

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 50
3117396

BETWEEN WARISSARA MATAJOD
Applicant

AND CRAZY HORSE LIMITED
Respondent

Member of Authority: Claire English

Representatives: Madison Prattley and Louise Taylor as co-counsel for the
Applicant
James Hobcraft, counsel for the Respondent

Investigation Meeting: 28 and 29 October 2021 at Christchurch

Submissions received: 15 November and 14 December 2021 from Applicant
6 December 2021 from Respondent

Determination: 23 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant was employed by the respondent, as a front-of-house staff member in the respondent's restaurant. In May 2020, following the nationwide lockdown, the respondent advised the applicant that due to a business downturn caused by the impacts of Covid-19, it could no longer continue to employ her to work the same number of hours she had worked previously. The respondent commenced a redundancy process, while offering to continue employing the applicant at reduced hours. The applicant asked for more hours than the respondent had offered. The respondent did not agree, and terminated the applicant's employment.

[2] The applicant brings claims for unjustified dismissal, and lost wages, holiday pay, and compensation resulting from this. The applicant also brings claims for underpayment of wages during the last two months of her employment, and underpaid holiday pay and public holiday entitlements.

[3] The respondent denies the claims, saying that the applicant's employment came to an end due to redundancy, as there was no work available.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from the applicant, and the applicant's partner, as well as the director of the respondent, and his general manager. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[6] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably dismissed?
- (b) Was the applicant short-paid for approximately the last two months of her employment?
- (c) Was the applicant's annual leave calculated correctly?
- (d) Was the applicant correctly paid for certain public holidays?
- (e) Should the applicant have been paid for a two week notice period instead of a one-week notice period?
- (f) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act

- (g) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to her grievance?
- (h) The payment of interest on any monies awarded.
- (i) Should either party contribute to the costs of representation of the other party.

Background

[7] The applicant, Ms Phan Warissara Matajod, was employed by Crazy Horse Limited, the respondent, trading as “Thai Orchid”.

[8] She was offered employment by Mr Julian Stokes, the owner of the respondent. Much of the day to day management of staff was performed by Mr Stokes’ general manager, Ms Jongkolnee Deerai who is an experienced manager and originally from Thailand. Ms Deerai was able to speak with Thai staff, including Ms Matajod, on a first-language basis.

[9] Ms Matajod’s employment started on or around 23 January 2018. She was employed according to the terms of a written employment agreement commencing on that date, which stated that she would work according to a weekly roster, and that there “will be a minimum of 15 hours per week”.

[10] The relatively low number of weekly hours allowed Ms Matajod to comply with the terms of her student visa, which permitted her to work up to a maximum of 20 hours in any given week.

[11] Although the employment agreement was stated to be for a fixed term, (described as “contract is a temporary 3 months contract”) ending on 23 April 2018, Ms Matajod’s employment continued after that date, by mutual agreement.

[12] Although Ms Matajod originally assisted in the kitchen and was given various general duties, she was re-assigned to front-of-house duties as a host, and found a natural fit in this role.

[13] In September 2018, Ms Matajod was granted a work visa. Her hours of work increased.

[14] She started working for Thai Orchid 6 days a week, every day except Sundays. She worked the evening shift, from 5pm through to close. This meant that her hours would vary depending on customer demand, as on weeknights her shift would end as early as 9 or 9.30 pm, but she would work later at weekends. Ms Matajod's hours varied from 30 hours per week, up to as much as 50 hours. Both parties agreed that 36 hours per week was a true numerical average of her hours over time.

[15] Ms Matajod rarely worked the lunch shift, although she would do so on occasions, by arrangement between herself and Ms Deerai.

[16] Ms Matajod was concerned that her hours at Crazy Horse were not sufficient to support herself, and so she also worked some lunch shifts at another restaurant, Hachi Hachi. She worked at this restaurant during the lunch shift, as a kitchen hand.

[17] At the time of the investigation meeting, some concerns were expressed about this, with Mr Stokes advising that, in his view, Hachi Hachi was a competitor to the respondent, and that it was inappropriate for Ms Matajod to work there on the basis that she might disclose financial information to his competitor. He also expressed the view that Ms Matajod's employment agreement required her to remain available for the lunch shift as well as the dinner shift every day, and that by working for Hachi Hachi Ms Matajod was not making herself available to work more hours at Thai Orchid.

[18] Neither of these concerns were raised with Ms Matajod at the time. Instead, it appears that Ms Matajod took on kitchen hand work for Hachi Hachi in the lunch shift, precisely because she was normally rostered to work only the dinner shifts at the respondent. She was open about the fact that she worked some lunch times at Hachi Hachi with Ms Deerai, and did in fact work some lunch shifts at the respondent by arrangement with Ms Deerai, although this was not as regular as the dinner shifts.

[19] In March 2019, the parties discussed entering into an updated employment agreement. A draft agreement was prepared by Mr Stokes, however, Ms Matajod felt that it did not fully reflect the work she did. Neither side ever signed this agreement, and Ms Matajod continued working as she had previously. Nothing flows from this.

[20] At the beginning of 2020, Mr Stokes became concerned about the potential impact of Covid-19 on the restaurant industry and what that might mean for the viability of his business. He described himself as being quite aware of the impact of lockdowns on the hospitality business overseas, and began to think about ways in which the business could keep serving customers, including things like take-away only offerings, and delivery options.

[21] When the wage subsidy scheme was first announced, Mr Stokes immediately applied for, and was in due course granted, the wage subsidy for all his staff, including Ms Matajod.

[22] When the country went into Level 4, Ms Matajod understood that she would be paid 80% of her normal wages.

