

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 386  
3269199

BETWEEN                      AMANDA CHIN TING FOO  
Applicant

AND                              CHIEF EXECUTIVE OF THE  
MINISTRY OF BUSINESS,  
INNOVATION AND  
EMPLOYMENT  
Respondent

Member of Authority:        Lucia Vincent

Representatives:              Applicant in person  
Petrina Siania for the Respondent

Investigation Meeting:        On the papers

Submissions Received:        26 February and 29 March 2024 from the Applicant  
27 March 2024 from the Respondent

Determination:                1 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] Ms Foo tried to transfer her parental leave payments twice, unsuccessfully. First, she transferred six weeks to her husband (after receiving some payments herself). Secondly, after Ms Foo's husband returned to work, she tried to transfer payments back. They stopped instead.

[2] When Ms Foo asked Inland Revenue (**IR**) why payments had stopped, it told her payments could not be transferred twice. IR did not tell her of that risk prior to the transfer. She lost 18 weeks' worth.

[3] IR received advice from the Ministry of Business, Innovation and Employment (**MBIE**) it would not allow a transfer back.<sup>1</sup> Ms Foo has asked the Authority to intervene.

### **How did the Authority investigate?**

[4] The parties agreed to investigate this matter on the papers.<sup>2</sup>

[5] Ms Foo provided an affidavit and supporting evidence. MBIE provided submissions. Ms Foo responded by way of email to those submissions.

[6] My determination makes findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. I have not recorded all evidence and submissions received.<sup>3</sup>

### **What are the issues?**

[7] I accept the issues identified by MBIE requiring determination are (in summary):

- (a) Can Ms Foo transfer twice under the Parental Leave and Employment Protection Act 1987 (**PLEP**)?<sup>4</sup>
- (b) Should the Authority change the decision made by MBIE not to allow Ms Foo to transfer twice?<sup>5</sup>

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<sup>1</sup> Notes from file dated 7 December 2023.

<sup>2</sup> Section 174D of the Employment Relations Act 2000 (**Act**) allows the Authority to determine a matter without holding an investigation meeting.

<sup>3</sup> As permitted by section 174E of the Act.

<sup>4</sup> Part 7A.

<sup>5</sup> Section 71ZB.

### **Can Ms Foo transfer twice?**

[8] Answering this question requires me to consider whether sections 71D(2) and 71J(1)(b) prohibit Ms Foo from getting parental leave payments (**payments**) more than once and in more than one continuous period for the same child.

[9] MBIE accepts Ms Foo met relevant tests under the PLEP to be eligible for parental leave.<sup>6</sup> Prior to transferring to her husband, Ms Foo was also entitled to the maximum 26 weeks of payments provided for under Part 7A.

[10] How does a transfer work? An eligible employee may choose to transfer all or part of their payments to their partner who will have primary responsibility for the day-to-day care of their child, if they are eligible for payments themselves and stop work while receiving payments.<sup>7</sup> Following an effective transfer, the transferee steps into the shoes of the transferor: The transferred entitlement is deducted from the transferor's payments and references in Part 7A apply to the partner to the extent of the transfer.<sup>8</sup> For example, upon returning to work, payments end.<sup>9</sup>

[11] Once entitled to payments, section 71J says payments are payable for one continuous period not exceeding 26 weeks, or, if part of the entitlement is transferred under section 71E, for one continuous period per person, so long as the two continuous periods do not together exceed 26 weeks.

[12] Despite being eligible and entitled to payments, section 71D(2)(a) disentitles someone to payments if they have previously received payments for that child.

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<sup>6</sup> Relevant tests as set out in section 2BA of the PLEP.

<sup>7</sup> Section 71E.

<sup>8</sup> Section 71EA.

<sup>9</sup> Section 71L.

[13] On the face of it, these two sections prevent transferring twice between partners. A transfer must go one way, once.<sup>10</sup>

[14] Ms Foo accepts she tried to transfer twice. Records show she received payments on 15 and 29 August and 12 September 2023. Her husband received payments on 12 and 26 September and 10 and 24 October 2023. She could not transfer payments back because of the rigid requirements of Part 7A around transfers.<sup>11</sup>

**Should the Authority change the decision made by MBIE not to allow Ms Foo to transfer twice?**

[15] After Ms Foo's husband received six weeks' worth of payments, he returned to work. Payments stopped. They did not transfer back to Ms Foo. When Ms Foo enquired, IR told her payments could not be transferred twice. It did not tell her prior to this.

