Wanaka Pharmacy Ltd v McKay

[2021] NZEmpC 112

Employment Court, Christchurch (EMPC 205/2020) 16 June;
Judge Beck 21 July 2021

Challenge — Non-de novo — Leave — Holiday pay — Calculation — Entitlement — Employee — What was the defendant's total holiday entitlement? — How many holidays were taken? — Whether the days taken as holidays really were holidays — Whether defendant worked while on holiday — Purpose of annual holidays — Whether defendant was required to work — What was the impact on the defendant's holiday? — Whether the 13-year delay and nature of defendant's role impacted the claim — Whether the Employment Relations Authority erred by using s 157 of the Employment Relations Act 2000 to resolve the evidential difficulties — Whether defendant entitled to interest — Employment Relations Act 2000, s 157; Holidays Act 2003, s 3(a).

Mr Heath (H) and Ms McKay (M), who were married, operated Wanaka Pharmacy Ltd and Wanaka Sun (2003) Ltd together. They both worked hard and did not take many holidays. When they did, they were often on call. Unfortunately, the family relationship and their working relationship ended. M subsequently wanted holiday pay for the 13 years of holidays she says she never took.

The Employment Relations Authority (the Authority) determined that M was an employee of the plaintiffs and that she had been unjustifiably dismissed. These findings were not challenged by the plaintiffs.

In dispute was the amount of holiday pay M was owed. The Authority agreed with M that for the most part she had not been able to take holidays during her 13 years of employment. Based on the substantial merits of M's case and what it thought was fair in the circumstances, it deducted four weeks from the holiday balance claimed and awarded her $57,334.24 holiday pay.

The plaintiffs challenged that finding, contending that the figure was too high and that the Authority was wrong.

The issues for the Court's determination were: (i) what was M's total holiday entitlement for the period of her employment?; (ii) how many holidays were taken?; (iii) did work occur in the holidays, and if so, did this impact on them being annual holidays for the purposes of the Holidays Act 2003?; (iv) given the nature of M's role in the business, what was the effect, if any, of the delay in claiming the holiday pay on the holiday pay claim?; (v) did the Authority err by using s 157 of the Employment Relations Act 2000 (the Act) to resolve the evidential difficulties?; and (vi) was M entitled to interest on her claim?

Held, (1) no deductions were ever made for holidays taken by either H or M. There were no wage and time records for any holidays taken by them. Consequently, both of them had very high holiday balances sitting in the system. Counsel for the plaintiffs calculated M's total entitlement as 50.5 weeks used by the Authority. M said that the accrued holiday entitlement figure in the payroll system was an accurate record of her

maximum accrued holiday entitlement. M produced a payslip for the period ending 2 September 2018, giving an annual holiday entitlement total of 246.6 days, or 49.32 weeks. While this was less than the figure calculated by the plaintiffs' counsel, M considered it to be accurate. Given her acceptance of the figure and the fact that it was beneficial to the employer, the Court did not propose to explore the difference between 49.32 and 50.5 weeks. Accordingly, 49.32 weeks, as recorded by the employer at the time, was the total maximum holiday liability and was a proper starting point. Final holiday pay is calculated at whatever rate was applicable at the time of termination, which the parties agreed that M's annual salary was $62,822 per annum or $1,208.12 per week. Therefore, the maximum holiday pay liability for the companies (before deductions for any holidays taken) was $1,208.12 x 49.32, giving a total of $59,584.48, not $62,166.70, as found by the Authority. (paras 6, 9-15)

(2) As to whether the days taken as holidays really were holidays, M accepted that four weeks of the 16.3 weeks were holidays and should be deducted. That left the question of whether the remaining 12.3 weeks at issue were really holidays. (para 24)

(3) On both H and M's evidence, it was apparent that M performed work while she was on holiday. M said even when she and H were meant to be on holiday, she would work remotely — posting to the website and to social media platforms, answering work phone calls for both the Wanaka Sun and the Wanaka Pharmacy, and responding to emails. She says she constantly worked, and it made no difference where she was located. Consequently, she claimed she did not get a real opportunity for rest or recreation. H said he did not require M to perform any work while away and that even if she did work, it was not as much as she now said it was. H agreed that when they were away, M spent a lot of time on her phone but said he did not know the details of what she was doing. He said that social media duties were work that she made the decision to do herself and he had not seen the need for that role. While he accepted that it raised community awareness, he said it would not have been economic, had he hired someone else to do it, to pay for more than a few hours per week. In relation to the pharmacy phone, it was not disputed that M took calls on the pharmacy phone, although H said they could have gone to someone else as there was cover in the pharmacy and most things could wait until they returned home. (paras 27-29, 32, 34)

