

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 45  
3157064

	BETWEEN	KIMBERLEY PRICE Applicant
	AND	PINEVALE FARMS LIMITED First Respondent
	AND	MARK HURST Second Respondent
Member of Authority:	David G Beck	
Representatives:	Geoff Martin, counsel and Louise Smith, advocate for the Applicant	
	Amy Keir, counsel for the First and Second Respondents	
Investigation Meeting:	22 and 23 November 2022 in Christchurch	
Submissions Received:	14 December 2022 from the applicant 23 November and 26 January 2023 from the respondents	
Date of Determination:	30 January 2023	

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Kimberley Price worked at a dairy farm owned by Pinevale Farms Limited (Pinevale) from mid-January 2020 to 1 October 2021. The basis of the initial engagement was purportedly as a casual relief milker. Mark Hurst, sole director, and shareholder of Pinevale, appointed Ms Price. It was mutually agreed Ms Price be paid \$70 net for each milking. Mr Hurst says this figure included a 'pay as you go' holiday component of 8%. The terms of the engagement were not the subject of a written employment agreement. Ms Price says she undertook wider milking duties not normally undertaken by a relief milker and then from March 2020, she agreed to do some general farm work. Mr Hurst says he offered

an employment agreement but Ms Price did not sign it. The employment continued until 1 October 2021 when it ended in disputed circumstances.

[2] Ms Price claims she was the subject of unreasonable treatment that led to her leaving in circumstances she believes amount to a constructive dismissal. Ms Price claims she was not appropriately remunerated in accord with minimum standards, including not being paid the minimum wages for all hours worked and her final pay and, holiday pay obligations were not met. Ms Price says she was employed directly by Mr Hurst who did not provide her with an employment agreement or keep wage and time and holidays and leave records.

[3] Ms Price seeks wages and holiday pay allegedly not paid (including additional pay for public holidays); a finding of unjustified dismissal; compensation for distress and humiliation and penalties for various identified breaches.

[4] By contrast, Mark Hurst asserts he did not personally employ Ms Price and that she was engaged by Pinevale. Mr Hurst contests the degree of unreasonable treatment and maintains that Ms Price at times, engaged in confrontational behaviour and that she voluntarily resigned.

[5] Mr Hurst contends Ms Price was paid appropriately for all hours worked. Mr Hurst asserted the Authority should consider the provision of rent-free accommodation in the employment equation. Mr Hurst says Ms Price was paid \$700 net per week regardless of how many milkings she undertook and would sometimes be paid extra for additional farm work out of a separate farm account. Mr Hurst initially suggested Ms Price abandoned her employment but during the investigation meeting acknowledged this not to be so – he accepted Ms Price worked a one week notice period.

[6] Mr Hurst conceded that Pinevale did not keep wage and time and holidays and leave records and that Ms Price's wages were recorded as paid by his accountant who would arrange PAYE payments to ensure Ms Price's pay was 'rounded up' to the net amount agreed per week.

[7] Ms Price's IRD records show remuneration being paid by Pinevale Farms Limited. Ms Price's bank account at times identifies Pinevale for some direct credited weekly wage amounts and other amounts as direct credits with no identified payer. The timing of payments was at times irregular.

[8] The parties attended mediation but the matter remained unresolved.

### **The Authority's investigation**

[9] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the helpful submissions received from both parties and refer to them where appropriate and relevant.

[10] Kimberley Price and her supporting witnesses' Greg Linstrom, ex-herd manager, Michael Mawhinney a farm consultant, Dylan Hanford, ex-co-worker, Susan Geddes, a vet, Richard Pearce, dairy farmer and Stacey Davis, neighbour of Pinevale provided written briefs and gave evidence at the investigation meeting. For Pinevale, I heard from Mark Hurst, Gareth Connell a current Pinevale farm worker and Michael Bennie an ex-Pinevale vehicle maintenance contractor.

### **Issues**

[11] The issues to be decided are:

- (i) Who was the employer of Ms Price?
- (ii) What was the nature of Ms Price's employment and how many hours did she work?
- (iii) Did Pinevale or Mark Hurst breach terms of employment or duties owed to Ms Price and if so, was it reasonably foreseeable that she would resign and the ending of her employment be categorised as a constructive dismissal rather than a resignation?
- (iv) Has Pinevale or Mr Hurst breached any statutory obligations and should any penalties be awarded for those identified breaches?
- (v) If any of Ms Price's claims are established what remedies should follow?

