

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 433  
3096372

BETWEEN

JOSEFINE BENNIEN  
Applicant

AND

CAREVETS HAMILTON  
LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: Daniel Church, counsel for the applicant  
Megan Dempster, counsel for the respondent

Investigation Meeting: 8 September 2020 in Hamilton  
14 September 2020 by telephone

Submissions and further information received: At the investigation meeting from the applicant  
At the investigation meeting from the respondent

Date of determination: 4 October 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Dr Josefina Bennien was an employee at the time she undertook duties for Carevets Hamilton Limited (Carevets).**
- B. Carevets is to pay Dr Bennien the following sums within 21 days of the date of this determination:**
- (a) \$3,807.36 gross as wage arrears;**
  - (b) \$304.59 gross as holiday pay;**
  - (c) \$2,333.66 for travel costs; and**
  - (d) Interest on those sums from 24 January 2020 until the date of payment.**

- C. Carevets breached statutory obligations and is to pay a penalty of \$8,000, with \$6,000 going to Dr Bennien and \$2,000 to the Authority for payment to the Crown account.**
- D. Dr Bennien is not granted leave to pursue a personal grievance claim out of time.**
- E. No special damages or indemnity costs are awarded but remaining costs issues are reserved and a timetable set if the parties are not able to resolve costs by agreement.**

### **Employment relationship problem**

[1] Dr Josefina Bennien undertook veterinary training in Germany and registered to practice there as a veterinarian. She went straight on to complete a doctorate, undertaking veterinary research in bio-molecular science. After completing her doctorate she wished to work in New Zealand for a period.

[2] Carevets Hamilton Limited (Carevets or the company) operates veterinary clinics in the Waikato. Dr Bennien and Carevets agreed that she would come to work at one of the clinics.

[3] Dr Bennien arrived and commenced at the clinic although there is a dispute about the nature and status of that involvement. There were complications with her registration with the New Zealand Veterinary Council (the Council). Carevets required Dr Bennien to cease any involvement at the clinic.

[4] Dr Bennien claims she is owed for work and travel costs. She also seeks leave to raise a dismissal personal grievance out of time. Carevets disputes that it owes Dr Bennien anything and objects to leave being granted.

[5] The statement of problem in this matter was served in March 2020, shortly before the Covid 19 level 4 lockdown commenced. No statement in reply was initially received with Carevets not engaging with the Authority until May 2020 when it sought an adjournment of an upcoming investigation meeting.

[6] Carevets indicated that it may file a counterclaim regarding costs incurred in having to hire a locum to replace Dr Bennien. The Authority required a statement of problem outlining that claim, if it was to proceed. A decision was then to be made

regarding whether the two matters should be heard together. Ultimately Carevets did not lodge a counterclaim although submissions sought for the locums' costs to be considered as regards to Dr Bennien's contribution, if her grievance was able to proceed and remedies assessed.

[7] On 8 September 2020 an investigation meeting was held in Hamilton. I heard from Dr Bennien whom had also provided three written witness statements. I also heard from Carevets' sole director Keith Houston and regional manager Courtney Taylor, both of whom had provided two written witness statements. Submissions were heard by telephone on 14 September 2020.

[8] This determination has been issued more than three months after the day on which the last information was received. When I advised the Chief of the Authority that this would likely be the case, he decided that s 174C(4) of the Employment Relations Act 2000 (the Act) was applicable.

[9] All material provided has been carefully considered. As permitted by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

## **Issues**

[10] The issues for investigation and determination are:

- (i) Was Dr Bennien employed by Carevets?
- (ii) If so, does Carevets owe Dr Bennien wage arrears and reimbursement for her flight costs to New Zealand?
- (iii) Did Carevets breach the Act by failing to keep wages and time records, the Wages Protection Act 1983 by failing to pay wages and the Holidays Act 2003 by failing to pay holiday pay and if so, should it be penalised?
- (iv) Was the delay in raising a personal grievance occasioned by exceptional circumstances and if so, is it just to grant Dr Bennien leave to raise a personal grievance out of time?<sup>1</sup>
- (v) If leave is granted, was Dr Bennien unjustifiably dismissed by Carevets?