(4) M was effectively required to work while on holiday when receiving and responding to the emails and phone calls for the pharmacy and newspaper. She was not able to have the benefit of rest and recreation at those times. She also worked by continuing to undertake her social media duties. However, this was of her own volition and not required by the employer. This would have impacted her ability to have rest and recreation and she did such work in the spirit of treating the companies as family businesses, but the work could have been paused. (paras 49, 50)

(5) The work undertaken by M in answering calls or responding to email queries did not mean that she could not rest and relax at all. It is therefore necessary to ascertain the extent to which that work impacted her ability to have rest and recreation. The best and only measure we have is time. M's evidence was that she spent the whole day working. She did not break down the time spent on particular tasks. M's evidence was that she worked more than 40-50 hours per week. On the evidence, the duties in question accounted for about a half-day per week or 10 per cent of her time. Given that 12.3 weeks were in contention, the appropriate credit for work required to be undertaken while on holiday was therefore 1.23 weeks. (paras 52-55)

(6) The total annual holiday amount in issue was 16.3 weeks, which should be reduced by 1.23 weeks as time that M was effectively required to work and was unable to enjoy rest and recreation. Though M worked at other times on her annual holiday and her reasons for doing so were admirable, this was of her own volition and

was not required by the employer. Accordingly, that work did not reduce the amount of annual holidays taken. Accordingly, the total amount of holidays that should be treated as annual holidays under the Holidays Act and deducted from M's total holiday entitlement was 15.07 weeks. (paras 56-59)

(7) An employee's entitlement to paid holidays exists until those holidays are taken or until the employment ceases, at which time payment is due in respect of outstanding holiday entitlements. There was no legal basis to reduce the amount of holiday pay owing due to delay. Here, there was no delay. M made her claim for holiday pay promptly. After undertaking the factual analysis, the Court was not satisfied that M had taken all of the holidays to which she was entitled. She only took 15.07 weeks. Accordingly, she was owed 34.25 weeks' holiday pay. In the face of minimum entitlement legislation, it was not open to the Court to reject a claim for delay or to make an arbitrary reduction in entitlement. This was particularly so in the absence of deceit or a breach of good faith in relation to the claim. There was no such conduct here. Accordingly, delay did not impact M's claim. (paras 73-76, 81, 82)

Rainbow Falls Organic Farm Ltd v Rockell [2014] NZEmpC 136, [2014] ERNZ 275, considered

(8) Given the Court's findings in this particular case, the Authority erred in applying s 157 of the Act in the way that it did. Greater analysis was required. That approach was likely because the focus of the investigation at that point was on the nature of the relationship and the claim of unjustified dismissal. The Court had the advantage of being able to focus solely on the issue of holiday pay and had the benefit of comprehensive evidence in relation to the holiday entitlement, the holidays actually taken, and the nature of the work undertaken during those holidays. (paras 83, 84)

(9) M's claim for interest raised several issues. The claim before the Court was a non-de novo challenge to certain elements of the Authority's determination and M did not appear to have sought interest in the Authority. The normal rule is that if a claim is not pleaded and no notice is given, there is no basis for the Court to make an award. The companies had objected on that basis. While the Court disagreed that the lack of a pleading is determinative in exercising the Court's discretion, it was clearly a relevant and significant factor, as is the fact that the companies had brought a challenge of a limited non-de novo nature. Any liability for interest, having not been sought in the Authority, may not have been considered as part of any risk assessment conducted by the companies prior to bringing their challenge. Finally, notice was only given at the eleventh hour that interest would be sought, allowing limited time for a response. In those circumstances, it was not appropriate to utilise the Court's discretion to award interest from the date of termination. However, it was appropriate to order that interest, calculated in accordance with sch 2 to the Interest on Money Claims Act 2016, be paid on any holiday pay amount outstanding from the date of this judgment until the date of payment. (paras 87-89)

Cases referred to

Attorney-General v N [2002] 1 NZLR 651, [2001] ERNZ 629 (CA)

Hatcher v Burgess Crowley Civil Ltd [2019] NZEmpC 117

Idea Services Ltd v Dickson [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192

Napier Aero Club Inc v Tayler [1998] 1 ERNZ 241 (EmpC)

Ora Ltd v Kirkley [2010] NZEmpC 6

Rainbow Falls Organic Farm Ltd v Rockell [2014] NZEmpC 136, [2014] ERNZ 275

Roach v Nazareth Care Charitable Trust Board [2018] NZEmpC 123, [2018] ERNZ 355

Shakes v Norske Skog Tasman Ltd [2008] ERNZ 121 (EmpC)

Challenge

This was a successful non-de novo challenge to an Employment Relations Authority determination which found that the defendant for the most part had not been able to take holidays during her 13 years of employment and awarded her $57,334.24 holiday pay.