[23] In order to calculate what 80% of her normal wages would be, Ms Deesai and Mr Stokes looked back at Ms Matajod's wages over the past year, and calculated that her average hours worked was 36 hours per week. Mr Stokes says that he also checked her employment agreement, and considered whether he should just pay the minimum of 15 hours per week referred to in that document, but accepted that this was no longer a good reflection of her more recent work patterns, so he settled on the average figure of 36 hours per week.

[24] Although there was some back and forth discussion by way of email between Ms Matajod and Mr Stokes on this matter, both sides in the end agreed that Ms Matajod's average hours per week immediately prior to lockdown were 36 hours per week, and 80% of this amounted to 29 hours per week.

[25] This was to be paid at Ms Matajod's usual hourly rate of \$19 per hour.

[26] Ms Matajod agreed to this, albeit reluctantly.

[27] Although Mr Stokes was clear that a payment of 29 hours per week at \$19.00 per hour was what had been intended by him, the pay slips for this period (being five weeks from the end of March through to the end of April 2020) show that, for the first week, Ms Matajod was paid for 29 hours ordinary time, at her usual hourly rate of \$19/hour.

[28] For the next four weeks, Ms Matajod was paid for 29 hours at \$19/hour, however, this was taken from her annual leave entitlements in full.

[29] At the investigation meeting, Mr Stokes accepted that the use of annual leave to cover the payment of 29 hours per week in full, was not what he had intended to occur, and was incorrect.

[30] There is at this point some confusion about what should have happened. Ms Matajod says that she had expected to receive payment for 29 hours per week at \$19 per hour ordinary time. She accepts she agreed to this, with the expectation that this would be revisited when the restaurant opened again.

[31] At the investigation meeting, Mr Stokes explained that he had intended that 80% of these 29 hours would be paid as ordinary time¹, and the remainder would be taken from Ms Matajod's annual leave entitlements. However, he says something slightly different in his witness statement and the legal submissions filed on his behalf, instead saying that he was obliged to pay Ms Matajod only 15 hours per week, with any payment in excess of 15 hours per week being taken from Ms Matajod's annual leave entitlements.

[32] Neither of these things occurred.

[33] For the first week, Ms Matajod received payment of 29 hours ordinary time, consistent with what she had expected.

[34] For the next four weeks, she was also paid 29 hours per week, but the entirety of this was annual leave, which is not consistent with either of the explanations given by Mr Stokes, where he suggested he had intended to pay a combination of ordinary time and annual leave.

[35] In support of her understanding of what was agreed, Ms Matajod points to the transcript of a recording taken by her of a meeting with Mr Stokes on the day the country entered Level 4. Among other things, Mr Stokes advises staff that the business has already applied for the wage subsidy, and should this be granted, he would pay the full amount to staff. Ms Matajod advises that her current hourly rate is \$19.00 per hour, and Mr Stokes goes on to explain that:

...then we'll pay you the full amount or the, five eighty-five divided by nineteen, so we'll be paying you 30 hours. 30 hours, if you're not working, based on the subsidy for up to four weeks.

¹ For reference, 80% of 29 hours would amount to 23.2 hours, meaning that 5.8 hours each week would therefore be met from annual leave entitlements.

[36] Mr Stokes objects to the recording as he was not aware of it at the time, but does not dispute the transcript of its contents.

[37] As there was no dining in, Mr Stokes decided to use this time to promote the business, including making some changes to the internal furniture of the restaurant, up-dating the menus, and (when this became allowable in accordance with the relevant alert levels) holding a formal “photo-shoot” day, where the chefs cooked the new dishes, staff got to enjoy and become familiar with the new food, and the front-of-house staff, including Ms Matajod, posed with the new dishes and photos were taken to illustrate the menu. Ms Matajod was paid for her time on this day, which was essentially the only work she had had in about five weeks.

[38] On about 25 April 2020, Mr Stokes held another staff meeting. His initial plan was to transition staff on to “casual” agreements, such that they were only paid for the hours that they actually worked. This was to better reflect the business uncertainties, as the restaurant was then focused on take-away and delivery services only.

[39] Ms Matajod was concerned about a proposal to pay strictly for hours actually worked, as at this time there was very little work available, particularly for the front-of-house staff. Ms Deerai also gave evidence that some staff approached her, and told her they were concerned as there had been only five hours work that week, which was not enough to support themselves.

[40] Ms Deerai indicated that she spoke with Mr Stokes about this, and after speaking with him, it was agreed to offer new employment contracts that guaranteed a minimum payment of 20 hours/week, with any work done in excess of this paid at the usual hourly rate.

[41] On 8 May 2020, Ms Matajod received her weekly pay calculated at the rate of 20 hours per week ordinary time, rather than the 29 hours she was expecting to receive.

[42] She texted and emailed Mr Stokes to query this.

[43] On 15 May, Ms Matajod was again paid for 20 hours ordinary time.

[44] On 16 May 2020, Mr Stokes emailed Ms Matajod, referring to the business’s “lack of economic profitability” and saying:

We are looking at 2 options for yourself:

1. Move you to a casual employment contract in 5 weeks and pay a minimum 20 hours
2. Terminate your current contract with one weeks' notice at 29 hours

Option one: You would be required to work any hours set-out in the weekly schedule set by Jum and would be paid more if you work more than the 20 hours.

Option two: we would terminate the current contract immediately with 1 week of pay at your 29 hours paid out in Lui [sic] of Notice. ...

We look forward to your feedback and will follow up with you on Monday after giving you the weekend to think about the options.

[45] Ms Matajod sought legal advice, and additional time for feedback was provided.

