IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2025] NZEmpC 208
EMPC 197/2022

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	LYN SOAPI First Plaintiff
AND	DANNY LAU Second Plaintiff
AND	MARY LAU Third Plaintiff
AND	PICK HAWKE'S BAY INCOPORATED Defendant

Court:	Judge K G Smith Judge Kathryn Beck Judge M S King
Hearing:	1 March 2024 and 25-27 June 2024 (Heard at Auckland, Napier and via Audio Visual Link with further submissions filed 8, 14 and 17 April 2025)
Appearances:	T Oldfield, counsel for plaintiffs A Butler KC and J Bates, counsel for defendant P Cranney and G Iddamalgoda, counsel for New Zealand Council of Trade Unions as Intervener P Mitskevitch and B Peck, counsel for Human Rights Commission as Intervener S Hornsby-Geluk, counsel for Horticulture New Zealand Inc as Intervener
Judgment:	15 September 2025

JUDGMENT OF THE FULL COURT

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[1] This case has its origin in deductions made by an employer from the wages payable to its employees who are working in New Zealand under a visa obtained through the Recognised Seasonal Employer (RSE) scheme.

[2] The plaintiffs are three of the defendant's former RSE employees. They claim that deductions made from their wages breached the Wages Protection Act 1983 and the Minimum Wage Act 1983. There is no dispute that the deductions were made. What is in issue is the lawfulness of them.

[3] The proceeding raises important questions about the treatment of wages payable to a person employed on the relevant adult minimum wage, especially where that person is employed under the RSE scheme. For that reason, the matter was removed by special leave from the Employment Relations Authority to the Court and a full Court was convened to hear it.[1]

The parties

[4] Ms Soapi, Mr Lau and Mrs Lau are citizens of the Solomon Islands. All three plaintiffs were recruited in Honiara. Ms Soapi worked for the defendant, Pick Hawke's Bay Inc, because it provided her with an opportunity to earn money to pay for her education and to provide for her family. She worked for Pick Hawke's Bay for two seasons. Mrs Lau and Mr Lau are married to each other. They worked for Pick Hawke's Bay to provide for their family. Mrs Lau was employed by Pick Hawke's Bay for 11 seasons. Mr Lau worked for Pick Hawke's Bay for two seasons.

[5] Pick Hawke's Bay was incorporated on 1 December 2008, to advance the interests of the horticulture and viticulture industries and to benefit from the RSE scheme. It is a not-for-profit organisation.

The RSE scheme generally

[6] The RSE scheme functions by allowing accredited New Zealand employers to employ workers from specified Pacific Island nations for work in the horticulture and viticulture industries.

[7] To participate in the RSE scheme an employer must be accredited by Immigration New Zealand (INZ). Applications for accreditation are considered under

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1 *Soapi v Pick Hawke's Bay Inc* [2022] NZEmpC 106.

INZ's Operational Manual which contains RSE instructions that are certified under s 22 of the Immigration Act 2009.[2]

[8] The purpose of accreditation is for an employer to be granted RSE status. Once that status is secured the process of employing staff from overseas requires the employer to first obtain from INZ approval for an Agreement to Recruit (ATR). An ATR may only be approved where the demand for workers cannot be met from the New Zealand workforce. Before granting an ATR, INZ must be satisfied that the employer:

(a) is a New Zealand employer;

(b) is in a sound financial position;

(c) has human resource policies and practices of a high standard, promotes the welfare of workers and has dispute resolution processes;

(d) has a demonstrable commitment to recruiting and training New Zealanders; and

(e) has good workplace practices and a history of compliance with New Zealand immigration and employment law.

[9] An employer seeking to recruit from overseas must agree to:

(a) pay for half the future employee's return airfare between New Zealand and the worker's country of residence;[3]

(b) comply with requirements for employment agreements, including the minimum remuneration and pay deductions in INZ's instructions; and

(c) make available appropriate pastoral care (including food and clothing, access to health services and suitable accommodation) to employees

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2 The instructions are published under s 25 of the Immigration Act.

3 There are exemptions for certain Pacific Nations where the return airfare is to Fiji.

recruited under the scheme at a reasonable cost during the period of the employee's visa.[4]

[10] An ATR application must include basic information such as the seasonal demand for labour, the number of employees required, the nature of each position, the work period, location, and the country or countries the employees are to be recruited from. A copy of the employment agreement to be offered is to be supplied as part of the application, which must be consistent with the ATR held by the employer. Employment may not be for more than seven months.[5]

[11] INZ's instructions require the approved employment agreement to specify a per-hour rate of pay for work consistent with the typical rate payable to a New Zealand citizen for equivalent work in the same period and region. The agreements must comply with New Zealand law specifically the Employment Relations Act 2000, holiday and leave requirements, statutory health and safety obligations and other "minimum statutory requirements".

[12] Under INZ's instructions deductions from an employee's pay are permissible where:

(a) the employer has submitted them to INZ for approval as part of the ATR process and where New Zealand law allows;

(b) the employer has obtained the written consent "freely given" from the employee before any deductions occur;

(c) the employer has informed the employee that consent to the deduction may be withdrawn at any time;

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4 The employer must notify INZ of any dispute that might result in the suspension or dismissal of the employee, and to pay to the Ministry of Business, Innovation and Employment the costs of repatriation if that is needed. The applicant must agree to INZ being able to obtain information from other Government services, the New Zealand Council of Trade Unions, other unions, agencies and industry bodies.

5 Unless the employee is a citizen of Tuvalu or Kiribati.

(d) the deductions are for a specified purpose and are for actual, reasonable, verifiable expenses in relation to that purpose; and

(e) the amount deducted is no greater than what would be deducted, in comparable circumstances, from the pay of employees who are New Zealand citizens or residence class visa holders.

[13] The RSE accreditation process is undertaken every three years. The ATR is granted yearly.

The RSE scheme as applied to Pick Hawke's Bay

[14] Pick Hawke's Bay has participated in the RSE scheme every year since 2008. Seasonal workers have been recruited from Vanuatu, Samoa, Solomon Islands, Fiji and Nauru.

[15] Each year when Pick Hawke's Bay sought an ATR, it supplied to INZ as part of the application a template employment agreement for the employment offers it intended to make. Mr Evans, the president of Pick Hawke's Bay's executive committee, produced each of the ATR applications for the years 2014 to 2019 inclusive.

[16] Each year Pick Hawke's Bay informed INZ that one of its representatives would meet new employees on arrival in New Zealand and escort them to Hawke's Bay. INZ was informed that there would be a four-step induction programme. One would be offshore, another pre-employment, one about INZ and finally a work site induction.

[17] The offshore induction appears to refer to the recruitment process the plaintiffs experienced in Honiara.

[18] Pick Hawke's Bay's template employment agreement stated that deductions would only be made from the employee's pay where INZ's instructions were complied with.[6]

[19] For several years Pick Hawke's Bay supplied INZ with a separate draft consent deduction form for deductions from employee's pay during the year in question. The deductions referred to in the form fell into two parts. The first part was described as a reducing balance deduction. The second part was described as weekly deductions. What separated these two types of deductions was how they were treated by Pick Hawke's Bay which will be discussed later.

[20] The costs that fell into the reducing balance deductions varied from year to year. However, it always included half the cost of the return international airfare, the cost of the RSE visa, domestic travel and an advance on wages. In other years, the reducing balance included an accommodation cost of one week payable in advance, the cost of bedding and, on some occasions, supplying a branded tee shirt.

[21] The make-up of the weekly deductions in the consent deduction form varied from year to year. It might include health insurance, weekly transport costs and accommodation. There were occasions when health insurance was not part of this deduction and it was replaced with travel insurance.

[22] Over time what was provided for in the consent forms migrated into the template employment agreements provided to INZ. One constant aspect of these deductions was that the employment agreement and consent deduction forms did not explain how they would work in practice.

The plaintiffs' circumstances

[23] The plaintiffs' evidence about their recruitment, arrival in New Zealand, transportation to Hawke's Bay, and the conditions of their employment were broadly similar. All three plaintiffs signed employment agreements in the Solomon Islands for work in Hawke's Bay.

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6 Those referred to at para [12].

[24] Another identical employment agreement was signed by each of them on arrival in Hawke's Bay, although why that happened was not explained. It appears that both versions of the employment agreements were in English even though the plaintiffs speak Solomon Islands Pidjin.

[25] Only one version of the employment agreements was provided to the Court. We assume that they were the ones signed in New Zealand.[7]

[26] After the first employment agreement was signed in the Solomon Islands, events moved reasonably quickly. Travel arrangements were made and paid for by Pick Hawke's Bay. On arrival in New Zealand the plaintiffs were met at the airport and driven to Hawke's Bay where an induction was performed and the second employment agreement was signed.

[27] On arrival in Hawke's Bay, Pick Hawke's Bay required the plaintiffs to hand over their passports. There was a disagreement about why that happened. From the plaintiffs' perspective there was little choice but to comply. Mr Evans thought the passports were being secured for safekeeping. He accepted, however, that the same service was not provided for other valuables employees may have wanted to store securely. He was not present at any of the inductions attended by the plaintiffs when the passports were handed over. We prefer the plaintiffs' evidence about this step, although ultimately it is not material to the pay deduction issue.

[28] The induction process that followed the plaintiffs' arrival in Hawke's Bay involved providing information to them about the work, workplace and accommodation. Each of them was supplied with tee shirts with a Pick Hawke's Bay brand, work gear comprising raincoats, work boots, gumboots and warm clothes. Ms Soapi and Mr Lau received hepatitis vaccinations to enable them to work with blueberries.

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[7] No issues arose about any potential differences between the two versions of employment agreement or from employment beginning, at least for some purposes, in a different jurisdiction.

Pastoral care and accommodation

[29] As part of the ATR process Pick Hawke's Bay was required to provide pastoral care, including suitable accommodation. The terms of the RSE visa, and of each employment agreement, required the plaintiffs to live in, and pay for, the accommodation provided to them. One requirement of the ATR approval was that worker accommodation must not exacerbate housing pressure in the region.

[30] Each of the plaintiffs was housed in gender-segregated accommodation. Ms Soapi and Mrs Lau lived in a Portacom building equipped with bunk beds separated by curtains. Ten women were allocated to one Portacom. Linen was supplied and, on at least one occasion, bedding was charged for. The facilities included separate buildings where approximately 80 women shared a kitchen, five showers and five toilets.

[31] The facility where Mr Lau stayed housed approximately 60 men. Six men were allocated to his Portacom. They shared a kitchen, six showers and six toilets, which were in a separate building. He described the accommodation as squashed and cold.

[32] The segregation of employees by gender was for safety and privacy reasons, but that meant Mr and Mrs Lau were prohibited from visiting each other in their respective accommodation.

