

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 273  
3136486

BETWEEN                      TE RAKIAMOA BRENNAN  
Applicant

AND                              AOTEAROA FISHERIES  
LIMITED t/a MOANA NEW  
ZEALAND  
Respondent

Member of Authority:           Philip Cheyne

Representatives:                Anna Oberndorfer, advocate for the Applicant  
Penny Swarbrick, counsel for the Respondent

Investigation Meeting:         3 February 2022

Submissions Received:         11 February and 18 March 2022 from the Applicant  
11 March 2022 from the Respondent

Date of Determination:         27 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The determination has been issued outside the timeframe at s 174C(3)(b) of the Employment Relations Act 2000 in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

[2]     Aotearoa Fisheries Limited trades as Moana New Zealand (MNZ). Its operations include a fish processing plant in the Chatham Islands. MNZ employed Te Rakiamoa Brennan at its plant in the Chatham Islands. Mr Brennan was on leave in the South Island at the time New Zealand moved into a nationwide level 4 lockdown in March 2020. The Covid-19 Alert

level restrictions prevented Mr Brennan returning to the Chatham Islands, but MNZ's plant in the Chatham Islands was an essential service so work continued for other workers. Passenger flights to the Chatham Islands resumed in May 2020, after New Zealand moved to Level 2. However, Mr Brennan did not report to work.

[3] After earlier exchanges of correspondence, on 24 July 2020 MNZ advised that as Mr Brennan had not returned to work or made alternative arrangements, his employment should be terminated on the basis that he had failed to fulfil his contractual obligation to work. That date was recorded as Mr Brennan's last date of employment.

[4] Mr Brennan says he was unjustifiably dismissed by MNZ. Mr Brennan also says that he has an unjustified disadvantage personal grievance as a result of MNZ not paying his wages while he was absent from work, and by not including him as an employee for the purposes of its Covid-19 wage subsidy application. Remedies of compensation and reimbursement are sought for the personal grievances.

[5] Mr Brennan says that MNZ breach its statutory good faith obligations by not being active and constructive in maintaining a productive employment relationship. Penalties are claimed for the alleged breaches of good faith.

[6] Mr Brennan also says that MNZ breached the Holidays Act 2003 by not paying him for Queens Birthday 2020.

[7] MNZ says it justifiably dismissed and did not unjustifiably disadvantage Mr Brennan, complied with its good faith obligations and was not obliged to pay Mr Brennan for Queens Birthday.

[8] Despite mediation, matters were not resolved. This determination resolves Mr Brennan's employment relationship problems.

[9] Much of what happened is apparent from the messages and correspondence between the parties. It is useful to set out the substance of this before considering justification for the dismissal, whether Mr Brennan was unjustifiably disadvantaged, whether MNZ breached good

faith and is liable for a penalty and whether MNZ should have paid Mr Brennan for Queens Birthday 2020.

### **What happened – Mr Brennan’s leave**

[10] Mr Brennan worked as a casual employee for MNZ for some months. In January 2020 MNZ offered and Mr Brennan accepted a position as a Rock Lobster Depot assistant for 40 hours per week, commencing 20 January 2020. MNZ recognised that continuous service for service-related benefits ran from 17 August 2019. Terms and conditions were set out in the written employment agreement signed in January 2020.

[11] Pita Thomas was MNZ’s regional/area manager for Chatham Islands. There is a whānau relationship between Mr Thomas and Mr Brennan. He told Mr Brennan that a position was coming up and he should apply for it. Mr Brennan’s evidence, which I accept, is that he had been living at Mr Thomas’ accommodation while employed by MNZ as a casual but told Mr Thomas he wanted his own accommodation. Mr Brennan was interviewed and offered the position by Terry Gittings, the Operations Manager. However, before the date of the employment agreement, there were exchanges with Mr Thomas that he was talking to MNZ about a payment of \$150.00 per week to Mr Brennan for rent as “they pay \$100 ...”