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<sup>1</sup> The Act, s 114(4).

- (vi) If Dr Bennien establishes her personal grievance what remedies, if any, should she receive, including a consideration of contribution?

**What communications occurred before Dr Bennien arrived in New Zealand?**

[11] In April 2019 Dr Bennien was in email correspondence with the New Zealand Veterinary Council (the Council). The Council informed her that under the current regulations her university did not meet the requirements for general registration. The Council indicated that instead her pathway would be sitting and passing the National Veterinary Examination. That was an intensive commitment which Dr Bennien did not want to undertake as she was not intending to immigrate permanently.

[12] Dr Bennien obtained further information later in April, that limited registration may be obtainable for those who do not hold recognised qualifications or have not passed a prescribed assessment or examination programme. One of the specifications was that limited registration was unlikely without the support of a prospective employer who has not been able to recruit a vet otherwise able to be registered in New Zealand. The Council advised that the process can take up to three months.

[13] Initially Dr Bennien sent her CV and other information to the CEO of the national Carevets' organisation. Her 12 June 2019 email indicated that she would like to apply for an internship. She wrote:

I am a veterinarian from Germany and have graduated in March 2015. I have completed my doctorate degree in August of last year and am now keen on working as a practical vet full time.

[14] The CEO responded about a role available in Hamilton. Dr Bennien was enthusiastic. Ms Taylor then emailed Dr Bennien indicating that Carevets were looking for a full time veterinarian at the Rototuna clinic.

[15] On about 24 June 2019 Ms Taylor interviewed Dr Bennien over the phone. Dr Bennien thinks she spoke about limited registration rather than registration more broadly. I accept that, although I also accept that Ms Taylor either did not pick up on or understand what was being said. There was no mention of limited registration in the email exchanges.

[16] On about 4 July 2019 Ms Taylor emailed offering Dr Bennien the position.<sup>2</sup> The email sets out the salary and other benefits. It includes Carevets covering flights to New Zealand and short term accommodation until Dr Bennien is settled. Dr Bennien accepted that offer on 5 July. She suggested arriving in August or November 2019. Ms Taylor responded that an August start date works well, again offering to reimburse the flights costs if the invoice is sent.

[17] Dr Bennien proposed a flight which would get her to Hamilton on 22 August. Ms Taylor agreed, saying that she would use that as the start date for Dr Bennien's contract. On 23 July 2019 Dr Bennien emails her flight tickets through, with Ms Taylor replying that she will forward it to accounts for payment.

[18] Ms Taylor sent an employment agreement. Dr Bennien responded that it looks fine but noted:

I just want to make sure, so there would be no misunderstandings, that I am more of a "new graduate" trainee and I could not directly take up a whole position as a fully functional veterinarian.

Just so everyone's on the same page.

[19] Ms Taylor responds on 6 August 2019:

Absolutely, we will be treating you as a new graduate and taking you at your own pace, your hours will be full time but won't be full-time Veterinarian workload until you feel capable, and this will be reviewed as you go.

### **What happened once Dr Bennien arrived?**

[20] Dr Bennien arrived in Hamilton. As agreed, Carevets provided her with short term accommodation and a car.

[21] Dr Bennien first attended the Carevets clinic on 27 August 2019. She met with Ms Taylor that day for an induction. At that meeting Ms Taylor was informed that Dr Bennien was not yet registered in New Zealand and did not have a practising certificate. Ms Taylor wanted to seek advice from others at Carevets about that situation.

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<sup>2</sup> Some dates not set out in emails as due to provision of emails forwarded with other emails.

[22] Dr Bennien's induction continued. She began working under the supervision of vets. I accept her evidence that she was working as a new graduate might, undertaking some tasks and also watching others work.

[23] There is some dispute about when it was first discussed in person that Dr Bennien was not able to get general registration without significant examinations and would need to apply for limited registration. Carevets was making efforts to get more information on options from the Council. In any event, Dr Bennien kept working under supervision.

