IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 216
5463933

BETWEEN	KATRINA KERR Applicant	
A N D	CROISILLES OYSTERS LIMITED Respondent	

Member of Authority:	David Appleton
Representatives:	Luke Acland, Counsel for Applicant Patrick Smith, Advocate for Respondent
Investigation Meeting:	12 December 2014 at Nelson
Submissions Received:	12 December 2014 from both parties, with additional information from the applicant on 19 December 2014
Date of Determination:	24 December 2014

DETERMINATION OF THE AUTHORITY

A. **The applicant was unjustifiably constructively dismissed and is awarded remedies as set out in this determination.**

B. **The applicant was unjustifiably disadvantaged in her employment.**

C. **The respondent operated a shutdown period which breached the applicant's employment agreement and which was in breach of the Holiday Act 2003. The applicant is awarded damages in relation to the breach of the employment agreement.**

D. **The respondent was not obliged to pay the Applicant in relation to six public holidays which fell during the shutdown period.**

E. **Costs are reserved.**

Employment relationship problem

[1] Ms Kerr claims that she was unjustifiably constructively dismissed on or around Thursday 13 February 2014 and that she suffered an unjustified disadvantage in her employment in respect of alleged actions by the respondent which led to her resignation.

[2] Ms Kerr also alleges that the respondent acted in breach of the Holidays Act 2003 and her employment agreement in respect of its implementation of a shutdown period and the failure to make payments to her in respect of six public holidays.

[3] The respondent denies any actions that justified Ms Kerr from resigning, saying that she resigned of her own accord, and denies that any of its actions amounted to unjustified disadvantage. It also denies that Ms Kerr was entitled to be paid for the six public holidays in question, arguing that none of these days fell on days which would otherwise have been working days for Ms Kerr.

[4] As it is contested by Ms Kerr that the period during which the respondent closed its operations in 2013/14 was a closedown period as defined by s.29 the Holidays Act, the term *closedown* in this determination shall refer to the statutory concept. The term *shutdown* shall refer to the period during which the respondent closed its operations.

Brief account of the events leading to Ms Kerr's resignation

[5] Ms Kerr commenced employed with the respondent on 24 October 2013 and signed an individual employment agreement with the respondent the following day. The employment agreement stated that Ms Kerr's position was *Oyster Opener* and contained the following material terms at schedule B:

Hours of Work	*Your normal work hours are based on 40 hours per week worked Monday to Friday to perform this role. From time to time additional hours may be required including weekend work.*
Piece Rate	*You will be paid a piece rate of .45 cents per dozen subject to quality standards being maintained. To qualify as a piece rate employee you will need to open on average 45kg per day whilst maintaining the quality standards expected. The piece rate programme is designed to reward people who are in full attendance for the fortnight. If you are absent*

without good reason during the fortnight you will only be paid at the hourly rate of $14.50 for all hours worked. You will need to comply with the Opener Rules which will be advised by the factory supervisor and amended from time to time. No payments will be made for rejects. Whilst you are training a starting rate of $14.50 will apply. Separate pay rates will be advised and applied for mussel processing. …

No Work Days — *No Work Days may be declared by the employer from time to time. When a No Work Day is declared you will not be paid for this day. The employer will endeavour to minimise No Work Days. These days will be due to factors such as rainout, no product, weather, environmental or factory operational issues.*

[6] The employment agreement also stated the following material terms:

> *3.2* ***On-going Duration Subject to the Trial Period***
>
> *Unless your employment is terminated in terms of the trial period set out in clause 3.3, your employment will continue until either we or you terminate your employment in accordance with the terms of this Agreement or otherwise as may be implied by law.*
>
> *4.4* ***New Work Methods/Equipment***
>
> *We may from time to time introduce new work methods or equipment and you must participate in the training provided by us to acquire any knowledge or skill necessary to meet such new methods or equipment. We may need to amend your duties from time to time as is reasonably required as a result of the introduction of any such new work methods or equipment. We will consult with you before doing this.*
>
> *5.1* ***Our Obligations***
>
> *We will:*
>
> *(a) Act as a good employer in all dealings with you.*
> *(b) Deal with you and any representative you have in good faith in all aspects of the employment relationship, and*
> *(c) Take all practicable steps to provide you with a safe and health work environment.*
>
> *10.1* ***Annual Leave***
>
> *You will be entitled to paid annual leave of four weeks per year after 12 months continuous employment with us. Annual leave will be given and paid for in accordance with the Holidays Act. The company will operate plant shutdowns during the winter and Christmas/New Year periods and you*

> *will be required to take your annual leave during this time. Each shutdown will be approximately two weeks. …*
>
> *10.2* ***Public Holidays***
>
> *You will be entitled to the public holidays specified in the Holidays Act, in addition to annual leave. Where the day in question would otherwise be a working day for you, you will be paid in accordance with the Holidays Act. The company operates a plant shutdown during the Christmas/New Year period and you will be required to take your annual leave during this period. …*
>
> *14.1* ***Notice and Days in Lieu of Notice***
>
> *You may terminate your employment by giving us the Employee's Notice.*

[7] The Employee's Notice is defined as two weeks' notice in Schedule B of the agreement.

[8] Ms Kerr usually worked eight hours a day from Monday to Thursday, except when she was occasionally required to additional hours or days. There was a factory supervisor in place who was identified as Penny by the respondent and the factory manager was Francesca Williams. Ms Williams is the daughter of Maurie Hebberd, who is the Managing Director and owner of the respondent.

