IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 95
EMPC 323/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	FREDRICK PRETORIUS Plaintiff
AND	MARRA CONSTRUCTION (2004) LIMITED Defendant

EMPC 376/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND BETWEEN	MARRA CONSTRUCTION (2004) LIMITED Plaintiff
AND	FREDRICK PRETORIUS Defendant

Hearing:	12 and 13 July 2016 (heard at Tauranga)
Appearances:	D Jacobson, counsel for Mr F Pretorius K Patterson, counsel for Marra Construction (2004) Limited
Judgment:	2 August 2016

JUDGMENT OF JUDGE B A CORKILL

A time limitation problem

[1] Mr Pretorius believes that additional payments should be made to him for work he undertook as a Quantity Surveyor on a large, joint venture construction

project in 2007 to 2010. His employer, Marra Construction (2004) Limited (Marra) says it has paid all monies it agreed to pay. It also contends that in any event Mr Pretorius' claims have been brought out of time and are therefore statute barred. It is this issue which the Court is required to resolve.

The procedural background

[2] The Employment Relations Authority (the Authority) investigated the time limitation defence as a preliminary issue. It recorded that Mr Pretorius had lodged claims for:[1]

a) $125,000, to include increased salary and bonus entitlements; or alternatively

b) payment on a quantum meruit basis for all hours worked in excess of 40 each week; or

c) payment for extra hours under the minimum wage provisions of the Minimum Wage Act 1983 (MW Act).

[3] The Authority concluded that any claims had to arise on or after 3 March 2008 since the statement of problem was filed on 3 March 2014. Then the Authority held:[2]

a) Certain oral understandings of late 2007, whether on a contractual or quantum meruit basis, were outside the limitation period and could not be pursued since all the elements necessary for prosecuting the claim had come into existence by 3 March 2008.

b) Because it was possible that liability for a bonus payment would not crystallise until the joint venture project concluded, the bonus claim was not time-barred.

c) Section 11B(2) was a potentially applicable provision of the MW Act; Mr Pretorius was not time-barred from pursuing a claim under that

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1 *Pretorius v Marra Construction (2004) Ltd* [2015] NZERA Auckland 314, at [21].
2 At [46], [51] and [56].

section for unpaid wages in excessive of 40 per week when those arose for hours in excess of 40 each week after 3 March 2008.

[4] On 3 November 2015, Mr Pretorius filed a de novo challenge to the Authority's determination, although the challenge focused on only one of the three issues which had been resolved by the Authority. That was the finding which was adverse to him, to the effect that the enhanced salary claim was time-barred.

[5] Marra wished to challenge those parts of the determination which were adverse to it; that is, that the claim for a bonus, and that the claim for entitlements under the MW Act were brought in time. In a judgment of 11 December 2015, I extended leave for this purpose, and Marra accordingly initiated its challenge.[3]

[6] Subsequently the Authority declined an application made by Mr Pretorius to remove the various remuneration issues to the Court.[4] The context within which this application arose involved a range of claims; Mr Pretorius had brought actions for unpaid monies but he had also raised a personal grievance which alleged he had been unjustifiably dismissed; as well Marra had brought what it described as a "very significant counter-claim". Mr Pretorius subsequently applied to this Court for special leave to remove the remuneration claims only. In my judgment dismissing the application, I held that it would be preferable for the Authority to investigate all the various claims before it in the usual way, including the matter which may fall for investigation after the Court has resolved the present challenge.[5]

[7] The result is that the Court has before it challenges brought by each party relating to different aspects of the Authority's determination; but those challenges relate to a determination of a preliminary point only in respect of claims which have yet to be investigated by the Authority.

How should the Court proceed?

[8] This somewhat unusual procedural situation raises a question as to how the Court should proceed when rehearing the preliminary issue.

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3 *Pretorius v Marra Construction (2004) Ltd* [2015] NZEmpC 222.
4 *Pretorius v Marra Construction (2004) Ltd* [2016] NZERA Auckland 8.
5 *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 43 at [37].

[9] Time limitation issues in a civil proceeding are often the subject of a strikeout application.[6] Such an application proceeds on the basis that assertions contained in the statement of claim are true,[7] perhaps supplemented by additional evidence where necessary, for instance about dates as to when events occurred where these are not referred to expressly in the pleadings.[8]

[10] In the present case, however, the parties called oral evidence and invited the Court to make factual findings on the basis of that evidence only. Neither party relied on their pleadings when presenting submissions as to the time limitation issues.

[11] In my view, this was appropriate for two reasons. First, the Court was required to hear a de novo challenge from an investigation of a preliminary point by the Authority; the matter was not before the Authority or the Court on the basis of a strike-out application.

[12] Secondly, such a process would not have been appropriate. Each party brought a challenge so that a focus on assertions contained in their respective statements of claim would not have led to a constructive analysis. On the basis of the pleadings parties were in agreement on some matters; but on other matters they differed.

[13] Accordingly, the correct approach in this case is for the Court to make findings on the basis of the evidence called, but to do so on a provisional basis recognising that where a cause of action is not time-barred, the actual merits will be the subject of a substantive investigation by the Authority.

[14] Given the scope of the issue before the Court, I shall refer only to those matters which are essential for resolution of the preliminary issue as to limitation.

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6 For example, *Brittain v Telecom Corp of NZ* [2001] ERNZ 647, [2002] 2 NZLR 201 (CA); *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721; *Commissioner of Inland Revenue v Michael Hill Finance Ltd* [2016] NZCA 276, (2016) 27 NZTC 22-056.

7 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

8 *Haig v Edgewater Developers Ltd* [2012] NZEmpC 189, [2012] ERNZ 543 at [2].

[15] A further evidential matter should be mentioned. At no time was a written employment agreement entered into between Marra and Mr Pretorius. That meant that the terms and conditions of Mr Pretorius' employment were not reduced to writing, notwithstanding the obligation on an employer to do so, as contained in s 65 of the Act. That failure has in large measure led to the present difficulties, where the Authority and the Court have been required to assess oral evidence some considerable time after the events in question in order to determine what Mr Pretorius' actual employment arrangements were.