[24] Mr Houston had a discussion with Dr Bennien about her needing to complete her limited registration application. He later completed a four page letter supporting that application. His letter is dated 10 September 2019 although appears not to have been sent that day with Ms Taylor collecting material and Dr Bennien being required to affirm documents.

[25] At some point Mr Houston told Ms Taylor that the situation with Dr Bennien could not keep going on as she would be deemed to be working. His evidence was of saying "we have to finish her off".

[26] On 19 September 2019 Ms Taylor told Dr Bennien to leave the clinic and go home because Carevets could not have her there without registration. Ms Taylor passed on her understanding that it may be difficult for Dr Bennien to get registration, with limited registration not a transition to general. Ms Taylor did not say when, if ever, Dr Bennien could come back to the clinic. Dr Bennien did not work after this.

[27] On about 26 September 2019 Ms Taylor asked Dr Bennien to return her work uniform and Carevets' car.

[28] Carevets indicated that it had sent Dr Bennien's application for limited registration to the Council, including with Mr Houston's support letter.

[29] On 30 September 2019 Mr Houston, Ms Taylor and Dr Bennien met. Mr Houston said that Carevets could not employ Dr Bennien in the absence of registration. Dr Bennien understood she had already been an employee before this point.

[30] Later that day Dr Bennien emailed Mr Houston, referring to having organised and discussed everything with Ms Taylor before coming to New Zealand. Mr Houston replied as follows:

1/we cannot employ you until you are registered: it is simply the law  
2/we were always going to apply for your APC  
3/the main issue is that your university degree is not recognised here post (2001)  
4/I am sure Courtney did not know your degree was not on the list and assumed it was as every other vet we have had from Germany has been an easy registration and then direct employment.  
5/I have not been party to the initial conversations so will have to go over the time lines.

[31] The Council did not receive the application. Dr Bennien wondered if it had not been sent although it seems unlikely that Mr Houston would have written a four page letter of support and then not ensured the application was sent. This is reinforced by an email Ms Taylor sent to the Council on 30 September 2019 asking if the limited registration application for Dr Bennien had been received.

[32] Dr Bennien contacted the Council on several occasions in late September and early/mid-October 2019 but the Council had still not received the application. She acknowledges thinking Carevets did not want to employ her any more.

[33] Carevets meanwhile were using a series of locums to cover work which Mr Houston says Dr Bennien would have done.

[34] On 23 December 2019 Dr Bennien sent a letter to Carevets with the subject of "Letter of Demand - Payment of Outstanding Sums Owed". She sought payment of outstanding money owed as per her employment agreement, particularly wages for hours worked and costs for the flight to New Zealand. The letter concludes that if payment is not received by 13 January 2020 Dr Bennien will hand over the issue to her solicitor for further action.

[35] Dr Bennien also wrote another letter to Mr Houston the same day indicating that she assumed they were no longer interested in working with or negotiating with her.

[36] Mr Houston responded on 23 January 2020 refuting Dr Bennien's demands. He identified the onus for registration as being on her. "[Y]ou cannot make us the whipping boy for your mistakes." He noted that Ms Taylor offered the position "on the assumption" that Dr Bennien was a vet with an acceptable degree.

[37] Dr Bennien then instructed lawyers who wrote to Carevets on 13 February 2020 seeking the outstanding money and raising a personal grievance for unjustified dismissal.

### **What went wrong?**

[38] Both parties thought the situation regarding Dr Bennien's registration and work was under control when she came to New Zealand. I found most of what both Dr Bennien and Ms Taylor had to say to be credible however, in the event of a conflict, I preferred Dr Bennien's evidence which was more internally consistent and consistent with documentation.

[39] The most likely explanation for the absence of a common understanding is the lack of sufficiently detailed conversation or written communications to establish clearly what the situation was regarding Dr Bennien's registration. Both Ms Taylor and Dr Bennien made assumptions and relied on the other.

[40] Ms Taylor assumed that Dr Bennien gaining registration would not be particularly difficult. She did not ask directly if Dr Bennien was able to get registered here nor for proof of registration or a practising certificate before Dr Bennien's arrival at the clinic. Neither Ms Taylor nor Mr Houston appear to have checked the publically available Council register prior to Dr Bennien commencing. Mr Houston expected people hired would be "able to be registered" but accepts that there could have been some confusion between the registration and practising certificate concepts in the conversation between Dr Bennien and Ms Taylor.

