

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 322  
3135502

BETWEEN	RAIL AND MARITIME TRANSPORT UNION INCORPORATED Applicant
AND	KIWIRAIL LIMITED Respondent

Member of Authority: Claire English

Representatives: Geoff Davenport, counsel for the Applicant  
Penny Swarbrick, counsel for the Respondent

Investigation Meeting: 28 April 2022 at Wellington

Submissions received: 28 April 2022 from Applicant  
28 April 2022 from Respondent

Determination: 14 July 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The parties are in dispute about the way that the respondent KiwiRail Limited (KiwiRail) calculates and provides paid annual leave taken during employment for employees who work shifts of more than 8 hours.

[2] KiwiRail takes the position that a day of annual leave equates to 8 hours. This results in a situation where an employee who works an 8 hour shift takes 1 shift off as paid annual leave, the amount of 1 day is deducted from their annual leave balance. Where employees who work shifts longer than 8 hours take 1 shift off as paid annual leave, more than 1 day is deducted from their annual leave balance in a pro-rata fashion,

eg, for an employee who works a 12 hour shift and takes 1 shift off as paid annual leave, 1.5 days is deducted from their annual leave balance, and for an employee who works a 12 hour and 15 minute shift, and takes 1 shift off as paid annual leave, 1.53 days is deducted from their annual leave balance.

[3] The union claims that this is in breach of the Holidays Act 2003 as certain employees who work 12 hour and 12-hour-and-15-minute shifts receive less than 4 weeks paid annual leave as a result; and/or that these employees receive less than the amount of paid annual leave they are entitled to under the relevant terms of the collective agreement.

[4] The respondent states that their provision of paid annual leave taken during employment is consistent with the provisions of both the Holidays Act 2003 and the collective agreement.

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

[5] For the Authority's investigation written witness statements were lodged by both parties. Witness statements were provided for the applicant by Mr Darren Hawkins, Mr Patrick Ogle-Turner, Mr Graham Beazley, and Mr Wayne Butson. For the respondent, witness statements were provided by Ms Maryan Street and Ms Raewyn Hills-Davey. All witnesses answered questions under affirmation from me and the parties' representatives, excepting Mr Butson, who's statement was admitted by consent. The representatives also gave oral and written closing submissions.

[6] 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**

[7] The issues requiring investigation and determination were:

- (a) Is KiwiRail's use of a 1.5 divisor where an employee who works 12 hour shifts takes annual leave during employment in breach of the Holidays Act 2003?
- (b) Is KiwiRail's use of a 1.5 divisor in breach of the collective agreement between the parties?

- (c) Should either party contribute to the costs of representation of the other party.

## **Background**

[8] This is a dispute between the parties about the provision of paid annual leave taken during employment for employees who work 12 hour (or 12 hour and 15 minute) shifts. There is no dispute about the payment for such leave, which is calculated and paid in accordance with the provisions of section 21 of the Holidays Act.

[9] The calculations that I have performed in this determination are based on the rostered hours of work, and therefore, on the minimum amount of hours and days the employee witnesses would expect to work. They are not based on the actual hours of work, which I was advised may vary.

[10] The relevant collective agreement is the Multi Employer Collective Agreement dated 1 July 2021 – 30 June 2023, as between KiwiRail Holdings Limited, KiwiRail Limited and the Rail & Maritime Transport Union (the collective).

[11] The relevant provisions of the collective are at clause 26, which deals with leave, and reads as follows:

### **26.2 Annual Leave Entitlements**

26.2.1 At the end of each year of employment you will be entitled to four weeks' annual leave. Any leave entitlement above four weeks may be taken in cash with your manager's approval. You must take a day's annual leave for each day cashed up.

26.2.2 KiwiRail employees with 7 or more year's continuous service will qualify for a fifth week of annual leave.

### **26.3 Shift Workers**

If you are a shift worker you will be entitled to an additional week's leave; prorated if you are on shift work for less than a year. ...

### **26.6 How Leave is Paid**

26.6.1 Annual leave for a full pay fortnight is counted as 10 days' annual leave. Annual leave is otherwise deducted on the basis of one day for every 8 hours absence, rounded to the nearest half day. There is no leave deducted, or paid, for absence on rostered extra work periods or other overtime. Part time employees are entitled to four weeks annual leave per annum calculated on the basis of their normal hours worked per week.

26.6.2 Annual leave will be paid for in accordance with the Holidays Act 2003...

[12] In practice, this means that employees may be entitled to either 4, 5, or 6 weeks annual leave in any given year.

