

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 24
3298479 & 3298519

BETWEEN	PHILIP HUNT Applicant in 3298479
AND	PENELOPE HUNT Applicant in 3298519
AND	HAMPSHIRE HOLIDAY PARKS LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Michael Walker and Ashley Dawson-Swale counsel, for the Applicants Naomh McAllister and Sally Hitchcock, counsel for the Respondent
Investigation Meeting:	6 and 7 November 2024 at Queenstown
Submissions Received:	7 and 11 November 2024 from the Applicant 7 November 2024 from the Respondent
Date of Determination:	17 January 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Philip and Penelope Hunt, a married couple, worked as park managers of a large lakeside motor camp situated at Glendhu Bay, around 10 kms outside Wanaka, until their employment ended on 11 November 2023 in disputed circumstances. The camp lease is owned by Hampshire Holiday Parks Limited (HHPL) the Hunts former employers. HHPL is a family-owned Australian business that operates a portfolio of land lease communities, holiday parks and caravan parks.

[2] The Hunts gave notice on 11 September 2023 of their desire to end their managerial roles with HHPL on 11 November. HHPL accepted the resignations. The Hunts while resigning their managerial roles, indicated they wished to continue working part-time to assist a newly appointed park manager. However, the parties were unable to conclude employment agreements and HHPL after exploring options, withdrew their offers of ongoing part-time employment of the Hunts on 22 November 2023, believing their employment relationship had ended on 11 November.

[3] By a letter from their lawyers of 5 December 2023, the Hunts suggested their employment had been unlawfully terminated as they believed they had been offered and accepted ongoing part-time employment commencing on 12 November 2023 and alternatively had the status of persons intending to work in accord with s 6(1)(b)(i) of the Employment Relations Act 2000 (the Act).

[4] HHPL's lawyers responded on 19 December asserting that no ongoing employment relationship had been formed after 11 November. HHPL denied the existence of personal grievances suggesting: "There was no acceptance of the employment offer, verbal, written or otherwise, therefore no dismissal occurred".

[5] In response the Hunts' lawyers by letter of 21 December, reiterated a view that an agreement on essential terms had been made despite it not being confirmed by executed employment agreements and they raised further retrospective unjustified disadvantage claims, citing HHPL's failure to include an availability provision in the Hunts' employment agreements covering the positions they had resigned from.

[6] The parties attended an unsuccessful mediation and the Hunts on 21 May 2024, filed employment relationship problems in the Authority. The Hunts identified claims that they had been:

- (a) Unjustifiably dismissed.
- (b) Unjustifiably disadvantaged by the lack of availability provision to cover 'on call' work.
- (c) Inadequately remunerated for all hours worked.

[7] Remedies sought were lost and unpaid wages, compensation for hurt and humiliation and a contribution to costs.

[8] For HHPL, counsel filed statements in reply on 4 June 2024, contesting the validity of the Hunts' claims.

The Authority investigation

[9] By consent as they had identical terms of employment and the same dispute, the Hunts claims were dealt with during one investigation meeting.

[10] During the investigation meeting I heard evidence in person from Philip Hunt and Penelope Hunt and for HHPL, Francis Sharkey, Chief Executive and Ben Baylis, NZ Area Manager. Richelle Woods, HHPL's Australia based Chief Human Resources Manager, gave evidence by an audio-visual link (AVL). All provided written statements and answered questions on them. I record that the parties provided useful background information and relevant documentation and assisted my investigation.

[11] Pursuant to s 174E of the Act I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received but I have carefully considered such.

Issues

[12] The issues I must broadly determine are:

- a) Were the Hunts still employees of HHPL at the time their offers of ongoing employment were withdrawn on 22 November 2023 and if so, were they unjustifiably dismissed?
- b) In the alternative, was HHPL's action of withdrawing the offers of employment unjustified in all the circumstances?
- c) Were the Hunts appropriately remunerated?
- d) If unjustified dismissals or wage arrears owed are established as claims - what remedies should be awarded.
- e) If remedies arising from the personal grievances are appropriate the issue of any contributory conduct is to be assessed.
- f) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[13] The Hunts commenced employment at a holiday park at Glendhu Bay, Wanaka as co-managers in March 2018 with the park's previous lease owners. The well-established park has over 400 sites, an amenities block, boat ramp, boat parking, dump stations, laundry, kitchen, and barbeque facilities.