[41] The employment agreement put forward by Carevets required an employee needing a specific registration or practising certificate "to obtain/maintain" such licence or certificate. It was not expressly conditional on the employee getting the certificate, for example, before the agreement came into force.

[42] Dr Bennien understood Carevets were experienced in employing overseas vets. She was upfront that she had minimal practical experience as a vet and that she still had to be registered in New Zealand. She did not indicate what the Council had told her getting limited registration might take three months but did say that she was equivalent to a new graduate and so would take some time to take up the whole role.

[43] Dr Bennien could have started the application process slightly sooner. However, given the indication from the Council that limited registration was unlikely without employer or proposed employer support, it would not have been unreasonable to wait until after the signed employment agreement was received. That was then less than two weeks before Dr Bennien left for New Zealand. Carevets had sought the nearest month offered by Dr Bennien, leaving little time for completion of any Council requirements.

### **Was there a valid employment agreement?**

[44] There is no dispute that a written employment agreement was signed by both parties. Carevets also provided a letter dated 27 August 2019 confirming Dr Bennien had a full time position employed at Carevets, to assist her establishment of a New Zealand bank account.

[45] Carevets argues that there was however no valid or lawful agreement with Dr Bennien, either because either the agreement entered into was unlawful or it was frustrated. These are considered below.

[46] There was also a suggestion in witness statements that Dr Bennien misled Carevets regarding her qualifications. That was moved away from promptly by witnesses during the investigation meeting. Neither Ms Taylor's own notes of her phone interview with Dr Bennien nor the email exchanges provide any basis at all for that claim. I reject it.

[47] Carevets also mentioned the possibility of trial period being in operation but the employment agreement only provided for a probation period rather than a trial period limiting personal grievance rights.<sup>3</sup>

### **Was the contract illegal?**

[48] Carevets argues the employment agreement between itself and Dr Bennien was an illegal contract and is therefore of no effect under s 71 of the Contract and Commercial Law Act 2017. The Authority has jurisdiction to make orders that the High Court or District Court may make under the Contract and Commercial Law Act.<sup>4</sup>

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<sup>3</sup> The Act, ss 67A and B.

<sup>4</sup> The Act, s 162.

[49] Illegal contracts are defined as contracts illegal in law or equity, whether that illegality arises from the creation or the performance of the contract.<sup>5</sup>

[50] Carevets' argument is based on requirements of the Veterinarians Act 2005, Animal Welfare Act 1999 and Misuse of Drugs Act 1975. The former requires practising veterinarians to be registered and have a practising certificate, with the latter limiting those who can undertake certain actions towards animals.<sup>6</sup> There is some overlap, particularly as regards the Veterinarians Act, with the frustration of contract argument covered below.

[51] In summary, the Animal Welfare Act restricts the performance of various surgical procedures on animals to veterinarians or students working under their supervision.<sup>7</sup> The Misuse of Drugs Act restricts the supply and administration of controlled drugs and exempts veterinarians from those restrictions.<sup>8</sup>

[52] Carevets' argument is that it would have been illegal for Dr Bennien to perform some of the key tasks in a schedule to the employment agreement, namely surgical services, treatment and prescribing.

[53] This was not an illegal contract from creation. It is not like a situation like that referred to in *Raine Blackadder Limited t/a Ray White Commercial v Noonan*, where a statutory provision outlawed the engagement or employment of people without a certificate of approval.<sup>9</sup>

[54] For roles requiring registration in New Zealand, it is common for those coming from overseas to enter into an employment agreement before their New Zealand registration is completed. In some cases an employment agreement will be needed to meet immigration requirements so the employee has no ability to legally work in New Zealand until the immigration process is completed. I conclude that entry into an employment agreement for a role which would require a person to have a registration they do not yet have, does not make the contract an illegal one.

[55] It would have been illegal for Dr Bennien to have undertaken some of the tasks in the employment agreement's position description, until she was registered and had a

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<sup>5</sup> Contract and Commercial Law Act 2017, s 71.

