IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 654
3176147

	BETWEEN	BRIDGET MCCLURE Applicant
	AND	MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Peter van Keulen
Representatives:	Applicant in person Amy Webster, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	21 August 2022 and 4 October 2022 from the Applicant 5 September 2022 from the Respondent
Date of Determination:	9 December 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bridget McClure has applied under s 71ZB of the Parental Leave and Employment Protection Act 1987 (PLEPA) to review of the decision of Ministry of Business, Innovation and Employment (MBIE) that she was not entitled to parental leave payments (PLP).

[2] MBIE decided Ms McClure was not eligible to receive PLP as she was not an employee in New Zealand for 26 weeks out of 52 weeks prior to the expected date of delivery of her child – this being the qualifying test for receiving PLP.

[3] Ms McClure accepts she did not meet the 26-week threshold for the qualifying test but she says:

(a) She was unable to return to New Zealand in time to meet the 26-week threshold due to entry restrictions imposed by the New Zealand Government at that time, in response to the Covid-19 pandemic – that is the requirement that anyone entering New Zealand had to isolate in a Managed Isolation and Quarantine Facility (MIQF) for which there were limited places available through an online virtual lobby or an off line emergency allocation system.

(b) When the New Zealand Government announced the phased border reopening in November 2021 – i.e., entry into New Zealand without isolation in MIQF - she relied on that advice to book her return to New Zealand. That booking would have been able her to meet the 26-week requirement but her return to New Zealand was delayed by the New Zealand Government extending out the time for the phased border re-opening.

[4] In essence Ms McClure has two arguments:

(a) The restricted entry to New Zealand accessible only through MIQF places allocated in the online virtual lobby and emergency allocation system during the Covid-19 pandemic was illegal and but for this illegal action by the New Zealand Government she would have returned to New Zealand in time to fulfil the 26-week requirement.[1]

[1] Relying on *Grounded Kiwis Group Incorporated v Minister of Health* [2022] NZHC 832.

(b) The New Zealand Government advice about her ability to return to New Zealand under the phased border re-opening was incorrect and she relied on the incorrect advice only to have her entry date to New Zealand pushed out when that advice was changed (when the phased border re-opening dates were changed in response to the Omicron variant of Covid-19 becoming prevalent). Again, this meant she was unable to return to New Zealand in time to meet the 26-week requirement.

[5] Based on these two arguments Ms McClure says I should review MBIE's decision and reverse it so that she receives PLP.

The Authority's investigation

[6] When an application for PLP has been declined by MBIE an employee can ask the Authority to review that decision under s 71ZB of PLEPA. This provision gives the Authority the power to confirm, modify or reverse MBIE's decision.

[7] It is Ms McClure's application pursuant to s 71BZ of PLEPA that I have investigated and this determination resolves.

[8] After consultation with the parties my investigation was conducted on the papers; that is, I received an agreed statement of facts and then submissions in writing from each party and these documents were the basis for my assessment of the application.

[9] As permitted by s 174E of the Employment Relations Act 2000 I have not recorded all of the evidence set out or all of the submissions received, in this determination. I have set out various facts based on the agreed statement of facts and relevant law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Issues

[10] There are two issues to consider on a review:

(a) Was MBIE correct in declining Ms McClure's application for PLP and in not exercising its statutory discretion to approve irregular payments?

(b) Are Ms McClure's circumstances such that the I should modify or reverse MBIE's decision?

What happened?

[11] The relevant facts in this matter are set out in a statement of agreed facts lodged with the Authority on 11 August 2022. I have added known events in relation to entry requirements for New Zealand at the relevant time. Based on these two things, I set the facts out below.

[12] On 8 March 2020, Ms McClure and her partner travelled to England for what was supposed to be a two-week visit. While they were there, the Covid-19 pandemic led to shutdowns in both England and New Zealand, meaning they were unable to return as planned.

[13] In May 2020, Ms McClure returned to New Zealand while her partner remained in England because he was not a New Zealand citizen and he did not hold a visa entitling him to enter New Zealand at that time.

