

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 262
3092132

BETWEEN	DAVID MCNABB Applicant
AND	FLUIDEX TRANSPORT LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Mr McNabb, in person Alexandria Till, counsel for Respondent
Investigation Meeting:	On the papers
Further information and submissions received:	14 May 2020, 28 October and 20 November 2020, from the Applicant; 3 June 2020, 19 October and 26 November 2020, from the Respondent
Determination:	18 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr McNabb was employed by Fluidex Transport Limited (Fluidex) in August 2012 as a chemical tank driver until March 2020. He says his holiday pay has been incorrectly calculated over his employment as well as sick, bereavement and alternative holiday pay. He seeks awards of leave entitlements totalling \$28,076.35, interest on that amount, a claim for unjust enrichment, an award of \$15,000 non-economic loss and a contribution to costs.

[2] Fluidex does not accept there has been any underpayment to Mr McNabb and says, in fact, he has been overpaid 90 days annual holiday entitlement. Fluidex seeks a finding of overpayment and that the calculation of such is reserved. It says the claim for non-economic loss should not be allowed given it was filed after the Authority made timetabling orders.

[3] In 2016 Mr McNabb first raised concerns with Fluidex about his pay calculations going back to the outset of his employment. He filed an application in the Authority in early 2020. An issue arises as to whether he is time-barred from bringing a claim beyond the six year period from date of filing.¹

The Authority's investigation

[4] Mr McNabb filed his application on 14 February 2020.

[5] By consent this matter is determined on the papers. The Authority affirmed the written evidence and the contents thereof of Mr McNabb, Theresa McNabb, his wife, Philip Spanswick, the union organiser who negotiated the relevant collective employment agreement, Adrian Henry, who at the relevant time was employed by Fluidex as the regional manager, Anthony Galbraith, Fluidex's managing director, Alvin Maharaj, Fluidex's chief financial officer and Peter Elder, an employment relations consultant engaged by Fluidex to negotiate the relevant collective employment agreement. The parties have filed submissions and further relevant information as directed.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. This determination has been issued outside the timeframe set out at s 174C (3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C (4) to do, are exceptional.

¹ S 142 Employment Relations Act 2000.

Issues

- [7] The issues identified for investigation and determination are:
- a. From 2012 to 1 December 2019 has Fluidex correctly calculated Mr McNabb's annual holiday pay?
 - b. Should the calculation of Mr McNabb's average daily pay include part days?
 - c. Should the ordinary pay rates set out in the relevant collective employment agreement apply to Mr McNabb from 24 September 2018?
 - d. Does the statutory six year limitation period apply to any part of the claim?²
 - e. Does the application apply to other employees?
 - f. Has Mr McNabb taken annual leave in excess of his entitlement either by way of overpayment of annual holiday pay, annual leave taken in advance and/or cashed up holiday pay?
 - g. If so, is Fluidex entitled to recover any overpayment from Mr McNabb?

The parties' employment agreement

[8] Determination of this employment relationship problem turns to a significant degree on the parties' employment agreement.

[9] On 22 August 2012 the parties entered a written employment agreement. For the purposes of this determination the relevant terms are:

5. Hours of Work

You are required to work at the times set out in **Schedule three**.³

12. Annual Holidays

12.1 If you have worked for more than four weeks but less than one year with the employer, your holiday pay is calculated at 8% of total gross earnings.

² Employment Relations Act 2000, s 142.

³ Hand written and initialled beside clause 5 is "4 x 4 day #29".

12.2 After working for the same employer for one year you are entitled to four weeks annual leave on your normal rate of pay. Holidays shall be taken in the year in which they fall due.

12.3 You may request to take holidays at a time preferable to you, but the employer retains the final right to decide when holidays are to be taken.

Schedule 3

Hours of Work

Your hours of work are flexible and may be up to 13 hours a day (excluding meal breaks) or as directed, Monday to Sunday. It is anticipated that on most occasions you will have 2 days off a week, depending on the needs of the business.

