

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 235
3160321

BETWEEN SALAVA TIATIA-SEFILINO
Applicant

AND MINISTRY OF BUSINESS,
INNOVATION AND
EMPLOYMENT
Respondent

Member of Authority: Pam Nuttall

Representatives: Applicant in person
Rochelle Hill, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 6 May 2022 from Applicant
20 May 2022 from Respondent

Determination: 3 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Salava Tiatia-Sefilino's baby was born on 27 October 2021 and her application for parental leave payment entitlements, including pre-term payments, was approved on 23 November 2021. Parental leave payments are government funded and Inland Revenue is the government department which undertakes the administration of these payments.

[2] No issues arise as to Ms Tiatia-Sefilino's eligibility or application for parental leave payments under the Parental Leave and Employment Protection Act 1987 (PLEPA).

[3] However, three days after the application for parental leave payments, Ms Tiatia-Sefilino's entitlement was transferred to her husband, Mr Sefilino, for a period of two weeks from 26 November 2021 until 10 December 2021. At the end of these two weeks all parental leave payments ceased.

[4] Upon enquiry, Ms Tiatia-Sefilino was informed that the payments could only be transferred once during the duration of the term. Because s71J(1)(b) PLEPA provides that the entitlement is payable for one continuous period per person if transferred, and because Ms Tiatia-Sefilino had already received some payment prior to the transfer, she was informed by Inland Revenue that the entitlement could not revert to her.

[5] On 12 January 2022, Ms Tiatia-Sefilino lodged a statement of problem in the Authority seeking a formal review of this decision.

The Authority's investigation

[6] The issue identified for investigation and determination in a case management conference with the parties was a review by the Authority of Inland Revenue's decision to cease paid parental leave payments following transfer of payments to Ms Tiatia-Sefilino's partner from 26 November 2021 until 10 December 2021.

[7] The parties agreed to the Authority determining this issue 'on the papers' based on the statement of problem and statement in reply and submissions from both the applicant and the respondent.

[8] Copies of the audio recordings of telephone conversations between Inland Revenue and Ms Tiatia-Sefilino were obtained for the following dates:

- 23 November 2021
- 25 November 2021
- 21 December 2021
- 10 January 2022

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) 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.

Jurisdiction to review this decision?

[10] Although parental leave payments are administered by Inland Revenue, the respondent in this matter is the Ministry for Business, Innovation and Employment (MBIE). MBIE submits that, while it has a statutory discretion under s71IA PLEPA, (to approve “the making of a parental leave payment to a person despite an irregularity in his or her application for the payment”), this discretion is narrow and does not extend to Ms Tiatia-Sefilino’s circumstances.

[11] However, MBIE’s submission accepts that the Authority can make orders on a wider basis and “in particular, notes that [t]he Act specifically gives the Authority the power to ‘modify or reverse’ any decision of the department” under s71ZB(3) PLEPA.

[12] Further, MBIE submits that “[i]n light of the audio recordings, the Respondent does not oppose the Authority exercising discretion pursuant to s 71ZB(3) of the Act to modify or reverse the decision that the payments to the Applicant could not be transferred back to herself after the initial transfer had taken place.”

[13] The Authority’s power to ‘modify or reverse’ a decision of the department, however, is restricted to the categories for which a review of a decision may be sought, as set out in s71ZB(1) PLEPA below:

71ZB Review of department’s decisions about parental leave payment

- (1) An employee or a self-employed person may apply to the Employment Relations Authority for a review of a decision made by the department relating to—
- (a) the person’s entitlement to a parental leave payment;
 - (b) whether a parental leave payment may be transferred to the person under section 71E;
 - (c) the amount of parental leave payment made to the person;
 - (d) the deduction or recovery of overpayments by the department under section 71X.

[14] The provision most relevant to Ms Tiatia-Sefilino’s circumstances would appear to be s71ZB(1)(b). But whether this provision encompasses modifying or reversing a decision that entitlement to payments cannot be transferred back to the originally eligible parent is not readily apparent.

