

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 59  
3210020

BETWEEN ALAN JAMES STRINGER  
Applicant

AND DAVID DRYDEN MCBRIDE  
Respondent

Member of Authority: Antoinette Baker

Representatives: Thomas Nation, Emily Rennell, counsel for the Applicant  
Rachel Stedman, Philip Ross, for the Respondent

Investigation Meeting: 10 October 2023 at Timaru

Submissions Received: 17 October 2023 from the Applicant  
4 and 6 November 2023 from the Respondent

Date of Determination: 2 February 2024

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**DETERMINATION OF THE AUTHORITY**

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[1] Mr Stringer was employed by Mr McBride as an architect assistant and became a qualified architect before the end of his employment<sup>1</sup>. He was employed for 8 years and approximately 11 months from 1 July 2013 to his last day on 17 June 2022. He resigned to start work in his own business. Mr Stringer claims he was unpaid for his last day and holiday pay at the end of his employment and should now be paid this. After it became apparent that Mr McBride did not agree that annual holiday pay was owed or that Mr Stringer's calculations were accurate, Mr Stringer raised a personal grievance on 14 September 2022. He says he was disadvantaged in his employment by the unjustified actions of Mr McBride in relation to the

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<sup>1</sup> Mr Stringer's pay records record him as a 'graduate' architect from commencement in 2013.

non-payment of his holiday pay. He seeks compensation for this grievance. He further claims that a penalty should be ordered against Mr McBride stating breaches of the Holidays Act 2003.

[2] Mr McBride says he kept compliant records, that there was no holiday pay owing and / or disputes Mr Stringer's interpretation of holiday leave entitlements. This includes saying that some other types of leave or time off was paid as annual leave taken. Mr McBride further says that leave taken in advance of entitlement was granted 'unlawfully' and that annual leave only accrued from the second year of employment onwards rather than taking this leave in the first year as part of the entitlement crystallising at the end of that year.

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

[3] Mr Stringer was represented by counsel throughout. Mr McBride was not. He confirmed that he appeared for himself at the phone conference call and at the investigation meeting. At the investigation meeting I heard sworn and affirmed evidence from Mr Stringer and Mr McBride. Parties were given the opportunity to ask questions of the other about that evidence. Written submissions were then timetabled and Mr McBride subsequently instructed counsel to file written submissions on his behalf after the investigation meeting (they had earlier filed evidence on his behalf). Mr McBride then filed his own supplementary written submission. I reserved my determination.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions in this determination. I have set out my findings of fact and law and based on this I have expressed conclusions on issues and made orders as necessary to dispose of the matter. I will now consider the issues and record my findings.

### **Issues**

[5] The issues are:

- a. Was Mr Stringer paid his last day of employment, and if not what is to be paid?
- b. Has Mr McBride kept holiday and leave records compliant with employer statutory obligations?
- c. What is the likely amount of annual leave that Mr Stringer took as paid annual leave during his period of employment and what if any remains to be paid to him?

- d. What amount if any is owed to Mr Stringer for the final part year he worked before further annual leave entitlement arose?
- c. Has Mr Stringer been disadvantaged in his employment as a result of Mr McBride's actions in relation to any nonpayment of holiday pay and if so, is Mr Stringer to be awarded compensation?
- e. Are penalties to be awarded and are any or all of these to be paid to Mr Stringer?
- f. Are any remedies to be reduced for employee contribution?
- g. Should either party pay a contribution towards the costs of the other?

**Was Mr Stringer paid his last day of employment, and if not what is to be paid?**

[6] Mr McBride acknowledges that Mr Stringer's last day of employment on 17 June 2022 was not paid. Correspondence on 27 July 2022 shows that Mr McBride accepted this day was unpaid, he could not explain to me why it remained unpaid other than to say that he didn't know.

[7] An employee may recover money from an employer when there has been a default in payment of wages or any other money<sup>2</sup>. Mr Stringer's evidence and the evidence from wages records support that at the end of employment Mr Stringer's daily gross pay was \$250.00. This is the amount Mr McBride is to pay Mr Stringer for this final unpaid day of employment. This figure will be referred to again as appropriate in relation to holiday entitlement calculations.<sup>3</sup>

**Has Mr McBride kept holiday and leave records compliant with employer statutory obligations?**

[8] I consider this issue here because it will assist me with subsequent issues. I start with some of the legislative requirements for record keeping.