[46] Ms Matajod emailed Mr Stokes on 21 May 2020, saying:

Your redundancy proposal is defective due to merely asserting “lack of economic profitability” without providing any detail or justification....

Our alternative proposal is as follows:

First, you backpay the 27 hours that are outstanding.

Second, Phan is more than happy to return to work (she has been willing to work throughout this entire process) for the 29 hours per week for the remainder of the subsidy term. If you wish to re-negotiate her contract at that time, (end of subsidy payments) to casual employment, that is something we're willing to discuss.

[47] Ms Matajod's email amounted to a counter-offer, where she asked to be paid a minimum of 29 hours per week, with the possibly of renegotiating again at a later date.

[48] Mr Stokes remained firm in his position that he was not able to offer more than 20 hours per week, albeit he intended to pay for any hours actually worked in excess of this 20 hours.

[49] Accordingly, on 22 May 2020, Mr Stokes emailed Ms Matajod again. He provided some more information about the financial situation of the business, stating:

The business has suffered the biggest drop in revenue that it has ever experienced. Our commercial information is confidential, and whether or not we provided you with access to our accounting records, we do not reasonably see that you would be able to

provide any feedback to solve the tsunami of costs and overheads that are consuming the business, or bring back the 60% of lost tourists that make up the Thai Orchid customers. The business has re-opened and the harsh reality is, if we do not move quickly to reduce costs, then, there will be no business to save.

[50] Mr Stokes also denied that there was 27 hours of backpay properly owing, saying:

Your employment agreement states a minimum of 15 hours per week. Therefore, at law, this was all that we were/are obliged to pay you...

[51] The email ended by terminating Ms Matajod's employment "for reason of redundancy", with a payment of one week's notice in lieu, which was to be 29 hours pay.

[52] On 23 June 2020, Ms Matajod wrote to Mr Stokes, raising a personal grievance claim.

Findings

The employment agreement

[53] Ms Matajod was employed by the respondent on a permanent basis. Although her employment agreement states that it was intended to be for a fixed term, this was effectively overtaken by events, and both parties agreed to continue the employment relationship. Hours of work varied, and were set by roster published weekly in advance, with Ms Matajod's most common work time being the night shift. She worked Mondays to Saturdays, with Sundays being her day off.

[54] Ms Matajod's employment agreement contained a fixed term provision which was not fully compliant with the requirements of section 66(2) of the Act, which requires that there must be genuine reasons based on reasonable grounds for implanting a fixed term agreement. No grounds were given in support of this clause. Where an employment agreement does not comply with these requirements, subsections (5) and (6) of section 66 of the Act provide that this does not affect the validity of the employment agreement itself, however, the fixed term provision will not be effective to end the employee's employment.

[55] Ms Matajod's employment did not come to an end because of the fixed term provision, so no issue arises in respect of this non-compliance. The reality of her employment was that she was a permanent employee, working variable hours in accordance with a roster.

[56] At the investigation meeting, Mr Stokes suggested that Ms Matajod should have held herself available to work all the possible lunch shifts referred to in the employment agreement, as well as all the dinner shifts. I have already found that Ms Matajod's normal hours of work were the dinner shifts, and that she also worked lunch shifts by agreement.

[57] The suggestion that she was compelled to hold herself available for more work in the absence of either her customary work hours or specific agreement is not consistent with the statement in the employment agreement that actual hours will be determined by a weekly roster prepared in advance. In addition, this would amount to an availability provision, and the employment agreement makes no provision for this, which would need to be in accordance with the statutory requirements set out in section 67D of the Act.

[58] As Ms Matajod worked in accordance with her rostered hours and otherwise by agreement, nothing flows from this.

Hours of Work

[59] Ms Matajod and Mr Stokes are in agreement that for the five week period from the end of March through to the end of April 2020, Ms Matajod was to be paid at the rate of 29 hours per week. This has occurred.

[60] Although no money arrears arise from this period, for the last four weeks of this period, all payments were deducted from Ms Matajod's annual leave balance.

[61] This is not correct. Ms Matajod advises that she understood she was to be paid wages for this period, and that this was because the amount the subsidy payment covered, and in fact exceeded, the amount that was to be paid to her. Mr Stokes advises firstly, that he intended that only 80% of this (eg, 23.2 hours) was to be paid by the respondent, with the remaining 5.8 hours each week to be deducted from Ms Matajod's annual leave entitlements.

[62] For clarity, although the payslips and underlying leave records show that for four weeks in April 2020, the 29 hours per week paid to Ms Matajod were taken entirely from her annual leave, both parties say that this should not have happened, and that the true intention was otherwise.

[63] The difficulty Mr Stokes faces in contending that some of Ms Matajod's wages during this time should instead be annual leave, is that there is no contemporaneous record to show that this intention was communicated to Ms Matajod, or that she understood or agreed to this. There is no email or text correspondence on the point. The transcript of the staff meeting where Mr Stokes engaged with Ms Matajod shows that he told Ms Matajod she would be paid \$585 per week (being the subsidy amount), and, after he had confirmed her current hourly rate, he explained that this sum would be the equivalent of her working 30 hours per week. Finally, it is telling that for the first week, Mr Stokes paid Ms Matajod 29 hours ordinary time, and then later paid annual leave only which he admits was incorrect on any accounting.

[64] In addition, there is no contemporaneous reference to the idea later advanced in written documents by Mr Stokes that the respondent was only obliged to pay Ms Matajod 15 hours per week, and anything above this would be taken from her annual leave balance. The first documentary reference to the idea that the employment agreement only required a payment of 15 hours/week is in an email from Mr Stokes dated 22 May 2020, and is raised in response to the claim by Ms Matajod for 27 hours of backpay. This 22 May email is also the email where Mr Stokes terminates Ms Matajod's employment. The context and timing are both significant. It is also significant that when putting forward the redundancy proposal by email on 16 May 2020, Mr Stokes specifically refers to the idea of 29 hours per week, stating that if Ms Matajod's employment was terminated, this would be "with 1 week of pay at your 29 hours paid out in Lui of Notice."

