

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 717  
3212259

BETWEEN	JESSE RYDER Applicant
AND	PARKERS BEVERAGE COMPANY LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Hayley Johnson, advocate for the Applicant Anna Barnett, counsel for the Respondent
Investigation Meeting:	15 August 2024 in Napier
Submissions received:	Up to 12 September 2024 from Applicant Up to 1 October 2024 from Respondent
Determination:	3 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Mr Jesse Ryder, worked as a stockman for the respondent Parkers Beverage Company Limited (Parkers). Mr Ryder's employment came to an end when he was made redundant in December 2022. He says that the ending of his employment was predetermined, he was sent away without his feedback being properly considered, and that Parkers owes him money for his notice period and holiday pay.

[2] Mr Ryder says that it took him 12 weeks to find another job, and he seeks remedies of lost wages, compensation for his unjustified dismissal, compensation for

an unpaid notice period, payment of annual leave, penalties for breaches of the Holidays Act 2003, and costs.

[3] Parkers denies that Mr Ryder's dismissal was unjustified, and says that no monies or remedies are properly owing to him. Parkers says that the business needed to make staff redundant for financial reasons, and that it carried out a fair consultation process.

### **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Mr Ryder, his co-worker Mr Rick Tasker, and on behalf of Parkers by its directors Mr Doug Speedy and Mr Campbell Johnstone. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[5] 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.

### **The issues**

[6] The issues requiring investigation and determination were:

- (a) Was Mr Ryder's dismissal unjustified?
- (b) Did he suffer an unjustified disadvantage by a failure to pay his contractual notice in full and/or having his contractual notice effectively deducted from his holiday pay?
- (c) If Parker's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act;
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Ryder that contributed to the situation giving rise to his grievance?
- (e) Should penalties be awarded for a breach of s 27 the Holidays Act 2003?

- (f) Should either party contribute to the costs of representation of the other party?

## **Background**

[7] Mr Ryder worked as a stockman for Parkers, doing a wide variety of jobs involving bottling water, packing, and assisting with stock movement and management. He initially started working for Parkers in August 2021, with approximately two months off to explore an apprenticeship. He then continued working for Parkers, working up to 80 hours a fortnight although records show he usually worked between 60 and 70 hours per fortnight.

[8] On 16 December 2022, Mr Ryder and all other staff at the production plant were asked to attend a meeting with the directors Mr Speedy and Mr Johnstone. All staff were given an individualised letter at that meeting, advising that the business was experiencing financial difficulties, and proposing a restructure. Job losses were a real possibility. All staff were asked to consider and to attend a second individualised meeting the following week to discuss any feedback.

[9] On Tuesday 20 December 2022, a second meeting was held with Mr Ryder, and both directors. Mr Ryder says that he put forward some feedback about focusing on core product more, and discontinuing less popular lines.

[10] He says that at the end of that meeting, he was told he could finish early and go home, because there was no more work. He understood that he was not to come to work the following day, because the work had ended. He says he went home, and understood that this was the end of his employment. He felt that his feedback had not been considered at all, and he felt worthless as a result.

[11] Mr Speedy and Mr Campbell disagree that this was what happened. They say that at the end of the meeting, they told Mr Ryder (and others) that they would consider the feedback given, and they would “be in touch” once they had made a final decision about the restructure. Neither can remember the words they used. Both say that they made no commitment to get in touch with staff by a particular time, or in a particular way. Mr Tasker on the other hand, recalls that Mr Campbell said that he would be in touch sometime the following day.

[12] Mr Speedy and Mr Campbell both accept that they told Mr Ryder (and other staff) that if they wanted to go home early, they could. They recall that about half the staff did. As for the following day, they state that there was no work, and that this was the start of their Christmas closedown. However, Mr Tasker (not Mr Ryder) says that he was told not to come into work again, as there was no work. It is clear that there was no expectation that staff would come to work on 21 December even though there is a letter in evidence showing that Parker's annual closedown dates for that year were from 22 December 2022 to 8 January 2023.

[13] In any event, Mr Campbell called Mr Ryder the following day (21 December), to tell him that the proposal was proceeding, and that he no longer had a job. Mr Campbell cannot remember the exact words used, but there is no dispute that Mr Ryder understood his job was at an end.

