IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 236
EMPC 468/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SMART SUSHI NORTHWEST LIMITED First Plaintiff
AND	SMART SUSHI WYNYARD LIMITED Second Plaintiff
AND	SMART SUSHI BRITOMART LIMITED Third Plaintiff
AND	SMART SUSHI MT. WELLINGTON LTD Fourth Plaintiff
AND	SMART SUSHI SYLVIA PARK K LTD Fifth Plaintiff
AND	SMART FOOD SERVICES LTD Sixth Plaintiff
AND	OK JONG JOO AND MYOUNGSUK KIM PARTNERSHIP NO.1 Seventh Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT Defendant

Hearing:	22 July 2025 (Heard at Auckland)
Appearances:	P Skelton KC and T Hwang, counsel for plaintiff T Gray, counsel for defendant
Judgment:	31 October 2025

JUDGMENT OF JUDGE M S KING

[1] This judgment resolves a non-de novo challenge to a determination of the Employment Relations Authority (the Authority).[1] The election relates to the parts of the determination where the Authority determined that the plaintiffs were not entitled to credit for the payments they had previously made to employees. The defendant, the Labour Inspector, defends the challenge.

[2] The key issues to be determined by the Court are whether the Authority erred in fact or in law in:

(a) determining that the plaintiffs were not entitled to set-off the lump-sum payments previously made to employees when making remediation payments for reinstated holidays;

(b) determining that the plaintiffs were not entitled to set-off the alternative holiday payments previously made to employees when making remediation payments for alternative holidays; and

(c) failing to properly determine the nature and extent of the loss suffered by employees as a result of the plaintiffs' breaches.

[3] An agreed statement of facts and common bundle with documentary evidence and witness statements which the Authority member had before her, were produced. These documents were admitted by consent for the purposes of providing context in respect of the uncontested Authority findings.

The facts giving rise to the challenge

[4] The plaintiffs are Smart Sushi Northwest Ltd, Smart Sushi Wynyard Ltd, Smart Sushi Britomart Ltd, Smart Sushi Mt. Wellington Ltd, Smart Sushi Sylvia Park K. Ltd, Smart Food Services Ltd, OK Jong Joo and Myoungsuk Kim Partnership No.1. The

[1] *Smart Sushi Northwest Ltd v Labour Inspector* [2024] NZERA 660.

plaintiffs are inter-related entities which trade under the name Smart Sushi (referred to collectively as Smart Sushi). Smart Sushi operates six sushi stores in Auckland and one sushi catering store.

[5] Smart Sushi had a long-standing practice of paying its employees eight per cent of their wages each year in December, in effect buying out their entire annual holiday entitlement for the year to come, rather than providing them with paid leave throughout the year (December payments). Employees were permitted to take leave at any time throughout the year. However, the leave was not paid. Smart Sushi accepts that there was no written request by employees to exchange their annual holiday entitlement for the December payments.

[6] Smart Sushi had a similar practice for alternative holidays. When its employees worked on a public holiday, they were paid both the amount that was intended to cover public holiday pay required under s 50 of the Holidays Act 2003 (the Act), and a payment in effect buying out the employees' entitlements to an alternative holiday day, which the employer was required to provide the employee under s 56 of the Act.

[7] In August 2021 the Ministry of Business, Innovation and Employment (MBIE) received a complaint from a former employee of Smart Sushi. MBIE subsequently received complaints from two other former employees.

[8] On 24 November 2022 the Labour Inspector issued an Investigation Report which concluded (among other breaches) that the practice of making December payments did not comply with the Act.

[9] On 18 January 2023 the Labour Inspector issued seven improvement notices against Smart Sushi under s 223D of the Employment Relations Act 2000 (the ER Act). The improvement notices stated that:

(a) the December payments were not in accordance with the Act; and

(b) the practice of paying alternative holidays in advance was not in accordance with the Act.

[10] Smart Sushi stopped both practices once it became aware they were unlawful.

[11] The parties agree that Smart Sushi's practices of buying out its employees' entitlements to annual holidays and alternative holidays breached the Act. It has agreed to remedy breaches covered by the improvement notices. However, Smart Sushi and the Labour Inspector disagree over whether Smart Sushi is entitled to any credit for payments previously made for those entitlements for the purpose of remediation payments required by the improvement notices. Smart Sushi acknowledges that top up payments (for other earnings/shortfalls) may be required, even if a credit is given for the payments it has previously made.

