IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 108
3083975

BETWEEN	LESLEY JOY BURKE Applicant
AND	CHARLOTTE JEAN MATERNITY HOSPITAL LTD Respondent

Member of Authority:	Philip Cheyne
Representatives:	Thomas Hiddlestone, advocate for the Applicant Roger O'Brien, advocate for the Respondent
Investigation Meeting:	8 December 2020 at Alexandra
Submissions Received:	22 December 2020 from the Applicant 16 December 2020 from the Respondent
Date of Determination:	17 March 2021

DETERMINATION OF THE AUTHORITY

A. I reserve the claim for arrears for further consideration, in accordance with the timetable set below.

B. Charlotte Jean Maternity Hospital Limited is to pay a penalty of $750.00 for breaching section 52 of the Holidays Act 2003, with $250.00 payable to Lesley Joy Burke; and $500.00 payable to the Authority to be paid into a Crown Bank Account. These amounts are payable on or after 19 April 2021.

C. Charlotte Jean Maternity Hospital Limited is to pay a penalty of $1,125.00 for breaching section 56 of the Holidays Act 2003, with $375.00 payable to Lesley Joy Burke; and $750.00 payable to the

Authority to be paid into a Crown Bank Account. These amounts are payable on or after 19 April 2021.

D. All other claims are dismissed.

Employment relationship problem

[1] Lesley Burke worked for Charlotte Jean Maternity Hospital Limited from 19 October 2016 until 8 May 2019.

[2] The company (CJMH) owns and operates Charlotte Jean Maternity Hospital. Roger O'Brien and Susan O'Brien are the company's directors. CJMH employed Ms Burke as a registered midwife in the position of clinical team leader. There is a written employment agreement under which it is a 0.8 FTE salaried position. The agreement set hours and days of work and also required Ms Burke to be on-call.

[3] Solicitors acting for Ms Burke wrote to CJMH on 15 August 2019 regarding a personal grievance. The on-call requirement was said to be an availability provision but without compensation for Ms Burke making herself available to perform work. Claims under the Holidays Act 2003 (HA) were also foreshadowed and information was sought. CJMH replied, providing information but declining consent for a grievance to be raised out of time.

[4] On 10 December 2019, Ms Burke lodged an application with the Authority. The application describes Ms Burke's problems as her being unjustifiably disadvantaged by CJMH's failure to compensate her availability while on-call and CJMH not complying with obligations under the HA. To resolve these problems, Ms Burke seeks compensation for her availability while on-call plus interest. Payment for public holidays, alternative holidays, annual leave and interest is sought. Ms Burke also seeks penalties for each breach of the HA, with penalties (all or part) paid to her. Costs are claimed.

[5] In reply, CJMH says that it does not consent to a personal grievance being raised out of time. It also says that the alleged grievance under s 103(1)(b) is excluded by effect of s 103(3) of the Employment Relations Act 2000 (ERA). CJMH disputes the arrears and penalty claims, acknowledges errors during the employment but says that there was an overpayment of $727.30 to Ms Burke if everything is calculated correctly.

[6] Prior to the investigation meeting, Ms Burke lodged details of an arrears claim together with details of the HA claims. The arrears claim is for an on-call allowance of $3.00 per hour for on-call time (not including rostered shifts and leave). $20,728.65 is claimed. The HA claim is for $674.97 after allowing for acknowledged overpayments.

[7] Ms Burke gave evidence about what caused her resignation. No grievance was raised about these matters, so it is not necessary to canvass them.

[8] The following issues arise:

(a) What were the terms and conditions of employment?

(b) Was the on-call personal grievance claim raised within time?

(c) If it was, what remedies are established?

(d) Is Ms Burke entitled to an on-call allowance?

(e) What leave was taken during the employment?

(f) Did CJMH comply with public holiday entitlements?

(g) Did CJMH comply with annual holiday entitlements?

(h) What if any arrears are due: sick leave; annual leave; working on Public Holidays; final holiday pay; alternative days?

(i) What if any penalty should be recovered?

What were the terms and conditions of employment?

[9] It is helpful to refer to provisions from the agreement and explain work arrangements.

[10] CJMH is a 4 bed primary maternity facility in Alexandra. It is open when there are in-patients, about 75% of the time. When not open, it would be unoccupied and unstaffed. CJMH employs registered nurses (RNs) and midwives who are rostered on-call. They support lead maternity carer midwives (LMCs) who are independent self-employed midwives. CJMH's employed RNs and midwives are generally casual employees, so are not paid (except for an on-call allowance) when CJMH is not open.

When an RN is on shift, CJMH is required to have a midwife on-call. The on-call midwife role had been provided by local LMC midwives or CJMH's casual employees.

[11] CJMH employed Ms Burke in a salaried position to cover three roles: rostered facility shifts, on-call midwife cover for the facility and clinical leadership. The position and duties are set out in an employment agreement and job description.

[12] Ms Burke's position was clinical team leader (CTL). The position required her to be in Alexandra to work over 8 continuous days, followed by 6 continuous days off. Ms Burke did not normally live in Alexandra during her days off. It was described at a 0.8 position.

[13] During the 8 day work period, Ms Burke was the on-call midwife. That role involved providing support as requested by LMC midwives or CJMH staff in an emergency situation or where extra support/experience was required. The number of calls to the on-call midwife was described as "minimal" and was not expected to change. On-call status involved being contactable by the employer and readily available for work within approximately 30 minutes.