T Mackenzie and *J Grant*, counsel for first plaintiff (Wanaka Pharmacy Ltd) and second plaintiff (Wanaka Sun (2003) Ltd)
Defendant in person (Nicola Jane McKay)

Cur adv vult

JUDGE BECK

[1] Mr Heath and Ms McKay were together for over 13 years. They were married, had three children together and operated two businesses together; Wanaka Pharmacy Ltd and Wanaka Sun (2003) Ltd.[1] They both worked hard and did not take many holidays. When they did, they were often on call. Unfortunately, the family relationship ended and, along with it, the working relationship. Ms McKay now wants holiday pay for the 13 years of holidays she says she never took.

[2] The Employment Relations Authority determined that Ms McKay was an employee of the plaintiffs and that she had been unjustifiably dismissed.[2] Those findings are not challenged by the plaintiffs.

[3] What is in dispute is the amount of holiday pay she is owed. The Authority agreed with Ms McKay that for the most part she had not been able to take holidays during her 13 years of employment. Based on the substantial merits of Ms McKay's case and what it thought was fair in the circumstances,[3] it deducted four weeks from the holiday balance claimed and awarded her $57,334.24 holiday pay. The plaintiffs challenge that finding. They say the figure is too high and that the Authority was wrong.

[4] The issues for the Court are:

(a) What was Ms McKay's total holiday entitlement for the period of her employment?
(b) How many holidays were taken?
(c) Did work occur in the holidays? If so, does this impact on them being annual holidays for the purposes of the Holidays Act 2003?
(d) Given the nature of Ms McKay's role in the business, what is the effect, if any, of the delay in claiming the holiday pay on the holiday pay claim?
(e) Did the Authority err by using s 157 of the Employment Relations Act 2000 (the Act) to resolve the evidential difficulties?
(f) Is Ms McKay entitled to interest on her claim?

What was the total holiday entitlement?

[5] What is our starting point?

[6] Mr Mackenzie, counsel for the plaintiffs, produced a table calculating the maximum entitlement that Ms McKay could have accrued over the period of her employment from 4 October 2006 to September 2018. He takes into account that prior

1 Those companies are the plaintiffs in this matter. Mr Heath is the sole director of both companies.

2 *McKay v Wanaka Pharmacy Ltd* [2020] NZERA 230 (Member Doyle).

3 Relying on the Employment Relations Act 2000, s 157.

to 1 April 2007, an employee was only entitled to three weeks' holidays per annum. He calculates Ms McKay's total entitlement as 50.5 weeks used by the Authority.

[7] He says the difference appears to lie in the Authority failing to take into account the reduced (three-week) holiday entitlement prior to 1 April 2007. He submits that this was an error and that the correct maximum holiday liability was 50.5 weeks. I accept this submission and agree, as does Ms McKay, that this was an error on the part of the Authority.

[8] Both parties were confident that the payroll system accurately recorded holidays as they accrued. That is not the problem.

[9] The problem is that no deductions were ever made for holidays taken by either Mr Heath or Ms McKay and there are no wage and time records for any holidays taken by them. This resulted in them both having very high holiday balances sitting in the system.

[10] For the purposes of ascertaining the correct starting point, Ms McKay says that the accrued holiday entitlement figure in the payroll system was an accurate record of her maximum accrued holiday entitlement.

[11] Ms McKay produced a payslip for the period ending 2 September 2018, giving an annual holiday entitlement total of 246.6 days, or 49.32 weeks.

[12] While this is less than the figure calculated by Mr Mackenzie, Ms McKay considers it to be accurate. She says it will have taken into account various periods when she was absent from the workplace due to three periods of parental leave. It may also allow for some uncertainty over her exact start date.

[13] Given her acceptance of the figure and the fact that it is beneficial to the employer, I do not propose to explore the difference between 49.32 and 50.5 weeks. I find that 49.32 weeks, as recorded by the employer at the time, is the total maximum holiday liability and is a proper starting point.

[14] Final holiday pay is calculated at whatever rate was applicable at the time of termination. The parties agree that Ms McKay's annual salary was $62,822 per annum. Her weekly pay was $1,208.12.

[15] Accordingly, the maximum holiday pay liability for the companies (before deductions for any holidays taken) is $1,208.12 x 49.32, giving a total of $59,584.48, not $62,166.70, as found by the Authority.

