

granted after she worked on public holidays. As remedies Ms Kaur seeks reimbursement of money she considers owed for the identified breaches and compensation for the distress Caisteal's co-director, Darren Angus has caused her in not resolving the identified issues in a timely or reasonable manner.

[3] In contrast, Mr Angus is of the view that all matters have been resolved with all entitlements owed having been properly administered and he asserts that the deduction from Mr Kaur's final pay was a legitimate recovery action made pursuant to ss 6(2) and 6(3)(c)(i) of the Wages Protection Act 1983.

The Authority Investigation

[4] At the investigation meeting I considered written and heard oral evidence, from Ms Kaur and Mr Angus.

[5] Reena Tripathi ably assisted me as an independent interpreter as English is not Ms Kaur's first language.

[6] Pursuant to s 174E of the Employment Relations Act 2000 I make findings of fact and law and outline conclusions on matters to resolve the disputed issue and make orders but I do not record all evidence and submissions received.

[7] The issues to be decided are:

- i. Is Ms Kaur owed any arrears of paid sick leave and should the unauthorised deduction made from her final pay be reversed?
- ii. Was the payment for alternative days taken after Ms Kaur worked on public holidays properly calculated?
- iii. Has Ms Kaur made out a claim that she was unjustifiably disadvantaged and if Ms Kaur's claims are established, what remedies should be awarded?

- iv. Should any remedies awarded be reduced by an assessment of Mr Kaur's contribution to the employment relationship problem?
- v. An assessment of the level of costs to be awarded to the successful party.

What Caused the Employment Relationship Problem?

[8] Ms Kaur first worked for Caisteal at their Akaroa motel in a casual "as required" capacity from 31 January 2022, while she worked in another hospitality position. This employment was the subject of an individual employment agreement signed on 28 January 2022. Hours of work that could be offered by Caisteal were Monday to Sunday between the core hours of 0830 until 2000. The job is described as a Hospitality Coordinator reporting to "the Director."

[9] Despite being directed to do so, Mr Angus did not initially disclose wage and time and leave records for Ms Kaur for the casual period of Ms Kaur's employment. Later in his brief of evidence, Mr Angus disclosed payroll records that showed Ms Kaur between 31 January 2022 and 13 June 2022 had been paid for 89.2 hours. Not all rosters were provided for this period. However, Ms Kaur said at the investigation meeting that when casual, she only worked on Sundays and that she did resign but could not recall when. Mr Angus's brief of evidence said that Ms Kaur worked up to 13 September 2022.

[10] Given the casual nature of the work and the seasonal nature of tourism it is more likely that after being paid up to mid-June, Ms Kaur was not required on a casual basis during the winter period.

[11] The employment agreement suggests that despite the job being deemed casual it would end by the giving of one week notice by either party. There was no evidence provided of Ms Kaur resigning except a note on the Xero payroll information disclosed suggesting Ms Kaur's casual employment ended on 16 September 2022.

[12] From 12 October 2022, Ms Kaur took on a permanent role with Caisteal, described in her disclosed second individual employment agreement as a ‘Hospitality Coordinator and Head Housekeeper’.

Relevant employment agreement provisions

[13] The hours of work clause in the employment agreement stated:

6. The employer will roster the employee on for 30 hours each week. The timeframe for those work sessions will be inclusive of weekends and Public Holidays. The timing of working hours will be set out in a roster.

7. The employee must be available to work more than the agreed number of guaranteed hours. The employee must be available to work during the hours of **0830 – 1900**. The employee’s salary includes compensation for being available to work.

8. The employer will let the employee know at least 1 week in advance of the new roster unless there are exceptional circumstances. The employer will make sure the employee has 2 days off in a row within a reasonable period when the roster is set.

[14] I observe that despite the above suggesting the position was salaried clause 10 of the employment agreement specified an hourly pay rate (\$30).

[15] In addition, clause 14 of the employment agreement under the heading: “Taking money from pay” provides for agreed deductions of pay on the employee’s request and clause 15 notes: “The employer will also take amounts as required by law, e.g., tax, student loan repayments, ACC, child support and KiwiSaver”.

[16] The sick leave clause stated:

22. The employee can take up to 5 paid days off a year due to illness or injury, or to care for their partner or other dependent person who is sick or injured. This leave will be available when they have worked for 6 months.

23. They must tell their manager if they are going to be on sick leave as soon as they can (before their usual start time, if possible).

24. The employee can build up to 20 days of untaken sick leave. The employer will not pay the employee for unused sick leave when their employment ends.

25. If the employee has used all available sick days, the employer might let them take sick leave in advance or annual leave.