[14] Ms Burke was rostered to on-call shifts usually of 12.25 hours during her 8 day period of work. Ms Burke and CJMH were to agree the number of shifts to achieve a sustainable balance between the CTL work and shifts, with Ms Burke rostered up to 6 shifts over the 8 days. It was anticipated that Ms Burke might be called in to work 3 or 4 of the on-call shifts. If not called in to work during a rostered on-call shift, Ms Burke was expected to work 8 hours during the day on CTL duties or other work assigned by the quality co-ordinator. Ms Burke was not expected to work more than 72 hours over the 8 day work period.

[15] Ms Burke referred to being on-site and working for "64-72" hours. 64 hours equates to .8 of a fulltime 40 hour position. However, the agreement set 72 hours as the maximum expected hours over the 8 day working period. Ms Burke's evidence is that she generally included call-outs and work as a lactation consultant within her "64-72" working hours.

[16] The annual salary was set at $72,290.00, paid monthly on the first week day of the following month. Clause 8 also said “An extra $2000 per annum shall be paid for any work carried out on public holidays as described in section 9”.

[17] Clause 9 provided:

> 9. Public Holidays
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> The employee shall be paid a bulk amount of $2000 per annum as payment for any work carried out on public holidays that may fall in the 8 day work period and on which the employee is required to work. If the hospital is not open on the public holiday then the employee is not required to work.
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> The $2000 payment will be made at the end of the year.

[18] The agreement set notice of termination at 3 months, subject to less notice by agreement. Ms Burke gave written notice on 8 March 2019 to be effective on 8 May 2019. I take CJMH as having consented to this period of notice.

Was a personal grievance claim raised within time?

[19] Ms Burke finished work on 8 May 2019.

[20] There were some email exchanges with Mr O’Brien on several points. On 18 May, Ms Burke queried her pay and asked for a payslip. The issue was the proportion of the last month due to Ms Burke. Mr O’Brien had paid 8 days out of a 31 day month, while Ms Burke considered she should have been paid for 14 days out of the 31 day month. The difference was whether the employment was treated as ending on Ms Burke’s last day of work, or at the end of her standard roster pattern including rostered days off. Mr O’Brien replied on 20 May and said MJMH would pay the higher amount.

[21] On 27 May Ms Burke emailed Mr O’Brien to ask about tax on the value of the accommodation which had been provided. It had been discussed before Ms Burke resigned. Mr O’Brien replied on 28 May. Mr O’Brien referred to the treatment of the value of accommodation for income tax purposes, as per CJMH’s accountant’s advice. Ms Burke detailed her concern in a further email on 1 June and referred to clause 21 in her employment agreement about resolving employment relationship problems. Mr O’Brien replied on 4 June. CJMH again outlined its tax treatment of the supplied accommodation, done in accordance with its accountant’s advice. However, CJMH offered to participate in mediation on the issue.

[22] Ms Burke's evidence is that CJMH never informed her or negotiated with her over its tax treatment of the accommodation it supplied under the employment agreement. However, there is no action before the Authority over this matter.

[23] The above communications did not refer to any issue over the on-call requirement, whether the employment agreement included an availability provision, compensation for being on-call, a personal grievance or ss 67D and 103(1)(h) of the ERA. Those issues were first raised with CJMH on 15 August 2019.

[24] The action alleged to amount to a personal grievance on 15 August 2019 was the requirement to be on-call under the employment agreement. The on-call requirement ended on 8 May. The personal grievance claim was not raised within the time set by s 114(1) of the ERA. If the action alleged to amount to a personal grievance was employment under an agreement that did not comply with s 67D of the ERA, and the date the agreement was terminated was taken as 14 May (the end of the roster cycle), the personal grievance claim would still be out of time.

[25] CJMH did not expressly or impliedly consent to the personal grievance claim being raised after the expiration of that time. There is no application for leave to raise the personal grievance claim out of time.

[26] The statement of problem says that Ms Burke was not aware of her entitlement to compensation for an availability provision until she sought legal advice after her employment had ended. I assume that this would have been some time shortly before the 15 August letter. I do not accept that the time for raising a grievance under s 114 of the ERA started when legal advice was obtained about a right to compensation for an availability provision. The time starts when the action alleged to amount to a personal grievance occurs or comes to the employee's notice (whichever is later), not when legal advice about the potential consequences of the action is obtained. The action here was the requirement to be on-call without payment additional to the salary.

[27] In the absence of a personal grievance claim, it is not necessary to consider whether the on-call requirement was an availability provision, whether it was in accordance with s 67D of the ERA or whether Mr Burke was disadvantaged by any non-compliance. Personal grievance remedies such as compensation or reimbursement under s 123 of the ERA do not arise.

[28] This part of the claim must fail.

Is Ms Burke entitled to an on-call allowance?

[29] The employment agreement set the annual salary at $72,290.00. There was a further payment of $2,000.00 per annum in relation to public holidays.

[30] Ms Burke's statement of problem refers to a payment of $3.00 per hour made to other CJMH employees when on-call. Mr Hiddlestone lodged calculations in relation to the arrears of wages claims following a case management conference. The calculations exclude time on annual leave, study leave, sick leave, rostered days off and rostered shifts, leaving 6909.05 hours on-call over the 32 months of the employment. Ms Burke claims $3.00 per hour, so $20,728.65 in arrears.