[12] The Authority determined that Smart Sushi had not discharged its obligation to pay its employees their annual and public holiday entitlements and could not deduct the previous payments when making remediation payments.[2]

[13] Smart Sushi says the Authority erred in law by failing to determine the nature and extent of loss suffered by employees under s 223E(2) of the ER Act. From its perspective the issue is simple. The proper approach to remedying the breaches is to put the affected employees in the position they would have been in had Smart Sushi properly complied with the Act. When Smart Sushi comes to making payment for the reinstated holidays, they should pay the difference between the amount already paid and the amount owing.

[14] The Labour Inspector takes a different view. It says that the right to be paid for annual holidays and alternative holidays (when they are taken) is a minimum entitlement of employees. The timing and method of paying those entitlements is prescribed by the Act. Smart Sushi's previous payments, even if they were made in good faith are not recognised as legitimate and do not discharge its obligations and the associated minimum entitlements provided under the Act. The Labour Inspector maintains that the employees have never been provided with the relevant minimum

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2 *Smart Sushi*, above n 1, at [86] and [123].

entitlements, that is the right to paid annual holidays and paid alternative holidays. The Labour Inspector says that the financial disadvantage to Smart Sushi is an unfortunate consequence and there is no mechanism under the Act to set-off or deduct previous invalid payments.

Did the Authority err in determining that Smart Sushi was not entitled to set-off the December payments when making remediation payments?

[15] A summary of the relevant statutory provisions is set out below.

[16] Section 3 sets out the purpose of the Act which is to:

> …promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to –
>
> (a) annual holidays to provide the opportunity for rest and recreation: …

[17] Section 15 sets out the purpose for the subpart of the Act, which relates to the taking of annual holidays and must be read alongside s 3 of the Act. The purposes include to:

> (a) provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and
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> (b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and
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> …

[18] Section 16 provides that employees are entitled to four weeks paid annual holidays at the completion of each 12 months of continuous employment. Section 16(4) provides that an employee's entitlement to annual holidays remains in force until the employee has:

> (a) taken all of the entitlement as paid holidays; or
>
> (b) been paid out under s 28B[3] of the Act for the entitlement in the entitlement year.

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[3] Sections 28A and 28B provide for the payment by agreement of up to one week of an employee's annual holidays entitlement at the employees written request.

[19] Section 27 requires payment of annual holidays before the holiday is taken, except in specified circumstances. None of the exceptions in s 27 apply in the circumstances of this proceeding.

[20] Section 28A permits payment of a maximum of one week's annual holidays each year, at the employee's written request.

[21] Section 28B(1) provides how the payment of annual holidays under s 28A must be calculated and when it is paid by an employer. Section 28B(2) states:

> If an employer has incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for payment, the employee's entitlement to take the portion of annual holidays concerned remains in force as if the payment had not been made.

[22] Smart Sushi submits that s 27 of the Act expressly permits payment in advance of annual holidays. The Act does not limit how far in advance a payment under s 27 can be made. Nor does it expressly prevent an employer from making a payment before the holiday is taken (or when the employment ends).

[23] However, Smart Sushi did not pay its employees before they took annual holidays in accordance with s 27 of the Act. Smart Sushi's December payments were made with the view of buying out and extinguishing its employees' entitlements to paid annual holidays. The entitlements to paid annual holidays were never taken nor intended to be taken by Smart Sushi employees. In those circumstances, the December payments cannot be fairly and reasonably interpreted as payment in advance before its employees took annual holidays in accordance with s 27. This interpretation is consistent with the text and in light of the purposes of the Act,[4] which included enabling employees to take annual holidays away from work, but also to have their pay in hand so that they could enjoy those holidays,[5] thereby promoting work-life balance.[6]

[24] Smart Sushi accepts that the Act prevents employers from buying out annual holidays (that is paying employee's annual holiday pay and treating that payment as a

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4 Legislation Act 2019, s 10(1).
5 Holidays Act 2003, s 15(a).
6 Holidays Act 2003, s 3.

discharge of their entitlement to take paid annual holidays) except, for the one week provided in s 28A of the Act, which can only be initiated at the employee's written request.

[25] Smart Sushi also accepts that s 28B of the Act functions to restore the employee's entitlement to annual holidays, despite its December payments to employees. However, it submits that there is no indication in the Act that when it comes to payment for the restored annual holiday entitlement, that earlier payments made by Smart Sushi must be ignored so that the employees end up receiving double payment of their holiday pay.