[33] Pick Hawke's Bay does not own the accommodation facilities. Mr Evans said the amount charged to employees was an expense incurred by Pick Hawke's Bay that it passed on to the employees at cost. So far as Mr Evans was aware, INZ assessed the accommodation, and the associated cost, as a desktop study without carrying out an inspection.

[34] It transpired that some of the accommodation suppliers are not really at arms-length from Pick Hawke's Bay. Mr Evans explained that some of the facilities, including those offered by his own company RJ Flowers Ltd, are owned by members of Pick Hawke's Bay. While Mr Evans did not say how many of those providers were

members of Pick Hawke's Bay in the years the plaintiffs were employed, some indication of that relationship can be gleaned from the financial statements he produced for the year ending 30 June 2022. It contained a related party disclosure stating the members of Pick Hawke's Bay providing services to it. What followed was a list of ten accommodation suppliers in that year.

[35] The cost of the accommodation charged to the employee was specified in either the individual employment agreement or consent deduction form. For some seasons it was $115 per week and in others it was $120 per week. We consider it is appropriate to mention, at this stage, Mr Evans' further explanation about how that charge was calculated. While the plaintiffs (and most other RSE employees) were employed for a season of no more than seven months, the accommodation cost they met each week was worked out using the suppliers' costs over a 12-month period. The consequence of this method of charging was that built into the weekly amount paid by the plaintiffs was a recovery of at least some of the accommodation supplier's costs for the five months when the plaintiffs were not using them.

[36] Mr Evans did not say what sort of cost was built into calculating what would be charged. We note, however, that in the ATR process there was no disclosure to INZ that the accommodation costs to be recovered from the employees would be calculated this way and be paid (at least in some cases) to entities associated with Pick Hawke's Bay.

[37] Each of the plaintiff's employment agreements was accompanied by a Pick Hawke's Bay code of conduct. Among fairly typical subjects covered by this code was that the plaintiffs were to comply with all reasonable and lawful instructions in the workplace and with all of its policies and procedures. The code re-stated the pastoral care to be provided by Pick Hawke's Bay as part of the ATR process and spelled out what would happen for transport, accommodation and to regulate behaviour outside of work. So far as accommodation was concerned, it stipulated that all employees were to stay in the accommodation supplied, which was alcohol free. Under the code consumption of alcohol would be considered to be serious misconduct potentially resulting in dismissal.

[38] The accommodation was curfewed. All employees were required to be at the facility by 9 pm. At 10 pm the lights were turned off and the kitchen was locked.

[39] If the accommodation facility was damaged, or kitchenware was lost or broken, the expense was deducted from the employee's pay. For example, in the 2018/2019 season Mr Lau and nine other employees were each charged $3.50 for lost kitchenware. What was lost was not described in the deductions, or in evidence, and there was no explanation for everyone being charged.

The claims

[40] In the plaintiffs' third amended statement of claim, they pleaded that the defendant made unlawful deductions from their pay in breach of the Wages Protection Act and the Minimum Wage Act. Additionally, Ms Soapi and Mrs Lau claimed that their employment agreements in the 2019/2020 season breached s 11B of the Minimum Wage Act by not fixing the maximum number of hours of work in any week. Claims were also made for penalties to be imposed.

The plaintiffs' claims under the Wages Protection Act 1983

[41] The plaintiffs claimed:

(a) that certain deductions identified in Schedule A to the third amended statement of claim were made without their written consent or were not made at their written request and therefore breached s 4;

(b) all of the deductions in Schedule A were unreasonable under s 5A and were made in breach of ss 4 and 5 because:

(i) they were not approved in the relevant ATR and were not submitted to INZ for approval;

(ii) they were made in breach of INZ's operation manual, because they were not submitted for approval;

(iii) they were made in breach of the individual employment agreements that required all deductions to be submitted to INZ for approval; or

(iv) they breached s 16 of the Health and Safety at Work Act 2015 and related regulations.

Issues

[42] This claim gives rise to three broad questions:

(a) Were deductions made without the plaintiffs' written consent or request?

(b) Were some deductions unlawful as a result of being made without approval from INZ?

(c) Did deductions contravene the Health and Safety at Work Act 2015 and regulations and, if so, were they unlawful?

[43] The plaintiffs' claims engage ss 4, 5 and 5A of the Wages Protection Act. Under s 4 an employer is required to pay to an employee the entire amount of any wages that are payable without deduction, except as provided for in ss 5(1) and 6(2).[8]

[44] Under s 5(1) deductions from wages may be made for a lawful purpose:

(a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or

(b) on the written request of the worker.

[45] Section 5(1A) prevents an employer from making a specific deduction in accordance with a general deductions clause in an employment agreement without first consulting the employee. Under s 5(2) the employee's consent to a deduction may be withdrawn or varied by giving notice to the employer.

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[8] Section 6(2) mentioned in s 4 is not relevant, because it deals with recovery of certain overpayments.

[46] Despite the apparently broad scope of s 5, under s 5A an employer must not make a deduction from wages payable to an employee if the deduction is unreasonable.

[47] In Schedule A to the third amended statement of claim the deductions that are the subject of this claim fell into the following categories:

(a) Weekly allowance payments.

(b) Deductions that the parties agree were unlawful.

(c) Arrears payments.

(d) Insurance policy deductions.

(e) Wage advance deductions.

(f) Overpayment.

What was the weekly allowance?

[48] The impression conveyed by the plaintiffs' claim was that they sought to recover a deduction from their wages for a weekly allowance of $100. The statement of claim did not provide any other assistance.

[49] Mr Evans explained that the notation "weekly allowance" on pay information was a function of Pick Hawke's Bay's payroll system that did not have anything more suitable available to record the transaction. He said, and the plaintiffs accepted, that it referred to a sum of money the plaintiffs were paid each week.

[50] An explanation is required. Earlier we described deductions listed in the individual employment agreements, or consent deduction forms, falling into two groups: the reducing balance and weekly deductions. The reducing balance recorded a debt owed to Pick Hawke's Bay by each employee. What Pick Hawke's Bay did was recover the entire amount of that debt by applying all of the plaintiffs' pay each week to repayment, except for $100.

[51] As an example of this process at work, in 2019 Ms Soapi faced a reducing balance debt of $2,028.64. She was required to pay the debt to Pick Hawke's Bay in priority to meeting her other expenses. Until the debt was paid in full, she received $100 of her weekly pay.

[52] The reducing balance was identified by Pick Hawke's Bay in the information supplied to INZ in the ATR process. However, so far as we can ascertain, how repayment of that balance operated in practice was not disclosed to INZ. It was also not disclosed to the plaintiffs, who found out about this debt recovery method after they arrived in the country.

[53] When asked about how this arrangement came about, Mr Evans explained that he thought it was established to respond to a situation several years ago, when some employees arrived in New Zealand but declined to start work. They were repatriated at Pick Hawke's Bay's expense. Because of that experience Pick Hawke's Bay decided to prioritise the recovery of its expenses to ensure that it was not placed in that position again. Pick Hawke's Bay ringfenced $100 of the weekly pay and the available category in its payroll system used to describe this sum was "weekly allowance".

[54] The plaintiffs acknowledged they received the money; however, they say that the sums were deducted from their wages before they were due and then paid to them in a separate transaction. It follows the "weekly allowance" payments were not deductions and are not recoverable.

The parties agree that some deductions were unlawful

[55] During the hearing, the parties agreed about some of the plaintiffs' claims under the Wages Protection Act. After the hearing, they filed a memorandum in which Pick Hawke's Bay accepted liability for the following categories in Schedule A to the third amended statement of claim: a Pick Hawkes Bay shirt, fuel, food costs, work or wet weather gear, lost kitchenware, immunisations, and storage boxes. The defendant conceded these categories because they were not approved under the ATR process.

[56] Despite that concession, the plaintiffs sought findings of liability to support their claims for penalties. We are satisfied that Pick Hawkes Bay breached the Wages Protection Act 1983 in relation to the agreed unlawful deductions.

[57] Initially, there was some dispute about work gear, and whether it was approved under the ATR process. The difficulty for Pick Hawke's Bay is that, under the Health and Safety at Work Act, a person in control of a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of workers while they are at work. There was no dispute that the equipment paid for by the plaintiffs included items that are personal protective equipment within the meaning of s 16 of that Act. Under s 27 of the Health and Safety at Work Act a levy or charge is not to be imposed on a worker for anything done, or provided, in relation to health and safety. The Act goes further and treats an employee as having been levied or charged if the employee is required to provide his or her own personal protective equipment as a precondition to employment or as a term or condition of it.[9] We agree with the plaintiffs that this equipment was required to be supplied to them by Pick Hawke's Bay and that making these deductions from pay was therefore unlawful.

[58] Reinforcing that conclusion is reg 15 of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 which applies where personal protective equipment is to be used. Under reg 15(2) a person in control of a business or undertaking must provide equipment to employees carrying out the work unless it is being provided by somebody else.[10]

[59] Pick Hawke's Bay identified the need for personal protective equipment, told INZ the equipment would be provided, and was obliged by law to provide it.

Were arrears payments unlawful deductions?

[60] Schedule A makes claims for deductions described as "arrears". Some of them arose because weekly deductions provided for in the employment agreements (or consent deduction forms) were deferred from one week to a subsequent week. Some

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9 Section 27(2).

10 There is an exception in reg 16, where a worker genuinely and voluntarily chooses to provide his or her own personal protective equipment for reasons of comfort or convenience.

arose because of liabilities incurred by the plaintiffs for expenses before they began work and were entitled to pay.

[61] The plaintiffs claimed that deductions from their wages for these expenses were not authorised.

[62] Pick Hawke's Bay's response was that these claims were "technical and inconsequential" in the scheme of things; the deductions had to be made at some point. The plaintiffs' interpretation of the consent deduction forms was described as "strained", and the deductions were permitted for expenses incurred prior to starting work.

[63] Before turning to consider individual deductions, it is necessary to consider two issues. First, was Pick Hawke's Bay entitled to defer weekly deductions so that they were made later? Second, was it entitled to make deductions for periods prior to the plaintiffs starting work?

[64] The answer to the first question depends on interpreting each deduction consent form. The forms used virtually identical language, a bold heading describing what the form is, space for the employee's name to be added, followed by a statement of the amount to be deducted "from my weekly wages until the total amount has been repaid". After that introduction the form is divided into two parts. One part is for the reducing balance deductions referred to earlier.

[65] The other part of the form is for the weekly deductions. Under the heading "Weekly deductions", the employee gives consent in the following way:

> I consent to the following amounts being [deducted] from my wages on a weekly basis:

[66] The form is completed by the employee's statement that he or she understands that consent may be withdrawn by written notice and that any outstanding balance may be deducted from his or her final pay at the end of employment.