[14] Ms McClure lived and worked in New Zealand from May 2020 to December 2020. She then returned to England to live with her partner, while he worked, to attain a relationship visa to allow him to return to New Zealand. Ms McClure worked as a teacher in England from February 2021.

[15] In August 2021, Ms McClure's partner was granted a visa, meaning they were able to return to New Zealand together.

[16] However, at that time there was a New Zealand Government requirement that anyone entering New Zealand had to isolate in MIQF. There were limited places available in MIQF and demand significantly exceeded the supply of places.

[17] In order to address that demand in what it perceived to be a fair way, from 1 September 2021 the New Zealand Government implemented a virtual lobby in which applicants were not prioritised by the timing of their application on a "first in first served" basis, which favoured those in better time zones and those with better internet connections, rather applicants were allocated a place in a queue on a random basis and then MIQF places were allocated. This MIQF virtual lobby was commonly referred to as a "lottery".

[18] In conjunction with the virtual lobby lottery system the New Zealand Government also had an offline system for allocating emergency places in MIQF, with tightly prescribed criteria for allocation of those emergency places.

[19] Ms McClure resigned from her job because she was conscious that her and her partner may only have a week's notice of their departure if they were able to secure an MIQF place in the lottery. And in September 2021, Ms McClure started working for a temping agency in a warehouse because it was the sort of job she could end at short notice.

[20] From August 2021 to November 2021, Ms McClure and her partner tried to secure a place in MIQF through the virtual lobby lottery system but they were repeatedly unsuccessful.

[21] On 24 November 2021, the New Zealand Government announced a phased border re-opening, including that from 13 February 2022 fully vaccinated New Zealand citizens and other eligible travellers would be able to travel from anywhere in the world to New Zealand without staying in MIQF on their arrival.

[22] At this time, Ms McClure received an email from the New Zealand Embassy stating that travellers to New Zealand would no longer be required to undertake isolation in MIQF. Based on this email Ms McClure and her partner stopped pursuing a place in MIQF. And on

25 November 2021, Ms McClure and her partner booked tickets to travel to Hokitika, via Christchurch, arriving on Tuesday 15 February 2022.

[23] In December 2021, Ms McClure found out she was pregnant.

[24] On 21 December 2021, the New Zealand Government announced that the phased border re-opening would be delayed in order to keep the Omicron variant of Covid-19 out of the community for as long as possible.

[25] On 3 February 2022, the New Zealand Government announced that the phased border re-opening relevant to Ms McClure would happen on 13 March 2022.

[26] Ms McClure and her partner set about rescheduling their flights and found out that to change their flights to 13 March 2022 would have cost an additional $1,170.00 or they could pay an additional $720.00 from 19 March 2022.

[27] On 12 February 2022 Ms McClure and her partner were able to book flights leaving on 27 March 2022 for approximately an additional $100.00, through to Hokitika, arriving on 29 March 2022.

[28] On 28 February 2022, the New Zealand Government announced that the phased border re-opening relevant to Mc McClure would be brought forward to 4 March 2022, although Ms McClure was not aware of this until recently.

[29] On 16 March 2022, Ms McClure left her warehouse agency job. On 27 March 2022, Ms McClure and her partner left England to return to New Zealand, arriving on 29 March 2022. Ms McClure was not required to self-isolate upon arriving in New Zealand.

[30] On 2 May 2022, Ms McClure started work at her current job at Bealey Quarter for the Oxford Group, in Christchurch.

[31] On 7 June 2022, Ms McClure applied for PLP to start from 8 August 2022.

[32] On 13 June 2022, Ms McClure's application for PLP was declined because Ms McClure had not worked for at least 26 of the 52 weeks preceding her due date.

[33] On 22 June 2022, Ms McClure filed a Statement of Problem with the Authority.

[34] On 15 July 2022, Ms McClure stopped working and her baby was born on 26 July 2022.