[9] Under s 81 of the Holidays Act 2003 (HAct) the employer is required to keep a record of holidays and leave which (as applicable to this matter) includes:

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<sup>2</sup> Employment Relations Act 2000, s 131.

<sup>3</sup> Holidays Act 2003, s 26.

(2) An employer must at all times keep a holiday and leave record showing, in the case of each employee employed by the employer, the following information:

- (a) the name of the employee:
  - (b) the date on which the employee's employment commenced:
  - (c) the number of hours worked each day in a pay period and the pay for those hours:
  - (d) the employee's current entitlement to annual holidays:
  - (e) the date on which the employee last became entitled to annual holidays:
  - (f) the employee's current entitlement to sick leave:
  - (g) the dates on which any annual holiday, sick leave, bereavement leave ... has been taken:
  - (h) the amount of payment for any annual holiday, sick leave, bereavement leave ... that has been taken:
  - (ha) the portion of any annual holidays that have been paid out in each entitlement year (if applicable):
  - ...
  - (i) the dates of, and payments for, any public holiday on which the employee worked:
  - (j) the number of hours that the employee worked on any public holiday:
  - (k) ...
  - (l) the details of the dates of and payments for, any public holiday or alternative holiday on which the employee did not work, but for which the employee had an entitlement to holiday pay:
  - (m) ...
  - (n) ...
  - (o) the date of termination of the employee's employment (if applicable)
  - (p) the amount paid to the employee as holiday pay upon the termination of the employee's employment (if applicable):
  - (q) any other particulars that may be prescribed.
- (3) The holiday and leave record must be kept-
- (a) in written form; or
  - (b) in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.

[10] There are similar provisions to the above in relation to an employer's obligations to keeping a time and wage record<sup>4</sup>. Both sets of provisions include that where an employee is salaried on 'usual hours' records can be contained in for example an employment agreement or roster, however the employer must keep a track of days and time worked to ensure any time over those usual hours does not breach the minimum wage rates (time and wage). The same can be said relating to ensuring holiday and leave requirements are paid correctly.

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<sup>4</sup> Employment Relations Act 2000, s 131.

[11] The above-mentioned records are required to be kept for 6 years after the date on which the information is entered (holiday and leave records)<sup>5</sup> or from when the obligation arose (time and wage records).<sup>6</sup>

[12] Mr McBride says he has complied with his record keeping obligations for holiday and leave records. This has also been submitted on his behalf. Mr Stringer disagrees that the records were compliant.

[13] It has been submitted for Mr McBride that ‘the requirement to keep records must not be conflated into a requirement to keep records in any particular form.’ I accept Mr McBride operated a manual system and this in itself does not attract noncompliance. It is further submitted for Mr McBride that while payslips including an ongoing leave balance were not provided, payslips are not a requirement. However, an ongoing leave balance is a statutory requirement under s 81(2)(d) of the HAct. While I accept a manual system could meet the above requirements of s 81 of the HAct, the evidence does not support that Mr McBride’s manual records fully did this and my reasons follow.

[14] Mr McBride says that the records he kept for holiday and leave were in three different places: a hard copy diary called the ‘day book’, manual wage records in template sheets with handwritten entries, and Mr Stringer’s own record of his leave.

*Mr Stringer’s own recording of his leave*

[15] It has been submitted for Mr McBride after the investigation meeting that the record of any leave taken by Mr Stringer was a ‘one of the important components of the *employer’s* records.’<sup>7</sup> This appears to be based from when Mr Stringer raised issue with his holiday pay and said he had his own records captured in his work diary. The submission is that if this leave was in his work diary, the diary belonged to the employer and therefore formed part of the

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<sup>5</sup> Holidays Act 2003, s 181(4).

<sup>6</sup> Employment Relations Act 2000, s 130(2).

<sup>7</sup> Italics added for my emphasis.

employer's holiday and leave record which Mr Stringer should have returned. Mr McBride also referred to this in his evidence.

[16] I do not accept that Mr Stringer's own recording of what leave he took supplements the gaps in his employer's record keeping obligations.

