IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 301
3022825

BETWEEN	RADIUS RESIDENTIAL CARE LIMITED Applicant
AND	A LABOUR INSPECTOR Respondent

Member of Authority:	TG Tetitaha
Representatives:	P.T. Kiely & S.R. Worthy, counsel for the Applicant A. Dumbleton, counsel for the Respondent
Investigation Meeting:	26 and 27 February 2019 at Auckland
Submissions Received:	27 February 2019 from both parties
Date of Determination:	23 May 2019

DETERMINATION OF THE AUTHORITY

A. I am not persuaded the applicant has failed to meet the specified provisions of the Holidays Act 2003. I am not inclined to modify the Improvement Notice because there is insufficient proof of any failing.

B. In the circumstances the improvement notice is rescinded.

C. Costs are reserved. The parties have 14 days to agree costs or file any application seeking a determination.

Employment Relationship Problem

[1] The respondent, a Labour Inspector, served an Improvement Notice upon the applicant, Radius Residential Care, requiring it to do a number of things to remedy failings to meet specified provisions in the Holidays Act 2003 (HA). The applicant objected to the

Improvement Notice and has sought to have it rescinded. This determination deals with the applicant's objection.

Relevant Facts

[2] The applicant operates a residential care facility for elderly residents across New Zealand.

[3] Residents are required to be supported and cared for on a 24/7 basis with staff working at facilities around the clock.

[4] As a result, the applicant rosters its staff in its facilities to perform their hours of work. Rosters are provided to employees a fortnight in advance and establish hours of work for a fortnightly period.

[5] Days actually worked by employees may change from week to week or fortnight to fortnight. Hours of work per week and days upon which those hours are worked often vary.

[6] Given this variation of work patterns, the applicant uses hours to calculate and pay leave to its employees. It also records days and start/finish times of work.

[7] The Labour Inspector undertook an audit of the applicant's leave record. On 25 July 2017 the respondent issued an audit report that found, amongst other things that the applicant employer:

- did not calculate an employee's annual holiday entitlements correctly;
- did not calculate and pay annual holidays correctly;
- did meet the qualifying requirements regarding the paying out of annual holidays, but did not calculate the payment of such correctly;
- did not calculate an employee's average daily pay correctly, meaning its calculation and payment for sick leave, public holiday not worked, alternative holidays and bereavement leave are not correct;
- did not calculate and pay at least time and half for working on a public holiday; and

- did provide an alternative holiday where required, but did not calculate payment correctly.

[8] The respondent alleged these breaches arose because the applicant:

(a) was not adhering to "the correct method of calculating an employee's entitlement to annual holidays". This was because s16 Holidays Act 2003 required an employee's annual leave to be "couched in terms of weeks" and "the employer determines such in hours." The respondent gave an example of one employee, CA, to show that hours worked "are not inherently representative of what genuinely constitutes a working week for an employee when calculating their annual holiday entitlement." (para 3.2).

(b) was not using "the correct method when calculating annual holiday pay" under the Holidays Act 2003. It alleged payment was incorrectly calculated using hours worked divided by 4 or gross earnings divided by total hours worked then applying the average hourly rate to the number of hours taken during the annual holidays. The Act provided for payment at the greater of ordinary weekly pay (OWP) calculated using gross earnings for 4 weeks prior to leave or average weekly earnings (AWE) 12 months gross earnings divided by 52. It gave an example of an employee, JE, to show underpayment by the applicant (para 3.3).

(c) "does not use the correct method when calculating annual holiday pay when employment ends" because it uses the above average hourly rate to calculate payment (para 3.4).

(d) does not calculate average daily pay (ADP) by dividing the employees gross earnings for the 52 weeks prior by the number of whole or part days worked. Instead it uses the employees' hours of work as the divisor for ADP. The example of CA given alleged to result in an underpayment of $3.68. This results in alleged breaches of ss9A, 49, 50, 60 and 71 Holidays Act 2003 regarding calculation of payment for public holidays not worked/worked, alternative holiday, sick and bereavement leave (paras 3.8 to 3.13).

[9] At the time the audit was undertaken the applicant had 1530 employees with 557 employees ceasing their employment in 12 months to 31 July 2016. The respondent requested the applicant enter into an enforceable undertaking.