[16] For the purposes of the challenges, Mr Pretorius gave evidence as to his recollection of key conversations and events. He referred to conversations he had had with others, particularly Mr Robert Bailey, who was a company Director and acted as Marra's General Manager; and also with a Project Manager, Mr Graeme Harvey who was an employee of the joint venture partner, Dominion Constructors Limited (Dominion). Neither of these persons were called by Marra. Indeed the main witness called by Marra was Mr Gregory Johnston, who is now General Manager of that company; but he was not employed by Marra at the relevant time, and could only give evidence as to his attempts to locate relevant documents relating to Mr Pretorius' employment arrangements, of which there were very few, if any. A second witness was called for the company, Mr Aaron McCormick, who was Site Manager during the project, but he could only give evidence about his own employment arrangements, and not those of Mr Pretorius. A copy of a brief of evidence prepared for the purposes of the Authority's investigation was placed before the Court; it related to the evidence of Mr Brett Russell, a Director of Dominion. It was produced on a hearsay basis, contained hearsay evidence, and focused on employment arrangements for Dominion staff rather than Marra staff. It was of limited assistance.

[17] The result is that Mr Pretorius' evidence as to the key events was not the subject of evidence from any other person; for present purposes, his case therefore stands or falls on the reliability of his evidence alone.

[18] I now set out my findings as to the relevant context on this basis of the evidence placed before the Court.

Core facts

[19] In late June 2004, Mr Pretorius was employed by Marra on a starting salary of $55,000 per annum. That salary covered 40 hours of work per week, along with what was described as "a small amount of overtime from time to time", for which overtime remuneration was not paid. He reported directly to Mr Bailey from July 2005.

[20] Marra became involved in a joint venture partnership negotiation with Dominion during 2007. The partnership was to construct a luxury block of apartments which would cost in excess of forty million dollars.

[21] Mr Pretorius first learnt about the intended project in March 2007, when Mr Bailey told him that consideration was being given to the project, with his services to be used due to his ability to negotiate with sub-contractors. Mr Bailey told Mr Pretorius he would work for the joint venture not Marra and that his place of work would be at the project site. He said a new contract would need to be drawn up prior to the commencement of the project. His working conditions would change to meet the joint venture requirements. He was told that he would be expected to work significant hours as would be expected for a contract of that size; and that the joint venture partners realised the contract would be extremely stressful and demanding on all employees, and as such all should benefit. Mr Bailey explained to Mr Pretorius that the parties had agreed to enter into the venture with complete transparency, and that there would be an equal split of profit between the contracting parties. Mr Pretorius would be working with the Dominion Project Manager, Mr Harvey, and they would be the two key people involved on site. Mr Bailey asked Mr Pretorius to work on the project on this basis, and to revert if he was interested in doing so. Soon after Mr Pretorius said he was.

[22] At that point, Mr Bailey told Mr Pretorius that a new salary rate would be agreed and a contract would be drawn up, as had previously been advised. Later in 2007, Mr Bailey produced a fixed term agreement; it was proposed the parties would be Mr Pretorius and Marra Holdings Limited. This company was already in existence and had been the payer of Mr Pretorius' salary throughout his employment;

it is clear, however, that Mr Pretorius' employer was Marra Construction (2004) Limited. It is evident from the draft agreement that Mr Pretorius would be required to work extended hours from time to time, including weekends and nights without any payment other than the agreed salary; that is, the salary was to cover what was anticipated as being extensive overtime. But the document also provided that leave was to be on a "no work, no pay" basis. As this provision was unacceptable to Mr Pretorius, he rejected the proposed agreement. Although Mr Pretorius was inconsistent when giving evidence on some dates, he ultimately said that to the best of his recollection the draft document was provided to him during November 2007.

[23] Mr Pretorius says that as a result of assurances from Mr Bailey, he was led to believe that he would be paid an increased salary rate and receive the same bonus incentives as a quantity surveyor working for Dominion would receive for working on a similar project. He says that a bonus was to be included and agreed to as an incentive payment to senior salaried staff; and that this would be an item taken into account in the project costings.

[24] Mr Pretorius worked on preliminary aspects of the proposed joint venture from August 2007. However, a formal deed was not entered into between the parties to the joint venture until 14 December 2007. In late December 2007, Mr Pretorius commenced work on the now agreed project. He said this occurred on 18 December 2007. On the same day his salary was increased from $73,000, to $78,000. He was also paid a Christmas bonus in late 2007 of $750.

[25] Mr Pretorius continued to work on the project continuously; his final pay for any substantial work on the project was provided in 30 May 2010; thereafter he was only engaged in "tidying up work".

[26] On or about 20 August 2008, Mr Pretorius and Mr Harvey agreed rates for key employees engaged in the project, for the purposes of invoicing by Marra and Dominion. The monthly fixed costs for such employees were based on them each working 50 hours per week, or 216 hours per month. In the case of Mr Pretorius this produced a figure of $12,500 per month. The figure included wages and allowances for costs relating to vehicles, computers, a mobile phone as well as ACC liabilities.

Recently, Mr Pretorius carried out a calculation which assumed he worked 50 hours per week. He said that his calculations confirmed that the monthly figure of $12,500 per month was made up of:

a)	Salary:	$8,487.80
b)	Bonus:	$847.78
c)	Administration costs:	$847.78
d)	Charges on taxable salary, public liability ACC:	$472.48
e)	Health and safety PPE, clothing:	$146.89
f)	Other allowances: mobile phone and training:	$371.24
g)	Vehicle costs:	$1326.03

[27] In his evidence Mr Pretorius said that by agreeing the monthly figure, Marra effectively agreed to pay him annual salary costs of $101,853.60, inclusive of overtime; and a bonus of $10,173.36 for extra weekend work, late night work, extra responsibility and the challenging site conditions.

[28] Mr Pretorius said that he worked long hours, weekends and public holidays. Often he worked 50 to 60 hours per week, and sometimes over 70 hours, to cover his increased workload on a significant construction project. On a provisional basis I find that he worked significantly more overtime than he had prior to his engagement on the joint venture project, but the precise details have yet to be investigated. It is his contention he worked an additional 1,341.2 hours, over and above the 40 hours which he had been contracted to work at the outset of his employment; I express no view as to the accuracy of this assessment.