[9] Ms Kerr said that she knew that there would be a shutdown over the Christmas/New Year period and she also knew that, when she came back to work the factory would then be processing mussels rather than oysters. Ms Kerr's evidence is that she was told at her interview for the job that the shutdown would be for two weeks. However, Ms Kerr says that, on the final day of operation for the year, on 19 December 2013, she and the other staff were told by Ms Williams that the shutdown was going to be extended for a further two weeks and that the staff would not be returning until 21 January 2014.

[10] Ms Kerr said that Ms Williams did not say what the reason for the extended shutdown period was and that she did not know that it was because the factory had to be significantly reconfigured so as to be able to process mussels. The evidence of the respondent is that the factory was new, and had only been operating for a few months, and this was the first shutdown that it had had over the Christmas/New Year period.

[11] On 8 January 2014 Ms Kerr telephoned Ms Williams and asked why she had not received pay for the four public holidays that had fallen during the period of the shutdown up to that point; namely, Christmas Day, Boxing Day, New Years Day and 2 January. She was told by Ms Williams that the staff were not being paid for those public holidays because it was a factory shutdown. There was some discussion between Ms Kerr and Ms Williams as to the rights and wrongs of this and during the conversation Ms Williams told Ms Kerr that the shutdown period would be extended a further week, until 27 January 2014.

[12] Ms Kerr says that Ms Williams promised her that she would telephone Ms Kerr to confirm the restart date of 27 January. Ms Kerr said that she never received notification from the respondent of the restart date despite this promise.

[13] Ms Kerr says that she rang the helpline operated by the Department of Labour (presumably, its successor, the Ministry of Business, Innovation and Employment (MBIE)) and was told that she should be paid for the public holidays in question. Accordingly, she telephoned Ms Williams again and they had a further discussion about whether the staff should be paid for these public holidays. Ms Williams told Ms Kerr that the company itself had checked with MBIE who had advised them that it was not necessary to pay the staff for these public holidays.

[14] During the conversation, Ms Kerr was advised to telephone Mr Hebberd. Ms Kerr said that she did, and that Mr Hebberd had told her that she should look at her employment agreement. Ms Kerr replied that she had done so and that there was nothing in it that said that the respondent did not have to pay her holiday pay during the shutdown period, to which Mr Hebberd replied that the contract that she had was *null and void* because the respondent was getting new contracts written up, which were replacing the *Oyster Contracts*. Ms Kerr said that, when she questioned this, saying that Ms Williams had told her that there would be no changes to the employment agreement, just a change to the piece rate, Mr Hebberd replied *you should speak to the chief and not the monkey.*

[15] Mr Hebberd, in his evidence to the Authority, denied that he had told Ms Kerr that her contract was *null and void.* Ms Kerr says she then rang MBIE again and was again told that she should be paid for those days in question. It was around this time that the matter was referred to a Labour Inspector, Doug Hixon.

[16] Ms Kerr says that, on or around 12 January 2014, she received a text message from one of her friends who worked with the respondent to say that she had received a text from Ms Williams to say that work would start back on 10 February 2014. Ms Kerr waited to see whether she would be contacted by Ms Williams but, on or around 3 February, not having heard anything, she called Ms Williams to ask when she would be starting back at work.

[17] Because Ms Kerr believed that, by now, she had lost her job for complaining about not being paid for the public holidays, she decided to record the telephone conversation. The Authority heard this audio recording, which had also been typed into a transcript for the purposes of the Authority's investigation meeting. The transcript records Ms Williams saying during this conversation:

> *Yeah we're not sort of um yeah we're not employing anyone else at the moment. We are not really, we are not operating just yet so we are not putting any more staff on.*

[18] Later on in the short conversation, Ms Williams said:

> *[Inaudible] we are not reemploying anymore thanks. I don't need contracts at the moment.*
>
> *Ms Kerr: Well so this you've basically reneged on the contract that you have given me.*
>
> *Ms Williams: Thank you [hangs up]*

[19] Ms Williams says that this transcript is not accurate because it does not record Ms Kerr arguing with her trying to get her to say that Ms Kerr had been *fired*. However, I am satisfied that the audio recording did not record such a conversation, although I do not discount the possibility that such a conversation took place separately. I do not find it likely, as was suggested by Ms Williams during the investigation meeting, that Ms Kerr has edited the actual audio recording to omit that part. Even if Ms Kerr had tried to get Ms Williams to say that she had been fired, this could well be because this is what Ms Kerr felt had occurred by that point.

[20] Ms Kerr says that, around three hours later, Ms Williams telephoned her again and said that she had spoken to Patrick Smith (the respondent's adviser) and wished to tell Ms Kerr that there were positions on the skeleton staff that had started back but

that, before Ms Kerr could start back, she needed to sign a new contract. This angered Ms Kerr and she hung up.

[21] Ms Kerr said that Mr Smith was the next person to telephone her a few days later on 7 February 2014 when he told her that she was being asked to sign a variation to her employment agreement, not a whole new agreement. Mr Smith told her that she had misunderstood what Ms Williams had told her. Ms Kerr said in evidence that she was never told what the variation was and was not sent a copy of it or given a new contract to read. She also said that she was never told the formal start back date by the respondent.

[22] Ms Kerr went to obtain legal advice from Community Law and, with their advice, decided that she should resign. Ms Kerr gave written notice of her resignation on Wednesday 13 February 2014. The terms of the written resignation were as follows:

> *Croisilles Oysters Ltd*
>
> *I Katrina Kerr hereby give written notice that I no longer seek to be employed by your company due to an employment issue that I cannot resolve amicably. Due to the hostile nature I have encountered makes it impossible to work through the two weeks notice required. I will continue to pursue legal advice on this employment issue.*
>
> *Katrina Kerr*

[23] Ms Kerr raised a notice of personal grievance for constructive dismissal on 4 March 2014 by way of a letter from her current representative.