[31] To the extent that this is a claim for compensation as a remedy under s 123 of the ERA, it cannot succeed for the reason given above.

[32] Alternatively, it could be a claim for arrears of $20,728.65 under s 131 of the ERA. To paraphrase, the section entitles an employee, by an action in the Authority, to recover wages (or other money payable) where there has been a default in payment under an employment agreement or where payment has been made at a rate lower than that legally payable.

[33] Here, Ms Burke's employment agreement did not provide a payment other than the salary for being on-call. The $3.00 per hour payable to other CJMH employees under their individual agreements was not legally payable to Ms Burke. There is no other basis on which $3.00 per hour was argued to be legally payable to Ms Burke.

[34] Ms Burke provided two sheets as a record of call-outs when she was on-call and additional on-call time. There is a response from CJMH accepting or disputing the information, line by line. The response has been compiled from sources including desk diaries. Ms Burke has not had access to that information. However, it is not necessary to resolve any disputes about additional on-call time or what would amount to a call-out while on-call. Ms Burke's employment agreement did not include a right to payment in addition to the salary for work performed as a result of a call-out.

[35] This part of the claim must be dismissed.

What leave was taken during the employment?

[36] There are timesheets completed by Ms Burke and a wagebook and leave/holiday records completed by CJMH. These records show Ms Burke started work on 19 October 2016. Ms Burke was paid a twelfth of the annual salary each month. However, the first month's payment was based on the proportion of the month worked (including rostered days off) from 19 October 2016. For July 2017, there was an extra payment of $1,568.75 for an extra period on-call. The May 2019 payments reflected the proportion of the month worked, including rostered days off.

[37] The leave and holiday record show that Ms Burke was paid sick leave (1 day in advance) for 1 December 2016, sick leave for 3 May 2017, sick leave for 1 August 2017, sick leave for 7 & 8 February 2018, sick leave (5 days due and 2 days in advance) for 19 – 15 April 2018, sick leave (8 days in advance) for 16 – 23 October 2018, and sick leave (in advance) for 6 & 7 April 2019. When Ms Burke finished her sick leave balance was recorded at -6.6 days.

[38] The records show annual leave (in advance) for 5 – 12 April[1] 2017, annual leave (in advance) for 23 – 28 August 2017, annual leave (in advance) for 23 – 31 January 2018, annual leave (in advance) for 14 & 24 March 2018, annual leave (in advance) for 22 – 29 August 2018, annual leave (in advance) for 14 & 15[2] November 2018, annual leave (in advance) for 12 & 13 March 2019, and annual leave (in advance) 20 – 27[3] March 2019. The 16 day entitlement was added in October 2017 and October 2018. The part-year from October 2018 to May 2019 was show as an entitlement of 9.3 days, or 16 days times 7 months worked divided by 12 months for the year. There was an annual leave balance of -4.7 days at the end.

[39] CJMH paid Ms Burke's final pay, without deduction for the additional sick leave and annual leave recorded as having been granted during the employment.

[40] Ms Burke's evidence is that she did apply for leave in advance.[4] While there is no reason to doubt that evidence, the claim is for arrears. I must assess whether there

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[1] The date is shown as "5-12/8/2017" in the record but Ms Burke has marked 5-12 as "AL" in her April timesheet. I treat the date in the leave record as a typographical error.
[2] I rely on the timesheet for the dates. The leave record shows "13-15/11/18 – 2 days".
[3] I rely on the timesheet for the dates. The leave record shows "20-28/3/19".
[4] Sections 20 and 63 of the HA permit the employer to allow an employee to take an agreed portion of annual leave and sick leave in advance.

was a shortfall in payments that were due. As part of that assessment, I will have regard to the payments that were made.

Did CJMH comply with public holiday entitlements?

[41] Under s 6 of the HA, each entitlement in the Act is a minimum entitlement. If an agreement excludes, restricts or reduces an entitlement, the agreement is of no effect to that extent.

[42] Clause 9 of the employment agreement provided a payment of $2,000.00 per annum to cover work on public holidays. It reflected a discussion between Ms Burke and CJMH prior to the agreement.[5] Ms Burke was paid $400.00 at the end of 2016 for the part-year from 19 October to 31 December 2016. $2,000.00 was paid at the end of 2017 and the end of 2018. $734.24 was paid at the end of the employment for the 2019 part-year. I need to assess whether the application of the agreement had the effect of excluding, restricting or reducing public holiday entitlements.

[43] The following public holidays fell on days that were Ms Burke's rostered days off so were not working days: Christmas day 2016; 6 February 2017; 23 March 2017; 14 & 17 April 2017; 6 February 2018; 30 March 2018, 2 April 2018; 25 December 2018; 25 April 2019. Under s 48 of the HA, when a public holiday falls on a day that would not otherwise be a working day, the Act is complied with if the employee does not work that day. CJMH complied with the HA for these days.