[29] Mr Pretorius also says that there were, over the contract period, public holidays which he worked and for which he was not paid entitlements under the Holidays Act 2003.

[30] In August/September 2008, Mr Pretorius asked Mr Bailey what was to happen with regard to his salary increase and benefits. Mr Bailey told him that

Marra would look after him at the end of the project for the extra work he was performing.

[31] In January 2011, Mr Pretorius again raised his remuneration issues with Mr Bailey; he said that Mr Bailey responded by saying he had resigned from the company and to take the issue up with Marra. He did so on 11 January 2011, by way of an email to a Director of the company, Mr Phil Marra. Mr Pretorius referred to the fact he had been told that he would be contracted out of Marra and into a joint venture entity, and that he would receive the same benefits as those paid to Dominion employees. This was obviously a reference to his earlier conversations with Mr Bailey.

[32] The email also referred to a request for an increase in salary; he said he had been given a company vehicle he had used on the joint venture project, as compensation for an increase. On the evidence presented to the Court, the provision of the vehicle was apparently not an offset for the benefits he had been told he would receive for his work on the joint venture project.

[33] Mr Marra responded by stating that he did not understand where Mr Pretorius was coming from, and generally disputed his entitlement to any additional payments.

[34] On 15 October 2011, Mr Pretorius attended a meeting with Mr Marra and Mr Russell regarding joint venture issues. Mr Pretorius again raised the issue of underpaid remuneration. According to a file note which Mr Pretorius made soon after the meeting, Mr Russell implied that any extra time which Mr Pretorius had devoted to the project was indeed covered in payments which had been invoiced by Marra to the joint venture. Immediately after the meeting Mr Pretorius told Mr Marra that he had been promised reimbursement for his efforts; however, Mr Marra said that unless this was in writing, he should let the issue go.

[35] Before discussing the individual causes of action, I summarise the key legal principles relating to limitation defences in this jurisdiction.

Limitation principles

[36] Although the Employment Court is a "specified court" under the Limitation Act 2010,[9] there are several limitation time limits and periods that apply to many claims which are within the jurisdiction of the Court, as prescribed by the Employment Relations Act. In those instances, s 40 of the Limitation Act 2010 applies; it provides that a defence under that Act does not apply to a claim where there is specific legislation prescribing a limitation period.

[37] For the purposes of the present case, the relevant provision is s 142 which states:

> **142 Limitation period for actions other than personal grievances**
>
> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[38] The term "employment relationship problem" is defined in s 5 of the Act in these terms:

> **employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

[39] A claim for unpaid wages (including one arising under an obligation to pay a salary) [10] is plainly an action in relation to an employment relationship problem, and one which is not a personal grievance. That much is common ground for the purposes of the present challenges.

[40] What is in issue is whether Mr Pretorius' various causes of action were commenced more than six years after the date on which those causes of action arose.

[41] The language used in s 142 is similar to that which applied to claims in contract under the Limitation Act 1950;[11] s 4 of that Act provided that such claims

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9 Limitation Act 2010, s 4.

10 *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25, [2014] ERNZ 576 at [70].

11 Repealed on 1 January 2011 by s 57 of the Limitation Act 2010.

could not be brought "after six years from the date on which the cause of action accrued".

[42] In *White v Taupo Totara Timber Co*, the High Court stated:[12]

> Under s 4. (1) of the Limitation Act 1950, actions founded on simple contract cannot be brought after the expiration of six years from the date on which the cause of action accrued. Cause of action has been defined as: "Every fact which is material to be proved to entitle the plaintiff to succeed– every fact which the defendant would have a right to traverse": *Cook v Gill* (1873) L.R. 8 C.P. 107, 116, per Brett J. In *Board of Trade v Cayzer Irvine and Co.* [1927] A.C. 610, Viscount Dunedin stated: "Cause of action means that which makes action possible" (*ibid*., 617). A cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to enable the plaintiffs to succeed. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved: *Read v Brown* (1989) 22 Q.B.D. 128, 131, per Lord Esher M.R.
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> In an action such as this for breach of contract, the cause of action accrues at the time of breach.
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> > The cause of action is the breach and not the actual damage (if any) resulting therefrom, for a breach of contract is actionable per se without proof of actual damage, nominal damages being recoverable in the absence of such proof. Even if resulting actual damage happens or is discovered after the occurrence of the breach, it will not be a new cause of action but merely an incident of the old one: *Salmond and Williams on Contracts*, 2nd ed., 610.
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> In *Cheshire and Fifoot's Law of Contract*, 4th ed., 519, it is stated:
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> > The statutory period begins to run the moment that the cause of action accrues, that is to say, when a breach of the contract is committed. The fact that actual damage is not suffered by the plaintiff until some date later than the breach, does not extend the time within which he may sue. As a general rule the fact that the plaintiff fails to discover the existence of his cause of action until the expiration of the statutory period, does not prevent the operation of the statute: See also *Preston and Newsom's Limitation of Actions*, 3rd ed., 25.

[43] These principles are uncontroversial and have been previously applied in this Court.[13] I respectfully adopt them for the purposes of the present case.

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[12] *White v Taupo Totara Timber Co* [1960] NZLR 547 (SC) at 548 - 549. See also *Manson v NZ Meat Workers and Related Trades Union* [1993] 2 NZLR 602 (HC); *Rabadan v Gale*[1996] 3 NZLR 220 (HC), *Stuart v Australian Guarantee Corp (NZ) Ltd* (2002) 16 PRNZ 139 (HC) and *Haig v Edgewater Developers Ltd*, above n 8 at [11] – [17].

[13] For example, *Haig v Edgewater Developers Ltd*, above n 8, at [17].

Was there an agreement regarding overtime or bonus payments?

[44] To determine the time limitation issue as to whether the causes of action relating to Mr Pretorius' overtime and bonus claims arose within time, I must first determine what terms and conditions of employment Mr Pretorius worked under during the project.

Express agreement?

