

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2023] NZEmpC 232
EMPC 413/2022**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MINISTRY OF BUSINESS, INNOVATION
AND EMPLOYMENT
Plaintiff

AND WENTING DUAN
Defendant

Court: Judge J C Holden
Judge Kathryn Beck
Judge M S King

Hearing: 20 September 2023
(Heard at Auckland)

Appearances: G La Hood and R Hill, counsel for plaintiff
No appearance for the defendant
S Jerebine, counsel assisting the Court

Judgment: 18 December 2023

JUDGMENT OF THE FULL COURT

[1] This judgment resolves a challenge by the Ministry of Business, Innovation and Employment (MBIE) to a determination of the Employment Relations Authority. The Authority found Ms Duan was entitled to paid parental leave under the Parental Leave and Employment Protection Act 1987 (PLEPA), even though her application to take that leave was for a period commencing more than five months after her baby was born, during which Ms Duan had been working.¹

¹ *Duan v Ministry of Business, Innovation and Employment* [2022] NZERA 557 (Member Craig).

[2] MBIE is not seeking to recover the monies paid to Ms Duan in compliance with the determination, and Ms Duan is not participating in the challenge before the Court.

[3] Nevertheless, the case raises important, and MBIE says recurring, issues. For that reason, the Chief Judge of the Employment Court directed that a full Court be convened to hear and determine the challenge.

[4] Further, as Ms Duan is not participating in the challenge, and given the nature of the issues involved, the Court requested, and the Solicitor-General appointed, Ms Jerebine as counsel assisting the Court. The Court is grateful for Ms Jerebine's assistance.

The facts are set out in the determination

[5] The challenge proceeded based on the facts as found by the Authority.

[6] Ms Duan's baby was born on 1 April 2021. She took a short period of annual leave following the birth of her child and returned to work for her employer, from home, in mid-April. Ms Duan worked for her employer until mid-September 2021 and had a family friend assisting in the day-to-day care of her baby during this period.²

[7] Ms Duan applied for paid parental leave on 29 August 2021, and the application was declined on 2 September 2021.

[8] Ms Duan then stopped work, resigning from her employment in mid-September 2021 to care for her child full-time, which she did until she started a new part-time job in February 2022.³

[9] Ms Duan filed an application with the Authority for a review of the decision to decline her application. The Authority issued its determination on 28 October 2022,

² For ease of understanding, we refer to mid-April and mid-September throughout this judgment.

³ *Duan v Ministry of Business, Innovation and Employment*, above n 1, at [6].

reversing the decision to decline the application and granting Ms Duan an entitlement to paid parental leave from mid-September 2021 to February 2022.⁴

Three issues arise

[10] MBIE claims the Authority's determination contains the following errors of law:

- (a) finding that Ms Duan became the primary carer of her baby in mid-September 2021;⁵
- (b) failing to consider s 71K(1)(a) of PLEPA in its assessment of Ms Duan's eligibility for paid parental leave; and
- (c) finding that MBIE should have used its discretion to approve irregular applications to grant Ms Duan paid parental leave (had the Authority not found Ms Duan entitled).⁶

Counsel agree on some matters

[11] MBIE says the Authority erred in finding that Ms Duan was not the primary carer of her baby in the period she worked following the birth of her child, through to her resignation when she stopped work to care for her baby full-time in mid-September 2021. It says this was a misapplication of the definition of "primary carer" in s 7 of PLEPA and that this error was further compounded by the Authority's failure to consider s 71K(1) of PLEPA when determining the commencement date for Ms Duan's entitlement to paid parental leave.⁷ It says she was not entitled to parental leave payments as she did not stop working, as prescribed under s 71D of PLEPA.⁸ Further, it says Ms Duan's decision to return to work in mid-April, after taking a few

⁴ At [16] and [28].

⁵ At [17(a)].

⁶ At [27].

⁷ Section 71K prescribes the date on which an applicant's parental leave payment period commences.

⁸ Parental Leave and Employment Protection Act 1987 (PLEPA), s 71D(1)(b), with MBIE describing the meaning of "stops working" as being either Ms Duan no longer being employed or her taking parental leave.

weeks' annual leave following the birth, operated as a stop, immediately closing the payable period for parental leave payments under s 71K(1) before it began.