[10] The applicant replied through its solicitors on 18 August 2017 seeking:

(a) clarification of CA's working week and hours given:

- The Report noted CA "appears to have worked more than 70 hours in the relevant fortnightly periods".
- Radius assessed CAs working week on the basis of 40 hours per week.
- The Report noted there were two different annual leave entitlement amounts for March 2015 (136.13) and March 2016 (125.67 hours).
- Radius explained the difference arose because CA took two days leave in advance in 2015;
- The Report stated that the "employer must ensure that each and every employee receives the correct entitlement in terms of payment in relation to ss16 and 17 [Holidays] Act".
- Radius disputes this is an accurate statement of the law. Underpayment or failing to pay or provide at least 4 weeks leave is prohibited. Overpayment of an entitlement in terms of time and monetary payment is not.

(b) clarification of what JE should have been paid for a week of annual leave given:

- JE's annual leave taken from 23 January to 5 February 2017 was based upon the roster he would have worked that fortnight resulting in 37 hours.
- OWP was calculated by dividing the last four weeks gross earnings by the actual hours worked those weeks to take account of the higher than normal working hours in those working weeks. This produced an average hourly rate ($16.3409) multiplied by 37 hours or $604.61 paid;

- The Report states the OWP was $835.49 but does not explain what should have been paid to JE for annual leave taken. It sought clarification of how many days constituted a week of leave for JE.

[11] Radius believed it had met its obligations to pay CA her minimum entitlements calculated on ADP. CA worked 225 days not 217. On ADP her entitlement was $415.50 for the two alternative days. She received $427.15. Radius then declined to sign the enforceable undertaking.

[12] The parties continued exchanging correspondence between 5 September and 13 October 2017. Radius sought a meeting.

[13] By email dated 17 October 2017 the respondent required the applicant to agree to the enforceable undertaking or he would issue an improvement notice. The applicant replied, seeking again to meet with the respondent.

[14] On 27 October 2017 the respondent issued Radius with an Improvement Notice.

Improvement notice

[15] The Improvement Notice (IN) identified the following failings (para 2.1):

(a) Failure to apply the correct method of ADP under s9A in calculating and making payment under ss49 and 50 (public holiday not worked/worked); s60 (alternative holiday and s71 (sick and bereavement leave) Holidays Act 2003 (HA);

(b) Failure to apply the correct, greater of AWE and OWE calculation and payment for annual leave taken or due on termination ss21,24 and 28B HA;

(c) Failure to apply the correct method of determining an employee's entitlement to at least four weeks of paid annual leave after each completed 12 months of continuous employment (s16 HA).

[16] The applicant disagreed with the improvement notice. It filed an objection to the improvement notice with the Authority. It seeks rescission of the improvement notice or variation.

Objection to IN

[17] The function of the Authority in determining an objection to an IN are prescribed in s223E(2) Employment Relations Act 2000:

> **223E Objection to improvement notice**
>
> (1) An employer may, within 28 days after the improvement notice is issued to the employer, lodge with the Authority an objection to the notice.
>
> (2) The function of the Authority in respect of an objection is to determine—
>
> (a) whether the employer is failing, or has failed, to comply with the specified provision of the relevant Acts; and
>
> (b) the nature and extent of the employer's failure to comply with the provision; and
>
> (c) the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).
>
> (3) The Authority may confirm, vary, or rescind the improvement notice as the Authority thinks fit.

Compliance issues of IN with s223D

[18] The applicant has taken issue with the content of the IN and its compliance with s223D below:

> **223D Labour Inspector may issue improvement notice**
>
> (1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.
> (2) An improvement notice issued under subsection (1) must state—
> (a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and
> (b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and
> (c) the nature and extent of the employer's failure to comply with the provision; and
> (d) the steps that the employer could take to comply with the provision; and
> (e) the date before which the employer must comply with the provision.
> (3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).
> (4) An improvement notice may be issued—
> (a) by giving it to the employer concerned; or
> (b) if the employer does not accept the improvement notice, by leaving it in the employer’s presence and drawing the employer’s attention to it.

> (5) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.
> (6) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

[19] There are issues about the adequacy of the IN in terms of its stated reasons for believing there have been failures to comply with specified provisions. The Labour Inspector primarily relies upon the content of its audit report to explain the failures set out in the IN. Given the audit report is not referenced at all in the IN, there are issues about the adequacy of the IN and whether it meets the requirements of s223D(2)(b) of the Employment Relations Act 2000.