[14] The Hunts lived on site in provided accommodation. HHPL acquired the business from a previous owner and a lease to run the park in early 2023 from the local council. HHPL continued to employ the Hunts as co-managers. The Hunts were provided draft identical individual employment agreements (IEAs) on 11 April 2023 that were returned after some negotiations, signed on 19 June 2023. The Hunts employment with HHPL commenced on 18 July 2023.

IEAs Key terms

Hours of work

[15] The IEAs at cl 6 described hours of work as:

- 6.1 The average hours of work are set out in Item 5c of the Employment Schedule, plus reasonable additional hours which are necessary to fulfil the requirements of the position. This may include but is not limited to, weekends, public holidays, and being on call from time to time.
- 6.2 The Employee and the Employer recognise the importance of flexibility in meeting workplace demands while accommodating personal circumstances. Both parties agree to adopt a flexible approach to working hours, where feasible and appropriate.

[16] Item 5c of the employment schedule specified: "Weekly working hours – 40" and 5d of the schedule noted: "On call – Yes".

Remuneration

[17] The IEAs cl 8: "Remuneration and Benefits", relevantly provided for payment of the annual salary cited in the Employment Schedule item 6 that was described as being "based on the average hours of work set out in item 5c" . Cl 9 of the IEAs noted an accommodation allowance would be paid as specified in schedule 6a that would then less tax be deducted from salary paid on a weekly basis. Cl 9.3 indicated the Hunts power account would be met by the employer.

[18] The salaries of the Hunts were described at item 6 as “Gross Base Salary” set at \$65,650 each less a \$75 per week accommodation deduction.

Leave

[19] The annual leave provision specified that leave “shall be taken during off-peak periods” and that planned absences required at least four weeks’ notice.

Position description

[20] The identical Park Manager position descriptions noted the Hunts reported to the Area Manager (Mr Bayliss) and they were responsible for the day-to-day operation of the park. They broadly described their role as ensuring:

... efficient management practices are employed in the area of front office, staffing, financial control, revenue management, facility management, equipment maintenance, environment, WHS and staff training.

[21] In addition of relevance to working hours, the job description noted that the park managers had to: “Provide after-hours supervision of the park on a rostered basis. A minimum of 4 nights is expected of managers, support staff can be rostered to assist”. A further provision described their duty was to “Provide support and assistance if the property is short staffed”.

[22] In addition, under a heading “Guest Relations” was a provision that the park managers had to “Attend to all matters relating to the security of the park whilst ensuring your own safety and that of the guests and co-workers are not put at risk”.

[23] The IEAs had no provisions for ‘on call’ remuneration.

The parties understanding of hours of work and ‘availability’

[24] The Hunts acknowledged in evidence that hours of work fluctuated on a seasonal basis and suggested during peak periods weekly hours became excessive and demanding but during off peak times they had more flexibility and reduced hours, less emergencies, and more time to attend to maintenance issues. The Hunts suggested however that additional hours were worked during the off-peak wintertime in order to support the handover from the previous leaseholders to HHPL and to introduce HHPL’s new operating procedures.

[25] In addition, the Hunts described typical onsite call out issues they had to deal with to accommodate guest needs and security issues (when rostered on call).

[26] HHPL's Mr Sharkey, essentially suggested that the salaries paid to the Hunts were 'all inclusive' for hours worked and call outs and believed that the IEAs requirement that additional hours were expected was a reasonable expectation of a salaried employee and down periods where no salary reduction occurred, balanced matters out. Mr Sharkey also suggested the overall employment package including flexibility and onsite low-cost accommodation "clearly have compensated you for reasonable additional hours".¹ HHPL also asserted that the Hunts were not sole charge and had access to additional staffing support during peak periods.

[27] In addressing the issue of an 'on call' requirement HHPL says this was not a separate provision of the Hunts employment package with the previous leaseholder and they had introduced an on-call payment but confined it to hourly paid workers. Again, HHPL asserted the on-call element of the Hunts' role was compensated by their salaries. Ms Woods' perspective was the Hunts were not required to work 24 hours a day, 7 days a week and:

Being on call isn't work. They weren't required to sleep with one eye open. They were effectively living in their own home, which happened to be on site, and could entertain their friends and family while on call for example or otherwise go about their normal day activities.