[24] It is the evidence of the respondent that it had originally hoped to have everybody back to work in early January but that the reconfiguration of the factory had taken much longer than they had expected. Then, in the first week of February, when the factory was eventually able to start processing mussels, it did not have enough product to re-employ all of the staff immediately. Therefore, they called a few staff back, in accordance with their seniority. Ms Kerr was not called back because she did not have as much service as other staff.

[25] By Tuesday 11 February the mussel quality and supply had improved, and not all of the staff that had originally been called back had reported for duty, so they needed to get all remaining staff back as soon as possible. Mr Smith therefore placed

an advertisement seeking four mussel openers and also drafted a letter to Ms Kerr in the following terms:

> *Dear Katrina*
>
> *Further to our telephone conversation on Friday 7th February, I am writing to clarify your employment status with Croisilles Oysters Limited. Given that you elected to end our conversation without allowing me to finish what I was saying, we have decided to outline these matters in writing as below:*
>
> 1. *You remain a permanent employee of the Company and your employment has not been terminated.*
> 2. *Due to a limited number of mussels to process, the company was unable to recommence all staff on Monday 10th February following the Christmas/New Year shutdown period.*
> 3. *The lack of supply of product has now improved and we have work for all current staff.*
> 4. *We therefore ask that you report to work to commence mussel opening.*
> 5. *All current staff will be issued with a variation to their employment agreement regarding hours of work and a possible move from hourly rate pay to piece rate pay at some stage of the 2014 mussel processing season.*
> 6. *Prior to starting, can you please obtain a copy of the variation for review and agreement from the factory manager.*
>
> *If you have any further queries regarding these matters, please do not hesitate to contact me on cell phone* [number omitted].
>
> *Yours sincerely*
>
> *Patrick Smith*
> *HR Adviser to Croisilles Oysters Ltd*

[26] However, as Ms Kerr's resignation crossed with the preparation of this letter, it was never sent to her.

The issues

[27] The following issues need to be determined by the Authority:

(i) Whether the respondent was entitled not to pay Ms Kerr for the public holidays that fell during its shutdown period;

(ii) Whether the shutdown period imposed by the respondent was lawful in accordance with the Holidays Act and Ms Kerr's employment agreement;

(iii) Whether the calling back of staff accordingly to seniority was a breach of Ms Kerr's employment agreement;

(iv) Whether the respondent's actions in relation to Ms Kerr constituted an unjustified disadvantage in her employment; and

(v) Whether Ms Kerr was unjustifiably constructively dismissed.

Was the respondent entitled not to pay Ms Kerr for the public holidays that fell during its shutdown period?

[28] There were six public holidays that fell during the period of the respondent's shutdown period; the four days that fell over Christmas and New Year, together with Nelson Anniversary Day (3 February) and Waitangi Day (6 February). None of these days fell on a Friday, the day when Ms Kerr normally did not work.

[29] The following sections of the Holidays Act 2003 are relevant to this question:

> ***46 Entitlement to public holidays***
> *(1) An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.*
> *(2) Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.*
> ***48 Compliance with section 46***
> *(1) If a public holiday falls on a day that would not otherwise be a working day for an employee, section 46 is complied with if—*
> *(a) the employee does not work on the day; or*
> *(b) the employee works on any part of the day and the employer pays the employee in accordance with section 50.*
> *(2) If a public holiday falls on a day that would otherwise be a working day for an employee, section 46 is complied with if—*
> *(a) the employee—*
> *(i) does not work on that day; and*
> *(ii) the employer pays the employee in accordance with section 49; or*
> *(b) the employee—*
> *(i) works (in accordance with his or her employment agreement) on any part of that day; and*
> *(ii) the employer pays the employee in accordance with section 50; and*
> *(iii) the employer provides the employee with an alternative holiday under section 56.*
> ***49 Payment if employee does not work on public holiday***
> If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

[30] The Holidays Act sets out guidance as to what would otherwise be a working day in s.12, which provides as follows:

> **12 Determination of what would otherwise be working day**
> *(1) This section applies for the purpose of determining an employee's entitlements to a public holiday, an alternative holiday, to sick leave, or to bereavement leave.*
> *(2) If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.*
> *(3) The factors are—*
> *(a) the employee's employment agreement:*
> *(b) the employee's work patterns:*
> *(c) any other relevant factors, including—*
> *(i) whether the employee works for the employer only when work is available:*
> *(ii) the employer's rosters or other similar systems:*
> *(iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.*
> *(d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.*
> *(3A) If the public holiday, alternative holiday, or day on which the employee was on sick leave or bereavement leave falls during a closedown period, the factors listed in subsection (3) must be taken into account as if the closedown period were not in effect.*
> *(4) For the purposes of public holidays, if an employee would otherwise work any amount of time on a public holiday, that day must be treated as a day that would otherwise be a working day for the employee.*

[31] The evidence of the respondent is that Mr Smith met with the Labour Inspector, Mr Hixon, to discuss whether the company was in breach of s.49 of the Holidays Act by not paying staff for the public holidays that fell during their shutdown period. The respondent's evidence is that Mr Hixon originally stated that he did not believe the company was in breach of the Holidays Act but later indicated that he needed to investigate the matter formally.