[26] Smart Sushi relies on the Court of Appeal decisions in *Drake Personnel (NZ) Ltd v Taylor*[7] and *Gladstone Milk Bar Ltd v Henning,*[8] both of which were determined under the Holidays Act 1981 (1981 Act). In these cases, the Court of Appeal found there was nothing in the 1981 Act that prevented it from taking into account advance payments made with the consent of the employee and nothing that required the employer to pay the employee a second time.

[27] *Drake* involved casual employees who became entitled to payment for unused holidays at the end of their employment. Section 21(2) of the 1981 Act said that on termination of employment, an employer shall "forthwith pay to the worker … 6 percent of his gross earnings…" as annual holiday pay.[9] However, in this case the parties had expressly agreed for six per cent of their pay to be paid on top of their regular pay to account for holiday pay. This is often referred to as a "pay as you go" arrangement. The Court of Appeal held that the question of whether these advance annual holiday payments could be taken into account was one of statutory interpretation. It said that:[10]

> [t]he payment required by s 21 does not become due and payable until the employment is terminated. The obligation, however, is created as soon as the qualifying period of employment starts to run… The amount is not immediately payable, but it is an amount which must inevitably become payable either on termination or as payment for the taking of an actual holiday.

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7 *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644, [1996] 1 ERNZ 324.
8 *Gladstone Milk Bar Ltd v Henning* [1998] 3 NZLR 183, [1998] 1 ERNZ 296.
9 At 647.
10 At 649.

> … It is a liability to pay at a future date … The question, therefore, is whether a debtor can by agreement discharge a liability by making payment before the debt is due, and if so, whether there is some exception created by the Act in respect of holiday pay.
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> There is no reason in principle why an obligation to pay money at some time in the future cannot be discharged by earlier payment. The creditor may be entitled to refuse earlier payment, but in this case the mode of earlier payment was agreed and the payments accepted. If holiday pay is an exception to the general rule, the exception must be found in the statute.

[28] The Court found there was nothing in the 1981 Act that prevented it from taking into account advance payments made with the consent of the employee. It held that where such anticipatory payments had been made and accepted, there was nothing in the Act that required the employer to pay the employee a second time. The Court concluded that it could not read into the 1981 Act a requirement to pay a second time, as this required something more than implication from context.[11] The Court also observed that through the anticipatory arrangement the employee had received more than his actual entitlement to annual holidays.[12]

[29] In *Gladstone*, the Court of Appeal applied the same reasoning to permanent part-time employees who became entitled to payment for unused holidays at the end of their employment. Like *Drake,* the parties had expressly agreed to a pay as you go arrangement to account for the employees' annual holiday pay. As in *Drake* the question was whether advance payments could be taken into account when calculating the amounts now payable to the employees at the end of their employment under ss 13 and 21 of the 1981 Act. The Court held the same considerations applied to those sections:[13]

> There is no basis for differentiating ss 13 and 21 … The employer's obligation is expressed in essentially the same language – "shall pay forthwith" … which this Court in *Drake Personnel* held did not forbid earlier payment (if agreed) and did not require an employee to be paid a second time if already paid in anticipation.

[30] Smart Sushi acknowledged that the pay as you go arrangement considered in *Drake* and *Gladstone* did not occur in its case. It did not pay employees as it went, instead it sought to cash up the employee's entitlement in December each year. It also

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11 At 650.
12 At 651.
13 *Gladstone*, above n 8, at 189.

accepted that the current Act allows pay as you go arrangements in some limited circumstances.[14]

[31] The Labour Inspector submits that there has been a sea change in legislation from 1981 to 2003. When *Drake* and *Gladstone* were decided, there was nothing in the legislation which forbade early payments of entitlements or compelled a double payment in principle. However, the 2003 Act expressly prohibits the pay as you go arrangements approved by *Drake* and *Gladstone*, except in limited circumstances, and it guarantees that employees who miss out on taking paid time away from work are not deemed to have forfeited those entitlements to paid holidays. For these reasons the Labour Inspector submits that the interpretive principles from *Drake* and *Gladstone* cannot override the clear and prescriptive language of the 2003 Act.