<sup>6</sup> Veterinarians Act, s 31; see below re Animal Welfare Act and Misuse of Drugs Act.

<sup>7</sup> Animal Welfare Act, ss 15, 17 and 18.

<sup>8</sup> Misuse of Drugs Act, ss 6 and 8.

<sup>9</sup> *Raine Blackadder Limited t/a Ray White Commercial v Noonan* [2006] ERNZ 112.

practising certificate. But under s 72 of the Contract and Commercial Act a contract lawfully entered into does not become unlawful or unenforceable because its performance is in breach of any enactment, unless the enactment expressly so provides or its objects clearly so requires.

[56] As noted above, Carevets does not rely on any statutes which make the entry into this agreement unlawful. Upholding an employment agreement, until such time as one or both parties take steps to terminate it or it can be regarded as frustrated, does not frustrate the purposes of the statutes relied on by Carevets. Dr Bennien could have performed other parts of the role without breaking the law and did in fact do so.

[57] I conclude that the employment agreement was not illegal.

### **Was the contract frustrated?**

[58] Carevets then argues that as Dr Bennien could not complete any of the primary tasks of a veterinarian the contract was frustrated.

[59] The Court of Appeal indicated in *AO Karelrybflot v Arthur Udovenko* that while it is conceivable a supervening event might be seen as frustrating an employment agreement:

... in view of the nature of a contract of employment the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees. ... We bear in mind also the observation of Bingham LJ ... in *J. Lauritzen AS v Wijsmuller BV* ... that:

Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.<sup>10</sup>

[60] Whether frustration has occurred is a matter of fact and degree in the circumstances.

[61] It was envisaged by the parties that Dr Bennien would work as a veterinarian. Ms Taylor's correspondence refers to wanting to hire a veterinarian. The employment agreement lists the job title as veterinarian. It also requires an employee who needs to

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<sup>10</sup> *AO Karelrybflot v Arthur Udovenko* [2000] 2 NZLR 24 at [37]; citation deleted.

hold specific qualifications, registration or practising certificate to obtain that qualification, registration or certificate.<sup>11</sup>

[62] There is a prohibition on people other than veterinarians using in connection with employment the title “veterinarian”. Dr Bennien was not entitled to use the title “veterinarian” during the relevant period as she was not registered under the Veterinarians Act and thus did not hold a practising certificate.<sup>12</sup> She was however able to lawfully complete a number of tasks in the position description albeit not some which I accept were of significance to the role.

[63] At some point, if Dr Bennien could not gain registration in New Zealand, perhaps at least without completing extensive study and/or examinations, the contract could be seen as frustrated. That point had not been reached. The Council had not received and considered her application at the time she was sent away from the workplace. I conclude that the agreement was not frustrated.

### **Was Dr Bennien an employee?**

[64] Having concluded that the employment contract was neither illegal nor frustrated, the question is whether Dr Bennien was an employee. There was clear offer and acceptance. A written agreement was signed with the terms of the employment established. Carevets’ witnesses accepted that Dr Bennien was at least a person intending to work, a description used in s 6 of the Act as part of the definition of “employee”.

[65] The employment agreement was not conditional on Dr Bennien being registered or having an annual practising certificate. Dr Bennien was not able to perform some of the tasks in her position description, particularly surgical procedures. However, having been informed in advance that Dr Bennien was effectively a new graduate, Carevets responded that it would be treating her as such, with her able to take it at her own pace without a full-time veterinarian workload until she felt capable. The company was not anticipating immediate full performance of all tasks.

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<sup>11</sup> Employment agreement, cl 19.4(a).

<sup>12</sup> Veterinarians Act, ss 31 and 32.

[66] At the investigation meeting Mr Houston acknowledged telling Ms Taylor that what Dr Bennien was doing would be “deemed a work contract”. Carevets allowed Dr Bennien to perform work for three weeks and three days in the business.

[67] I conclude that Dr Bennien was an employee and worked for Carevets for a short period.