[45] The essence of Mr Pretorius' case was that he agreed with Mr Bailey that terms would be agreed to reflect the additional hours and responsibility he would be undertaking for the purposes of the joint venture project, and that these details were confirmed in August 2008, as was evidenced by the email sent by Mr Harvey to Mr Russell and Mr Marra.

[46] For present purposes, I do not accept Mr Pretorius' contention that an agreement as to the terms of remuneration for additional work was concluded in August 2008. First, the email on which Mr Pretorius relies relates, as it says, to the basis on which Marra and Dominion could invoice the joint venture partnership in respect of services rendered by their respective senior employees. What Marra and Dominion chose to pay their employees was a matter for each of them. That was a separate issue.

[47] Secondly, it is inherently unlikely that Marra would have agreed that Mr Pretorius himself could decide what his salary and bonus arrangements would be, in conjunction with a third party, Mr Harvey of Dominion.

[48] Thirdly, the fact that Mr Pretorius subsequently asked Mr Bailey in January 2011 what was to happen with regard to remuneration for the additional work he was undertaking, tends to confirm that these matters had not been agreed.

[49] It is apparent that Mr Pretorius was paid a salary of $78,000 from December 2007, and for the duration of the project. An issue raised by Mr Patterson is whether this salary was intended to cover the anticipated additional overtime Mr Pretorius would work during the joint venture project. Mr Patterson submitted

that this was evident from the terms of the draft employment agreement which was submitted by Mr Bailey, prior to the commencement of the project.

[50] However, that document did not include a salary figure; although it indicated that an agreed salary would include overtime, Mr Pretorius rejected the proposed agreement, and it was never signed. Accordingly, it does not assist in establishing Mr Pretorius' agreed terms and conditions of employment.

[51] Before it could be concluded that such salary as Mr Pretorius was paid included overtime, there would need to be evidence showing that both parties agreed that salary covered overtime; and if so, the extent of that overtime.

[52] Up to 2007, Mr Pretorius' overtime obligations, for which he had not been paid, were comparatively modest and his salary apparently covered the additional hours.

[53] By contrast, during the project Mr Pretorius was required to work a more significant proportion of overtime hours. As the project proceeded, these increased. No detailed analysis was placed before the Court for the purposes of the preliminary issue, but Mr Pretorius said that the hours often exceeded 50 per week and on some occasions exceeded 70 per week. He calculates that he worked an additional 1,341.2 hours in total, over and above the 40 hours per week which he agreed to work at the outset of his employment. The August 2008 email referred to earlier confirmed that the monthly invoicing was predicated on the basis of significant overtime being worked per week, either 50 hours per week or 216 hours per month.

[54] In short, it was foreseen that significantly greater overtime would be worked during the project. This possibility was expressly raised with Mr Pretorius when he was asked if he would agree to work on the project in early 2007. If salary was to remunerate that work, there would need to be an agreement to that effect. Indeed this expectation is codified by s 11B of the MW Act, which provides that the maximum number of hours exclusive of overtime fixed by an employment agreement to be worked may be fixed at a number greater than 40 "if the parties to the agreement agree".

[55] Mr Patterson points to the fact that Mr Pretorius' salary was increased from $73,000 to $78,000, just as the project commenced. However, Mr Pretorius' evidence was that this was a routine increase of his salary. The Court has limited evidence regarding salary increases, but it is evident there were increases from time to time. Mr Pretorius' initial salary was $55,000. Then he was party to a profit-sharing scheme although this was phased out. By 2007 his salary stood at $73,000. This was followed by the increase to $78,000 in December 2007. No reliable evidence was called by the company to dispute Mr Pretorius' assertion that this was a routine increase for 40 hours worked each week.

[56] But more to the point, there is no reliable evidence to confirm that it was agreed the increased salary included remuneration for the anticipated extensive overtime.

[57] In the result, I find that:

a) There was never a specific agreement to the effect that salary payments would include the foreseeable additional overtime.

b) In particular, there is no evidence that the increased salary in December 2007 was intended to include the reimbursement for that overtime, and that this was agreed to by Mr Pretorius.

c) The basis as to which hours worked beyond 40 would be reimbursed was never agreed.

d) Throughout the project Mr Pretorius was paid a salary of $78,000.

[58] I conclude that Mr Pretorius was paid the salary which he was expecting to be paid for 40 hours of work each week; but there was no express agreement as to the terms of payment for any additional work. Consequently, there is no cause of action for unpaid additional remuneration under an express contract which can be considered for time limitation purposes.

Quantum meruit claim: overtime

[59] That, however, is not the end of Mr Pretorius' claims for increased remuneration; it is next necessary to consider the position relating to his claim in quantum meruit. Such a claim seeks to recover the reasonable value of, or reasonable remuneration for, services performed by a plaintiff for a defendant.[14] Here, the claim is brought on the basis that Mr Bailey promised Mr Pretorius that he would be looked after by Marra at the end of the project for all extra hours of work required of him, that is over and above 40 per week. Mr Pretorius accepted that promise and worked extensive overtime accordingly. Further, it was confirmed by Mr Bailey in approximately August or September 2008 that he would be paid the extra remuneration at the end of the project.

[60] Marra has not called any evidence to contradict these assertions, and I therefore proceed on the basis they are correct.

[61] There are two legal issues which require consideration for the purposes of this claim. The first is whether the remedy of quantum meruit is available in respect of a claim brought under the Act. The second relates to the availability of a quantum meruit remedy for work performed beyond that agreed to in a binding contract. Unless these essential pre-requisites are able to be established, there is no basis for such a claim and a time limitation question would not arise.

[62] Claims brought on a quantum meruit basis are relatively rare in this jurisdiction. In *Lamont v Power Beat International Ltd*, Judge Travis considered authorities in other jurisdictions as to quantum meruit. Under the Employment Contracts Act 1991 (ECA), he considered whether such a claim could be regarded as a genuine action in contract based on a real promise to pay, even although that promise had not been expressed in words and the amount of the payment had not been agreed.[15] However, in that case there was an ancillary issue as to whether the subject employment contract had been repudiated by the defendant and then cancelled by the plaintiff. These circumstances brought s 9 of the Contractual

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[14] The history and principles of such a claim are usefully discussed in Judy Becker Sloan "Quantum Meruit: Residual Equity in Law", (1992) 42 DePaul L Rev, 399.

