IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2022] NZEmpC 200
EMPC 125/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JAMES STEWART Plaintiff
AND	AFFCO NEW ZEALAND LIMITED Defendant

Hearing:	12 September 2022 (heard at Wellington)
Appearances:	J Stewart, in person G Malone and R Robertson, counsel for defendant
Judgment:	8 November 2022

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The issue before the Court is a confined one. It concerns whether Mr James Stewart, a current employee of AFFCO New Zealand Ltd (AFFCO), can establish that he was disadvantaged by the inclusion of a non-compliant availability provision in his individual employment agreement (IEA) and if so, whether he is entitled to a remedy.

[2] Mr Stewart's claim comes before the Court as a non-de novo challenge to a determination of the Employment Relations Authority.[1] The Authority concluded that certain provisions of his IEA fulfilled the definitional requirements of s 67D of the

[1] *Stewart v AFFCO New Zealand Ltd* [2022] NZERA 99 (Member Loftus).

Employment Relations Act 2000 (the Act) and amounted to being an availability provision. However, the clause did not specify compensation as required by s 67D(3)(b) of the Act.[2]

[3] The Authority noted that AFFCO had conceded there was an availability provision in the IEA but had gone on to say that AFFCO claimed all overtime was performed voluntarily. There was no evidence it had ever tried to enforce a refusal or that Mr Stewart suffered a disadvantage such as receipt of a warning.[3]

[4] The Authority concluded there was no disadvantage for the purposes of Mr Stewart's grievance because there was no evidence AFFCO had tried to enforce the clause. The real issue between the parties was a significant disagreement about the level of appropriate compensation in exchange for agreeing to be available. The Authority determined it could not resolve that particular issue as it would constitute the fixing of a term which is precluded by the Act, except in specific circumstances which did not apply.[4]

[5] It is this finding that is challenged. The sole issue is whether Mr Stewart suffered any disadvantage because a non-compliant availability provision was included in his IEA.

[6] Mr Stewart says he suffered disadvantage in several respects which I will outline shortly. By way of remedy – if necessary on a quantum meruit basis – he says he should receive $4 per hour for each hour of availability since 1 April 2016.

The evidence

[7] Mr Stewart is employed by AFFCO at its Imlay Plant at Whanganui.

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2 At [27].
3 At [29].
4 At [32].

[8] With effect from 9 July 2018, he was engaged under a fixed-term IEA for the 2018–2019 meat processing season. Subsequently, this Court concluded that this agreement became permanent so that the IEA continues to be in effect.[5]

[9] Included in that document were the provisions which the Authority found were availability provisions:

> **6. SEASONAL EMPLOYMENT**
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> ...
>
> 6.10 As a result of uncertain livestock flows and the seasonal nature of the industry, the employee agrees to be available to work for the hours as outlined in this agreement and overtime as reasonably required by the employer and will be paid as [prescribed] in clauses 8 and 9 of this agreement.
>
> 6.11 As a result of animal welfare and operational requirements, and the seasonal nature of the industry, the employee agrees to not partake in any secondary employment that will conflict with their ability to fulfil the requirements outlined in this agreement. If such conflict arises the employer will endeavour to accommodate the employee in respect to such matters where possible. It is agreed that final determination as to suitability and required availability shall be determined by the employer.
>
> ...
>
> **9. OVERTIME**
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> ...
>
> 9.3 Given the seasonal nature of the industry, the employee accepts that s/he may be required to work extra hours both during the week and on weekends as required by the employer and agrees to work such extra hours as are required.
>
> 9.4 The employer shall notify all employees required to undertake weekend overtime work not later than the end of their work period on the Thursday before. Notwithstanding the above, where unforeseen circumstances necessitate Saturday work, and such notification is not possible, agreement to work shall not be unreasonably withheld.

[10] Mr Stewart confirmed on 20 August 2019 that he was raising several personal grievances, one of which was that the availability provision of his IEA did not comply with s 67D of the Act.

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5 *Stewart v AFFCO New Zealand Ltd* [2021] NZEmpC 215 at [15].

[11] In August 2020, Mr Stewart was offered a new IEA. He did not accept the offered terms.