[35] The expected date of delivery of Ms McClure's baby was 23 August 2022, so the 52-week period relevant to the PLP threshold test is 23 August 2021 to 23 August 2022. In that period, Ms McClure was employed for 10 hours or more for 16 weeks in New Zealand.

Was MBIE correct in declining Ms McClure's application for PLP and in not exercising its statutory discretion to approve irregular payments?

[36] To be entitled to PLP, a person must be an eligible employee or an eligible self-employed person as set out in s 71D(1)(a) PLEPA. Section 71CA of PLEPA defines an eligible employee as a person who is the primary carer in respect of a child and meets the parental leave payment threshold test.

[37] Ms McClure is the primary carer, as defined in s 7 PLEPA, in respect of her child.

[38] However, MBIE says Ms McClure does not meet the PLP threshold test as set out in s 2BA(4)(a) of PLEPA.

[39] Section 2BA(4)(a) of PLEPA sets out the PLP threshold test as follows:

> (4) In this Act, the following test is used to determine a person's entitlement to parental leave payments (the parental leave payment threshold test):
>
> (a) an employee meets the parental leave payment threshold test if he or she will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding—
>
> (i) the expected date of delivery of the child (in the case of a child to be born to the person or his or her spouse or partner); or

> (ii) the first date on which the person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case):
>
> (b) ....

[40] MBIE says, Ms McClure does not meet the 26-week test in s 2BA(4)(a) of PLEPA because she was only employed to work in New Zealand for 16 weeks within the relevant 52-week period.

[41] MBIE then says that as Ms McClure does not meet the statutory test it was right to decline her application given its discretion is limited to approve irregular applications where the irregularity is a matter of form, such as making a late application or applying in a manner other than that prescribed in the regulations.[2] There is no such irregularity in this case.

[42] Put simply MBIE says Ms McClure's failure to meet the 26-week test is a matter of substance and it has applied PLEPA appropriately.

[43] I accept this, Ms McClure did not work an average of 10 hours a week for any 26 of the 52 weeks immediately preceding the expected date of her child, so MBIE applied the test correctly. And there was not an applicable irregularity in Ms McClure's application.

[44] MBIE was correct in declining Ms McClure's application for PLP and in not exercising its statutory discretion to approve irregular payments.

Are Ms McClure's circumstances such that the I should modify or reverse MBIE's decision?

Ms McClure's arguments

[45] Ms McClure says there are two sets of circumstances that I should consider in assessing her application. These circumstances meant she was unable to return to New

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[2] Section 71IA of PLEPA.

Zealand by 22 February 2022, this being the date she needed to commence work in New Zealand to complete the 26-week criteria for the PLP threshold test.

[46] First, Ms McClure was unable to return to New Zealand in the period September 2021 through to February 2022 because she could not secure a MIQF place. In this period MIQF places were allocated through the virtual lobby lottery system with eight relevant opportunities to obtain a MIQF place between 20 September 2021 and 18 November 2021. Ms McClure says she applied for a MIQF place in seven of those lotteries and was not successful.

[47] Second, Ms McClure stopped pursuing a MIQF place as she received an email from the New Zealand High Commission, on 24 November 2021, advising her that she would be able to enter New Zealand after 13 February 2022 as the Government was opening the borders to fully vaccinated New Zealand citizens from 14 February 2022. On 25 November 2021 Ms McClure booked tickets for her and her partner to fly to New Zealand arriving on 15 February 2022. However, on 21 December 2021 the New Zealand Government announced that it was delaying this opening of the New Zealand borders until 13 March 2022.

[48] In terms of the first set of circumstances, Ms McClure primarily relies on the "but for" test which she says the Authority has applied to applications to review decisions on PLP.[3] Ms McClure says but for the breach of law pertaining to the virtual lobby lottery system for MIQF places she would have been able to return to New Zealand and commence work in sufficient time to satisfy the criteria to be eligible for PLP.