[20] However I have determined that this would be a matter best left to judicial review of the exercise of the Labour Inspector's powers to issue an IN. This is because my function in determining a notice of objection are prescribed by s223E(2) above. This does not include judicial review regarding compliance of the IN with s223D.

[21] However if the IN does not adequately prove the matters set out in s223E(2) that does fall within my functions in determining a notice of objection. I deal with these issues below.

Has there been a failure to meet specified provisions of the HA?

[22] The IN alleges there have been failures to comply with ss9A, 16, 21, 24, 28B, 49, 50, 60 and 71 HA.

Purpose of HA

[23] All provisions of the HA must be read in conjunction with the purpose of the HA in s3 below:

> **3 Purpose**
>
> The purpose of this Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to—
>
> (a) annual holidays to provide the opportunity for rest and recreation:
>
> (b) public holidays for the observance of days of national, religious, or cultural significance:

> (c) sick leave to assist employees who are unable to attend work because they are sick or injured, or because someone who depends on the employee for care is sick or injured:
>
> (d) bereavement leave to assist employees who are unable to attend work because they have suffered a bereavement:
>
> (e) domestic violence leave to assist employees to deal with the effects on the employees of being people affected by domestic violence.

[24] The purpose requires payment of minimum entitlements and opportunity to take leave from work for various other stated purposes. It does not specify any method of calculation of payment. This is dealt with by other sections of the HA.

Section 9A HA

[25] Section 9A HA prescribes the method for calculating average daily pay (ADP) below:

> **9A Average daily pay**
>
> (1) An employer may use an employee's average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or domestic violence leave if—
>
> (a) it is not possible or practicable to determine an employee's relevant daily pay under section 9(1); or
> (b) the employee's daily pay varies within the pay period when the holiday or leave falls.
>
> (2) The employee's average daily pay must be calculated in accordance with the following formula:
>
> $$\frac{a}{b}$$
>
> where—
>
> a is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made
>
> b is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.
>
> (3) To avoid doubt, if subsection (2) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

[26] ADP is used to calculate minimum entitlements for leave days taken such as public holidays, alternative days and bereavement leave. Whether this provision has been breached depends upon its application in respect of ss49, 50, 60 and 71 HA.

Sections 49, 50, 60 and 71 HA

[27] Section 49 and 60 HA do not prescribe payment exactly at the rate calculated in accordance with s9A. Both ss49 and 60 require the employer pay "not less than" ADP. This infers payment above ADP would still be compliant with this provision:

> **49 Payment if employee does not work on public holiday**
>
> If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay [or average daily pay] for that day.
>
> **60 Payment for alternative holiday**
> (1) An employer must pay an employee not less than the employee's relevant daily pay [or average daily pay] for the day which is taken as the alternative holiday.
> (2) Payment for an alternative holiday must be made—
> (a) in the pay that relates to the pay period in which the alternative holiday is taken; or
> (b) if the employee has not taken the alternative holiday before the date on which his or her employment ends,—
> (i) at the rate of the employee's relevant daily pay [or average daily pay] for his or her last day of employment; and
> (ii) in the pay that relates to the employee's final period of employment.

[28] Sections 50 and 71 HA do not contain the words "not less than". Section 50 requires the employer pay "the greater of relevant daily pay or [ADP]". Section 71 requires the employer pay an amount "that is equivalent to" relevant daily pay (RDP) or ADP:

> **50 Employer must pay employee at least time and a half for working on public holiday**
> (1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—
> (a) the portion of the employee's relevant daily pay or average daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
> (b) the portion of the employee's relevant daily pay that relates to the time actually worked on the day.
> (2) In subsection (1)(a), penal rates—
> (a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but
> (b) does not include, for example, any additional payment for a sixth or seventh day of work.
> (3) This section is subject to section 51.
>
> **71 Payment for sick leave and bereavement leave**

> (1) An employer must pay an employee an amount that is equivalent to the employee's relevant daily pay or average daily pay for each day of sick leave or bereavement leave taken by the employee that would otherwise be a working day for the employee.
> (2) Despite subsection (1), an employer is not required to pay an employee for any time for which the employee is paid weekly compensation under the Accident Compensation Act 2001 or former Act.
> (3) An employer must not require an employee to take as sick leave any time for which the employee is being paid—
> (a) first week compensation by the employer under section 97 of the Accident Compensation Act 2001 or former Act; or
> (b) weekly compensation for a work-related injury within the meaning of that Act or former Act.
> (4) However, if an employer pays the difference between the employee's first week compensation or weekly compensation and ordinary weekly pay, the employer may agree with the employee that he or she may deduct from the employee's current sick leave entitlement 1 day for every 5 whole days that the employer makes that payment.