[32] On 23 June 2014, having completed his investigation, Mr Hixon wrote to the respondent to advise it that he believed that the respondent was not in breach of s.49 of the Holidays Act. In Mr Hixon's report he stated the following:

> *It is my opinion that the reason for the no work day declaration appears valid and that the days in question do not qualify as otherwise working days under s.12 for this employee.*

[33] The respondent's case is reasonably simple in justifying its decision not to pay staff for the public holidays that fell during its shutdown period. This is that it was not possible to provide any work for the staff as there was simply no product to be processed. Therefore, notwithstanding the fact that these days fell on a Monday (Nelson Anniversary Day) a Wednesday (Christmas Day and New Years Day) and a Thursday (Boxing Day, New Year holiday and Waitangi Day holiday) if Ms Kerr had turned up for work on those days there would have been no work for her. Therefore, these days were not *otherwise working days.* This is the argument which satisfied Mr Hixon.

[34] First, I accept the submission of Mr Acland that the fact that the public holidays fell during what the respondent was characterising as a statutory closedown period is irrelevant for the issue of determining whether the respondent should have paid Ms Kerr in respect of those public holidays in accordance with s.49 of the Holidays Act. This is because of the provisions of s.12(3A) of the Holidays Act.

[35] Section 12(2) of the Holidays Act envisages that the employee and the employer are expected to attempt to reach agreement on whether the days in question would otherwise have been working days. It is my finding that Ms Kerr and the respondent did attempt to reach agreement, as is evidenced by the various telephone calls that took place between Ms Kerr, Ms Williams and Mr Hebberd. I also believe that the respondent acted in good faith in concluding that Ms Kerr was not entitled to be paid in respect of the public holidays as it sought advice from, I understand, both the MBIE helpline and Mr Hixon.

[36] The fact that the respondent sought advice from Mr Hixon is relevant given the provisions of s.13 of the Holidays Act, which provides:

> ***13 Labour Inspector may determine what would otherwise be working day***
> *(1) This section applies if an employer and employee cannot agree under section 12 on whether a day would otherwise be a working day for the employee.*
> *(2) A Labour Inspector may determine whether the day would otherwise be a working day for the employee.*
> *(3) In making a determination, the Labour Inspector must take into account the factors listed in section 12(3).*

[37] In order to determine whether Mr Hixon's advice to the respondent was correct, it is necessary to consider s.12 of the Holidays Act against the factual matrix

that prevailed at the relevant time. I shall do this by examining each of the factors referred to in s.12(3).

The employee's employment agreement

[38] It is plain from clause 3.2 of the employment agreement between the parties that Ms Kerr's employment was permanent, and not casual. It is also plain from the terms of Schedule B that she was an hourly paid employee, save where her work rate qualified her to receive the piece rate. Ms Kerr's evidence was that this was rare. Ms Kerr was employed every week, it appears, between Mondays and Thursdays.

[39] The employment agreement clearly envisages a situation where there was no work to be done, in which case no pay would be earned. These would be when the employer declared a No Work Day.

[40] The verb *declare* is defined in the New Zealand Oxford Dictionary[1] as *to announce openly or formally.* It is also defined as *to assert emphatically; state explicitly.* It is without dispute that the respondent did not openly or formally *declare* any No Work Days between 19 December 2013 and 10 February 2014. At the time, it was treating the period between those two dates as an extended closedown period.

[41] The respondent now seeks to rely upon the No Work Days clause to justify not paying Ms Kerr throughout the period of 20 December 2013 to 9 February 2014 and also to argue that the six public holidays falling between these dates were not otherwise working days. However, I accept the submission of Mr Acland that, as far as the terms of the employment agreement are concerned, the respondent acted in breach of them. This is because its shutdown period was significantly longer than *approximately two weeks,* as stated in clause 10.1 and also because the respondent did not declare any No Work Days during the days in question.

[42] Therefore, on this basis, Ms Kerr had an expectation of being paid as these days were not declared as No Work Days. However, it is also necessary to take into account the other factors set out in s.12(3) of the Holidays Act.

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1 Oxford University Press, 2005

The employee's work patterns

[43] Ms Kerr's work pattern was to work every Monday to Thursday (save when, exceptionally, she was required to work additional days). All of the public holidays in question fell on one of these four days. However, Ms Kerr said that there had been at least one occasion prior to the shutdown when a No Work Day had been declared when there had been heavy rain. Therefore, Ms Kerr's work pattern did entail, potentially, days on which no work was available and, therefore, when she was not entitled to be paid.

Whether Ms Kerr worked for the respondent only when work was available

[44] Viewed simply, this is the case, although work was normally available during throughout the oyster season. Although the employment was not casual it was wholly dependent upon the availability of product being available to process. Without that product, the employees would be standing around idle and, if a No Work Day had been declared, Ms Kerr would not have been entitled to have been paid.

The respondent's rosters or other similar systems

[45] This is not a relevant factor in Ms Kerr's case.

The reasonable expectations of the respondent and/or Ms Kerr that she would work on the day concerned

[46] It is not disputed that, by 25 December 2013, there were no more oysters available to be processed and there were also no mussels yet available to be processed in their place. Therefore, it cannot be said that there was a reasonable expectation that Ms Kerr would have worked on that date were it not for the fact that it was Christmas Day.

[47] The same can be said in respect of Boxing Day, New Year's Day, New Year holiday, Nelson Anniversary Day and Waitangi Day holiday. It is my understanding from the evidence of the respondent that, not only could the factory not process mussels during the period of 20 December 2013 to 9 February 2014 because the factory was being reconfigured, but also because it was only by around 10 February that there were any available mussels to process at all.

Conclusion

[48] Whilst it is my view that the respondent failed to operate the employment agreement in accordance with its terms, that failure is only one factor that should be taken into account when deciding whether the public holidays in question would otherwise have been working days. The key factor to take into account is that there simply was no product available for Ms Kerr to process between 20 December 2013 and 9 February 2014. The respondent did not operate like a supermarket, for example, where products are available to be sold on any day of the year. The point of Ms Kerr's employment was to process shellfish. When there were no oysters available, and when there was no alternative product, she simply would not have been able to work.