[12] Clause 21 of the employment agreement states that the agreement represents a full record of the agreement between the parties. The terms of the agreement did not include any additional payment towards accommodation. Clause 5 stated that MNZ would “pay you the hourly rate and ... the benefits set out in Schedule 1”. Schedule 1 provided an hourly rate for 40 hours per week but did not include accommodation or any payment towards accommodation costs. Mr Brennan initialled the pages and signed the agreement dating it 16 January 2020.

[13] Mr Brennan was paid weekly thereafter but never received any accommodation payment. He did not raise any concern about not being paid extra for accommodation during the employment. While the possibility of an allowance was mentioned by Mr Thomas, the agreement did not include one. There is no basis now on which Mr Brennan can claim a contractual entitlement to payments other than those in the employment agreement.

[14] In March 2020 Mr Brennan learnt that his uncle was terminally ill with only a couple of weeks to live. On 20 March, Mr Brennan requested bereavement leave until 7 April so he could return to New Zealand to see his uncle and be with whānau. Mr Brennan's evidence is that Mr Thomas approved his leave request straight away. While there is no reason to doubt that evidence, Mr Thomas did not approve paid leave in excess of Mr Brennan's contractual (and statutory) entitlements.

[15] Mr Brennan's evidence is that he did not have a log-in for MNZ's on-line leave request system (ESS), despite having asked. However, in a message to Mr Thomas on 24 March, Mr Brennan said he was doing the ESS request from home. In a later message to Mr Brennan, Mr Thomas said he had asked him to do the ESS request from work. I take from the messages that Mr Thomas had requested Mr Brennan to complete the ESS request. If Mr Brennan was not able to do the ESS request because MNZ had not sorted out his log-in issue, he did not alert Mr Thomas to that problem. In any event, the ESS issue was not relevant to later events.

[16] Mr Brennan left the Chatham Islands on 24 March 2020. At 11.59pm on 25 March New Zealand moved to Alert Level 4, that intention having been announced at 1.30pm on 23 March. Messages between Mr Thomas and Mr Brennan on 23 March had referred to the possibility of lockdown.

[17] In messages on 24 March, Mr Brennan asked if MNZ was closing down and Mr Thomas said "Yep". Mr Thomas told Mr Brennan to apply for his annual leave and bereavement leave and Mr Brennan asked "if you guys shut down do we get our guaranteed hours?" Mr Thomas answered "Na" as MNZ was an essential service. He repeated that answer when it was queried by Mr Brennan.

[18] Mr Thomas messaged Mr Brennan on 27 March to say that "HR" was "very angry" as Mr Brennan had not done his ESS leave request. In a message, Mr Brennan requested bereavement leave and annual leave from Tuesday 24 March to Tuesday 7 April. Mr Thomas said that Mr Brennan could not do a bereavement leave request as his uncle had not died. The formality of Mr Brennan's response caused Mr Thomas to say that he would get HR (Petula) to contact Mr Brennan. On 30 March Mr Brennan messaged Mr Thomas that he had not been contacted. Mr Thomas replied that he had spoken to HR and they had actioned the annual leave

request for the prior week and the bereavement leave request for the current week. Mr Brennan asked what the working arrangements were “over the lockdown”.

[19] During the exchanges, Mr Brennan’s mother (Nicole Manawatu-Brennan) obtained the phone number for Petula from Mr Thomas. There was reference between Ms Manawatu-Brennan and Mr Thomas about the suspension of flights to the Chatham Islands and a 14-day isolation requirement on arrival. Later, Mr Thomas messaged Mr Brennan that Petula had told him he had to deal with Mr Brennan. The working arrangement was “we are still open for business for those who are left”.

[20] Mr Brennan asked MNZ to deal with his representative “Nicole Manawatu-Brennan”.

[21] On 9 April 2020 Mr Brennan received a form from MNZ seeking his consent for it to release personal information to MSD “for Moana New Zealand to make an application for a Covid-19 wage subsidy or essential workers leave payment”. Ms Manawatu-Brennan returned the signed form to Mr Thomas on 10 April.

[22] On 14 April Ms Manawatu-Brennan sent an email to Mr Thomas asking for an update. Mr Thomas replied that he had forwarded the email to Mr Gittings. Ms Manawatu-Brennan then emailed Mr Gittings.