...

Schedule 4

Pay Rate & Benefits

Your starting rate shall be Grade 6 (\$25.20 per hour) while performing Orica work for the Company and Grade 5 (\$23.20 per hour) when completing other work for the Company. Once you start working for Fluidex you will then be assessed according to the Fluidex Grading & Bonus scheme detailed in Operating procedures OP11.

...

[10] On 6 May 2019 Fluidex and Mr McNabb's union entered a collective employment agreement (CEA).⁴ Mr McNabb was a member of the union and covered by the CEA the relevant terms of which are:

8. Annual Holidays

8.1 Employees will be entitled to four weeks annual leave after twelve months continuous service in accordance with the Holidays Act 2003. For employees who are working on four on four off shift pattern four weeks equals 14 shifts per annum. The Company agrees to increase this to 16 shifts per annum for chemical drivers only.

Pay rates and Allowances – Commencement Date

The rates of pay and allowances specified above shall come into effect from the pay period beginning **24 September 2018**.

[11] In addition to these written terms Mr McNabb says he and Fluidex agreed, at least up to the entering of the CEA that four weeks annual leave entitled him to 20 annual leave days per annum. He also says Fluidex

⁴ Fluidex Transport Limited and The Rail and Maritime Transport Union of New Zealand collective employment agreement 6 May 2019 to 5 October 2020.

guaranteed him at least 80 hours work per fortnight and under that agreement was obliged to top up any short pays. Fluidex denies such additional terms.

Relevant law

Calculation of annual holiday entitlement

[12] The Holidays Act 2003 provides all employees are entitled to a minimum of 4 weeks' annual holidays.⁵ An employer and employee may agree on how the 4 week annual holiday entitlement may be met based on what genuinely constitutes a working week for the employee.⁶

[13] Section 21 of the Holidays Act provides how annual holiday pay is to be calculated:

21 Calculation of annual holiday pay

(1) If an employee takes an annual holiday after the employee's entitlement to the holiday has arisen, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).

(2) Annual holiday pay must be—

(a) for the agreed portion of the annual holidays entitlement; and

(b) at a rate that is based on the greater of—

(i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or

(ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[14] Section 8 provides the meaning of ordinary weekly pay and provides three ways to determine it:

(i) If the value of the week can be determined;⁷

(ii) If the value of the week cannot be determined then a calculation is provided;⁸ or

⁵ Holidays Act 2003, s 15(a).

⁶ Holidays Act 2003, s 17(1).

⁷ Holidays Act 2003, s 8(1).

⁸ Holidays Act 2003, s 8(2).

(iii) By agreement of the parties written into the employment agreement.⁹

[15] Because Mr McNabb's working hours varied the correct ordinary weekly pay calculation to apply is section 8(2) which is gross earnings for the four calendar weeks prior to the calculation less payments that are not regular divided by four.

[16] Section 5 provides average weekly earnings means 1/52 of an employee's gross earnings.¹⁰

[17] Once the average weekly earnings and ordinary weekly pay are identified the greater of the two is what is paid for the week of annual holidays. If less than a week is to be taken then the higher amount is divided by the number of days in the week (as defined by the employment agreement). If the employment agreement does not define the number of days in a working week then an averaging exercise will need to be undertaken using the total number of days worked in a year divided by 52.

[18] It is fundamental to the calculation of annual holiday entitlement that the week is first worked out. To approach the calculation of annual holiday entitlement by first using relevant daily pay or average daily pay is incorrect.¹¹ Such calculations are for public holiday, alternative holiday, sick leave, bereavement leave or family violence leave. The formula for which is set out in sections 9 and 9A of the Holidays Act 2003. The section 9 average daily pay formula includes a divisor of total days worked which expressly includes whole and part days.

Key documents

[19] This employment relationship problem has a number of unique elements including:

⁹ Holidays Act 2003, s 8(3).

¹⁰ Holidays Act 2003, s 5.