(vi) If Ms Price is successful in all or any elements of her personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct?

(vii) An assessment of the level of costs to be awarded to the successful party.

### **What caused the employment relationship problem?**

[12] Ms Price commenced work at the farm on 11 January 2020. The terms of the initial period of employment were informally agreed. Ms Price says after having been made redundant from another farm and losing accommodation following an M.Bovis outbreak, she was desperately looking for any form of farm work. Ms Price recalls the Pinevale job being described by Mr Hurst as relief milking and agreeing to being paid a net amount of \$70 for each milking. Ms Price understood the agreed amount included an 8% holiday pay loading.

[13] Assessing the evidence of Mr Hurst, which was that he did not keep wage, time and holidays and leave records and had a trusting approach to engaging workers, I consider it more likely than not, that no employment agreement was offered. Mr Hurst openly conceded administration and record keeping was not his strength and he left the administration of pay up to his accountant. Mr Hurst alluded to a difficulty in engaging farm workers on milking tasks due to the seasonal nature of dairying. I observe such difficulties are easily dealt with by a systemic approach to recording actual time worked – Mr Hurst fell down badly on this front.

[14] Ms Price says her work was directed by Mr Hurst and this was usually by disclosed text exchanges when he was not present. Several text exchanges covering the 18 months' employment period were disclosed and the overwhelming majority were cordial.

[15] Initially, Ms Price says she was assisted in her milking tasks but after a week undertook the entire process on a largely sole-charge basis, including getting the cows in and hosing the shed down afterwards and then returning the cows to their allotted paddocks. Generally, Ms Price says she would start preparation at around 5 am and complete the morning milking process around 9:30 am. She would then have a break off the farm and return to do the afternoon milking. Ms Price has some land close to Mr Hurst's farm where she keeps horses for show. At the start of her employment, Ms Price was living in temporary accommodation on this land.

[16] Around the end of March 2020, Ms Price says with the extra farm work she took on, the break she had after morning milking was to have breakfast (a 30 minutes' break) and then she would return to the farm to complete farm work tasks such as moving the muck spreader, fencing and other work before doing the afternoon milking and finish between 4 – 5 pm. Ms Price also undertook calve rearing tasks.

[17] Ms Price's depiction of her working hours and the tasks she undertook was a subject of contention. Ms Price and witnesses insisted each milking would take between four and four and a half hours and Mr Hurst claimed it would only take two to three hours and that Ms Price would then leave the farm for a break without doing a lot of farm work. As Mr Hurst had no time recording system it was impossible to resolve this dispute.

[18] Ms Price disputed the term relief milking as adequately describing her role. Ms Price contended relief milking is usually confined to someone milking the cows in the shed with no preparation or aftermath work. While this may be the case, for the purposes of this investigation my main inquiry is to whether the employment was initially of a casual or permanent basis. Ms Price says she was told: "I could choose how many milkings to do and would be paid in line with this" and she "elected to do as many as were available".

[19] Mr Hurst says when Ms Price started, he was "very short on staff" and Ms Price said she was "available for most milking provided she could work around her horse care commitments – i.e.: when she would go to shows and stuff". Mr Hurst says shortly after commencing work: "Kim was keen for as much milking as she could get" and they agreed on 10 milkings per-week. On this basis, a weekly \$700 net payment was set up. Mr Hurst claimed Ms Price set her own roster by indicating her availability on a calendar kept in the milking shed. In contrast, Ms Price says Mr Hurst directed her hours of work.

[20] Although not recorded in a tenancy agreement, Mr Hurst says the provision of accommodation on the farm for Ms Price from March 2020 was free as he recognised, she was struggling living in temporary accommodation. Mr Hurst says and Ms Price did not dispute it, that he set a notional rent of \$240 per week and that the expectation was, half of that was provided free in lieu of Ms Price working additional hours on general farm labouring tasks. Mr Hurst, despite this supposed arrangement, says Ms Price did not pay the remainder of her rent and effectively lived rent free. The accounting records disclosed by Mr Hurst show no component of Ms Price's remuneration having rent deducted but they do show PAYE

amounts were remitted to Inland Revenue. There was no evidence that Mr Hurst confronted Ms Price about her not paying rent.