[44] The following public holidays fell on days that would otherwise be working days for Ms Burke and on which Ms Burke worked as shown: 24 October 2016 (12 hours); 1 January 2017 (12 hours); 2 January 2017 – 0 hours; 25 April 2017 (12 hours); 5 June 2017 (10.25 hours); 23 October 2017 (12.25 hours); 25 December 2017 (8.25 hours); 26 December 2017 (0 hours); 1 January 2018 (11 hours); 2 January 2018 (4.5 hours); 26 March 2018 (9.5 hours); 25 April 2018 (sick leave); 4 June 2018 (7 hours); 22 October 2018 (sick leave); 26 December 2018 (0 hours); 1 & 2 January 2019 (0 hours); 6 February 2019 (0 hours); 25 March 2019 (annual leave); 19 April 2019 (0 hours); 22 April 2019 (12.25 hours).

[5] They may have been partly at cross purposes. Ms Burke would have been referring to the payment she received for working on public holidays in her previous job without taking account of alternative days. Mr O'Brien may have thought the discussion was about the cash value inclusive of alternative days. It is not necessary to resolve the point, given the effect of s 6 of the Holidays Act 2003.

[45] Under s 48 of the HA, when a public holiday falls on a day that would otherwise be a working day, there are two ways to comply with the Act. First, compliance is achieved if the employee does not work that day but the employee is paid is accordance with s 49 of the HA. Ms Burke did not work on but was paid for 2 January 2017, 26 December 2017, 26 December 2018, 1 & 2 January 2019, 6 February 2019 and 19 April 2019. CJMH complied with the HA for these days.

[46] The second way of complying with the HA if the employee works on any part of the day, is for the employee to be paid in accordance with s 50 of the HA and to be provided an alternative holiday under s 56 of the HA.

[47] Ms Burke worked on and was entitled to an alternative holiday for 24 October 2016, 1 January 2017, 25 April 2017, 5 June 2017, 23 October 2017, 25 December 2017, 1 & 2 January 2018, 26 March 2018, 4 June 2018 and 22 April 2019. That is 11 alternative holidays. Alternative holidays not taken during the employment must be paid in the final holiday pay.[6] I return to this matter later.

[48] Ms Burke worked a total of 111 hours on these days, received normal salary but was entitled to be paid half time extra for the time worked. I return to this matter later.

[49] On 25 April 2018 and 22 October 2018, Ms Burke was sick. Under s 61A of the HA, Ms Burke was entitled to be paid as a public holiday not worked in accordance with s 49 of the HA, but without the day being treated as sick leave. CJMH recorded these two days as sick leave, so they were part of the negative sick leave balance shown when the employment ended. However, CJMH complied with the HA by paying Ms Burke her salary without deduction.

[50] Ms Burke was on annual leave for 25 March 2019, Otago Anniversary Day. Under s 40 of the HA, a public holiday that occurs during an employee's annual leave must be treated as a public holiday and not as part of the employee's annual leave. However, CJMH recorded 25 March as an annual leave day and it contributed to the negative balance recorded at the end of the employment. I return to the point later.

[51] Ms Burke was on-call but not called to work on the following days: 2 January 2017, 26 December 2018, 1 & 2 January 2019, and 19 April 2019. Section 59(3) of

[6] Section 60(2)(b) of the Holidays Act 2003.

the HA provides that if an employee is on-call and is not called in to work, they are entitled to an alternative holiday if the nature of the restriction imposed by the on-call condition on their freedom of action is such, that for all practical purposes, they have not had a whole holiday.

[52] Under the employment agreement Ms Burke had to be contactable and "readily available for work within approximately 30 minutes". The job description gives more detail of the "on-call midwifery support". Ms Burke had to provide urgent antenatal assessment to mothers who are without or are unable to contact their LMC. Ms Burke had to provide midwifery support to LMC midwives during labour and birth. Ms Burke had to provide postnatal midwifery assessment and care if the LMC was not able to visit or nursing staff required additional support.

[53] Ms Burke's evidence, which I accept, is that there was no phone in the supplied accommodation. CJMH offered Ms Burke a mobile phone but she preferred to use her own phone. Ms Burke gave evidence that a family meal, other family arrangements and a visit to a movie with a friend were interrupted by call-outs. Ms Burke did not identify these interruptions as having been on public holidays. Mr O'Brien's evidence, which I accept, is that Ms Burke sometimes sought greater flexibility when she was on-call. For example, Ms Burke several times went to Wanaka, more than 30 minutes away from Alexandra. I accept that there was some flexibility about the arrangement. Mr O'Brien's evidence was not specifically about arrangements on public holidays.

[54] For present purposes, the restriction on Ms Burke's enjoyment of a whole holiday was the possibility of having to respond while on-call and holding herself in a position of being able to do so in accordance with her midwifery professional obligations. Of the 30 public holidays during her employment, 16 fell on Ms Burke's working days. Ms Burke had to respond to an on-call situation on 11 days and was not called on 5 days.

[55] *O'Brien (Labour Inspector) v Guardian Alarms (Auckland) Ltd*[7] is a case that predates s 59(3) of the HA. There, to cover on-call, the employee had to carry a pager after business hours, remain within range (within an hour's drive of Auckland CBD) and turn-out to a client's premises within 2 hours if called. This was to meet the

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[7] [1995] 2 ERNZ 170.

employer's contractual obligation to clients. The employee had been called twice in 3 years. The Court considered that there might be situations where the restriction on the employee's freedom of action will be so great that it can be said, for all practical purposes, that the employee has not had a whole holiday because of the requirement to be ready, willing and able to return to work. However, the Act guaranteed a holiday on pay. In the circumstances of that case, the employee had received whole holidays on pay.