[67] The plain language of the consent form needs no further analysis. It was specific and limited. It follows that we do not agree with Mr Butler KC's submission that the plaintiffs' claim is technical or inconsequential.

[68] The consent deduction forms did not provide a basis for Pick Hawke's Bay to defer a weekly deduction from one week to the next. Importantly, the forms were submitted to INZ as part of the approval process. We were not referred to any part of the application to INZ purporting to authorise the deferral of deductions from one week to another. In those circumstances, it was not open to Pick Hawke's Bay to adopt a practice departing from what was consented to and to do so in a way that preferred its interests.

[69] While that conclusion means Pick Hawke's Bay may have had to take other action to recover those sums that is a consequence of the way the Wages Protection Act, and the consent deduction forms, function. For completeness, the forms contemplated that any outstanding amounts could be deducted from final pay. Although not addressed in submissions, our view is that any arrears of that type are not captured. That follows because, if the amounts referred to as weekly deductions could not be deferred from one week to another, it is difficult to see how they could be deferred to the end of employment and treated as part of a general wash up. That is not to say this part of the form is meaningless. The consent also dealt with reducing balance deductions. If, through some circumstance, the sums referred to in the reducing balance remained outstanding they were captured by this part of the form.

Could Pick Hawke's Bay make deductions prior to the plaintiffs commencing work?

[70] We accept Mr Butler's submission that under the consent deduction forms the defendant was entitled to make deductions for costs, such as airfares, incurred prior to the plaintiffs starting work. Those costs could be recovered as reducing balances.

[71] However, that does not address the issue raised by the plaintiffs, where costs were being recovered through the weekly deductions for periods before the plaintiffs started work and were not receiving pay.

[72] We do not consider that such costs were captured by the form.

Deductions made for the same category of item on the same week

[73] Before assessing specific deductions, there were some situations where arrears deductions and weekly deductions were both made. Some of the weekly deductions were not made at the maximum amount authorised by the plaintiffs. We are satisfied that the otherwise unused portion of the weekly deductions could be put towards meeting the arrears deduction debt.

[74] We do not need to consider arrears deductions for each plaintiff separately. However, one example demonstrates why, in many cases, the deductions were unlawful. On 1 December 2019, Pick Hawke's Bay deducted $197.14 from Ms Soapi's wages for "arrears accommodation". It also deducted $115 for weekly accommodation. As only $120 was approved as a deduction for accommodation, $192.14 of the accommodation-related arrears was not approved. Similar issues arose with deductions in other seasons and involving the other plaintiffs, not only for accommodation but also for insurance and wage advances.

[75] Finally, an overpayment deduction was made unlawfully in relation to Mr Lau on 27 January 2019. The consent deduction form for that season does not refer to deductions for overpayments and it is not in the template employment agreement submitted to INZ for that year. Section 6 of the Wages Protection Act allows, in some circumstances, an employer to recover an overpayment made to an employee by way of a wage deduction. There are, however, prerequisites to be met before that step is taken. There was no evidence that Pick Hawke's Bay was exercising this statutory power or, for that matter, took any of the required steps.

Conclusion

[76] In summary, there were several breaches of the Wages Protection Act for unlawful deductions from the plaintiffs' pay.

The plaintiffs' claim under s 11B of the Minimum Wage Act 1983

[77] The first and third plaintiffs claimed that Pick Hawke's Bay failed to fix the maximum number of hours to be worked in their employment agreement for the 2019/2020 season in breach of s 11B of the Minimum Wage Act.

[78] Ms Soapi, Mrs Lau and Pick Hawke's Bay agreed that the employment agreements for the 2019/2020 season breached s 11B by not providing for maximum hours. However, Pick Hawke's Bay says that it should not face the prospect of a penalty for that breach because there was no detriment to the plaintiffs; they were paid for all hours worked.

[79] Mr Oldfield submitted that in this case the failure was significant and Ms Soapi and Mrs Lau were adversely affected. That was because Pick Hawke's Bay was required to provide an average of 30 hours of work per week under their employment agreements. Without fixing maximum hours, the plaintiffs were exposed to the possibility of working for a few hours in one week and a substantial number of hours in the next week while still meeting the contractual average. The same weekly deductions continued to be made no matter how many hours were worked. He said this also meant that Ms Soapi and Mrs Lau missed out on the possibility of overtime. Although not pleaded, Mr Oldfield submitted that the employment agreements failed to satisfy the availability provisions in s 67D of the Employment Relations Act, which is correct but is not a matter that we take any further.

[80] We are satisfied that the circumstances in which this agreement was entered into, and the way in which Ms Soapi and Mrs Lau worked, is sufficient to contemplate the possibility of imposing a penalty. During the hearing we accepted Mr Butler's submission that, if one was to be considered, an opportunity to make submissions at a later time would be appropriate. The issue of any imposition of any penalty (and if one is imposed its amount) is adjourned.

The plaintiffs' claim under s 6 of the Minimum Wage Act 1983

[81] The plaintiffs were paid the minimum adult rate of wages, under s 4 of the Minimum Wage Act.

[82] The plaintiffs claimed that s 6 of the Minimum Wage Act required that they receive payment from Pick Hawke's Bay for their work at not less than the applicable minimum rate, subject only to the exceptions provided in ss 7 to 9. Section 7 is about deductions that may be made from the minimum rate for board or lodging provided by the employer or for time lost by the employee. Sections 8 and 9 are irrelevant.[11]

[83] The plaintiffs claimed that Pick Hawke's Bay was not entitled to make any deductions from the applicable minimum rate of pay even if they agreed to them under s 5 of the Wages Protection Act because:

(a) section 15 of the Wages Protection Act provides that it applies subject to the provisions of any other Act and the exceptions in ss 6(2) and 16 do not apply;[12]

(b) section 6 of the Minimum Wage Act applies notwithstanding anything to the contrary in any Act; and

(c) section 6 of the Minimum Wage Act required the plaintiffs to receive payment from Pick Hawke's Bay at not less than the minimum rate, and if deductions are made from their wages, they do not receive that payment.

[84] Part of this claim was that, for several weeks at the start of each season, the plaintiffs received no wages from the Pick Hawke's Bay after deductions were made

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11 Section 8 authorizes minimum wage exemption permits to be issued in some circumstances; s 9 provides for certain exemptions for apprentices, persons in charitable institutions and travel-related expenses where the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016 applies.

12 Section 6 deals with an employer's right to recover overpayments in certain circumstances while s 16 provides that nothing in the Act derogates from or makes it unlawful to comply with a collective agreement or an order by the Court or the Employment Relations Authority.

and, at other times, what they received was less than the applicable minimum rate because of those deductions. The pleading did not acknowledge the $100 payment discussed earlier, but in any event Pick Hawke's Bay denied breaching the Minimum Wage Act.

Submissions

[85] The plaintiffs submitted that where deductions were made by Pick Hawke's Bay, they did not receive payment of those amounts for the purposes of s 6 of Minimum Wage Act. They noted that s 6 is subject to s 7, which provides limited scope for deductions and that is only for board, lodging or time lost by the employee and not otherwise.

[86] The submission was that, even if deductions are lawful for the purposes of the Wages Protection Act, they cannot be made if doing so reduced the plaintiffs' wages below the minimum rate of pay. Supporting this submission was s 15 of the Wages Protection Act, which provides that it is subject to the provisions of any other Act. The only exceptions to s 15 are in ss 6(2) and 16.

[87] The plaintiffs relied on *Sandhu v Gate Gourmet New Zealand Ltd* where the Court of Appeal affirmed the minority judgment of Chief Judge Inglis in the case under appeal, where she described the combined effect of ss 6 and 7 of the Minimum Wage Act as "a floor with carefully defined trap doors which an employer must go through if they want to pay less than the prescribed minimum wage".[13]

[88] Conversely, the plaintiffs sought to distinguish *Terranova Homes and Care Ltd v Faitala*, which addressed deductions made from the minimum rate of pay to cover the employer's statutory liability for KiwiSaver contributions.[14] The plaintiffs said *Faitala* did not address the relationship between ss 6 and 7. Further, they argued that, even if *Faitala* could not be distinguished, there was another ground which meant it is not applicable, namely that the deductions in that case were ones required by statute and were external to the employment relationship which is not the situation here.

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13 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237, [2020] ERNZ 561; *Sandhu v Gate Gourmet New Zealand Ltd* [2021] NZCA 591, [2021] ERNZ 1065 at [54].

14 *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347 at [17].

[89] Overall support for the plaintiffs' case was drawn from Parliamentary debates which, it was said, indicated that the ability to make deductions dropping an employee's pay below the minimum wage was intended to be limited by s 7. Further support was drawn from the Minimum Wage-Fixing Machinery Convention 1928, which provided that minimum rates of wages should be fixed in a manner which prevented abatement of them by individual agreement.[15]

[90] Ultimately, the plaintiffs emphasised that s 6 should not be interpreted in a way that allows employers to deduct an employee's entire weekly wage, or as in this case, nearly all of it. Mr Oldfield, counsel for the plaintiffs, described the consequences of such an interpretation as being to effectively authorise indentured labour, where employees could work solely to pay off debts to their employer.

[91] Mr Iddamalgoda, counsel for the New Zealand Council of Trade Unions (NZCTU) generally supported the plaintiffs' position as did Ms Mitskevitch from the Human Rights Commission. NZCTU submitted that deductions cannot be made under the Wages Protection Act that reduce an employee's pay below the minimum wage. Where deductions are made which breach the Minimum Wage Act, he submitted they would also be unreasonable within the meaning of s 5A of the Wages Protection Act. More generally, the union submitted that, where deductions exceed 10 per cent of an employee's wages, any deductions over that percentage are likely to be unreasonable.

[92] Pick Hawke's Bay's response was that the focus of s 6 is in assessing whether the statutory minimum rate of pay has been respected. So long as that was established, it considered there was no tension between the Minimum Wage Act and the Wages Protection Act and therefore no impediment to the deductions in this case. Mr Butler said that s 6 is not an anti-deduction provision and should not be interpreted in that way. If s 6 is read as being about "money in the hand" (meaning physically received as distinct from earned), the opening words of the section would produce a result that would effectively disallow other obligations such as complying with the Income Tax Act 2007, the Accident Compensation Act 2001, the Student Loan Scheme Act 2011, and the Child Support Act 1991.

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[15] Minimum Wage-Fixing Machinery Convention 39 UNTS 3 (opened for signature 16 June 1928, entered into force 14 June 1930), art 3(2)(3).