[49] Specifically, Ms McClure says:

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[3] *Kerapa v Ministry of Business Innovation and Employment* [2016] NZERA 41; and *Fitzek v Ministry of Business Innovation and Employment* [2021] NZERA 28.

(a) The New Zealand Government management of MIQF, particularly the virtual lobby lottery system introduced between 1 September 2021 and 17 December 2021, was a breach of New Zealand Bill of Rights Act 1990 (BORA).[4]

(b) This breach of law is relevant in that it prevented her from entering New Zealand.

(c) Being unable to enter New Zealand was directly causative of her inability to satisfy the 26-week criteria for the PLP threshold test.

(d) Applying the but for test, it is more likely than not that but for the breach of law by the New Zealand Government she would have been able to meet the 26-week criteria for the PLP threshold test.

(e) Therefore, in equity and good conscience I should modify and reverse MBIE's decision to decline her applications for PLP.

[50] In terms of the second set of criteria Ms McClure says she relied on advice from the New Zealand High Commission to book tickets to return to New Zealand for immediately after the New Zealand borders would be opened and stopped trying to obtain a MIQF place and this advice turned out to be erroneous.

[51] I take this to be that Ms McClure is saying she relied on the advice to book flights to New Zealand that meant she would have met the 26-week criteria and had the New Zealand Government not "backtracked" on its position, the advice she relied on would have been correct and she would have been able to return to New Zealand in time to meet the 26-week criteria. In reality the argument is "but for" the New Zealand Government's change on the timing of the New Zealand borders being opened Ms McClure would have met the required criteria.

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[4] *Grounded Kiwis Group Incorporated*, above n 1.

MBIE's response

[52] MBIE says that Ms McClure's circumstances do not align with the two cases she relies on in that the advice from the New Zealand High commission was not erroneous and the MIQF virtual lobby lottery system was not a breach of law in relation to Ms McClure.

[53] MBIE says Ms McClure's circumstance should be assessed as follows:

(a) Ms McClure would have needed to arrive in New Zealand on or around 8 January 2022 to commence work in time to meet the 26-week criteria for the PLP threshold test.[5]

(b) The MIQF requirements prevented Ms McClure from arriving before 8 January 2022 – not the New Zealand Government's decision to delay the opening of New Zealand's borders.

(c) Arriving after 8 January 2022 did not mean Ms McClure was subject to unreasonable delay – based on the reasoning in *Grounded Kiwis Incorporated*.

(d) However, even if Ms McClure was subject to unreasonable delay through the MIQF virtual lobby lottery system, it is more likely than not that she would not have arrived in New Zealand in time to meet the 26-week criteria in the PLP threshold test.

The approach to assessing an application for review

[54] Applications to review MBIE's decisions on PLP have been considered and reported in various determinations of the Authority.[6] Ms McClure and counsel for MBIE referred me to these determinations with differing views about their application to my analysis.

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[5] MBIE calculates this as being the relevant date based on the required isolation period plus time for Ms McClure to become settled and find appropriate work.

[6] *Kerapa v Ministry of Business Innovation and Employment* [2016] NZERA 41; *Cook v Ministry of Business Innovation and Employment* [2019] NZERA 164; *Shah v Ministry of Business Innovation and Employment* [2020] NZERA 102; *Fitzek v Ministry of Business Innovation and Employment* [2021] NZERA 28; *Allcock v*

[55] Whilst the outcome in these determinations has varied – with MBIE's decision being confirmed, modified and reversed - all of these determinations are instructive on the way to approach this aspect of a review. What all of these determinations have in common is the Authority has considered the relevant circumstances to assess whether the applicant suffered an injustice. Then, if there has been an injustice the Authority has considered whether that injustice prevented the applicant from meeting the criteria for the PLP threshold test and the applicant would otherwise have met the criteria.[7]

[56] It is in such circumstances that equity and good conscience dictates that the review should be allowed and MBIE's decision modified or reversed.

[57] In this case injustice could arise from two things – the allocation of MIQF places though the virtual lobby lottery system between 1 September 2021 and 17 December 2021 and the change by the New Zealand Government regarding the timing of reopening New Zealand's borders in 2022.