[21] The parties accepted that the employment proceeded, at times, on a rather fraught basis with Ms Price saying she was frustrated by Mr Hurst's communication style, failure to provide agreed and timely scheduled time off at weekends, sometimes not being paid regularly and his refusal to address requests to provide an employment agreement. Ms Price says around July and September 2021 after she sought advice from an MBIE phone helpline on 'pay as you go' holidays, she raised with Mr Hurst the need to formalise her pay and holidays provision in an employment agreement but none was forthcoming.

[22] In contrast, Mr Hurst claimed Ms Price was a difficult employee who had communication issues with him and co-workers and was frequently rude and disrespectful and set her own hours. Mr Hurst claimed he had cause to issue written warnings over animal welfare and communication issues. Ms Price strongly contested these claims and says she did not have any disciplinary meetings and did not receive the warning letters produced during the Authority investigation process.

[23] It was evident from Mr Hurst's poor documentation and lack of recall of timelines that the claimed written warnings had either not been administered or if they had been, the process used was unsatisfactory. I conclude, it was unlikely that issues were formally brought to Ms Price's attention and the evidence from witnesses around the allegations of animal ill-treatment was unconvincing. I prefer the evidence of Ms Price and other witnesses, that Ms Price's approach to animal welfare was more likely than not, beyond reproach.

[24] The evidence of Mr Hurst's "robust" communication impacting negatively upon Ms Price was however, less than convincing. Ms Price impressed as a confident witness and she openly acknowledged that 'rough language' was generally not an issue. Ms Price sought to highlight the impact of Mr Hurst's use of the term 'cunt' in a telephone conversation of 14 September 2021. The exchange was recorded without Mr Hurst's consent.

[25] Upon reviewing the recording, it is clear the parties were to put it colloquially 'effing and blinding' at each other. The discussion initially was about scheduling a rostered day off for Ms Price and she was clearly expressing frustration in her tone and approach. Mr Hurst was initially calm, reasonable, and accommodating until Ms Price forcefully highlighted her past concerns including a belief that holidays and time in lieu were owed. Mr Hurst did then

use the term cunt in an offensive manner but Ms Price's response was not one of outrage and she repeated the word back to him and he backed down from the suggestion he had made that Ms Price was being awkward in her leave request.

[26] Considering the evidence, I heard during the investigation meeting on the frequent use of swear words, I do not find objectively the specific use of the word cunt during the recorded exchange caused Ms Price specific distress. I do find that Mr Hurst was bluntly dismissive of Ms Price's concerns over her leave situation and not having an employment agreement. Mr Hurst displayed no willingness to address these legitimate issues and the conversation confirmed they were not being raised for the first time by Ms Price.

[27] The 14 September exchange also demonstrated that Mr Hurst controlled the allocation of Ms Price's rostered days off which gave no credence to his suggestion that Ms Price could pick and choose the days she worked. Ms Price says that Mr Hurst had briefly introduced a 6 on, 2 days off roster in August 2021 but then reverted to allocating workdays randomly in his belief that Ms Price was taking too many days off. Ms Price says this caused her problems in scheduling days off.

[28] Whether Mr Hurst's ongoing and repeated breaches of the Holiday's Act by incorporating holiday pay into Ms Price's notional hourly rate and not providing paid holidays,<sup>1</sup> his refusal to address her request for an employment agreement and his method of paying Ms Price a fixed amount regardless of hours worked led to Ms Price's foreseeable resignation is a moot point discussed below.

### **Ending of the relationship**

[29] The 14 September 2021 telephone conversation was portrayed by Ms Price's counsel as a catalyst for her decision to leave. Mr Hurst claimed he had been made aware that Ms Price was looking for other work around July 2021. Ms Price says she concluded she needed to move on but decided to not leave Mr Hurst without milking cover. Ms Price says finding alternative work mid-season was problematic and the opportunity she took was merely fortuitous. Ms Price says Mr Hurst got increasingly "snarky" in their exchanges during the July-September 2021 period and sought to avoid personally communicating with her. When

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<sup>1</sup> Section 28(1) Holidays Act 2003 provides that including holiday pay in an hourly rate is only permissible where the employment is fixed term or "so intermittent or irregular that it is impractical" to provide paid holidays (and the employee agrees to this arrangement in an employment agreement).

asked why she eventually resigned, Ms Price cited: the way he treated me; workload pressures and a lack of appreciation of her contribution. No single causative factor was given by Ms Price and it appears that the constant use of offensive language was not a significant issue.