[17] The employment agreement provision covering public holidays has a requirement that: “The employee agrees to work on any public holiday that would otherwise be a working day” and a provision that if they work on such a public holiday they would in addition to being paid their “relevant daily pay or average daily pay”, be paid half that amount again for each hour worked. And a provision for a paid day off later.

[18] Under an “Ending employment” heading the agreement provided that the employee “will give 1 month notice in writing”.

The dispute

[19] By email of 31 July 2023, Ms Kaur attached a resignation letter that indicated her last day of employment would be 29 August, impliedly agreeing to work out her notice period. In response by email of 1 August, Mr Angus acknowledged the resignation letter. A further exchange of 2-3 August shows that the last day of employment was agreed to be brought forward to Sunday 27 August.

[20] In a text of Friday 11 August, Ms Kaur told Mr Angus she had hurt her back and would not be coming in to work that day but she would work the following day. In addition, Ms Kaur worked on 14 and 15 August.

[21] On Wednesday 16 August at 6:08 am, Ms Kaur emailed Mr Angus indicating she was feeling unwell “due to lack of rest” and her GP had advised she take time off work. Ms Kaur further indicated “I will be taking Friday to Tuesday off, which gives me a lot of time to rest and relax. Sorry about inconvenience.” Later that day Ms Kaur provided a medical certificate dated 15 August that indicated after seeing Ms Kaur on 15 August the medical practitioner stated “in my opinion ...is/has been medically unfit from 15th August 2023 and should be fit to resume work on 23 August 2023.

[22] Mr Angus responded by email on 16 August expressing concern and asked for the doctor’s email that had accompanied the medical certificate to Ms Kaur “for completion of

the Records? ". He then said Ms Kaur had 18 hours sick leave available "so 2 days will have to be taken as either Annual Leave or Unpaid". Ms Kaur promptly responded with:

I have been taking 4-6 pain killers every day, but I would refrain from any explanations.

I have forwarded the email as asked, also I still have 30 hours worth of balance as of 14 August on my payslip says the same, I last used my sick leave on 11-12 August. I am providing you with the screenshot of payslip, if you disagree kindly provide me with official records for leave & holiday & we will surely work something out.

[23] Mr Angus replied by email of the same day with:

An employee has 10 days Sick Leave entitlements per year, in your case this is calculated on the 30-hour week which equates to 60 hours.

As you are leaving us in August the Sick Leave is Pro Rata to 10 months which is 8 days entitlement, equating to 48 hours of Sick Leave Entitlement.

As per the screen shot, you have used 30 hours of Sick Leave, with a balance of 18 hours remaining.

It is also noted that the Medical Certificate is made out to Harry and not yourself, so will require a Certificate in your name for Audit Purposes please.

I will pop round to your place either later today or tomorrow to get your office keys as we will need them whilst you are away.

[24] Ms Kaur responded further suggesting the sick leave entitlements for someone who has worked continuously for 6 Months was 10 days and she attached an extract from Employment NZ's website confirming this as being consistent with s 63(1)(a) of the Holidays Act 2000. Ms Kaur noted Mr Angus had not provided the requested leave record she asked for.

[25] Ms Kaur further clarified the medical certificate reference to her as Harpreet was correct (unfortunately it was apparent, Mr Angus who knew Harpreet as Tia from all previous communication, genuinely confused the reference to Harpreet as being Harry – the name Tia's partner Harleen used). Ms Kaur concluded by offering that Harleen could meet Mr Angus at Little River to return the keys (Ms Kaur at the time lived nearby at Birdlings Flat).

[26] Mr Angus in an objectively 'snippy' tone, responded further on 16 August by first suggesting to Ms Kaur: "You need to be careful when you are reading information from the Employment NZ site as without knowledge of the relevant Acts it is easy to get confused, as you obviously are". Then despite this, Mr Angus said: "At your insistence I have taken another look at your entitlements and, you are correct, I was wrong in my calculation of your Sick Leave Entitlement and have clarified this with Employment NZ this afternoon. However, Mr Angus then proceeded to suggest that Mr Kaur entitlement should be calculated from her completing 6 months service in April 2023 "and not from the commencement of your employment". Although not explicitly stated I took this to be that Mr Angus believed Ms Kaur's previous casual service did not count toward continuous service.

[27] Ms Kaur then went on to state a view that:

As sick leave is an accrued entitlement as per Section 63(1)(a) and your entitlement being reached after 12 months continuous service from the end of the 6 month qualification period, your entitlements actually 3.33 days, which equates to (rounded up) 20 hours. That is 4 months employment from the end of the 6 month qualification period (May-August 2023) and the 3.33 days (converted to your hours from your 30 hours) equalling 20 Hours Sick Leave Entitlement.