How many holidays were taken?

[16] It is apparent from the evidence that both Mr Heath and Ms McKay worked hard in the businesses and did not take much time away for themselves.

[17] Ms McKay agrees that there were four overseas holidays and while she says she did some work, she is happy to accept that they were holidays for the purposes of the Holidays Act. She says these amount to about six days each. She therefore accepts the Authority's finding that four weeks' holidays were taken over the period and that a deduction of that amount is appropriate.

[18] Mr Heath says that considerably more holidays were taken. In his evidence he went through a series of approximately 30 breaks of between a half and five working days per break, often tacked onto weekends or public holidays, where they had been away from Wanaka over the period of employment. Both Mr Heath and Ms McKay agree that they did not go away for more than a week or so at a time due to the timing and delivery of the newspaper, the Wanaka Sun.

[19] Mr Heath says he erred on the side of caution when calculating the days away. He claims that in total, Ms McKay had at least 81.5 working days' (16.3 weeks') holiday over the period of employment. This includes the four weeks' overseas holidays.

[20] Ms McKay did not dispute that these were the times when they were away. However, she does say that, other than when they were overseas, even when she did get away from Wanaka, she worked. Therefore, they should not be counted as holidays. Before discussing this point, we first need to ascertain what amount is in contention.

[21] As already noted, Ms McKay did not dispute Mr Heath's evidence as to the times she was away from Wanaka, ostensibly on holiday. Mr Heath did not suggest that there were any more holidays than those he detailed in his evidence, although he noted it was difficult to recall so far back.

[22] While 16.3 weeks in 13 years does not seem like very many holidays, it is consistent with both Mr Heath's and Ms McKay's evidence that they only took short breaks, often attached to weekends. It was hard to get away. The pharmacy was a seven-day-a-week operation and the Wanaka Sun was a weekly publication.

[23] I find that 81.5 days or 16.3 weeks were taken by Ms McKay as holidays away from the business. That, however, is not the key issue in this case.

Were the days taken as holidays really holidays?

[24] Ms McKay accepts that four weeks, of the 16.3 weeks, were holidays and should be deducted. That leaves the question of whether the remaining 12.3 weeks at issue were really holidays.

Did Ms McKay work while on holiday?

[25] Ms McKay says she was a full-time salaried employee who worked well over 40 to 50 hours per week. She undertook a wide range of roles and responsibilities including:

(a) Human resources/recruiter (Wanaka Sun and Wanaka Pharmacy);
(b) Payroll (Wanaka Sun and Wanaka Pharmacy);
(c) Social media manager (Wanaka Sun and Wanaka Pharmacy);
(d) Rostering Staff (Wanaka Pharmacy);
(e) Website editor (Wanaka Sun);
(f) News photographer (Wanaka Sun);
(g) Event co-ordinator (Wanaka Sun);
(h) Newspaper deliveries (Wanaka Sun);
(i) Telephonist (Wanaka Sun); and
(j) Administration — answering and handling all "general inquiry" messages sent to the newspaper email account (Wanaka Sun).

[26] In the Authority she attributed the following times to her duties:[4]

(a) Newspaper communications and deliveries (15 hours per fortnight) — included answering all incoming general phone inquiries to the Wanaka Sun, social media inquiries and email inquiries to the main email address, liaising between the editor and administrator as required, managing advertising, organising community events, photographing various events, and delivering copies of the Wanaka Sun every Thursday morning to a variety of businesses around Wanaka.
(b) Website editor for Wanaka Sun (18 hours per fortnight) — included uploading the online edition of the paper every Thursday to the website between 4.30 am and 6.30 am, overseeing the website layout, checking content for accuracy, proofreading and editing, and collaborating with professionals to improve presentation.

4 *McKay v Wanaka Pharmacy Ltd*, above n 1, at [39], [42], [44], [47] and [51].

(c) Social media manager for the Wanaka Sun and Wanaka Pharmacy (40 hours per fortnight) — included managing and contributing to posts on various social media platforms including Facebook, Instagram and Twitter.

(d) Human resources administration for the Wanaka Sun and Wanaka Pharmacy (10 hours per fortnight) — included dealing with grievances, recruitment, maintaining payroll information and collating and managing time cards, and checking hours to payroll.

(e) Pharmacy administration (10 hours per fortnight) — included preparing rosters for up to 15 staff at the pharmacy for the business that operated 12 hours a day, seven days a week for 365 days of the year, ensuring cover, arranging staff changes, and managing outstanding leave balances for staff.