[30] Ms Price says she resolved to resign on notice and she drafted a resignation letter on the 24<sup>th</sup> of September 2021 and once printed on the 25<sup>th</sup>, she left it in an area Mr Hurst used for his administration. Ms Price says on 26 September the resignation letter had been removed but no discussion was had about it with Mr Hurst.

[31] Mr Hurst initially claimed that Ms Price just stopped coming into work without an explanation after 25 September and he later found the resignation letter “about a week later”. However, during the investigation meeting Mr Hurst conceded that he was aware that Ms Price worked out her notice period up to and including 1 October and vacated the accommodation on 3 October but he did not discuss anything with her during this period.

[32] The resignation letter detailed in summary that Ms Price had resigned due to Mr Hurst’s:

- Failure to provide an employment agreement despite several requests.
- Lack of regular days off and unilateral roster changes.
- Failure to address Ms Price’s pay rate commensurate with extra hours worked.
- Failure to provide paid holidays and appropriate remuneration for when Ms Price worked on public holidays.
- Recent treatment of Ms Price i.e., cutting back hours whilst saying not enough farm work is being done and avoiding communication

[33] Ms Price concluded the resignation letter by referring to the impact of Mr Hurst’s behaviour on her mental well-being.

[34] Mr Hurst indicated he did not pay Ms Price for the one-week notice worked, saying he withheld payment because the vacated accommodation was untidy. Mr Hurst says he now realises that holiday pay was owed but has to date, not paid any.

[35] I conclude it is more likely than not, that Mr Hurst having alluded to his frustration with Ms Price, viewed the resignation letter on either 25 or 26 September and chose to do nothing about it and then he deliberately avoided contact with Ms Price during the time she worked out her notice period.

[36] Ms Price promptly secured alternative employment and commenced working for another dairy farmer on 4 October 2021.

### **Issue One – who was the employer?**

[37] Ms Price gave no compelling evidence during the investigation to suggest she was personally employed by Mr Hurst other than the lack of an employment agreement. On the basis that Ms Price openly disclosed she knew Pinevale Farms Limited existed and was the source of her income (apart from times she was paid by a separate farm account), I conclude Pinevale Farms Limited was the employer. Mr Hurst is not personally liable for any compensatory awards I may make.

### **Issue two – what was the nature of Ms Price’s employment and how many hours did she work?**

[38] Mr Hurst described Ms Price as a “relief milker”. I find this categorisation was used incorrectly to describe the initial period of employment. Relief milkers as the term implies, are commonly used as a short-term solution to fill in for milkers who are on leave or temporarily unavailable. This type of position is casual or is sometimes undertaken by a contractor. Mr Hurst conceded that Ms Price was not employed on the latter basis and acknowledged that her relief milking role was permanent. Mr Hurst also accepted that Ms Price’s expanded role was permanent although he tried to maintain that Ms Price had a choice of how many milkings she wished to undertake. Mr Hurst says his employment practices were somewhat informal. He says he sometimes used Federated Farmers’ standard format employment agreements but produced no evidence to support this assertion. The Federated Farmers template employment agreement he produced and claimed he gave to Ms Price, was in a format designed for permanent employees.

[39] I accept there was some initial flexibility in the times Ms Price made herself available but it was evident that she considered that she had to approach Mr Hurst to arrange

for time off and that any notion of working solely as a relief milker ended when Ms Price took on additional farm work as directed by Mr Hurst.

[40] I conclude Ms Price was a permanent employee with full-time hours fluctuating to suit Pinevale's seasonal requirements. What reinforces this view, was Mr Hurst did not engage another permanent milker and Ms Price's work was ongoing and involved other farm tasks.

[41] The actual hours Ms Price worked are difficult to calculate and were disputed. I deal with this matter below.