¹¹ Holidays Act 2003, ss 9 and 9A.

- (i) Mr McNabb was employed on a rolling 4 x 4 shift;
- (ii) his hours of work varied;
- (iii) his hourly rate of pay and allowances varied by type of work undertaken;
- (iv) the terms of employment were set out in an IEA and then a CEA along with terms outside the written documents;
- (v) Fluidex's holiday pay calculation methodology varied; and
- (vi) the wage and time records do not record how holiday pay was calculated.

[20] In addition to the wage, time and leave records and payslips (primary documents) documents analysing the data contained therein has been provided. The document titled 'Main Sheet' is significant because the parties agree it correctly records Mr McNabb's total gross earnings and total hours worked over the entire period of his employment.¹² It is also agreed the 'Main Sheet' correctly records totals paid to Mr McNabb for annual leave, alternative public holiday leave, sick and bereavement leave.

Background

The parties' enter an employment agreement – August 2012

[21] In August 2012 Mr McNabb commenced employment with Fluidex as a chemical driver.¹³ He negotiated the terms of employment with Adrian Henry, Fluidex's then Regional Manager. The parties entered a written individual employment agreement on 22 August 2012.

[22] Mr McNabb says in addition to the written terms of his employment Mr Henry confirmed the four weeks holiday per annum amounted to twenty days holiday per annum. Mrs McNabb says this was a surprise because he expected 16 annual leave days.

Mr McNabb first queries his holiday pay – March 2016

[23] In late March early April 2016 Mr McNabb compared his payslips and observed the daily rate calculation for holiday pay was less than a minimum day's work of ten

¹² With minor exceptions noted in Mr McNabb's submissions dated 28 October 2020.

¹³ Mr McNabb had previously worked for Fluidex between 2005 and 2010.

hours per day calculated at the relevant pay rate. He discussed this with Mrs McNabb. Her view was he should receive at least the ordinary daily rate of pay for annual leave.

[24] On 6 April 2016 Mr McNabb wrote to Fluidex raising the daily rate of pay issue and asking for an explanation as to how holiday pay had been calculated for the pay period ending 13 March 2016:

Hi

I wonder if you could explain to me how holiday pay is worked out, My understanding is that it is averaged over the previous 12 months for shift workers. As I rarely work less than 12hrs a day and mostly more I fail to see how 8.3hrs approx. is an average of that.

The law is not easily understood so I'm not sure I am alone in not understanding it's finer points.

[25] On 7 April Fluidex replied to Mr McNabb's query that holiday pay was calculated by either dividing annual gross pay by five to get the daily rate:

Hi David,

I have attached the schedule of your earnings that your leave pay was calculated on. Let me know if you are still not clear on the calculation.
(Gross divided by 52 weeks divided by 5 days = daily rate)
 $54793.18/52/5=210.74$ as per payslip

[26] Mr McNabb did not agree with the five day divisor. On 7 April he emailed Fluidex with a calculation based on his calculation of average daily pay based on a minimum daily pay of \$252.00 per pay:

I believe your calculation is incorrect.

As per my contract I work 4 days on and 4 days off so in 365 days that equals 91 sets of four days of which I work 45.625. This is a total of 182.5 days annually.
The calculation should be $54793.18/182.5=300.24$ per day.

This figure may be slightly different depending on the actual start dates of my shifts of the period you calculate which may mean there is a slight difference in the total number of days.

This daily amount $300.24/25.2 = 11.9$ hours which I believe is a more accurate reflection of my average daily hours.

[27] On 12 April the pay roll administrator emailed Mr McNabb apologising for not yet getting back to him and that she would do so as soon as she got a chance.

[28] On 19 April Mr McNabb was copied in on an email from Fluidex administration manager that there appeared to be a discrepancy in calculation of his holiday pay, the matter would be thoroughly investigated and if an underpayment was found it would be corrected.

[29] Mr McNabb did not receive a further response but his pay slips after 22 May appeared to show a holiday pay calculation based on a 4 x 4 shift pattern.

[30] At this time Mr McNabb was involved in bargaining for a collective agreement with his union, Rail and Maritime Transport Union and Fluidex. During the course of bargaining Fluidex proposed 4 x 4 shift workers would receive a holiday entitlement of 14 days per annum. This proposal was not accepted by the union.

[31] On 16 June Mr McNabb was copied in on an email from Mr Galbraith that stated there appeared to be a calculation error for double shift, Fluidex would check the records, present an outcome of the review for agreement. The email stated any outstanding monies would be put right as quickly as possible and asked for patience because Fluidex wished to get this right.

[32] The pay slip for the period ending 11 September allocated Mr McNabb thirteen days annual leave entitlement. Mr McNabb was not satisfied with this calculation. He accepts at this date he was in arrears for 1 day's annual leave but says he never agreed to change his annual leave entitlement from 20 to 14 days. He says further, the reasons for the change were not communicated to him including that Fluidex held the view the 20 day calculation was a mistake.

The query is progressed – March 2017

[33] In March 2017 Mr McNabb asked Mrs McNabb to analyse his pay slips and calculate his holiday pay. Her calculations were that Mr McNabb was owed \$4,700.00 in holiday pay at that date.

[34] There was no substantive discussion of the issue between the parties until 18 September after Mr McNabb spoke to Fluidex's operations manager who emailed him that day that the company would review its findings and get a formal reply to him as soon as possible.

[35] On 20 September Mr Galbraith emailed Mr McNabb asking him to detail his concerns and that he understood the issue was resolved by the collective employment agreement (CEA) negotiation process.

[36] Mr McNabb replied the same day that he understood he was owed \$4,700.00 because the calculations of holiday pay days varied between 8 and 12.5 hours per day which led him to understand whatever the formula was Fluidex was using to calculate his holidays was not being used consistently. He also said the CEA negotiation discussions were forward looking and did not resolve his claim. Mr McNabb also sent Mr Galbraith that day the emails on the issue going back to April 2016.

[37] On 28 September Fluidex asked for the pay periods and the workings applicable to the \$4,700.00 arrears claim. On 1 October Mrs McNabb sent a spreadsheet to Fluidex. Further emails were exchanged between Mrs McNabb and Fluidex.

[38] On 28 November Fluidex wrote to Mrs McNabb attaching a spreadsheet and stating Mr McNabb had been:

- allocated 20 days annual leave entitlement in error for three years; and
- overpaid \$3,843 in holiday pay.

[39] Mr McNabb did not agree with this analysis. There was some delay in replying.

From March 2018

[40] On 15 March 2018 Mr McNabb through his union wrote to Fluidex restating his position and requesting proof he was receiving his correct annual leave entitlements. Fluidex replied the same day that comprehensive workings had been undertaken, they showed an overpayment to Mr McNabb of annual leave of which Fluidex did not seek repayment and it had no intention to underpay him. The 28 November 2017 spreadsheet was attached.

[41] In answer to a further query from Mr McNabb's union Fluidex stated Mr McNabb believed he should be paid at a 4 x 4 shift rate but this was inconsistent with 20 days annual leave.

[42] The correspondence between the parties continued including Mr McNabb requesting evidence he had agreed to change from 20 days to 14 day entitlement and Fluidex stating he had been paid the greater of average weekly earnings and ordinary weekly pay.

[43] Issues around sick, alternative holiday and bereavement leave pay were also raised. In response on 4 April Fluidex emailed the union attaching a further spreadsheet. Fluidex said this spreadsheet showed Mr McNabb's average weekly earnings were slightly higher than the relevant daily pay rate and he had been paid the higher rate for public holidays, alternative holiday and sick leave. The email continued Mr McNabb had benefited from this and had been overpaid \$2107.13.

[44] Mrs McNabb reviewed the spreadsheet. She did not agree with the calculations. She did not agree with Fluidex's use of a divisor of five because Mr McNabb did not work a five day week. Her view was average daily pay calculation should have been used. She also did not agree with the hourly rate calculation.

[45] Mr McNabb's pay query was put on hold while negotiations for the CEA continued over the balance of 2018.

2019

[46] In March 2019 Mr McNabb raised a pay query regarding top up pay for the pay period ending 10 March 2019. It was not resolved. The parties agreed to attend mediation. This also did not resolve matters between them.

The parties' positions

[47] In an email dated 12 December 2019 Mr Maharaj set out the issues between the parties:

The issue has been narrowed down to the following:

- In order to calculate holiday pay Fluidex used the higher of; the last 4 weeks' pay and days worked, and the last 52 weeks' pay and days worked to determine the Average Daily Pay. David McNabb is on a 4 on 4 off roster but his work

pattern has varied. The third method of using the ordinary pay rate would not be applicable in this case.

- David's claim is that the last 4 weeks' pay, and the last 52 weeks' pay should be divided by a flat 3.5 days. His reasoning is that 4 on 4 off equates to 7 days annual leave per fortnight (based upon 4 weeks of annual leave) and therefore averages to 3.5 days per week.
- However, we explained to him that he isn't averaging 3.5 days per week and the total amount earned in the last 4 weeks or the last 52 weeks is as a result of more days worked over the period of time and it needs to be based upon the actual days worked.

[48] I am satisfied this email accurately reflects the parties' positions.

Discussion

From 2012 to 1 December 2019 has Fluidex correctly calculated Mr McNabb's annual holiday pay?

(i) Entitlement to 20 days annual leave per annum?

[49] Mr McNabb says agreement was "4 weeks annual leave entitlement equated to 20 days per annum". Mr McNabb in his written evidence said "Adrian verbally confirmed that the 4 weeks holiday per annum amounted to 20 days holiday per annum and not the 16 days that I had been expecting, and which was a baseline condition for my acceptance of the role." Mr Henry also says in his witness statement statement that "four weeks/20 days annual leave".

[50] Mr McNabb says the first time Fluidex claimed the annual holiday entitlement of 20 days was an error was by email dated 28 November 2017. Pay slips show Mr McNabb had been allocated 20 days annual leave entitlement on each anniversary 2013, 2014 and 2015.

[51] While the written terms of the parties' employment agreement records Mr McNabb's annual leave entitlement in number of weeks (four) the evidence of discussions as to the number of days annual leave entitlement when the employment agreement was entered was unchallenged and the annual leave entitlement allocation in subsequent years was 20 days. Fluidex has said the allocation of 20 days annual leave to Mr McNabb was a mistake. It has not provided evidence sufficient to satisfy me this was a mistake given Mr McNabb had no reason not to believe Mr Henry was authorised to enter terms with him and the 20 days was confirmed by action entirely within the control of Fluidex year on year.

[52] I am satisfied the parties agreed Mr McNabb would receive 4 weeks annual leave per year of 20 days. Any reduction in that annual leave entitlement without agreement is a unilateral variation to the parties' employment agreement and unlawful. A reduction did occur with the entering of the CEA.

(ii) *Should the calculation of Mr McNabb's average daily pay include part days?*

[53] Yes. Holiday pay for public holiday, alternative holiday, sick leave, bereavement or family violence leave is to be calculated using the formula provided by the Holidays Act. The parties are referred to [18] above.

(iii) *Has Mr McNabb taken annual leave in excess of his entitlement either by way of overpayment of annual holiday pay, annual leave taken in advance and/or cashed up holiday pay?*

[54] Mr McNabb had an annual leave entitlement of four weeks at 20 days until varied under the CEA. There can be no overpayment on that basis.

(iv) *If so, is Fluidex entitled to recover any overpayment from Mr McNabb?*

[55] The answer is this is unlikely given the above findings.