[12] Ms Jerebine agrees that Ms Duan became the primary carer of her baby on the birth of the baby and continued as primary carer from that time.

[13] Ms Jerebine says, however, that the payment period in s 71K(1)(a) is not the same as the entitlement to leave period. She says PLEPA allows a person to stop work and to receive parental leave payments for 26 weeks, provided the person applies for those parental leave payments before they return to work, or before the child's first birthday, and meets other eligibility criteria. Ms Jerebine submits that Ms Duan did not leave work until mid-September 2021; accordingly, the applicable return-to-work date is February 2022. She says this means that Ms Duan was entitled to parental leave payments for the period from mid-September 2021 until February 2022.

[14] MBIE and Ms Jerebine agree that the Authority's finding that MBIE should (or could) use its discretion to grant Ms Duan an entitlement to payment under s 71IA of PLEPA was incorrect. They agree that s 71IA(5) limits the meaning of "irregularity" to technicalities, for example, missing an application date or to matters of form.

The outcome, in summary

[15] For the reasons set out in this judgment:

- (a) Ms Duan was the primary carer of her baby at all times.
- (b) Ms Duan was not entitled to paid parental leave when she applied for it as she had already returned to work following the birth of her child.
- (c) Section 71IA(5) limits the meaning of "irregularity" in s 71IA to technicalities, for example, missing an application date or deficiencies in form. It would not have allowed MBIE to approve parental leave payments in this case.

The situation is governed by PLEPA

[16] The meaning of PLEPA provisions must be ascertained from their text and in light of their purpose and context. The text to be considered includes any indications provided, for example, by way of preamble, table of contents, headings, diagrams, graphics, examples and explanatory material, and the organisation and format of the legislation.⁹

[17] Even if the meaning of the text of legislation appears plain in isolation to its purpose and context, that meaning should always be cross-checked against purpose and context to observe the three-fold requirements of text, purpose and context. In determining context, the Court must have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial, or other objective of the enactment.¹⁰

[18] Rights to parental leave, and to parental leave payments, arise from PLEPA, the purpose of which is to:¹¹

- (a) set minimum entitlements with respect to parental leave for male and female employees; and
- (b) protect the rights of employees during pregnancy and parental leave; and
- (c) entitle certain persons to up to 26 weeks of parental leave payments.

[19] The provisions covering parental leave payments are set out in pt 7A of PLEPA, which came into force on 1 July 2002. Section 71A builds on the overall purpose of PLEPA, in particular s 1A(c), and provides:

The purpose of this Part is to entitle certain persons who become the primary carer in respect of a child, and who stop working or take a period of leave, to—

- (a) up to 26 weeks of parental leave payments out of public money; and
- (b) additional preterm baby payments out of public money if the child is born before the end of the 36th week of gestation.

⁹ Legislation Act 2019, s 10.

¹⁰ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

¹¹ PLEPA, s 1A.

Ms Duan was the primary carer throughout

[20] The Authority found that Ms Duan was the primary carer of her baby, both when she was on leave in April 2021, and from mid-September 2021 until February 2022.¹² The Authority does not identify who, if anyone, was the primary carer between mid-April and mid-September 2021, but the inference is that the family friend, who helped take care of the baby while Ms Duan worked, became the primary carer over this period.

[21] “Primary carer” is defined in s 7 of PLEPA, which relevantly provides:

- (1) In this Act, unless the context otherwise requires, **primary carer** means—
 - (a) a female (the **biological mother**) who is pregnant or has given birth to a child:
 - (b) the spouse or partner of the biological mother, only if—
 - (i) the spouse or partner has succeeded under section 72B to all or part of the biological mother’s entitlement to a parental leave payment; or
 - (ii) the biological mother has transferred all or part of her entitlement to a parental leave payment to that spouse or partner under section 71E (in which case the spouse or partner is the primary carer for the period of time in relation to which the entitlement is transferred); or
 - (iii) ...
 - (c) a person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development, and upbringing of a child who is under the age of 6 years ...

Examples

If a child under the age of 6 years goes to live with their aunt, who intends to raise the child in place of the child’s biological parents, the aunt is the child’s primary carer.

If a couple formally adopt a child under the age of 6 years, or undertake to care for the child permanently, the member of the couple that is nominated under subsection (2) is the child’s primary carer.