[28] Ms Woods while conceding being on call was essential to respond to guest needs, suggested they only tend to call when arriving late or for emergencies. Ms Woods then suggested on call work at a camping ground is flexible and it did not prevent staff from going about their normal day and that the responsibility could be shared with other family members (for a period up till their resignations, the Hunts son and his partner worked at the park). Ms Woods says during their employment as managers the Hunts did not raise an issue of an on-call allowance apart from advocating one for their son and his partner during a period the Hunts took leave.²

[29] When HHPL took over running the park in July 2023, they also introduced a time recording system whereby the Hunts had to clock in and out of work. Mr Bayliss says the Hunts appeared to be happy in their continuing roles but they struggled to cope with a newly introduced guest booking system. The Hunts confirmed this saying they were often interrupted by guests before 'clocking on' and would not record time when engaged in call out activities.

¹ Letter of 22 November 2023 from Francis Sharkey to the Hunts headed "Resignation and Other Employment Matters"

² Richelle Woods statement of evidence, 18 October 2024.

They acknowledged that for two nights a week they would usually be able to have relief from on call duties by rostering wage workers.

[30] Mr Sharkey, who is based in Australia, recalled during the period of due diligence when he visited to check out the park, he met Mr Hunt in late 2022, and he apprised him the park was very busy during peak periods and that the Hunts worked big hours, 7 days a week and then took time off in the low season. Mr Sharkey says he responded by saying that HHPL would “need to consider obligations and implications under New Zealand law”.³

The ending of the employment relationship

[31] Mr Sharkey recalled a discussion with Mr Hunt prior to the settlement of taking over the business in which Mr Hunt said they were thinking of swapping their roles with their son and his partner who were working as their assistants. Mr Sharkey says he was non-committal on this proposal, advising it would be considered once HHPL took over and had a chance to assess all staff performance in their roles.

Resignation?

[32] By way of an email of 3 September 2023 to Mr Sharkey and Mr Bayliss, Mr Hunt indicated the Hunts wanted to step back to working 20 hours per week to allow their son and his partner to take over, claiming this had been arranged by their previous employers.

[33] In a further email of 11 September to Mr Sharkey, Mr Bayliss and Ms Woods, the Hunts indicated:

Pene & I wish to give two months notice of our desire to step back from our position of joint managers as arranged two years ago with GDR and agreed to by Hampstead Property Group prior to the sale approval of Glendhu Bay Motor Camp. This was programmed to take place straight after Easter 2023 but was understandably held-up by the delays caused by OIO. We have thoroughly enjoyed our role as camp managers over the past 5.5 years which was longer than we intended. It is time for us to kick back a bit and trust you will honour agreement for us to commit to 20 hours each a week. We believe we have a lot to contribute here and we look forward to being valued team members of the Hampshire Holiday Parks staff at Glendhu Bay for many years to come.

[34] Mr Sharkey responded by email of 21 September indicating, in part: “As previously discussed, I am happy to consider the change in roles at Glendhu Bay”. Mr Sharkey then asked Mr Hunt to provide information on staff deployment based on previous rosters and some detail on what roles the Hunts envisaged. Mr Sharkey expressed firmer interest in employing the

³ Francis Sharkey’s statement of evidence, 18 October 2024.

Hunts' son and partner as park managers, saying he would have to speak to Ms Woods and Mr Bayliss about what additional training may be required for them to "step up".

[35] In the event, the Hunts son and partner decided they were not interested in the roles under discussion and resigned. Mr Hunt confirmed this in an email to Mr Sharkey of 22 September. Other than indicating the Hunts would take on any roles to make the transition easier and they wished to vacate the managers' accommodation and live in an on-site caravan they owned, the email provided scant detail on what they would do (other than suggesting Mrs Hunt should ideally not work on reception duties).

[36] Next on 13 October, Mr Sharkey and Mr Bayliss had an AVL meeting with Mr Hunt to discuss on going employment. At this meeting, Mr Hunt indicated they wanted to work part-time up till Waitangi Day then thereafter to take on casual roles or projects to allow them the flexibility to travel. In the interim, a replacement park manager was engaged and commenced employment on 30 October.

[37] By identical emailed letters of 2 November entitled: "Acknowledgment of Resignation", Ms Woods acknowledged the resignations and confirmed the Hunts last working day as park managers would be 11 November. The letters offered them fixed term engagements on 20 hours per week from 12 November to 6 February 2024. The Hunts were directed to discuss working days with Mr Bayliss. Ms Woods then advised: "A formal change of working conditions will be sent to you through the EmployeeConnect system along with any relevant accrued leave entitlements".