[27] Ms McKay says even when she and Mr Heath were meant to be on holiday, she would work remotely — posting to the website, posting to social media platforms, answering work phone calls for both the Wanaka Sun and the Wanaka Pharmacy, and responding to emails. She says she worked constantly and it made no difference where she was located.[5]

[28] As a result, she claims she did not get a real opportunity for rest or recreation.

[29] Mr Heath says he did not require her to perform any work while away and that even if she did work, it was not as much as she now says it was.

[30] He says Ms McKay's key duties, like payroll and rostering, were all completed before they went away. Ms McKay accepts this but says there were ongoing staff queries and absences that she continued to deal with via email and phone as they arose.

[31] Both Mr Heath and Ms McKay gave evidence that they would take holidays around the delivery of the Wanaka Sun. Accordingly, the work involved in getting the edition out, uploading it to the website and delivering it, was done before going on holiday.

[32] Mr Heath agrees that when they were away, Ms McKay spent a lot of time on her phone but says he did not know the details of what she was doing. He says that social media duties were work that she made the decision to do herself. He had not seen the need for that role. While he accepts that it raised community awareness, he says it would not have been economic, had he hired someone else to do it, to pay for more than a few hours per week.[6] He says there is no way he would instruct someone to do this work while on holiday and on at least one occasion he asked her not to do it.

[33] In relation to answering the diverted phone for the Wanaka Sun, he says that this was only from 2016 when the business vacated the offices it was in. He also says that the editor offered to pick up some of Ms McKay's duties but she refused.

[34] In relation to the pharmacy phone, it was not disputed that Ms McKay took these calls, although Mr Heath says they could have gone to someone else as there was cover in the pharmacy and most things could wait until they returned home.

[35] Regarding responding to emails for both the pharmacy and the paper, Mr Heath says that unless something was absolutely pressing, it could have been dealt with when they returned.

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5 In support of her claims Ms McKay provided screen shots of examples of posts made to the Wanaka Sun and Wanaka Pharmacy Facebook, Instagram and Twitter pages while she was away.

6 The companies now pay someone for five hours per week.

[36] On both Mr Heath and Ms McKay's evidence, it is apparent that Ms McKay performed work while she was on holiday.

The purpose of annual holidays

[37] The purpose of annual holidays is described in s 3(a) of the Holidays Act as providing the opportunity for rest and recreation.

[38] The explanatory note to the original Holidays Bill 2003 includes the reduction of stress, refreshment and more general social wellbeing as some of the benefits provided by annual holidays.[7] As this Court has previously noted, while there is a monetary aspect, annual holidays provide recreational time for the employee in recognition of both the work done leading up to the holiday and of the social desirability of a balance between work and recreation.[8]

[39] These benefits are undermined if an employer requires an employee to be responsive to emails and phone calls while on annual holidays or to undertake other tasks. An employer does not fulfil their obligations in respect of annual holidays simply by paying holiday pay and allowing an employee to be absent from the workplace. That is particularly the case now, given that so much work is performed remotely.

[40] That said, an employee who, while on annual holidays, actively chooses to engage in work without it being required of them by their employer (by instruction, or by pressure or expectation), or it being necessitated by the circumstances, cannot then claim to have been denied their entitlement. Again, this is particularly relevant now with so much work being performed away from a traditional place of business, where it may be difficult for an employer to control, prevent or even monitor work being undertaken by an employee while on holiday.

Was Ms McKay required to work?

[41] Having found that Ms McKay worked while on holiday, the question for the Court is was she required to perform that work?

[42] Ms McKay operated largely autonomously, as would be expected in a family business. She undertook a range of duties. There is no dispute that she took her responsibilities seriously and was committed in her work.

[43] The essential work that had to be completed was completed before she went on holiday. She would ensure the paper was delivered and uploaded, all information for processing the payroll was submitted, and the rosters were completed.

[44] Most of Ms McKay's work on holiday was related to social media.

[45] Despite noting the valuable contribution of social media in an article on the 15th anniversary of the Wanaka Sun, it was apparent from his evidence that Mr Heath (rightly or wrongly) did not in fact attach much value to Ms McKay's social media work.[9] I accept his evidence that as far as he was concerned, the social media work could have paused while on holiday. He did not require it to be done.

[46] The phones and emails for the paper and the pharmacy were the other aspect of her duties that Ms McKay continued to perform while on holiday. Ms McKay says that she did this work because there was no cover and it had to be done.