[23] Mr Gittings replied on 16 April. He advised that one day’s bereavement leave had been paid under MNZ’s policy, that annual leave had been taken up from 24 to 27 March and that 1, 2 and 3 April was unpaid leave. Mr Gittings stated that the consent form was not confirmation that MNZ had applied for a wage subsidy but just authorisation for MNZ to supply personal information to MSD if MNZ decided to proceed. Mr Gittings asked when Mr Brennan had left the Chatham Islands.

[24] In response, Ms Manawatu-Brennan set out Mr Brennan’s understanding from the form’s wording that MNZ would apply for a wage subsidy or essential workers leave payment. Ms Manawatu-Brennan sought payment for Good Friday and mentioned the upcoming payment for Easter Monday, for Mr Brennan as a full-time employee.

[25] Mr Brennan also received an email from MNZ with a health questionnaire and memo dated 25 March 2020 attached. The form was completed and returned. It included Mr Brennan confirming he was asthmatic and saying in response to the question about whether anything would stop him coming to work:

I was in Christchurch on planned annual leave & bereavement leave when lockdown commenced. All passenger flights to Chathams were stopped. Apart from the above there is nothing to stop me from working should Moana have a plant in Christchurch.

[26] Ms Manawatu-Brennan's evidence is that she spoke with Mr Gittings by phone a short while after and told him that Mr Brennan could not afford the flight to return to the Chathams. Mr Gittings evidence is that he does not recall this conversation and that he was never told by Ms Manawatu-Brennan or Mr Brennan about why Mr Brennan was not at work. I accept Ms Manawatu-Brennan's evidence.

[27] New Zealand returned to Alert Level 3 from 11.59pm on 27 April 2020.

[28] On 11 May 2020 in a message exchange with Mr Thomas, Ms Manawatu-Brennan mentioned that Mr Brennan was working out his costs including accommodation for a return.

[29] New Zealand moved to Alert Level 2 from 11.59pm on 13 May 2020.

[30] On 24 May in a message exchange with Mr Thomas, Ms Manawatu-Brennan asked who at MNZ was the best person to contact to sort out the wage subsidy matter. Ms Manawatu-Brennan repeated the question the following day. Ms Manawatu-Brennan also rang and spoke to Mr Gittings about why Mr Brennan had not been paid the wage subsidy since MNZ had claimed it. At some point before that discussion Ms Manawatu-Brennan knew, having searched the MSD website, that MNZ had received Covid-19 wage subsidy payments.

[31] Mr Brennan says that Ms Manawatu-Brennan spoke to Mr Gittings on 27 May and asked him if MNZ could help financially with accommodation and food costs with that to be deducted from Mr Brennan's wages, given he would not be paid wages for two weeks after he started work again. Ms Manawatu-Brennan's evidence is that she spoke with Mr Gittings about the wage subsidy. Ms Manawatu-Brennan also says that she tried to discuss "a way to cover the financial side of things on the island". Mr Gittings' evidence is that he is not aware of a

discussion with Ms Manawatu-Brennan about financial assistance. However, there is no reason to doubt Ms Manawatu-Brennan's evidence.

[32] Ms Manawatu-Brennan sent an email to Mr Gittings on 27 May 2020. Ms Manawatu-Brennan asked if MNZ had applied for a wage subsidy for Mr Brennan, if so why it had not been paid to him or if not, why Mr Brennan as a fulltime employee had not been included. Mr Gittings acknowledged the email and promised a response "next week". On 4 June 2020 Ms Manawatu-Brennan asked when the response would be received. Later that day, Mr Gittings sent a letter dated 3 June 2020.

[33] In the 3 June letter, Mr Brennan's communications are characterised as "intermittent and largely uninformative" communication, MNZ says it has no clear idea if and when Mr Brennan intends to return to work, the reasons for not including Mr Brennan in MNZ's wage subsidy application are set out, it appeared from what had been said that Mr Brennan no longer had accommodation on the Chathams, and Mr Gittings asked for a reliable indication if and when Mr Brennan would return. Failing an assurance and if Mr Brennan does not meet the assurance, MNZ would need to consider the implications for Mr Brennan's employment.