[38] Further, the 2 November letter detailed the agreed vacation of the managers' accommodation arrangement and that during the fixed term engagement the Hunts would be allowed to occupy a caravan site without a site fee. The letter also noted the Hunts willingness to work beyond the fixed term on a casual basis and thanked them for their contribution to Glendhu Bay Holiday Park (impliedly in their managerial roles). The letter invited further discussion with Ms Woods or Mr Bayliss to answer any queries on the 2 November letters' content.

[39] By return email to Ms Woods on the same day (2 November), Mr Hunt thanked her for acknowledging their resignations and indicated he was happy with the 2 November letter's content apart from the fixed term offers. Mr Hunt described the discussion of the latter on 13 October, as not being conclusive and he indicated "In the interim we need a permanent , part-

time contract”. He also signalled they may then move onto casual employment “on an ad hoc basis once we can nut out exactly how that would work for both parties”. After Ms Woods had forwarded the proposed fixed term employment agreements, Mr Hunt asked in an email of 3 November for a change to a permanent arrangement.

[40] Mr Sharkey then emailed Mr Hunt (copying in Ms Woods) on 3 November, expressing confusion and he described the proposal Mr Hunt had previously put to him.

[41] In response Mr Hunt suggested their offer had been a ‘spur of the moment thing’ and stated: “Let’s just go with the permanent contract for now and see if this can evolve into something different further down the track”.

[42] Despite the confusion and the Hunts evident change in ‘bargaining approach’, Mr Sharkey says they decided to offer them permanent part-time roles, in part, to accommodate them in a site service tenancy to allow them to occupy their caravan at the park while employed. This was facilitated by an early morning email of 8 November from Ms Woods to Mr Hunt, attaching re-drafted permanent employment agreements and seeking a response by 10 November (to coincide with expiry of the Hunts’ notice period).

[43] At this point in time a further complication arose as Mr Hunt got embroiled in a dispute with Ms Woods. Mr Hunt had without obtaining prior approval sought independent legal advice on HHPL’s purported obligation to pay on call payments to staff (including his son). Mr Hunt then sought payment for the resulting law firm invoice from HHPL. An HHPL manager responded by email of 7 November, suggesting it was “not for Hampshire – assume it was for personal Legal Advice”. Mr Hunt then promptly emailed back stating “I’m afraid it is for Hampshire. HR we’re [sic] trying to cheat my staff. HR requested a copy of it so they own it”.

[44] Ms Woods then became involved and by email of 8 November to Mr Hunt, she said the invoice could not be reimbursed as the legal advice had been sought without prior approval. Ms Woods then admonished Mr Hunt for the accusatory tone of his email to another HHPL employee.

[45] In response to Ms Woods’ email later on 8 November (that was copied to Mr Sharkey, Mr Bayliss, and another employee), Mr Hunt suggested the legal advice had been necessary as human resources had breached his son and partner’s IEAs, in an illegal and unethical manner.

[46] While the above dispute was unfortunately timed (coinciding with the Hunts negotiating their ongoing employment status) it was compounded by Mr Hunt ending his 8 November email with: “It remains a HPG expense! I accept that our differing values makes our future employment with HPG untenable”.

[47] Ms Woods by a further email of the morning of 9 November reiterated the inappropriateness of Mr Hunt seeking legal advice “in your personal capacity”. Ms Woods then turned to the offer of ongoing employment and asked, “are you indicating that you will be finishing your employment with Hampshire on 11th November 2023 and not taking up the offer of a part-time employment contract?”.

[48] Mr Hunt responded by brief email in the evening of 9 November that first justified the decision to get legal advice on behalf of his son and partner suggesting: “Payment is therefore on you” and then in response to the offer of ongoing employment indicated: “We certainly can’t enter into another Hampshire contract before getting paid out in full from the current one”.

[49] Mr Hunt did not elaborate further on the concluding remarks of his 9 November email and the deadline for acceptance of the new employment agreements passed without a response from the Hunts.

[50] On 10 November the new park manager advised the Hunts by email that given his understanding they had not reached new contract agreements: “ I have been advised that past the 11th of November I will have to take you off the roster until I get the go ahead from HR”.

[51] Mr Hunt responded by email on 11 November thanking the new park manager for explaining the matter in person but then stated: “I’m not really sure that our current contract is actually cancelled by our stepping down as managers, but we accept your position and wish you the best going forward”.