#### **What does Carevets owe Dr Bennien in wages?**

[68] Dr Bennien claims payment of \$3,807.36 gross for her work at the Carevets’ clinic, along with holiday pay and interest on those sums. This covers the period from 27 August to 19 September 2019 (inclusive).

[69] Having found that Dr Bennien was an employee, she is entitled to be paid in accordance with her agreement. I reject a suggestion made for Carevets late in the proceeding that Dr Bennien agreed to work for nothing, as I did not find that evidence credible.

[70] Dr Bennien’s claim is calculated on an hourly basis. Carevets points out that the agreement refers to salary and Mr Houston refers to staff being paid on a daily basis. On that basis Dr Bennien would be entitled to \$2,712.33 gross.

[71] The employment agreement does not specify a daily rate or provide for payment on that basis. In the absence of wages and time records providing a different figure or calculation method I am entitled to rely on the employee’s own calculations in determining the amount of wages owing.<sup>13</sup> Carevets is ordered to pay Dr Bennien within 21 days of the date of this determination the sum of \$3,807.36 gross along with holiday pay at 8%, being \$304.59 gross.

#### **Does Carevets owe Dr Bennien reimbursement for travel costs?**

[72] There was a clear written offer by Carevets to pay Dr Bennien’s airfare from Germany to New Zealand. This was not in the written employment agreement but the agreement has no “entire agreement” provision in it. Dr Bennien, in reliance on the promise, booked her flights. Ms Taylor asked for the invoice and said she had sent it through to account for payment. Payment was not made.

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<sup>13</sup> The Act, s 132(2).

[73] Dr Bennien's air ticket from Hamburg to Hamilton cost €1281.78 (NZ \$2,235.66) with additional charges of €55.00 (NZ\$98). The company should reimburse her for those amounts. Carevets is to pay Dr Bennien within 21 days of the date of this determination \$2,333.66 for her travel costs.

### **Should interest be awarded?**

[74] This is a situation where interest is appropriate. Dr Bennien made her claim for wages and travel costs known to Carevets in December 2019. Carevets is ordered to pay Dr Bennien interest on \$2,333.66 from 24 January 2020 until the date of payment calculated in accordance with the Civil Interest Debt Calculator.<sup>14</sup>

### **Were there statutory breaches by Carevets?**

[75] Dr Bennien claims that Carevets breached its statutory obligations. She wants Carevets penalised.

[76] Having found that Carevets did not pay Dr Bennien for the time she worked, it is established that the company breached its obligations to pay wages under s 4 of the Wages Protection Act and holiday pay under s 23(2) of the Holidays Act. There were also no wages and time records provided by Carevets despite requests, breaching s 130(2) of the Act.

[77] Should Carevets be subject to a penalty? There is an argument that the situation Carevets and Dr Bennien found themselves in was unexpected and confusing and thus Carevets' actions do not warrant a penalty. However, it is not evident that Carevets acted appropriately by seeking advice when it appears to have been in a position to do so. Rather it seems a resentment towards Dr Bennien and/or desire to protect its own position, drove the response. No payment was forthcoming nor seemingly advice sought, once Dr Bennien made a demand for wages. In these circumstances I do consider a penalty is warranted, although I will take into account the unexpected nature of the situation in looking at the quantum.

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<sup>14</sup> Ministry of Justice Civil Interest Debt Calculator, <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

[78] In considering what the right amount of penalty is, I have regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.<sup>15</sup>

[79] There are three statutory breaches. I do not regard the breaches as sufficiently interrelated to warrant a globalisation of breaches. The maximum penalty against a company is \$20,000. For three breaches that gives a total of \$60,000.

[80] In terms of seriousness of the breaches, the actions involve a mix of employment standards and minimum entitlement provisions. Dr Bennien was a migrant. I recognise that she was less vulnerable than many migrants for whom such claims are brought. However, she was still newly in a country she was not familiar with and had few contacts. There were repeated demands by her and her counsel for payment which were either refused or ignored.

[81] The breaches were intentional and continued for an extended period of time. Carevets was irritated by the whole situation and the claim for wages.

[82] The wages breach involves payment covering a short period of time only and the holiday pay is thus small as a result. There is no indication of Carevets having been involved in similar actions with other employees. The breaches are set against a situation of Dr Bennien being unable to carry out aspects of the role and Carevets having to consider what its obligations were.