[56] In *Rail and Maritime Transport Union Inc v North Tugz Limited*[8] the Employment Relations Authority applied s 59(3) of the Holidays Act 2003. A collective agreement included the expectation that employees were contactable at all times, but those unavailable for work were expected to notify the company of their absence. Employees required and available for work were expected to remain within one hour of the port when vessels were in port. Staff had to be contactable by mobile phone. The agreement stated that permanent employee's available but not required to work on a public holiday would be paid their daily engagement rate but would not be paid a "day in lieu". The Authority noted that the "blanket exclusion" in the collective agreement was contrary to law. Since s 59(3) of the HA came into effect, there had been three public holidays with no shipping movements and therefore no work. For two days of those days, employees had advance notification so had been granted the whole holiday on pay. On the third day, the shipping movement scheduled for 8pm was cancelled at 8.30am and employee were advised. At [40] the Authority said:

> Section 59 (3) does not provide that all on-call situations will require the giving of a day in lieu. It clearly allows for a degree of restriction upon an employee's freedom of action. A degree of restriction is an inherent part of being on-call. A person who is on-call will need to be:
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> - Able to be contacted, therefore will need to be within cell phone or pager reach;
> - Will need to be able to access the location where the on-call work is to be carried out within the appropriate period of time;
> - Is unlikely to be able to consume alcohol.

[57] *New Zealand Police Association v Commissioner of Police*[9] involved issues about whether a collective agreement complied with the Holidays Act 2003 that had been removed to the Employment Court. One issue was whether requirements to respond on-call immediately or within 15 minutes were so restrictive that the

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[8] AA 201/07, 3 July 2007 CHECK CITE
[9] [2005] ERNZ 1021.

employee could not be said to have had a whole holiday, so affected employees became entitled to an alternative holiday. However, when matters were before the Full Court, the employer conceded that both categories of on-call employees were entitled to (and had been granted) an alternative holiday. The Court was not required to make a decision.

[58] The restrictions on Ms Burke were significantly greater that in the *Guardian Alarms* case. Hindsight allows the conclusion that Ms Burke was much more likely to be called than the employee in that case. The restrictions on Ms Burke were greater than on the employees in the *North Tugz* case. Ms Burke did not have the benefit of notice early in the day that she would not be required. The response time for Ms Burke was longer than in the *Commissioner of Police* case, but she had to hold herself ready to respond in a similar way. I conclude that, for all practical purposes, the restrictions imposed by the on-call condition on Ms Burke's freedom of action meant that she did not have a whole holiday. CJMH did not comply with s 59 of the HA. Ms Burke is entitled to 5 further alternative holidays, making a total of 16 alternative holidays.

Did CJMH comply with annual holiday entitlements?

[59] The employment agreement included an entitlement to 16 days annual leave equivalent to 4 weeks leave per year. That reflected the roster pattern of 8 on 6 off. Ms Burke became entitled to 16 days leave after 18 October 2017 and a further 16 days after 18 October 2019. The leave records and her timesheets show that Ms Burke took more annual leave, than became due. This matches Ms Burke's timesheets.

[60] Ms Burke was also entitled to 8% of her gross earnings from 19 October 2019 to the date the employment ended, less any amount paid for annual holidays taken in advance. CJMH considered that it had met its obligations regarding annual holiday entitlements, so no further payment was made.

[61] Subject to consideration below about arrears, CJMH complied with the statutory entitlements regarding annual holidays.

What if any arrears are due – sick leave?

[62] As explained, Ms Burke received 22 days sick leave during her employment. The sick leave provision in the agreement reflected the statutory entitlement. Often the leave was in advance. The balance of -6.6 days at the end of the employment must be adjusted to -4.6 days, in light of the incorrect treatment on 25 April and 22 October 2018.

[63] An employer must pay an amount equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave. Relevant daily pay, for the purposes of calculating sick leave, means the amount of pay the employee would have received had they worked the day in question.

[64] Generally, payment for sick leave must be included in the pay for that pay period when the leave was taken. The statutory exception has no present application.

[65] For each day of paid sick leave, CJMH paid Ms Burke the amount she would have received if she had worked on each of those days. The payment was part of the monthly salary payment.

[66] No arrears occurred regarding payment for sick leave.

What if any arrears are due – annual leave?

[67] The annual leave taken by Mrs Burke was always in advance. Calculation had to be in accordance with s 22 of the HA. The pay had to be at the greater of the ordinary weekly pay at the time or the employee's average weekly earnings for the 12 months immediately before the holiday, for the proportion of leave taken. For employment of a shorter duration, average weekly earnings was calculated using the period of employment up to the end of the pay period beforehand.

[68] Average weekly earnings means 1/52 of the employee's gross earnings. Gross earnings means payments required under the employment agreement, including salary and payments for annual holidays, public holidays and sick leave. The payments to Ms Burke under clause 9 of the agreement for public holidays fall within the definition.

[69] The payment in April 2017 for 8 days annual leave days should have been at the average weekly wage rate including the $400.00 payment in December 2016.

[70] The additional payment to Ms Burke in July 2017 also falls within the definition. The 8 days annual leave payment in August 2017 should have included the $400.00 and the $1,568.75 payments in the calculations.

