

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 509  
3131294

BETWEEN SHARON NAUDÉ  
Applicant  
AND CUSTOM CARE NURSING  
LIMITED  
Respondent

Member of Authority: Michele Ryan  
Representatives: Applicant in person  
Kim Matches for the respondent  
Investigation Meeting: 2 June 2021 at Wellington  
Further information: On or by 21 June 2021 and 3 November 2021  
Date of Determination: 17 November 2021

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Ms Sharon Naudé is employed by Custom Care Nursing Ltd (“CCN”) as a Support Worker. Her role includes ordinary shifts, and shifts known as “sleepovers”. Sleepovers are paid at a lower rate than ordinary shifts.

[2] Between 2016 and 2019 (inclusive) Ms Naudé’s pattern of work was relatively predictable. Over any given week Ms Naudé worked the same number of sleepover shifts, with each shift comprising 8 hours. However, the number of ordinary shift hours varied across a fortnight period with one week comprising a greater number of hours of work than the other.

[3] In October 2019 Ms Naudé obtained a copy of a CCN payroll document entitled “*Timesheet History*”. Amongst other things, the Timesheet History recorded when Ms Naudé had taken, or cashed up, annual leave between 2014 and 2019, and the rate at which it was paid.

[4] Critical to the dispute between the parties, the Timesheet History revealed three instances, once each in 2017, 2018 and 2019, which now form the basis to Ms Naudé’s claims. On each of these occasions holiday pay was paid at a lower rate, between \$18 and \$21.50 per hour, compared to other holiday pay payments where Ms Naudé had been paid \$34 to \$35 per hour, or more.

[5] The parties attended mediation in December 2019.

[6] CCN subsequently wrote to Ms Naudé, advising it had investigated the matter.<sup>1</sup> As regards the 2017 payment (which had been paid at the rate of \$18 per hour) CCN agreed the payment was incorrect. It said the payment should have been made at the rate of \$26.34 per hour. In respect of the 2018 and 2019 payments CCN held the view that Ms Naudé had been paid correctly at the rate of \$21.00 and \$21.50 respectively.

[7] In the same letter, CCN attached three “Holiday Rate Reports” (the Reports) from which the various payments had been calculated.<sup>2</sup> Collectively the Reports chronicled Ms Naudé’s hours of work and weekly wages for the 12 months that immediately preceded each of the payments at issue. A “Summary” at the conclusion of each Report set out Ms Naudé’s average hourly rate as well as her ordinary hourly rate at the time each payment was made.

[8] CCN’s correspondence did not abate Ms Naudé’s concerns, and in 2021 she filed an application with the Authority.

### **The Authority’s investigation**

[9] The Authority met with Ms Naudé and CCN’s Accounts and Quality Manager, Ms Kim Matches, to investigate the dispute.

---

<sup>1</sup> Dated 16 December 2019.

<sup>2</sup> Each document was headed “Holiday Rate Report”

[10] Not all the information provided to the Authority has been recorded. Rather, this determination contains findings of fact and law in order to resolve the employment relationship problem raised by Ms Naudé.

### **Analysis**

[11] To determine whether Ms Naudé has been properly paid her entitlement to holiday pay (or not), it is necessary to set out the provisions in the Holidays Act 2003 that prescribe how annual leave should be calculated. I have then assessed whether CCN has correctly applied those provisions to the three payments in which Ms Naudé takes issue.

### ***The relevant provisions of the Holidays Act 2003***

[12] The following provisions all fall under the Holidays Act 2003 (the Act), and I have referred to these by the relevant section number.

[13] The starting point begins with s 21, as recorded below:

#### **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 an agreed portion of the annual holiday 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] "*Ordinary weekly pay*" must be calculated in accordance with s 8 as follows:

#### **8 Meaning of ordinary weekly pay**

- (1) In this Act, unless the context otherwise requires, **ordinary weekly pay**, for the purposes of calculating annual holiday pay,-
  - (a) means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and

*[subsection (1)(b) and (1)(c) detail payments that should be either included or excluded (respectively) in the assessment as to ordinary weekly pay]*

- (2) If it is not possible to determine an employee's ordinary weekly pay under subsection (1), the pay must be calculated in accordance with the formula:

$$\frac{a - b}{c}$$

where-

- a is the employee's gross earnings for-
  - (i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or
  - (ii) if, the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made
- b is the total amount of payments described in section (1)(c)(i) to (iii)
- c is 4.