¹² *Duan v Ministry of Business, Innovation and Employment*, above n 1, at [17](a).

If a child under the age of 6 is temporarily placed with a foster parent, that person is not a primary carer because the placement is not permanent.

If a child's grandmother minds the child every day while his or her parents are at work, the grandmother is not a primary carer, because the child's parents still have primary responsibility for the child's upbringing.

...

[22] When Ms Duan gave birth to her baby, she became the primary carer of her baby.¹³ At no time did she relinquish that role, and no other person took permanent primary responsibility for the care, development, and upbringing of the baby. The role of the friend was less than the third example given, being the foster parent with whom a baby is temporarily placed, and is most akin to the last example, being the child's grandparent minding the child while their parents are working.¹⁴ As in that last example, Ms Duan still had primary responsibility for her baby's upbringing; she remained the primary carer, notwithstanding her return to work in mid-April 2021.

A roadmap for assessing eligibility and entitlement to receive parental leave payments under PLEPA

[23] PLEPA's origins can be traced back to legislation dating back more than 120 years.¹⁵ Over that time the legislation has been heavily amended as new policies towards parenting in New Zealand's workplaces have been grafted into the legislation. This incremental approach to amendments has resulted in PLEPA being complex and at times difficult to navigate.

[24] The requirements concerning a person's eligibility and entitlement to receive parental leave payments from public money contained in pt 7A are rigid and do not allow a great deal of autonomy for parents to arrange parental leave matters, including parental leave payments, in a way that they consider best suits their family, without

¹³ PLEPA, s 7(1)(a).

¹⁴ Section 7(1)(c).

¹⁵ PLEPA repealed the Maternity Leave and Employment Protection Act 1980. Key terms in PLEPA relating to pregnancy, such as "confinement", appear to have their origins dating back through the Maternity Leave and Employment Protection Act, its predecessor s 38(1) of the Factories Act 1946, and even further back to s 54 of the Factories Act 1894.

putting their entitlement at risk. Below is a roadmap of the approach taken by the Court when navigating PLEPA and determining whether Ms Duan was entitled to paid parental leave when she applied for it.

Step 1 – eligibility to receive parental leave payments

[25] Section 71CA provides a two-limb test for a person to come within the definition of an “eligible employee” under pt 7A. Specifically, an eligible employee means a person who:

- (a) is the primary carer of a child;¹⁶ and
- (b) meets the parental leave payment threshold.¹⁷

[26] If a person is an “eligible employee”, then the next step is to consider whether they are entitled to receive parental leave payments.

Step 2 – entitlement to parental leave payments

[27] Under s 71D, an eligible employee will be entitled to receive parental leave payments if, during the relevant period, they are not employed or self-employed, or they take parental leave from their employment or self-employment.¹⁸

Step 3 – application for parental leave payment

[28] If a person has passed through the steps above, being both eligible and entitled to parental leave payments, the next step is for them to make an application for parental leave payments. Section 71I requires an application to be made before the earliest of:

¹⁶ Section 7.

¹⁷ Section 2BA(4) provides that an employee meets the threshold if they 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 before the due date of their baby, or the date they or their partner becomes the primary carer of a child under six years permanently. The employment for this test can be with more than one employer and does not have to be continuous employment.

¹⁸ Section 71D(1)(b).

- (a) the date on which the person returns to work;¹⁹ or
- (b) the date on which the child attains the age of 12 months (in the case of a biological mother or their spouse or partner);²⁰ or
- (c) the date that is the first anniversary of the date on which the person or the person’s spouse or partner became the primary carer (in the case of non-biological primary carers).²¹

[29] What “returns to work” means was a key issue in this case and is dealt with below.²²

Step 4 – start of parental leave payment period

[30] Section 71K prescribes the date on which an applicant’s parental leave payment period commences. In the case of a child born to the eligible and entitled person, or to the person’s spouse or partner, it provides that the parental leave payment is payable for a period that begins on the earlier of:

- (a) the date the person commences parental leave; or
- (b) the date of confinement.²³

[31] The phrase “date of confinement” is not defined in PLEPA. MBIE submitted that its meaning was: “when the child was born”. Ms Jerebine submitted the phrase means: “the condition of giving birth”. After considering dictionary definitions,²⁴ the use of the phrase within s 71K of PLEPA, the purpose of pt 7A of PLEPA, indications as to the meaning of the phrase from other provisions within PLEPA, preceding

¹⁹ Section 71I(2)(a)(i).