[12] On 24 August 2020, employees were offered a rate review and a provision which included compensation for availability. Those provisions would be part and parcel of the applicable IEA.

[13] There was to be a 1.5 per cent increase on all paid rates. AFFCO also offered a compensatory provision, being a loading of 1.25 per cent on employees' weekly pay. This was intended to provide reasonable compensation for employees making themselves available to work ordinary hours as well as reasonable overtime as required.

[14] Mr Stewart said that although he had not agreed to the 2020/2021 IEA, this offer was nonetheless extended to him.

[15] On 26 August 2020, Mr Stewart wrote to AFFCO, rejecting the offer. He said this:

> While the 1.5% general pay increase is enticing as we haven't had such an increase in more than a decade, the 1.25% offered to compensate for availability is woefully inadequate. Given my current income level it would mean an average payment of a little over 14 dollars a week, less than 750 dollars a year. In return for that 14 dollars per week based on the availability required over the last few years, I expect to be surrendering the right to my own time of around 30 hours per week over 7 days (on top of 42.5 ordinary hours). Giving away the right to plan weekends ahead of time and more for the price of a burger chips and fries upsized each week, if reflected on, is a deal few people would make. Sadly I think many people have no sense of their right to decline to accept it and ask for better.
>
> ...

[16] Mr Stewart in evidence said that what he was rejecting in his email was not the obligation to perform overtime, but the level of compensation which was being offered which he believed was insufficient.

[17] Mr Stewart gave detailed and unchallenged evidence as to the regular overtime which was required at Imlay.

[18] He said that both before and after August 2020, he regarded himself as bound by the obligation to make himself available for such overtime.

[19] He said he was a member of a relatively small service department. In reality there was no option to decline overtime if requested. To do so would have placed a lot of stress on co-workers. He considered there was "an absolute expectation" that he would undertake this work.

[20] Overtime was common on Mondays to Fridays. It was also common on Saturdays. A more recent issue was that he was expected to work on a short Saturday shift starting at 11.00 am, or a long shift starting at 3.00 pm. He would be expected to hold himself available for either option.

[21] During the bobby-calf season, he was also be expected to work on Sundays.

[22] He could apply for permission not to work for a notified overtime period, and permission would likely be granted. However, to all intents and purposes he felt there was an expectation that he would perform overtime when asked. This had been the case for many years.

[23] In cross-examination, Mr Stewart accepted that given a non-compliant availability provision, he could legally refuse to work in light of the provisions of s 67D of the Act. He also knew that if he did refuse, it was illegal for AFFCO to punish him for the refusal. Mr Stewart said this had never occurred, but this was because he never gave AFFCO a reason to punish him. Had the company attempted to do so, the issue would have been taken to the Authority.

[24] Finally, Mr Stewart referred to certain diary notes he had made. He recorded on 11 February 2020 that after stating mandatory Sunday shifts would be rostered over the forthcoming weekend, AFFCO changed this requirement and asked for volunteers. Mr Stewart had emailed his managers, telling them they had no power to enforce overtime at all. He understood that these circumstances were a backtrack by AFFCO.

[25] In his entry for Saturday, 15 February 2020, he recorded he had spoken to his supervisor. Despite there having been a backdown a few days previously, the plant manager was now stating that Sunday work "will be compulsory for the freezers" and that all plant managers had been directed to make their respective freezer departments work on Sundays. Mr Stewart said this was in the context of a need for AFFCO to catch up on container loading and happened despite – in Mr Stewart's opinion – the fact that such a step was not permitted in the absence of a compliant availability provision.

Overview of the parties' cases

[26] Mr Stewart submitted that there were three elements to his disadvantage claim.

[27] First, he said that by not receiving any consideration for making himself available or by being offered unreasonable consideration for such, he was disadvantaged in pecuniary terms.

[28] Second, he submitted that if employers in such circumstances did not share the burden of the cost of availability, they would not necessarily organise themselves so as to minimise the burden on workers.

[29] Third, he submitted that the wording of s 103(1)(h) of the Act meant that any disadvantage should be recognised as existing at the point where a non-complaint availability provision was included in an employment agreement.