[65] Taking all these circumstances into account, I find it is more likely than not that Mr Stokes and Ms Matajod did agree that, at least initially, she would receive payment at the rate of 29 hours per week, ordinary time. This is consistent with the idea that the wage subsidy was to cover 80% of an employee's hours, the first payslip sent through by Mr Stokes, and the subsequent reference he makes to "your 29 hours", as well as Ms Matajod's repeated requests to be paid at the rate of 29 hours per week. If Mr Stokes had intended to deduct 5.8 hours each week from Ms Matajod's leave balance, the onus was on him to have clearly communicated this so as to achieve Ms Matajod's consent. The only contemporaneous document is the transcript of the meeting on 25 March 2020, and Mr Stokes does not mention annual leave in that conversation. The contemporaneous pay records do not support this interpretation either.

[66] It follows that, for the last nine weeks of her employment, Ms Matajod should be paid at the rate of 29 hours ordinary time each week, as this is what was agreed between herself and Mr Stokes.

[67] No other alternative agreement was ever reached. For the first three weeks in May 2020, beginning with the payment on made on 7 May (albeit marked as 8 May in the pay records), Ms Matajod was only paid for 20 hours per week. There was no agreement with her to reduce her hours from 29 hours per week. Mr Stokes first put forwards the proposal to pay 20 hours per week to Ms Matajod in an email dated 16 May 2020. By this time, he had already put through two weekly payments at the lower rate of 20 hours per week. Ms Matajod had objected to this by texting him about what she described as a “mistake” on 7 May, as soon as she first became aware that her weekly payment had dropped.

[68] Despite Ms Matajod’s objections, a third week was paid at the rate of 20 hours only, before her final week was paid at the agreed rate of 29 hours. An employer is not able to unilaterally vary the terms of an employment agreement², and Mr Stokes’ attempt to reduce Ms Matajod’s hours and pay without her agreement is not effective.

[69] Accordingly, Ms Matajod is owed:

- a. Pay for 27 hours, amounting to \$513.00 gross at \$19/hour;
- b. 8% holiday pay on this amount, being \$41.04.

Annual Leave

[70] In addition, there remains the question of what was Ms Matajod’s correct annual leave balance as at the termination of employment.

[71] No annual leave payment was made to Ms Matajod on the ending of her employment.

[72] The payslips given to Ms Matajod for the four weeks in April 2020 show that her annual leave balance was reduced by 29 hours per week over four weeks, eg 116 hours. I have already found there was no agreement for her annual leave to be used in this way.

² Section 63 and 63A of the Employment Relations Act 2000; section 4 of the Wages Protection Act 1983.

[73] In addition, these figures do not appear on the Annual Leave report Mr Stokes has provided for Ms Matajod, following the investigation meeting.

[74] Instead, Mr Stokes has submitted that, during the last nine weeks of Ms Matajod's employment, for each hour paid to Ms Matajod in excess of 15 hours per week, these hours should be deducted from Ms Matajod's annual leave balance. This is contrary to both what was shown on the payslips generated at the time, which refer to either "annual leave" for the four weeks in April, or to "ordinary time" for the last payment in March and the four payments in May.

[75] There is no record of Ms Matajod agreeing to this.

[76] In addition, there is no record to suggest that Mr Stokes explained to Ms Matajod that, for each week when she was paid at 29 hours a week, 14 of those hours would be deducted from her annual leave balance, or that for each week when she was paid for 20 hours per week, five hours would be deducted from her annual leave balance.

[77] The deductions of annual leave suggested by Mr Stokes amount to a total of 85 hours. The Annual Leave report shows that, as at 22 January 2020 (which was her anniversary date), Ms Matajod had an annual leave entitlement of 82.61538 hours. Mr Stokes has deducted the amount of 85 hours from this, and says that Ms Matajod therefore had an annual leave balance of -2.38462 hours. The report showing these figures does not match the payment records, and contains typographical errors in the relevant months, which do not flow through to an increase in the hours relating to that date range, which is what might be expected if that report was automatically generated.

[78] Importantly, Mr Stokes himself made it clear at the time, that in respect of the payments of 20 hours per week, this was a minimum guaranteed payment. This was set out in his own explanatory email to Ms Matajod on 16 May 2020, where he says "and pay a minimum of 20 hours".

[79] Accordingly, I am unable to find that there was any agreement between the parties to pay out Ms Matajod's annual leave in whole or in part during the last nine weeks of her employment. Given that the payslips (and pay records) for this period do not show annual leave being deducted in the way that Mr Stokes argues for, the respondent has not in fact kept these

records, and Ms Matajod's evidence on this point is to be preferred, in accordance with section 132 of the Act.

[80] It is important that Ms Matajod's annual leave is calculated and paid to her in accordance with the requirements of the Holidays Act 2003. How annual leave is to be calculated is set out in sections 24, 25, and 26 of the Holidays Act 2003.

[81] As Ms Matajod had been employed for more than a year, she had an entitlement to holidays. The Annual Leave report provided by the respondent shows that Ms Matajod's anniversary date was 22 January, which is consistent with the original start date of her employment; and, as of 22 January 2022, Ms Matajod had an annual leave entitlement of 82.61538 hours³.

[82] Following this date, Ms Matajod did not take any agreed annual leave through to the ending of her employment.