[58] The injustice that might arise for Ms McClure in these circumstances is that her right to enter New Zealand, under s 18(2) of BORA, was infringed in a manner that was not demonstrably justified in a free and democratic society – this being the justified limitation that can be imposed on the rights and freedoms set out in BORA.[8]

The lottery system for MIQF places

[59] Ms McClure says the operation of the virtual lobby lottery system for MIQF places and the system for emergency allocation of places in MIQF were a breach of law by the New

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Ministry of Business Innovation and Employment [2021] NZERA 105; *Hood v Ministry of Business Innovation and Employment* [2021] NZERA 215; and *Kemp v Ministry of Business Innovation and Employment* [2021] NZERA 240.

[7] It may be that this aspect is helpfully assessed by applying the "but for" test but I do not view that test as being necessary to resolve this aspect.

[8] Section 5 New Zealand Bill of Rights Act 1990.

Zealand Government. She says this is a breach of s 18(2) of BORA and the High Court decision in *Grounded Kiwis Group Incorporated* determined this.[9]

[60] In terms of whether Ms McClure suffered an injustice, because of the operation of the virtual lobby and emergency allocation systems for allocating MIQF places, the question is not just whether the systems were a breach of law by the New Zealand Government but rather whether the way the systems operated in connection with Ms McClure's attempts to secure MIQF places were a breach of law for her i.e., a breach of her rights under BORA.

[61] The problem that Ms McClure faces in establishing that her rights were breached in the circumstances is that:

(a) *Grounded Kiwis Group Incorporated* is not authority for the proposition that every person trying to enter New Zealand in the relevant period who was subject to the virtual lobby lottery and/or the emergency allocation system had their rights under BORA breached by the New Zealand Government.

(b) I cannot determine if Ms McClure's rights under BORA were breached by the New Zealand Government in these circumstances as I do not have the jurisdiction to decide that or even if I do, I do not have that claim before me to determine that outcome.

[62] Turning to the first point it is helpful to consider two paragraphs from the High Court decision in *Grounded Kiwis Group Incorporated*, which summarise the key aspects of Justice Mallon's conclusions:

> [17] I have determined that the requirement for arrivals to have a voucher in MIQF did not in and of itself amount to an unjustified infringement of New Zealanders' right to enter their country. The requirement to isolate in a MIQF for a period of 14 days (until 14 November 2021) and then for 7 days (from 14 November 2021) were reasonable and proportionate limits on the right to enter while those requirements were in place. Other options would not sufficiently

[9] *Grounded Kiwis Group Incorporated*, above n 1.

have achieved the public health objectives the Government had legitimately determined to pursue.

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[22] While there is no bright-line test that restrictions preventing a person from being able to enter their country for a three-month period cannot be justified, the evidence indicates that at least some New Zealanders experienced unreasonable delays in exercising their right to enter. The MIQ system did not have an adequate mechanism for identifying them. Although MIQ was a critical component of the Government's elimination strategy that was highly successful in achieving positive health outcomes, the combination of the virtual lobby and the narrow emergency criteria operated in a way that meant New Zealanders' right to enter their country could be infringed in some instances in a manner that was not demonstrably justified in a free and democratic society.

[63] And then subsequently the declaratory relief granted was expressed as:[10]

[8] Having considered the wording respectively proposed by the parties and the submissions they advanced in respect of that wording, I consider the wording that appropriately and fairly vindicates the right that was breached and the errors of law made is as follows:

Declaratory relief

This declaratory relief relates to the period between 1 September 2021 and 17 December 2021 (being the period at issue in the proceeding and referred to as "the relevant period"). It concerns the right that a New Zealand citizen has to enter New Zealand affirmed by s 18(2) of the New Zealand Bill of Rights Act 1990. It relates to requirements imposed under the COVID-19 Public Health Act 2020 (the Act) or the COVID-19 Public Health Response (Air Border) Order (No 2) 2020 and the COVID-19 Public Health Response (Isolation and Quarantine) Order 2020 made under the Act.

