

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2024] NZERA 423  
3204839

BETWEEN

CALEB DAVIES  
Applicant

AND

KELVIN NEWPORT &  
LORRAINE NEWPORT  
Respondents

Member of Authority: Shane Kinley

Representatives: Philip Ross and Chris Wong, counsel for the Applicant  
Respondents in person

Investigation Meeting: 26 March 2024 in Palmerston North

Submissions and further information: Up to 20 April 2024 for the Applicant

Determination: 12 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Caleb Davies was employed by Kelvin and Lorraine Newport from April 2019 until July 2022. Mr Davies was not provided with an employment agreement and claimed for unpaid holiday pay, unpaid time and a half entitlements and payment for alternative holidays for working on public holidays. He also seeks a penalty for the non-provision of an employment agreement.

[2] The Newports conceded Mr Davies had not been provided with an employment agreement and confirmed they had paid him annual holiday pay as part of his regular pay but did not accept Mr Davies had worked on all of the public holidays that he claimed. They also claimed he had taken some annual holidays.

## **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged for Mr Davies, and in a combined format for the Newports. Mr Davies and the Newports answered questions, under oath, from me and from counsel for Mr Davies.

[4] The Newports represented themselves at the investigation meeting and provided their evidence on a combined basis. They also both asked questions of Mr Davies. Mr Wong handed up written submissions at the conclusion of the investigation meeting, with supplementary information provided on behalf of and directly from Mr Davies following the investigation meeting.

[5] This matter involved both a change in representation for Mr Davies and initially the Newports were also represented. Following the change of Mr Davies' representative and an initial case management conference in September 2023, Mr Davies' claims were refined. This determination reflects the claims from the amended Statement of problem lodged by Mr Davies' current representatives on 10 October 2023.

[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) Whether Mr Davies is owed unpaid annual holiday pay or public holiday pay by the Newports?
- (b) Should penalties be imposed for the Newports failure to provide Mr Davies with an employment agreement?
- (c) Should either party contribute to the costs of representation of the other party.

[8] At a second case management conference on 13 November 2023 the Newports acknowledged they did not have a written employment agreement with Mr Davies. I drew the Newports' attention to the provisions of s 28 of the Holidays Act 2003 (HA2003) for the requirements for when annual holiday pay may be paid as part of an employee's pay. I also drew their attention to ss 130 and 132 of the Act and ss 81 and 83 of the HA2003 in relation to record keeping requirements and the potential

consequences of a failure to keep or produce records. I recommended the Newports take advice on these points, which I return to at paragraphs [22] to [42] below.

[9] As a preliminary point, this determination identifies the Newports as the Respondents. Mr Davies said he was initially employed by the Newports trading as Newport Cleaning Services, with bank records provided by the Newports showing payments to Mr Davies from a bank account in the name of “L & K Newport Partnership”, with one of those bank records also showing the account name as “L & K Newport Partnership t/a Newport Cleaning Services”. Mr Davies provided extracts from myIR records showing payments being received from “K N & L Newport”.

[10] For the avoidance of doubt, I find that Mr Davies was employed jointly by Kelvin Newport and Lorraine Newport, referred to in this determination as the Newports.

**Is Mr Davies owed unpaid annual holiday pay or public holiday pay by the Newports?**

*What was claimed by Mr Davies?*

[11] Mr Davies said he was employed by the Newports from 17 April 2019 until 7 July 2022. He said he worked from Saturday to Thursday for between 30 and 50 hours per week as a cleaner at supermarkets located in the Manawatū-Whanganui, Kāpiti Coast and Wellington regions, with his role supporting Mr Newport, performing cleaning and polishing, and supervising other cleaners. Mr Davies described his working arrangements as being “on salary” and “on-call” where if he got a phone call he would need to “jump up and go to work”. He said he had only about two-thirds of Fridays off work although if work was quiet, he would try to take a second day off, however, he would also cover if other staff were sick. When I asked whether Mr Davies had any records of the days or hours he worked, he said he did not as it was “not my duty to do that”.

[12] Mr Davies initially claimed to be due annual holiday pay of 8% of his total gross earnings over the period of employment totalling \$14,874.54 on the basis that he did not take any annual holidays. In response to questions from me, Mr Davies said this amount was calculated with assistance from his representative based on total earnings shown on his IRD records. He also said he only became aware the payslips the Newports provided him included hand-written annotations for holiday pay after his employment ended and he had not agreed to receive holiday pay in his regular pay. Mr

Davies said he was paid regular amounts, with a couple of pay rises, but did not know what the references on his payslips to taxable allowances related to.