[28] Then Mr Angus stated as Mr Kaur had taken 30 hours sick leave since April 2023 it was 10 hours above her entitlement prior to the latest request. Mr Angus then said as this had been an oversight in granting the leave "we will not look to recover these extra 10 hours you have already received above and beyond your entitlement".

[29] Mr Angus then suggested as in his view Ms Kaur had exceeded her sick leave entitlement "can you advise whether you want you wish for the period covered by the Medical Certificate you sent today to be taken as Annual Leave or as Unpaid Leave?".

[30] In response, Ms Kaur stated she was not confused, she had also spoken to Employment NZ and said Mr Angus had not given her any extra 10 hours of entitlement and that she believed she was entitled to 10 days sick leave. Ms Kaur then indicated as she considered they were "going round in circles" she would like a professional look at their differences.

[31] On 23 August Ms Kaur provided another medical certificate indicating from that day she would not be fit to resume work until 28 August and in the email accompanying such Mr Kaur said: Attached is my medical certification [sic] be able to do last 3 days. Thanks!”.

Personal grievance

[32] On 24 October 2023 Mr Kaur emailed Caisteal for Mr Angus’s attention, a personal grievance letter asserting that she had been unjustifiably disadvantaged by Mr Angus’s failure to “pay me my entitlements”. The letter identified three claims:

1. Ten days unpaid sick leave from 16 August onwards.
2. Incorrect calculation of pay for alternative holidays.
3. An unlawful deduction from final pay.

[33] Ms Kaur suggested mediation. In an obtuse response of 24 October, Mr Angus asked Ms Kaur to “confirm whether you are submitting a Personal Grievance under Section 114 of the Employment Relations Act 2010 to be handled by ourselves or if this is a notification that you have applied for Mediation?”. Ms Kaur replied that she had not applied for mediation. Mr Angus responded acknowledging the personal grievance and outlined a link to MBIE’s website then confusingly stated:

... please can you clearly state what your complaint is and the reasons why you believe that you have a grievance. This information will form the basis of the Grievance Hearing that will be scheduled to look into this matter.

[34] After Ms Kaur requested and asked for wage, time, and holidays information, which were eventually provided on 9 November, Mr Angus suggested Ms Kaur had accrued 53.5 hours of alternative holidays for working on identified public holidays for which she had taken 12 hours as leave and been paid 41.5 hours in her final pay.

[35] Mr Angus then thanked Ms Kaur for agreeing to have her personal grievance dealt with “On the Papers” and asked her to forward submissions to him by close of business the next day.

[36] Mr Angus then unusually authored what purported to be an investigation report on Ms Kaur's personal grievance on behalf of his own company, which concluded that the company "has acted as any reasonable employer could" and there was "no basis for any of her Grievances contained in her 24 October 2023 submission."

[37] The report contained a summation that:

The Company considered Mrs Kaur on Unauthorised Absence from 16 August 2023, however as Mrs Kaur had effectively Absconded and did not return to work prior to her final contractual date of 31 August 2023 no formal investigation of her actions could take place but it was considered based on the known facts, that Mr Kaur was, and is, attempting to Enrich herself at the expense of the Company.

Assessment

[38] Apart from the incongruity of Mr Angus essentially investigating and affirming his own actions, I note at the time of Ms Kaur's notice period that had been agreed to expire on 27 August and not 31 August, Mr Angus did not put concerns to Ms Kaur that she had been on unauthorised absence or that she had absconded or effectively abandoned her employment. The correspondence disclosed showed that Mr Angus did not at the time, challenge the validity of Ms Kaur's medical certificates as was an option to him under s 68 of the Holidays Act, other than to wrongly suggest the medical certificate had been issued under her partner's name and say he was only inquiring for his "records". No allegations of any impropriety were put to Ms Kaur at the time that were retrospectively traversed as concerns by Mr Angus in his "investigation" report and it is evident that the tone of the report has caused Ms Kaur understandable distress.

Application to the Authority

[39] Unhappy with Mr Angus's investigation and further responses, Ms Kaur applied to the Authority on 6 December 2023 for a resolution of her employment relationship problems and amended her application on 4 March 2024. In response Mr Angus for Caisteal, has questioned the level of detail provided but has rightly assumed the issue at stake was Ms Kaur's personal grievance of 23 October 2023.

[40] The parties were directed to and attended mediation in April 2023 but the matter remains unresolved.