[17] I accept the submission for Mr Stringer that the Employment Court<sup>8</sup> made it clear that record keeping is an obligation on an employer and an employee cannot be blamed for noncompliance in relation to these obligations. This is even if the employee in trying to work out their leave gets some things wrong. The Court said that an employee 'should not be placed in a position where it is necessary to take extra steps in an attempt to reconstruct a leave record.'<sup>9</sup>

[18] Accordingly, I do not find that Mr McBride can claim that any record of what leave his employee took formed part of the holiday and leave employer records that he was required to keep.

#### *The 'wages book'*

[19] I have Mr McBride's set of wage records for the period of Mr Stringer's employment. They are in hard copy standard template form with handwritten entries showing gross, PAYE and net pay line by line against fortnightly pays. Mr Stringer was paid a salary figure which increased at points during his employment. Otherwise, he was mostly paid the same each week even where there is reference, or where it is now agreed, that he would have taken annual leave. On each form there is a box to allow for dates of leave, what was paid and unpaid, and a place for a 'balance brought forward'. Only a few of these boxes are filled in and if they are there are entries not always describing the type of leave taken, a requirement under s 181(2)(g) of the HAct. There is no ongoing record of the annual leave 'balance brought forward' in these boxes. It is a statutory requirement for an employer to keep a record of an employee's current entitlement to annual holidays under s 81(2)(d) of the HAct.

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<sup>8</sup> *O'Boyle v McCue* [2020] NZEmpC 175, 29 October 2020 at [112].

<sup>9</sup> Above at [112].

*The 'day book'*

[20] Mr McBride explained that other leave recording was in the 'daybook' that was kept on the reception desk. As I understood evidence from both parties, this book recorded the day-to-day business with clients and projects and that it may have included who was where. I note that the workplace was small being Mr and Mrs McBride, their son and Mr Stringer.

[21] Mr Stringer says he was aware of the 'daybook' but did not write in it. I accept it would have likely had references to when Mr Stringer may or may not have been in the office or not working. However, this record has not been produced and while I accept Mr McBride's explanation that this was an issue of 'sheer volume' (I presume there was 9 years' worth of 'day books') this points to the problem at the heart of this matter.

[22] An employer is obliged under s 81 HAct to keep comprehensive leave and holiday records and this includes at s 81(3) that the record must be in 'written form' or kept 'in a form or in a manner that allows the information in the record to be easily accessed and converted into written form.' I take from this that it is implicit that the written records must be accessible. Clearly entries in the 'day books' have not been easily accessible as this dispute has borne out.

[23] Standing back from the above there are some holiday and leave references in the wage records but they are not complete or consistent. There is no ongoing leave entitlement balance. While it has been submitted for Mr McBride that in any event he was only obliged to keep records for 6 years, the obligation to keep a current entitlement to leave cannot by logic drop off during an employee's employment of more than six years. This is especially relevant when the employee has been allowed to take leave in advance of entitlement some years before the employment ends, as has happened here.

[24] Considering the above I accept the submission for Mr Stringer that the manual system operated by Mr McBride was disorganised and that there was no single master record of leave taken. Mr McBride's own oral evidence included that it was 'ad hoc' and that 'it could have been better.' I accept the submission for Mr Stringer that I may now accept as proven by Mr Stringer, in the absence of evidence to the contrary, statements made about holiday leave or

leave taken during the employment in order to determine what if any of the holiday pay claimed remains unpaid.<sup>10</sup>

**What is the likely amount of annual leave that Mr Stringer took as paid annual leave during his period of employment and what if any holiday pay remains to be paid to him?**

[25] If holiday pay is to be manually worked out at the end of employment then a two-stage calculation of holiday pay is required if an employee has worked more than 12 months (or a number of 12-month continuous periods) and then finishes employment before a further 12 months is completed.<sup>11</sup> That is what happened here. Mr Stringer worked 8 years and approximately 11 months.

[26] Throughout his employment Mr Stringer was entitled to be paid 4 weeks of paid annual leave for every 12 months of continuous employment.<sup>12</sup> There appears to be no dispute that a week constituted 5 days, so each full year of the eight years worked Mr Stringer was entitled to 20 days of paid annual leave. For the first stage of calculation, it is necessary to work from a total of 160 days for the full 8 years. Any annual leave taken during the whole of that employment should be tallied against this 160 days. This will enable the employer to know what if any untaken annual leave entitlement is to be paid out.