[83] Section 24(2) provides that this entitlement is to be paid at a rate that is based on the greater of either (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or (b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

[84] Ordinary weekly pay is defined in section 8 of the Holidays Act 2003, and "means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week".

[85] At the time of the ending of Ms Matajod's employment, on 22 May 2020, her ordinary weekly pay was \$551.00 gross (being 29 hours at \$19/hour).

[86] Average weekly earnings are defined in section 5 of the Holidays Act 2003, and "means 1/52 of an employee's gross earnings".

[87] At the time of the ending of Ms Matajod's employment on 22 May 2022, her average weekly earnings were \$639.57.

³ Ms Matajod had taken an overseas holiday in January 2020, and for completeness, I note that the 82.61538 hours annual leave entitlement is what remains after the annual leave taken during that holiday had been deducted.

[88] As Ms Matajod's average weekly earnings are greater than her ordinary weekly pay, this is the weekly rate that must be used to calculate her annual holiday entitlement under section 24. Ms Matajod's annual holiday entitlement of 82.61538 hours amounts to 2.29 weeks at her agreed average weekly hours (being 29 hours/week). At the rate of \$639.57, this gives a sum of \$1,467.73.

[89] In addition to the annual holiday entitlement as at Ms Matajod's anniversary date of 22 January, calculated under section 24, section 26 of the Holidays Act 2003 provides that Ms Matajod must also be paid annual holiday pay in respect of the time worked from 23 January 2020 through to the ending of her employment. This is to be calculated in accordance with section 25 of the Holidays Act 2003, which requires a payment of 8% of gross earnings for that time.

[90] Ms Matajod's gross earnings between 23 January 2020 and the ending of her employment were \$9,177, and 8% of this amount is \$734.16.

[91] Accordingly, the annual leave properly payable to Ms Matajod as at the ending of her employment amounts to \$2,201.89, (being made up of her entitled and untaken annual leave of \$1,467.73 as at her anniversary date, plus a further allowance of \$734.16 calculated at the rate of 8% of gross earnings for the time from her anniversary date through to the ending of her employment.)

Payment for Public Holidays Not Worked

[92] The applicant claims that there were three public holidays on which she did not work, but which would have been ordinary working days for her, and that accordingly, she should be paid for these days at the rate of her relevant daily pay.

[93] The days in question are: Queen's Birthday 2019, which fell on Monday 3 June; Canterbury Anniversary 2019, which fell on Friday 13 November 2019, and Waitangi Day 2020, which fell on Thursday 6 February 2020.

[94] The pay records for these dates show that all of these days and dates are correctly noted in the pay records, which show that Ms Matajod worked no hours and received no pay in respect of those days. This is in contrast to the entries for other public holidays which are also noted, where the pay records show the hours worked on that public holiday and the relevant hourly

rate, which is, correctly, 1.5 times Ms Matajod's usual rate, and the provision of an alternative holiday.

[95] Section 49 of the Holidays Act 2003 provides that:

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.

[96] In this instance, Ms Matajod will be entitled to receive pay for these three public holidays at the rate of her relevant daily pay⁴, as long as those are days on which she would otherwise have worked.

[97] How to determinate what is otherwise working day is set out in section 12 of the Holidays Act 2003. Subsection (4) relevantly states:

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.

[98] Ms Matajod's usual days of work were Mondays through Saturdays, with Sunday being her usual weekly rostered day off. The three public holidays she has claimed for fell on Monday, Friday, and Thursday respectively. These days of the week were days on which Ms Matajod ordinarily worked. Therefore, she is entitled to payment at the rate of her relevant daily pay, for each of these three days.

[99] Ms Matajod has calculated her relevant daily pay in respect of these days. The respondent has submitted in respect of its records and Ms Matajod's leave entitlements that it "will happily make any payment required to the applicant without delay⁵".

[100] Accordingly, the respondent is to pay to Ms Matajod the sum of \$414.15 in respect of public holidays not worked, being:

- a. \$135.98 for Queen's Birthday 2019;

⁴ Relevant Daily Pay is defined in section 9 of the Holidays Act 2003, together with the requirements for calculating it.

⁵ Paragraph 81 of the legal submissions on behalf of the respondent.

- b. \$139.65 for Canterbury Anniversary 2019; and
- c. \$139.65 for Waitangi Day 2020; and
- d. \$33.22 being holiday pay at the rate of 8% on these amounts.

Notice

[101] At the time her employment ended on 22 May 2020, Mr Stokes had advised Ms Matajod that she would be paid one week's notice, which would have amounted to a payment through to the end of 29 May 2020.

[102] The payslips show that Ms Matajod's pay was calculated only up to 24 May 2020. Therefore on any accounting, Ms Matajod has been short-paid by 5 days. At 29 hours per week, Ms Matajod is owed a further \$393.57, plus a further 8% holiday pay on this sum, being \$31.48 for these five days.

[103] Ms Matajod has also claimed for payment of a further week's notice, on the grounds that she was entitled to reasonable notice, and that two weeks' notice would be reasonable in all the circumstances.

[104] The employment agreement between the parties states:

Clause 15. Redundancy / Termination

- Redundancy applies to the requirement of termination of employment before contract end dates. This may arise due to; business being sold, re-structuring to improve efficiency of customer service, lack of profitable work, significant change in nature of role of employment.
- Both Thai Orchid and the employee are expected to give 1 weeks notice in writing, stating they will be terminating the contract and employment due to being within 90 day contract....

[105] It is submitted for Ms Matajod that although the employment agreement provides for one week's notice, this is stated to apply during the first 90 days of employment, and therefore, no longer applies to Ms Matajod.