Interim issues

[52] While the above exchanges could reasonably be construed as their employment period ending for the Hunts by way of resignation effective on 11 November 2023 and no agreement being reached on alternative ongoing employment there was a ‘further twist to the tale’.

[53] On 13 November Mr Hunt texted Mr Sharkey (he says he had lost trust in dealing with Ms Woods) as follows:

Hi Frank

Please do both of us a favour. Please check out the initial contracts that Pene & I were sent and also those of Tyson and Emily [the Hunts' son and partner]. Compare ours with the CCR [the Hunts previous employer] contracts that we were required to send over. Check Tyson & Emily's contracts against the messages from Andrea & Richelle to see why the employment lawyer was required to get a fair ruling. The most relevant clauses you need to look at are 6. Hours of Work & the Employment Schedule.

Cheers, Phil

[54] Mr Sharkey chose to continue to engage with Mr Hunt and texted back on 15 November, saying he intended with Ms Woods input to do "a complete review of the employment issues and contracting at Glendhu". Mr Sharkey said in the text he would revert to Mr Hunt once the review was completed then Mr Starkey stated in the ending of the text:

Understand that your resignation as managers happened but you haven't accepted the new part time employment agreement, is that because of these other issues?

[55] In what may be seen as a key omission, Mr Hunt did not respond to the email. Mr Hunt says he drafted a response but did not send it.

[56] Despite not contacting Mr Hunt further and saying he was not entirely clear what the Hunts issue was, Mr Sharkey reviewed the situation and in a letter of 22 November to the Hunts, headed "Resignation and Other Employment Matters" he set out his views. These were in summary that:

- As the Hunts had not identified any specific issues with the draft part-time employment agreements or sought any amendments and had not returned and signed them, they were no longer employed by HHPL.
- Mr Hunt's expressed concerns related to the different approach HHPL took to operating the business.
- On the hours worked for the salaries paid Mr Hunt's view of hours 'averaging' over peak and non-peak times was acknowledged and described as "which saw you work excessive weekly hours during peak periods, obtain time in lieu and then work shorter weekly hours in the off-peak periods".

- HHPL had sought to introduce a standard 40-hour week plus “reasonable additional hours” and prevent excessive hours by better support staffing and he reiterated a belief that the salaries paid compensated for occasional additional hours worked.
- After looking at the ‘on call’ issue pertaining to the Hunts’ son and partner, he had resolved to introduce a \$50 per night on call payment for wage earners.
- Notwithstanding objections to Mr Hunt obtaining legal advice without HHPL consent, he would arrange for the invoice to be paid.
- He viewed some of Mr Hunt’s email correspondence as not acceptable, that would “not be tolerated in future, should you have future employment with us”.
- Mr Hunt’s claim for hours worked in his final pay period where he had unusually recorded additional hours would be looked at if Mr Hunt could identify why they were not considered “reasonable additional hours as contemplated by your managers employment agreement”.

[57] The Wednesday 22 November letter, concluded with the Hunts having failed to accept an offer of ongoing employment:

...that offer is now withdrawn. If you still wish to be considered for future part-time employment, we are happy to consider any request provided you make such a request before 5pm this Friday. Our Area Manager and Park Manager are keen to make final decisions on staffing for the coming season as a matter of urgency.

I look forward to hearing from you at your earliest convenience.

[58] The Hunts did not engage further with the offer of ongoing employment and responded through their lawyer’s letter of 5 December 2023, suggesting their employment had been unlawfully terminated.

Assessment

[59] This is a matter with a somewhat unique fact situation. Determining whether a situation can be characterised as a dismissal as the Hunts’ claim, normally requires an assessment of who initiated the ending of the employment relationship. If a dismissal is claimed the onus of proving the dismissal occurred rests with the employee.

[60] On the facts, there was no dispute that the Hunts intended to and did, resign from their positions as co-park managers. This included them vacating provided accommodation and

raising no objection to the appointment of a successor commencing in their roles during the twilight of their notice period. This was an amicable resignation with the Hunts working out their full notice period and cooperating in the transition to the new park manager. The fact of the resignation could not have been altered unless the parties mutually agreed to allow it to be retracted. The resignation brought the employment relationship to an end on 11 November 2023.

[61] However, at the time they resigned the Hunts say they had an ongoing expectation of the employment relationship being preserved in a different format but there is nothing in their employment agreements that suggest this and it is apparent that any assurances around this were created by the previous employer and were not binding on HHPL unless specifically provided for.