The first declaration

During the relevant period:

(a) overseas arrivals were required to have a place in a managed isolation and quarantine facility (MIQF) before entering New Zealand;

(b) demand for places in a MIQF exceeded supply;

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[10] *Grounded Kiwis Group Incorporated v Minister of Health* [2022] NZHC 1407.

(c) the virtual lobby (an online system) was the main pathway through which overseas New Zealand citizens could exercise their right to enter their country;

(d) the virtual lobby did not prioritise places in MIQ on the basis of New Zealand citizenship, nor on a New Zealand citizen's need to enter New Zealand or the delay they were experiencing in exercising their right;

(e) an offline system for emergency places in MIQF (the emergency allocation system) was an inadequate mechanism to address the deficiency of the virtual lobby system (referred to in (d) above) because the criteria for emergency places were tightly prescribed, strictly and, in some respects*, incorrectly and inflexibly interpreted;

(f) the MIQ system did not have an adequate mechanism for determining whether a New Zealand citizen was experiencing unreasonable delays that were disproportionate to any public health risk they might present.

The combination of the virtual lobby and the emergency allocation system meant that the MIQ system, because and to the extent that it did not allow New Zealand citizens facing unreasonable delays to be considered and prioritised where necessary, operated as an unjustified limit on the right of New Zealand citizens to enter their country. It inevitably meant that in some instances that right could be breached.

* See the second declaration at (a) and (b).

[64] What these quotes show is that the Court decided the restriction imposed by the New Zealand Government on entry into New Zealand in terms of isolating in MIQF was a reasonable and proportionate restriction of people's rights – so the operation of the MIQF system was not a breach of rights for New Zealand Citizens seeking to enter New Zealand. Then the operation of the virtual lobby lottery and the emergency allocation systems for allocating MIQF places meant the rights of some New Zealand Citizens seeking to enter New Zealand could be infringed. I think it follows that some rights of New Zealand citizens seeking to enter New Zealand were infringed, but these people are not identified and the Court does not provide particular circumstances where those rights would be infringed or had been infringed.

[65] Therefore, the High Court decision cannot be used to draw conclusions about anyone in particular having their rights breached by the operation of the virtual lobby lottery and the emergency allocation systems for allocating MIQF places, that is that their rights under BORA (specifically, the right to enter New Zealand) were infringed in a manner that was not demonstrably justified in a free and democratic society.

[66] What is required, in these circumstances to show that Ms McClure suffered an injustice, is a decision that her rights under s 18(2) of BORA were breached by the New Zealand Government's operation of the virtual lobby lottery and the emergency allocation systems for allocating MIQF places, when she was attempting to obtain a place in MIQF.

[67] There is no such decision and turning to my second point, I am not able to make that decision as I do not have the necessary jurisdiction.[11] And, even if I did have the jurisdiction there is no appropriate application or claim before me that I have investigated and can determine – otherwise it appears to me I am making a decision about parties' liability (in this case the Minister of health, the Minister of Covid-19 Response and MBIE) without affording those parties the opportunity to be heard on the claim.

[68] For these reasons I cannot conclude that Ms McClure has suffered an injustice in the circumstances relating to her attempts to obtain a place in MIQF so that she could return to New Zealand.

New Zealand Government delaying the re-opening of New Zealand's borders

[69] For similar reasons there is no basis for me to conclude that Ms McClure's rights under BORA were breached by the New Zealand Government when it decided to delay the reopening of New Zealand's borders in early 2022.