[15] Any decision as to whether an entitlement to payments can be transferred back, however, requires that the initial transfer away from the originally eligible parent has been validly made.

[16] Accordingly the Authority's investigation reviews two issues submitted by the respondent:

- (a) Was the transfer to Mr Sefilino valid?
- (b) Did Ms Tiatia-Sefilino understand the implications of transferring her entitlements before a transfer application was made?

Was the transfer to Mr Sefilino valid?

[17] In order for Ms Tiatia-Sefilino to transfer her entitlements to Mr Sefilino, he needed to have satisfied the requirements in s 71E(2) PLEPA. In particular he must have:

- Assumed primary responsibility for the day-to-day care of the child;
- Met the parental leave payment threshold test (in s 2BA of PLEPA); and
- Stopped working during the time that the paid parental leave entitlements were transferred.

[18] On the information available, the Authority finds it more likely than not that Ms Tiatia-Sefilino remained throughout the primary carer for the baby.

[19] As Mr Sefilino was not the primary carer, he did not meet the requirements of s71E(2) PLEPA and the transfer should not have been approved.

Did Ms Tiatia-Sefilino understand the implications of transferring her entitlement?

[20] If part of the entitlement is transferred under s 71E PLEPA, section 71J(1)(b) provides that the parental leave payment is payable for one continuous period per person. This meant that Ms Tiatia-Sefilino, who had already received some paid parental leave before the transfer of her entitlement to her husband, was informed by Inland Revenue that she was prevented from applying to have the paid parental leave payments transferred back to her.

[21] It appears the situation would have been different if the transfer had occurred before Ms Tiatia-Sefilino received any payments.

[22] The respondent (MBIE) has accepted, on the basis of the recorded telephone conversations, that Ms Tiatia-Sefilino was not advised by Inland Revenue that in her circumstances she would not be able to have her paid parental leave transferred back to her or that her payments would cease entirely.

[23] Ms Tiatia-Sefilino in her statement of problem has claimed that she did not intend to transfer her entitlement to her husband but was trying to find how to have the partner's two weeks unpaid annual leave paid. The recordings make clear that this enquiry arose because Mr Sefilino had taken unpaid leave from his employment when the baby's delivery was unexpectedly premature.

[24] While transfer dates were discussed in the recorded phone call on 25 November 2021, there was no discussion about what would happen to the paid parental leave after 10 December 2021. MBIE has accepted, that in these circumstances, it would have been reasonable for Ms Tiatia-Sefilino to expect that she would also have been advised that she could not transfer the payments back after 10 December 2021 and that the payments would cease.

[25] In the circumstances I find that on the balance of probabilities Ms Tiatia-Sefilino would not have sought to transfer entitlement to her husband if she had been informed of these consequences.

[26] In summary then the Authority's investigation has established that no transfer of paid parental leave entitlement should have been made to Mr Sefilino.

[27] As set out in [19] above, the transfer of paid parental leave payments to Mr Sefilino did not meet the statutory criteria and should not have been approved. The application to transfer also reasonably relied on advice, subsequently found to be deficient, provided by a government department.

[28] In the circumstances I find it to be inequitable that Ms Tiatia-Sefilino should be deprived of an entitlement to parental leave payments as the eventual consequence of a transfer of entitlements that should not have been made.

[29] Accordingly I consider it appropriate to exercise the Authority's discretion and to reverse the decision that paid parental payments to Ms Tiatia-Sefilino should cease.

[30] Ms Tiatia-Sefilino also seeks an award of compensation as a result of this unfortunate situation. The Authority has no jurisdiction or discretion to make any such award.

[31] MBIE should now take the necessary steps to ensure Ms Tiatia-Sefilino receives the parental leave payments due to her. Should Ms Tiatia-Sefilino have returned to her employment earlier than the date originally specified, payments are to be amended accordingly.

Costs

[32] MBIE is to pay to Ms Tiatia-Sefilino the sum of \$71.56 being the filing fee for lodging her Statement of Problem with the Authority. Any other costs are reserved.

[33] If costs are sought and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Pam Nuttall
Member of the Employment Relations Authority