[15] Section 8(3) further allows for the employment agreement between the parties to specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay.

[16] Section 5 of the Act states that "**average weekly earnings** means 1/52 of an employee's gross earnings".

[17] "**Gross earnings** in relation to an employee for the period during which earnings are assessed" is then defined at s 14(1) as meaning:

"... all payments that the employer is required to pay to the employee under the employee's employment agreement"

***Should Ms Naudé's entitlement to paid annual leave be calculated by her ordinary weekly pay or by her average weekly earnings?***

[18] The variation to Ms Naudé's hours of work from week to week means it is not possible to calculate her ordinary weekly pay as defined by s 8(1). Nor does the employment agreement indicate the parties had made arrangements for a specified ordinary weekly pay rate as per s 8(3).

[19] It follows that s 8(2) is the appropriate mechanism by which Ms Naudé's ordinary weekly pay for each holiday pay period at issue should be calculated. Once this calculation is undertaken, that sum reached must then be compared to Ms Naudé's average weekly pay as calculated in accordance with s 5 and s 14, to ascertain which of the two is greater.

[20] The Reports previously provided by CCN to Ms Naudé have been lodged with the Authority. I have cross-checked the information contained in that documentation against the

content of payslips also filed with the Authority, and am satisfied the information in the Reports has been recorded correctly.

[21] From the information contained in the Reports, Ms Naudé's ordinary weekly pay and her average weekly earnings relevant to each of the three payments can be compared, as follows:

<b><u>ORDINARY WEEKLY PAY</u></b> -for 4 calendar weeks up to the end of the pay period dated:	<b><u>AVERAGE WEEKLY EARNINGS</u></b> -for 52 weeks up to the end of the pay period dated:
28/05/2017: = <b>\$1,712.25</b>	28/05/2017: = <b>\$1,749.82</b>
21/10/2018: = <b>\$1,683.36</b>	21/10/2018: = <b>\$1,749.15</b>
15/09/2019: = <b>\$1,770.25</b>	15/09/2019: = <b>\$1,842.18</b>

[22] As the above table shows, at each of the above times in question the average weekly earnings formula provided the greater rate of the two possible options. I am further satisfied that CCN applied the average weekly earnings methodology to calculate the material payments.

***Calculation of payment for annual leave where the corresponding payment was for more (or less) than a week?***

[23] After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.<sup>3</sup> There is no evidence of an agreement between Ms Naudé and CCN as to how the entitlement to 4 weeks' annual holidays was to be met, but the employment agreement and payroll documentation each treat a working week as beginning on a Monday at 00.00 and finishes the following Sunday at 23.59.59.

[24] It is not uncommon for employees to take (or have paid out) annual leave in periods that are less than, or more than, a working week. Many employees arrange to take annual leave by the day or by the hour. This means an appropriate rate of pay must be calculated.

[25] In each of the three payments at issue in this matter, the length of time for which annual leave was paid was not for a full working week commencing on the Monday and finishing on the Sunday. Therefore, having first established Ms Naudé's average weekly earnings, it was

---

<sup>3</sup> S 16 Holidays Act 2003.

necessary for CCN to understand the number of hours of work per week so that an appropriate proportion of a week's annual leave could be paid.

[26] I note also that Ms Naudé's pattern of work encompasses two entirely different hourly rates depending on the time in which support was provided. The statutory calculations of both ordinary weekly pay and average weekly earnings require the averaging of pay across a week where there are differing rates of pay during a week for whatever reason.

[27] Applying Ms Naudé's average weekly earnings against the quantum of hours of work undertaken over the calendar year an hourly rate can be similarly extrapolated as follows:

[28] The first (longer) method is to divide the number of hours worked over the previous 12 months by 52 so as to determine the average number of hours worked per week. Next, the sum of average weekly earnings can then be divided by the average number of hours to reach an hourly rate.

[29] The second (shorter) method is to simply divide the annual gross earnings by the annual number of hours worked over the same timeframe to arrive at an hourly rate.