[30] He also referred to various computations to support his contention that in the circumstances fair recompense for the time involved in making himself available would be $4 per hour. This was to be contrasted with the loading which AFFCO had offered which would be just under 39.7 cents per hour. He said such modest recompense would not be sufficient to encourage AFFCO to organise its affairs so as to minimise the encroachment.

[31] For AFFCO, Mr Malone submitted that actual disadvantage was required to establish the personal grievance. This did not arise in the present case. Whilst there was a non-compliant availability provision, it was not enforced. Without Mr Stewart's

consent to varying the agreement by removal of the provision, AFFCO could only decline to enforce it.

[32] He submitted that Mr Stewart was aware of this, he accepted overtime requests were not being enforced against him and he undertook overtime on a voluntary basis. He was free to refuse overtime and knew it. In such circumstances he was in the same position that would have applied if the availability provision had not been included at all.

[33] Mr Malone also referred to what was considered initially by the Authority in *Maritime New Zealand Ltd v ISO Ltd*;[6] and in the related challenge which gave rise to a trio of judgments in this Court where consideration was given to the possibility of making a compliance order that the employer should cease offering a non-compliant availability provision.[7]

[34] Mr Malone said the circumstances of this litigation gave rise to similar issues. The sequence of decisions in this Court illustrated the fact that if a non-compliant availability provision was included in an employment agreement, unless the parties could agree on the terms necessary to rectify the problem the only remedy which could be considered would be one to remove the offending clause.

Relevant statutory provisions

[35] I now set out the sections of the Act that are relevant to this challenge. Section 67D describes the requirements of an availability provision as follows:

> **67D Availability provision**
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> (1) In this section and section 67E, an **availability provision** means a provision in an employment agreement under which—
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> (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.
>
> (2) An availability provision may only—

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6 *Maritime Union of New Zealand Inc v ISO Ltd* [2019] NZERA 704.

7 *Lye v ISO Ltd* [2020] NZEmpC 231, [2020] ERNZ 551; *Lye v ISO Ltd (No 2)* [2021] NZEmpC 120, [2021] ERNZ 550; and *Lye v ISO Ltd (No 3)* [2021] NZEmpC 189, [2021] ERNZ 1019.

(a) be included in an employment agreement that specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and

(b) relate to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.

(3) An availability provision must not be included in an employment agreement unless—

(a) the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours of work specified in that provision; and

(b) the availability provision provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the provision.

(4) An availability provision that is not included in an employment agreement in accordance with subsection (3) is not enforceable against the employee.

(5) In considering whether there are genuine reasons based on reasonable grounds for including an availability provision, an employer must have regard to all relevant matters, including the following:

(a) whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision:

(b) the number of hours for which the employee would be required to be available:

(c) the proportion of the hours referred to in paragraph (b) to the agreed hours of work.

(6) Compensation payable under an availability provision must be determined having regard to all relevant matters, including the following:

(a) the number of hours for which the employee is required to be available:

(b) the proportion of the hours referred to in paragraph (a) to the agreed hours of work:

(c) the nature of any restrictions resulting from the availability provision:

(d) the rate of payment under the employment agreement for the work for which the employee is available:

(e) if the employee is remunerated by way of salary, the amount of the salary.

(7) For the purposes of subsection (3)(b), an employer and an employee who is remunerated for agreed hours of work by way of salary may agree that the employee's remuneration includes compensation for the employee making himself or herself available for work under an availability provision.

[36] Section 67E permits an employee to refuse work in addition to working guaranteed hours in certain circumstances:

> **67E Employee may refuse to perform certain work**
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> An employee is entitled to refuse to perform work in addition to any guaranteed hours specified in the employee's employment agreement if the agreement does not contain an availability provision that provides for the payment of reasonable compensation to the employee for making himself or herself available to perform work under the availability provision.

[37] Section 103 provides for personal grievances. The section relevantly states for present purposes:

> **103 Personal grievance**
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> (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
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> ...
>
> (h) that the employee has been disadvantaged by the employee's employment agreement not being in accordance with section 67C, 67D, 67G, or 67H; or
>
> (i) that the employee's employer has contravened section 67F or 67G(3); or
>
> ...