[47] Emails and phones could have been redirected to others, as the phones were when Ms McKay was overseas. While Ms McKay may have been reluctant to do this, an employer cannot simply sit on their hands; Mr Heath took no steps to encourage it or ensure that it occurred.

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7 Holidays Bill 2003 (32-1) (explanatory note) at 19.

8 *Shakes v Norske Skog Tasman Ltd* [2008] ERNZ 121 (EmpC) at [23].

9 This is supported by the significant reduction, and in some cases complete absence, of social media activity since Ms McKay stopped working for the plaintiffs.

[48] Mr Heath says most inquiries could have waited until they returned home. That may well be correct. However, having taken no steps to facilitate her holiday, for example by arranging cover or redirection, he cannot now be critical of Ms McKay for her diligence in responding.

[49] Accordingly, I find that Ms McKay was effectively required to work while on holiday when receiving and responding to the emails and phone calls for the pharmacy and newspaper. She was not able to have the benefit of rest and recreation at those times.

[50] She also worked by continuing to undertake her social media duties. However, I find that this was of her own volition and not required by the employer. I accept that this would have impacted her ability to have rest and recreation and she did such work in the spirit of treating the companies as family businesses, but the work could have been paused.

What was the impact on her holiday?

[51] It is possible in some cases that undertaking any work at all may render the whole day or holiday nugatory. This will depend on the nature of the work and its impact on the employee.[10]

[52] This is not one of those cases. I do not consider that the work undertaken by Ms McKay in answering calls or responding to email queries meant that she could not rest and relax at all. It is therefore necessary to ascertain the extent to which that work impacted her ability to have rest and recreation.

[53] The best and only measure we have is time. Ms McKay's evidence was that she spent the whole day working. She did not break down the time spent on particular tasks. Given that nothing changed in relation to these particular tasks, whether she was on holiday or not, the best evidence is to look at the normal work week.

[54] Ms McKay's evidence was that she worked more than 40-50 hours per week. On the evidence, the duties in question account for about a half-day per week or 10 per cent of her time.

[55] Given that we have 12.3 weeks in contention, the appropriate credit for work required to be undertaken while on holiday is therefore 1.23 weeks.

What was the total annual holiday taken?

[56] The total annual holiday amount in issue is 16.3 weeks.

[57] Given the analysis set out above, the amount of annual holidays taken should be reduced by 1.23 weeks as time that Ms McKay was effectively required to work and was unable to enjoy rest and recreation.

[58] As noted above, while I accept that Ms McKay worked at other times on her annual holiday and her reasons for doing so were admirable,[11] this was of her own volition and not required by the employer. Accordingly, that work does not reduce the amount of annual holidays taken.

[59] I find the total amount of holidays that should be treated as annual holidays under the Holidays Act and deducted from Ms McKay's total holiday entitlement is 15.07 weeks.[12]

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10 Neither party sought to advance arguments that Ms McKay was, or was not, working throughout the holidays in the sense considered in *Idea Services Ltd v Dickson* [2011] NZCA 14, [2011] 2 NZLR 522, [2011] ERNZ 192. For completeness, I would not have found that to be the case.

11 She considered she was working in a family business for the benefit of her family.

12 The equation being 16.3 - 1.23 = 15.07.

Does the 13-year delay and nature of Ms McKay's role impact the claim?

[60] Mr Heath also says it is not fair to ask him to try and remember so far back and, given that Ms McKay was the one in charge of wage and time records, she should not now be allowed to derive an advantage from that delay.

[61] Mr Mackenzie submits that the Court should take into account the difficulties that Ms McKay has caused in not querying her holiday entitlement during the employment relationship and, instead, leaving a claim to burgeon over time. He says that the Court should recognise the consequent difficulties in discharging the burden of proof and, where the employee is responsible for organising and recording their own holidays, as is the case here, but does not do so for a lengthy period of time, the claim should be rejected.

[62] He says the Authority failed to consider the very lengthy delay in her claiming annual holidays and the difficulties that this caused.

[63] He submitted that a finding of an entitlement of one week per year of service (that is, 13 weeks) would be an appropriate outcome.

[64] Ms McKay says her holiday balance was not a secret or a surprise. It was clearly recorded in the payroll system. Mr Heath saw the reports. She says they even joked together about their high holiday balances. She submits there was no delay. Her claim did not arise until the termination of her employment when she was not paid any holiday pay, and she made the claim as soon as she was aware there was an issue.

[65] Mr Mackenzie relies on *Rainbow Falls Organic Farm Ltd v Rockell* in support of his argument.[13] In that case the employee was claiming that the wage records, which showed him being owed holiday pay, were accurate and he therefore had a wage arrears/holiday pay claim. The employer, who was overseas, argued that the records which had been kept by the employee, who operated on a largely autonomous basis, were not in fact accurate. They argued that not only did they not owe him any money, he owed them.