²⁰ Section 71I(2)(a)(ii).

²¹ Section 71I(2)(a)(iii).

²² At [40] to [41].

²³ Section 71K(1)(b) applies to non-biological primary carers and is not relevant to the current case.

²⁴ Michael Proffitt (ed) “confinement: noun” (September 2023) Oxford English Dictionary <www.oed.com> at [4]; and Michael Proffitt (ed) “confine: verb” (September 2023) Oxford English Dictionary <www.oed.com> at [6].

legislation,²⁵ and other related maternity legislation,²⁶ we accept the meaning of “date of confinement” is the date on which the process of giving birth begins (for example, a mother begins labour resulting in the birth of her child, or commences the medical procedure leading to the birth such as by way of a caesarean birth).

[32] Section 71K(2) allows an eligible and entitled person to elect to delay the start date of their parental leave payment period if the person takes a period of paid leave at the start of their parental leave period. The effect of an election is that the start date of the parental leave payment period is delayed until the day after the date on which the paid leave ends.

[33] The Authority did not refer to s 71K or explain how it had applied to the analysis in its determination. MBIE and Ms Jerebine have opposing views on how the section applies.

[34] MBIE submits that the start date is strictly as set out in PLEPA: the earlier of either the date a person commences parental leave or the date of confinement.

[35] Ms Jerebine submits that s 71K is permissive and should be interpreted as only concerning when parental leave payments may be payable from. She submits it should not be interpreted as providing a strict start date of the parental leave payment period. In her view, s 71K does not require a biological mother to stop working on the date her child is born to keep her entitlement to parental leave payments. Ms Jerebine

²⁵ PLEPA repealed the Maternity Leave and Employment Protection Act 1980 (MLEPA), which also used the phrase “date of confinement” in ss 9, 11, and 12 without definition. MLEPA repealed the Factories Act 1946, which stated in s 38(1): “No woman shall be permitted, during the period of six weeks immediately following her confinement, to work in any factory other than a factory in which only members of the same family are employed.” Section 38(1) of the Factories Act 1946 appears to have originated from the Factories Act 1894, which stated in s 54: “No person shall employ in any factory or work-room any woman during the four weeks immediately after her confinement.” The New Zealand factory legislation appears to be parallel in nature to British legislation such as the Factory and Workshop Act 1901 (UK) 1 Edw 7 c 22, which stated in s 61: “An occupier of a factory or workshop shall not knowingly allow a woman or girl to be employed therein within four weeks after she has given birth to a child.”

²⁶ Sections 10 and 20 of the Births and Death Registration Act 1951 refer to confinement as birthing or the labour process. It draws a distinction between “the confinement” and “the birth”, which indicates that “the confinement” primarily refers to the process of giving birth. Regulation 17 of the Health Entitlement Cards Regulations 1993 refers to the term confinement in the context of defining “maternity services” and similarly draws a distinction between the confinement and the birth.

submitted that a biological mother can elect when she wants to begin to receive their parental leave payments provided it is within 12 months of the birth.

[36] Ms Jerebine submitted that if s 71K was interpreted as proposed by MBIE, this would restrict when a person would be able to make an application, which she said would effectively cut across s 71I, which prescribes the requirements relating to parental leave applications, and s 71D, which prescribes a person's eligibility and entitlements to parental leave payments.

[37] The Court considers the interpretation advanced by Ms Jerebine to be inconsistent with the purpose of pt 7A and would make the application of s 71K(1) strained and s 71K(2) redundant. The Court agrees with MBIE's interpretation of s 71K, being that it prescribes the criteria for an entitlement, requiring certain persons to do certain things at certain times to receive that entitlement. Section 71K does not impose when a person is to take parental leave. However, to be entitled to receive the Government parental leave payments, their leave must align with the timing set out in s 71K.

[38] The starting point in the section is that the parental leave payment period begins on the earlier of either the date of confinement or the commencement of parental leave. Section 71K(2)(a) allows a person to delay the start date of their parental leave payment period until the end of other paid leave, but no longer than that.