[29] Taking a purposive approach, s3, 9A, 49 and 60 means payment at not less than ADP is required. Exact payment at the ADP calculated under s9A is not required. The purpose of the HA is to provide employees with minimum entitlements. This is still met by overpayment. Payment in excess of minimum entitlements for public holidays not worked and alternative days meets the purpose of the HA. There is no dispute the employees were able to take the leave and were not at work.

[30] Sections 50 and 71 can and should be read consistently with those sections. This is because s50 deals with the same public holiday leave as in ss49 and 60. Although s71 deals with bereavement leave, the words “equivalent to” do not confine payment to the rate of ADP only. ADP is the minimum statutory entitlement. “Equivalent to” is defined as “having the same or similar effect as”. Overpayment meets minimum requirements and would be equivalent to exact payment at ADP. The wording of these sections indicated payment at or in excess of the statutory minimum is required.

What happened here?

[31] There is little doubt the applicant’s method of calculating ADP is inconsistent with s9A HA. However s9A is only a method for calculating ADP. Failures to follow this calculation exactly cannot on its own result in failings to meet the applicable minimum statutory entitlement. As noted above, overpayment of statutory minimum entitlements will still meet the statutory criteria.

[32] There was contested evidence that the applicant’s calculation resulted in underpayments to employees for leave taken. No details of what were the alleged

underpayments are set out in the IN. Instead the IN focuses upon that fact "the employer has not applied the correct provisions of section 9A" and states under the nature and extent of the loss that:

> 5.1.1 Employees have not received their correct payments for ADP in respect of the employers calculations and payments for public holidays (worked and not worked) sick and bereavement leave and alternative holidays.

[33] There is no detail about what the exact loss alleged was from the failure to apply s9A within the IN. The IN does not show evidence that employees have been underpaid. It only states this has occurred as a result of the applicant not following the s9A methodology for calculating ADP. This cannot be an adequate reason on its own for believing there has been a failure to pay minimum leave entitlements. This is especially if the employee has been paid in excess of those minimum entitlements.

[34] The IN relies upon the content of the audit report to justify the alleged failings. A party is entitled to know the particulars of the alleged failings in the IN. The respondent alleges it has given sufficient particulars in its IN. I respectfully disagree.

[35] However this applicant cannot allege it was unaware of the particulars set out in the audit report because this was provided prior to the IN and the respondent relied upon those grounds in issuing the IN. In the circumstances I have also considered the content of the audit report in order to execute my function under s223E.

[36] I decline however to consider the additional examples the respondent has referred to in its additional evidence filed for hearing of failures. Those were not known to the parties at the time the IN was issued. They cannot be relied upon to justify an IN retrospectively. It would also be unfair for the Authority to embark on an investigation of new grounds in order to justify the contents of the IN before it. This is especially where the respondent is able to withdraw an IN at any time and reissue below:

> **223G Withdrawal of improvement notice**
>
> An improvement notice may be withdrawn at any time by a Labour Inspector, but the withdrawal of an improvement notice does not prevent another improvement notice being served in relation to the same matter.

[37] There was also a significant dispute between the parties regarding these new examples at hearing. What became clear was that these examples needed further investigation before any determination about any failings could be made.

[38] In terms of the sample employee referred to in the audit report under s9A I accept the applicant's evidence they were paid at or in excess of her statutory minimum entitlements. This is because there was evidence prior to the issue of the IN of Radius advising on 18 August that the audit reports sample employee CA's days of work had been incorrectly recorded. Using the ADP calculation of 52 weeks gross earnings divided by days worked (46,743.99/225) gives an ADP of $207.75 x 2 days leave results in $415.50. CA was paid $427.15.

[39] The evidence does not support any failing to pay employees' statutory minimum entitlements set out in sections 49, 50, 60 and 71 Holiday Act 2003 under this IN.

[40] As a consequence the applicant's failure to calculate ADP in accordance with s9A Holiday Act 2003 does not mean it is failing or has failed to meet a specified provision if the employee has been paid the same or in excess of their statutory minimum entitlement.