[41] At a case management conference, I made it clear that the Authority has general authority under s 161(3) of the Act to resolve employment relationship problems however described and this matter is one involving access to minimum entitlements.

Assessment Issue 1 - Is Ms Kaur owed any arrears of paid sick leave and should the unauthorised deduction made from her final pay be reversed?

[42] The first issue is to determine Ms Kaur's length of service with Caisteal for calculation purposes. The evidence establishes there was a break between Ms Kaur's casual employment and permanent employment. Any accrued sick leave in the first period of employment does not carry over to the second period. For calculation of sick leave in dispute the service starting point is the second period of employment, from 12 October 2022.

The law

[43] Section 65(2) of the Holidays Act 2003 (HA) provides an employee "is entitled to 10 days sick leave for each of the 12-month periods specified in section 63(2)". The threshold for entitlement to sick leave under s 63(1)(a) HA is "after the employee has completed 6 months' current continuous employment". Further s 63(2)(a)(i) specifies that the 10 days sick leave entitlement for the first 12 months runs from the end of the first six months of continuous employment.

[44] Given Ms Kaur's last day of employment was 27 August 2023. This is a period of employment of 10 months and two weeks and equates to 8.75 days entitlement. From the records provided Ms Kaur used three days of this entitlement in her period of employment. The last day of sick leave recorded as being deducted was 15 August 2023. As Ms Kaur's medical certificates covered the period Monday 15 August to Sunday 27 August inclusive the remaining sick leave entitlement covered that period.

[45] The next issue to determine is what were Ms Kaur's ordinary working days. Mr Angus produced the roster for the week of 14-20 August that did not assist other than to show Ms Kaur worked on 14 and 15 August and it had a line through the remaining days. Mr Angus disclosed payroll timesheets for Ms Kaur but only up to 16 July 2023.

Assessment

[46] From the evidence before me I find that the days Ms Kaur worked changed over time and her employment agreement made it clear she had a minimum of 30 hours guaranteed but had to make herself available any day she was needed. The pattern of hours, however, show that Caistal normally allowed for two days clear of duty each week that were latterly Wednesday and Thursday.

Finding

[47] Taking the above into account, I find Ms Kaur was sick for 8 days from and including 16 August and given three days had been used her entitlement to still be paid is the remaining 5.75 days of her accrued entitlement.

[48] I also find based on the above, that the deduction from Ms Kaur's final pay of \$191.70 was unlawful as there was no basis for the deduction – Ms Kaur's sick leave balance was not in deficit. The deduction made was in breach of s 5A of the Wages Protection Act 2022 as it was "unreasonable" in the circumstances.

[49] I determine how Ms Kaur's sick leave pay should be calculated. Section 71 HA states:

An employer must pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave or bereavement leave taken by the employee that would otherwise be a working day for the employee.

[50] Given Ms Kaur's hours fluctuated to work out what Ms Kaur would receive on days she would have worked in the weeks spanning 15-20 August. The employment agreement provides a minimum of 30 hours per week that I apply as the relevant daily pay being six

hours per day. With the sick leave amount owed of 5.75 days this equates to 34.5 hours at \$30 per hour – a total of \$1,035.

[51] I find Ms Kaur is owed arrears for unpaid sick leave in the sum of \$1,035.

Issue 2: did Caisteal properly calculate alternative holidays Ms Kaur qualified for after working on public holidays?

[52] Ms Kaur asserts Caisteal paid her incorrectly for alternative holidays she took after working on public holidays. Ms Kaur says for example after working 10 hours and 30 minutes on a public holiday, Caisteal would only pay for 6 hours on the day Ms Kaur took an alternative day but, on another occasion, when she worked 4 hours 30 minutes on a public holiday, Caisteal would pay four hours 30 minutes on the day Ms Kaur took an alternative day's holiday.

Assessment

[53] Section 51 of the HA specifies that an employee be paid for an alternative holiday taken as per s 60(1) of the HA. The latter provision indicates:

An employer must pay an employee not less than the employee's relevant daily pay or average daily pay for the day which is taken as the alternative holiday.

[54] As I have found above in determining Ms Kaur's paid sick leave entitlement, Ms Kaur's relevant daily pay was based on six hours. Applying this, Ms Kaur should have consistently been paid six hours for each public holiday alternative day taken.

[55] It was difficult to determine Ms Kaur's claim in this area due to both her not identifying the days she took alternative holidays and was allegedly paid incorrectly and the inadequate holidays record provided by Caisteal that failed to show which public holidays Ms Kaur worked on. Mr Angus did not initially assist by wrongly suggesting in his own 21 November 2023 "investigation" report that Ms Kaur's claim in this context was outside of 90 days.