Analysis

[38] I begin by considering the meaning of the statement made by Mr Stewart in his email of 26 August 2020, when he rejected the offer of availability compensation.[8]

[39] Mr Malone submitted that what Mr Stewart was in effect saying in the email was that he wished to keep his freedoms, including the right to plan weekends ahead of time. He was impliedly indicating that he might be prepared to meet AFFCO's requirements if he were to obtain what he would regard as more reasonable compensation.

[40] I infer from Mr Malone's submission that when Mr Stewart rejected the offered compensation, he also rejected the obligation to make himself available.

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[8] See [15] above.

[41] However, I do not accept that Mr Stewart went that far. He was certainly unwilling to agree compensation at the level offered, but that is not the same as saying that he was therefore unwilling to meet his IEA obligations.

[42] I find that the effect of Mr Stewart's communication was that AFFCO needed to reconsider its position as to the extent of compensation. What he was saying was that AFFCO had choices. It could either bargain with Mr Stewart for a level of compensation that was mutually acceptable, or it could withdraw the obligations Mr Stewart had entered into with regard to his availability.

[43] There was a significant power imbalance between Mr Stewart and AFFCO. AFFCO was the party wishing to control the times at which overtime would be worked. It wanted its employees to be available for additional work in light of the demands of its business.

[44] Mr Stewart kept to his side of the bargain. He made himself available for work in a small freezer team when asked, in a context where he reasonably believed there was an absolute expectation that he would provide his services. He felt he had little choice. AFFCO did nothing to dissuade him from this position. It did not clarify that were he to work when asked he would be doing so on a voluntary basis; or that he could choose not to attend work at such times.

[45] Mr Stewart knew that if he and his colleagues were notified that they would be required to work overtime, he could request permission to be released from any such obligation. He also knew that permission was likely to be granted. But his position was no different from other workers who were subject to an availability provision which allowed for compensation. The possibility of being relieved from the underlying obligation was available to all workers in the unit where Mr Stewart worked, whether or not they had complaint availability provisions.

[46] There is no evidence that AFFCO either bargained with Mr Stewart over the compensatory amount or released him from the obligation to be available as contained in his IEA.

[47] It is not enough to point to s 67E of the Act, as AFFCO does, to say that Mr Stewart had the right to refuse to perform certain work, that he never exercised that right, and that he was never disciplined, or would not have been, for declining extra work. Mr Stewart was aware of his right of refusal, but in the circumstances which developed, AFFCO did not make it clear to him that he was free to refuse an overtime request. In my view, AFFCO carried an obligation in the circumstances either to bargain with Mr Stewart as to reasonable compensation, or to vary the IEA so as to release him from the availability obligations.

[48] In *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*, a full Court stated that agreements which purport to reserve to an employer the unilateral ability to require an employee to work past their usual hours *do* materially constrain a worker's ability to plan their life away from work.[9]

[49] I conclude that disadvantage arose by the inclusion of a non-compliant clause because no consideration was given to Mr Stewart for in fact holding himself available as stipulated in his IEA.

[50] This conclusion effectively deals with Mr Stewart's first two points of disadvantage: there was no valuing of his availability, and there was no sharing of the cost of him making himself available.

[51] Turning to Mr Stewart's third point, I do not accept his submission that it was Parliament's intention when enacting s 103(1)(h) to provide for a personal grievance simply by the inclusion of a non-compliant clause. The language of the provision makes it clear that the employee must have been disadvantaged by the relevant non-compliance. The subsection can be usefully compared with s 103(1)(i), which provides that a personal grievance exists where the employer has "contravened" certain provisions. Section 67D, which includes the obligation to provide reasonable compensation, is not one of those specified provisions.

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

[52] However, it follows from my analysis that Mr Stewart suffered a disadvantage. I respectfully disagree with the Authority's contrary conclusion. Accordingly, his personal grievance is established.