[27] For the final part year (approximately 11 months) Mr Stringer was entitled to be paid 8% of his total annual gross earnings for that part year less any paid annual leave he took in advance.<sup>13</sup> This is because he had not reached a further entitlement to 20 days paid annual leave. The total gross earnings in this equation includes all gross payments and includes untaken paid annual leave taken on the above 160-day figure (if any) and for example any arrears I order to be paid in this determination.<sup>14</sup>

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<sup>10</sup> Holidays Act 2003, ss 81 and 83.

<sup>11</sup> Holidays Act 2003, ss 24,25.

<sup>12</sup> Holidays Act 2003, s 16.

<sup>13</sup> Holidays Act 2003, s 25.

<sup>14</sup> Holidays Act 2003, s 25.

*Of the 160 days paid annual leave entitlement how much was taken and paid to Mr Stringer during his employment (s 16 HAct)?*

[28] The parties have agreed on much of the leave taken since this issue arose but there are several points that Mr McBride disputes. I will consider each under the next headings.

*Leave taken in advance in the first year*

[29] I do not accept Mr McBride's continued insistence that the annual leave in advance of entitlement in Mr Stringer's first year was 'unlawful' or somehow a difficult 'legal' situation. This will not be a surprise to him. I attempted as far as I could to explain this to him at the phone conference call and at the investigation meeting. This stance appears to be Mr McBride's reason for effectively taking annual leave entitlement of 20 days from Mr Stringer when considering final holiday pay. It is clear he continued to do this in July 2022 when he provided a table attached to an email to Mr Stringer as to his workings of annual leave taken. That table includes clearly that he regarded entitlement to annual leave in Mr McBride's first year as 'nil'. He has continued to contend this as recently as his own final written submission after the investigation meeting.

[30] In short, an employer may allow an employee to take annual leave in advance of their entitlement.<sup>15</sup> There is nothing 'unlawful' about this. Mr McBride allowed the leave in advance in the first year. The risk with allowing leave in advance may mean that an employee never reaches full entitlement to what is allowed (usually if an employee leaves early in the first twelve months after taking leave in advance or continues to take more leave in excess of ongoing entitlement. That logically is why there is a requirement for an employer to keep a current record of leave entitlement to avoid the sort of dispute that is here in the context of a long period of employment.

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<sup>15</sup> Holidays Act 2003, s 20.

[31] Having heard from Mr McBride and considered the above I find I can only attempt to understand (at best) that he ‘misunderstood aspects of the law’<sup>16</sup> which may be connected to this type of employer risk. Little else makes sense about his own continued position which he did not, as submitted for him, correct after multiple opportunities to do so.<sup>17</sup> However, I can only surmise in the attempt to understand Mr McBride’s otherwise intransigent attachment to an incorrect interpretation about the annual leave calculation at the end of employment.

[32] Accordingly the assessment of what leave entitlement is taken is based on 160 days for eight years and not 140 days which has been the effect of Mr McBride’s position. I will now consider the issues raised by Mr McBride about leave taken or not taken under relevant headings.

*Days before or at the start of Christmas closedowns*

[33] Mr McBride says that on the final breakup day before Christmas in years from 2013 to 2017 and then 2019 Mr Stringer took annual leave days. Mr Stringer says he completed work in the morning and then Mr McBride would invite him to have a Christmas drink with him around lunchtime. He says that he could be said to have taken half days of annual leave (the afternoon) on these days. Nothing is recorded about these being whole days of annual leave in the wage records. Mr McBride appears not to have raised that these should have been whole days of annual leave days until this dispute arose some years after the three years he refers to. I find it likely this is a form of retrospective accounting by Mr McBride for reasons only he knows. I accept Mr Stringer’s evidence that these days should be regarded as half and not full days of annual leave.

*Leave to attend professional training in Christchurch*

[34] After this dispute arose Mr McBride raised three further paid annual leave days taken when Mr Stringer attended day courses in Christchurch on 20 November 2017, 16 April 2018,

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<sup>16</sup> Closing submissions for the Respondent, 4 November at paragraph 39.