[49] Therefore, taking into account the purpose of the legislation in respect of payment for public holidays as set out in the Holidays Act 2003, I am satisfied that the six public holidays in question were not otherwise working days for Ms Kerr.

[50] Therefore, I conclude that the respondent was not obliged to pay Ms Kerr in respect of those six days.

Was the shutdown period lawful?

[51] It is the view of Mr Acland that the entire shutdown period was unlawful as it did not comply with the requirements of the Holidays Act 2003. Section 29 of the Holidays Act provides as follows:

> ***29 Meaning of closedown period***
> *In this section and sections 12(3A) and 30 to 35,* ***closedown period*** *means a period during which an employer customarily—*
> *(a) closes the employer's operations or discontinues the work of 1 or more employees; and*
> *(b) requires the employer's employees to take all or some of their annual holidays.*

[52] First, Mr Acland submits that s.29 was not complied with in respect of the respondent's shutdown period because the factory was newly established and this was the first shutdown period for the factory. Therefore, it cannot be said that the shutdown period was a period during which the respondent *customarily* closed its operations. There does not appear to be any case law dealing with a situation where an employer is in its first year of operation and whether term *customarily* applies to such a situation.

[53] The term *customarily* is not defined in the Holidays Act but is defined in the New Zealand Oxford Dictionary as:

> 1. *According to the customs or usual practices associated with a particular society, place, or set of circumstances and*
>
> 2. *According to a person's habitual practice.*

[54] This definition strongly suggests that a new employer cannot have a closedown period as defined by the Holidays Act during its first year of operation. Taking into account the normal meaning of *customary* I agree with Mr Acland that the shutdown period imposed by the respondent between 20 December 2013 and 9 February 2014 did not satisfy the conditions set out in s.29 of the Holidays Act 2003.

[55] In addition, this extended shutdown was also in breach of the terms of clause 10.1 of the employment agreement. A shutdown period of 52 days (seven weeks and three days) is not, by any reasonable stretch of the English language, *approximately two weeks.*

[56] I do not agree with Mr Acland's third submission that the respondent failed to give Ms Kerr 14 days' notice as required by s.32(3) of the Holidays Act as this section did not apply to Ms Kerr's situation, as she was not entitled to any holidays at the commencement of the shutdown period. Section 34 of the Holidays Act applied to Ms Kerr and it is my understanding that Ms Kerr does not argue that she was not paid in accordance with that section.

Conclusion

[57] I conclude that the shutdown period imposed by the respondent upon Ms Kerr did not comprise a closedown period as defined by s.29 of the Holidays Act and, in addition, was in breach of clause 10.1 of the employment agreement as it lasted significantly longer than *approximately two weeks*.

[58] What I also find is that this shutdown period was a period when there was no work available to Ms Kerr in accordance with the provisions of the No Work Day arrangements set out in Schedule B of Ms Kerr's employment agreement. However, the respondent did not *declare* any of the days between 20 December and 9 February to be No Work Days. The declaration of No Work Days was the only way under the

terms of the employment agreement that entitled the employer to not pay Ms Kerr. Given that the shutdown period was not compliant with clause 10.1 and that the respondent failed to declare any No Work Days during the shutdown period, it follows that Ms Kerr is entitled to be paid for the period of the shutdown. This, however, excludes the six public holidays which I have found the respondent was not obliged to pay as they were *not otherwise working days*.

[59] Whilst the respondent may argue that all of the other days of the shutdown were also *not otherwise working days*, the terms of the employment agreement are not trumped by the Holidays Act in respect of non-public holidays. In other words, apart from the six public holidays, the terms of the employment agreement prevail in these current circumstances.

[60] The Wages Protection Act 1983 states, at s.4 that, subject to ss.5(1) and 6(2), *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.* Section 5 provides that *an employer may, for any lawful purpose, make deductions from wages payable to that worker either with the written consent of the worker on the written request of the worker*. Section 6.2 deals with overpayments to workers and so is not relevant.

[61] Therefore, the withholding of pay from Ms Kerr by the respondent during the period of its shutdown when that shutdown did not comply with the Holidays Act, nor was in accordance with clause 10.1 of the employment agreement, and where no *No Work Days* had been *declared* in accordance with Schedule B of Ms Kerr's employment agreement, means that the respondent was not entitled to withhold those wages (save for the six public holidays), and so did so unlawfully.

Did the employer breach the terms of its employment agreement by recalling staff back to work in order of seniority?

[62] The respondent is a seasonal employer and was faced with the situation where, immediately at the end of its shutdown period, it did not have enough product to employ all of its staff. It decided to recall staff in order of seniority. This is a common practice within certain seasonal industries, such as freezing works. However, the employment agreement between the respondent and Ms Kerr did not provide for the ability to not provide her with work when work was available, or to favour other staff in the provision of work on the basis that they had more seniority with the employer.

[63] Under the terms of the employment agreement, if work had been available to have been done, that work should have been offered to Ms Kerr. In order to have entitled the respondent to have chosen not to do that, an express clause should have been incorporated into the agreement enabling the respondent to choose not to call her back in favour of other staff according to clearly defined criteria, such as seniority.

[64] Therefore, I conclude that the failure to call Ms Kerr to work once the shutdown period had re-started was in breach of her employment agreement. Ms Kerr is therefore entitled to be paid for the period from 10 February 2014, when the shutdown period ended, to 13 February when she resigned.

Did the respondent's actions result in an unjustified disadvantage in Ms Kerr's employment?