[13] Kiwirail advises employees of their leave entitlements via their fortnightly payslips. The payslips show “Leave Entitlement Balances”, made up as follows:

- a. “Annual Lve Days Due” is annual leave the employee is entitled to take under section 16 of the Holidays Act 2003;
- b. “Annual Lve Days Accruing” is explained on the payslip itself as “days you are earning towards your annual leave [but] are not yet owing to you”;
- c. “Sick Days Due” is paid sick leave available to be taken;
- d. “Alt Days Due” is alternative holidays the employee has earned that are available to be taken.
- e. “Long Service Lve Days Due” is additional long service leave if available to the employee.

[14] Each of these balances is expressed in days, to 2 decimal places, for example,

Annual Lve Days Due	33.41 Days
Annual Lve Days Accruing	18.36 Days

[15] Each of these balances may show at “0.00 Days”, if no entitlement is available as of the date of the relevant payslip.

[16] Each of these balances is updated every fortnight, to show a current balance.

[17] KiwiRail provides employees with 5 days paid leave per week of entitlement. This means that employees who are entitled to 4 week’s annual leave per year receive 20 Annual Leave Days each year, shown on their payslips. Employees who are entitled to receive 5 weeks annual leave per year receive 25 Annual Leave Days per year, and those who are entitled to receive 6 weeks annual leave per year receive 30 Annual Leave Days per year. Employees are made aware of their annual leave balance in days, as this

is shown on their fortnightly payslips, and can be easily tracked as the balances change to show leave accrued or taken throughout the year.

[18] When an employee takes annual leave, the amount taken will be deducted from the balance of Annual Leave Days Due. Employees who work shifts of longer than 8 hours are made aware that KiwiRail deducts more than 1 Day from their balance of “Annual Leave Days Due” by the rate of deductions that are made from that balance.

[19] I was not made aware of any formal policy setting this out, apart from the reference in clause 26.2.1 in the collective stating: “Annual leave is otherwise deducted on the basis of one day for every 8 hours absence, rounded to the nearest half day.” The employee witnesses for the applicant explained to me what calculations were made by reference to their rosters and payslips. The payroll personnel from Kiwirail confirmed that the employees had correctly understood the divisors being used.

[20] I note at this point that although clause 26.2.1 also states that annual leave deductions will be “rounded to the nearest half day”, the payroll figures and payslip details provided were calculated to 2 decimal places.

[21] The result of the way KiwiRail calculates annual leave taken during employment is easily understood. It costs employees who work shifts that are longer than 8 hours proportionally more Annual Leave Days Due to take the same amount of time off work. For example, Mr Hawkins gave evidence that he would work either 4 or 5 days in any given week, on 12 hour shifts. To take a week off work on paid annual leave, he would need to use either 6 Annual Leave Days Due, or 7.5 Annual Leave Days Due, depending on whether he would otherwise have worked 4 or 5 days in that week. In other words, it would cost more than 1 week’s leave entitlement for him to take one week off work as paid annual leave.

[22] To calculate this another way, Mr Hawkins’ (minimum) yearly annual leave entitlement of 20 Days<sup>1</sup> would enable him to take 13.33 shifts as paid annual leave. At 4 shifts worked per week, this amounts to only 3.33 weeks of paid annual leave. At 5 shifts worked per week, this is only 2.67 weeks of paid annual leave. Both these figures are less than the minimum entitlement of 4 weeks paid annual leave provided for at section 16 of the Holidays Act 2003.

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<sup>1</sup> Equating to 4 weeks, as KiwiRail provided 5 Days per week.

[23] These figures are similar for Mr Beazley, who works shifts that are either 12 hours long, or 12 hours and 15 minutes long. This means that to take a shift off as paid annual leave, Mr Beazley is required to use either 1.5 or 1.53 of his Annual Leave Days Due. Mr Beazley works 7 shifts per fortnight. Using a divisor of 1.5, if Mr Beazley takes annual leave in a week when he was rostered on for 3 shifts, he will need to use 4.5 of his Annual Leave Days Due to take a week off work as paid annual leave. Using a divisor of 1.53, he will need to use 4.59 of his Annual Leave Days Due to take a week off. If Mr Beazley takes annual leave in a week when he is rostered on for 4 shifts, then he will need to use either 6 Annual Leave Days Due, or 6.12 Annual Leave Days Due to take a week of paid annual leave. Whether Mr Beazley has to use more than 1 week's worth of annual leave entitlement to take a week off as paid annual leave depends on what week of his roster he takes leave in.

[24] Mr Beazley's roster repeats fortnightly, and he is in fact required to work 7 shifts per fortnight, which averages to 3.5 shifts per week. Even at the averaged rate of 3.5 shifts per week, and using the lower divisor of 1.5 that KiwiRail applies to Mr Beazley, Mr Beazley must use 5.25 Annual Leave Days Due to achieve an "average" week of paid annual leave, when he receives only 5 entitlement days per week.