[32] Smart Sushi accepts in its submissions that while *Drake* and *Gladstone* dealt with the 1981 Act and with pay as you go arrangements (which do not apply to current proceedings), the general principles from the Court of Appeal decisions apply to the present situation. It submits that the cases establish three propositions:

(a) as a general rule of law, there is no reason an obligation to pay money in the future cannot be discharged by early payment (proposition one);[15]

(b) if holiday pay is an exception to the general rule, the exception must be found in the statute (proposition two);[16] and

(c) nothing in the 1981 Act prevented prior payments being taken into account or required that employees be paid a second time (proposition three).[17]

[33] Smart Sushi submits that the first two propositions are not statute specific. It submits that these remain good law despite the 1981 Act being repealed. Its third

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14 Holidays Act 2003, s 28. An employer may regularly pay annual holiday pay to employees but an employee must be employed on a fixed term for less than 12 months, or on an intermittent or irregular basis. Other requirements must also be complied with.

15 *Drake*, above n 7, at 649; and *Gladstone*, above n 8, at 188.

16 *Drake*, above n 7, at 649.

17 *Drake*, above n 7, at 650; and *Gladstone*, above n 8, at 189.

proposition relates to the interpretation of s 28B(2) of the Act, which Smart Sushi submits restores an employee's entitlement to incorrectly cashed-up annual holiday entitlements, but it does not expressly state that the earlier payments must be ignored, and that the employees are entitled to receive their holiday pay twice.

[34] The facts in the current proceeding can be distinguished from *Drake* and *Gladstone*, and provide a material basis to depart from proposition one:

(a) The general rule of law Smart Sushi is seeking to rely on misses a key element: the parties' agreement to discharge the liability before the debt is due.[18] In both *Drake* and *Gladstone* the parties expressly set out in their employment agreement how payment in advance of their annual holiday entitlement was to be made. The Court of Appeal held that this earlier agreement discharged the employers' obligation to pay the employee's annual holiday entitlement and there was no requirement to pay the employees' annual holidays a second time.

(b) In the current proceeding there was no evidence of an agreement to pay out holidays. The December payment arrangement was a long-standing practice that Smart Sushi had unilaterally put in place. The Authority found on the evidence that there was "little seeking of individual agreement to pay the December annual leave payments."[19] The Authority also acknowledged that there was little or no complaint from employees to the advance payment. This failure to obtain express agreement is a material ground for distinguishing *Drake* and *Gladstone* from the current proceeding. I also do not accept that employees failing to complain or return the payments to Smart Sushi amounts to an agreement by conduct. The failure to object to an unlawful practice is not an endorsement or implied agreement of that practice, particularly when the purported agreement is seeking to discharge an employer's obligations to pay an employee minimum employment entitlements.[20]

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18 *Gladstone*, above n 8, at 188.
19 *Smart Sushi*, above n 1, at [31].
20 Holidays Act 2003, s 6(1).

> That position would effectively enable employers to contract out of minimum entitlements on the basis of an employee's acquiescence. This would be plainly inconsistent with both the purpose of the Act and the ER Act.[21]

[35] Proposition two fails. The provisions of the Act provide the basis for annual holiday pay entitlements to be an exception to the general rule of law that applies to other debtors.

(a) Section 10(1) of the Legislation Act 2019 requires the meaning of the Act to be ascertained from its text and in the light of its purpose and context. The purpose of the Act and the subpart have been considered above.[22] The purpose and context of the Act emphasises the social desirability of employees being paid when taking holidays to enable the employee to enjoy a period of rest and relaxation and promotes work-life balance for employees. A purposive interpretation, required by the Legislation Act, supports reading the Act in a way that protects an employee's minimum entitlement to paid time off work. This interpretation is further supported by the legislative background, which demonstrates that Parliament intended to mitigate the risks associated with cashing up annual holidays, except in limited circumstances.

(b) The Court of Appeal's reasoning in *Drake* and *Gladstone* is tied to the specific interpretation of the wording in the 1981 Act, particularly given the lack of purpose provisions. Parliament subsequently responded to cases like *Drake* and *Gladstone* by building into the Act ss 16(4), 28(4) and 28B(2). These sections expressly provide that incorrect payments of annual holiday pay do not discharge an employee's entitlements under the Act, unless provided within the narrow exceptions of the law.

(c) Those provisions above, when viewed against the purpose and context of the Act, also provide a sound basis to find that the payment of annual

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21 Holidays Act 2003, s 6(1)(3); and Employment Relations Act 2000, s 238.
22 See [24] above.

holiday entitlement is an exception to the general rule that an obligation to pay money in the future can be discharged through an earlier payment.