[71] The 8 days annual leave payment in January 2018 should have included the December 2017 $2,000 payment and the $1,568.75 payments in the average weekly wage rate calculations.

[72] The 2 days annual leave in March 2018 should have included the $1,568.75 payment and the December 2017 $2,000.00 payment in the average weekly wage rate calculations.

[73] The 8 days annual leave in August 2018 and the 2 days in November 2018 should have included the December 2017 $2,000.00 payment in the average weekly wage rate calculations.

[74] The 10 days annual leave in March 2019 should have included the December 2018 $2,000.00 payment in the average weekly wage rate calculations.

[75] The effect of the incorrect rate was greatest for the January 2018 annual leave. The 8 days then covered a rostered fortnight, so equates to half the four weeks annual leave entitlement. A fortnight's base salary was approximately $2,780.00. A fortnight's average earnings (including the extra two payments) comes to $2,917.64. The shortfall would be $137 approximately. Calculating payment for annual leave in advance at average weekly earnings would generate a lower shortfall before the December 2017 payment and after the 1 August 2018 when the July payment no longer should have been counted.

[76] Ms Burke was recorded as taking 46 days annual leave during her employment. As explained above, one was Otago Anniversary. Recording that day as a public holiday, rather than annual leave reduces the leave taken to 45 days. That still leaves Ms Burke having taken more annual leave during the employment than was due to her. Payment for the additional leave exceeds the shortfall arising from paying the leave in advance at the rate of the ordinary weekly wage rather than the rate of the average weekly earnings.

[77] No arrears arise in respect of the annual leave taken during the employment.

What if any arrears are due – working on public holidays?

[78] As explained above, Ms Burke worked 111 hours on public holidays but was not paid half time extra for the time worked. That is the equivalent of 1.54 working fortnights. A fortnight salary amounted to $2,780.38. Half time extra at that rate across 1.54 fortnights totals $2,140.89.

[79] The holidays and therefore the entitlement to payment of the half time extra fell at different times after employment commenced, but CJMH paid the clause 9 payment in December 2016, December 2017, December 2018 and in May 2019. These payments totalled $5,134.24 (gross).

[80] Whether Ms Burke should have been at relevant daily pay or average daily pay under s 50 of the HA, CJMH's payments to Ms Burke under clause 9 exceeded the payments required under s 50 of the HA.

[81] No arrears arise in respect of the time worked on public holidays.

What if any arrears are due – final holiday pay

[82] Ms Burke's employment ended before she had become entitled to further annual holidays. Section 25 of the HA required CJMH to pay Ms Burke 8% of her gross earnings since her last entitlement (October 2018), less any amount paid to the employee for holidays taken in advance.

[83] Ms Burke received $54,824.87 (gross) in salary and clause 9 payments after 19 October 2018. 8% of Ms Burke's gross earnings is $4,385.99.

[84] As at May 2019 Ms Burke had a leave balance of -14 days. Adjusting for the inclusion of Otago Anniversary day as annual leave, 13 days annual leave had been taken in advance. 13 days at the relevant daily rate of $347.54 comes to $4,518.13 as the amount paid in advance by CJMH. As the amount paid for holidays taken in advance exceeded 8% of Ms Burke's gross earnings since she had last become entitled to annual holidays, there was no obligation under s 25 of the HA to pay an additional amount in final holiday pay.

What if any arrears are due – alternative holidays

[85] CJMH was required to provide Ms Burke with 16 alternative holidays for working on public holidays and for being on-call on other public holidays, as explained above. Under s 57 of the HA, alternative holidays must be taken on an agreed date, or on a date set reasonably by the employer if the parties cannot agree. However, CJMH did not provide Ms Burke with any alternative holidays during the employment.

[86] Payment for an alternative holiday must be made in the pay that relates to the employee's final period of employment, if the alternative holiday is not taken during the employment. Under s 60 of the HA, payment must be not less than the employee's relevant daily pay or average daily pay for their last day of employment. Section 9A of the HA permits the employer to use average daily pay if it is not possible or practicable to determine the employee's relevant daily pay under s 9(1). In the present case, it was practicable to calculate Ms Burke's relevant daily pay at the end of her employment.

[87] Taking $347.55 as the rate of relevant daily pay, Ms Burke was entitled under s 60 of the HA to receive a payment of $5,560.80 for alternative holidays.

[88] CJMH had paid Ms Burke $5,134.24 during the employment in reliance on clause 9 of the employment agreement. As the payments under clause 9 were an attempt to meet statutory entitlements regarding public holidays, the payments can be brought to account now in assessing whether there was a default in money payable to Ms Burke arising from those statutory entitlements. I note that $2,140.89 has already been attributed to the statutory obligation to pay half time extra. $2,993.35 is available to offset against the alternative holiday payment of $5,560.80 which should have be made with the final pay. $2,567.45 is the payment shortfall not accounted for.

[89] For Ms Burke, Mr Hiddlestone points to the s 9 of the HA definition of relevant daily pay as including the cash value of any board or lodgings provided by the employer to the employee. As earlier explained, CJMH provided accommodation without charge to Ms Burke which she used during the time she was rostered to work in Alexandra. To comply with income tax obligations, the accommodation was accorded a notional value, which was added to Ms Burke's salary for the purpose of calculating the PAYE deduction each month. The notional value was then deducted from the net paid to Ms Burke.