Section 16 HA

[41] Section 16 Holidays Act 2003 provides:

> **16 Entitlement to annual holidays**
>
> (1) After the end of each completed 12 months of continuous employment, an employee is entitled to not less than 4 weeks' paid annual holidays.
> (2) For the purposes of subsection (1), the 12 months of continuous employment—
> (a) includes any period during which the employee was—
> (i) on paid holidays or leave under this Act (for example, domestic violence leave); or
> (ii) on parental leave under the Parental Leave and Employment Protection Act 1987; or
> (iii)on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; or
> (iv) receiving weekly compensation under the Accident Compensation Act 2001 or former Act as well as, or instead of, payment from the employer; or
> (v) on unpaid sick leave or unpaid bereavement leave or unpaid domestic violence leave; or
> (vi) on unpaid leave for any other reason for a period of no more than 1 week; but
> (b) unless otherwise agreed, does not include any other unpaid leave, being leave other than that referred to in paragraph (a)(v) and (vi).
> (3) If, for the purposes of subsection (2)(b), an employer and employee agree that any period of unpaid leave of more than 1 week is to be included in the employee's 12 months of continuous employment, the divisor of 52 to be used for the purposes of calculating the

employee's average weekly earnings must be reduced by the number of whole or part weeks greater than 1 week that the employee was on the unpaid leave.
(4) An employee's entitlement to annual holidays remains in force until the employee has—
(a) taken all of the entitlement as paid holidays; or
(b) been paid out under section 28B for the entitlement in the entitlement year.

[42] Section 17 HA requires employers and employees use "what genuinely constitutes a working week" in calculating an employees' annual leave entitlement:

17 How employee's entitlement to annual holidays may be met

(1) An employer and employee may agree on how an employee's entitlement to 4 weeks' annual holidays is to be met based on what genuinely constitutes a working week for the employee.
(2) If an employer and employee cannot agree on how an employee's entitlement to 4 weeks' annual holidays is to be met, a Labour Inspector may determine the matter for them.
(3) In making a determination, the Labour Inspector may take into account any matters that the Labour Inspector thinks fit, including the matters specified in section 12(3).

[43] The respondent disputed how the applicant calculated CA's annual holiday entitlements by the number of hours worked in the preceding 52 weeks divided by a fixed 2080 hours then multiplied by 160 hours. The formula assumed CA worked 40 hours each week. The Audit report noted:

… while CA appears to have worked more than 70 hours in the relevant fortnightly periods, her entitlement to annual holidays at her anniversary dates at March 2015 and March 2016 were shown as 136.13 and 125.67 hours respectively. This incorrect formula diminished CA's entitlements from one year to another, despite no material differences in working patterns. This illustrate that hours worked are not inherently representative of what genuinely constitutes a working week for an employee when calculating an employee's annual holiday entitlement.

Has there been a failure to meet to comply with s16 HA?

[44] I cannot see how the notional figure of 40 hours per week results in a reduced annual leave entitlement for CA if she usually works 70 hours per fortnight. There is no evidence CA worked in excess of 80 hours per fortnight – the number of hours per fortnight the applicant based its pay upon using the notional 40 hour per week figure. She appears to have been given more hours of leave as a consequence of the applicant's definition of a working week.

[45] On 18 August prior to the issue of the IN Radius advised the reason for the differences in CA's March 2015 and 2016 annual leave entitlement arose due to CA taking two days leave in advance. This did not indicate any failings with the applicant calculations.

[46] The respondent's evidence refers to CA having regularly worked 9 days per fortnight in 2014 and 2015. Even if this was correct, I cannot see how this impacts upon the applicant's use of the notional 40 hour working week other than to reduce CA's entitlement from what the applicant has calculated at 40 hours to less. Presuming CA worked 8 hours per day, 4 ½ days per week or 9 days per fortnight results in 72 hours per fortnight this would result in a 36 hour working week. On the applicants notional 40 hour week she is paid for 8 hours more than she should have received. I cannot see how she has been disadvantaged by this.

[47] There is provision for the Labour Inspector to determine how an employee's entitlement to 4 weeks annual leave is to be met in s17(2). This would require the Labour Inspector take account of the below factors in s12(3) HA in determining the entitlement:

> (3) The factors are—
> (a) the employee's employment agreement:
> (b) the employee's work patterns:
> (c) any other relevant factors, including—
> (i) whether the employee works for the employer only when work is available:
> (ii) the employer's rosters or other similar systems:
> (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
> (d) whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave or domestic violence leave, the employee would have worked on the day concerned.