[15] *Lamont v Power Beat International Ltd* [1998] 2 ERNZ 20.

Remedies Act 1979 into play. The Court resolved the plaintiff's claim under that statute. Judge Travis stated, however, that it might be questionable whether the Court would have jurisdiction to deal with an action brought on a quantum meruit basis under the ECA.[16]

[63] At the request of the Court in the current case, counsel filed supplementary submissions on these issues.

[64] Mr Jacobson submitted that on the basis of English authorities[17] and commentary[18] it was clear that a Court would order reasonable remuneration to be paid, whether that amount related to "additional remuneration" or "basic remuneration". He also submitted that there was jurisdiction under the Act to provide relief for additional remuneration, whether that was grounded in the obligations of s 4 of the Act for breach of the implied term of trust and confidence,[19] or by relying on the equity and good conscience provision of the Act as it applies to the Court, under s 189 of the Act.

[65] Mr Patterson did not contest whether the Court had jurisdiction to deal with a quantum meruit claim; rather he directed the Court to commentary in *Mazengarb's Employment Law* which describes the circumstances when a claim for a quantum meruit for reasonable remuneration for services rendered may be brought.[20] Mr Patterson's primary argument was that Mr Pretorius was excluded from bringing such a claim; he said Mr Pretorius' claim was actually in contract; and on the facts no such claim could be established.

[66] I deal first with the issue of jurisdiction. That requires a consideration as to the nature of a quantum meruit claim. Is such a claim based upon an implied contract, or is it now properly to be regarded as a restitutionary claim?

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16 At [39].

17 *Powell v Braun* [1954] 1 WLR 401 (CA) and *Driver v Air India Ltd* [2011] EWCA Civ 830, [2011] IRLR 992.

18 HG Beale (ed) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) vol 2 at [40-079].

19 Relying on *Driver v Air India Ltd*, above n 17.

20 *Mazengard's Employment Law* (looseleaf ed, LexisNexis) at [1819] – [1821].

[67] In *West Deutsche Landesbank Girozentrale v Islington London Borough Council*, Lord Browne-Wilkinson discussed the basis of an implied contract claim in these terms:[21]

> Subsequent developments in the law of restitution demonstrate that [implied contract] reasoning is no longer sound. The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay … In my judgment, Your Lordships should now unequivocally and finally reject the concept that the claim for monies had and received as based on an implied contract. I would overrule *Sinclair v Broughamme* on this point. (citations omitted)

[68] In *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health*, Winkelman J accepted this view, concluding that "the quantum meruit cause of action like other claims for restitution at common law is solidly based upon principles of unjust enrichment, rather than upon a notion of implied contract".[22]

[69] In *Morning Star (St Luke's Garden Apartments) Ltd v Canam Construction Ltd*, the Court of Appeal considered the underlying basis of a quantum meruit claim and observed that whilst historically such had been treated as being based upon an implied contract, today it is generally seen as being a restitutionary claim.[23] That said, the Court of Appeal noted that not all commentators agree that the principle of unjust enrichment underlies a quantum meruit claim;[24] it referred to discussion in Grantham and Rickett, where it is argued that the principle application of quantum meruit is as a response to a promissory obligation.[25] The Court ultimately concluded, however, that it did not need to "resolve the doctrinal dispute".[26] It held that there was a general agreement that:[27]

> … a plaintiff will be able to establish a quantum meruit claim where the defendant asks the plaintiff to provide certain services, or freely accepts services provided by the plaintiff, in circumstances where the defendant

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21 *West Deutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961 (HL) at 710.

22 *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 (HC) at [76].

23 *Morning Star (St Lukes Garden Apartments) Ltd v Canam Construction Ltd*, CA90/05, 8 August 2006 at [40].

24 At [42].

25 R Grantham and CEF Rickett *Enrichment and Restitution in New Zealand* (Hart Publishing Oxford, 2000), ch 11.

26 At [50].

27 At [50].

> knows (or ought to know) that the plaintiff expects to be reimbursed for those services, irrespective of whether there is an actual benefit to the defendant.

[70] It is equally unnecessary for this Court to "resolve the doctrinal dispute". Whether or not the quantum meruit remedy sought in this case is regarded as having a foundation in contract, or in equity, it is my view that the Court and the Authority would have jurisdiction to consider it. My reasons for this conclusion can be briefly stated since Marra does not contest this issue.

[71] First, it is common ground that there was an employment relationship; this is not a quantum meruit claim of a kind where proof of the qualifying relationship itself is in dispute. Rather, the focus is on aspects of that relationship, and whether quantum meruit should be ordered as a response to a promissory obligation to remunerate for overtime.

[72] Turning to the provisions of the Act, it is first necessary to consider the scope of the Authority's jurisdiction. Under s 161(1), the Authority has exclusive jurisdiction to make "determinations about employment relationship problems generally". There then follows an inclusive description of 28 matters which may be considered by the Authority. One of those is found in s 161(1)(r) which states:

> [A]ny other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[73] It follows from the use of this broad language that "employment relationship problems" are not confined, under the Act, to contractual causes of action: *Newick v Working In Ltd*,[28] per Judge Inglis. Her Honour also emphasised that it is s 161 which provides the platform for considering where the jurisdictional boundary for the exclusive jurisdiction of the Authority or Court lies.[29] As her Honour observed, there is no express exclusion of actions in equity, although there is an exclusion of actions in tort.[30] But that does not mean that any cause of action can be brought: the

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28 *Newick v Working In Ltd* [2012] NZEmpC 156, [2012] ERNZ 510 at [35].
29 At [46].
30 At [46].

existence of an employment relationship must be a necessary component of the cause of action.[31]

[74] In *Newick* Judge Inglis was required to consider whether there was jurisdiction for a cause of action founded in estoppel. Her Honour concluded that s 189 of the Act, which bestows on the Court its equity and good conscience jurisdiction, also reflects a Parliamentary intent "that the court is to adopt a distinctive approach in deciding cases relating to employment relationships coming before it, to support the underlying purposes of the Act".[32] After considering a range of decisions that considered where equitable claims should be brought, Judge Inglis said:[33]

> The limit on the jurisdiction of the Authority and Court comes not from the restriction of claims by their legal category (except with regard to tort) but from the fact that they must arise from or relate to an employment relationship.