#### **What happened – Dismissal of Mr Brennan**

[34] In mid-June 2020, MNZ's senior HR advisor contacted an advocate to check MNZ's understanding that she had been instructed by Mr Brennan, and if so to seek a response to its 3 June letter.

[35] Mr Gittings sent a further letter dated 22 June 2020. The letter referenced the employment agreement providing that absence for a continuous period of three or more days without consent and without good reason was deemed as abandonment. It gave Mr Brennan notice that, failing contact from him by Friday 26 June, it would assume that Mr Brennan did not intend to return to work and had abandoned his employment.

[36] Mr Brennan through his advocate replied on 25 June. A claim for arrears of wages from the end of Mr Brennan's bereavement leave through the lockdown was outlined. Had MNZ paid his wages, Mr Brennan would have been able to return to the Chathams. MNZ knew that

Mr Brennan had not abandoned the employment. The request for financial assistance with his return had been refused without justification. Mr Brennan sought agreement to remedy the wage claim with a plan for his return to work.

[37] Mr Gittings replied on 1 July 2020. Mr Gittings acknowledged Mr Brennan's position on abandonment but stated it was imperative that he return to the Chatham Islands in a timely manner to continue his employment. MNZ rejected the claim for arrears as Mr Brennan was not "ready, willing and able to work". When MNZ became eligible to apply for the wage subsidy on 27 April, Mr Brennan had been absent for 7 weeks and had not communicated his intention to return to work. MNZ was unable to apply for a subsidy for Mr Brennan as it had no indication that he would be working during the period it covered. MNZ was not aware that Mr Brennan would have to isolate on return and had not previously paid his airfares or accommodation. Those costs had been and would remain his responsibility. MNZ required Mr Brennan to return to work by Monday 13 July 2020 but was prepared to discuss alternative dates if for good reason that was not achievable. A failure to return on 13 July or to reach other arrangements would be regarded as an ongoing failure to fulfil a contractual obligation to work and MNZ would likely terminate his employment "on that basis".

[38] Mr Brennan's representative replied on 13 July 2020. The letter stated that there was no reasonable explanation "To leave only him" off the wage subsidy application. Mr Brennan had completed the form for the purpose of the application. Wages for the period were again sought. It was unreasonable on 1 July to expect a return to work by 13 July, when MNZ knew that the only flight between those dates was Tuesday 7 July. MNZ had housing available but had refused to assist Mr Brennan. MNZ by not paying wages had made it impossible for Mr Brennan to meet its requirement. Confirmation was sought that MNZ would pay arrears or wages, public holidays and holiday pay. Compensation for distress caused by the deprivation of income was sought. It was also noted that Mr Brennan sought to work on another site, but MNZ would not accommodate that option.

[39] Mr Gittings replied on 24 July 2020. Mr Gittings responded to several points. Mr Brennan was not the only employee for whom a wage subsidy was not sought. There were no MNZ sites in the Canterbury region where Mr Brennan could have worked as an option. Mr

Brennan had been resident on the Chatham Island when he was employed, MNZ had not provided any accommodation then and was not obliged to do so now. Mr Brennan left the island at his own expense and MNZ expected him to pay for his return. MNZ did not accept that the hurdles to Mr Brennan's return stemmed from any failure on its part. Mr Gittings advised:

Having carefully considered all of the circumstances it is clear that Mr Brennan did not return to work on Monday 13 July as required, has not made alternative arrangements with us, and has continued (for a period of about 4 months) to fail to fulfil his contractual obligation to work. I have therefore decided that his employment should be terminated on that basis.

[40] MNZ's practice is that a manager consults with senior management (including HR management) before dismissing an employee. This also involves informing the chief executive for formal approval. In evidence is a 24 July 2020 email exchange between Mr Gittings' manager and the chief executive seeking and giving approval for the proposed dismissal. The request for approval includes a precis of the circumstances. The chief executive gave approval to proceed with the proposed dismissal.