[83] There is no indication of Carevets having financial difficulties so I make no deduction for inability to pay.

[84] Standing back, looking at that figure, including in comparison to other cases and the total arrears, I conclude that a fair penalty is \$8,000.

[85] Payment is sought of penalties to Dr Bennien. The wages and holiday pay matters are minimum entitlement provisions and so a matter of particular public interest.<sup>16</sup> Lack of wages put some pressure on Dr Bennien. I regard a 75% payment as suitably reflecting her difficulties in being without pay, the work required in putting

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<sup>15</sup> *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

<sup>16</sup> The Act, s 5 definition.

together calculations without wages and time records and having to pursue Carevets through the Authority.

[86] Carevets is ordered to pay a penalty of \$8,000 within 21 days of the date of this determination, with \$6,000 paid to Dr Bennien and \$2,000 paid into the Authority's bank account to be forwarded to the Crown account.

**Should Dr Bennien be granted leave to raise a grievance out of time?**

[87] Dr Bennien's lawyers raised her grievance by way of 13 February 2019 letter emailed to Carevets. There was no argument that a grievance was raised earlier and it is acknowledged that the grievance was raised out of time.

[88] Several grounds were put forward as either individually or collectively amounting to exceptional circumstances:

- (a) lack of formal notice of termination;
- (b) Dr Bennien not being from Aotearoa New Zealand;
- (c) her apprehension regarding Mr Houston and the Council; and
- (d) the wording of the dispute resolution clause.

*Lack of formal notice of termination*

[89] Dr Bennien's employment agreement required three months' notice of termination to be given. Neither party took that step. It was therefore less obvious when her employment finished.

[90] However, it was apparent that she was not being paid fortnightly as the agreement provided.<sup>17</sup> On 19 September 2019 Ms Taylor sent Dr Bennien away from the workplace with no indication that she would be returning. A little later she was asked to return the Carevets' work uniform and car. Mr Houston and Ms Taylor met with Dr Bennien on 30 September, with him advising that he could not employ Dr Bennien as she was not a registered veterinarian. A similar message was sent by email the same day.

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<sup>17</sup> Employment agreement, Schedule A.

*Not being a New Zealander*

[91] Dr Bennien was not raised in New Zealand, only arriving here when her time at Carevets was about to begin. This is not a language issue as her English is very good. It is an argument about her having no understanding about our personal grievance system.

[92] Cases based on earlier legislation concluded that ignorance of the law was not of itself an exceptional circumstance.<sup>18</sup> It is arguable that a somewhat less stringent approach to exceptional circumstances has since taken since that time.<sup>19</sup>

*Apprehension regarding Mr Houston and the Council*

[93] Dr Bennien was aware that Mr Houston had some connections with the Council. She reports being worried that if she raised issues he might somehow influence the processing of her registration application. However, under cross examination she accepted that she did not feel that Mr Houston was threatening her with this at the 30 September meeting.

[94] Mr Houston called the Council to check if the application was being processed. He dealt with the Council through his work but was not friends with anyone there.

[95] I have difficulty accepting that this concern was an on-going motivation for Dr Bennien, delaying raising a grievance. She did hold off sending a demand but by December 2019 was willing to issue a strongly worded demand letter to Mr Houston. That was still within the 90 day period from the 30 September meeting and email from Mr Houston.

*Wording of the dispute resolution clause*

[96] The employment agreement specified that:

If, after bringing your concerns to our attention as outlined above you feel that you have grounds for raising a personal grievance (for unjustified dismissal ...) then you must do so within 90 days of the action occurring and or coming to your attention. Otherwise, your claim may be deemed to be submitted out of time.

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<sup>18</sup> *Muggeridge v Miden Construction Co Limited* [1992] 1 ERNZ 232 and *Thomson v Thomson* [1992] 2 ERNZ 84.

<sup>19</sup> *Creedy v Commissioner of Police* [2008] ERNZ 109 (SC).