[16] On 13 November 2023, Ms Foo complained because IR did not tell her she could transfer only one way, once. If IR had told Ms Foo she would lose her remaining entitlement by making the transfer when she did, she would have waited 20 weeks before transferring to ensure she only transferred payments once.

[17] Having listened to the call Ms Foo made to IR on 10 August asking about a transfer, it was clear she wanted to transfer only six weeks of her entitlement to her husband. She refers to trying to action the transfer online but being unable to put an end date in because it took her to the end of her approved parental leave period. It was reasonable to expect to be told of the consequences should IR manually enter the dates for her in the system to facilitate the transfer – she would forfeit her remaining 18 weeks of payments.

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<sup>10</sup> Unless an exception applies, such as that set out in section 30JK for COVID-19 response workers where it stated the requirements in sections 71DA(2) and 71J did not apply (although together the periods could not exceed a total 26 weeks).

<sup>11</sup> The Employment Court has referred to the requirements contained in Part 7A as rigid without allowing autonomy for parents to arrange parental leave matters (including payments), in a way they consider best suits their family, without putting their entitlements at risk: *Ministry of Business, Innovation and Employment v Duan* [2023] NZEmpC 232 at [24].

[18] IR's Complaints Management Service emailed Ms Foo on 15 November 2023 after investigating Ms Foo's complaint. After a review of the contact between Ms Foo and IR staff, IR agreed the staff member's actions were not appropriate nor the service acceptable. The email said the staff member understood they gave Ms Foo incorrect information and apologised.

[19] MBIE acknowledges Ms Foo could have been provided with additional information regarding the inability to transfer payments back to herself.<sup>12</sup> IR failed to advise Ms Foo of the consequences should she transfer payments to her husband, having herself already received payments, namely, cutting herself short of 18 weeks of payments.

[20] MBIE has a narrow discretion under section 71IA to approve irregular applications and considered it could not extend to Ms Foo's situation. MBIE acknowledges the Authority can make orders that are wider in scope than the discretion it has.

[21] Under section 71ZB an employee may apply to the Authority for a review of a decision made by MBIE about their payments. The Authority may confirm, modify, or reverse MBIE's decision.

[22] IR acknowledged it failed to advise Ms Foo of the consequences of transferring payments to her husband when she herself had already received payments. The advisor acknowledged having given incorrect advice. But for those factors, Ms Foo would not have transferred her entitlements to her husband when she did. If she had known she could not transfer them back, she would have waited until she had received 20 weeks of payments before transferring payments to him, ensuring only one transfer. Consequently, she lost 18 weeks of payments.

[23] The Authority must exercise its discretion in a principled way having regard to the policy and purpose of the PLEP. The Authority has exercised its discretion in cases where interactions with IR have not been acceptable, resulting in lost entitlements.<sup>13</sup> I am satisfied I

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<sup>12</sup> At [15], submissions.

<sup>13</sup> For example, the Authority has reversed decisions by MBIE where someone relied on incorrect or inadequate advice given by IR in relation to transferring twice in *Murphy v Ministry of Business, Innovation and Employment* [2022] NZERA 211 and *Tiatia-Sefilino v Ministry of Business, Innovation and Employment* [2022] NZERA 235.

should exercise my discretion to reverse the decision in Ms Foo's situation. Ms Foo should receive her remaining 18 weeks of payments.

### **Order**

[24] In the exercise of my discretion, I reverse the decision by MBIE. I order MBIE to take the necessary steps to ensure Ms Foo receives her further 18 weeks of payments.

### **Costs**

[25] I also order MBIE to reimburse Ms Foo for her filing fee of \$71.55. Because Ms Foo represented herself, costs are not normally ordered.<sup>14</sup> If there are any circumstances Ms Foo wishes to bring to my attention (such as other expenses), I give leave to her to do so within the next 28 days should she be unable to agree this with MBIE directly.

Lucia Vincent  
Member of the Employment Relations Authority

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<sup>14</sup> [Practice Direction of the Employment Relations Authority \(era.govt.nz\)](https://era.govt.nz/practice-direction/)