### **Justification for the dismissal**

[41] A dismissal is justified if the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[42] There is a submission that MNZ's threat of dismissal by way of abandonment was without foundation, leading to the conclusion that it did not intend to maintain the employment relationship. MNZ raised abandonment in its 22 June 2020 letter, having mentioned in its 3 June 2020 letter "implications" for the "ongoing employment" in the absence of an indicated return date. I agree that a fair and reasonable employer could not have treated Mr Brennan as having abandoned his employment in the circumstances. Mr Brennan's absence commenced with MNZ's consent and for good reason. His absence continued for the different but still good reason that he could not return to the island when flights were suspended. Flights resumed from about 24 May 2020. From that point, Mr Brennan's absence continued because he could not afford to pay for a flight. That was known to MNZ before its 22 June letter. Whether that was

“good reason” for the purposes of abandonment could have been the subject of consideration, but a fair and reasonable employer probably could not have relied on abandonment, given the circumstances.

[43] However, I do not agree that this leads to the conclusion that MNZ had no intention of maintaining the employment relationship. When it received the representative’s 25 June 2020 letter refuting any abandonment, MNZ acknowledged that but then directly put its concern that if Mr Brennan was to continue his employment “it is imperative that he returns to the Chatham Islands in a timely fashion”. It set 13 July 2020 as the return date, subject to discussion about alternative dates if for good reason that was not achievable. That demonstrates that MNZ was open to the continuation of the employment relationship, at Mr Brennan’s initiative.

[44] There is evidence and submission to the effect that it was not a realistic offer given a single weekly flight from New Zealand. However, Mr Brennan did not respond to the invitation to discuss alternative return dates. MNZ raised its concern and gave Mr Brennan a reasonable opportunity to respond to that concern before it acted further.

[45] There is a submission that the hurdles faced by Mr Brennan in returning to the Island resulted from MNZ’s breach of not paying wages. This overlaps with MNZ not applying for a Covid-19 wage subsidy for Mr Brennan.

[46] For reasons set out below, I find that MNZ did not breach an obligation to pay wages to Mr Brennan. MNZ set out its position about the arrears claim several times before the dismissal. It follows that I do not accept the submission. More needs to be said about the Covid-19 wage subsidy.

[47] Mr Thomas initially answered “Yep” in response to Mr Brennan’s question whether MNZ was closing down, but corrected that to explain it was an essential service and would continue operating. It was made clear to Mr Brennan that MNZ’s operations would continue. There is no evidence to establish that Mr Brennan acted in reliance on the initial wrong answer. Mr Brennan’s continued absence after flights resumed in late May cannot reasonably be attributed to the answer first given by Mr Thomas.

[48] I accept MNZ's evidence that it first applied for a Covid-19 wage subsidy on or about 28 April 2020. MNZ considered that Mr Brennan was on unpaid leave at the time, so was one of its current employees for whom MNZ could not apply for a Covid-19 wage subsidy. Before the application, MNZ obtained consent from all its employees (including Mr Brennan) to release personal information "to make an application" for a subsidy. I accept MNZ's evidence that this was in preparation if it applied for a subsidy. Although Mr Brennan and Ms Manawatu-Brennan took from the text of the form that MNZ would apply, MNZ explained that it was a preparatory step. An application by MNZ had to comply with the rules of the scheme. MNZ had legal advice at the time of the application that it could not apply for the subsidy for employees who were away from the workplace on unpaid leave. MNZ answered Ms Manawatu-Brennan's points about the Covid-19 wage subsidy in its letter of 3 June 2020, before the dismissal.

[49] There is a submission that MNZ refused to allow Mr Brennan to stay at its accommodation and would not assist with the costs of returning and reintegrating to the island, in circumstances where a fair and reasonable employer could have "exercised some common-sense discretion" and entered into an agreement for Mr Brennan to get back to work. MNZ had no express or implied legal obligation to fund Mr Brennan's travel (flights), accommodation and other living costs during the employment. While an employer might have paid some wages in advance or otherwise supported an employee in Mr Brennan's situation, MNZ elected not to do so. In its communications before it dismissed Mr Brennan, MNZ made it clear it would not assist. To hold MNZ liable now for not assisting would in effect treat such support as a legal obligation. There is no proper basis on which I could do that.