[14] Mr Ryder received payment for the 4 statutory holidays that fell over the Christmas and New Year period. He did not receive any payment in lieu of notice, even though his employment contract provided for 4 weeks notice. He did not receive any payment for annual holidays even though he says that his payslips showed that he was owed 126 hours of annual holiday pay.

[15] Parkers says simply that Mr Ryder was not entitled to notice, as the notice period fell during the Christmas closedown, so he would not have been working during that time anyway, so no "ordinary hours" of work are due. However, it did pay him for the statutory holidays during that time, as he was still employed.

[16] At the time, Parkers was operating under the assumption that Mr Ryder was owed 2 weeks notice. It later became apparent that Mr Ryder's employment agreement provided for 4 weeks notice, and the directors accept that the second 2 weeks remains unpaid, due to a mistake as to what they believed the correct notice period to be.

### **Was Mr Ryder's dismissal unjustified?**

[17] In order to be justified, Mr Ryder's dismissal must be both substantively and procedurally fair.

[18] I accept that Parkers had a genuine substantive reason for the redundancies that occurred. Evidence was provided to me that the business was not making money, and Mr Speedy in particular explained some specific changes to its trading circumstances

that brought matters to a head. I note that Parkers was placed into voluntary administration in 2023, and has only recently come out of that status, I am advised due to shareholder contributions. At the time, Mr Ryder accepted the need for restructure, and it is fair to say that his claim of unjustified dismissal is focused on procedural fairness, which may be summarised by reference to the test set out at s. 103A of the Act.

[19] In applying the test, I must consider whether Parkers:

- a. sufficiently investigated the circumstances before dismissing Mr Ryder;
- b. raised the concerns that it had with Mr Ryder before dismissing him;
- c. gave Mr Ryder a reasonable opportunity to respond before dismissing him; and
- d. genuinely considered his explanations before making the decision to dismiss.

[20] My view is that Parkers did sufficiently investigate the circumstances before dismissing Mr Ryder. The evidence establishes the company's poor financial situation as I have said earlier, and it was sufficient to affect almost every staff member of the business. Mr Ryder was not singled out. Effectively, the business closed.

[21] Parkers did raise the concerns it had with Mr Ryder before the decision to dismiss. This occurred by way of the first meeting on 16 December 2022, where Mr Ryder and other staff were told of the situation and the proposal to restructure with resulting job losses. Mr Ryder's evidence is that he understood the situation. There was no confusion as to what was proposed or why, and this is borne out by the meeting notes as to his feedback on 20 December 2022.

[22] Mr Ryder's concern is that he was not given a real opportunity to respond and provide feedback before he was dismissed, and that Mr Speedy and Mr Campbell did not consider his feedback before dismissing him. Mr Ryder says that he was abruptly dismissed at the end of the meeting on 20 December, and told to finish up and go home as there was no more work for him. He says it was clear that he was not to come back to work, there was no more work, and this was the end of his employment. He says he was told to look for other work. He says he felt gutted, as it was clear to him that they had not, and were not going to, consider his feedback, and the matter was already decided.

[23] In saying this, he acknowledges that Mr Speedy and Mr Campbell did not use formal words such as redundancy, and he further says he expected Mr Campbell to call him the following day. When it was put to him that he was not dismissed until the call from Mr Campbell the following day, he said that the doors were shut, and that he was told not to come back after that day.

[24] Mr Ryder accepts that Mr Campbell did call him some time the following day, and had a brief discussion with him confirming that the restructure would proceed, and he was redundant. He says he was expecting to receive 2 weeks “redundancy pay” plus the 126 hours of annual leave showing on his payslip.

[25] Mr Ryder says he struggled to know what to do next, as he does not have a lot of skills. He says that he asked friends about any work that was going, and tried to look for jobs on line. He found work after 12 weeks as a driver, but was unable to continue in that job as he caught Covid and was unable to work. After he recovered, he found work as a groundskeeper. Mr Ryder says that this was a struggle for him, financially and personally and he often felt he did not know what to do next. He had to use his superannuation savings to get by due to the sudden loss of income, and ended up having his car deregistered which made his job search more difficult.