[75] Judge Inglis concluded that the Court does have jurisdiction to consider claims in equity provided the claim arises from or relates to an employment relationship problem that engaged the exclusive jurisdiction under s 161 to make determinations about employment relationship problems. She held that the estoppel cause of action in that case was properly before the Court on the basis of the pleaded facts, being based on an employment relationship.[34]

[76] This conclusion is consistent with other findings in this Court to similar effect where a cause of action has an equitable basis. So, in *New Zealand Fire Service Commission v Warner,*[35] there were claims before the Court in contract, equity and quasi-contract. Chief Judge Colgan held:[36]

> While such of the employers causes of action as are in contract are clearly within jurisdiction, and its claim in tort is clearly without jurisdiction, the status of the claims in equity or quasi-contract are more difficult to decide. Because of the breadth of the concept of an employment relationship problem that is justiciable, I respectfully disagree with the obiter dicta

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31 *J P Morgan Chase Bank NA v Lewis* [2015] NZCA 255; [2015] ECNZ 37 at [97].
32 *Newick v Working In Ltd*, above n 28, at [40].
33 At [52].
34 At [59].
35 *New Zealand Fire Service Commission v Warner* [2010] ERNZ 290 (EmpC).
36 At [37].

> (observations) of the High Court in para [74] of *BDM Grange*[37] ... If, as here, the employment relationship problem for resolution (a claim for repayment of allowances allegedly overpaid to employees) requires a consideration and application of the law of restitution of monies had and received or of unjust enrichment, then this was intended, to use the words of the High Court, to be the core business of the Authority. The jurisdictional ability to perform that core business necessarily follows.[38]

[77] I respectfully agree with these conclusions as to jurisdiction. The key issue for present purposes is whether the quantum meruit action arises from or relates to an employment relationship.[39] Applying those principles, I find that the essence of Mr Pretorius' claim in quantum meruit, whether based on quasi contract or equity, relates to and arises from an employment relationship. Consequently, the Authority has jurisdiction to consider the possibility of awarding such a remedy on the basis of that employment relationship.

[78] The next legal issue relates to the availability of a quantum meruit claim in an employment situation when additional work is performed beyond that agreed in an underlying employment agreement.

[79] In *Powell v Braun,*[40] the English Court of Appeal considered such an issue. In that instance, the employer agreed to pay the employee a bonus each year, based on net trading profit in recognition of past services and additional responsibilities in the future. Subsequently he declined to do so, stating that payment of a bonus was in the circumstances discretionary. The Court of Appeal held that the employee should succeed on a quantum meruit plea. That meant that remuneration would be paid over and above the employee's fixed salary. The Court held that reasonable remuneration equated to the amount that should have been paid as a bonus.

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37 This is a reference to *BDM Grange Ltd v Parker* [2005] ERNZ 343, [2006] 1 NZLR 353 (HC).

38 See also *Tu'itupo v Guardian Healthcare Operations Ltd* (2006) 4 NZELR 1 (EmpC), and with regard to an equitable defence, *Foai v Air New Zealand Ltd* [2012] NZEmpC 57, [2012] ERNZ 229.

39 *JP Morgan Chase Bank NA v Lewis*, above n 30, at [97].

40 *Powell v Braun* [1954] 1 WLR 401.

[80] A more recent application of that principle is found in *Cooke v Hopper*,[41] also a decision of the English Court of Appeal, although not an employment law example. The claimants were requested by an employer to undertake additional work as property consultants, outside of the scope of an existing contract between those parties. Remuneration had not been agreed for the additional work. The Court of Appeal held that the defendant was liable to pay the claimants for this work, with the award being determined on a quantum meruit basis.

[81] On the basis of these illustrative decisions – particularly *Powell's* case – I find that in principle a quantum meruit remedy is available as recompense for additional work, over and above that which has been contracted and paid for.

[82] Turning to the essential facts in respect of this claim, there is undisputed evidence to the effect that Mr Pretorius was assured that at the end of the project he would be reimbursed for extra hours worked. The assurances were given prior to the inception of the project and were relied on by Mr Pretorius. Confirmation that such payment would be made at the conclusion of the project was given in August or September 2008. Mr Pretorius understood that the assurances related not only to overtime, but also the payment of regular bonuses as paid to Dominion employees, and as invoiced by Marra.

[83] There is evidence that as a result Mr Pretorius worked extensive overtime, that is, hours beyond 40 for which he was being paid a salary of $78,000 per annum.

[84] When giving evidence for Marra, Mr Johnston stated that Marra had never approved Mr Pretorius to work overtime, and that the reason why he had to work overtime was because he "… always failed to meet deadlines, [and] was behind and slow in performing his job and he needed to catch up". Mr Johnson was not employed by Marra at the time, and the basis for this opinion was not explained. Moreover it is not consistent with the direct evidence of Mr Pretorius that Mr Bailey told him he would need to work considerable overtime. Nor is it consistent with the information contained in the email of 20 August 2008, referred to earlier, wherein invoicing expectations proceeded on the basis that Mr Pretorius was required to

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41 *Cooke v Hooper* [2012] EWCA Civ 175.

work 54 hours per week or 216 hours per month. There is also evidence that Mr Pretorius completed timesheets which recorded extensive overtime; there is no evidence that any representative of Marra challenged his hours. Be that as it may, these are matters which would fall for consideration in a quantum meruit assessment, where there would necessarily be a focus on what would constitute reasonable remuneration in the particular circumstances.