[66] In that case the Authority's approach had effectively hinged on a strict application of s 132 of the Act.[14] Because the employer was unable to prove the claims were incorrect, the Authority had considered it was required to accept the employee's claim as proved. However, the Court found that s 132 was permissive as opposed to mandatory, and it did not require the Court to accept the employee's claims as proved where there was evidence that would tell against those claims. It then went on to conduct a factual analysis of the claim.

[67] I agree that is an appropriate approach. That analysis has been undertaken above.

[68] It is correct that Mr Heath relied on Ms McKay to keep track of holiday entitlements. However, unlike the director of the employer in *Rainbow Falls*, he was not out of the country. He was in the business every day and for the most part he and Ms McKay took their holidays together. Mr Heath saw the holiday report(s) that had his and Ms McKay's increasingly large holiday balances. He could therefore also see that the holidays they took were not being recorded. There is no evidence that he raised any concerns at the time.

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13 *Rainbow Falls Organic Farm Ltd v Rockell* [2014] NZEmpC 136, [2014] ERNZ 275.

14 Section 132 sets out that where an employer has failed to keep wage and time records and, as a result, has prejudiced an employee's ability to bring an accurate claim, the Authority *may*, unless the employer proves otherwise, accept all claims made by the employee in respect of wages actually paid and the times worked by the employee.

[69] There was no obfuscation or deceit on Ms McKay's part. Her evidence is that she did not record/deduct their times away because she did not consider them to be holidays. I have found otherwise but her view was genuine. There is no breach of good faith on her part as suggested by Mr Mackenzie.

[70] While it may be the case that the passage of time has made it difficult for Mr Heath to recall, he has done so and taken the Court through a series of holidays amounting to 16.3 weeks. There is no evidence that there were more holidays than that amount. Both parties agree that they took few holidays.

[71] The situation needs to be looked at through the lens of a business being treated as a family business by both Ms McKay and Mr Heath. This approach, by both parties, translated into long hours and carefully timed minimal holidays. The findings above reflect that.

[72] The position now taken by Mr Heath in another jurisdiction is that it was not in fact a family business. He cannot have it both ways. As Ms McKay said, in relation to treating the plaintiff companies as their family business, as she discovered, "For one of us it was. For me I was an employee".

[73] An employee's entitlement to paid holidays exists until those holidays are taken or until the employment ceases, at which time payment is due in respect of outstanding holiday entitlements.[15]

[74] There is no legal basis to reduce the amount of holiday pay owing due to delay. The reference to delay in *Rainbow Falls* was in regard to an issue of credibility. That is not a factor here.

[75] In any case there was no delay. Ms McKay made her claim for holiday pay promptly.

[76] Unlike Mr Rockell in *Rainbow Falls*, after undertaking the factual analysis, I am not satisfied that Ms McKay had taken all of the holidays to which she was entitled. I have found that she only took 15.07 weeks. Accordingly, she is owed 34.25 weeks' holiday pay.[16]

[77] There is no factual basis for Mr Mackenzie's submission that the claim should be rejected or that Ms McKay should only be given one week of holiday for every year of employment. Nor is there any principled legal basis upon which I could make such orders.

[78] To order 13 weeks of holiday pay would require taking the same or at least a similar approach to that for which he has (rightly) criticised the Authority and which forms the basis for this challenge.[17]

[79] I consider that Chief Judge Goddard's statement in *Napier Aero Club Inc v Tayler* is appropriate:[18]

> … however undesirable stale claims in respect of untaken holidays may seem, there is no room for applying equity and good conscience to defeat them.

[80] This was, to an extent, accepted by Mr Mackenzie in our discussion when he properly conceded that the dead end he kept running into was the minimum entitlement in the Holidays Act.

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15 *Hatcher v Burgess Crowley Civil Ltd* [2019] NZEmpC 117 at [12].

16 49.32 (above at [13]) less 15.07 (above at [59]) equals 34.25.

17 Finding on the basis of the substantial merits of Ms McKay's case and what it thought was fair in the circumstances under s 157.

18 *Napier Aero Club Inc v Tayler* [1998] 1 ERNZ 241 (EmpC) at 247.

[81] In the face of minimum entitlement legislation, it is not open to the Court to reject a claim for delay or to make an arbitrary reduction in entitlement.[19] This is particularly so in the absence of deceit or a breach of good faith in relation to the claim. There was no such conduct here.