[36] Proposition three also fails. The meaning of s 28B(2) ascertained from its text and in the light of the purpose and context of the Act requires an employee's entitlement to paid annual holidays to be restored in full, which includes the entitlement for that leave to be paid:

(a) Smart Sushi seeks to distinguish the wording in s 28B of the Act from s 28(4). While it accepts that s 28(4) expressly requires double payment by an employer in the case of unlawful pay as you go payments for annual holidays, it submits that s 28B(2) does not. It points to what it says is an important difference between the wording in the two sections. It focusses on what each section expressly provides will remain in force despite the mistaken payment and asserts that:

(i) Section 28B(2) only provides that the "entitlement to take" annual holidays remains in force.

(ii) Section 28(4) provides that both the employee's "entitle[ment] to annual holidays" and the entitlement to be "paid in accordance with this subpart" remain in force.

(b) Smart Sushi submits that the Court would need to read words into s 28B(2) for it to have the same effect as s 28(4).

(c) Smart Sushi's submissions omit consideration of the final words in s 28B(2), which provide that an entitlement to take annual holidays remains in force "as if the payment had not been made".

(d) While s 28(4) may expressly provide for an entitlement to be paid in accordance with the Act, the meaning of s 28B(2), on a plain interpretation of the text, unambiguously restores an employee's

> entitlement to annual holidays. The entitlement to annual holidays is a paid entitlement, as set out in s 16(4). Section 28B(2) provides that the paid entitlement expressly "remains in force as if the payment [by the employer] had not been made." The plain meaning of ss 16(4) and 28B(2) must mean that any earlier payments must be disregarded when the entitlement is restored. This purposive interpretation is consistent with the scheme and purpose of the Act, as discussed above. The entitlement that is restored in s 28B, is a paid entitlement and the employer is required to pay that in full to the employee, regardless of any previous mistaken payments.

[37] Both parties accept that holiday pay and leave entitlements are treated as wages earned by an employee[23] and are subject to the Wages Protection Act 1983 (WPA). The parties accept that an employer cannot make any deduction from an employee's wages except in the very limited circumstances set out in the WPA, which requires the employee's written consent or a specific statutory basis.[24] However, Smart Sushi submits that this does not prevent the Court from taking into account money already paid when assessing the correct remediation methodology to be included in an improvement notice. This submission will be returned to when considering the nature and extent of loss.

[38] The parties accept that an employer, who makes incorrect minimum wage entitlements due under the Minimum Wage Act 1983, can credit any incorrect payments against the outstanding minimum wage entitlements.[25] However, the Labour Inspector submits that holiday entitlements are treated differently by the legislation. Specifically, that there are no set-off provisions for unlawful payments made by an employer in s 28B(2), or anywhere else in the Act. The Labour Inspector maintains that if Parliament had intended something other than the entitlement to paid leave to remain in force under ss 28(4) and 28B(2), it could have easily done so. It states that the Court cannot read in a right of set-off by implication for employers as this would contravene the scheme and purpose of the Act.

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23 Holidays Act 2003, s 86(a).
24 Wages Protection Act, s 5.
25 Minimum Wage Act 1983, s 11(2).

[39] The Labour Inspector submits that the effect of ss 28(4) or 28B(2) of the Act is that employees are entitled to keep earlier payments unlawfully paid by an employer, and that the employer is not entitled to credit or to set-off such payments. The Labour Inspector referred to a number of Authority determinations where it refused to allow an employer to account for unlawful payments under s 28 of the Act when remediating an employee's holiday entitlement.[26] It submitted that the Authority's determinations are consistent with the purposes of the Act.

[40] The Authority determinations relied on by the Labour Inspector observed that allowing an employer to account for unlawful payments would render ss 27 and 28 of the Act "largely irrelevant" and would be inconsistent with its object.[27] In *Cross v D Bell Distributors Ltd*,[28] when declining the employer's request to account for unlawful payments, the Authority stated:[29]

> The consequence for an errant employer, of effectively having to pay holiday pay twice, may seem harsh. [The employer] submitted the Holidays Act could not intend to entitle a worker to "a double dip". Section 28(4) is however, clearly, a deliberate instrument of parliamentary intention to provide regularly and continuously-employed workers with annual holidays so they have real opportunities for rest and recreation.[30] Subsection (4) intentionally creates a significant financial disincentive to the use of pay-as-you-go provisions outside the two strictly limited categories of employee allowed by s 28. An employer who does not strictly comply with the conditions for use of s 28 does so at its own, costly, peril.