[62] HHPL became aware of the Hunts expectations prior to their resignations and while not accepting any contractual obligation, in good faith agreed to explore ongoing part-time employment of the Hunts in another capacity. Negotiations commenced and it is evident that HHPL adopted a flexible approach to try and accommodate the Hunts needs and their wish to preserve a long-standing attachment to the work environment for work and leisure or ‘lifestyle’ reasons.

[63] The negotiations did not conclude with the Hunts accepting offered employment agreements and the Hunts failed to identify any specific counter claims during the reasonably lengthy bargaining phase.

[64] I do not consider that the assertion in submissions that all essential terms and conditions had been agreed and therefore the Hunts fall into the Act’s category of a person intending to work,⁴ bears scrutiny on the evidence. A “person intending to work” is defined in the interpretation section (s 5) of the Act as meaning “a person who has been offered and accepted, work as an employee; and **intended work** has a corresponding meaning”.⁵ The Hunts do not fall within this category.

[65] At best, from Mr Hunt’s email of 9 November, it could be construed that a ‘conditional acceptance’ was communicated by Mr Hunt (i.e. they would agree to a new employment agreement once they were “paid out in full from the current one”). Mr Hunt despite having

⁴ Employment Relations Act 2000, s 6.

⁵ Section 5.

ample opportunity to do so, did not clarify what this bargaining stance entailed. At worst for the Hunts, the response could reasonably be viewed as a counter-offer that the Hunts later, despite ample time to do so, did not resile from. This counter-offer had the legal effect of destroying the original offer.

[66] The Hunts' 9 November email was in response to an unequivocal question from HHPL's Ms Wood, who asked "are you indicating that you will be finishing your employment with Hampshire on 11th November 2023 and not taking up the offer of a part-time employment contract?".

[67] A further conceptual hurdle is that it is well established, that to bring a claim of unjustified dismissal requires the person to be employed at the time of the dismissal.⁶ The Hunts had resigned employment with HHPL and worked out their notice period when the identified unjustified dismissal claims pertaining to positions' they had not accepted, crystallised.

[68] Further, after setting a deadline for acceptance (10 November) HHPL did not withdraw the offers but instead tried to investigate the Hunts' concerns, that were objectively a dispute about their son and his son's partner's on call provisions, and an obtusely implied claim that the Hunts may not have been remunerated for all hours worked in their previous co-park manager, positions.

[69] Mr Hunt did not articulate their position clearly despite being invited to do so by Mr Sharkey's text of 15 November (see para [53] above). At this point in time, it was still open to the Hunts to accept the proffered part time offers or elaborate upon the specific reason why they could not do so. They did not, so no formal offer and acceptance process was completed.

[70] HHPL then in Mr Sharkey's letter of 22 November, addressed past issues pertaining to hours worked and set out their reasoning for rejecting such claims and in the absence of a response, withdrew the offers of ongoing employment. However, Mr Sharkey still left a 'window open' by inviting the Hunts to declare an interest in ongoing part-time employment by the end of business on 24 November. The Hunts did not respond.

⁶ See for example *Butterfield v Alliance Group Ltd* [2018] NZEmpC 61 at [33].

[71] In these circumstances I cannot conclude that HHPL failed to meet their bargaining good faith obligations set out in the Act.⁷

Finding on issue one - Were the Hunts still employees of HHPL at the time their offer of ongoing employment was withdrawn on 22 November 2023 and if so, were they unjustifiably dismissed?

[72] I find on the facts, that the Hunts were neither employees or persons' intending to work at the time their offers of employment were withdrawn and therefore they were not unjustifiably dismissed.

[73] This leaves the residual issue of whether the Hunts were disadvantaged by HHPL's withdrawal of offers of ongoing employment. Given the Hunts were not in an employment relationship at the time the offers were withdrawn no good faith duties arise as they do not survive the ending of the employment relationship.⁸

[74] However, given the employment offers were made while the Hunts were still in an employment relationship, the action of HHPL in withdrawing the offers, arguably could be construed as founding potential disadvantage claims because the duty to act in good faith extends to bargaining or varying an existing employment agreement.⁹ In examining this aspect of the Hunts claims and applying s 103A of the Act, I have as above, not found any evidence of HHPL departing from a standard of what a fair and reasonable employer could have done in the prevailing circumstances at the time. I find HHPL made extensive efforts in bargaining to accommodate the Hunts' expressed needs.