<sup>17</sup> As above.

and 29 March 2019. Mr McBride acknowledged to me that he did not discuss with Mr Stringer that these needed to be taken as annual leave days at the time the days occurred. He gave oral evidence that someone (more latterly) told him they would not be a business deductible expense if the courses were just related to the employee gaining their own skills and knowledge. Mr McBride explained to me that these were professional body courses and he accessed these as part of his membership. Mr McBride attended at least one of these courses, travelling to Christchurch in the car with Mr Stringer. These days were all before Mr Stringer had resigned and may have communicated that he was starting out in his own business. I understand the courses assisted him to get the requisite registration to do this. I find it likely they were at the time of benefit to Mr McBride's business. Even if I am wrong I do not accept that Mr McBride can now recategorize that Mr Stringer took annual leave on these days especially when he has no reliable record of annual leave recorded for them and this was never discussed.

[35] I find these three days were not taken as paid annual leave.

*'Parental leave'*

[36] I accept that Mr Stringer was not working and continued to be paid after the birth of two of his children. Mr McBride says this should have been annual leave. Mr Stringer says it was sick leave. While Mr McBride says they were both 10 days and Mr Stringer says one was 8.5 days and the other 10, a dispute not necessary for me to decide because I do not accept any of this leave can now be reclassified as annual leave. My reasons follow.

[37] The 2018 Wages book entry shows handwritten reference to 'parental leave' and then this is crossed out and records annual leave. Nothing is recorded in the 2020 wages book for the 2020 leave.

[38] After hearing from both, I am satisfied that Mr Stringer and Mr McBride likely talked about this leave and used the phrase 'parental leave' or at the very least I am satisfied Mr McBride knew what it was for. Mr Stringer was taking time to care for his wife and children after each birth. It did not relate to any formal parental leave under legislation. Mr McBride accepted in cross examination that the leave was just granted, and the wages continued. The

crossing out of 'parental leave' and then handwritten 'annual leave' on the November 2018 wage record box seems more consistent with Mr McBride's retrospective of what leave ought to be called. Again, I find some likelihood that what is likely to have happened is that this leave was never discussed as annual leave until Mr Stringer brought a claim for unpaid holiday pay at the end of his employment. Mr Stringer did not receive payslips and would never have seen any record of what this leave was called. I accept his evidence that he did not see the wage records until after he left his employment and after this dispute arose about his holiday pay.

[39] Whether this leave should now be called sick leave as Mr Stringer now suggests would be dependent on whether sick leave was available. I have no records that show me anything about sick leave and it is unlikely may not be recorded with any more accuracy or consistency than the annual leave. By default, it may simply be that this leave was provided for a purpose known to Mr McBride. In such a small workplace I find it implausible that Mr McBride did not know this at the time and do not accept his submission that Mr Stringer is at fault for not properly asking for sick leave for this period under s 64 of the HAct.

[40] Standing back from the above, I find that whatever this leave was (18.5 days or 20 days) it should not now count as annual leave taken.

#### *Bereavement leave*

[41] Mr McBride has questioned Mr Stringer's bereavement leave taken during employment. As with the above leave (after the children were born) he says that Mr Stringer never provided information about this and therefore (as also submitted for Mr McBride) was inconsistent with s 64 of the HAct. Mr Stringer has (after Mr McBride included this further issue in his evidence) provided evidence that he attended to three grandparent bereavements and another close matter. I accept his plausible and emotional oral evidence that the latter was well known to Mr McBride, his wife kindly visited their house at the time. Whether or not Mr Stringer made some more formal application for this bereavement leave I am well satisfied that Mr McBride knew what it was for in such a small collegial workplace.

[42] All of the above aside, by the time of the investigation meeting, Mr McBride accepted this was not annual leave but still instructed submissions on his behalf pointing out the fault of Mr Stringer in not providing information about what type of leave it was at the time.

*5 June 2015*

[43] Mr McBride notes this was recorded as an annual leave day. I agree. The box on the relevant 2015 wages record is filled in with 'Holiday 5 June' it is written before the other side of that weekend which was the public holiday for Queen's Birthday on the Monday. Mr Stringer disputes this. He tells me he has cross checked this with the work project he was doing and his own leave records. However, he has not provided these records to me and on this point I rely on the employer's record that this was recorded as annual leave and should be accounted as such in considering how much annual leave he likely took.

*Sick leave*

[44] Mr McBride raised issue with sick leave taken in advance in his written evidence but in his oral evidence he said he no longer treated this as annual leave.