[41] However, the Labour Inspector does not refer to the Authority determination in *Begum v Saiyad Enterprise Ltd*[31] where an employer's decision to cash up more than a week of an employee's holiday entitlement, at the employee's request, did not require a finding under s 28B(2) that the payments were incorrect. It acknowledged that such a finding would have meant that the entitlement would have remained in force as if no payment had been made.

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26 *David O'Neill Contracting Ltd v Labour Inspector*, ERA Christchurch, CA 41/08, 16 April 2008; *Harding v V & A Keefe* ERA Christchurch CA 48A/08, 10 October 2008; and *Cross v D Bell Distributors Ltd* [2017] NZERA Auckland 295.

27 *David O'Neill*, above 26, at [20]–[21].

28 *Cross v D Bell Distributors Ltd*, above n 26.

29 *Cross*, above 26, at [38].

30 Holidays Act 2003, s 3(a).

31 *Begum v Saiyad Enterprise Ltd* [2014] NZERA Auckland 505.

[42] Instead, the Labour Inspector relies on *A v Raelene and Dean Rees Partnership t/a Rees Accounting Partnership*[32] where the Authority distinguished *Begum* on the basis that the employee in *Rees Accounting Partnership* did not request for her annual holiday entitlement to be paid out. The employer had unlawfully paid out the employee's annual holiday entitlement prior to an annual closedown period each year. The Authority determined that s 28B contemplated the employee gaining back their annual holiday entitlement that was wrongly paid out during their employment. It went on to state:[33]

> Had the [employer] re-credited [the employee] with her annual holidays entitlements during her employment, as s 28B(2) required, it may have asked her to re-pay the holiday pay it incorrectly paid out. However, the [employer] was not aware that it had breached the [Act] so did not do so. At the end of their employment, employees must be paid the monetary value of their annual leave entitlement. [The employee] should have been reinstated with annual holiday entitlements and therefore, could have taken that leave during each year outside the closedown period.

[43] The Authority anticipated the employer bringing a claim to recover the unlawful payment from an existing employee. However, the determination is silent on whether the employer could bring an action to recover any money paid mistakenly when seeking to cash out the employee's annual holidays.

[44] The Court is not bound by the Authority's determinations. While I have found that the purpose of the Act and the text of s 28B(2) requires the employees' annual holiday entitlement to be restored as if the payment had not been made, nowhere in the Act, its regulatory impact statement, or the select committee report, does it say that employees can retain any earlier payment incorrectly paid. There is no mention of a prohibition against an employer seeking to recover such payments or a reference to the employee keeping any incorrectly paid entitlements.

[45] In the circumstances, I consider that there is insufficient basis for the Court to imply into s 28B(2) of the Act a prohibition against an employer recovering an earlier payment incorrectly paid under the Act. This means that there is nothing to prevent Smart Sushi from bringing a counterclaim or a claim to recover the mistaken payment

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32 *A v Raelene and Dean Rees Partnership t/a Rees Accounting Partnership* [2017] NZERA 31.
33 *Rees Accounting Partnership*, above n 32, at [53].

from the employees in this Court. At a practical level, if that action succeeded there would be a reduction in the amount owed to the employee. This addresses any concerns of double-dipping or a windfall to the employees and prevents them from unjustly benefiting from the employer's mistake.

[46] The ability for employers to recover mistaken payments also aligns with the compensatory and remedial focus of s 28B. It is intended to restore the employees minimum entitlements to annual holidays, reflecting that these minimum entitlements are rights to paid time off for rest and recreation (the core purpose of the Act). Smart Sushi argues that requiring double payment effectively imposes a penalty. However, the inability to set-off payments made incorrectly is not punitive in these circumstances, because it ensures the statutory minimum entitlement is fully protected as part of the Act's protective design. Since mistaken payments do not fulfil the minimum entitlement, the entitlement remains outstanding. Crucially, the employer is not barred from recovering the mistaken payment, which negates the risk that the double payment results in a penalty.

[47] Smart Sushi accepts that it could have brought a counterclaim, or a separate action to recover the December payments it mistakenly made to employees. However, it chose not to do so and submits that doing so would be impractical, involving over 600 former employees. However, the Labour Inspector's own modelling assesses the number of former employees entitled to remediation payments to be significantly less, being approximately 56 employees across the plaintiffs' seven entities.

[48] I therefore do not accept the impracticability. The reality is that Smart Sushi is required to locate these employees for the purposes of restoring or remediating their entitlements to annual holidays under the Act before it seeks to claim back the mistaken payments from former employees.