### **Issue three - Was Ms Price constructively dismissed?**

[42] A 'constructive dismissal' can be found if an employer's conduct compels a worker to resign in circumstances where although on the surface the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this construct is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer. The Court of Appeal has stated the broad legal approach as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. <sup>2</sup>

[43] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith' <sup>3</sup> is that an employer should not without proper cause, act in a

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<sup>2</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

<sup>3</sup> Section 4 (1A)(a) and s 4(1A)(b).

manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship.<sup>4</sup>

### **Ms Price's claim regarding a potential breach of duty**

[44] Ms Price's counsel suggested she had resigned in response to being unable to cope with Mr Hurst preventing her taking leave; his failure to properly remunerate her; properly formalise terms of employment; and his repeated abusive language and behaviour.

[45] In reviewing the circumstances leading up to the resignation I conclude Ms Price was the subject of ongoing breaches of a serious nature and that Mr Hurst, when made aware of them, chose to wilfully ignore, and not provide any remedial measures to assist an ongoing employment relationship. As such, Mr Hurst's actions were causative of the ending of the employment relationship and on an alternative analysis, were latterly a deliberate course of conduct designed to induce Ms Price's resignation.

[46] I have not found Mr Hurst was consistently abusive in his language or demeanour toward Ms Price. Ms Price's evidence did not establish that there was sustained aggressiveness or repeated bullying behaviour. Overall, Ms Price appeared to indicate there was little personal interaction between her and Mr Hurst and most of the communication was by text.

[47] However, the breaches identified are objectively serious and involve a failure to adhere to minimum standards and establish a normal employment relationship that calculates pay on hours worked rather than tasks completed. The nature of the employment undertaken by Ms Price would objectively suit being remunerated on an hourly rate basis given the actual payment for milking hours equated roughly to the statutory hourly minimum wage rate. The alternative was to pay Ms Price an annual salary but the seasonal and fluctuating nature of the work may have meant that was impracticable.

[48] Mr Hurst is an experienced and mature employer; his business is well established and he has employed workers in various capacities. He was aware of employment obligations and claimed in employing others he used standard Federated Farmers employment agreement templates. Mr Hurst suggested administration and record keeping was not his strong point and says he struggles with engaging workers to fit the seasonal nature of the

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<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

work. Whilst I accept this, Mr Hurst took no steps to address these shortcomings. I accept he has now done so and engaged legal assistance on compliance matters.

[49] In Ms Price's situation, the terms of the employment relationship were informally imposed and not documented. Mr Hurst could not explain why this was so, apart from his perspective and misconception that the initial milking work was casual and then when he provided accommodation, he failed to properly detail the terms of such. I am convinced Ms Price requested an employment agreement on more than one occasion and none was provided and she also sought to have her working days and annual leave arrangements regularised. Mr Hurst had no cogent explanation why he did not resolve these issues and central to his casualness was his failure to put in place a system to record Ms Price's hours of work and afford her access to paid annual leave.

[50] Mr Hurst's approach to remunerating Ms Price took no account of the actual hours she worked and Mr Hanford also gave evidence that he was paid on a similar basis. Mr Hurst in his brief of evidence indicated: "Most of the time I have three full time staff and three part time. Sometimes I use casual staff, and obviously, relief milkers" he then says: "Some people are paid a per job rate". Mr Hurst in justifying his approach, claimed he had a handful of staff, "who have worked for me in this flexible manner for many years". Whilst Mr Hurst appeared to genuinely believe that he had provided Ms Price with a fair employment package that included free accommodation, his approach had no regard to legal compliance obligations. The 'work bargain' he struck with Ms Price was advantageous to Mr Hurst and provided Ms Price with few key minimum entitlements. Ms Price was vulnerable and a bargaining imbalance existed.

### **Finding**

[51] I find the breaches were serious and ongoing. Ms Price's resignation was entirely foreseeable given she provided Mr Hurst many opportunities to rectify her legitimate concerns. Ms Price was constructively dismissed.

[52] Having obtained a finding of an unjustified constructive dismissal and breaches of identified minimum entitlements, Ms Price is successful in her personal grievance and is entitled to consideration of specific remedies.

## **Remedies**

### **Compensation for humiliation and loss of dignity, and injury to feelings**

[53] Ms Price gave evidence of the impact of Mr Hurst's approach to the ending of the employment relationship and undermining of her confidence and well-being. The impact was exacerbated by Mr Hurst's unfounded personal attacks on Ms Price's credibility in handling and caring for animals and attempts to discredit her. I also take account of the provision of accommodation that was lost because of the employment ending which was an additional distressing factor.