[26] I accept Mr Ryder’s evidence as to the real impacts of the dismissal on him. However, I do not accept that he was dismissed at the meeting on 20 December. He does not claim that specific language like redundancy, dismissal, or termination was used. He says that he was told he could go home, there was no more work, and that he was expecting a follow-up phone call from Mr Campbell the following day. In answer to questions from me, Mr Ryder said “we weren’t told that day, I was told we’d be called the next day”, that is, Wednesday 21 December. His further evidence is that it was in this phone call that Mr Campbell used the word “redundancy”, and there was a brief discussion about wages and holiday pay and what he could expect to receive. This was when the dismissal occurred, and I accept the evidence of Mr Speedy that the reference to Mr Ryder going home was in reference to all staff being permitted to leave early if they wished to do so, given the potential emotional impact and that production was wrapping up in preparation for the planned closedown instead.

[27] Mr Ryder’s claim of unjustified dismissal is not made out. No orders are made.

## **Other Matters**

[28] Mr Ryder raises claims that he should have been paid for his 4 week notice period, and that he should have been paid for 126 hours of annual leave shown on his payslips.

[29] These two claims are interrelated, as Parkers says (a) that Mr Ryder was on annual leave for the first two weeks of his notice period being the annual closedown and he was not paid for these two weeks (with the exception of the 4 statutory holidays that fell during this time) because he had no annual leave available, and this is also why he was not paid any annual leave on the termination of his employment.

[30] As to the second two weeks of Mr Ryder's notice period, Parkers say that he was not paid for this period as it was operating on the mistaken assumption that his employment agreement only had a two-week notice period, when in fact, it now accepts that the contractual notice period was four weeks.

[31] At the investigation meeting, Mr Ryder gave evidence that his payslips sent to him throughout his employment showed that he accrued annual leave with the number of hours owing to him gradually increasing over time. This was disputed by Parkers. Parkers provided copies of payslips showing that Mr Ryder was paid holiday pay at the rate of 8% in his usual pay, and showing a "Balance" for "Annual Leave – including leave available to taken in advance (Hours) at the rate of 0.00.

[32] Time was allowed for Mr Ryder to provide copies of the payslips in his possession. These payslips were identical to the payslips provided by Parkers, except for some sizing changes on the Parkers payslips, and as Mr Ryder had said, the payslips in his possession showed that he was accruing annual leave on a fortnightly basis, with his last payslip showing a balance of 126 hours available.

[33] Parkers has made no comment on this, including why the payslips they provided to the Authority as part of these proceedings were different to those provided to Mr Ryder during his employment.

### *The second 2-weeks of Mr Ryder's notice period*

[34] In light of Parker's concessions, it is convenient to consider this time period first. Mr Ryder's employment agreement is clear that he is entitled to a 4 week notice

period in the event of termination for any reason. There is now no dispute that Mr Ryder should have been paid for the second two weeks of his four week notice period.

[35] There is a dispute as to how to calculate his wages for these two weeks. Both parties agree Mr Ryder was, at the relevant time, being paid at the rate of \$24.00 per hour. Mr Ryder claims payment at the rate of 40 hours per week. Parkers claims that this should be calculated at 24 hours per week, which was said to be his average hours of work from January to December 2022. The relevant employment agreement states that his ordinary hours of work are 35 hours per week<sup>1</sup>.

[36] The evidence was that Mr Ryder's hours varied, but pay records show that he most often worked 60 hours per fortnight which is generally consistent with his employment agreement and also with his in person evidence. I find that Mr Ryder should be paid a further two weeks wages in respect of the second outstanding half of his notice period, calculated at the rate of 30 hours per week, or 60 hours in total, at the rate of \$24.00 per hour. This equates to \$1,440.00 gross. Orders are made accordingly.

[37] Holiday pay is payable in addition to this at the rate of 8%, equating to a further \$115.20 gross.

*The first 2-weeks of Mr Ryder's notice period*

[38] Mr Ryder claims that he should be paid for these 2 weeks at the rate of 40 hours per week, and \$24.00 per hour. No allowance is made for the 4 statutory holidays already paid. In addition, Mr Ryder claims that he should be paid for the 126 hours of annual leave balance showing on the last payslip he received.

[39] Mr Ryder did not work during his notice period as the first two weeks were covered by Parker's closedown period, and the second two weeks were not paid at all by Parkers.