[90] Under the definition, relevant daily pay means the amount of pay the employee would have received had the employee worked on the day concerned, and includes the cash value and two other types of benefit which do not arise. I accept that the alternative days paid after the employment ended should take account of the fact that the benefit of the CJMH supplied accommodation ceased when the employment ended. By comparison, leave taken during the employment already included the cash value as the accommodation continued to be supplied.

[91] The 16 alternative days amounts to two roster fortnights. At $200.00 per week, it increases the payment shortfall by $800.00.

[92] Arrears totalling $3,367.45 in respect of alternative day entitlements have been established.

[93] Both parties take the approach that the payment of sick leave and annual leave, in excess of the statutory entitlements, should be brought to account. I accept that is appropriate. I will require CJMH to calculate the additional payments, taking account of the conclusions in this determination. CJMH should then provide those calculations to Mr Hiddlestone. If the residual arrears is agreed, I will order that sum to be paid. If it is not agreed, there will be a case management conference to discuss how best to resolve the remaining dispute.

[94] I am asked to order interest to be paid. Any shortfall should have been paid in the final pay. It is appropriate to compensate Ms Burke for the loss of the use of money which should have been paid. I will include interest in accordance with the statutory provision from the date of the final pay until the date of my order, if necessary.

What if any penalty should be recovered?

[95] The claim is for penalties for each breach of the Holidays Act 2003. The application was lodged in November 2019. I deal with each section in the order mentioned in the statement of problem.

[96] Section 52 provides that each employment agreement entered into after 1 April 2004 must include a provision that confirms the right of the employee to be paid in accordance with section 50 for working on a public holiday. The employment agreement between Ms Burke and CJMH did not. The employment agreement was

signed by CJMH in July 2016 and by Ms Burke in August 2016, before work commenced in October 2016. Although the cause of action first arose when the employment agreement was entered into, the non-compliance with s 52 continued until the end of the employment. The November 2019 claim is within the time provided by s 135 of the Employment Relations Act 2000 for the commencement of an action for a penalty. CJMH is liable for a penalty of up to $20,000.00 for that breach.

[97] Section 55 obliges an employer to pay an employee for a public holiday in the pay that relates to the pay period in which the holiday occurs. Any failure by CJMH regarding public holidays prior to November 2018 falls outside the time set in s 135 of the Employment Relations Act 2000. For the public holidays after November 2018, CJMH's monthly salary covered payment for the days which were otherwise ordinary working days for Ms Burke, so CJMH complied, to that extent. There was also an obligation to pay half time extra for the time worked. As explained above, CJMH exceeded its obligations to pay by making the payments under clause 9 of the employment agreement. Taking account of the December 2018 payment, CJMH effectively paid in advance of any of the public holidays from then until the end of the employment. CJMH either did not breach s 55 of the HA, or if payment in advance was seen as non-compliance with s 55, it would be breaches for which no penalty should be recovered.

[98] Regarding a penalty for breach of the obligation in s 50 of the HA to pay half time extra for work on a public holiday, I apply the same approach as above. Only the public holidays after November 2018 can be considered. For any work on those public holidays, CJMH exceeded its statutory obligation to pay half time extra by effect of the December 2018 clause 9 payment. CJMH did not breach s 50 of the Holidays Act; or if it did, it would be breaches for which no penalty should be recovered.

[99] If an employee is sick and does not work on a public holiday, that would otherwise have been a working day, s 61A of the HA requires the employer to treat it as a public holiday and not as sick leave. 25 April 2018 and 22 October 2018 are recorded as sick leave in CJMH's leave records. Two points emerge. If CJMH breached s 61A by marking these days as sick leave, it would be causes of action arising in April and October 2018. A claim in November 2019 would be outside the time allowed to commence a penalty claim. If I assumed they continued as causes of

action, based on the sick leave balance in the records taking account of 25 April 2018 and 22 October 2018 until the employment ended, that would bring any breach within time for an action for a penalty. The difficulty then is that it is a breach with no effect. Recording it as sick leave did not affect the payment to Ms Burke in April 2018 and in October 2018. It did not affect any payment to Ms Burke after that date. If 25 April 2018 and 22 October were properly treated as public holidays and the sick leave balance was reduced by a day in April and a day in October, Ms Burke still carried a negative sick leave balance because CJMH paid sick without limiting payment to the statutory entitlement. No penalty can or should be recovered in relation to s 61A of the HA.

[100] A public holiday that occurs during an employee's annual leave must be treated as a public holiday, not as part of the employee's annual holidays. CJMH paid Ms Burke for 25 March 2019, recording it as an annual leave day. I accept that this was in breach of s 40 of the HA. CJMH is liable for a penalty of up to $20,000.00 for that breach.

[101] There are penalty claims under s 56 and s 59 of the HA. Under s 56, an employer must provide an alternative holiday if an employee works on a public holiday when it falls on a day that would otherwise be a working day. The entitlement remains in force until the alternative holiday has been taken or paid. Under s 59 an employee on-call, but who has not in effect had a whole holiday, is entitled to an alternative holiday under s 56. I treat these two types of alternative day non-compliance as a breach of s 56. As explained above, there was an entitlement to 16 alternative days. CJMH partly discharged Ms Burke's alternative holiday entitlements by the clause 9 payments and allowing annual leave in advance. However, some of the entitlement was not met. CJMH breached s 56 of the HA to that extent. The breach can properly be understood as a single breach arising at the point that CJMH did not pay Ms Burke in accordance with s 61 of the HA. CJMH is liable for a penalty of up to $20,000.00 for the breach of s 56 of the HA.

