

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 18  
5550144

BETWEEN            JUDY HEELEY  
                                 Applicant

AND                    BOARD OF TRUSTEES  
                                 CHILTON ST JAMES SCHOOL  
                                 Respondent

Member of Authority:    M B Loftus

Representatives:        Peter Cranney, Counsel for Applicant  
                                 Geoff Davenport, Counsel for Respondent

Investigation Meeting:    On the papers

Submissions Received:    24 June 2015 and 23 July 2015 from Applicant  
                                 9 July 2015 from Respondent

Determination:            9 February 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    This is a dispute about the amount Ms Heeley should be paid for her annual holidays.

[2]    By agreement of the parties this dispute is to be determined on the papers

[3]    Ms Heeley is employed by the Board of Trustees of Chilton St James School (the school) in a support role and is identified as a *term time employee*. This means she is an *employee who [does] not work a full year because of the term breaks which occur as part of the education calendar*.<sup>1</sup>

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<sup>1</sup> Clause 1.5(a)(2) of the applicable collective employment agreement (the CEC)

[4] Also contained within the collective employment agreement (the CEC) are other clauses pertinent to this dispute. They read:

*School Vacations, as defined by the Employer, means the period between school terms during the school year... Individual Term Time employee's work requirements vary in the school vacations, but all are unpaid in the periods that they are not required to work.<sup>2</sup>*

And

*All employees are entitled to four weeks annual leave with pay calculated in accordance with the Holidays Act 2003, prorated in accordance with the proportion of the year worked.<sup>3</sup>*

And

*Term-time employees are required to take annual leave at the end of the school year and when this is exhausted the employee is on unpaid leave until School resumes.<sup>4</sup>*

[5] As already said ([3] above) Ms Heeley does not work a full year. The school estimates she works approximately 85% of the hours a full time employee would complete. It appears from the correspondence the way this is applied in practice is that a full time employee is deemed to work 45.8 week per year. In the year this dispute first arose (2012) Ms Heeley worked 38.97 weeks or 85% of the year. Applying that as a multiplier means *the 4 weeks annual leave (20 days) translates to 17 working days<sup>5</sup>* and that is what was paid.

[6] The school considers this a proper application of the agreement leave for term time employees be prorated. Ms Heeley, and her union, disagree and contend she should still receive four weeks pay without deduction.

### **The parties positions**

[7] Both parties provided thorough submissions of which the following is a summary.

[8] For Ms Heeley it is contended the CEC provision which provides leave be *prorated in accordance with the proportion of the year worked* is contrary to Holidays Act

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<sup>2</sup> Clause 7.4 of the CEC

<sup>3</sup> Clause 8.2.1 of the CEC

<sup>4</sup> Clause 8.2.3 of the CEC

<sup>5</sup> E-mail Davenport to Cranney dated 30 October 2013

2003 and therefore *of no effect to the extent it reduces employees' entitlements under the Act: s6(3).*<sup>6</sup> In particular Ms Heeley contends:

- a. She is entitled to four weeks annual holidays upon the completion of each twelve months of service (s16(1) of the Act);
- b. The amount to be paid must be calculated in accordance with the provisions of s21 which requires she receive the greater of either her ordinary weekly pay or average earnings over the preceding twelve months;
- c. During the school term Ms Heeley works full time hours. That is her ordinary weekly pay and given it exceeds the average when her annual earnings are divided by 52<sup>7</sup> that is what she should receive when on leave.

[9] For the school it is submitted there is no breach as the amount paid is Ms Heeley's ordinary weekly pay. The school goes on to say:

*The effect of Ms Heeley's complaint is that she should, notwithstanding that she is a part-time employee, who works 85% of a full year, receive 20 working days annual leave. That is not what the parties have agreed to in the applicable collective employment agreement.*<sup>8</sup>

[10] It is noted the parties are entitled to ... *agree on how an employee's entitlement to 4 weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee*<sup>9</sup> and submitted that is what they have done.

### **Determination**

[11] Having considered the evidence, the Act and the submissions I conclude the applicant's argument is the more persuasive and the CEC's prorate provision has the effect of reducing a statutory entitlement. It is not therefore enforceable.

[12] The parties agree that while there are periods during which the applicant is not required to work and not, by agreement, paid the relationship is ongoing. It is agreed

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<sup>6</sup> Letter Cranney to Board Chairperson dated 2 September 2013

<sup>7</sup> Definition of average weekly earnings in s5 of the Holidays Act 2003

<sup>8</sup> Respondent's submission at paragraph 2

<sup>9</sup> Section 17(1) of the Holidays Act 2003

that as a result Ms Heeley is entitled to four weeks holidays. The debate is about what she is paid and the school has applied the prorated provision to convert the allocation into days. That said there is no evidence as to how the agreement came about and what the parties considered it to mean at the time it was inserted into the CEC.

[13] The problem with the schools' approach is the act does not grant leave by the day. It grants it by the week and the sections describing payment deal with the issue accordingly. The key section, 21, provides payment for each of those weeks is to be paid at the greater of the employee's average weekly earnings or their ordinary weekly pay at the commencement of the holiday.

[14] Ordinary is defined as *regular, normal, customary, usual*<sup>10</sup> etc. As already said, when Ms Heeley works she works full time hours. She is paid accordingly and, when working and paid, receives the same weekly pay as a full timer. Indeed, the record provided with the evidence shows she never earned less than a full time rate when working and that was the weekly amount she was receiving at the commencement of her holiday.

[15] The effect of not working a full year is to reduce her average weekly rate over the period of a full year making it a lesser figure. That should be applied as a reduction in the weekly rate for each of the four weeks and not a reduction in the number of days paid. The greater figure, and that I conclude should be paid, is the rate she normally earned when working and which applied at the commencement of her leave and not the lesser average.

[16] The parties are in possession of the information required to rectify the shortfall and are therefore asked to do so. If problems arise leave is reserved for a return to the Authority. Costs are reserved but the parties are reminded that as this essentially a dispute it is normal that costs will lie where they fall.<sup>11</sup>

M B Loftus  
Member of the Employment Relations Authority

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<sup>10</sup> The Concise Oxford Dictionary, Oxford University Press

<sup>11</sup> See for example *New Zealand Merchant Service Guild IUOW Inc. v Inter-Island Line* (unreported) EC Wellington, WC 21A/03, 18 December 2003