[93] Pick Hawke's Bay relied on *Faitala* where the Court of Appeal held that the right to receive the minimum wage is "subject to statutory or other legal deductions", which it considered is what these deductions were.[16] Mr Butler said that in *Faitala* the employer failed because it was seeking to make the employee cover the employer's legal obligations through deductions, whereas the present case involved deductions to meet the employee's obligations.

[94] Mr Butler submitted that, if the plaintiffs are correct, both employees and employers will be disadvantaged. They will not be able to take advantage of the deduction at source mechanism when legitimate reasons exist for being able to use it. As an alternative, Pick Hawke's Bay supported the submissions of Horticulture NZ about s 6.

[95] Mx Hornsby-Geluk, counsel for Horticulture NZ, made four overlapping submissions about s 6. The first two submissions were about *Faitala*, and the right to receive the minimum wage being "subject to statutory or other legal deductions". They were that where deductions are approved by INZ, they are statutory for the purpose of *Faitala.* Further, where deductions are approved by INZ, and consented to by the employee, they are "other legal deductions".

[96] Horticulture NZ's third submission was that, where deductions are approved by INZ, and consented to by the employee, they can be considered as part of the payment or wages received for work performed by the employee. If, at the point of payment, a portion of the wages payable is allocated to satisfy previously agreed expenses, the result was not the employee receiving less than full pay. Rather, as with statutory deductions such as for income tax, the employee received full pay but the amount was allocated in different ways.

[97] Finally, Horticulture NZ said that, where proposed deductions were scrutinised by INZ, they cannot be unreasonable for the purposes of s 5A of the Wages Protection Act.

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16 At [17].

Analysis

[98] Section 6(1) of the Minimum Wage Act provides:

> Notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[99] The leading case is *Faitala*.[17] As already mentioned, it was about the employees being required to meet the employer's KiwiSaver contribution. The employment agreement referred to payment at the minimum rate, but the pay calculation included the employer's KiwiSaver contribution. As a consequence, the employee's hourly rate of pay was effectively reduced by the value of both the employer and employee KiwiSaver contributions.

[100] The first argument for the employer considered by the Court of Appeal in that case was that it was artificial to strictly construe "receive" in s 6. The employer referred to all wages being subject to PAYE and other deductions imposed by law or according to the parties' contractual obligations.[18] The argument was that applicable taxes and deductions therefore comprise part of the minimum wage for the purposes of the Minimum Wage Act and are part of the employee's wage.[19]

[101] The Court of Appeal held that:

> [17] … It is true that an employee on a minimum wage whose income is subject to statutory or other legal deductions does not receive payment of the prescribed minimum. However, that is because the law recognises that he or she has certain personal obligations to third parties such as the state which must take priority over his or her right of access to the cash represented by the wage. That is a function of the employee's legal liability for which he or she is solely responsible. Deductions of this kind are external to the employment relationship. By contrast, the deductions relevant to this appeal derive their justification from the employment contract.
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> [18] … s 6 does not envisage that an employer will be entitled separately to deduct from the minimum wage an amount equal to its statutory liability relating to that worker. The phrase "…shall be entitled to receive from his

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17 *Faitala*, above n 14.
18 At [16].
19 At [16].

> employer payment [of a wage] for his work at not less than [the] minimum rate" has a temporal and physical quality, suggesting an employee's right to receive a fixed amount periodically payable for actual performance of his or her services. The payment to a third party of a compulsory statutory obligation imposed on an employer does not fit easily within this concept.

[102] Mr Butler made a similar submission in this case, that s 6 was not about "the amount in the hand". The argument was that the key obligation of an employer under s 6 is to correctly calculate an employee's pay in accordance with the minimum rate of wages.

[103] The plaintiffs' case about s 6 (and as it relates to s 7) was criticised as having at its heart an allegation that deductions, which the plaintiffs accept were ATR approved and consented to in writing, to be reasonable in nature and amount (meaning that they survive a challenge under the Wages Protection Act), are not deductible or recoverable because the plaintiffs are minimum wage workers. Mr Butler described those propositions, as he summarised them, as extraordinary and not supported by the Minimum Wage Act or its purpose. To back up this submission it was said that if the plaintiffs are correct they, and others in a similar position, would lose the right to access a deduction at source, preventing them from joining arrangements available to those who are paid more. For example, an employment health insurance scheme which may require deductions from pay at source, or other reasonably common scenarios such as making a payment to a Christmas savings scheme or a credit union. For that matter, it was said that the plaintiffs could not receive an interest free loan from an employer if it was a condition that repayment was to be by deduction from wages.

[104] Mr Butler urged an interpretation which departed from what he called the plaintiffs' incorrect focus on the concept of a "payment receipt". In this analysis, s 6 was said to perform two functions:

(a) To be used to calculate a minimum pay figure.

(b) Prohibit all deductions except those envisaged by ss 7 to 9 but it is not about the amount of money in hand. Rather, it was about whether the

statutory minimum rate of wages was respected when the employee's pay was calculated.

[105] Viewed in this light, s 6 is not an "anti-deduction provision". Instead, the focus of the section is on the rate of pay, which can be seen in its language and in the surrounding sections. Pick Hawke's Bay considered its approach reconciles the Minimum Wage Act and the Wages Protection Act.

[106] Given the decision in *Faitala*, Pick Hawke's Bay's case is unsustainable. Section 6 is not confined to ensuring that the calculation of pay for a person employed on the minimum rate of pay is correct. As noted by the Court of Appeal, there is a temporal and physical quality to the section, suggesting an employee's right to receive a fixed amount periodically payable.[20]

[107] Mr Butler and Mx Hornsby-Geluk relied on *Faitala*, in saying that ATR approved deductions are within the scope of the section because they are "statutory and other legal" deductions.

[108] We do not accept those submissions. The statutory deductions referred to in *Faitala* were compulsory. The deductions in this case are of a different quality. Furthermore, INZ's manual is specifically subordinate to relevant employment law and therefore gives way to s 6.

[109] Horticulture NZ developed an argument that the deductions were "other legal deductions" because they were approved by INZ. The INZ approval does not mean that the deductions were lawful for all purposes; it just means that they were lawful in the context of the RSE scheme.

[110] There is a distinction between this case and *Faitala.* In *Faitala*, the disputed deductions were made by the employer to meet its statutory obligations under the KiwiSaver Act 2006. In the present case, the deductions were made to meet contractual obligations. *Faitala* is clear. Statutory deductions from the minimum

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[20] At [18].

wage, such as child support payments, are lawful, as are other legal deductions such as those made under s 7 of the Minimum Wage Act.

[111] Where the Court of Appeal referred to "statutory and other legal deductions", it was to those that are "external to the employment relationship".[21] In the present case, the deductions were made to meet obligations the plaintiffs owed to their employer. They were not external to that employment relationship.

[112] We do not accept Mr Butler's submission that the deductions were external to the relationship, because the RSE instructions required the defendant to provide accommodation and pastoral care which attracted some of the expense. The reality was that the deductions were to satisfy debts owed to Pick Hawke's Bay.

[113] The hypothetical situations developed by Pick Hawke's Bay to illustrate why its case should be preferred are unpersuasive. An example of one of them was what might happen if an employee in the plaintiffs' position instructed an employer to pay a creditor overseas from wages due to that employee. If the instruction was complied with the overseas debt would be satisfied, but the fact that the payment was made could support a claim for breaching s 6. The unsatisfactory outcome referred to was that the employer in this example could be required to pay twice. Having satisfied the employee's debt by following the instructions to pay the employer could be compelled to make a second payment to the employee. Such an outcome was described as an unjustified windfall for the employee. Other examples were used to show how an otherwise legitimate payment could be manipulated to the disadvantage of the employer. The point of these illustrations was to show that Parliament would not have intended to prohibit reasonable pay deduction arrangements.

[114] The answer to those criticisms is in *Faitala*, where the deductions derived their justification from the employment agreement.[22] The Court of Appeal emphasised:

> [31] … The opening phrase used in s 6 of the [Minimum Wage Act] — "notwithstanding anything to the contrary" — is an unequivocal statement of legislative intent that the provision shall prevail over any enactment, award, collective agreement, determination or contract of service which purports to

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21 At [17].
22 At [17].

> limit the worker's entitlement to the prescribed minimum wage. Relevantly here, the contracts of service purport to limit the statutory entitlement.
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> [32] We are satisfied that the introductory words of s 6 prohibit parties to an employment contract entering into an agreement which might affect its substance. As Mr Cranney submitted …, a strict construction of the introductory phrase is consistent with New Zealand's international obligations to the effect that the purpose of minimum wage legislation is that minimum wages shall not be subject to abatement by individual agreement.[23] In accordance with this international purpose, s 6 is of central importance in setting a minimum statutory threshold.

[115] That is the situation in this case. Given the strong language in *Faitala*, it follows that the deductions by Pick Hawke's Bay were inconsistent with the section. As to the hypothetical situations described by Mr Butler, they could be addressed in other ways that do not infringe s 6.

[116] In *Faitala*, the Court emphasised that the Minimum Wage Act was designed to create a floor of rights. That floor is directed at preventing exploitation and is a statutory recognition of the diminished bargaining power of those in low paid employment.[24] That objective was repeated in *Sandhu v Gate Gourmet New Zealand Ltd* and *Mount Cook Airline Ltd v E Tū Inc*.[25]

[117] In *Faitala*, the Court stated that, given the importance of the objective, if Parliament had intended to repeal, override or limit the effect of s 6 when it enacted s 101B of the KiwiSaver Act 2006, then it would have done so expressly.[26]

[118] The Wages Protection Act and Minimum Wage Act were passed at the same time. Whereas s 6 of the Minimum Wage Act provides that it applies "notwithstanding anything to the contrary in any enactment", s 15 of the Wages Protection Act provides that "this Act shall be read subject to the provisions of any other Act." If Parliament had intended the Wages Protection Act to limit the effect of s 6 of the Minimum Wage Act, it is reasonable to expect that it would have said so. Given s 15 makes the Wages

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23 Minimum Wage-Fixing Machinery Convention 39 UNTS 3 (opened for signature 16 June 1928, entered into force 14 June 1930), art 3(2)(3).

24 *Faitala,* above n 14, at [28], citing *Faitala v Terranova Homes and Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614 at [39].

25 *Sandhu v Gate Gourmet New Zealand Ltd*, above n 13, at [10]; and *Mount Cook Airline Ltd v E Tū Inc* [2024] NZCA 19, [2024] ERNZ 74 at [60]–[61]. See also *Gate Gourmet New Zealand Ltd v Sandhu*, above n 13, at [53], [54] and [68].

26 *Faitala,* above n 14, at [28].