[97] The clause does envisage a step of bringing concerns to Carevets' attention before the stage of raising a grievance, although it does spell out that the raising of a grievance must be within 90 days "of the action occurring or coming" to the employee's attention.

[98] Dr Bennien's argument is not as strong as that of the employee in *Chief Executive of Manukau Institute of Technology v Zivaljevic*, where a more complex provision indicated up to two steps were required before a grievance is raised.<sup>20</sup>

#### *Conclusion on leave*

[99] The first three grounds do not fall within the descriptions of exceptional circumstances provided in s 115 of the Act. That is not fatal as s 115 only provides examples of such circumstances rather than a definition of them. The fourth ground comes within, or is related to, the s 115(c) example of the employment agreement not containing the explanation concerning the resolution of employment relationship problems required by s 65 of the Act.

[100] Dr Bennien's difficulty is that even if one or a combination of the circumstances were seen as exceptional, I am not satisfied that the delay can be said to have been occasioned by those circumstances. That is a requirement of s 114(4)(a) of the Act.

[101] Dr Bennien was not without resources. She had a friend who was experienced in employment law and contracts who she spoke to about her situation. She was advised in about October or November 2019 to send a letter of demand and to read her employment agreement. Under questioning she accepted that it was also recommended at that time that she saw Daniel Church, her current legal representative.

[102] Dr Bennien's evidence was that she read the employment agreement and noted there was a 90 day time frame to raise a personal grievance but she wanted to try to resolve the employment issue without involving lawyers. She delayed somewhat progressing her claim despite her knowledge of what was required. At the time she wrote to Carevets in December 2019 she was aware of the 90 day requirement as set out in her employment agreement. Her delay in raising the grievance was not occasioned by any of the circumstances now put forward.

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<sup>20</sup> *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

[103] I conclude that Dr Bennien has not met the test for leave under s 114(4) of the Act. She is therefore not able to pursue an unjustifiable dismissal claim.

### **What about special damages and indemnity costs?**

[104] For Dr Bennien, it is submitted that full costs should be awarded as a matter of equity and good conscience, rather than the daily tariff approach.

[105] The claim appears to have an element of special damages to it as it includes costs arising when Dr Bennien first obtained legal advice in January 2020. The initial amounts sought include preparation of a letter to Mr Houston and so are not about preparation for the Authority claim. The claim also seeks indemnity costs as full payment of Dr Bennien's legal expenses is sought.

[106] These costs are submitted to be justified on a number of bases including the need to chase wages and other entitlements which are owed to her, as well as Carevets' refusal to engage, including initial declining of mediation and failure to engage with the Authority.

[107] As regards special damages, I do not accept that this situation can be seen as being in the same category as *Stormont v Peddle Thorp Aitken Limited* where a fundamentally flawed process, instigated for the dominant purpose of securing the employee's departure warranted a special damages award.<sup>21</sup>

[108] Carevets' actions or inactions are submitted to fall within the categories where indemnity costs may be ordered, according to the Court of Appeal judgment in *Bradbury v Westpac Banking Corporation*.<sup>22</sup> The grounds focused on are wilful disregard for known facts or clearly established law and making allegations about matters which ought never to have been made or unduly prolonging a case with groundless contentions.

[109] Whilst I appreciate that Carevets' lack of engagement may well have been frustrating for Dr Bennien, I am not satisfied the test for indemnity costs are met. Behaviour during the proceeding which increased costs unnecessarily may be taken into account in the costs award.

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<sup>21</sup> *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

<sup>22</sup> *Bradbury & Anor v Westpac Banking Corporation & Anor* [2009] CA 234

**What is the remaining costs issue?**

[110] Dr Bennien seeks to be heard further on costs.

[111] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Dr Bennien shall have 21 days from the date of this determination in which to file and serve a memorandum on the matter. Carevets shall have a further 14 days in which to file and serve a memorandum in reply.

[112] The parties could expect the Authority's assessment to start from the notional daily tariff for a one day investigation meeting which is \$4,500. Consideration will be given to Dr Bennien's partial success as well as whether proceeding to an Authority investigation was the only way to achieve a positive outcome.

Nicola Craig

Member of the Employment Relations Authority