[65] There are four main actions of the respondent alleged by Ms Kerr which are capable of amounting to actions that could give rise to an unjustified disadvantage in her employment. Section 103A(1) and (2) of the Employment Relations Act 2000 (the Act) provide the test of justification that must be applied by the Authority when deciding, inter alia, whether an employee's employment is effected to the employee's disadvantage by some unjustifiable action by the employer. These provisions provide as follows:

> **Section 103A Test of justification**
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[66] Sub-sections 4(1) and (1A) of the Act is also relevant to this case. These provide as follows:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
> *(1A) The duty of good faith in subsection (1)—*

> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> (b*) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*

Telling Ms Kerr that her employment agreement as null and void

[67] The first alleged action of relevance is that Mr Hebberd told Ms Kerr that her contract was *null and void.* Although this is denied by Mr Hebberd, I found Ms Kerr's evidence to be consistent and detailed, and therefore plausible. On balance, therefore, I find that Mr Hebberd did indeed tell Ms Kerr that her contract was *null and void.* Whilst I do not find that Mr Hebberd did this deliberately in order to undermine the employment relationship between the parties, and whilst I find that he genuinely believed (erroneously) that the respondent had the right to replace Ms Kerr's employment agreement on the basis that they had ceased oyster processing and were planning to start mussel processing, to tell an employee without warning that their contract is *null and void* is a statement of some considerable import which, predictably, caused Ms Kerr some significant concerns.

[68] The fact was that Ms Kerr's employment agreement was not null and void, as she continued to be employed under a permanent employment agreement, the terms of which she was entitled to rely upon.

[69] It is my finding that the action of telling Ms Kerr that her employment agreement was null and void caused Ms Kerr a disadvantage in her employment because of the considerable concern that it caused her. I also find that no fair and reasonable employer could have told an employee that their contract was *null and void* in the circumstances that prevailed at the time this action occurred. Therefore, I find that this action did cause Ms Kerr an unjustified disadvantage in her employment.

Telling Ms Kerr that the respondent was not reemploying anyone anymore

[70] I also find that Ms Williams told Ms Kerr that the respondent was not re-employing anyone anymore. This is confirmed by the audio recording of that telephone conversation. While the respondent objected to the covert recording of this telephone conversation, the Authority is entitled to take it into account in accordance with s.160(2) of the Act that provides that the Authority may take into account such

evidence and information as in equity and good conscious it thinks fit, whether strictly legal evidence or not. This was an important conversation, and in the circumstances it is appropriate to admit the evidence.

[71] To be told whilst on a shutdown imposed by the employer that the employer was not re-employing anyone after Ms Kerr had asked what her position was, caused Ms Kerr anxiety which constitutes a disadvantage in her employment.

[72] Furthermore, I find that no fair and reasonable employer could have told an employee such a thing in all the circumstances at the time that action occurred. Accordingly, I find that this statement by Ms Williams caused an unjustified disadvantage in Ms Kerr's employment.

Being told that she had to sign a variation to her employment agreement

[73] The third allegation of significance is that Ms Kerr was told that she needed to sign a variation to her employment agreement. The oral evidence to the Authority from Ms Williams was that it was not necessary for Ms Kerr to sign a variation to her employment agreement and, indeed, another member of staff had not done so and was still employed.

[74] Considering the terms of the employment agreement between the respondent and Ms Kerr, as well as the variation document that was produced by the respondent (which Ms Kerr never saw during her employment) I would agree that signing the variation document was not necessary in respect of the change to mussel processing due to the clause in Schedule B of the employment agreement which stated that separate pay rates would be advised and applied for mussel processing.

[75] However, whilst the respondent now states that it was not necessary for Ms Kerr to sign the variation document, I note that in the respondent's statement in reply (drafted by Mr Smith) it is stated that Mr Smith advised Ms Kerr that *we need all staff to sign a variation which clarified the situation with mussels.* In his written statement of evidence for the Authority, Mr Smith also stated that he told Ms Kerr that there had been misunderstanding and *we want her to sign a variation to her existing employment agreement.* In the same statement Mr Smith said again that he explained *we need all staff to sign a variation which clarifies the situation with mussels.*

[76] In light of this evidence, on balance, I find that Ms Kerr was told that she *needed* to sign a variation to her employment agreement with the implication that, if she did not, she would not be allowed to return. It is a matter of straightforward contract law that an employer cannot unilaterally require an employee to enter into a variation of their employment terms. A variation of employment terms must be agreed willingly by both parties. Therefore, telling Ms Kerr that she needed to sign a variation was misleading. It also caused Ms Kerr anxiety and therefore amounted to a disadvantage in her employment.

[77] I also find that no fair and reasonable employer could have required an employee to sign a variation to their employment agreement in all the circumstances at the time the action occurred, and I therefore find that this also constituted an unjustified disadvantage in Ms Kerr's employment.

Extending the shutdown period

[78] The final matter to consider is the respondent extending the shutdown period from 21 January 2014 to 10 February 2014. Given that the imposition of a shutdown period upon Ms Kerr was in breach of her employment agreement in any event, extending it even longer was also in breach of her employment agreement. However, I also find that the communication between the respondent and Ms Kerr was insufficient and in breach of s.4(1A) of the Act. Whilst Ms Williams said in her evidence that it was not possible that Ms Kerr could have been advised on 12 January that the start back date would not be until 10 February, as this date was not known on 12 January, the respondent made the very same statement in its statement in reply. Whilst this was explained away by the respondent as a formatting error in the statement in reply, on balance I do not believe that to be the case.