Step 5 – end of parental leave payment period

[39] Section 71L(1) prescribes the date on which an applicant's parental leave payment period ends, being the earlier of:

- (a) 26 weeks after the date on which it started in accordance with s 71K;
or
- (b) the date the person returns to work; or
- (c) the date on which the person ceases to be the primary caregiver.

[40] One of the events giving rise to the end of a person’s parental leave payment period is the date the person returns to work. This takes us to the issue of the meaning of “returns to work”. Taking into account the text in the light of its purpose and context, we find that the phrase “returns to work” means:

- (a) in the case of a biological mother or their spouse or partner, the date on which the person returns to perform paid work after the birth of the child; and
- (b) in the case of non-biological primary carers, the date on which the person returns to perform paid work after becoming the primary carer of the child.

[41] While the phrase is not defined in ss 71I or 71L, it is referenced in s 71CE in the context of keeping-in-touch days. In s 71CE an employee is treated as having returned to work if they perform paid work for their employer within 28 days of the date of birth, or perform more than 64 hours of paid work during the parental leave payment period.²⁷ The reference to 28 days and 64 hours is related to the issue of keeping-in-touch days and is not material to the meaning of “returns to work” for the purposes of ss 71I or 71L. The key aspect in terms of these sections is the performance of paid work. Once a person starts to perform work for which they are paid, they have returned to work.²⁸

Ms Duan was not entitled to paid parental leave

[42] As explained below, the Court finds that Ms Duan was eligible but not entitled to receive the parental leave payment when she applied for it in August 2021.

²⁷ Section 71CE(3).

²⁸ At this point, we note that a person will not be deemed to have returned to work if one of the express, narrow exceptions in PLEPA applies. Exceptions include s 71K(2)(a) which allows an eligible employee who takes paid leave at the start of his or her parental leave payment period to elect to delay the start of his parental leave pay period to the day after the date on which that period of paid leave ends. Section 71CE allows an eligible employee to work from the 29th day of their parental leave payment period for up to 64 hours of work without this work being considered a return to work from parental leave.

Step 1 – eligibility

[43] Ms Duan met the two-limb eligible employee test in s 71CA. Specifically, she was the primary carer of her child, and she met the parental leave payment threshold.²⁹

Step 2 – entitlement

[44] Although Ms Duan was an eligible employee, she failed to meet the second limb of the test in s 71D(1), which required her to not be employed, or to have taken parental leave from her employment, during the period in which she was eligible to receive parental leave payments as defined by ss 71K and 71L.

[45] The Authority erred in finding Ms Duan’s parental leave payment period did not start until she resigned from her employment in mid-September 2021. The start of the period for which Ms Duan was entitled to receive the parental leave payment is determined in step 4 of the road map.

[46] Ms Duan’s parental leave payment eligibility period started following the birth of her child. By taking paid leave, Ms Duan could have elected to delay the start of her parental leave payment period to the day after the date on which her paid leave ended. However, by returning to work immediately after her paid leave ended, Ms Duan did not take advantage of that ability to elect.

[47] Ms Duan’s return to work in mid-April 2021 following her paid leave had the effect of disentitling her under the second limb of the s 71D test.

Step 3 – application

[48] Section 71I required Ms Duan to make an application for parental leave payment before the earliest of either:

- (a) the date on which she returned to work; or
- (b) the date on which her child attained the age of 12 months.

²⁹ *Duan v Ministry of Business, Innovation and Employment*, above n 1, at [17](b).

[49] The Authority erred when it determined:

- (a) Ms Duan’s return to work, following the birth of her child and taking of paid leave, did not constitute a “return to work” for the purposes of s 71I(2)(a)(i);
- (b) Ms Duan did not stop working for the purposes of PLEPA, following the birth of her child, until September 2021 when she resigned from her employment; and
- (c) Ms Duan returned to work for the purposes of s 71I(2)(a)(i) in February 2022 when she commenced a new job.³⁰

[50] The above errors led to the Authority incorrectly finding that Ms Duan’s application for parental leave payments was made in time in accordance with the requirements of s 71I.

[51] Ms Duan did not make her application for parental leave payments until August 2021, which was after she had returned to work. In accordance with the requirements of s 71I(2)(a)(i), Ms Duan’s application was out of time.