[75] I also observe that good faith is a mutual obligation¹⁰ and the Hunts did not at crucial times, engage in open and responsive communications.

Finding on issue two - In the alternative, was HHPL's action of withdrawing the offers of employment unjustified in all the circumstances?

[76] I find the withdrawal of the offers of employment were not unjustified actions. The Hunts are not entitled to consideration of any remedies relating to this aspect of their claims.

⁷ Employment Relations Act 2000, ss 63A and 68.

⁸ *Balfour v Chief Executive, Department of Corrections* [2007] ERNZ 808 at [31].

⁹ See discussion of this concept by Member Doyle *Thom v Fletcher Building Ltd* [2017] NZERA 205 at [54]-[55] and Employment Relations Act 2000, s 4(4)(ba).

¹⁰ Employment Relations Act 2000, s 4(1)(a).

Issue three - were the Hunts appropriately remunerated for all hours they worked?

[77] The above aspect of the Hunts' claims was split into an unjustified disadvantage claim relating to an assertion that HHPL was obliged as per s 67D of the Act to have an availability provision and if so, compensate the Hunts for being available to accept work outside their normal hours and an alternative or allied claim of whether HHPL had been unjustifiably enriched by failing to pay the Hunts "for hours worked in excess of 40 Hours per week and whether the Applicants are therefore entitled to reimbursement of wages".¹¹ In submissions, the Hunts indicated they were not seeking remuneration akin to what are known as 'sleepover' cases¹² but were confining their remedies sought to payment of compensation for additional hours worked.

Availability

[78] The Hunts contend their unjustified disadvantage claim made pursuant to s 103(1)(h) of the Act was based upon their employment agreement not being compliant with s 67D(1) of the Act that deal with availability provisions. S 67D(1) of the Act defines the meaning of an availability provision in an employment agreement if it specifies:

- (a) The employee's performance of work is conditional on the employer making work available to the employee; and
- (b) The employee is required to be available to accept any work that the employer makes available.

[79] While the amendments to the Act that were introduced on 1 April 2016, ostensibly had the purpose of addressing what are known as 'zero hours' provisions where minimum hours of work may not be specified, the Employment Court in *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* held that s 67D of the Act extended beyond this situation and encompassed a concept that reasonable compensation should be paid to workers making themselves available for their employer's benefit.¹³ In context, the Hunts' employment agreements did require them to make themselves available "to fulfil the requirements of the position" but with no constraints beyond an expressed concept that those hours be worked on a "reasonable" basis. The hours of work while being described as "average hours" are also described as being 40 "weekly working hours". The terminology used is imprecise but capable of being construed as that the Hunts were paid at all times on the basis of a 40-hour week.

¹¹ Synopsis of Applicants' Legal Submissions, 7 November 2024.

¹² For example, *Idea Services Ltd v Dickson* [2011] NZCA 14 or *Law v Woodford House* [2014] ERNZ 576.

¹³ *Postal Workers of Aotearoa Inc v New Zealand Post Ltd* [2019] NZEmpC 47, [2019] ERNZ 78 at [24].

[80] As a result, I conclude the employment agreement effectively contained an availability provision and it was in context, included on genuine grounds given the unique nature of the employment and was a reasonable provision.

[81] I find, with no reasonable compensatory provision as envisaged under s 67D(3)(b) of the Act the availability provision is non-complaint with s 67D.

[82] In terms of potentially remedying the situation s 103(1)(h) of the Act provides that an employee may be disadvantaged by their employment agreement not being in “accordance” with section 67D of the Act as I have found. I also must have regard to s 67D(7) of the Act to determine if the Hunts have been disadvantaged. This provision allows the parties to circumvent the need to pay compensation for availability as it provides that:

.... an employer and an employee who is remunerated for agreed hours of work by way of a salary may agree that the employee’s remuneration includes compensation for the employee making himself or herself available for work under an availability provision.¹⁴

[83] On the evidence there was some suggestion that the Hunts, by accepting the nature of their hours of work having ‘peaks and troughs’, tacitly agreed their remuneration and conditions package included compensation for availability. The Hunts brought no evidence to suggest having raised this issue with HHPL until their employment had concluded.