[79] Not being kept properly informed as to when Ms Kerr would be able to start back at work, again caused her anxiety which was a disadvantage in her employment. I find that no fair and reasonable employer could have failed to have kept their employee properly informed in all the circumstances at the time and I therefore find that this disadvantage was unjustified.

Was Ms Kerr unjustifiably constructively dismissed?

[80] The law in relation to constructive dismissal in New Zealand is well settled and the principles have been explored in a number of cases. *Wellington, Taranaki and*

Marlborough Clerical IUOW v *Greenwich (t/a Greenwich and Associates Employment Agency and Complete Fitness Centre)* [1983] ERNZ SEL Cas 95 (AC) held at [104]

> *A constructive dismissal is one in which the employer's actions are equivalent to a dismissal, or the employer's conduct tantamount to a dismissal.*
> ...
> *There is no substantial difference between the case of an employer who, intending to terminate the employment relationship, dismisses the employee and the case of the employer who, by conduct, compels the employee to leave the employment. This is the doctrine of constructive dismissal.*

[81] In the first Court of Appeal decision[2] considering constructive dismissal, the Court enunciated three (non-exhaustive) situations in which a constructive dismissal may occur:

i. where the employee is given a choice of resignation or dismissal;

ii. where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and

iii. where a breach of duty by the employer leads a worker to resign.

[82] The essential questions to be addressed in constructive dismissal cases are:[3]

a. What were the terms of the contract?

b. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

[83] The very nature of a claim for constructive dismissal is dependant on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach of the employer's duty or other actions by the employer (*Commissioner of Police v Hawkins* [2009] NZCA 209).

[84] A typical constructive dismissal scenario occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without

[2] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372
[3] *Greewich supra*

reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship or trust in confidence. In such a case, it is not necessary to show that the employer intended any repudiation of the contract (*Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407).

[85] It is well established that the repudiatory contract by the employer may involve a series of events over a period of time such that no single event may be sufficiently serious to enable the employee to treat the contract as repudiated but the cumulative effect may be. (*Lewis v, Motor World Garages Limited* [1986] ICR 157 (CA)).

[86] To found a claim for constructive dismissal the breach of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable (*Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140).

[87] In her evidence to the Authority Ms Kerr said that the factors that led her to resign were:

a. She had not heard from Ms Williams as to when she was starting back. Ms Kerr said that she had given Ms Williams a chance to contact her and Ms Williams had promised that she would but she never did.

b. When Ms Kerr rang Ms Williams she was told by her that the employer was no longer employing people. Ms Kerr therefore inferred that she was no longer wanted back in the respondent's employment.

c. Ms Kerr said that she was of the opinion that she had been dismissed in that telephone conversation with Ms Williams and, essentially, did not trust what she was told when Mr Smith called her back.

[88] With respect to the reference to hostility in her resignation letter, Ms Kerr said that she was referring to the way that Mr Hebberd spoke to her when she had called him. She said that he had been angry and that he had given her *aggro.*

[89] When I stand back and consider the events that occurred to Mr Kerr I note the following:

(i) Ms Kerr was originally told that the shutdown period would be two weeks, which was reflected by the terms of her written employment agreement. This period of shutdown was, however, extended at least three times, to four weeks, five weeks and then seven weeks;

(ii) Ms Kerr was told by Ms Williams that she would contact her to confirm that she would be called back to start work on 27 January. This, however, did not occur;

(iii) Mr Hebberd then told Ms Kerr that her contract of employment was *null and void;*

(iv) Ms Williams then told Ms Kerr that the company was no longer employing anybody; and

(v) Ms Kerr was then told that she needed to sign a variation of her employment, implying that she would not be allowed back if she did not do so.

[90] I believe that, when viewed together, these events, which took place over a reasonably short period of time, cumulatively amounted to a fundamental breach of Ms Kerr's employment agreement with the respondent. Such a breach amounted to a repudiation of the contract between the parties which gave Ms Kerr the choice of either ignoring the breach and staying employed, or accepting that the contract had been repudiated and resigning.

[91] Furthermore, the breach of duty by the respondent was of such character as to make the employee's resignation reasonably foreseeable. Whilst the respondent may say that it never foresaw that Ms Kerr would resign, an objective observer would agree that Ms Kerr was left with little realistic option but to regard her employment as either at an end by having been told that the respondent was not re-employing staff, and that her contract as null and void, or so seriously impaired that it was not reasonable for her continue to work for the respondent.

[92] I also find that, when taken together, the actions of the employer were not the actions that a fair and reasonable employer could have done in all the circumstances at the time.

[93] Accordingly, I find that Ms Kerr's resignation amounted to a constructive dismissal and that that dismissal was unjustified.

Remedies

[94] Ms Kerr will be entitled to remedies under four headings:

a. Damages flowing from the breach of contract arising out of the shutdown period;

b. Damages flowing from the breach of contract arising out of the calling back of staff in order of *seniority*;

c. Reimbursement of lost wages arising from the unjustified constructive dismissal;

d. Compensation for humiliation, loss of dignity and injury to her feelings arising out of the unjustified constructive dismissal and the unjustified disadvantage.

Damages flowing from the breach of contract arising out of the shutdown period

[95] Ms Kerr is entitled to damages for the losses she incurred when she was subjected to a shutdown in breach of the terms of her employment agreement. Mr Acland on behalf of Ms Kerr argues that Ms Kerr is entitled to the sum of $4,408 gross, together with holiday pay calculated at 8% of those earnings. However, I disagree with Mr Acland's calculations as he has assumed that Ms Kerr would have worked five days a week during the period of the shutdown, and because he has not taken into account the six public holidays which I have found Ms Kerr was not entitled to be paid for.