Protection Act subordinate to the Minimum Wage Act, it follows that Parliament did not intend to limit s 6. This does not render the Wages Protection Act ineffective, but it has limitations where employees are paid wages at the minimum rate.

[119] It follows that we do not accept the submission that, when s 6 of the Minimum Wage Act and s 5 of the Wages Protection Act are read together, they authorised the defendant's deductions from the plaintiffs' wages.

[120] As an alternative approach, Mr Butler and Mx Hornsby-Geluk submitted that where deductions are made under the Wages Protection Act, they constitute part of an employee's wages for the purposes of "receiving" the minimum wage. On this approach, at the point of payment a portion of the wages payable is allocated to pay for a previously agreed matter, but full pay was "received". It was just allocated in different ways.

[121] We do not accept that submission. It urges a strained reading of s 6, is inconsistent with the broader statutory context (including the requirement for wages to be payable in money)[27] and is effectively the same as an unsuccessful submission in *Faitala.*

[122] Further, in *Faitala* the Court accepted that "an employee on a minimum wage whose income is subject to statutory or other legal deductions does not receive payment of the prescribed minimum".[28] That conclusion is inconsistent with the submission.

[123] For completeness, we record Mr Butler's submission that employers and employees will be disadvantaged by a conclusion that deductions from the minimum wage cannot be made under the Wages Protection Act. If that is so, it is the effect of the statute and the underlying policy.

[124] We accept that this outcome may be inconvenient in some situations, but this case illustrates why it is necessary. The plaintiffs found themselves at the beginning

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27 Wages Protection Act 1983, s 7.
28 At [17].

of each season having their entire weekly wage, except for $100, taken to satisfy debts to their employer until those debts were paid in full. That happened no matter how frequently the plaintiffs returned to work for Pick Hawke's Bay. Further, if Pick Hawke's Bay's arguments were accepted, there would be no requirement to even pay the weekly $100; in the defendant's conception of the legislation, the plaintiffs could have worked without receiving any money at all for several weeks. We consider s 6 was designed to prevent that situation.

Conclusion

[125] We conclude that it was a breach of s 6 of the Minimum Wage Act for Pick Hawke's Bay to make deductions under the Wages Protection Act from the plaintiffs' pay that reduced their wages below the minimum rate of pay insofar as such deductions were not permitted by s 7 of the Minimum Wage Act. We turn to consider whether the accommodation-related deductions in this case were permissible under s 7.

The plaintiffs' claim under s 7 of the Minimum Wage Act 1983

[126] Pick Hawke's Bay was required to provide accommodation as part of its pastoral care. Accommodation was provided to the plaintiffs from the day they arrived in Hawke's Bay, including in the period prior to them starting work and receiving their first pay. Deductions were made for the entire period the plaintiffs used the accommodation.

[127] The plaintiffs claimed that s 7 of the Minimum Wage Act was breached by Pick Hawke's Bay in making deductions from their pay for accommodation. The claim was that those deductions exceeded the five per cent allowed by s 7 for lodging and that there was no Act, determination, or agreement within the meaning of the section that fixed the cash value of that lodging, authorising what was deducted.

[128] Section 7(1) of the Minimum Wage Act provides:

> In any case where a worker is provided with board or lodging by his employer, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wage calculated at the appropriate minimum rate

> by more than the cash value thereof as fixed by or under any Act, determination, or agreement relating to the worker's employment, or, if it is not so fixed, the deduction in respect thereof by the employer shall not exceed such amount as will reduce the worker's wages (as so calculated) by more than 15% for board or by more than 5% for lodging.

[129] There was no dispute that s 7 applies. From the plaintiffs' perspective, because they were paid at the minimum rate, no deduction could be made from their pay unless a two-step process was followed. That is, as described in the section, the "cash value" must be fixed first and the second step is the subsequent deduction. In the absence of those steps being taken they say that the maximum permissible amount of any deduction for lodging is five per cent of their pay.

[130] As part of this argument, the plaintiffs say that the cash value could not be fixed by the employment agreements. Alternatively, they say that even if it is possible to fix the value in that way, that is not what happened.

[131] There are two issues to consider:

(a) Where deductions are made for lodging under s 7 of the Minimum Wage Act, how can the cash value be fixed?

(b) If the cash value can be fixed by an employment agreement, was it fixed that way in this case?

How can the cash value be fixed?

[132] The plaintiffs' case is that s 7, where it refers to deductions being fixed under any "Act, determination, or agreement" does not allow the individual employment agreement to be the vehicle used. The remaining mechanisms in the section (an Act or determination) were said to no longer exist. If those propositions are accepted, the consequence is that the only operative part of s 7 is the default deduction rate of five per cent.

[133] The plaintiffs' case was that an "agreement" for the purposes of s 7 is not a collective agreement, or an individual employment agreement. Mr Oldfield noted s 6 refers to both collective agreements and contracts of service (as individual

employment agreements are sometimes known). Sections 4A and 4B also refer to contracts of service. On this analysis, the references in ss 4A, 4B and 6 to contracts of service and collective agreements indicated that they are distinct from an "agreement" in s 7.

[134] Mr Oldfield said that the language of s 7 is archaic and that "agreement" historically did not refer to an individual employment agreement but to other types of agreements that are no longer available or no longer exist.

[135] The same approach was taken to the meaning of "determination" in the section. Mr Oldfield acknowledged that, if these propositions are accepted, that would make references in s 7 to "agreements" and "determinations" essentially dead letters. All that could remain to apply were the default deduction amounts of five per cent for lodging and 15 per cent for board.

[136] Although acknowledging that the Employment Relations Act refers to agreements, Mr Oldfield pointed out that s 7 was not updated to refer to that Act when it was passed. The Court was urged to not read "agreement" in s 7 as "individual employment agreement" just because that expression was used in the Employment Relations Act, particularly when, on this analysis, it has historically not been possible for the cash value of board or lodging to be fixed by a contract of service.

[137] This submission was bolstered by using two international conventions: the Minimum Wage Fixing Machinery (Agriculture) Convention 1951 and the Minimum Wage-Fixing Machinery Convention 1928, both of which were said to show that it should not be possible for individual employment agreements to set the cash value of accommodation.

[138] More broadly, Mr Oldfield said that, if the cash value of accommodation can be fixed by individual employment agreements, the situation could be open to abuse. Employers would be able to agree with employees to deduct an entire wage in exchange for accommodation. For completeness, he doubted that the ATR process could be an "agreement" for the purposes of s 7.

[139] Pick Hawke's Bay's response was that "agreement" has a wide definition, not the limited one advanced by the plaintiffs. That was said to be clear from the section itself and its antecedents. Mr Butler submitted that there is nothing in the history of s 7 to displace this conclusion. Section 7 was amended in 1991, when the Employment Contracts Act 1991 came into force, by removing the possibility of the cash value being fixed by an "award" or "collective agreement". The decision to remove "collective agreement" from the legislation but keep "agreement" was said to show that Parliament intended parties to still be free to fix the cash value for themselves.

[140] The defendant relied on cases where the (former) Employment Tribunal and the Authority referred to parties being able to fix the cash value of accommodation.[29]

[141] Horticulture NZ similarly considered that "agreement relating to the worker's employment" in s 7 must include an individual employment agreement.

Analysis

[142] The starting point is the text of s 7 in the light of its purpose and its context.[30]

[143] Where the section refers to any "agreement relating to the worker's employment", the word "agreement" is broad enough to include an individual employment agreement. Such a conclusion is also consistent with common usage, certainly since the Employment Relations Act was passed.

[144] Looking at earlier legislation supports that conclusion. The predecessor to the Minimum Wage Act was the Minimum Wage Act 1945. In s 2(4) of 1945 Act, the cash value of board or lodging could only be fixed by an Act, award or "agreement". That could be contrasted with s 2(1) of the 1945 Act which provided for the minimum wage applying notwithstanding any "enactment, award, industrial agreement, or contract of service".

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29 *Allison v Roller t/a Kingston Corner* ET Dunedin CT116/93, 1 September 1993; *Final v Outboard Boating Club of Auckland Inc* ET Auckland AT217/94, 8 July 1994; and *A Labour Inspector v Alpine Motor Inn & Café (2008) Ltd* [2016] NZERA Christchurch 130.

30 Legislation Act 2019, s 10.

[145] Mr Oldfield said that, as there was no reference to contracts of service in s 2(4) of the 1945 Act, that was an indication Parliament intended not to allow the cash value to be fixed by them. Mr Butler took a contrary view, that "agreement" was used broadly in s 2(4) of the 1945 Act to include both industrial agreements and contracts of service.

[146] No authority for either proposition was provided. Mr Oldfield's submission, however, was consistent with the Minimum Wage-Fixing Machinery Convention, 1928:[31]

> … minimum rates of wages which have been fixed shall be binding on the employers and workers concerned so as not to be subject to abatement by them by individual agreement, nor, except with general or particular authorisation of the competent authority, by collective agreement.

[147] After the 1945 Act was passed, the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No 99) came into force. It stated:[32]

> National laws or regulations, collective agreements or arbitration awards may authorise the partial payment of minimum wages in the form of allowances in kind in cases in which payment in the form of such allowances is customary or desirable.

[148] The Industrial Relations Act 1973, which applied when the Minimum Wage Act came into force, defined "agreement" and "collective agreement" as synonyms:[33]

> "Agreement", or "collective agreement", means an agreement in writing registered by the Industrial Commission and made in amicable settlement of a dispute of interest between one or more employers or unions or associations of employers and one or more unions or associations of workers, and containing terms and conditions of employment of workers; and includes a composite agreement under section 66 of this Act:

[149] That definition answers the question of what s 7 meant as enacted when it referred to collective agreements, but does not resolve the present problem. However, when the language of s 7 at the time is compared with the language of s 6, there are obvious parallels in the use of common terms, indicating that the second use of the

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31 Minimum Wage-Fixing Machinery Convention 39 UNTS 3 (opened for signature 16 June 1928, entered into force 14 June 1930), art 3(2)(3). This was ratified by New Zealand on 29 March 1938.

32 Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No 99), art 2(1).

33 Industrial Relations Act 1973, s 2.

word "agreement" was intended to be a reference to individual employment agreements.

[150] Both ss 6 and 7 address awards, collective agreements, and determinations. The only difference in words used in the sections is that s 6 refers to an enactment and contract of service whereas s 7 refers to "Act" or "agreement".

[151] By the time the Minimum Wage Act 1983 was introduced, "agreement" in s 7 referred to contracts of service. Subsequently, as part of the 1991 reforms with the passage of the Employment Contracts Act, s 7 was amended into its current form and no longer included "awards" and "collective agreements".