[30] Using the second (shorter) method I have calculated the hourly rate relevant to the 2018 and the 2019 payments (I shall return to the 2017 payment in due course), as follows:

*The 2018 payment;*

- Ms Naudé's gross earnings for 52 weeks up to 21/10/18 was \$90,955.81.
- Her hours of work over the same time frame equal 5,035.68.

$$\underline{\$90,955.81 / 5,035.68 = \text{hourly rate of } \mathbf{\$18.05}}$$

*The 2019 payment;*

- Ms Naudé's gross earnings for 52 weeks up to 15/09/2019 was \$95,793.61.
- Her hours of work over the same time equal 5,071.32.

$$\underline{\$95,793.61 / 5,071.32 = \text{hourly rate of } \mathbf{\$18.88}}$$

[31] Notably, CCN's Holiday Rate Reports as they concern 2018 and 2019, resulted in an identical or near identical rate as calculated by the Authority in this determination.<sup>4</sup> Each of

---

<sup>4</sup> For the 2018 payment both CCN and the Authority each arrived at the same figure of \$18.05 as the correct hourly rate. For the 2019 payment the Authority calculated the hourly rate to be \$18.889 whereas CCN appears to have rounded the rate up to \$18.89.

the rates applicable to one or other of the payments at issue is the result of a mathematical averaging of the two pay rates relevant at the time; the ordinary hours rate and the lower rate at which sleep-overs were paid.

[32] In any event, the payments for the 2018 and 2019 instances by CCN were both paid at Ms Naudé's ordinary shift rate (the higher of the two rates) at \$21.00 in the 2018 instance, and \$21.50 in 2019. The lower average rate was not applied in either instance.

[33] It follows that CCN did not incorrectly calculate the quantum of annual holiday pay (in the 2018/19 instances) such that Ms Naudé was deprived of her legal entitlement and these two claims are dismissed.

[34] I now need to assess the 2017 payment for two reasons. Firstly, whilst CCN has conceded its initial calculation was incorrect, the parties remain in dispute as to whether CCN's revised rate of \$26.34 per hour is correct. Moreover, Ms Naudé does not accept CCN's explanation for the change in the rate on which annual leave is paid as identified in the Timesheet History. In resolving these issues I have carefully examined the 2017 Holiday Rate Report (the 2017 Report) relevant to the 2017 payment. My assessment resolves both issues as follows:

[35] As already noted, the 2017 Report records the hours of work and wages paid (gross) every week for the 52 weeks prior to the payment at issue. The Report therefore begins on 13 May 2016 (recorded in the period entry column of 05/06/2016.).

[36] Importantly, two thirds through the 2017 Report there is a change to the way information is documented. This is evidenced by an ostensible (and significant) increase in the recorded number of worked hours beginning on 13 February 2017 (noted in the period entry column of 19/02/2017) and going forward.

[37] Prior to 13 February, the 2017 Report itemised the number of hours associated with ordinary shifts from week to week, but hours associated with each sleepover shift were not recorded. Rather, a sleepover shift was recorded as a single unit. Payslips around this period of time (for example in January 2017) also categorise a sleep-over as a single unit, and a

corresponding payment of \$122.00 gross<sup>5</sup> (recorded as an allowance) for each unit, rather than an hourly rate.

[38] From 13 February 2017, the number of sleepover hours logged going forward are included in the “Summary” portion of 2017 Report, which includes a final number of “Associated Hours” for the 52 weeks prior to the 2017 payment. These are said to be 3,390. But the 2017 Report omits the sleep-over hours actually worked between 13 May 2016 and 12 February 2017: 2,072 hours in total.<sup>6</sup> The failure to quantify and record all hours worked in the 2017 Report, (and on which the 2017 payment is calculated) must mean the rate of \$26.34 is incorrect.

[39] In order to ascertain the rate at which the 2017 payment should have been made I have applied the second formula (set out at para [29] above) as follows:

*The 2017 payment;*

- Ms Naudé’s gross earnings for 52 weeks up to 28/05/2017 = \$90,991.46.
- Her hours of work over the same time frame equal 5,462.<sup>7</sup>

\$90,991 / 5,462 = hourly rate of **\$16.65**

[40] CCN initially paid the 2017 payment at the rate of \$18.00 per hour. It is unclear from the evidence if it made an additional payment to remedy the difference between that sum and \$26.84 after CCN erroneously recalculated the rate.