[56] The evidence I had was inconclusive. It showed during Ms Kaur's employment she accrued 53.5 hours of alternative holidays of which she took two days with 12 hours being deducted for those two days and she was paid a balance of 41.5 hours in her final pay. However, Ms Kaur provided clarification in an email of 2 July 2024 that she was only claiming for one occasion where after working on 5 June 2023, she was paid four and a half hours when she subsequently took an alternative day.

Finding

[57] I find on the alternative day taken for working on a public holiday Ms Kaur should have been paid six hours and was short paid by one and a half hours.

Issue 3: Was Ms Kaur disadvantaged by Caisteal's actions or omissions?

[58] Mr Kaur has asserted a disadvantage personal grievance arose broadly because of how Mr Angus on Caisteal's behalf responded to her requests to have her leave and holidays matters clarified.

[59] Section 103(1)(b) of the Act provides for a personal grievance action where an employee's employment or any condition of such, is or are impacted to that employee's disadvantage by an unjustifiable action by the employer. To determine if an action is unjustified the Authority applies the test in s 103A of the Act and assesses whether obligations contained in s 4(1A) of the Act are complied with (the duty of good faith). In the latter context the parties amongst other obligations must not mislead or deceive each other and should be active and constructive in maintaining the employment relationship.

[60] The breadth of what can be considered "conditions of employment" is well defined and includes "all the rights, benefits and obligations arising out of the employment relationship; the concept is necessarily wider than the terms of an employment agreement."¹

[61] While Ms Kaur was not seeking to establish that Mr Angus's conduct led to her resignation, she nevertheless asserted that his responses to her legitimate concerns about

¹ *Spotless Facility Services NZ Limited v Mackay (No2)* [2017] ERNZ 64.

minimum entitlements and how Mr Angus dealt with them caused her unnecessary frustration and ongoing distress.

Assessment

[62] As how the Employment Court approached matters in *Clarkson v Department of Child Youth and Family Services*, I consider broadly what is at issue here is did Mr Angus treat Ms Kaur with respect and dignity.²

[63] Viewing the correspondence and listening to Mr Angus's perspective, I have formed the view that while genuinely believing himself to be justified in his approach, Mr Angus attempted to mislead Ms Kaur as to her entitlements by inappropriately investigating his own company's actions and attempting to portray his findings as fair and balanced his latter approach to question her integrity over the validity of her medical certificates was unjustified. I have assessed Mr Angus's style of written communication and found it to be curt and at times obstructive. In giving evidence before the Authority Mr Angus appeared to have no insight as to the distress his approach had caused Ms Kaur.

Finding

[64] I find Mr Angus's actions overall were unjustified and in breach of his good faith obligations. Ms Kaur's unjustified disadvantage personal grievance is established and she is entitled to consideration of a separate remedy under s 123(1)(c)(i) of the Act.

[65] I assess on the evidence that Ms Kaur's distress and sense of being hurt by Mr Angus's remarks about her motivation for pursuing her entitlements and humiliated was genuine. The distress would have been exacerbated by the financial pressure of not being paid income to which she was entitled. Mr Angus in his submissions acknowledged that at the time Ms Kaur was under financial pressure.

² *Clarkson v Department of Child Youth and Family Services* [2004], EmpC., Christchurch CC9/04, 5 May 2004

[66] However, I find Ms Kaur's distress was objectively temporary, and should only be moderately compensated. In applying the Authority's discretion, I fix that compensation at \$3,000.

Contribution

[67] Section 124 of the Act states that I must consider the extent to what, if any, Ms Kaur's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedies granted should be reduced I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*³.

[68] Given this was a situation where Ms Kaur merely sought to establish her minimum entitlements, I do not see any issues of contribution arise. I cannot objectively deem Ms Kaur's conduct to have been in any way 'culpable' and the remedies I have ordered below are not to be reduced.

Orders

[69] I have found that Caisteal An Ime Limited must pay Harpreet Kaur the sums of:

- i. \$1,035 (gross) to cover a paid sick leave entitlement owed.
- ii. \$191.70 to reimburse for an overpayment unlawfully deducted from Mr Kaur's final pay.
- iii. \$45.00 to compensate for being incorrectly paid for an alternative day's holiday after working on a public holiday.
- iv. \$3,000 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- v. The Authority filing fee of \$71.55.

³ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Costs

[70] Costs are not at issue as the applicant was self-represented but I have as above directed Caisteal An Ime Limited to pay Harpreet Kaur the Authority filing fee.

David G Beck
Member of the Employment Relations Authority