[152] Given that the purpose of the 1991 reforms was to increase the ability of employers and employees to contract individually, it is unlikely that Parliament would have amended the Minimum Wage Act in a manner removing or restricting their ability to fix the cash value of board or lodging directly through individual employment agreements.[34] From 1991 onwards, "agreement" in s 7 referred to both collective agreements and contracts of service. We consider that "agreement" in s 7 continues to refer to individual employment agreements.

[153] Mr Oldfield was critical of the defendant's approach because it could allow an employer to make an agreement with a minimum wage employee fixing the cash value of accommodation as the entire wage and, effectively, allow what amounted to indentured labour. We prefer the approach taken by NZCTU that, where the cash value of accommodation is fixed, it must be representative of the actual value of that accommodation. The NZCTU's approach is consistent with the text of s 7. If the actual cash value was irrelevant, the section need not have used the word "value". It could have stated that the deduction for board or lodging was not permitted to reduce the minimum wage worker's wages by more than any "amount" fixed by or under any Act, determination or agreement.

[154] Although not mentioned by counsel, this interpretation is consistent with the Income Tax Act 2007, which provides that the value of accommodation is treated as

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[34] See (19 December 1990) 511 NZPD 553.

income for tax purposes and is equal to the market rental value of that accommodation.[35] We also consider that it is consistent with the purpose of the Minimum Wage Act to impose a floor of rights to prevent exploitation.[36] If parties to an employment relationship were able to agree any amount for accommodation, that purpose would be undermined.

[155] We do not accept Mr Butler's submission that the cash value of accommodation could be fixed through the ATR process.

[156] We do not accept that the ATR process could be seen as a third-party fixing mechanism of the sort contemplated by s 7. Complying with the ATR process was a prerequisite for Pick Hawke's Bay being able to employ the plaintiffs. It is, however, a long bow to draw to say that steps taken by it to obtain permission to employ overseas workers also satisfied this requirement of s 7. The ATR process is different in quality and kind from what is contemplated by the section and, for that matter, it had to occur before offers of employment could be made and accepted at which point the plaintiffs were effectively presented with non-negotiable positions.

[157] The history of s 7 indicates that the types of agreements envisaged by the section were ones which, at the very least, involved the employee as a party. The ATR process merely permitted certain deductions as part of a visa process and cannot realistically be seen as going any further.

Conclusion

[158] The cash value of board of lodging can be fixed by an individual employment agreement but that did not happen under the ATR process.

Was the cash value of accommodation fixed by or under the parties' individual employment agreements?

[159] The plaintiffs submitted that the employment agreements stated the amount to be deducted from their wages for accommodation but did not fix its cash value. A

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35 Income Tax Act 2007, s CE 1B(1).
36 *Faitala,* above n 14, at [28]; see also Wages Protection Act, s 5A.

distinction between the cash value and the amount of the deduction was maintained, because they were regarded as separate concepts.

[160] The plaintiffs drew support for this analysis from the Holidays Act 2003 which uses the cash value of board or lodgings in calculating ordinary weekly pay and relevant daily pay. The cash value of board or lodging must be determined for the purposes of that Act. Recording the amount to be deducted is insufficient because that amount and the cash value are not necessarily the same.

[161] Mr Oldfield submitted that the cash value was not taken into account by the defendant, as required by the Holidays Act, which showed that it did not put its mind to the issue at all.

[162] Those submissions were echoed by the NZCTU, but the union went further. The submission was that whether the employment agreements in this case set a non-exploitative cash value has significant implications for employees paying as much as they were for a dormitory-style accommodation. The union went so far as to say that the actual cash value of what was provided could be zero or close to it.

[163] Pick Hawke's Bay's response was that the cash value was fixed under the ATRs and by the parties through the deductions consent forms, or individual employment agreements. The consent forms were said to reflect the actual value as the cost being passed on, which was approved by INZ.

[164] Horticulture NZ submitted that, where it is clear from the employment agreement that a specific deduction is for board or lodging, that is sufficient to "fix the cash value". Where that value can be ascertained from the deduction specified in the employment agreement, it must be said to fix the cash value.

Analysis

[165] Determining whether the individual employment agreements fixed the cash value of the accommodation is a question of contractual interpretation. The approach is an objective one, of ascertaining the meaning the employment agreements would

convey to a reasonable person, having all the background knowledge that would reasonably have been available to the parties in the situation in which they were in at the time the agreement was concluded. This objective meaning is taken to be what the parties intended. While there is no conceptual limit to what may be regarded as background, it has to be what a reasonable person would regard as relevant. Accordingly, the context provided by the agreement as a whole and any relevant background informs meaning.[37]

[166] As a preliminary comment, we accept in principle the point by Horticulture NZ that an agreement in some situations can fix the cash value for accommodation through a deductions consent clause, but that will not always be the case. The text of s 7 suggests that the amount able to be deducted for accommodation is dependent on whether the cash value was fixed as a separate step. If the cash value can be fixed by needing only to state an amount to be deducted, the limits provided for in s 7 would be deprived of effective meaning.

[167] We accept Mr Oldfield's submission that there is a distinction between fixing the cash value of accommodation and any deductions made for it.

[168] In the present case, the employment agreements stated the amount to be deducted from the plaintiffs' wages for accommodation per week as a dollar amount. In some seasons it was $115 per week and in others it was $120 per week.

[169] While Pick Hawke's Bay submitted that the cash value was fixed by the deductions consent form or agreement and/or the employment agreements, there was no evidence that they intended to fix the cash value in the wording of the form. Mr Evans emphasized that the defendant passed on the accommodation suppliers' charges at cost, without a margin, but did not know the cash value. He said that the amount specified in the deductions consent form reflected the costs of the accommodation to the employer, but the concepts are not synonymous. The deductions were calculated to cover costs, and we have already discussed how the accommodation suppliers

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[37] *Bathurst Resources ltd v L & M Coal Holdings Ltd t/a Zurich New Zealand* [2021] NZSC 696; confirming *Firm PI 1 Ltd v Zurich Australia Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].

incorporated into the accommodation cost holding costs for periods of time when the plaintiffs were not using the facilities.[38]

[170] Given that the cash value was not recorded in the holiday and leave records, it seems Mr Oldfield was correct and the parties did not put their minds to the task.[39]

Conclusion

[171] We consider that the employment agreements did not fix the cash value of the accommodation. The deductions for accommodation did not comply with s 7 where the amounts taken exceeded five per cent of the plaintiffs' minimum rate of pay.

[172] For completeness, even if the cash value of the accommodation was found to be fixed under the employment agreements, the amounts deducted were not reasonable and would have been unlawful under the Wages Protection Act, s 5A. They did not reflect actual costs because, as Pick Hawkes Bay conceded, the calculation included costs incurred by Pick Hawkes Bay during off-season periods.

Calculating the quantum of the breaches of the Minimum Wage Act 1983

[173] The amounts claimed by the plaintiffs to be recovered as arrears under s 11 of the Wages Protection Act and s 131 of the Employment Relations Act were in Schedule A to the third amended statement of claim. Ms Soapi claimed $1,880.90, Mr Lau claimed $1,776.77 and Mrs Lau claimed $3,596.20.

[174] The amounts claimed by the plaintiffs to be recovered as arrears under ss 6, 7 and 11 of the Minimum Wage Act were in Schedule B to the third amended statement of claim. Ms Soapi claimed $8,402.73, Mr Lau claimed $23,606.75 and Ms Lau claimed $26,931.35.

[175] The method of calculation in Schedule B was explained in the statement of claim as being the difference between the payment each of the plaintiffs received from Pick Hawke's Bay for their work after deductions were made and 95 per cent of the

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38 See paras [36]–37] above.
39 Holidays Act 2003, ss 10, 14, and 81.

applicable minimum adult hourly rate or piece work wage calculated under the Minimum Wage Act, plus eight per cent annual holiday pay.

[176] Ms Booker, an expert witness for the plaintiffs, undertook what she described as a reconciliation of the records associated with the pay deductions, to determine whether the plaintiffs were paid an amount "less than 95% of minimum wage and how much they are owed if they were". She encountered difficulties in reconstructing relevant earnings for each of the plaintiffs given problems over the available information. Despite that difficulty, her evidence supported the pleaded claims by Ms Soapi and Mr Lau, namely that the amounts due to them for accommodation-related deductions were $8,402.73 and $23,606.75 gross respectively. Ms Booker made an adjustment for Mr Lau's claim by revising his claim from $23,606.75 to $21,652.33. Ms Booker was not cross-examined about her calculations.

[177] Despite not cross-examining Ms Booker, not all of her calculations were accepted by Pick Hawke's Bay. Mr Evans provided revised schedules, prepared by its accountant, derived from analysing Schedule A to show where the plaintiffs' claims were considered to be wrongly calculated.

[178] In a joint memorandum of counsel filed after the hearing, a revised amount of the claims was provided in the following table:

	Total gross underpayment allowing 5% for lodging (not including holiday pay)	*Total gross underpayment allowing 5% for lodging (including holiday pay)*
Lyn Soapi	$6,346.54	$8,402.73
Danny Lau	$10,075.83	$13,155.53
Mary Lau	$19,706.23	$26,931.35

[179] An explanation about this table is required. Pick Hawke's Bay accepted the calculations in the table are arithmetically correct but denied liability. The memorandum advised us that Pick Hawke's Bay maintained that:

(a) the cash value of the lodging and/or board was fixed by agreement in the ATRs and the individual employment agreements so that the default formula of five per cent in s 7 of the Minimum Wage Act did not apply;

(b) including gross holiday pay in the calculations was incorrect, because the plaintiffs were paid or credited all of the gross holiday pay amounts (eight per cent of the actual total gross) before the deductions;

(c) the inclusion of the amounts that appear on the plaintiffs' summary of earnings as deductions for weekly allowances and wage advances is incorrect, because each of the plaintiffs received payments of those amounts across all seasons claimed by them; and

(d) if the Court decided the defendant is liable for any amounts in Schedule A (relating to unlawful deductions in breach of the Wages Protection Act) there is a duplication with the amounts in Schedule B (relating to breaches of the Minimum Wage Act and failure to fix cash value) to the third amended statement of claim that need to be removed.

[180] The amount of the duplication between schedules referred to in the memorandum was not stated. Despite the evolution in the dollar value of the claims, the joint memorandum advised us that the plaintiffs still sought the amounts in Schedule A.

[181] Our conclusion is that in the table the sums able to be claimed is the lower amount for each plaintiff, because holiday pay was brought to account by Pick Hawke's Bay before any deduction was made.

[182] We agree that Ms Booker's calculations cover all deductions made by the defendant. This includes any deductions made that were in breach of the Wages

Protection Act. It would be double counting to add the amounts together. The total amount of underpayment for Ms Soapi is $6,346.54, Mr Lau is owed $10,075.83, and Ms Lau is owed $19,706.23, subject to the defendant's counterclaim.