[41] I find Ms Naudé correctly received her holiday entitlement for the 2017 payment.

***CCN’s explanation for the change to the rate at which paid annual leave is calculated.***

[42] In evaluating the content of the Timesheet History, it is understandable that Ms Naudé perceived that, in the three identified instances, she was underpaid her entitlement to paid annual leave. I find, however, that CCN’s evidence concerning the changes to the way it documents sleepover shifts provides a credible explanation to Ms Naudé’s concerns.

---

<sup>5</sup> The minimum hourly rate of \$15.25 per hour x 8 = \$122.00 (gross)

<sup>6</sup> There are 37 calendar weeks between 13 May 2016 and 12 February 2017. Sleep-over shifts of 7 per week x 8 (hours per shift) x 37 weeks = 2,072 hours.

<sup>7</sup> 3390 hours recorded in the 2017 Holiday Rate Report plus 2072 unrecorded sleep-over hours = 5,462 hours.

[43] CCN says the change was prompted by recommendations made by its external payroll provider. I agree the failure to record hours associated with a sleepover shift meant CCN was potentially in breach of its obligation to keep an accurate record of the number of hours worked each day in a pay period.<sup>8</sup> The omission is likely a consequence of a practice which historically treated sleepover shifts as a discrete event and corresponding payment was usually made in the form of an allowance.<sup>9</sup>

[44] To assess whether CCN's approach to the way it documented Ms Naudé's hours of work negatively impacted on her paid annual leave entitlement, I have applied each of CCN's methods of calculating an appropriate hourly rate for annual leave payments. In both instances I have used the shift pattern Ms Naudé was working immediately prior to the change on 13 February 2017 and have intentionally not included any of the discrete additional payments made over the preceding 52 weeks such as statutory holiday pay or minor one-off variations to Ms Naudé's work schedule so as to keep the comparison as direct as it can be.

Calculation to obtain average weekly earnings

Ms Naudé's average weekly earnings relevant to this illustration is calculated as follows:

- alternating weekly work patterns of 52 and 41.50 ordinary hours per fortnight averages over 52 weeks = 46.75 ordinary hours per week, at \$18 per hour = \$43,758 (gross);
- 52 weeks at 7 sleepovers shifts per week at 8 hours per shift paid at minimum wage rates of \$122 per shift, (equivalent to \$15.25 per hour) = \$44,408 (gross)
- \$43,758 + \$44,408 = \$88,166 in gross earning over 52 weeks and equates to average weekly earnings of **\$1695.50 (gross)**.

The pre February methodology to calculate hourly rate

Average weekly earnings of \$1,695.50 (gross) divided by average ordinary weekly hours of 46.75 (these do not include hours actually worked during x 7 sleepover shifts) = \$36.26 per hour based on 1 week's annual leave entitlement; equivalent to 46.75 hours per week.

The post 13 February methodology to calculate hourly rate

Average weekly earnings of \$1,695 (gross) divided by average weekly hours of 102.75 (ordinary average weekly hours of 46.75 plus 56 sleepover hours) = \$16.496 (rounded up to \$16.50) based on 1 week's annual leave entitlement; equivalent to 102.75 hours per week.

---

<sup>8</sup> Employment Relations Act 2000 at s 130(g).

<sup>9</sup> See for example the background facts and events in *Idea Services Limited v Dixon* [2009] ERNZ 116, and *Law v Board of Trustees of Woodford House* [2014] NZEmpC 25

[45] From the above assessment I find that although the February 2017 increase in recorded hours had the effect of lowering the hourly rate at which Ms Naudé's annual leave was paid, the number of annual leave hours for which she was entitled to be paid commensurately increased. In both instances the entitlement to the sum equal to one week's paid annual leave: \$1,695 (gross) in total, did not alter. Both methods result in the same outcome.

[46] It follows that in each of the three instances before the Authority, the change in the way Ms Naudé's holiday pay was recorded and calculated was, in effect, a paper exercise only, and Ms Naudé's financial entitlement to paid annual leave has not been reduced.

[47] Ms Naudé's claims are dismissed.

### **Costs**

[48] Both parties were self-represented at the Authority's investigation and no order for costs associated with this application is required.

Michele Ryan  
Member of the Employment Relations Authority