Step 4 – start of period

[52] The Authority did not refer to s 71K or how this section applied to Ms Duan’s eligibility for paid parental leave in its determination.

[53] Ms Jerebine says that Ms Duan did not leave work following the birth of her child and that she remained employed until she resigned from her employment in mid-September 2021 when her baby was more than five months old. Ms Jerebine submitted that Ms Duan could not return to work as she had not left work.

³⁰ While this was not explicitly stated, it is implicit in the reasoning of the Authority.

[54] The Court disagrees. Section 71K is prescriptive. It stipulates the date that Ms Duan's parental leave payment period commences. In Ms Duan's case it required the period to commence on the earlier of either:

- (a) the date she chose to take parental leave; or
- (b) the date of confinement, being 1 April 2021 when Ms Duan gave birth (or otherwise began the birthing process).

[55] Ms Duan did not take a period of parental leave prior to her giving birth to her child. On the plain reading of s 71K and following consideration of the purpose of pt 7A, the surrounding sections and the context of the legislation, it is clear that Ms Duan's parental leave payment eligibility period commenced after giving birth and following the completion of the period of paid leave she had elected to take after giving birth.

Step 5 – end of period

[56] Section 71L stipulates the date that Ms Duan's parental leave payment period ended. Section 71L(1) states the period ends on the earlier of either:

- (a) 26 weeks after the date on which the parental leave payments began in accordance with s 71K; or
- (b) the date on which the person returns to work as an employee; or
- (c) the date on which the person ceases to be the primary carer.

[57] While s 71K prescribes the date on which the parental leave payment period starts, s 71L(1)(b) sets the end of the parental leave payment period. In Ms Duan's situation her parental leave payment period ended when she first returned to work after the birth of her child.

MBIE could not cure the defect by exercising its discretion

[58] The Authority found that MBIE should have exercised its discretion under s 71IA of PLEPA to allow Ms Duan’s application to proceed.³¹ It took into account some uncertainty regarding Ms Duan’s childcare arrangements and later return to work, that English is not her first language, the complexity of PLEPA, and her failure to discuss with the Inland Revenue Department the possibility of starting work again and then taking leave later. The Authority noted that Ms Duan acted in good faith.³²

[59] Section 71IA allows MBIE to approve the making of a parental leave payment to a person despite an irregularity in their application for payment. In deciding whether to approve the making of a parental leave payment under s 71IA, MBIE is required to have regard to:³³

- (a) the extent of the irregularity (including whether the extent of the irregularity was reasonable in all the circumstances); and
- (b) whether the person was acting in good faith.

[60] Section 71IA(5) defines “irregularity” for the purposes of the section. It means:

- ...
- (a) failing to make the application for payment before the relevant date in section 71I; or
 - (b) applying in a manner other than that prescribed in the regulations; or
 - (c) failing to specify all the matters or include all the documents prescribed in the regulations; or
 - (d) failing to state whether the person wishes to transfer all or part of the entitlement under section 71E; or
 - (e) otherwise applying irregularly in matter of form.

[61] In this case, if MBIE was being called upon to exercise its discretion, it would not have been because there was an irregularity in form or a difficulty with the timing

³¹ *Duan v Ministry of Business, Innovation and Employment*, above n 1, at [27].

³² At [24]–[26].

³³ PLEPA, s 71IA(2).

of the application. Rather, it would be a matter of substance, being that Ms Duan was not entitled to a parental leave payment.³⁴

[62] Section 71IA does not allow MBIE to exercise its discretion to move the relevant dates, being the start and end dates of Ms Duan's parental leave payment period, to another time period not provided for by the legislation. As submitted by both MBIE and Ms Jerebine, the Authority erred in finding that MBIE could (or should) have exercised its discretion to grant Ms Duan a parental leave payment in her circumstances.

No issue as to costs

[63] In its statement of claim MBIE advised that, if the challenge was successful, it did not intend to seek costs. That stance is appropriate in the circumstances, and therefore no issue as to costs arises.

M S King
for the full Court

Judgment signed at 3 pm on 18 December 2023

³⁴ If the only impediment to Ms Duan's entitlement to parental leave payments was due to her failure to make an election under s 71K(2)(a) to delay the start date of her parental leave payment period until the day after her paid leave had finished, this may be an irregularity that could be remedied by MBIE exercising its discretion in s 71A(5).