[85] Assuming for present purposes that Mr Pretorius' evidence is accepted, it is then necessary to determine when the promises which were made were breached. The uncontradicted evidence is that Mr Pretorius was told by Mr Bailey he would be paid at the conclusion of the project. At the earliest, this was 30 May 2010, although there is evidence that relatively minor matters were attended to thereafter. Mr Jacobson submitted that time would not run until Mr Pretorius made a claim for unpaid monies, the quantum of which had not been agreed. He said this occurred in January 2011. I do not accept this submission, because the breach is the operative event and it occurred at the date when there was a default in paying the promised amounts.

[86] In any event, on either basis the quantum meruit cause of action was brought within six years of the date when the obligation to pay was breached. I disagree with the Authority's conclusion on the issue relating to increased remuneration.

Quantum meruit: bonus claim

[87] That claim relates at least to remuneration for overtime: but it appears from Mr Jacobson's submission that it also relates to Mr Pretorius' claim for a bonus, which he said was to be paid on the same basis as would apply to a Dominion employee. Mr Pretorius relied on the fact that the invoice arrangements which were agreed in August 2008 allowed for a bonus each month. It was his point that this allowance should have been paid to him by Marra, once it was invoiced to the joint venture partnership.

[88] The Authority recorded in its determination that Mr Russell had provided evidence that Dominion employees received bonus payments which were discretionary in nature and based on Dominion's performance overall rather than

being project or job based.[42] The Authority concluded that a bonus payment may not crystallise until the conclusion of a project, and that providing Mr Pretorius could establish the details of his claim it would not be statute barred.[43]

[89] It is also relevant to note that the evidence provided to the Court suggested that Mr Pretorius received from Marra a Christmas bonus of $750 first for the period April 2007 until March 2008, and secondly for the period April 2008 until March 2009.

[90] The end result is that when investigating Mr Pretorius' quantum meruit claim, consideration will need to be given to the issue of whether there was a promissory obligation to pay a bonus, either routinely or on a discretionary basis, and if so when. If it is established that there was an obligation to pay a bonus on or after 8 March 2008 and that this obligation was breached, the claim will not be statute barred. I agree with the Authority's conclusion on this issue.

[91] Before leaving these issues I comment on the submission made by Mr Jacobson that Mr Pretorius may have a claim for damages in breach of the implied term of trust and confidence.[44]

[92] Since Mr Pretorius' claim was not pleaded on this basis, and it was not the subject of argument, I express no views as to such a possibility.

Claim under the Minimum Wage Act 1983

[93] As an alternative to his overtime claim, Mr Pretorius alleges that for the six year period prior to the filing of the statement of problem in the Authority, he is entitled to payment for hours worked beyond 40 per week at the relevant adult minimum wage.

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42 *Pretorius v Marra Construction (2004) Ltd*, above n 1, at [47].
43 At [48].
44 Relying on dicta in *Driver v Air India Ltd*, above n 17, at [113].

[94] This cause of action, which is brought under the MW Act, proceeds on the basis of s 11B(2) of that statute which states:

> The maximum number of hours (exclusive of overtime) fixed by an employment agreement to be worked by any worker in any week may be fixed at a number greater than 40 if the parties to the agreement agree.

[95] Then reference should be made to the Minimum Wage Orders which applied during the period of Mr Pretorius' work on the project as prescribed under s 4 of the MW Act. So, cl 4 of the Minimum Wage Order 2007 stated:

> **4 Minimum adult rates**
>
> The following rates are the minimum rates of wages payable to an adult worker:
>
> (a) For an adult worker paid by the hour or by piece-work, $11.25 per hour:
>
> (b) For an adult worker paid by the day,–
> (i) $90 per day; and
> (ii) $11.25 per hour for each hour exceeding 8 hours worked by a worker on a day:
>
> (c) In all other cases–
> (i) $450 per week; and
> (ii) $11.25 per hour for each hour exceeding 40 worked by a worker in a week.

[96] As Chief Judge Colgan found in *Woodford House* the clause provides for three categories, the third of which applies in cases where the first two do not apply.[45]

[97] Mr Pretorius was not paid per hour, or by the day, so that his circumstances must be assessed under the third category, that is, "In all other cases".

[98] The same decision is authority for the proposition that the words "wages" and "salary" are different descriptions of essentially the same thing, that is remuneration paid to employees for work performed. Chief Judge Colgan found, therefore, that:[46]

> … an employee in receipt of a salary (or of remuneration so expressed) is not thereby excluded from coverage and falls under the category of "in all other cases" in the rates specified in … statutory Minimum Wage Orders …

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45 *Law v Board of Trustees of Woodford House*, above n 10, at [49] - [50].
46 At [71].

[99] I find that this conclusion potentially applies to Mr Pretorius' claim under the MW Act. That is, notwithstanding his status as a salaried employer, where hours worked in each week were more than 40, payment for each extra hour above 40 is liable to be made for a sum not less than the minimum hourly rate under cl 4(c)(ii) of the relevant Minimum Wage Order.

[100] Mr Patterson argued that Marra was entitled to apply the rates prescribed under the relevant Minimum Wage Orders to hours actually worked including overtime; he argued that this showed Mr Pretorius was paid above the adult minimum rate for all the hours he worked including his overtime hours, so that his claim is misconceived. That submission, however, involves a process of averaging. The majority of this Court rejected such an approach in *Idea Services Ltd v Dickson (No 1)*;[47] and so did the Court of Appeal in *Idea Services Ltd v Dickson*.[48] The most recent discussion of this principle, with regard to salaried employees, is found in *Woodford House*, where Chief Judge Colgan held that averaging should not apply where remuneration is calculated on an annual salary basis.[49] I respectfully agree with this finding; I reject Mr Patterson's submission.

[101] Mr Patterson's principal argument was that this claim is time barred because all the elements necessary to create that claim arose more than six years before Mr Pretorius filed his proceeding. That is, Marra alleges that any agreement which would provide the basis for a MW Act claim would be based on the conversations conducted with Mr Bailey in 2007; and according to timesheets maintained by Mr Pretorius, the first pay period during which overtime occurred in February 2008, which was beyond the six-year time limit which commenced on 3 March 2008.

[102] Mr Patterson elaborated on this submission by arguing that if the first of a series of breaches occur outside the limitation period, then there is a statute bar for the entire series of breaches.