*March 2016*

[45] I note there appears to be a dispute about annual leave taken in March 2016 being that Mr McBride says 15 days were taken and Mr Stringer says 14.<sup>18</sup> I accept the 14 days. There is nothing recorded in the wage records to assist me, and I have struggled to find dates that this leave applies to. I accept Mr Stringer's 14-day assessment.<sup>19</sup>

[46] Accordingly, I summarise the above findings about annual leave taken:

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<sup>18</sup> Summarised in the table provided in the Applicant's submissions.

<sup>19</sup> Applying the aforementioned Holidays Act 2003, s 83(3) and (4).

- a. Mr McBride cannot double count the first year of leave taken in advance thereby eliminating 20 days of annual leave entitlement;
- b. 5 June 2015 is to be counted as an annual leave day taken; and
- c. I do not accept that the two leave periods after the birth of Mr Stringer's children should be counted as annual leave taken.

[47] Based on the most recent table submitted showing a summary of the leave agreed as taken<sup>20</sup> and my above summarised findings I find from 160 days of paid annual leave that Mr Stringer was entitled (after his eight years of employment) to 145 annual leave days leaving him to be paid out 15 of these at \$250.00 gross each at the end. This is a total of \$3,750.00 gross.

**What amount if any is owed to Mr Stringer for the final part year he worked before further annual leave entitlement arose?**

[48] Mr Stringer's IRD earnings provided in his evidence show that he earned \$67,500.00 gross in his final part year of employment. Added to this figure is to be the now awarded last day of employment at \$250.00 gross, and the above annual leave entitlement of \$3,750.00 gross.<sup>21</sup> This means the total gross figure for the last part year was \$71,500.00 gross. Mr McBride's evidence contains reference to this figure being \$60,000.00. This is not supported by any evidence. I find that the IRD records provided by Mr Stringer are more reliable evidence.

[49] Based on the above, Mr Stringer's total gross earnings for the final part year were \$71,500.00 gross, 8% of this amount is \$5,720.00 gross which is now what Mr McBride is to pay together with the above \$3,750.00. This is a final holiday arrears payment of \$9,470.00 gross.

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<sup>20</sup> Closing Submissions of Respondent dated 4 November 2023.

<sup>21</sup> Holidays Act 2003, s26.

**Has Mr Stringer been disadvantaged in his employment as a result of Mr McBride's actions in relation to nonpayment of holiday pay and if so, is Mr Stringer to be awarded compensation?**

[50] Section 103 of the Act refers to the type of grievance Mr Stringer brings being one that claims his employer, Mr McBride, through unjustified actions acted in a way that affected a condition of his employment that extended beyond the end of his employment. I accept that the condition is the nonpayment of Mr Stringer's statutory entitlement to holiday pay.

[51] Applying s 103A of the Act I need to consider whether Mr McBride's actions, and how he acted, were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred.

[52] Mr Stringer's evidence is that the dispute around holiday pay was something that appeared to grow. The communications and various drafts of what Mr McBride proposed as annual leave taken across the almost 9 years were more akin to a bargaining exercise. I accept that Mr McBride initially refused holiday pay because he said holiday pay did not accrue year by year and then corrected this position. I am not satisfied he took this remedial step about not acknowledging that the first-year leave in advance counted as entitlement. I have already found above that this is not correct, and I find that to continue to hold this view not reasonable.

[53] Mr McBride is long experienced in his profession and his business. He has had access to or at the very least the opportunity to obtain and listen to reliable employment law advice. It would be difficult to understand that advice could have supported his continued stance about the annual leave only starting to accrue in the second year effectively affecting the unpaid annual leave calculation by a reduction of 20 days. This on its own would have left Mr Stringer without any payment for untaken annual leave, a figure I have found is now to be paid at \$3,700.00 gross. Had this not been what seems to have been Mr McBride's major focus of why he has resisted paying holiday pay, I find a high likelihood this matter would not have escalated the way it did.