[70] In fact, *Grounded Kiwis Group Incorporated* indicates that Ms McClure's rights under BORA were probably not infringed in these circumstances – although the point made about

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[11] *GF v Minister of COVID-19 Response* [2021] NZHC 2526; *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291; and *Employees v Attorney-General* [2021] NZEmpC 141.

my ability to determine whether there has been a breach or not in respect of Ms McClure's rights under BORA remain.[12] What Justice Mallon decided, amongst other things, was that the restrictions imposed on New Zealand Citizens seeking to enter New Zealand in the relevant period – that is that they isolate in MIQF - was not an unjustified infringement of New Zealanders' right to enter New Zealand, rather it was the operation of the systems for allocating places in MIQF that might have infringed the rights of some people. It follows that the continuation of the restrictions imposed by deciding to not reopen the New Zealand Borders in February 2022 as indicated would most likely not be an infringement of New Zealand citizen's rights.

[71] In any event, I am not satisfied that Ms McClure suffered an injustice by the New Zealand Government's decision to delay the reopening of New Zealand's borders in early 2022.

[72] Also, it is worth stating, I do not consider that Ms McClure suffered an injustice by relying on the initial advice regarding the timing of the New Zealand borders reopening. The key point here is that the advice was correct at the time.

Would Ms McClure otherwise have met the 26-week criteria of the PLP threshold test?

[73] As I have decided that the circumstances pertaining to Ms McClure do not amount to an injustice for her, I do not need to consider if the circumstances prevented Ms McClure from meeting the criteria for the PLP threshold test and she would otherwise have met the criteria.

[74] However, I observe that there would have been some difficulties for Ms McClure in establishing that she would have otherwise met the criteria for PLP, in both sets of circumstances:

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[12] *Grounded Kiwis Group Incorporated*, above n 1.

(a) It does not necessarily follow that had Ms McClure not been subject to the virtual lobby lottery and/or emergency allocation systems for trying to obtain an MIQF place that she would have obtained a MIQF place. MIQF has been accepted as a reasonable restriction on New Zealanders' rights, so some form of allocation of MIQF places would have needed to occur. Given the high demand and limited MIQF places it is impossible to know if Ms McClure would have obtained a place and therefore been able to travel to New Zealand in time to meet the 26-week criteria, under some other allocation system.

(b) The timing of Ms McClure's pregnancy means it is difficult to know if she would have been pregnant in New Zealand on her return had she obtained a MIQF place before December 2021 (either through the allocation system in place or some other system). So her eligibility for PLP could have fundamentally changed as her travel circumstances changed.

(c) Even if Ms McClure was pregnant and arrived in New Zealand by mid-February 2022 (in time to fulfil the 26-week criteria) I do not know with any certainty that she would have obtained employment in time to do so. This fundamental change to her circumstances may have meant the job she did obtain in New Zealand was not available for her then and I do not know whether she would have obtained other employment.

Summary and orders

[75] Whilst I can empathise with Ms McClure (and the many hundreds or even thousands of New Zealand citizens who tried to return to New Zealand in 2021 and early 2022 but were unable to do so because of the MIQF requirements) I cannot find that these restrictions and the subsequent delay in reopening New Zealand's borders was a breach of her rights (or specifically any one individual's rights) under BORA. Therefore, the restrictions imposed on Ms McClure that prevented her from returning to New Zealand so that she might have been able to meet the 26-week criteria for the threshold test for PLP, were not an injustice and the

circumstances do not present as a situation where in equity and good conscience I should modify or reverse MBIE's decision not to grant Ms McClure PLP.

[76] Ms McClure's application to review MBIE's decision on PLP is not successful and MBIE's decision is confirmed.

Costs

[77] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. I take the unusual step at this stage to indicate that my thoughts on costs are that Ms McClure's application was a test case, considering the effect of *Grounded Kiwis Group Incorporated* on individual rights under BORA and the consequences in terms of loss for individuals who were unable to return to New Zealand when they wished to do so because of the systems the New Zealand Government used to allocate MIQF places. In this regard it is appropriate that costs should lie where they fall, and the parties should consider this in any discussion and attempt to resolve costs.

[78] If the parties are unable to resolve the issue of costs between them and an Authority determination on costs is needed, MBIE may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms McClure 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.

Peter van Keulen
Member of the Employment Relations Authority