[102] Ms Burke says that she was paid relevant daily pay rather than average daily pay for annual leave, in breach of s 21 of the HA. Section 21 of the HA has no application to the current mater. Ms Burke never took annual holidays after her entitlement had arisen. CJMH did not breach s 21 of the HA.

[103] In summary, I find that CJMH is liable for a penalty of up to $20,000.00 for breach of s 52 of the HA, up to $20,000.00 for breach of s 40 of the HA and up to $20,000.00 for breach of s 56 of the HA.

[104] I am required by s 133A of the Employment Relations Act 2000 to have regard to relevant matters, including those there set out. An object of the Act is to promote the enforcement of employment standards. The present matters involve employment standards, being minimum entitlements and payment for those under the Holidays Act 2000. No specific issue about inequality of power in the employment relationship arises.

[105] No issue about vulnerability arises. CJMH has not previously been found to have breached relevant Acts.

[106] The breach of s 52 of the HA arose from discussions between Ms Burke and CJMH about how to recognise, by a payment in the agreement, work on public holidays during rostered days on. CJMH produced the draft that did not comply with s 52, even though it reflected the discussion. I treat this as a low level of negligence rather than inadvertence as it was non-compliant with a statutory requirement. The breach had no substantive effect. CJMH fully met its statutory payment obligations. The circumstances call for a small penalty.

[107] The breach of s 40 is the incorrect recording of a public holiday as annual leave. It was inadvertent, rather than intentional or negligent. It had no effect on Ms Burke and caused her no loss. It was not known to her until leave and wage records were sought after the dispute arose. I treat it as an insignificant technical breach, in the present circumstances. No penalty is warranted. The present finding is sufficient as a penalty response.

[108] The breach of s 56 of the HA was negligent as CJMH did not recognise a statutory entitlement to alternative days. While I accept that the clause 9 payments can be brought to account in assessing arrears, there remained a shortfall. Ms Burke suffered a loss to that effect, reflecting the advantage to CJMH. This breach is also related the inclusion of clause 9 in the employment agreement, so is connected to the s 52 breach. However, the time and a half payment requirement is distinct from the alternative day requirements, so the breaches should not be globalised. The breach calls for a modestly higher penalty than the s 52 breach.

[109] Penalties at a low level are a sufficient deterrence in the present case. CJMH is very unlikely to put itself in the same position again. Nothing about the case calls for a more general deterrence. No limited ability to pay was raised by CJMH. I was not referred to any other cases in the Authority or the Court as comparators. There is no reason to think that penalties at a low level are inconsistent with other cases. Overall, CJMH's breaches are sufficiently recognised by setting penalties at a low level compared to the maximum liability at $40,000.

[110] I fix as a starting point a penalty of $2,000.00 for the breach of s 52 and a penalty of $3,000.00 for the breach of s 56. I bring to account CJMH's record as not having been found in breach of relevant Acts previously. I fix a reduction of 50% to recognise that. Penalties reduce to $1,000.00 and $1,500.00. I also take account of CJMH's payment of additional salary to Ms Burke when she raised a dispute about the final salary being paid to early May. In light of the notice given, that was a concession that it was not obliged to make, but was in an effort to avoid an ongoing dispute. I bring it to account by way of mitigating the effect of the breaches. However, no submission was made that it should have been set off against any arrears, so I limit its relevance to the mitigation point. I reduce the penalties by a further 25% to take it into account.

[111] I will fix a penalty of $750.00 for the breach of s 52 of the HA and a penalty of $1,125.00 for the breach of s 56 of the HA.

[112] Ms Burke seeks part or all of the penalty payable to her. There has been a breach of her statutory entitlements. The arrears component of that is already covered, together with interest on the arrears. The breach of statutory rights stands apart from that. It can be recognised by an order that one-third of each penalty be payable to Ms Burke.

Summary

[113] I will reserve the amount of arrears for further consideration. Within 14 days, CJMH is to provide submissions to Ms Burke (via Mr Hiddlestone), quantifying the sum of additional sick leave and additional annual holidays in advance that should be offset against the arears of $3,367.45. Ms Burke should respond to CJMH within a

further 14 days fixed holidays, setting out any disagreement. The parties are to advise the Authority by no later than 19 April whether there is agreement about the sum to be offset, or the matters remains unresolved. A case management conference will then be arranged.

[114] If an order is required fixing the arrears to be paid, there will also be an order requiring CJMH to pay interest on that sum, as indicated above.

[115] There will be penalties of $750.00 and $1,125.00, a third payable to Ms Burke and two-thirds payable to the crown.

[116] All other claims are dismissed.

[117] I will reserve costs. As I understood it, neither parties incurred the cost of a representative for the Authority's investigation, so could not claim a contribution to costs. If costs are an issue, it is not immediately apparently who should be regarded as the successful party. The major claims by Ms Burke did not succeed. However, CJMH did not comply with employment standards, leaving Ms Burke with a right to some remedy. Any issue about costs can be canvassed as part of a case management conference if necessary.

Philip Cheyne
Member of the Employment Relations Authority