[54] Ms Price impressed the Authority as a proud, independent, and determined person who placed a significant emphasis in her life on the care of animals and allegations of mistreatment caused her unnecessary distress and potentially damaged her reputation. Evidence from Ms Price's new employer and compelling character evidence went some way to alleviating this situation.

[55] Whilst I got the impression that Ms Price coped with the unique male dominated culture of the workplace and did not take offense to language usage that would be unacceptable in other contexts, Mr Hurst's latter approach during the recorded conversation went too far and he was bluntly dismissive of her legitimate concerns.

## **Finding**

[56] Taking account of the evidence proffered and awards made by the Authority and the Employment Court in similar situations and surveying cases brought to my attention in submissions, I consider that Ms Price's evidence warrants compensation in the amount of \$20,000 under s 123(1)(c)(i) of the Act.<sup>5</sup>

### **Lost wages and other money**

[57] Given Ms Price immediately secured alternative employment no award of lost wages is appropriate under s 123(1)(b) of the Act. However, s 123(1)(b) also indicates "other money" lost because of a grievance is recoverable. I find this includes the shortfall in Ms Price's pay for the actual hours she worked and the non-payment of her final notice week.

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<sup>5</sup> See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

Any calculation of other money owed is hampered by there being no wage and time records and Ms Price's produced diary entries are not a comprehensive record of hours and days worked.

[58] In assessing whether Ms Price was paid for all hours worked which is essentially akin to an arrears claim under s 131 of the Act, I have regard to s 132 (2) of the Act (and the corresponding provision s 83(3) Holidays Act 2003) which allows the Authority to accept as proved claims made by the employee due to a failure "to keep or produce records" prejudicing an employee's ability to bring an accurate claim. Here, no wage time or holidays records were kept.

[59] Mr Hurst after the investigation meeting, provided a milking shed calendar that purported to be a record of the days Ms Price undertook milking. The accuracy of such was contested by Ms Price and I only found it of limited assistance as no working hours are recorded. No accurate record was kept by either party of the additional hours Ms Price spent doing tasks other than milking and the extent and scope of those tasks was contested. Ms Price provided an incomplete diary with limited records of her hours worked but it only covered the period 1 January 2021 until her resignation. Mr Hurst's counsel pointed to the fluctuating nature of the milking work and despite this Pinevale still paid a flat \$700 per week.

[60] Ms Price in submissions suggested that any calculation of additional hours worked must be based on the minimum hourly wage rate that from 11 January 2020 was \$17.70 and then from 1 April 2020 was \$18.90 and from 1 April 2021 it was \$20. The latter level of the minimum hourly rate prevailed at the time Ms Price resigned (1 October 2021).

[61] Ms Price accepted that being paid \$70 per milking in the period from 11 January 2020 to 29 March 2021 on the hours she recalled working equated to \$17.79 per hour that suggested Mr Hurst was using the minimum wage as a rough guideline. However, from 29 March 2020, Ms Price's hours and work increased but her rate of pay remained static and the minimum hourly rate increased to \$20. Ms Price claimed that she was working on average 42 hours per week (milking and farm work) and claimed a cumulative estimated sum of \$34,829.80 without holiday pay being accounted for.

[62] Exercising the discretion available to the Authority and adopting an equitable approach that takes account of the free accommodation provided and the fact that Ms Price

was paid a flat \$700 for all weeks worked, I determine that Pinevale should pay Ms Price unpaid wages for additional farm work tasks in an estimated amount of \$25,000.

[63] In addition, based on the then hourly minimum of \$20 per hour and a fair estimate that Ms Price was working 40 hours per week, I determine she be paid \$800 for the final week she worked for Pinevale.

[64] I have declined the claims for unpaid meal and rest breaks since they were not conclusively established and Ms Price did take breaks during the working day.

### **Holiday Pay/Public Holidays worked**

[65] This leaves the calculation of holiday pay owing, as incorporating 8% into the per job rate for milking, is not permitted by the Holidays Act. I find Ms Price was entitled to the provision of paid holidays and that such should be calculated on the total amount of time Ms Price worked for Pinevale. Due to the lack of records, I determine the fairest way of calculating this is to apply an additional 8% to the total of what Ms Price was paid by Pinevale during her employment plus the \$25,000 I have awarded for unremunerated additional work. Ms Price's disclosed IRD earnings statement shows Pinevale paid her \$78,589.17 during the entire period of employment. I therefore determine that 8% additional holiday pay owed be paid on the cumulative sum of \$103,589.17. This is a sum of \$8,287.13.