[49] However, for the reasons above, Smart Sushi cannot self-help by crediting the December payments from the remediation payments that are due.

Did the Authority err in determining that Smart Sushi was not entitled to set-off alternative holiday payments when making remediation payments?

[50] Section 50 of the Act requires that an employee who works on public holidays be paid time and a half of the usual pay rate for the time worked.

[51] Where an employee works a public holiday which would otherwise be a working day, they are entitled to an alternative holiday under s 56 of the Act. This entitlement remains in force until the employee has taken the alternative holiday or has been paid for the holiday in accordance with ss 60 or 61 of the Act.

[52] Section 60(2) provides that payment for alternative holidays is due in the pay period in which the alternative holiday is taken or in the final period of employment if the employee has not taken the alternative holiday before the date on which his or her employment ends.

[53] Section 61 permits an employee to exchange their alternative holiday for payment at the request of the employee, but only if 12 months has passed since their entitlement to the alternative holiday arose.

[54] Smart Sushi accepts that it incorrectly cashed out its employees' alternative holiday entitlements. However, it's submissions regarding its liability for incorrectly paid alternative holidays, is similar, to the submissions it made in relation to its liability for incorrectly paid annual holidays above. It says that remedying the loss does not require the employees to be paid more for alternative holidays than the amount prescribed in the Act, or that the payments it already made must be disregarded. It goes further and submits that this position is evident when considering that neither s 60 or any other provision expressly prohibits payment or part-payment in advance. It says the Act does not expressly state that if a payment for alternative holidays is made in advance, it must be ignored so that the employee is paid twice. Smart Sushi argues that there is no equivalent to s 28B that relates to incorrectly paying out alternative holidays, and therefore it cannot be argued that this provision should be applied by analogy with s 28(4) so as to require that alternative holidays be paid twice. Instead, the principles in *Drake* and *Gladstone* apply directly to the issue of whether alternative holidays can be set-off.

[55] The Labour Inspector submits that the statutory language regarding alternative holiday provisions mirrors the language of s 16(4) of the Act, which (in conjunction with s 28(4)), authorised double payment but which was amended in 2010 to also apply to s 28B(2). The Labour Inspector contends that there can be no suggestion that Smart Sushi was entitled to "pre-pay" alternative holidays and in any event, the payments made in lieu of providing a paid alternative holiday were defective and calculated incorrectly. The minimum entitlements to alternative holidays remain in force and unlawfully made payments cannot be deducted from the value of those alternative holidays.[34] The Labour Inspector argues that this approach is consistent with the relevant purpose provisions of the Act which include: [35]

> (a) to provide employees with an entitlement to 12 public holidays if the holidays fall on days that would otherwise be working days for the employee:
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> …

[56] The Labour Inspector concludes that the alternative holiday stands in for the entitlement to paid time off, and the obligation must be discharged by being calculated and paid in accordance with s 60(2)(b) of the Act.

[57] As I have found above,[36] *Drake* and *Gladstone* are grounded in the interpretation of the 1981 Act. By contrast, the current Act is a protective instrument. It provides the basis for treating annual holiday pay and alternative holiday pay entitlements as an exception to the general principles of set-off.

[58] While the provisions relating to the reinstatement of annual holiday pay specifically address incorrect payments and the risk of double payment, they reflect a general rationale and purpose underpinning the Act. Incorrect payments do not discharge an employee's entitlements, nor do they discharge an employer's obligations to pay those entitlements correctly.

[59] Smart Sushi argues that a provision cannot be read into the Act that requires incorrectly paid alternative holiday pay to be paid twice. However, Smart Sushi is in

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34 Relying on *Wright v Diehl* [2023] NZERA 613.
35 Holidays Act 2003, s 43(a).
36 See above at [34]–[35].

effect seeking to read in an implied right of set-off into the Act, a principle which is not expressly provided for (although expressly provided for in other legislation). The scheme and purpose of the Act extend to the provisions relating to alternative holidays, meaning that a failure to discharge minimum entitlements is not recognised as legitimate under the Act.

[60] Section 56(3) of the Act provides that an alternative holiday entitlement can only be discharged in one of two ways. Either the employee takes the paid day off calculated in accordance with the formula, or the employer pays for the day under ss 60 or 61. Section 60 states that if an alternative holiday is not taken by the time the employment ends, it must be paid out at the employees' relevant daily pay. Section 61 states that only after 12 months of the entitlement arising can the employer and employee agree to exchange an unused alternative holiday for payment. None of the requirements prescribed by the Act in relation to alternative holiday pay were discharged by Smart Sushi.