[50] MNZ dismissed Mr Brennan on 24 July 2020 for not fulfilling his contractual obligation to work for a period of about four months and not either returning to work on 13 July 2020 or making alternative arrangements to return. Before making that decision, MNZ raised its concerns, gave Mr Brennan a reasonable opportunity to respond and genuinely considered Mr Brennan's explanations.

[51] The 24 July 2020 email to the chief executive only summarised circumstances and did not contain any undisclosed information relevant to the continuation of Mr Brennan's

employment. I accept the evidence that the chief executive was not the decision-maker. MNZ complied with the good faith duty set out in s 4(1A)(c) of the Employment Relations Act 2000.

[52] I find that MNZ justifiably dismissed Mr Brennan.

**Did MNZ unjustifiably disadvantage Mr Brennan – Covid-19 wage subsidy?**

[53] A personal grievance includes where the employee's employment, or 1 or more conditions of the employment, is affected to the worker's disadvantage by some unjustifiable action by the employer. An action that derives solely from a dispute as defined is excluded from this type of personal grievance.

[54] The submission is that the consent request form (received 9 April) did not explain that MNZ sought consent in case a subsidy application would be made. That was said to create the "reasonable expectation" that MNZ would apply for Mr Brennan. MNZ did not clarify the point until 16 April 2020. It then "unilaterally categorised" Mr Brennan as being on leave without pay. That status had not been agreed. Rather, Mr Brennan was unable to return to the Chatham Islands because of Alert Level restrictions. I am asked to infer that Mr Brennan was not included in the wage subsidy application because MNZ had unlawfully suspended him as part of a disciplinary process.

[55] The leave arrangement was between Mr Thomas and Mr Brennan. The exchanges include a message from Mr Thomas on 23 March 2020 advising Mr Brennan to pack his gear in case "u go in lock down in CHCH no ESS no pay...". On 24 March 2020 Mr Brennan said he was doing the ESS application and to take all annual leave hours and bereavement leave. However, he did not do an ESS request. In a message, Mr Brennan requested bereavement leave and annual leave from 24 March to 7 April 2020. Mr Thomas explained that bereavement leave could not yet apply. Later Mr Thomas advised that HR had done annual leave for the previous week and bereavement leave in the current week. Mr Brennan asked about working arrangements over the lockdown and received a response from Mr Thomas:

I see they have paid you your bereavement leave and your annual leave rest as LWOP

[56] Mr Brennan understood when he requested leave that the duration of his intended leave would exceed any entitlement he had for paid bereavement leave. Mr Brennan was not entitled to annual holidays, but he understood his leave request would exceed any annual leave granted in advance. Mr Thomas reinforced the point on 23 March. His later description of LWOP reflected what had been arranged. I find that Mr Brennan sought and agreed to leave without pay to cover his absence from work, other than the paid absence. The imposition of travel restrictions under the Alert Level framework did not turn that absence into some other type of leave.

[57] I do not read into Mr Gittings' statements in his 3 June 2020 letter under the heading "recap", that MNZ was foreshadowing disciplinary action over his absences before he left the Chatham Islands. Mr Gittings misstated the situation. However, Mr Gittings did not manage MNZ's Covid-19 wage subsidy application. The group HR manager (Ms Thomson) relied on the leave without pay arrangement Mr Brennan had made with Mr Thomas. At the date of the Covid-19 wage subsidy application, there was no reason for MNZ to think that Mr Brennan would be available to work during the subsidy period. MNZ complied with the scheme rules and did not include Mr Brennan.

[58] Mr Brennan did not receive the benefit of a Covid-19 wage subsidy because MNZ was not entitled to apply for it in his name. If Mr Brennan's employment or a condition of it was affected to his disadvantage, it was the result of his decision to take unpaid leave not any action by MNZ.

[59] Mr Brennan has not established a personal grievance in relation to the Covid-19 wage subsidy.