[82] Accordingly, I find delay does not impact Ms McKay's claim.

Did the Authority err by using s 157 of the Act to resolve the evidential difficulties?

[83] Given the findings above, I find that the Authority did err in applying s 157 in the way that it did. Greater analysis was required. As noted by Mr Mackenzie, that approach was likely because the focus of the investigation at that point was on the nature of the relationship and the claim of unjustified dismissal.

[84] This Court had the advantage of being able to focus solely on the issue of holiday pay and had the benefit of comprehensive evidence in relation to the holiday entitlement, the holidays actually taken, and the nature of the work undertaken during those holidays.

Is Ms McKay entitled to interest?

[85] At a teleconference held the day before the hearing, Ms McKay advised that she would be seeking interest on any amounts awarded in the Court, calculated from the date of termination.[20] She says this would be appropriate, given that three years have now passed since the end of her employment. The Authority has made no order as to interest in its determination and it does not appear that it was claimed at the time.

[86] Clause 14 of sch 3 to the Act gives the Court a general discretion in relation to the award of interest, setting it apart from the comparatively more black and white approach taken in civil proceedings in other Courts under the Interest on Money Claims Act 2016 (the IMCA).[21]

[87] Ms McKay's claim for interest raises a number of issues. The claim before the Court is a non-de novo challenge to certain elements of the Authority's determination and Ms McKay does not appear to have sought interest in the Authority. The normal rule is that if a claim is not pleaded and no notice is given, there is no basis for the Court to make an award.[22] The companies have objected on that basis.

[88] While I disagree that the lack of a pleading is determinative in exercising the Court's discretion, it is clearly a relevant and significant factor, as is the fact that the companies have brought a challenge of a limited non-de novo nature. Any liability for interest, having not been sought in the Authority, may not have been considered as part of any risk assessment conducted by the companies prior to bringing their challenge. Finally, notice was only given at the eleventh hour that interest would be sought, allowing limited time for a response.

[89] In those circumstances, I do not think it appropriate to utilise my discretion to award interest from the date of termination. However, it is appropriate to order that interest, calculated in accordance with sch 2 to the IMCA, be paid on any holiday pay amount outstanding from the date of this judgment until the date of payment.

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19 The Court's equity and good conscience jurisdiction is expressly limited in s 189(1) which says that it is to be exercised in a manner "not inconsistent with this or any other Act".

20 Relying on *Attorney-General v N* [2002] 1 NZLR 651, [2001] ERNZ 629 (CA) at [26].

21 See the discussion in *Roach v Nazareth Care Charitable Trust Board* [2018] NZEmpC 123, [2018] ERNZ 355 at [89].

22 *Ora Ltd v Kirkley* [2010] NZEmpC 6 at [28].

Conclusion

[90] The companies' challenge is successful. I find that the Authority did err in:

(a) Setting the starting point for Ms McKay's entitlement at $62,166.70 when it should have been $59,584.48;[23] and

(b) Awarding Ms McKay $57,334.24 holiday pay.

[91] However, I note that the amount I have found to be owing to Ms McKay is significantly greater than what was proposed by the plaintiffs.

[92] Ms McKay is entitled to 34.25 weeks' holiday pay.

[93] At the rate of $1,208.12 per week, she is entitled to a gross payment of $41,378.11 together with interest.[24]

[94] This is less than she would like because, thinking she was contributing to a family business, she worked during many of those holidays. While I have sympathy for her view, I have found that the majority of that work was not required by the employer.

[95] The orders in the Authority were against both plaintiffs. That was not challenged by either party. For the sake of clarity, the amount in [93] above is jointly and severally owed to the defendant by the plaintiffs.

[96] The Authority's determination in relation to holiday pay is set aside and this judgment stands in its place.

[97] I order that the plaintiffs pay the amount of $41,378.11 (gross) plus any interest to the defendant within 21 days.

[98] Costs are reserved. In the event that the parties are unable to agree on costs, the plaintiffs will have 14 days to file and serve any memorandum and supporting material, with the defendant having a further 14 days to respond. Any reply should be filed within seven days.

Plaintiffs' challenge successful; defendant entitled to 34.25 weeks' holiday pay; defendant entitled to a gross payment of $41,378, plus interest (jointly and severally owed to the defendant by the plaintiffs); Employment Relations Authority determination regarding holiday pay set aside and this judgment to stand in its place; payment of $41,378 (gross), plus interest to be paid to the defendant within 21 days

23 Above at [14].

24 Calculated in accordance with sch 2 to the IMCA, from the date of this judgment until the date of payment.