[84] While arguably covered under cl 6.2 in the Hunts’ IEAs (“Both parties agree to adopt a flexible approach to working hours, where feasible and appropriate”), this is not a distinct availability provision and nowhere is it recorded in the IEAs that salary is total recompense for all hours worked (as was suggested by HHPL in submissions).

[85] The Hunts in contrast, provided evidence in the form of draft provisions of employment under negotiation in March 2023 prior to commencing employment with HHPL, that show they specifically rejected a total salary recompense clause that indicated the Hunts were to “make themselves available to work additional hours outside their ordinary hours of work, which may include being on call from time to time”. In the circumstances this rejected provision would have better described HHPL’s actual intentions but still would have constituted an availability provision that without compensation did not comply with s 67D of the Act.

¹⁴ Employment Relations Act 2000, s 67D(7).

[86] As a result, I find that the Hunts have made out their claims that a lack of a compliant availability provision means no reasonable compensation was paid for the times they were required to work additional hours or make themselves available for work 'on call' beyond reasonable expectations and they are entitled to consideration of remedies.

Remuneration for all hours worked

[87] I have considered the alternative claim that the Hunts were not paid for all hours worked and should be compensated on a quantum meruit basis (facilitated by an Authority declaration that the employer has been unduly enriched by failing to pay for additional hours) but rejected this on the basis that the Hunts both in evidence and submissions conceded the seasonal nature of their work meant they received a salary during all weeks of the year. I note that their hourly rate calculated on 40 hours per week is \$32.04 per hour.

[88] I was not provided with compelling evidence on what hours were actually worked during both busy and off-peak periods. However, during the limited period, the Hunts worked for HHPL (16 weeks) it appeared to be accepted that on average Philip Hunt worked 50 hours per week and Penelope Hunt worked 44.5 hours per week.

Remedies

[89] Exercising the discretion the Authority has under s 160(3) of the Act and consistent with the finding that the Hunts employment agreements did not comply with the Act's availability requirements, I find that compensation should be awarded to the Hunts for the additional hours they made themselves available (including on call duties) during their 16 weeks of employment.

[90] Considering that there were times that the Hunts would be expected to make themselves reasonably available for additional hours that I fix at two hours per week, I award arrears of wages to Philip Hunt in the amount of \$4,101.12 (being an additional 8 hours per week for 16 weeks at \$32.04 ph.) and for Penelope Hunt the amount of \$1,281.60 (being an additional 2.5 hours per week for 16 weeks at \$32.04 ph.) with annual leave and Kiwi saver payments being paid on these amounts. No other remedies are granted as I am not convinced that in this context the impact of working additional hours caused emotional harm. The Hunts emphasised they had an attachment to living and working at Glendhu Bay and accepted the nature of their responsibilities that HHPL acknowledge were ably met with genuine commitment.

[91] The Authority, while not condoning HHPLs failure to comply with s 67D of the Act heard evidence that such a breach was genuinely inadvertent and has been partly resolved for

wage workers. I suggest if not already resolved, provisions for salaried workers need to properly reflect the Act's intentions pertaining to compensating for additional hours worked in appropriate circumstances.

Interest

[92] The Hunts claimed interest on the amounts due. Given the time that has elapsed since the additional payments should have been made, I find the sums awarded below shall also have interest levied upon the whole amounts, in accord with Schedule 2, clause 11(1) of the Act i.e., to be calculated as set out in Schedule 2, Interest on Money Claims Act 2016 from the period up to 7 November 2024.

Contribution

[93] I record given the circumstance that the remedies granted are to address an issue of breaches of a statutory provision, no reduction of any remedies for contribution are at issue.

Outcome

[94] I have found that:

- a. Philip and Penelope Hunt were not unjustifiably dismissed from their employment with Hampshire Holiday Parks Limited.
- b. Hampshire Holiday Parks Limited must compensate the Hunts for failing to recompense them for making themselves available for additional hours of work by the sums below:
 - i. Philip Hunt - \$4,101.12 gross unpaid wages.
 - ii. Penelope Hunt - \$1,281.60 gross unpaid wages.
 - iii. Holiday pay and Kiwi-saver contributions are to be calculated and paid on both the above amounts as is interest as per Schedule 2, Interest on Money Claims Act 2016 up to 7 November 2024.

Costs

[95] Costs are reserved.

[96] The parties are encouraged to resolve any issue of costs between themselves.

[97] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party seeking a costs award may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum.

[98] Upon request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁵

David G Beck
Member of the Employment Relations Authority

¹⁵ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1