[106] Mr Stokes accepted at the investigation meeting that he had intended the one week's notice to be effective during a trial-type period at the beginning of the employment.

Accordingly, I agree that one week's notice is neither applicable nor reasonable in the circumstances.

[107] An employer has an obligation to provide reasonable notice, and the Court of Appeal has accepted that reasonable notice in a redundancy situation may be shorter than what is reasonable in other circumstances⁶. Four weeks (or one month) is the most common length of notice period, and one week is significantly short of this, and leaves very little time for an employee to reasonably order their affairs and seek alternative employment. Ms Matajod was paid on a weekly basis, and had a moderate amount of service in the respondent's employ. Accordingly, I find that a two week notice period would be reasonable, taking into account also the financial impacts of a longer notice period on the respondent.

[108] Ms Matajod is awarded a further week's notice, plus holiday pay calculated at the rate of 8%, being \$551.00 gross, plus \$44.08.

Interest

[109] Ms Matajod has also claimed for interest on unpaid monies.

[110] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[111] The amount of interest owing is to be calculated in accordance with that Act⁷, and an interest site calculator is provided for the purposes of calculation⁸, known as the Civil Debt Interest Calculator.

[112] Ms Matajod should have been paid her notice and holiday pay on or immediately after the ending of her employment on 22 May 2020. Taking the practicalities of the payroll system into account, the respondent made its last payment to Ms Matajod on 29 May 2020, and I adopt this as a fair starting point for the calculation of interest owing, effectively giving the respondent credit for the seven days in between. Outstanding wages and holiday pay attract interest until paid. In the present case, I find that it would be appropriate to award interest on the sums that

⁶ *Charta Packaging Ltd v Howard*, [2002]1 ERNZ 10.

⁷ See section 12 of the Interest on Money Claims Act 2016.

⁸ See section 13 of the Interest on Money Claims Act 2016.

should have been paid to her on the ending of employment, being short wages, notice payments, and annual leave and public holiday entitlements. These amount to a total of \$4,242.56, and Ms Matajod could reasonably have expected to be paid these sums on the ending of her employment, leaving aside the personal grievance claims around the ending of her employment.

[113] The amount of interest owing up to the date of this determination is \$106.72. This sum is also to be paid to Ms Matajod, in recognition of her loss of the use of the monies that should have been paid to her.

Was the applicant unjustifiably dismissed?

[114] The respondent states that Ms Matajod's employment came to an end by reason of redundancy. Ms Matajod claims that she was unjustifiably dismissed, on the grounds that her dismissal was a response to a dispute between the parties about her pay and hours of work. In addition, Ms Matajod claims that the redundancy was not genuine, because no or insufficient information was provided by the respondent about the business's financial situation.

[115] The termination of employment by reason of redundancy is a dismissal⁹. Ms Matajod was dismissed from her employment. In considering whether this was a justified dismissal, the question is whether the respondent has discharged its obligations to act as a fair and reasonable employer, and whether it has met the test of justification set out in section 103A of the Act. The test for justification of a dismissal under s 103A of the Act applies to redundancies as well as all other forms of dismissal, with the necessary modifications of the statutory language¹⁰.

[116] For dismissal by way of redundancy to be justified, it must be carried out for genuine economic reasons. It must also be carried out in a fair manner, which includes following the usual requirements to consult and provide notice and other supports.

[117] In the present case, it is not clear that the respondent had genuine reasons for the redundancy of Ms Matajod's position at that point in time. I accept that, in general terms, the business had suffered both a substantive financial hit from being entirely closed during Level

⁹ See for example *New Zealand King Salmon Co Ltd v Slotemaker*, [2017] NZEmpC 99.

¹⁰ The Court of Appeal has confirmed that "it will be necessary to interpret s 103A(3) in a way that adapts it to a situation not involving misconduct and to invoke s 103A(4) (allowing it to consider "any other factors it thinks appropriate") in redundancy cases.", in the case of *Grace Team Accounting v Brake* [2014] NZCA 541, at [77].

4, and was facing on-going financial challenges due to the lack of customers, particularly its base of overseas tourists.

[118] However, Mr Stokes had sought and been granted, the wage subsidy for his staff, including Ms Matajod, as an employee who was working more than 20 hours per week. This was effectively a lump sum payment, amounting to (in respect of Ms Matajod) \$585.00 weekly for 12 weeks, which was in excess of her then weekly wage of \$551.00 per week.

[119] It is also relevant that Mr Stokes applied for the subsidy on 24 March 2020, and the declaration at that time required that he declare that the business had experienced a minimum 30% decline in actual or predicted revenue, and that:

you agree you will, using best endeavours, retain the employees named in your application in employment on at least 80% of their regular income for the period of the subsidy.

[120] Given that the subsidy payment made to the respondent ran from on or about 26 March 2020, this meant that the respondent and Mr Stokes had an obligation to use best endeavours to retain Ms Matajod's employment (at the agreed 29 hours per week) until 16 June 2020. Instead, he terminated her employment on 22 May 2020, with her notice being paid up to 29 May 2020.

[121] Mr Stokes provided no particular reason why he could not have continued Ms Matajod's employment through to the end of the subsidy period, although he did explain that he was using the subsidy funds he had received in respect of Ms Matajod that were in excess of her weekly wages to effectively fund the payments the business was making to higher-paid employees.

[122] It is at best unfortunate that Mr Stokes chose not to continue Ms Matajod's employment for the short number of days it would have taken to comply with the subsidy obligations.

[123] I also find that the redundancy process followed by the respondent was flawed. Applying the tests in section 103A of the Act to the present case, it is not clear that Mr Stokes sufficiently raised the concerns he had with Ms Matajod before taking action.