[54] It has been submitted for Mr Stringer that the situation is similar to an Employment Court case where disadvantage and constructive dismissal grievances were compensated globally.<sup>22</sup>

[55] The Court in the above-mentioned case considered that the dispute before it was ‘front and centre’ about holiday pay entitlement, and that the employer blamed the employee’s inaccurate assessment to what she was owed. This was in the context of what the court found was the employer’s ‘fundamental misunderstanding as to annual leave entitlement’, ‘inadequate’ holiday and leave records, and an unacceptable blaming of the employee for the situation when the provisions of the Holidays Act 2003 are ‘clearly spelt out.’<sup>23</sup> I agree there are similarities to the present.

[56] For Mr McBride it is submitted that I should not entertain compensation under s 103(1)(c) of the Act in the context of a claim that is effectively for ‘unpaid wages’. It is further submitted that the compensation claim is ‘unhelpful’ and that it cannot be ‘dressed up as a personal grievance.’ The submission conceded that as in the above mentioned case, sometimes disputes relating to entitlements can amount to unjustified disadvantage. The submission, as I understand it, invites me to consider that the employment relationship was harmonious and that the dispute only arose after the employment ended, and that in any event the employee was in part to blame by not providing his records which were part of the employer’s records. I am invited to only consider remedies in relation to any unpaid entitlements. I do not agree.

[57] I consider that Mr Stringer has been disadvantaged in his employment starting from when he first responded to Mr McBride when the issue was raised by Mr Stringer during his notice period about his final holiday pay. There is a tone of respectfulness in Mr Stringer’s requests and having heard from him I find it is easy to see that the employment relationship included this respectfulness for the older Mr McBride. However, as the Court observed in *O’Boyle*, this is a case that should never have had to get this far. It involved a simple case of resolving holiday pay, a calculation that would have been easy but for the lack of inadequate record keeping by the employer and a continued erroneous claim about calculation.

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<sup>22</sup> Above at note 8.

<sup>23</sup> Above at [110]-[13].

[58] I have considered whether this is a case of double dipping a remedy or as submitted for Mr McBride, a 'wages claim dressed as a grievance.' I conclude it is not. The situation in my view is unusual and is similar to the disadvantage considered in *O'Boyle*. However, I accept the submission for Mr Stringer that the \$15,000.00 compensatory award in that case was global incorporating other grievance matters. I note also that it involved a more long standing and combative situation than what I am considering here.

[59] I accept Mr Stringer's evidence that he felt humiliated by Mr McBride's actions. Mr McBride in cross examination could not seem to answer or perhaps understand why Mr Stringer would suffer this effect. I accept that Mr Stringer feel humiliated by having to ask extended family for financial assistance when he had planned to rely on his holiday pay at the commencement of his business (before he could invoice clients and get paid). I accept he felt humiliated by the questioning by Mr McBride of his leave entitlement especially bereavement leave genuinely known about. He describes feeling insulted by these claims that came as the issues continued back and forth through Mr Stringer's counsel. Mr Stringer became visibly distressed talking about this. I accept he had worked for many years for Mr McBride from when he first graduated. I find Mr McBride seemed to act with an element of blaming Mr Stringer rather than doing what a fair and reasonable employer could be expected to do which would be to get some reliable advice about the way the leave should be calculated and accept responsibility for inadequate record keeping.

[60] While I accept Mr Stringer has felt the stress of this matter hanging over him to get a resolution, a component of that applies to all who bring a claim. I do not accept this aspect wholly links to the grievance.

[61] Considering the above, I find a lower level of compensation than claimed is appropriate and order Mr McBride to pay Mr Stringer \$4,000.00.

**Are penalties to be awarded and are any or all of these to be paid to Mr Stringer?**

[62] An individual employer can be liable for a penalty not exceeding \$10,000.00 for each breach of the HAct. The provisions that attract these penalties are listed separately under s 75(2) of the HAct.

[63] In deciding whether to impose a penalty, and if I decide to, I consider the number and nature of the breaches; prior breaches; the severity of each breach; the ability of the person in breach to pay; and proportionality to ensure that any final penalties awarded are ‘just in all the circumstances.’<sup>24</sup>

[64] Penalties are also punitive and a reason to award them is to support compliance with employment standards and not a mechanism to compensate employees individually although sometimes it is appropriate to have part or all of a penalty paid to an employee.<sup>25</sup> The Employment Court has observed there can be a risk of double up remedies if the same things raised to support penalties have been raised to support a grievance.<sup>26</sup>

[65] Mr Stringer has put forward that I should consider two different penalties, one for non-payment of holiday pay and one for not keeping a holiday and leave record. I will deal with each in turn. For Mr McBride it is submitted that this is not a matter that attracts penalties, but that if a penalty was to be awarded it should be at the lowest end.