[61] Although Smart Sushi is concerned with double payment and windfall to employees, I have already noted above that it is not prevented from bringing a claim or counterclaim to recover mistaken payments.

Did the Authority fail to properly determine the nature and extent of the loss suffered by employees?

[62] Smart Sushi submits that when considering an objection to an improvement notice under s 223E(2), it is the role of the Court and Authority to determine: whether the employer has breached the relevant Act, the nature and extent of the employer's failure to comply, and the nature and extent of loss suffered by the employee as a result of the employers failure to comply.[37] Following this exercise, the Authority and Court can then confirm, vary or rescind the improvement notices pursuant to s 223E(3) of the ER Act. In its determination, the Authority stated that the reference to the "nature and extent of any loss suffered" in s 223E(2) of the ER Act did not impact its analysis.[38] Smart Sushi argues that this was a clear error of law, and that the Authority was

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37 Employment Relations Act 2000, s 223E(2).
38 *Smart Sushi,* above n 1, at [85].

required to determine the nature and extent of loss suffered as a mandatory consideration under its power to confirm, vary or rescind the improvement notice.

[63] Smart Sushi accepts that it has breached the Act and needs to remediate by reinstating holidays that were unlawfully paid out. However, it says that reinstating an employees' entitlements does not require that employees be paid more than what is prescribed in the Act, or that payments already made by the employer must be disregarded. It says the purpose of s 223E is compensatory for loss suffered, it is not punitive.

[64] Smart Sushi highlights the provisions of the WPA in support of its submissions. It notes that the WPA prevents an employer from deducting amounts when paying wages without an employee's consent, but it does not prevent a Court from taking into account money already paid when assessing the correct remediation methodology to be included in the improvement notices. This is required when assessing "the extent of loss suffered". By failing to consider the December payments and alternative holiday payments, the nature and extent of loss suffered by the employee was incorrectly assessed.

[65] The Labour Inspector submits that s 223E does not require the Authority to determine the precise quantum of loss suffered, nor does it require the Authority to undertake a full remediation assessment. Instead, it provides a wide discretion to confirm, vary or rescind the improvement notice as the Authority thinks fit.[39] The Labour Inspector says that the Authority did in fact make findings that Smart Sushi failed to comply with the relevant provisions in the Act, and particular findings regarding the loss. It did so to the extent that it could with the available evidence.

[66] Further, the Labour Inspector maintains that when holiday pay is incorrectly paid, the minimum entitlement remains in force. Implicit in the nature and extent of the loss is that the entitlements have not been provided in full and that equity and good conscience requires their restoration in full. Confirming the improvement notice therefore would not be sending a punitive message.

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39 Employment Relations Act 2000, s 223E(3).

[67] It has already been established that Smart Sushi unlawfully bought out its employees' entitlements to annual and alternative holidays in breach of the Act.

[68] Smart Sushi's failure to comply with the Act resulted in a total loss of minimum entitlements to employees. It is also a loss that is not strictly financial, it is the loss of entitlements to paid holidays as prescribed by the Act, for the purposes of rest and recreation. The nature and extent of Smart Sushi's failures therefore cannot be remedied by the incorrect payments made. The nature and extent of loss suffered by the employees was absolute and the minimum entitlements remain in force as if the incorrect payments were not made.

[69] When assessing the nature and extent of loss suffered by the employees, the Court cannot take into account the incorrect payments made by Smart Sushi. This is because the failure and loss are absolute and can only be restored in full when the entitlements are paid out in compliance with the Act.

[70] The argument made by Smart Sushi would effectively provide a backdoor to permit employers to unilaterally credit or set-off incorrect payments in breach of the scheme, purpose and provisions of the Act.

[71] To the extent that the employees have been unfairly enriched, or Smart Sushi has suffered a loss as a result of the incorrect payments, this loss cannot be taken into account or otherwise limit the employees' statutory right to be paid their entitlements in full under the Act. Once again, if Smart Sushi is concerned with any unfair enrichment, or windfall to employees, it can bring a claim or counter-claim to recover the incorrect payments it has made.

Outcome

[72] Smart Sushi's challenge is unsuccessful, and it is dismissed. The improvement notices are upheld.

[73] The costs of these proceedings are reserved. If they cannot be agreed the parties may file memoranda.

M S King
Judge

Judgment signed at 12.30 pm on 31 October 2025