[124] In particular, the business was receiving more from the wage subsidy payments in respect of Ms Matajod than it was paying to her on a weekly basis. Mr Stokes did not discuss with her what impact the receipt of the wage subsidy would have on her employment, or explain

to her how long the wage subsidy payments would continue for. He did not explain to her, as he did at the investigation meeting, that he wanted Ms Matajod to use some of her annual leave to pay/meet 20% of the agreed 29 hours/week, so that this would free up more of the wage subsidy money he had received in respect of her employment to subsidise the payments he was making to the higher-waged chefs. And later, when he put forward a redundancy proposal together with an alternative offer of employment at a lesser number of hours, he did not explain to her fully that he intended to pay a guaranteed minimum of 20 hours per week despite providing her with an employment agreement labelled as “casual”.

[125] I also have concerns that Mr Stokes did not give Ms Matajod a reasonable opportunity to respond to the redundancy proposal that he first put to her by email on 16 May 2020, before emailing her conveying his decision to terminate her employment six days later on 22 May 2020.

[126] At the time, it seems that Mr Stokes was frustrated by Ms Matajod’s pointed questioning about the hours she would be paid, and by her protesting about Mr Stokes’ unilateral decision to reduce her pay to 20 hours per week, which she became aware of on 7 May 2020, after it had already been implemented through the payroll system.

[127] It seems that Mr Stokes was relying on the all-hands meeting he (and Ms Deerai) had with Ms Matajod and other staff on about 25 April where the prospect of a further reduction in hours and the switch to new casual contracts was put forward. However, this meeting was only sufficient to raise the idea of further changes, and was not sufficient to obtain Ms Matajod’s proper feedback or consent to changes that would affect her personally. This is especially so given that Ms Matajod is a second-language speaker. In addition, it is plain from the email correspondence (as well as the oral evidence of Mr Stokes and Ms Deerai) that Mr Stokes continued to refine his thinking after this meeting in consultation with Ms Deerai, as indicated in his email to Ms Matajod on 12 May 2020, where he said: “I’m reviewing things with Jum tonight/tomorrow morning and will send you options tomorrow.”

[128] Ms Matajod was disadvantaged in that she was never given an opportunity to talk through the proposal to either make her position redundant or to reduce her hours and pay to a minimum guaranteed payment of 20 hours per week with Mr Stokes and Ms Deerai on a one-to-one basis. This would have provided an opportunity for both sides to fully understand each

other's position, and if this had occurred, might have led to a different outcome, although this remains speculative, especially in light of Ms Matajod's written rejection of Mr Stokes' proposal and her desire to not accept a pay reduction below 29 hours per week.

[129] Despite the difficulties facing the respondent, when considering all the circumstances at the time, the decision to dismiss was unjustified¹¹.

[130] For completeness, I note that the respondent has argued that it provided sufficient information to Ms Matajod during the redundancy process, and that it was not obliged to provide sensitive financial information to her as part of the redundancy process because she also worked for a competitor. I have already found that there were various steps the respondent and Mr Stokes could have taken which would have allowed the respondent to meet its obligations under the Act, which would not have required the inappropriate disclosure of "sensitive" financial information, so this submission has no weight.

[131] As a result of the applicant's unjustified dismissal, she becomes entitled to claim remedies including lost remuneration, and compensation payments for humiliation, loss of dignity, and injury to feelings.

Lost Remuneration

[132] The applicant was dismissed on 22 May, and I have already made findings awarding two weeks' notice above. Ms Matajod suffered a car accident on 26 July, which rendered her unable to work for some time. Discounting the two week notice period, this is a period of some seven weeks for which Ms Matajod is able to claim lost remuneration.

[133] Section 128 of the Act provides that where an employee has lost remuneration as a result of a personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

[134] Ms Matajod has effectively lost seven weeks wages, once the notice period already awarded, and the date of her accident, are taken into account. Seven weeks lost wages amounts

¹¹ The Court of Appeal has held that in a redundancy situation, "the decision to dismiss was in breach of s 103A and therefore unjustified. The fact that it was not a decision used as a pretext to remove an unwanted employee (and, therefore, "genuine") did not alter the fact that s 103A was breached." *Ibid*, at [105].

to \$3,857.00 (when calculated at the rate of \$551 per week, which is 29 hours per week at \$19 per hour).

[135] Ms Matajod advises that she was unable to obtain other employment in the nine week period between the ending of her employment with the respondent, but was able to increase her hours at her other job. She advises this amounted to a mitigation of loss of \$177.57 per week over nine weeks, which amounts to \$1,598.13. This sum is to be deducted from any lost wages awarded.

[136] When Ms Matajod's additional earnings of \$1,598.13 are taken into account, this amounts to \$2,258.87 in lost wages. Annual leave entitlements on this sum calculated at the rate of 8%, being \$180.71, are also awarded.

Lost ACC Payments

[137] Ms Matajod has also claimed for what she says is a lower rate of ACC compensation as a result of her dismissal, for a four-week period following her accident¹². This is effectively a claim under section 123(1)(c)(ii) of the Act, for compensation for:

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.

[138] This claim is made on the ground that, immediately prior to accident, Ms Matajod should have been earning an average weekly amount of \$698.25 from her employment with the respondent, based on average weekly hours of 36.75, at an hourly rate of \$19.00.

[139] This in turn is based on the assumptions that (a) Ms Matajod would have continued to work 36.75 hours per week for the respondent uninterrupted up until the date of her accident, and (b) that there would have been no lawful changes affecting this such as an agreed reduction in her hours of work, or a lawful redundancy occurring.