[66] The claim for Ms Price not being paid time and a half for working on public holidays was not specifically detailed other than an amount of \$3,916.35 being claimed. On reviewing the text exchanges between Ms Price and Mr Hurst and Ms Price's diary entries, I conclude Ms Price worked on nine public holidays being: 6 February 2020, 1 June 2020, 26 October 2020, 28 December 2020, 3 and 4 January 2021, 15 and 16 April 2020, 25 April 2021. All appear they were paid at Ms Price's then standard rate.

[67] No claim was made for additional days off but I can find no reference to such being granted. Thus, I find that the fairest way to approach this is to set a nominal daily rate that I fix at eight hours at a rate of \$20 per hour which equates to \$2,160.00 if paid at time and a half.

## **Interest**

[68] Ms Price has claimed interest on the compensatory awards made. Section 123(1)(b) of the Act allows the Authority to consider reimbursing “other money lost” by the employee flowing from a grievance and interest plainly falls under this category of remedy. I find that interest as claimed should be paid only on arrears of wages and holiday pay/public holidays awarded and not the compensatory award for distress (an approach adopted by Chief Judge Inglis in *Nath v Advance International Cleaning Systems (NZ) Ltd*)<sup>6</sup>. However, given the Authority’s discretionary approach to this matter and applying guidance from the Court of Appeal in *Gilbert v Attorney-General*<sup>7</sup>, I limit the period of interest to eighteen months.

## **Issue 4 – should any penalties be awarded for the identified breaches?**

[69] By a narrow margin, I am not persuaded penalties sought for the various breaches identified are appropriate against either Pinevale or Mr Hurst. I note in the latter’s case no application for leave under s 142Y(2)(a) of the Act was brought to allow Ms Price to pursue a claim against Mr Hurst personally and the threshold test of establishing whether on the balance of probabilities the company was unable to pay the money the Authority has awarded was not explored.

[70] In my overall view, the transgressions Ms Price’s counsel has identified though not minor or condoned, are adequately remedied by my findings that Ms Price has successfully established she was constructively dismissed and that compensation and arrears are due. In making this assessment I rely generally upon s 160 (3) of the Act.

## **Contribution**

[71] Section 124 of the Act states that I must assess the extent to what, if any, Ms Price’s actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced, I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*<sup>8</sup>.

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<sup>6</sup> *Nath v Advance International Cleaning Systems (NZ) Ltd* [2017] NZEmpC 101 at [112] – [114].

<sup>7</sup> *Gilbert v Attorney-General* [2010] NZCA 421 at [100].

<sup>8</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

[72] On balance, I consider no reduction in remedies awarded is warranted, Ms Price did not contribute to the factors that gave rise to her personal grievance – the grievance arose from Pinevale’s ongoing breaches of its obligations.

### **Orders**

[73] I have found that:

(a) Kimberly Price was constructively dismissed by Pinevale Farms Limited.

(b) In the circumstances, Pinevale Farms Limited must pay Kimberly Price:

- (i) \$20,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.
- (ii) \$25,000 (gross) unpaid wages, pursuant to s 123(1)(b) Employment Relations Act 2000.
- (iii) Unpaid wages for the notice period worked in the amount of \$800 (gross).
- (iv) Unpaid Holiday pay in the amount of \$8,287.13 (gross).
- (v) Payment for Ms Price working on nine public holidays in the amount of \$2,160.
- (vi) Interest is to be paid on the arrears figures above ((ii) to (iv) in accordance with Schedule 2 of the Interest on Money Claims Act 2016 for a period of eighteen months commencing from 1 October 2021.

### **Costs**

[74] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Kimberley Price has 14 days from the date of this determination in which to file and serve a memorandum on costs. Pinevale Farms Limited has a further 14 days in which to file and serve a memorandum in reply.

[75] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or other factors, require an adjustment upwards or downwards.<sup>9</sup>

David G Beck  
Member of the Employment Relations Authority

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<sup>9</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)