Remedies

[53] Shortly before the personal grievance was raised, Mr Stewart said that his availability compensation should be fixed at $4 per relevant hour. AFFCO had said that the appropriate loading would be 1.25 per cent of a relevant week's pay. At the time, Mr Stewart considered that this amounted on average to be about $14 a week or 39.7 cents per hour.

[54] No further analysis of either party's position was placed before the Court. It was submitted that were I to conclude that the personal grievance was established, the parties should be given an opportunity to resolve the issues directly since neither side was in a position to provide focused submissions as to quantum.

[55] I agree with this approach. However, it is appropriate for me to address two issues which were raised at the hearing.

The commencement date of Mr Stewart's claim

[56] The first relates to Mr Stewart's pleaded claim that his personal grievance should be regarded as running from 1 April 2016. That was the date when the availability provisions were introduced to the Act. He wishes to assert that availability compensation be paid as from that date.

[57] AFFCO, however, takes the position that the issue did not arise until Mr Stewart sent his email of 20 August 2019 raising a personal grievance, and that the 90-day limitation in s 114 of the Act precludes any back dating to a point in time which precedes the previous three-months.

[58] At the hearing, I granted Mr Stewart leave to file an application to bring his personal grievance out of time under s 114 and established a suitable timetable for the filing of submissions. Initially, Mr Stewart advised he would not file an application

under s 114. I concluded, however, that the interests of justice required a particular issue with regard to s 114 to be pointed out to Mr Stewart, as a self-represented litigant who was not legally qualified. It concerned the fact that s 114(1) of the Act refers to either the possibility of an employee raising a personal grievance within 90 days of the matter arising, *or* the employee doing so within 90 days of the matter coming to their notice, whichever is later.

[59] As a result, Mr Stewart filed an affidavit outlining the circumstances which led up to him formally raising his personal grievance. He stated that on 5 May and 4 June 2019, he had emailed the plant manager on the topic of layoffs of employees where insufficient notice had been given, a subject he had raised previously.

[60] He became concerned with what he perceived was AFFCO's belief that it did not need to adhere to the law or comply with minimum employment standards as legislated for. He then ordered a copy of The Employment Law Guide 2019, by Richard Rudman, on 16 July 2019, which was forwarded to him on or about 22 July 2019.

[61] He said that he had been aware for many years that his IEAs included clauses that required availability, but it was only after obtaining this resource that he understood how these particular clauses were deficient and that there was a statutory basis for raising a personal grievance on the subject. It was in that context that he raised his personal grievance on 20 August 2019, which focused on the inclusion of an availability provision in his employment agreement that was inconsistent with the statutory requirements.

[62] Mr Malone responded by stating that AFFCO was not in a position to dispute this evidence, and it would not therefore cross-examine him or call evidence in reply.

[63] However, Mr Malone went on to say the act giving rise to disadvantage was the tendering of a non-complaint IEA. Mr Malone also submitted that when Mr Stewart signed the IEA on 18 July 2018, he was aware it contained availability provisions, and other than an overtime rate, no extra payment would be made for Mr Stewart's availability. The fact that he was unaware of ss 67C to 67F of the Act

did not change the fact that he had sufficient information to accept the contract. He also signed a declaration that he had read and understood the agreement, and that he had been given an opportunity and time to take advice.

[64] In response, Mr Stewart noted that the document he had signed stated it was one made pursuant to s 65 of the Act. Section 65(2)(b) provides that an IEA must not contain anything which is contrary to law or inconsistent with the Act. Consequently, the fact that he signed the agreement containing provisions that did not comply with the Act could not be held against him.

[65] I have considered both points raised by AFFCO. As Mr Stewart pointed out, under the IEA which he signed in mid-2018, he was asked to undertake overtime with reasonable regularity. As discussed earlier, he kept himself available for this possibility. However, it is common ground the document did not comply with the Act. In fact there was a continuing default by AFFCO as to the provision of availability compensation, and there is no evidence that Mr Stewart waived that non-compliance. The disadvantage goes further than the provision of a non-compliant IEA.

[66] Second, the fact that Mr Stewart signed the non-compliant IEA does not mean that he waived the consequences of that fact. The availability provisions of the Act to provide minimum protections. It was AFFCO's responsibility to satisfy those obligations. The act of signing the IEA did not alter that fact.