[48] Some of the factors listed were part of the reasoning used by the applicant to support its method of determining an employee's working week such as work patterns, rosters and reasonable expectations the employee would work that day. This indicates the applicant's approach to determining the working week was not without merit. It may have been compliant if a determination had been sought.

[49] I am not persuaded there was evidence of any failing to comply with s16 HA at the time the IN was issued. The evidence suggests CA has received payment for the same or more than her statutory entitlement.

Section 21, 24 and 28B HA

[50] The relevant sections are set out 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 the agreed portion of the annual holidays entitlement; and
(b) at a rate that is based on the greater of—
(i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or
(ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

24 Calculation of annual holiday pay if employment ends and entitlement to holiday has arisen

(1) Subsection (2) applies if—
(a) the employment of an employee comes to an end; and
(b) the employee is entitled to annual holidays; and
(c) the employee has not taken annual holidays or has taken only some of them.
(2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—
(a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
(b) the employee's average weekly earnings during the 12 months immediately before the end of the last pay period before the end of the employee's employment.

28B Payment for annual holidays paid out

(1) If an employer agrees to pay out a portion of the employee's annual holidays under section 28A(3)(c), the employer must pay the employee for that portion—
(a) in accordance with section 21(2); and
(b) as soon as practicable after the employer has agreed to the employee's request under that provision.
(2) If an employer has incorrectly paid out a portion of the employee's annual holidays where the employee did not make a request for the payment, the employee's entitlement to take the portion of annual holidays concerned remains in force as if the payment had not been made.

[51] The applicant has again calculated the "working week" using an average hourly rate multiplied by the numbers of hours the employee would have worked during the period of leave. This does not conform to the OWP or AWE set out in s5 and 8 HA below:

5 Interpretation
average weekly earnings means 1/52 of an employee's gross earnings

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
(b) includes—
(i) productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay:
(ii) payments for overtime if those payments are a regular part of the employee's pay:
(iii) the cash value of any board or lodgings provided by the employer to the employee; but
(c) excludes—
(i) productivity or incentive-based payments that are not a regular part of the employee's pay:
(ii) payments for overtime that are not a regular part of the employee's pay:
(iii) any one-off or exceptional payments:
(iv) any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay the [employee:
(v) any payment of any employer contribution to a superannuation scheme for the benefit of the employee.
(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 following 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 subsection (1)(c)(i) to (iii)
c is 4.
(3) However, an employment agreement may specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (2).

[52] The respondent calculated sample employee JE's OWP of $835.49 per week as the greater of AWE $457.28. The applicants paid JE $605. The respondent alleged this has resulted in an underpayment but does not specify the amount. There is insufficient detail of the calculation used to reach the figure of $835.49 in the audit report or the IN. I assume this is based upon the last 4 working weeks income divided by 4. This figure appears to include overtime that was not a regular part of JE's pay and should be therefore be excluded pursuant to s8(2). This is because he worked overtime shifts due to staff shortages over the Christmas and New Year period in the 4 weeks prior. It may also include time and a half for his work on public holidays that he did not usually work as well. The respondent's audit report and IN are not sufficiently detailed about how the OWP has been calculated.

[53] The applicant states he would have been rostered to work 6 days during his leave period as his working week. The respondents OWP calculation may include days JE would

not normally work due to his overtime during the Christmas and New Year period. JE's genuine working week would not have been that which he worked in the four weeks preceding his annual leave.

[54] This again raises the issue about what genuinely constitutes a "working week" for JE. Until this is determined, any alleged underpayment cannot be determined. I am uncertain from the respondent's evidence what the Labour Inspector believed constituted a working week. Information about these matters was sought on 18 August 2017 prior to the issue of the IN. No further information appears to have been provided.

[55] I am not persuaded JE has not received his statutory minimum entitlements. Until the respondent provides its calculations of the OWP exclusive of overtime and what it believes was JE's working week, there is insufficient evidence to show any failing by the applicant to meet the provisions of ss21, 24 and 28B HA.

[56] I am not persuaded the applicant has failed to meet the specified provisions of the Holidays Act 2003. I am not inclined to modify the Improvement Notice because there is insufficient proof of any failing.

[57] In the circumstances the improvement notice is rescinded.

[58] Costs are reserved. The parties have 14 days to agree costs or file any application seeking a determination.

TG Tetitaha
Member of the Employment Relations Authority