[25] This means that depending on the combination of shift length and which week of his roster Mr Beazley took leave on, the amount of annual leave Mr Beazley could take could be as low as 3.27 weeks in a year or as high as 4.44 weeks in a year<sup>2</sup>.

[26] Mr Beazley is only provided with at least 4 weeks of paid annual leave per year, if he takes all his annual leave in the weeks when he is rostered on to work only 3 shifts. If Mr Beazley takes annual leave in weeks when he is rostered on to work 4 shifts, he will not receive the equivalent of "at least" 4 weeks of paid annual leave required by section 16 of the Holidays Act 2003. Even using the average of 3.5 shifts per week, which arguably more accurately reflects the fact that Mr Beazley is rostered on for 7 days each fortnight, he will not receive the equivalent of "at least" 4 weeks of paid annual leave required by section 16 of the Holidays Act 2003.

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<sup>2</sup> Figures as follows: a. 13.07 shifts at 3 shifts per week = 4.35 weeks per year; b. 13.07 shifts at 3.5 shifts per week = 3.73 weeks per year; c. 13.07 shifts at 4 shifts per week = 3.27 weeks per year; d. 13.33 shifts at 3 shifts per week = 4.44 weeks per year; e. 13.33 shifts at 3.5 shifts per week = 3.81 weeks per year; f. 13.33 shifts at 4 shifts per week = 3.33 weeks per year.

[27] Having assessed the amount of annual leave provided to employees working a 12 hours shift with reference to the requirement in section 16 of the Holidays Act 2003 that “an employee is entitled to not less than 4 weeks’ paid annual holidays”, there are two other matters to consider.

[28] First, does the reference to how annual leave is deducted as set out in the collective make the way KiwiRail provides annual leave compliant?

[29] Second, what is the impact of the reference in the collective to setting an amount of annual leave for “a full pay fortnight”?

[30] KiwiRail maintains that the way it provides paid annual leave during employment is consistent with the provisions of both the Holidays Act 2003, which provides annual leave in “weeks”, and also consistent with the provisions of the relevant collective.

[31] KiwiRail refers to clause 26.6.1 of the collective, which states that:

Annual leave is otherwise deducted on the basis of one day for every 8 hours absence, rounded to the nearest half day.

[32] This is the provision that KiwiRail relies on to explain and justify their decision to deduct annual leave taken during employment at rates greater than 1 day per shift, for employees who work shifts that are longer than 8 hours. However, while this clause explains the methodology used, it does not change the reality of what is occurring. When employees who work shifts of more than 8 hours take a day of paid annual leave, KiwiRail deducts more than a day’s worth of annual leave from the entitlement balance of these employees, on the grounds that KiwiRail deems a “day” of paid annual leave to be 8 hours long regardless of the circumstances.

[33] The provision of “at least 4 weeks” paid annual leave needs to be assessed with reference to what a week is for the employee concerned. The court has found:

Despite the fact the entitlement is expressed in weeks, it is clear the employee can take the leave in shorter periods. The number of working days off will turn on “what genuinely constitutes a working week for the employee”: s 17(1). A Monday to Friday worker will get 15 working days off, while a six day a week employee will end up getting 18 working days off. In order to work out what

would otherwise have been a working day for the employee, one looks at the standard working week or period for that employee<sup>3</sup>.

[34] Employees who work shifts that are longer than 8 hours need to have their annual leave provided in a way that accords with the reality of what a standard working week is for them.

[35] Clause 26.6.1 needs to be interpreted in light of clause 6(3) of the Holidays Act 2003 which provides that: “an employment agreement that excludes, restricts, or reduces an employee’s entitlements under this Act has no effect to the extent that it does so..”. To the extent that this clause operates to reduce the annual leave entitlements of employees who work shifts that are longer than 8 hours, it will be ineffective.

[36] I also need to note that there was some discussion at the investigation meeting about rostered days off. The rosters worked by the employee witnesses did not align with the traditional 7 day week. One of the outcomes of this is that the employees might have 3 or even 4 rostered days off in a row (although these would not necessarily align with Saturdays and Sundays). Having 3 or 4 rostered days of in a row may well be a function of the roster patterns, but this does not have any impact on the question of whether or not the employees were provided with adequate paid annual leave. Rostered days off (like weekends off for Monday to Friday workers) are not paid annual leave days, they are simply days when the employee is not contractually obliged to report for work.

[37] There was also some discussion about alternative holidays. An employee’s entitlement to alternative holidays is also set out in the “Leave Entitlement Balances” section of the payslips, as “Alt Days Due”. The applicant points out that when alternative holidays<sup>4</sup> are taken by employees, they are taken at the rate of 1 day for 1 shift away from work, eg that alternative holidays are provided on the basis that 1 alternative day equals 1 shift off work, regardless of the length of the shift. Only paid annual leave days taken during employment are subject to the nominal “8 hours = 1 day” calculation.