[67] Next, it is not disputed that Mr Stewart did not learn about the legal provisions relating to availability compensation until approximately 18 July 2019. Adopting the approach taken by Judge Couch in *Wyatt v Simpson Grierson*, that was when Mr Stewart became aware of the relevant circumstances to the extent necessary to form a reasonable belief that his employer's actions had been unjustifiable, and thus actionable.[10]

[68] He then raised his personal grievance. I accept Mr Stewart's explanation. It is obvious he was familiar with the process involved in raising a personal grievance.

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[10] *Wyatt v Simpson Grierson (A Partnership)* [2007] ERNZ 489 (EmpC) at [29].

Had he possessed the necessary information earlier, it is probable he would have raised the grievance concerning availability compensation earlier.

[69] I conclude the circumstances fall within the parameters of s 114(1) of the Act. The personal grievance was raised within the necessary 90-day timeframe following Mr Stewart becoming aware of his right to initiate a personal grievance.

[70] Although Mr Stewart's claim was pleaded as running from 1 April 2016, the evidence and submissions focused on the rights contained in the IEA Mr Stewart signed on 18 July 2018, rather than on the manner in which AFFCO may have treated availability expectations under previous IEA(s) once they applied.[11]

[71] Accordingly, the correct date for consideration of Mr Stewart's availability compensation claim is the date when his current IEA took effect, which was 9 July 2018.

The correct approach to calculating Mr Stewart's remedy

[72] The second issue relates to the appropriate approach for determining a remedy for the established personal grievance. Section 123 of the Act provides the statutory mandate for awarding remedies.

[73] In *Fraser v McDonalds Restaurants (New Zealand) Ltd*, a full Court concluded that the Court could not apply s 67D(6) to determine a remedy.[12] That was because the Court in doing so would be fixing terms and conditions of employment, which is outside its jurisdiction.

[74] The Court went on to say that any monetary remedies may have to be confined to some form of compensation under s 123(1)(c) of the Act, which without argument or consideration, was considered on a preliminary basis not to be compensation or remuneration as specified in s 67D(6) of the Act.[13]

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11 If Mr Stewart had entered into an IEA before the commencement date of the availability provisions on 1 April 2016, ss 67C to 67H would not have applied to the agreement until 1 April 2017: Employment Relations Act 2000, cl 3(3), sch 1AA.

12 *Fraser v McDonalds Restaurants (NZ) Ltd* [2017] NZEmpC 95, [2017] ERNZ 539.

13 At [13].

[75] Mr Stewart, however, submitted that it is appropriate to review the Court's ability to award remedies in circumstances such as the present on a quantum meruit basis.

[76] In *Pretorius v Marra Construction (2004) Ltd*, I reviewed whether the Authority and the Court had jurisdiction to consider a quantum meruit claim.[14]

[77] I noted that such a claim seeks to recover the reasonable value of, or reasonable remuneration for, services performed by a plaintiff for a defendant.[15] I observed that such claims are relatively rare in this jurisdiction.[16]

[78] I considered authorities which discussed whether such a claim is based upon an implied contract, or whether it should properly be regarded as a restitutionary claim. I referred to cases which suggest that implied contract reasoning is no longer sound, and that quantum meruit claims are restitutionary claims which are solidly based on principles of unjust enrichment.[17]

[79] I then reviewed cases relating to the bringing of actions in equity under the Act. I noted that in *Newick v Working in Ltd* "employment relationship problems" were not confined to contractual causes of action.[18] In that instance, Judge Inglis, as she then was, concluded that the Court is able to consider claims in equity providing the claim arises from, or relates to, an employment relationship problem that engages the exclusive jurisdiction under s 161 to make determinations about employment relationship problems.[19] I was satisfied that this was a term used in a broad sense and that there was no exclusion of actions in equity under the Act. However, an employment relationship is a necessary requirement.

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14 *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95, [2016] ERNZ 591.