[183] For completeness, Mr Oldfield submitted that Ms Booker's calculated sums should be added to the Schedule A sums as long as it does not result in the plaintiffs receiving more than their actual wages. However, we consider that a five per cent deduction for accommodation is appropriate and should be reflected in the amount owing to the plaintiffs. This is what was captured by Ms Booker's calculations.

The defendant's counterclaim for restitution

[184] Pick Hawke's Bay counterclaimed seeking restitution or to set off the amount of the deductions from wages if it was found that any sum is due to the plaintiffs. The pleading was that the defendant was entitled to relief for unjust enrichment, quantum meruit, and/or mistake of fact or law.

[185] The plaintiffs deny that there is any basis for the counterclaim to succeed and pointed to the Court's equity and good conscience jurisdiction as precluding some or all of the claimed relief.

[186] There are four issues:

(a) What is the scope of the counterclaim?

(b) Does s 189 of the Employment Relations Act bar any of the counterclaim?

(c) Is there a time bar?

(d) If the counterclaim is not prevented or time-barred by s 189, should it succeed?

[187] For completeness, the plaintiffs raised two issues that were abandoned at the hearing. They were whether a settlement agreement between Ms Soapi and the

defendant precluded the counterclaim as it related to her, and that the counterclaim was not properly before the Court as part of the removal from the Authority.

What is the scope of the counterclaim?

[188] The defendant's counterclaim is very brief:

> 69. The Plaintiffs have received the benefit of weekly allowances, insurance, accommodation, and travel costs provided or paid by the Defendant in respect to items under Schedule A (claimed as "arrears").
>
> 70. To the extent the Defendant is held liable it seeks restitution of the payments from the Plaintiffs or to set them off in the event the Court determines that any arrears are owed (denied) on the basis that:
>
> (a) the Plaintiffs will be unjustly enriched at the Defendant's expense; and/or
>
> (b) A quantum meruit; and/or
>
> (c) Such payments were made under a mistake of fact or law.

[189] The first paragraph is about Schedule A to the statement of claim, listing the deductions challenged by the plaintiffs. The pleading was subsequently amended to add Schedule B, stating the dollar value of the alleged breaches of the Minimum Wages Act.

[190] Mr Oldfield submitted that, because the counterclaim only mentions Schedule A, it was limited in scope. We do not agree. The breadth of the pleading is capable of capturing any liability established against Pick Hawke's Bay. However, we note that in the joint memorandum filed after the hearing, the parties agreed that some deductions breached the Wages Protection Act and, by agreement, that they do not form part of the counterclaim. They are not addressed any further.

Does s 189 of the Employment Relations Act 2000 bar the claim?

[191] Mr Oldfield and Mr Butler agreed that the Court has exclusive jurisdiction to determine claims such as those brought by the defendant. That was inevitable given *FMV v TZB*.[40]

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[40] *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466.

[192] Nevertheless, Mr Oldfield submitted that s 189 is a bar to the counterclaim, because the equity and good conscience jurisdiction is limited by not being available if the outcome is inconsistent with any Act. His point was that granting relief to the defendant where breaches of the Wages Protection Act and/or Minimum Wage Act were established must be inconsistent with s 189. They were also inconsistent with the Wages Protection Act because that would permit the impeached deductions being made in a roundabout way.

[193] In response, Mr Butler acknowledged that the Court cannot make decisions in equity and good conscience that are inconsistent with any Act. However, he submitted that the relief sought is not inconsistent because what was done was permitted by both the Wages Protection Act and Minimum Wage Act. To emphasize the point, he referred to the underlying contractual basis for the goods and services supplied, which liability could not be expunged and where refusing to grant relief would result in an unjustified windfall for the plaintiffs. He accepted that, if the underlying arrangement was a prohibited premium under s 12A of the Wages Protection Act, or was found by the Court to be unreasonable under ss 5A, the arrangement might be unenforceable. However, he said that the plaintiffs did not plead their cases that way.

Analysis

[194] The Court of Appeal in *Kidd v Cowan* and the Employment Court in *Juyi International Ltd v Pan* both held that where wages were paid in kind, that payment could not be taken into account when calculating wage arrears.[41] Those cases predated the Supreme Court's decision in *FMV v TZB*.

[195] *Kidd v Cowan* was an application for leave to appeal where an employee was not paid wages but received a parcel of land and free accommodation instead.[42] The Authority had accepted that wages were payable by the employer, but also ordered the employee to pay the employer for the value of the land, because the parties intended that value to be taken into account as if it were money wages paid.[43] The Authority

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41 *Kidd v Cowan* [2020] NZCA 681, [2020] ERNZ 577; and *Juyi International Ltd v Pan* [2021] NZEmpC 168, [2021] ERNZ 892.

42 *Kidd v Cowan,* above n 41.

43 *Cowan v Kidd Partnership* [2018] NZERA Christchurch 50 at [92].

considered that it had jurisdiction under ss 161(1)(r) and 162 of the Employment Relations Act.[44]

[196] When the determination was challenged, the Employment Court took a different approach.[45] The Court held that, while it accepted that the transfer of land in part recognised work done by the employee, its value could not be taken into account in the calculation of wages due to him.[46] The Court considered that, if the employer has a claim about the land, it would be in another jurisdiction.[47]

[197] When declining leave to appeal, the Court of Appeal considered the following question:[48]

> Whether the Court can exercise its inherent jurisdiction to act in equity and good conscience and take into account the provision of the section (or other valuable consideration) by way of an offset when calculating wage arrears.

[198] The Court held that the proposed question was not seriously arguable. The Court could not take into account the provision of the land by way of an offset when calculating wage arrears because that would be inconsistent with s 7 of the Minimum Wage Act and s 5 of the Wages Protection Act.[49] The Court commented:

> [24] The Employment Court did not rely on the Authority's analysis under ss 161(1) and 162(a), and that analysis was not referred to by the applicant in its submission regarding significance of the Employment Court's equity and good conscience jurisdiction. We have, accordingly, not considered the significance, or otherwise, of that analysis with regards that application.
>
> [25] Rather, the challenge was to the Employment Court's conclusion there was no power to deduct any amount from the wages due from the Partnership to Mr Cowan by reference to the value of the land transferred.

[199] Some care is required in relying on the Court of Appeal's decision because, as that Court has recently stated, leave decisions are not necessarily binding precedent.[50] However, in this case, the observations in *Kidd v Cowan* are apposite. First, in refusing leave, the Court of Appeal acknowledged the limitations on this Court's equity and

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44 At [128].
45 *Cowan v Kidd* [2020] NZEmpC 110, [2020] ERNZ 319.
46 At [54].
47 At [54].
48 *Kidd v Cowan,* above n 41, at [17].
49 At [31]–[32].
50 *Accident Compensation Corporation v TN* [2023] NZCA 664 at [13].

good conscience jurisdiction. It also expressly did not undertake an analysis of the nature and extent of the Authority's jurisdiction conferred by s 161; the Authority considered it had power to address claims about unjust enrichment by payment in kind under ss 161(1)(r) and 162 of the Employment Relations Act. Those powers are available to the Court in this proceeding because it was removed from the Authority. Given *FMV v TZB*, those claims need to be brought in the Authority or Court.

[200] Similar considerations applied in *Juyi International Ltd*, where the Court was considering a situation where an employee was provided with a kitchen in exchange for giving up his holiday pay entitlements.[51] The Authority accepted that an agreement existed, but found that the employer had not complied with the Holidays Act because it had provided goods in exchange for the employee's holiday pay entitlement rather than money.[52]

[201] The employer challenged the determination, claiming that the Authority failed to consider whether the employee was unjustly enriched. The claim was that the Authority failed to acknowledge the agreement and to offset the holiday pay entitlement with the kitchen.[53] Following *Kidd v Cowan*, the Court rejected the contention that an offset was available under s 189 and upheld the Authority's determination on that issue.[54] The Court held that, while s 189 would not permit the claimed offset, the employer could consider bringing a claim for the kitchen but in another jurisdiction.[55]

[202] *Juyi International Ltd* is consistent with *Kidd v Cowan*, in that a payment in kind cannot be taken into account in claims for wage arrears. However, *Juyi International Ltd* left room for an employer to recover the value of a payment in kind where any deductions for it were unlawful. Having made that comment, given *FMV v TZB,* the Authority and Court are the appropriate places for such a claim to be brought.

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51 *Juyi International Ltd v Pan,* above n 41.
52 At [6].
53 At [7].
54 At [57]–[70].
55 At [71].

[203] We accept that s 189 cannot be used as justification for a counterclaim that would authorise a deduction breaching the Minimum Wage Act. The plain words of the section preclude such a claim succeeding. However, that does not mean the employee is entitled to unjustly benefit. An action can be started against an employee. At a practical level, if that action succeeded there would be a reduction in the amount owed to the employee. Once the existence of a debt was established then we see no impediment to a set-off.[56]

[204] For completeness, we do not accept Mr Butler's submission that s 11 of the Wages Protection Act and s 11 of the Minimum Wage Act leave the Court with a discretion as to whether to grant the full recovery of wages under those Acts. Mr Butler noted that both sections state that a worker, or Labour Inspector on behalf of the worker, may recover any unpaid wages. He emphasised the word "may" as indicative of a discretion. We do not agree; "may" in both sections just indicates a choice as to whether to seek unpaid wages; its use does not grant the Court a discretion to decline the recovery of wages where they are owing.

[205] Finally, we acknowledge Mr Oldfield's submission that allowing an employer to recover the value of a payment in kind can have the effect of allowing that employer to defeat an employee's claim for arrears. That may be the case in some situations, but an employee can also seek penalties where the matter has been raised in time.[57]

Conclusion

[206] The defendant's counterclaim is not barred by s 189 so long as it seeks to recover the value of that which was provided to the plaintiffs or paid to third parties.

Is there a time bar for the counterclaim?

[207] The counterclaim was filed on 17 August 2022. Mr Oldfield submitted that any claim for relief predating 17 August 2016 is time-barred by s 142 of the Employment Relations Act. The section provides that no action may be started in

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56 See Set-Off Act 1729; and Set-Off Act 1735.
57 Employment Relations Act, s 136(2).

relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.[58]

[208] Mr Butler's response was that the cause of action for the counterclaim could only arise if and when the Court decides that unlawful deductions were made. We agree. Prior to the deductions being found to be unlawful, the plaintiffs could not be said to have been unjustly enriched. Pick Hawke's Bay could not have brought a claim against them in anticipation of such an adverse conclusion. Similarly, no claim could have been brought for quantum meruit or on the grounds of the pleaded claim of a mistake.