[40] In respect of the first two weeks, Mr Ryder was not at work, and nor was he required to be at work. It had been made clear to him that this was the annual closedown period for the company, and correspondence from Parkers referred to the use of annual leave to cover this period, insofar as this was available to be used. It not clear to me how Mr Ryer can properly claim both the full amount of what he says is his annual

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<sup>1</sup> At clause 10 of that agreement.

leave balance, as well as additional payment for the closedown period which was effectively pre-planned annual leave, which Parkers was entitled to direct him to take by way of written notice in advance.

[41] Accordingly, I find that Mr Ryder was not entitled to any additional payment for the first two weeks of his notice period, other than the payment for 4 statutory holidays falling during this time (which payment was made at the time). To find otherwise would be a double-counting of his entitlement to pay, or to put it another way, he is not entitled to be paid twice in respect of the same time period.

[42] I then come to consider whether Mr Ryder should be paid the 126 hours of annual leave balance that Parkers told him he was owed by way of his payslips. Parkers says that it does not owe Mr Ryder any annual leave payments. It says this is because Mr Ryder was a casual worker, who was paid 8% of his wages in his normal fortnightly pay as (also) shown in the payslips, and because the employment agreement states in the “Remuneration” clause that “You will be paid \$24.00 per hour; holiday pay inclusive for each hour worked”.

[43] Section 28 of the Holidays Act 2003 sets out when annual holiday pay may be paid with an employee’s pay:

- a. the employee must have been employed on a fixed-term agreement for less than 12 months, or work on a basis that is so intermittent or irregular that it is impractical to provide 4 weeks annual holidays.
- b. There must be agreement to this in the employment agreement;
- c. The annual holiday pay must be paid as an identifiable part of the employee’s pay; and
- d. It must be calculated at not less than 8% of gross earnings.

[44] All four requirements must be made out. If not, s 28(4) of the Holidays Act 2003 provides that “despite” any payments made, the employee will be entitled annual holidays in accordance with s 16 of the Holidays Act 2003, where the employment has continued for 12 months or more.

[45] Mr Ryder was not employed on a fixed term agreement. His employment agreement states that states that his role was permanent (clause 3) with 35 ordinary hours of work per week (clause 10). Parkers submits that Mr Ryder’s work was so

intermittent or irregular that it would have been impractical to provide him with 4 weeks annual holidays. This submission is not supported by the facts. The employment agreement, as drafted by Parkers, states that Mr Ryder is a permanent employee with ordinary hours of work, and provides him with four weeks annual holidays to be allowed after 12 months continuous employment in accordance with the Holidays Act 2003 (clause 24); and provides that any outstanding holiday pay will be paid out at the termination of employment (clause 13). In addition, I have already found above that he usually worked 30 hours per week, and Parker's own submissions are that he worked 24 hours per fortnight.

[46] In support of its position, Parkers referred to occasional time off when Mr Ryder played cricket or related activities. This was known and accepted by the directors, who explained that as Mr Ryder was paid by the hour, he was simply not paid for time he was not at work. This does not suggest casual status, as the directors knew why he was absent and no issues as to pay arose.

[47] Accordingly, Mr Ryder does not meet the test set out in s 28(1). Subsection 28(4) provides that Mr Ryder is entitled to receive annual holidays despite any payments made, where subsection (1) does not apply and where employment has continued for 12 months or more.

[48] I find that Mr Ryder's employment ended as of 19 January 2023, as he was given 4 week's notice of the termination of his employment on 1 December 2022.

[49] Submissions for Parkers state that Mr Ryder was employed "in January 2022". A date is not specified. Pay records show that Mr Ryder was paid for 33.27 hours of work on 26 January 2022, and payslips show that this was for work done in the pay period from 9 January to 22 January 2022. No further records are available to show the date on which Mr Ryder started work. His employment agreement is of no assistance as it specifies a start date of 8 February 2022 which is accepted by both parties to be wrong. All of this suggests that Mr Ryder was employed for 12 months or more. The lack of precision results from Parker's failure to keep a record of the number of hours worked each day in a pay period and the pay for those hours, as required by s 130(g) of the Act.