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47 *Idea Services Ltd v Dickson (No 1)* [2009] ERNZ 116 (EmpC).
48 *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] ERNZ 192 at [26] - [52].
49 *Law v Board of Trustees of Woodford House*, above n 10, at [218].

[103] Mr Patterson went on to say that such an approach was demonstrated by a determination of the Authority, *Sheath v The Selwyn Foundation*.[50] That case concerned an alleged breach of contract where there was a failure to pay certain insurances and pension fund contributions on a regular basis. The Authority held that the cause of action accrued when the first date for payment of those monies fell due; and that their continual non-payment was relevant to the duration of the period for the assessment of loss or damages, but did not give rise to new causes of action.

[104] In response, Mr Jacobson submitted that such an approach would be unfair and would lead to an unprincipled outcome. He argued that if an employer underpaid an employee over a long period of time, with the first relevant breach occurring outside the limitation period, it would be inequitable for that employer to be protected in respect of the underpayments which fell within the limitation period.

[105] The relevant principles in respect of such a situation is explained in this passage in *Chitty on Contracts*:[51]

> **Successive and continuing breaches.** Where the innocent party elects to treat himself as discharged from further performance consequent upon a breach of the contract, time begins to run immediately. For instance, if there is an anticipatory breach accepted by him as a repudiation of the contract, his cause of action accrues at once, and not from the failure of the party in default subsequently to perform at the time fixed for performance. But if there are one or more breaches which do not give rise to a discharge either because they are not sufficiently fundamental or because the innocent party declines to accept them as having that effect, each will give rise to a separate cause of action. *There may also be a series of breaches of a single covenant.* Examples are failure to pay instalments of interest or rent. Or the breach may be a continuing one e.g. of a covenant to keep in repair. In such a case the claimant will succeed in respect of so much of the series of breaches or the continuing breach as occurred within the six (or 12) years before action brought.
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> …
>
> (Emphasis added)

[106] Such an approach had been adopted in this Court with regard to claims under the Act. An example is found in *Woodford House*.[52] The claim concerned

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50 *Sheath v The Selwyn Foundation* [2015] NZERA Auckland 134.

51 H G Beale (ed) *Chitty on Contracts* (32nd ed, Sweet & Maxwell, London, 2015) vol 1, at 28 - 035, (footnotes omitted).

52 *Law v Board of Trustees of Woodford House,* above n 10.

entitlements to statutory minimum remuneration for "sleepovers" in the boarding hostels of two schools, under the MW Act. The Court held that causes of action arose on the dates when plaintiffs claimed they should have been paid minimum wage rates for sleepovers.[53] That meant that individual assessments for each plaintiff would need to be undertaken on a plaintiff by plaintiff basis, "starting in each case with the first working day after the date six years before the plaintiff's claims were filed in the Authority".[54] A further example of this principle being applied in this Court is found in *Poulter v Antipodean Growers Limited*.[55]

[107] The legal issue raised by Marra is accordingly resolved by the principles to which I have just referred. It is well established that a series of breaches of a single covenant result in an outcome where only those breaches which fall outside the statutory limitation period are precluded. To do otherwise would result in the wholly unfair outcome described by Mr Jacobson.

[108] It is my conclusion that any potential claim under the MW Act is not statute barred in respect of any established breaches which occurred after 3 March 2008. I agree with the conclusion reached by the Authority with respect to this claim.

Holidays Act claim

[109] Mr Pretorius' statement of claim refers to a claim which is made under the Holidays Act 1993 for working on public holidays and annual leave; it is asserted that entitlements under this statute were not paid. The pleading appears also to suggest that it is necessary for the Court to consider whether any such claim would be time barred. Neither counsel advanced submissions on this point. However, were it to be established that there were breaches of Holidays Act entitlements within the six years prior to the filing of Mr Pretorius' statement of problem, such a claim would not be statute barred. This is because time runs from the date of the relevant breach, as explained earlier.

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53 At [78].
54 At [233].
55 *Poulter v Antipodean Growers Ltd* [2010] NZEmpC 77, at [25].

Conclusion

[110] I have found that Mr Pretorius' claim in simple contract cannot proceed. There was no express agreement as to the quantum of payment arrangements for overtime;[56] consequently there was no viable cause of action which could be assessed for time limitation purposes.

[111] I have found, however, that his claim for remuneration on a quantum meruit basis if established for overtime or for bonus payments, would not be statute barred by s 142 of the Act, since payment was due at the conclusion of the project in March 2010.[57] I have also concluded that Mr Pretorius' claim, in the alternative, under the MW Act would not be statute barred in respect of established breaches which occurred after 3 March 2008.[58]

[112] Finally, any claims for unpaid entitlements under the Holidays Act, where non-payment occurred after the same date would not be statute barred if they were to be made out.[59]

[113] Accordingly, Mr Pretorius' challenge is partially allowed, and Marra's challenge is dismissed. Because my conclusions differ in some respects from those of the Authority, the determination of the Authority is set aside and this decision stands in its place.

[114] I reserve costs with regard to each of the challenges; I note that costs were also reserved in respect of the application for special leave to remove part of Mr Pretorius' relationship problem.[60] I invite the parties to agree any outstanding costs issues if possible; if, however, that does not prove possible, any party seeking costs should file their application and any supporting evidence within 21 days of the date of this judgment; the responding party is to file its response and any supporting evidence 21 days thereafter. If such an application is brought, it would be helpful if the parties could provide relevant calculations under the Costs Guidelines contained

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56 This judgment at [58].
57 This judgment at [86] and [90].
58 This judgment at [108].
59 This judgment at [109].
60 *Pretorius v Marra Construction [2004] Ltd* [2016] NZEmpC 43 at [39].

in the Court's Practice Direction of October 2015. Any such application for costs will be resolved on the papers.

[115] The findings in this judgment may provide a basis for constructive discussions between the parties. Unless their differences are resolved, it would seem inevitable that each party will incur further significant costs. For that reason, I invite the parties to consider further attendance at mediation.

B A Corkill
Judge

Judgment signed on 2 August 2016 at 11.30 am