[209] The counterclaim is not barred by s 142 of the Employment Relations Act.

Should the counterclaim succeed?

[210] Pick Hawke's Bay's case is that it is seeking to recover the value of payments made on the plaintiffs' behalf where deductions from their wages have been subsequently found to be unlawful. In this analysis the defendant was in the position of being the plaintiffs' agents in making payments to airlines, the health insurance provider and the accommodation owners. That meant the payments effectively created a loan which the parties agreed would be repaid from wages.

[211] Continuing with this analysis, the plaintiffs received the benefit of those payments and would be unjustly enriched if the amounts are not able to be reclaimed. As to the pleading that payments were made by mistake, Pick Hawke's Bay submitted that it mistakenly relied on the deductions consent form when it should have paid the plaintiffs' wages in full and demanded payment of the outstanding sums. Two cases were relied on where payments to a third party on behalf of defendants were made and recovery was permitted.[59]

[212] Mr Butler's premise was that if the deductions were not made at source, the plaintiffs would have remained liable in debt because the underlying transaction

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58 The limitation period for actions that are personal grievances is three years: s 114(6).

59 *Jenner v Morris* (1861) 45 ER 795 (Ch); and *Westpac Banking Corp v Rae* [1992] 1 NZLR 338 (HC).

created a liability that remained. As an alternative, the defendant could enforce the agreement that the plaintiffs reimburse it.

[213] Mr Oldfield's reply was that Pick Hawke's Bay had not explained how the elements of an unjust enrichment claim were established and that the plaintiffs were not unjustly enriched. The basis for this submission was that, on a realistic view, they were not enriched by living in a Portacom and their work provided good consideration for everything that was provided to them.

[214] The plaintiffs supplemented those arguments by criticising what they said was a lack of evidence of what was paid to the third parties to sustain these claims. Mr Oldfield commented that there was confusion about what the accommodation was worth and the evidence on this subject was insufficient. He accepted money would have been paid by Pick Hawke's Bay for insurance and airline tickets, but how much was not established. He pointed out that the amount of the deductions was agreed in the Solomon Islands, before the purchase of both airline tickets and insurance. He said there was no evidence about whether the amount deducted for these purchases was the same as the price paid and referred to Mr Evans being unable to explain the various costs being relied on to justify the counterclaim when asked to explain them.

[215] Two further points were made by Mr Oldfield about the counterclaim. The first of them was that allowing accommodation costs to be recovered in this way would breach s 12 of the Wages Protection Act, which prohibits an employer from stipulating the manner in which wages are paid. Underpinning that submission was that the plaintiffs had no option but to stay in the accommodation because doing so was tied to their visas and employment agreements. The second point was to question whether the plaintiffs had to pay for the accommodation, and other pastoral care, given that those things were required to be provided by the employer under the RSE scheme even if consent to deductions was withdrawn.

Analysis

[216] The counterclaim is pursued on three bases: unjust enrichment, quantum meruit, and mistaken payment. The elements of unjust enrichment were described by the Court of Appeal in *Xu v Meng*:[60]

> …A claimant for unjust enrichment's restitutionary remedy must establish "the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust".

[217] The third element was described in The Laws of New Zealand:[61]

> In deciding whether or not a particular enrichment is unjust, the Court is not given free rein to give effect to its own perception of what is or is not unjust, but must have regard to the case law in deciding whether, in a particular case, it is unjust that the defendant should retain the benefit without recompensing the claimant.

[218] In this case, there are two situations where enrichment can be found to be unjust. First, where a payment was made by mistake. Second, where a claimant has made a payment to a third party for the respondent with their agreement or on request.[62]

[219] The elements of a claim for recovery under quantum meruit were described by the Court of Appeal in *Edubase Ltd v Minister of Education*:[63]

> … New Zealand courts have settled on the elements that will justify recovery under quantum meruit, namely that (1) the plaintiff has provided services to the defendant, (2) the plaintiff made clear their expectations of being paid and (3) the defendant freely accepted, or least acquiesced in the provision of the services.

[220] By way of remedy, Pick Hawke's Bay seeks restitution or set-off. The object of restitution is to deprive the recipient of a gain that the law says should not be kept. Restitution is distinct from a remedy of damages.[64] Where a claim for restitution relates to a sum of money paid by a claimant to a respondent or a third party, restitution

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60 *Xu v Meng* [2024] NZCA 436 at [34] (footnote omitted).
61 *The Laws of New Zealand* Restitution (online ed) at [10] (footnotes omitted).
62 At [10]–[35].
63 *Edubase Ltd v Minister of Education* [2024] NZCA 430 at [70] (footnotes omitted); see also *The Laws of New Zealand*, above n 61, at [47]–[49].
64 *The Laws of New Zealand*, above n 61, at [1].

would allow its recovery.[65] However, where a claim for restitution relies on quantum meruit relating to goods or services provided, the claimant will only be able to recover the market value of the goods or services.[66]

[221] It is arguable that Pick Hawke's Bay met the plaintiffs' liabilities when it paid for flights, visas, and health insurance. It is less arguable in relation to transport arrangements and accommodation. Under the RSE scheme Pick Hawke's Bay had to provide them, albeit at a reasonable cost. We do not accept any suggestion that Pick Hawke's Bay met the plaintiffs' liabilities when it paid for transport and accommodation.

[222] The primary difficulty with the counterclaim is that Pick Hawkes Bay seeks to recover money it paid but has not proved what it paid.[67] We do not consider that the deductions consent forms, or the deductions themselves, are sufficient. Three examples illustrate this point. The first one is the way accommodation was charged as we have already mentioned. While Mr Evans said the accommodation cost was passed on without a margin, there was no evidence of the amount actually charged to Pick Hawke's Bay. We bear in mind Mr Evans' evidence that Pick Hawke's Bay knew the accommodation providers were recovering holding costs for time when the plaintiffs were not living in the accommodation. The second example is airfares. The amounts charged were stipulated in the employment agreements, but the cost was incurred after the agreement was entered into and there was no evidence about what that was. The third example is that the evidence suggested that deductions were made for transportation even where employees walked to the worksite.

[223] In relation to accommodation, it could be said that it was effectively provided directly by the employer, in which case the relevant point is its market value. Mr Evans said that the plaintiffs were charged for the accommodation at cost, but there

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65 At [11]–[35]; and *Westpac Banking Corp,* above n 59.

66 *Edubase,* above n 63, at [71].

67 Mr Evans produced financial statements for the years ending 30 June 2022 and 2023. They show as costs gross amounts paid for items such as accommodation, health insurance, international airfares, immigration, transport/domestic travel and other expenses. In the 2022 accounts there is a comparison between costs in that year and the previous financial year. None of those costs is broken down to explain how they might relate to the plaintiffs and all of them appear to us to fall outside of the claim periods.

may be a difference between the cost to the employer and its market value.[68] We are not prepared to infer that cost equates to market value or is the best evidence of that value.

[224] We generally agree with counsel for the plaintiffs that there has been no unjust enrichment. For accommodation, the default five per cent deduction for accommodation specified in the Minimum Wage Act is sufficient in the circumstances to satisfy us that there was no injustice.

[225] The only payments that can be recovered are the wage advance payments to the plaintiffs. They were made under the mistaken belief that they could be recovered through wage deductions. A debt was created and is payable. Unlike the other sums, there is no uncertainty as to the amount that has been paid. A set-off in the amount of $270 is appropriate for Ms Soapi, $260 for Mr Lau and $650 for Mrs Lau.

[226] For completeness, we note that Mr Butler said that the defendant could have recovered the sums sought in the counterclaim through enforcing an agreement or contract between the parties. The argument was that there was a debt able to be enforced. The counterclaim does not make that claim.

[227] Even if we had been persuaded that the pleading was broad enough to encompass a claim based in contract, it would have failed given the lack of evidence.

Conclusion

[228] We accept that the defendant was able to bring a counterclaim in relation to some of the deductions, but with one exception, it fails on the facts.

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[68] Although not specifically referred to by the parties we note that in the Pick Hawke's Bay financial statements for 2022 expenses paid by it relating to accommodation included bunk beds, stoves, fridges, freezers and washing machines, mattresses and CCTV cameras at two locations. It was not clear if similar expenses were incurred in previous years or how, if they were, that impacts on cost or value.

Outcome

[229] The defendant breached s 4 of the Wages Protection Act and ss 6, 7 and 11B of the Minimum Wage Act.

[230] The plaintiffs' claims succeed in the following amounts: $19,706.23 for Ms Lau, $6,346.54 for Ms Soapi, and $10,075.83 for Mr Lau. The defendants' counterclaim succeeds in off-setting $270 for Ms Soapi, $260 for Mr Lau and $650 for Ms Lau. This leads to a total of:

(a) $6,076.54 for Ms Soapi.

(b) $9,815.83 for Mr Lau.

(c) $19,056.23 for Ms Lau.

[231] Interest is payable on the amounts in paragraph [230] pursuant to the Interest on Money Claims Act 2016 until payment is made. We direct that the calculation is to be from each plaintiff's last day of employment in each season to which the components of the claim relates. Leave is reserved to seek further orders as to the interest payable.

[232] The Court will now need to receive further submissions to address the claims for penalties (if any) for the breaches that occurred during the 2019/2020 season for which they are sought by the first and third plaintiffs. The Registrar is to arrange a telephone directions conference the purpose of which will be to make arrangements for those submissions to be heard.

[233] Costs are reserved.

Final comment

[234] As will be apparent from this decision, there are aspects of the way in which the defendant operated when the plaintiffs were employed by it that are of concern to the Court. There are three in particular that we wish to comment about.

[235] The first matter is the retention of the plaintiffs' passports. The holding of an employee's passports potentially renders that person vulnerable to exploitation. The Ministry of Business, Innovation and Employment advises migrant workers not to give passports to their employer.[69]

[236] The second matter is the way the defendant used the reducing balances formula, which left the plaintiffs with only $100 per week to live on until their debts to Pick Hawke's Bay were paid.

[237] The third matter is the lack of transparency about accommodation ownership. The connection between some of the accommodation owners and the defendant raises a concern about how accommodation charges were set, particularly taking into account the living conditions we heard about. Part of this concern is that the plaintiffs were only in New Zealand on visas that operated for a limited time, but what they paid included all of the accommodation provider's holding costs over a 12-month period.

[238] We are sufficiently concerned about these matters that the Registrar is directed to send a copy of this judgment to INZ for its consideration.

K G Smith
Judge
for the full Court

Judgment signed at 4.15 pm on 15 September 2025

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69 Employment New Zealand "Migrant exploitation" (3 June 2025) <employment.govt.nz>.