[50] Both the payslips and the report on payments made to Mr Ryder also show that Mr Ryder first worked for Parkers in August, September, and October 2021. He took

time to explore an apprenticeship, and then continued his work for Parkers in January 2022. His employment clearly continued for longer than 12 months if his commencement date was in August 2021. Parkers submits that I should view this as a separate period of employment for the purposes of calculating entitlements, however, their own pay records demonstrate otherwise.

[51] Insofar as there is doubt, this is caused by Parkers' failures to keep accurate wage and time records as required by section 130 of the Act. Section 132 of the Act provides that where there is a failure by the employer to keep or produce wage and time records, and this failure prejudices the employee's ability to bring an accurate claim for arrears, the Authority may accept as proved all claims by the employee in respect of wages actually paid and hours, days and time worked by the employee. Mr Ryder's evidence is that he worked for Parkers starting in late August 2021, and I accept that evidence as I am entitled to do.

[52] Accordingly, Mr Ryder is entitled to be paid for his accrued annual leave in accordance with s 28(4) of the Holidays Act 2003.

[53] It is significant that Parkers has consistently led Mr Ryder to expect that he would receive annual holidays or an equivalent payment. The employment agreement states that Mr Ryder will receive 4 weeks annual holidays per annum, with un-used leave paid out on the termination of employment. Although there was a single reference in the employment agreement to "holiday pay inclusive" in the stated hourly rate, Parkers did not pay in accordance with that clause. In addition, the payslips Parkers sent to Mr Ryder throughout his employment showed Mr Ryder the leave he was accruing on a weekly basis. Parkers was in control of the terms in the employment agreement and over the details shown on the payslips. Through these documents, they led Mr Ryder to expect he had an entitlement to annual leave amounting to 126 hours. Mr Ryder is entitled to this, and should be paid accordingly. Orders are made for the payment of 126 hours of annual leave at the rate of \$24.00 gross per hour.

#### **Unjustified Disadvantage**

[54] Mr Ryder raises a claim for unjustified disadvantage in relation to the non-payment of his notice period, and seeks compensation and interest accordingly.

[55] It is submitted for Mr Ryder that "unlawful deductions from the Applicant's final pay put the Applicant in a difficult position financially giving rise to his claim for

unjustified disadvantage”. Although Parkers accepts that Mr Ryder was entitled to payment for his 4-week notice period, there have been ongoing disputes between the parties about what that payment amounts to, how many hours a week should be paid, and how to deal with annual leave, that have only been resolved by this determination. In addition, it is questionable whether the relevant acts occurred post-employment. In all these circumstances, I decline to find that a separate unjustified disadvantage is made out.

[56] A claim for interest was made in submissions for Mr Ryder, which claim was not made in the statement of problem or amended statement of problem. I decline to award interest, both as this was not properly pleaded so as to give Parkers a fair chance to respond, and because I do not consider that interest can properly be awarded where there was a genuine dispute as to the monies actually owed.

[57] No further orders are made.

### **Penalty**

[58] It is submitted for Mr Ryder that a penalty should be imposed on Parkers as Parkers has breached s 27(2) of the Holidays Act 2003, by failing to pay annual holiday pay on the termination of employment. It is submitted for Parkers that no breach of the Holidays Act 2003 occurred, as it was not obliged to pay annual holiday pay to Mr Ryder.

[59] The same issue arises here. Although as a matter of fact there is no dispute that Parkers did not pay Mr Ryder annual holiday pay on the termination of his employment, this is because there was a dispute between the parties as to whether any needed to be paid which has only been resolved by this determination. In these circumstances, I decline to find that a breach occurred that could properly attract penalties, and no further orders are made.

### **Orders**

[60] Mr Ryder’s personal grievance claims of unjustified dismissal and unjustified disadvantage are not made out. No orders are made.

[61] Parkers Beverage Company Limited is ordered to pay to Mr Jessie Ryder within 28 days of the date of this determination:

- a. The sum of \$1,440.00 gross in respect of two weeks unpaid contractual notice;
- b. The sum of \$115.20 gross, being holiday pay on the amount of \$1,440.00 calculated at the rate of 8%;
- c. The sum of \$3,024.00 gross, being 126 hours of annual leave at the rate of \$24.00 gross per hour.

## **Costs**

[62] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[63] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[64] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>2</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>2</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)