[140] I have already found that Ms Matajod's hours had been reduced to 29 hours per week prior to her dismissal, rather than the 36.75 hours per week this claim is based on. It is also clear that Mr Stokes was proposing a further reduction in hours to 20 hours per week. And, the wage subsidy on which the respondent had been relying was due to expire. During this time, Ms Matajod also sought and was granted additional hours at her second job, which is another change in her hours of work and source of income.

[141] In these circumstances, the claim that, at the point of her accident, Ms Matajod would have been working 36.75 hours per week for the respondent but for her dismissal alone, is highly speculative, and cannot be properly established. It is not clear that Ms Matajod might reasonably have been expected to have returned to working 36.75 hours per week for the respondent if the personal grievance had not arisen.

[142] For this reason, I find that the claim for loss of ACC compensation is not made out.

¹² This is based on the usual 12 week compensatory period, plus Ms Matajod's claim for two weeks reasonable notice.

Hurt & Humiliation

[143] Section 123(1)(c)(i) provides that where an employee has a personal grievance, one of the remedies available is compensation for humiliation, loss of dignity, and injury to the feelings of the employee.

[144] In her evidence at the investigation meeting, Ms Matajod explained that her dismissal had impacted on her quality of life, and her ability to trust others. Most importantly, Ms Matajod explained that she had built strong relationships with other staff who worked with her, and particularly with Ms Deera and Mr Stokes. Ms Deera and Ms Matajod had much in common, as they discovered they had similar experiences in Thailand before coming to New Zealand, and Mr Stokes had often assisted Ms Matajod by driving her home on occasions when she had needed to work late. These relationships had not survived the ending of her employment. Ms Matajod's partner also gave evidence that he had witnessed changes in Ms Matajod following the ending of her employment, including her losing energy and interest in her usual activities and hobbies, and the impact this had on her health and their relationship.

[145] In contrast, the respondent submits that the applicant's contribution "exceeds the remedies she has sought¹³", and that section 124 of the Act must be applied. Section 124 of the Act states:

the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[146] Specifically, the respondent refers to Ms Matajod's statement at the investigation meeting that, although she took steps to increase her hours at her existing second job, she did not actively look for other employment leading up to her accident, on the grounds that she had asked around, and knew that hospitality businesses were not hiring at that time. The respondent also submits that it offered Ms Matajod a guaranteed payment of 20 hours per week. Looking at the figures provided by Ms Matajod, it appears that the respondent is arguing that if she had

¹³ Paragraph 32 of the respondent's submissions.

continued working for the respondent, she would have lost nine hours work per week (being the difference between the agreed 29 hours per week, and the proposed 20 hours per week), and if she had accepted this and also increased her hours of work at her second job as she did, then these increased hours at her second job would have matched the lost nine hours per week from the respondent almost exactly in monetary terms.

[147] As I have already found, the respondent never properly put its proposal to pay a guaranteed minimum of 20 hours per week to Ms Matajod, so this is not a straightforward comparison. However, some weight needs to be given to the fact that Ms Matajod understood that the business was not in a position to continue providing her with the 36 or more hours per week of work that she had enjoyed prior to lockdown, and when Mr Stokes wrote to her about changing the terms of her employment agreement, she put forward an active counter-proposal where she indicated that she wanted to continue her employment at a minimum of 29 hours per week, which was not something Mr Stokes was willing to agree to.

[148] The impacts on Ms Matajod of her dismissal were real, and need to be recognised. Standing back and looking at all the circumstances leading up to the ending of her employment, a compensatory payment of \$5,000 is a reasonable award.

[149] In addition, the respondent submits that, if any substantial award is made against the respondent, there is a risk that the respondent will not be able to meet such an award. The respondent has not provided any financial information to the Authority in support of this submission, and accordingly, I am not able to give it weight. Neither is it a relevant factor in determining what a fair award to Ms Matajod might be¹⁴.

Orders

[150] Accordingly, Ms Matajod is owed the following amounts.

[151] An award for short-paid wages, being:

- a. \$513 gross, for pay of 27 hours at \$19 per hour;
- b. \$41.04, being 8% holiday pay on this amount.

¹⁴ See *Innovative Landscapes (2015) Ltd v Popkin*, [2020] NZEmpC 40.

[152] An award for short-paid notice, being:

- a. \$393.57 gross, plus a further 8% holiday pay, being \$31.48, for the first week's notice that was underpaid; and
- b. \$551.00 gross, plus a further 8% holiday pay, being \$44.08, for a further week's reasonable notice.

[153] An award for annual leave owing, being:

- a. \$2,201.89 (made up of entitled and untaken annual leave of \$1,467.73, plus a further sum of \$734.16 at the rate of 8% of gross earnings for the time from the applicant's anniversary date through to the ending of her employment.)

[154] An award for unworked public holidays, being:

- a. \$135.98 gross for Queen's Birthday 2019;
- b. \$139.65 gross for Canterbury Anniversary 2019; and
- c. \$139.65 gross for Waitangi Day 2020; and
- d. \$33.22 gross being 8% holiday pay on this amount.

[155] Compensation for seven weeks lost remuneration, being:

- a. \$2,258.87 gross in lost wages.
- b. \$180.71 gross, being 8% holiday pay on this amount.

[156] An award for interest in accordance with the Money Claims Act 2016, in the sum of \$106.72, up to the date of this determination, and continuing on all outstanding sums until paid in accordance with the Civil Debt Calculator.

[157] An award for compensation for hurt and humiliation, in the sum of \$5,000 without deduction.

Costs

[158] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[159] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter.

[160] From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum.

[161] Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[162] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹⁵

Claire English
Member of the Employment Relations Authority

¹⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].