[96] Ms Kerr's earnings amounted to $116.00 per day gross. I ignore the piece rate as, in reality, Ms Kerr would not have received it during the shutdown period. The shutdown lasted for seven weeks and three days. At four days' work a week, this amounts to $3,596 gross. After deducting six days' public holidays, the resultant loss amounts to a gross sum of $2,900. Holiday pay on this sum at 8% of this sum amounts to $232.

Damages flowing from the breach of contract arising out of the calling back of staff in order of seniority

[97] This loss amounts to three days loss of earnings, for 10, 11 and 12 February 2014, when the respondent had work, but did not call Ms Kerr back to do it. This amounts to a gross loss of earnings of $348, together with holiday pay of $27.84.

Reimbursement of lost wages arising from the unjustified constructive dismissal

[98] Section 123 of the Act provides as follows:

> ***123 Remedies***
> *(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*
> *(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee:*
> *(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*
> *(c) the payment to the employee of compensation by the employee's employer, including compensation for—*
> *(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*
> *(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*
> *(ca) if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring:*

[99] By virtue of s.123 of the Act, I find that Ms Kerr is entitled to be awarded a sum in relation to her lost wages arising out of her unjustified constructive dismissal as well as compensation for humiliation, loss of dignity and injury to her feelings.

[100] In respect of reimbursement of wages lost by Ms Kerr was a result of her personal grievance, I take into account s.128 of the Act which provides as follows:

> ***128 Reimbursement***
> *(1) This section applies where the Authority or the court determines, in respect of any employee,—*
> *(a) that the employee has a personal grievance; and*
> *(b) that the employee has lost remuneration as a result of the personal grievance.*
> *(2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to*

> *pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.*
> *(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.*

[101] Ms Kerr found new employment earning $14.50 per hour, working around 20 hours per week, commencing around the end of February 2014. On 16 April 2014 Ms Kerr found new part time work earning $14.75 per hour for 25 hours per week.

[102] I do not believe there are any exceptional factors that justify my exercising the discretion set out in s.128(3) of the Act to award a sum greater than that to which an order under sub-section (2) would relate. Mr Acland submits that Ms Kerr sustained a total gross loss of $6,036.88. This relates to the period from 7 January 2014 until 12 December 2014. However, this calculation ignores the possibility of a (lawful) closedown period in the winter of 2014, when Ms Kerr may not have been entitled to pay due to (lawfully) declared No Work Days, and also double counts the period of 7 January until 12 February, for which I have already awarded damages.

[103] A better approach in this case is therefore to adopt the usual approach of the Authority, and to award 3 months' lost wages (which amounts to the gross sum of $6,032) less income made by Ms Kerr during that period (13 February 2014 to 14 May 2014). Unfortunately, Ms Kerr is unable to supply details of her gross earnings during this period, but has supplied details of her net earnings, which amount to $2,340.45. The Authority does not have details of what net sum 13 week's pay equates to and so cannot calculate the net sum due to Ms Kerr. Mr Kerr and the respondent should have these details and so they are to co-operate with one another and to agree what net sum is owed to Ms Kerr. They are then to agree what holiday pay on this sum is due to her. In the absence of an agreement within 28 days of the date of this determination, Ms Kerr may apply to the Authority for its assistance in fixing the sum due.

Compensation for humiliation, loss of dignity and injury to feelings

[104] Turning to s.123(1)(c)(i) of the Act, I note that Ms Kerr suffered unjustified disadvantage by the actions of her employer prior to her resignation, and that these factors led her directly to resign. It is therefore not appropriate to attempt to separate the humiliation, loss of dignity and injury to her feelings arising from the unjustified

actions from the humiliation, loss of dignity and injury to her feelings arising from the constructive dismissal.

[105] I accept that Ms Kerr suffered humiliation, loss of dignity and injury to her feelings, and that this was moderately severe. I believe that the sum of $7,000 is a just sum to award.

[106] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s.124 of the Act).

[107] I find that Ms Kerr did not contribute in any blameworthy way to her dismissal or to the actions that amounted to unjustified actions. Whilst I accept the evidence of the respondent that Ms Kerr swore during at least two of the conversations she had (with Mr Hebberd and Mr Smith), this did not contribute to the situation that gave rise to the personal grievance. I therefore decline to reduce the remedies awarded above.

Recommendation

[108] Section 123(ca) provides that, if the Authority finds that any workplace conduct or practices were a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring can be made.

[109] I believe that a significant factor in the personal grievance of Ms Kerr was the unsuitability of the terms of the employment agreement that she had been asked to enter into. The respondent operates a seasonal employment and it needs to ensure that the terms of the employment agreement are compliant with the Holidays Act and provides provisions that are appropriate for the seasonality of its work and operations, including how it chooses to call staff back from a shutdown period. I recommend that the respondent reviews its employment agreements (if it has not already done so) to ensure that more suitable terms are in place for new employees it may employ on seasonal work.

Orders

[110] I order the respondent to pay to Ms Kerr the following sums:

a. Lost wages to be calculated by the parties in accordance with paragraph [103];

b. Holiday pay on those lost wages to be calculated by the parties;

c. Total damages for breach of contract in the total gross sum of $3,248;

d. Holiday pay in respect of the total damages for breach of contract in the gross sum of $259.84;

e. Compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $7,000.

Costs

[111] Costs are reserved. The parties should seek to agree how costs are to be dealt with between them but, if within 28 days of the date of this determination they are unable to reach agreement, Ms Kerr's representative has a further 14 days within which to serve and lodge a memorandum of costs and the respondent should have a further 14 days within which to reply.

David Appleton
Member of the Employment Relations Authority