**Did MNZ unjustifiably disadvantage Mr Brennan – non-payment of wages?**

[60] This is advanced as a personal grievance claim, despite the exclusion of actions deriving solely from disputed interpretation, application, or operation of any provision of the employment agreement from this definition of personal grievance.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000 s 103(3).

[61] There are several relevant provisions. Clause 1 sets out Mr Brennan’s position, primary responsibilities and normal place of work. Clause 2 sets out normal hours of work. Clause 4 required Mr Brennan to perform services set out in Schedule 4 (Position Description) and to devote his working time to the duties of his position. Clause 5 obliged MNZ to pay his hourly rate and benefits as per Schedule 1. Clause 6 authorised MNZ to make rateable deductions from payments due including for default by Mr Brennan, following consultation.

[62] There is a widely understood common law rule that, where there are agreed hours of work cancelled by an employer, wages remain payable provided the employee was ready and willing to work those hours.<sup>2</sup> Earlier in the *Gate Gourmet* matter the Authority had found that if the employees were “ready willing and able” to carry out their function in an essential industry, the employer was obliged to pay them at least the statutory minimum wage.<sup>3</sup> The Authority’s determination was restored by the Court of Appeal.<sup>4</sup> *Gate Gourmet* concerned the application of the Minimum Wage Act 1983, but the common law rule applies generally.

[63] To adopt the words of the Chief Judge,<sup>5</sup> Mr Brennan was not “ready and willing” to work his agreed hours of work. Other than the bereavement leave and advance annual leave, no payment to Mr Brennan was due from MNZ because of the arrangement about leave without pay and then because Mr Brennan was not available to perform the work that MNZ had employed him for, had available for him and required him to perform.

[64] The present situation differs from *Gate Gourmet*. There the workers were not working but at the direction of the employer. The employer could not rely on the ability to make deductions from minimum wages due in respect of time lost by reason of the default of the worker. Similarly, the present case differs from the *Dove Hospice* case.<sup>6</sup> There, the workers were ready and willing to work. The Covid-19 restrictions “and/or” the employer’s decision not to require the employees to attend work during restructuring processes and subsequent notice periods, did not release the employer from paying wages without deduction as required

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<sup>2</sup> See *Gate Gourmet New Zealand v Sandu* [2020] ERNZ 561 at [60] (per Inglis CJ).

<sup>3</sup> *Sandu v Gate Gourmet New Zealand Limited* [2020] NZERA 259 at [36].

<sup>4</sup> *Sandu Gate Gourmet New Zealand Limited* [2021] NZCA 591.

<sup>5</sup> Above n 2.

<sup>6</sup> *Raggett and oths v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266.

by the Wages Protection Act 1983. Here, Mr Brennan was not ready and willing to perform the work he was engaged to perform.

[65] MNZ not paying wages to Mr Brennan does not give rise to a personal grievance.

### **Breach of good faith - penalties**

[66] A penalty is available only for certain breaches of good faith. To paraphrase, a party to an employment relationship is liable to a penalty if the failure to comply with the statutory good faith duty was deliberate, serious and sustained. A penalty is also available if the failure was intended to undermine bargaining, an employment agreement, the employment relationship or a pay equity claim resolution process. A penalty is also available for a breach of the Act's provisions regarding passing on.<sup>7</sup> The Act sets a high bar for the imposition of a penalty.<sup>8</sup>

[67] The present problem does not involve passing on, a pay equity process or bargaining. Sections 4A(c), 4A(b)(iv) and 4A(b)(i) of the Act are not relevant.

[68] There is no evidence that MNZ or its managers dealing with Mr Brennan intended to undermine Mr Brennan's employment agreement or his employment relationship by their conduct (my emphasis). Even if I assumed that MNZ through its managers breached the duty of good faith owed to Mr Brennan, there could be no liability under s 4A(b)(ii) and s 4A(b)(iii) of the Act.

[69] The only remaining ground for consideration of a penalty is if MNZ's breach of the duty was deliberate, serious and sustained – s 4A(a) of the Act.