15 At [59]. See also *Worldwide NZ LLC v New Zealand Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [27]; *Morning Star (St Lukes Garden Appointments) Ltd v Canam Construction Ltd* CA90/05, 8 August 2006 at [50]; and Charles Rickett and Jessica Palmer "Restitutionary Remedies" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at [9.2.2].

16 At [62].

17 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* HC Auckland CIV-2003-404-5143, 6 April 2005 at [76]; *Morning Star,* above n 15, at [40].

18 *Newick v Working in Ltd* [2012] NZEmpC 156, [2012] ERNZ 510 at [35].

19 At [59]; see also *New Zealand Fire Service Commission v Warner* [2010] NZEmpC 90, [2010] ERNZ 290 at [37].

[80] I therefore concluded that there is jurisdiction to consider a quantum meruit claim (which has an equitable basis), and that both the Authority and Court may consider such a claim.[20]

[81] I note that a broad approach to the phrase "employment relationship problem" was confirmed more recently in the Supreme Court in *FMV v TZB*. In that decision, a majority held that Parliament used the non-technical term "problem" to ensure legal form was not a distraction and that employment relationship problems are a "supervening class" which may encompass the rules of contract, property, tort or equity "as long as the problem relates to or arises from an employment relationship".[21]

[82] I must also consider s 123(1)(c) of the Act which, as noted earlier, was mentioned by the full Court in *Fraser*. The section provides that where there is a personal grievance, the Authority or Court may award payment of compensation, including for:

> ... loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen

[83] An early consideration of the concept of "benefit" is found in *NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd*, where compensation was sought and where certain breaches of contract affecting shed officials had been proved.[22] The Labour Court said this:[23]

> We conclude that significant "hidden" financial costs associated with a sustained denial of earned income, to which both grievants were contractually entitled – but did not derive because of the ongoing breached situation to which each was subject – have been occurred. By "hidden" costs, we contemplate costs incurred through refinancing/borrowing and the like, which both grievants would, and did, we find, incur in the nature of service charges.

[84] The Court went on to note that the term was one which was to be construed broadly. In that instance, two shed officials in a particular off-season had lost the

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20 *Pretorius*, above n 14, at [78].
21 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [92].
22 *NZ Meat Processors etc IUOW v Alliance Freezing Company (Southland) Ltd* [1989] 2 NZILR 246 (Labour Court).
23 At 268.

benefit of the receipt and application of recurrent wages at a contractually anticipated level. Compensation was accordingly fixed in a global amount.

[85] There are other examples which demonstrate the broad application of the term "benefit".[24]

[86] In my view, if compensation can be assessed on a quantum meruit basis, then it amounts to being a benefit which the Court can properly direct for payment under s 123(1)(c)(ii) of the Act.

[87] Mr Malone accepted that this was the applicable subsection, although he also said that any award of such compensation should not be greater than that which was offered as a loading for availability compensation.

[88] I say no more at this stage about appropriate compensation since in the first instance, as I have indicated, the parties should have the opportunity of attempting to resolve these issues for the time period involved as between themselves. If, however, that does not prove possible, I reserve leave for either party to return to Court. Subject to the submissions of the parties, it is likely that this issue could be resolved on the papers.

Result

[89] I allow the challenge.

[90] This judgment replaces those paragraphs of the Authority's determination which dealt with the issue of disadvantage.

[91] Mr Stewart has established he was disadvantaged by the maintaining of a non-compliant availability provision in his IEA; accordingly, his personal grievance is established.

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[24] *Prebble v Coastline FM Ltd* [1992] 3 ERNZ 294 (EmpC); *McKendry v Jansen* [2010] NZEmpC 128, [2010] ERNZ 453; *Gunning v Bankrupt Vehicle Sales and Finance Ltd* [2013] NZEmpC 212; and *Wills v Goodman Fielder New Zealand Ltd* [2014] NZEmpC 233.

[92] I adjourn the issue of remedies reserving leave to the parties to return to the Court for the finalising of this issue, if necessary, on reasonable notice.

[93] I reserve costs which may be the subject of directions in due course once the parties have discussed the outstanding issue of quantum.

B A Corkill
Judge

Judgment signed at 10.15 am on 8 November 2022