*Penalty for not paying holiday pay*

[66] I have already found above that Mr McBride had not paid Mr Stringer his holiday pay at the end of his employment. This can attract a penalty under s 75 HAct. Mr Stringer applied for a penalty for this reason in his Statement of Problem dated 25 January 2023 which was within the 12 months to bring the action<sup>27</sup>.

[67] Mr Stringer has been without a significant amount of his holiday pay since his employment ended on 17 June 2022. I find no good reason for the non-compliance. This leans towards considering a penalty to send a message to employers to ensure that relatively straight

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<sup>24</sup> *Borsboom v Preet PVT Limited* [2016] NZEmpC43 at [151].

<sup>25</sup> Holidays Act 2003, s 76(6).

<sup>26</sup> *Xu v McIntosh* [2004] 2 ERNZ 448 at [43] – [45]

<sup>27</sup> Holidays Act 2003, s 76(5).

forward aspects of holiday pay entitlement calculations can be understood beyond initial misunderstandings and by taking note of reliable advice. There is a public interest aspect here in avoiding the sort of unnecessary dispute that has evolved before me.

[68] I have no evidence before me that Mr McBride cannot pay a penalty, but I have no information about whether he has previously breached employment standards provisions. I have found Mr McBride's apparent uncompromising incorrect stance about how to calculate holiday pay far from admirable, but I have awarded compensation for the effect of this on Mr Stringer. However, I accept this is likely one breach with one no family employee (for some years) in a very small workplace where there was informality and collegiality until the issue of final holiday pay arose.

[69] Standing back from the above I am not satisfied that a penalty would add anything further to this particular matter. I am of a mind that Mr McBride will find this determination of serious consequence to see him get some reliable assistance to ensure he avoids a repeat of this type of dispute in the future if he continues to employ. This in my view tempers a need to order a penalty for deterrence.

*Penalty for not keeping a holiday and leave record*

[70] It has been submitted for Mr Stringer that a penalty should be awarded against Mr McBride for a failure to keep a holiday and leave record<sup>28</sup>. For the same reasons as above I would have been unlikely to find this appropriate. I also note that an action for the recovery of a penalty under s 76(5) of the HAct 'must be commenced within 12 months after the earlier of when the cause of action became known, or should reasonably have become known, to the ... employee concerned.' I am not satisfied that an action for raising this described penalty has been brought within the 12 months from when Mr Stringer ought to have reasonably known that Mr McBride was not keeping an accurate holiday and leave record. Accordingly, the time frame being strict I have not considered this further.

**Are any remedies to be reduced for employee contribution?**

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<sup>28</sup> Written Submissions for the Applicant dated 17 October 2023, paragraph 30 and 50 read together.

[71] Under s 124 of the Act I am required to consider if any remedies awarded should be reduced for an employee's contribution towards the situation that gave rise to the personal grievance.

[72] While not framed in response to contribution it has been submitted for Mr McBride that Mr Stringer did not follow his obligation under s 64 of the HAct to request sick and bereavement and that he kept his own records and did not provide them calling them a 'primary component' of the employer's own records. The latter submission included, 'That in relation to record keeping that 'one component of those records [the employer's records] was a diary which [Mr Stringer] did not return. He cannot complain that there were difficulties calculating his entitlements when he is at least partially at fault as he has not returned one of the documents that holds relevant records.' I have already considered these things above and do not accept, for the same reasons, that they could satisfy me that Mr Stringer should have any remedies reduced for his contribution to the grievance.

### **Summary of Orders**

[73] David Dryden McBride is to pay Alan James Stringer the following:

- a. \$250.00 gross for wage arrears (final day of employment).
- b. \$9,470.00 gross for unpaid holiday pay at the end of employment.
- c. \$4,000.00 compensation under s 123(1)(c) of the Act.

### **Costs**

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

[75] If they are not able to do so and an Authority determination on costs is needed Mr Stringer may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr McBride would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[76] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>29</sup>

Antoinette Baker  
Member of the Employment Relations Authority

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<sup>29</sup> <https://www.era.govt.nz/determinations/awarding-costs-remedies/>