[70] MNZ is said to have stopped paying wages without consultation with Mr Brennan. That claim is not supported by the facts. When he left work in March 2020, Mr Brennan knew that his planned absence would not be fully covered by paid leave. MNZ stopped paying wages because Mr Brennan was no longer entitled to payment. There was no breach of good faith by MNZ.

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<sup>7</sup> Employment Relations Act 2000 s 4A.

<sup>8</sup> *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112.

[71] MNZ is said to have not considered constructive solutions to keep the relationship intact. MNZ did not agree to fund Mr Brennan's return to work or provide accommodation and/or an advance of wages to facilitate his return. It made that clear to Mr Brennan. It had no legal obligation to advance money to Mr Brennan. I do not accept that MNZ breached its good faith duty by dealing with Mr Brennan on that basis.

[72] There are criticisms of MNZ's communication with Mr Brennan such as delay and lack of response. Considered in hindsight, there might be some merit in the point about the timeliness of some communications before the 3 June 2020 letter. MNZ then sought a reliable indication of when Mr Brennan would return, given that the Covid-19 Alert Level restrictions were no longer an obstacle. I do not accept that MNZ breach its good faith duty in respect of being responsive and communicative from 4 June 2020. Before then, any breach of good faith by MNZ was well short of being "deliberate, serious and sustained".

[73] MNZ is said to have used Mr Brennan's "compromised position" as the reason for the dismissal. That is a reference to Mr Brennan's financial position, having not been paid since March 2020. For the reasons already set out, MNZ had no obligation to pay wages to Mr Brennan and no right to seek a Covid-19 wage subsidy in his name. MNZ did not breach its good faith duty is relying on his on-going failure to work as the reason for dismissal.

[74] I find that MNZ is not liable for a penalty under s 4A of the Employment Relations Act 2000.

#### **Public holiday – Queen's Birthday**

[75] MNZ paid Mr Brennan for the two Easter public holidays and for ANZAC Day, but not Queen's Birthday. There is a claim for arrears for Monday 1 June 2020.

[76] There is a submission that Mr Brennan would have resumed his normal duties before Queen's Birthday, but for MNZ not applying for the Covid-19 wage subsidy. As explained above, I do not accept that submission. Nonetheless, I must still consider the arrears claim.

[77] The employment agreement refers to the Holidays Act 2003. MNZ must comply with the agreement and the Act. Under section 48 of the Act, if Queen's Birthday fell on a day that

would otherwise be a working day for Mr Brennan, MNZ would comply with the Act if Mr Brennan did not work and MNZ paid him in accordance with s 49 of the Act. The present claim turns on whether Monday 1 June 2020 was an otherwise working day for Mr Brennan.

[78] Section 12 of the Act applies for the purpose of determining Mr Brennan's entitlement to a public holiday. If it is not clear whether a day would be an otherwise working day, the employer and employee must take specified factors into account with a view to reaching agreement. If the employee and the employer cannot agree, a Labour Inspector may determine the point. The Inspector must also take account of the specified factors.

[79] Neither party expressly attempted to reach an agreement about whether Queen's Birthday was an otherwise working day, or referred the matter to the Labour Inspector. Despite that, the specified factors remain relevant to the determination of whether MNZ complied with the Holidays Act 2003.

[80] Mr Brennan's employment agreement and his work pattern up to the start of his absence include Mondays as a working day. Despite that, Mr Brennan and MNZ had no expectation that he would work on Queen's Birthday. At that point, Mr Brennan had been on leave without pay for some time, with no indication from him about when he would return to the Chatham Islands and to work. Mr Brennan did not work on 1 June 2020 because he was on leave without pay. It was not because it was a Public Holiday.

[81] As Queen's Birthday was not an otherwise working day for Mr Brennan, MNZ was not required by the Act or the employment agreement to pay him for the day. That conclusion is not affected by MNZ having paid Mr Brennan for other Public Holidays that fell during his leave without pay.

[82] The claim must be dismissed.

### **Summary**

[83] Mr Brennan's claims are dismissed.

[84] Costs are reserved. If the parties are not able to resolve costs between themselves, the party claiming costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party may then lodge and serve a memorandum in reply, within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority