

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 202
3144789

BETWEEN JEREMY MURRAY MEIKLEJOHN
Applicant

AND DCM ROOFING LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Jeremy Meiklejohn, the Applicant
Iain McPhail for the Respondent

Investigation Meeting: 10 May 2022 at Christchurch

Date of Determination: 18 May 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jeremy Meiklejohn was employed by DCM Roofing Limited (DCM) from 3 April 2017 until he gave notice of his resignation on 10 July 2019. Although he resigned in July 2019, Mr Meiklejohn had been off work on ACC from about February 2018.

[2] DCM paid Mr Meiklejohn final holiday pay when he resigned. DCM calculated Mr Meiklejohn's average weekly earnings during the employment and used that figure for the payment.

[3] Mr Meiklejohn claims arrears of holiday pay. He says he should have been paid four weeks holiday pay at his ordinary weekly pay for the year ending 2 April 2018 (less one day taken in advance), four weeks holiday pay at his ordinary weekly pay for the year ending 2 April 2019 and 8% on gross earnings for the final part year to July 2019.

[4] DCM says it paid Mr Meiklejohn in accordance with the Holidays Act 2003.

The Authority's investigation

[5] Mr Meiklejohn and DCM had attempted to resolve the matter through mediation before the application was lodged with the Authority. Further mediation was not directed as it would not have contributed constructively to resolving the problem.

[6] There is no significant factual dispute. The difference between Mr Meiklejohn and DCM arises from the application of the Holidays Act 2003 in the circumstances of Mr Meiklejohn's employment.

[7] In evidence is the employment agreement, a spreadsheet covering wages and time records and copies of the parties' exchanges before the claim was lodged with the Authority.

[8] Mr Meiklejohn attended but DCM did not at the time set for an investigation meeting. The Authority Officer phoned DCM's representative who advised that he was no longer instructed to appear. He contacted DCM and advised the Officer that DCM's director could attend by 11.00am. I deferred starting the investigation meeting until then.

[9] Iain McPhail is DCM's director. He attended by 11.00am. I heard evidence from Mr Meiklejohn and Mr McPhail.

[10] In what follows, I will set out the relevant facts, state and explain findings on the relevant legal issues, set out any other necessary conclusions and specify any orders that follow.

Relevant facts

[11] Mr Meiklejohn and DCM signed a written employment agreement dated 3 April 2017.

[12] By clause 5.1, Mr Meiklejohn's normal hours of work were set out in Schedule A, subject to the caveat that it may be necessary to work outside those hours due the nature of the employer's business. Clause 5.2 provided that for waged employees the wage was payable for each hour worked, but only in respect of hours actually worked. Clause 5.3 permitted the employer to amend Mr Meiklejohn's normal hours of work following consultation. DCM did not amend Mr Meiklejohn's normal hours of work.

[13] Schedule A stated that hours of work would be as required to complete duties and responsibilities. It then provided "Normal working hours will be from 7.30am through to 4.00pm Monday to Friday". Additional hours may be "called on" as required, paid at the hourly rate of pay. At times work may not be available due to weather or other unforeseeable circumstances. This would be at no pay but chances to make up hours would be given where possible.

[14] The job title was "Roofer", the position was "Full time" and the wage rate was \$33.00 per hour.

[15] If work was not available due to weather, Mr Meiklejohn would receive a message from DCM in the morning.

[16] The wage and time records show that Mr Meiklejohn's hours of work varied, either fewer than 40 per week or more than 40 per week. Mr Meiklejohn was paid for time worked.

[17] Mr Meiklejohn suffered an accident at the end of September 2017 and was off work on ACC until mid-January 2018. Mr Meiklejohn then returned to work for about three weeks. It is common ground that Mr Meiklejohn took one day's paid annual holiday in advance in the week starting 5 February 2018.

[18] Mr Meiklejohn went off work again on ACC from Wednesday 14 February 2018. Mr Meiklejohn did not return to work but remained on ACC receiving weekly compensation under the Accident Compensation Act 2001.

[19] Mr Meiklejohn gave notice of resignation on 10 July 2019. By then, Mr Meiklejohn had become entitled to 8 weeks of annual holidays, less one day taken in advance (7.8 weeks annual holidays).

[20] DCM calculated Mr Meiklejohn's earnings from 3 April 2017 to 2 April 2018 at \$38,238.92 to give average weekly earnings of \$735.36 or \$147.07 per day (based on a 5-day working week). Mr Meiklejohn had 19 days annual leave due for the year to 2 April 2018, having taken one day annual holiday in advance. DCM calculated that \$2,794.33 (gross) was due. DCM assessed that no holiday pay was due for the year to 2 April 2019, as Mr Meiklejohn's average weekly earnings in the period were zero. In the part year 3 April 2019 to July 2019, Mr Meiklejohn had no gross earnings so 8% of gross earnings came to zero. DCM paid Mr Meiklejohn \$2,794.33 (gross) soon after the resignation.

Relevant legal findings

[21] Mr Meiklejohn's absence from work between September 2017 and January 2018 and after 14 February 2018 did not affect his continuity of service for fixing his entitlement to annual holidays, given the application of s 16(2)(iv) of the Holidays Act 2003 (HA).

[22] Applying s 16(1) of the HA, Mr Meiklejohn became entitled to four weeks' paid annual holidays for the 12 months of continuous service completed on 2 April 2018 and a further four weeks' paid annual holidays on 2 April 2019 at the completion of the second 12 months continuous service. By the time Mr Meiklejohn resigned, he was entitled to a total of eight weeks paid annual holiday, less one day taken in advance.

[23] Section 24 of the HA applied as Mr Meiklejohn had only taken some (one day) of his annual holidays when the employment ended.

[24] Under s 24, DCM had to pay Mr Meiklejohn for the portion of annual holiday entitlement not taken at the greater of Mr Meiklejohn's ordinary weekly pay at the end of the employment or Mr Meiklejohn's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employment. I first assess average weekly earnings.

[25] Average weekly earnings is defined in s 5 of the HA as 1/52 of the employee's gross earnings. Gross earnings is defined in s 14 of the HA. DCM did not pay Mr Meiklejohn any wages under his employment agreement, as he was off work on ACC for the entire 12 months immediately before the end of last pay period before the employment ended. Weekly compensation payable to Mr Meiklejohn under the Accident Compensation Act 2001 was

excluded from the assessment of his gross earnings.¹ In summary, under the HA, Mr Meiklejohn's gross earnings in the 12 months before the end of the employment was zero, so his average weekly earnings for the purposes of s 24(2)(b) of the HA was zero.

[26] I also need to assess Mr Meiklejohn's ordinary weekly pay as at the date of the end of the employment.

[27] Ordinary weekly pay has the meaning given to it by s 8 of the HA. For the purposes of calculating annual holiday pay, it means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week. Some specific types of payments are included and some are excluded under s 8(1)(b) and (c) of the HA. None of the specific inclusions and exclusions are involved in this matter.

[28] I find that it was possible to determine Mr Meiklejohn's ordinary pay under s 8(1) of the HA, so the averaging calculation provided by s 8(2) does not apply. The employment agreement did not specify a special rate of ordinary weekly pay for the purposes of calculating annual holiday pay, so s 8(3) does not apply either.

[29] The amount of pay Mr Meiklejohn receives under his employment agreement for an ordinary working week was set.

[30] The Employment Relations Act 2000 requires an individual employment agreement to include any agreed hours of work, or if no hours of work are agreed an indication of arrangements relating to the times the employee is to work.² The employment agreement at clause 5 "Hours of Work" and Schedule A sets out the agreed hours of work.

[31] Clause 5 states that the "normal hours of work" are set out in Schedule A. Schedule A declares "Normal working hours" will be "from 7.30am through to 4.00pm Monday to Friday". Taking into account an unpaid 30-minute meal break in accordance with clause 5.4, Mr Meiklejohn's "Normal working hours" in his "Full time" position as a "Roofer", were 40 hours per week. The "Wages/Salary" for the position was \$33.00 per hour so weekly wages for the normal working hours amounted to \$1,320.00.

¹ Holidays Act 2003 s 14(b)(ii).

² Employment Relations Act s 65(2)(a)(iv) and s 67C.

[32] Schedule A provided that “Some additional hours” may be called on as required, payable at the same rate. It also stated that work may not be required due to weather or other unforeseeable reasons, without pay but subject to chances to make up hours where possible. The Schedule A provisions for paid additional hours as required and unpaid weather (or otherwise) cancellation accompanied by a chance for make-up hours support rather than detract from the employment agreement fixing “Normal working hours” at 40 per week. If the employment agreement had not fixed the “Normal working hours” at 40 per week, these Schedule A provisions about extra paid hours and unpaid cancellations would be unnecessary.

[33] The time and wages spreadsheet reflects variation in accordance with clause 5 and Schedule A. Mr Meiklejohn often worked more than 40 hours per week. Where Mr Meiklejohn worked fewer than 40 hours per week, the spreadsheet usually includes a notation about paid leave such as public holidays, unpaid leave, or rain.

[34] The Supreme Court stated, in a case about the calculation of ordinary weekly pay under s 8(2) of the Holidays Act 2003 for the purposes of s 21 of Act, that:³

In a very broad sense, the purpose of the holiday pay calculations is that an employee on holiday is paid an amount which is at least similar to what would have been earned if the holiday had not been taken.

[35] Although *Tourism Holdings* was a case concerning “ordinary weekly pay” under s 21 of the HA for annual holidays taken during employment, the same approach must apply under s 24 of the HA when calculating “ordinary weekly pay” for the payment due upon termination for holidays not taken during the employment.

[36] *Tourism Holdings* was a case where the averaging formula in s 8(2) of the HA applied because it was not possible to determine the employees’ ordinary weekly pay under s 8(1) of the HA. In the present case, if it had not been possible to determine Mr Meiklejohn’s ordinary weekly pay under s 8(1), the formula set out in s 8(2) would have been problematic. The formula is based on “gross earnings” for the four calendar weeks before the end of the last pay period immediately before the date of calculation. Mr Meiklejohn had only received ACC weekly compensation in that period, a type of payment excluded from “gross earnings”.⁴ Under the formula, Mr Meiklejohn’s “gross earnings” would have been zero, his

³ *Tourism Holdings Limited v Labour Inspector* [2021] NZSC 157 at [34].

⁴ Holidays Act 2003 s 14(b)(ii).

“ordinary weekly pay” under s 8(2) would have been zero, his “ordinary weekly pay” for the purposes of s 24(2) would have been zero and his average weekly earnings for the prior 12 months would have been zero. Mr Meiklejohn would have received nothing, even though he had accrued an entitlement to annual holidays which had not been taken.

[37] DCM used Mr Meiklejohn’s average earnings between 3 April 2017 and 2 April 2018 to fix payment for untaken annual holidays following his resignation in July 2019. It generated weekly holiday pay of \$735.36, against a weekly wage for normal working hours of \$1,320.00. The payment was well short of what would have been paid if the holiday had not been taken. The effect was that DCM paid Mr Meiklejohn holiday pay as if he had been employed for less than a year, rather than for more than two years.

[38] I find that “the amount of pay that the employee receives under his or her employment agreement for an ordinary working week” for the purposes of s 8(1) and s 24(2)(a) was the same amount of wages payable under the employment agreement to Mr Meiklejohn for his “Normal working hours”. That amount was \$1,320.00 each week. It is common ground that 7.8 weeks of annual holidays had not been taken at the date of Mr Meiklejohn’s resignation.

[39] Section 25 of the HA also applied to Mr Meiklejohn as his employment came to an end before the subsequent 12-month period commencing 3 April 2019 had concluded. Under s 25(2) of the HA DCM was required to pay Mr Meiklejohn 8% of gross earnings since 2 April 2019. Mr Meiklejohn’s only gross earnings was the payment he was due under s 24 of the HA. Section 26 of the HA declares that a payment under s 24 is part of an employee’s gross earnings.

[40] I find that, under s 25 of the HA, Mr Meiklejohn was also entitled to 8% of the amount he should have been paid under s 24 of the HA.

What orders should be made?

[41] Based on 7.8 weeks annual holiday entitlement, Mr Meiklejohn should have received \$10,296.00 under s 24 of the HA.

[42] Under s 25 of the HA, Mr Meiklejohn should also have received 8% of \$10,296.00 amounting to \$823.68.

[43] Holiday pay under s 24 and s 25 of the Holidays Act 2003 totalled \$11,119.68. DCM paid Mr Meiklejohn \$2,794.33, leaving arrears of \$8,325.35. DCM did not raise any issue about its ability to pay. The arrears date from 2019, so there is no reason to defer payment any longer. Mr Meiklejohn did not claim interest or costs.

[44] DCM Roofing Limited is ordered to pay Jeremy Murray Meiklejohn \$8,325.35.

Philip Cheyne
Member of the Employment Relations Authority