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<sup>3</sup> *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union*, [2007] 2 NZLR 356 (CA). Para [14].

<sup>4</sup> As well as sick leave and bereavement leave.

[38] The Court of Appeal quoted with approval the comments of the Employment Court on this matter, which stated:

Returning to the meaning of the sentence as a whole, a day's leave means freedom from any obligation to work for a whole day with no loss of salary. Such leave is to be accrued and accounted for in days. On each of the days specified in s 7A(2) of the Holidays Act 1981, one day's leave is to be added to the employee's account. When the employee uses that leave to take a holiday, one day's leave is to be deducted from the employee's account for each day of absence, regardless of the number of hours the employee might otherwise have worked<sup>5</sup>.

[39] Albeit these comments were made in the context of the provision of alternative holidays, they support the conclusion that I have reached, that a day's annual leave is to mean a day off work, however, long the relevant shift might be.

[40] Both parties also referred to statement in clause 26.6.1 of the collective that: "Annual leave for a full pay fortnight is counted as 10 days' annual leave."

[41] The applicant argues that this clause creates a contractual obligation on KiwiRail to provide 20 days annual leave each year (where a day off is the same as a shift off). KiwiRail does not agree with this interpretation, but said that this was a clause about how annual leave was to be calculated and paid, and that it actually provided annual leave in "weeks", as set out in clause 26.2.1 of the collective, headed "Annual Leave Entitlement".

[42] KiwiRail's evidence was that in about November 2020, following a Labour Inspectorate audit, KiwiRail made changes to its payroll system, so that if an employee took a fortnight of annual leave, a maximum of 10 days would be deducted from the employee's leave balance, regardless of their shift length. This "override" only occurs when an employee takes a fortnight of annual leave at one time, meaning that when employees take annual leave in periods of less than a fortnight, the 1.5 divisor still applies. The employee witnesses all gave evidence to the effect that it was rare for them to be able to take leave in blocks as long as a fortnight together.

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<sup>5</sup> *New Zealand Aluminium Smelters Limited v Weller* [2016] NZCA 19 (22 February 2016), quoted at para [14].

[43] The difficulty with KiwiRail's submission that clause 26.6.1 is only about calculating payment, and that it has no application to the amount of annual leave that an employee is entitled to under the collective, is that this is not how the clause has been implemented in practice. KiwiRail provides its employees with annual leave calculated in the form of "days", as advised to the employees by way of their payslips. The amount of "days" set out on the payslips equates to 5 days per week of entitlement. This is entirely consistent with clause 26.6.1 of the collective stating that a fortnight of annual leave is the same as "10 days annual leave". In addition, KiwiRail implement the provisions of clause 26.6.1 so as to ensure that where an employee does take a fortnight of annual leave, it only "costs" the employee 10 days of their "Annual Leave Days Due", regardless of the length of that employee's shifts. Most tellingly, when it comes to calculating payment for annual leave, KiwiRail's evidence is that annual leave is actually calculated in accordance with section 21(2)(b) of the Holidays Act 2003.

[44] The court has previously found that employees who work 12 hour shifts are entitled to receive annual leave entitlements on the basis of 20 days per the statutory minimum entitlement of 4 weeks<sup>6</sup>.

[45] The way that the parties have implemented this clause leads to the conclusion that the agreement between the parties is what it appears to be on its face, that is, that employees are to receive an entitlement to paid annual leave at the rate of 20 days in respect of the minimum statutory entitlement of 4 weeks. These days are to be provided with reference to a normal working day (or shift period) for the employee concerned.

[46] Finally, I note that I was provided with excerpts from previous historical collective agreements between the parties regarding annual leave entitlements. These prior documents show that there was previously a three-step definition of annual leave entitlements, where the hours of work were set at 8 hours per day, annual leave was provided in working days, and annual leave was paid at the rate of 8 hours to the day. At a certain point, the parties agreed to allow for rostered shift work that was not tied to an 8 hour day, and to provide annual leave entitlements in weeks rather than working days. The requirement for calculating payment changed also, first referring to payment for a normal days work on the basis of one-tenth of an average fortnight's wages, before finally at a late stage, changing to indicate that payment would be calculated in

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<sup>6</sup> *The Chief of the New Zealand Defence Force v The New Zealand Public Service Association Incorporated*, [2011] NZEmpC 39.

accordance with the 1981 Holidays Act, and in due course, the 2003 Holidays Act. These prior provisions suggest to me that the intention was to provide both leave, and payment for that leave, on the basis of what was a normal working day for an employee, while still allowing for the implementation of shifts of varying lengths.

### **Costs**

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

[48] If they are not able to do so and an Authority determination on costs is needed [party name] 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 [other party name] would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[49] 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>7</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>7</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].