Additional issues

(i) *Should the ordinary pay rates set out in the relevant collective employment agreement apply to Mr McNabb from 24 September 2018?*

[56] If Mr McNabb was covered by the collective agreement then yes. Whether Mr McNabb's pay rate increased under the terms of that agreement is a question of the operation and application of the CEA.

(ii) *Does the statutory six year limitation period apply to any part of the claim¹⁴?*

[57] Section 142 of the Employment Relations Act provides:

No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the course of action arose.

¹⁴ Employment Relations Act 2000, s 142.

[58] Relevant to this employment relationship problem the Employment Court has held a claim for holiday pay is an employment relationship problem to which s 142 applies and the limitation for accumulated leave owing at the time of termination runs from the date of termination of employment:

The obligation to make payment for the accumulated leave arises when the leave is actually taken during the course of employment. If at the time of the termination of employment there is accumulated leave, which has not been taken or paid for, then there are prescribed formulae for calculating the amount owing for such outstanding leave at that date. While limitation applies, it cannot commence to run until completion of the leave having been taken and not paid for during the course of employment; or, if it is accumulated leave owing at the date of termination, limitation runs from the date of termination of employment.

...

The entitlement to payment for leave not taken before termination of employment does not crystallise until the date of termination.¹⁵

[59] Mr McNabb's claim involves other entitlements to wages, sick, bereavement and alternative days' pay to which the same limitation applies.¹⁶ Applied to the circumstances of this case leave taken and paid for six years prior to the date Mr McNabb filed his application in the Authority, 18 February 2020, is time barred by operation of s 142 of the Act.

(iii) *Does the application apply to other employees?*

[60] No. This matter turns on Mr McNabb's individual terms of employment.

(iv) *Top up payments*

[61] Mr McNabb says from October 2012 he received top up payments to make his pay up to the equivalent of 80 hours per fortnight. He says these top ups were not discretionary and points to an email dated 8 April 2019 from Mr Maharaj to Mr McNabb which includes:

Under the arrangement Fluidex is paying you wages **equivalent to 80 hours of pay at the ordinary pay rate in each fortnightly pay run.**

...

¹⁵ *Vince Roberts Electrical Limited v Carroll* [2015] NZEmpC 122 at [26].

¹⁶ *Pretorious v Marra Construction Limited* [2016] NZEmpC 95.

It is very rare for drivers to be working less than 80 hours per fortnight but Fluidex has fulfilled its obligations by ensuring you have been paid the minimum 80 hours' worth of fortnightly ordinary wages.

[62] The written terms of the parties' employment agreement does not provide for minimum hours of 80 per fortnight and there is no express provision for top up payments contained therein. Notwithstanding, this was how the parties have operated throughout Mr McNabb's employment – the pay slips show he received a number of top ups and has sought and been paid top ups on request. In addition Mr Maharaj expresses the top ups in terms of an obligation and I am satisfied this was indeed the case. The top up to 80 hours per fortnight paid at ordinary rate, as outlined in Mr Maharaj's email, is an enforceable term of the parties' employment agreement.

(v) *Claims for unjust enrichment/non-economic loss*

[63] The factual basis of the claims has not been tested. There is insufficient information to determine this part of Mr McNabb's claim.

Outcome

[64] The key findings are:

- a) Mr McNabb had a holiday leave entitlement of 4 weeks or 20 days until varied by effect of the relevant collective employment agreement; and
- b) Fluidex guaranteed Mr McNabb a minimum of hours 80 per fortnight with any top up to be paid at the ordinary rate.

[65] Given the above findings the parties are directed to attend mediation within 28 days of the date of this determination with a view to resolving any residual holiday and other leave calculation issues. If this does not resolve those calculation issues they have leave to refer the matter back to the Authority for further direction. If this occurs the Authority is likely to refer the matter to the Labour Inspector for calculation.

Costs

[66] Costs are reserved. The parties may apply for a timetable to be set.

Marija Urlich
Member of the Employment Relations Authority