[13] Mr Davies acknowledged asking for six days leave to go to Rotorua, but said he only took three days leave. In response to the Newports' evidence (discussed at paragraphs [18] to [20] below) he said a number of the 45 days which they claimed he had taken off were:

at best substitution for days which I was supposed to have off as weekends, not annual leave. I observe that over 3 and a half years, I worked around 60 Fridays which were supposed to be free from work at all.

[14] Mr Davies claimed to be owed for 26 worked public holidays over the time he was employed by the Newports, saying he worked on all public holidays except for Good Fridays, Easter Mondays, Christmas Day 2019 and other public holidays that fell on Fridays (being Christmas Day 2020, New Years Day 2021 and Matariki Day in 2022). As he said he was paid a salary, he claimed to have not received time and a half for working on those public holidays. He also said he did not get paid for alternative holidays. He initially claimed \$3,611.50 for unpaid public holidays.

[15] Following the investigation meeting Mr Davies provided a letter setting out his updated calculations of what he considered he was owed. His letter calculated unpaid annual holidays at \$15,175.07, based on a claim for 8% of total earnings from the Newports of \$189,688.37.<sup>1</sup> For 26 alternative holidays Mr Davies claimed \$5,050.50 and for extra half-time not paid for work on 26 public holidays Mr Davies claimed \$2,525.25.

[16] Mr Davies also claimed an inflation adjustment. As this was raised for the first time in Mr Davies' letter, I have not considered it further.

#### *The Newports' evidence*

[17] The Newports described having started their cleaning business and then expanding until they had contracts to clean at up to 15 supermarkets. As their business expanded they had employed additional workers, including Mr Davies. While paying Mr Davies for a regular 40 hours per week, the Newports' witness statement said:

Most of the time unless polishing he only was doing a very minimum hours pw. Some weeks very minimum hours. [Mr Newport and Mr Davies] spoke

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<sup>1</sup> This figure appeared to be incorrect as total payments from the Newports were \$186,247.34, with unspecified payments from other sources.

daily as to what or who would be working that day as in our cleaning business there was many moving parts. Hence very hard to give a contract.

[18] In relation to leave, the Newports' witness statement said:<sup>2</sup>

[Mr Davies] nearly always got off any time requested (holidays) A lot of the time this was done verbally but we have evidence of recorded days asking for 45 days off. Plus another 10 by text . (on top of his normal day off) [sic]

[19] Mrs Newport provided a hand-written record of days which she said were Mr Davies's annual leave from December 2021 through June 2022, claiming he had 45 days off. She said she only started recording leave when "he started to get nasty", referring to what appeared to have been a break down in the relationship between Mr Davies and the Newports. The Newports also provided copies of text messages which they said supported their records of annual leave being taken, saying at the investigation meeting these reflected the verbal and handshake agreements that Mr Davies and Mr Newport would reach over who worked at which supermarket, on which days.

[20] The Newports included in their claimed period of annual leave six days when Mr Davies went to Rotorua, which they said was in June 2021. They claimed that if he had come back to his home from Rotorua early, he had not worked. The Newports also said Mr Davies would take time off with his son, for karate and sometimes for school holidays.

[21] The Newports claimed Mr Davies never worked on a public holiday apart from two days at Christmas 2021 as "he only filled in if staff were away & all staff wanted to work then so they could get their time & half & day in lieu [sic]". The Newports said in their witness statement and again at the investigation meeting that Mr Davies needed to say which of the supermarkets he worked at and for how many hours. As he was unable to, they claimed he was not entitled to pay for the days, as they said they had records of other workers having worked at all of the stores they were responsible for.

### *Relevant law*

[22] Section 28 of the HA2003 sets out the only two situations when annual holiday pay is permitted to be paid with an employee's pay and three additional requirements associated with doing so.

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<sup>2</sup> At the investigation meeting the Newports clarified this statement to say nine days leave had been requested by text rather than ten days leave.

- [23] The two situations are where the employee:<sup>3</sup>
- a. is employed on a fixed — term agreement to work for less than 12 months; or
  - b. works on such an intermittent or irregular basis that it is impracticable for the employer to provide four weeks' annual holidays.

- [24] In addition, the following requirements apply:<sup>4</sup>
- a. the employee must agree to be paid in this way in their employment agreement; and
  - b. the annual holiday pay must be paid as an identifiable component of the employee's pay; and
  - c. the annual holiday pay must be paid at a rate not less than 8% of the employee's gross earnings.

[25] Where an employer has incorrectly paid holiday pay with an employee's pay, the employee becomes entitled to annual holidays as per s 16 of the Holidays Act.<sup>5</sup>

[26] Section 50 of the HA2003 requires employers pay employees at least time and a half for working on public holiday, while s 56 of the HA2003 requires an alternative holiday also be provided if the public holiday would otherwise be a working day for an employee. Section 60 of the HA2003 specifies what payment is required including in situations where alternative holidays have not been taken when employment ends.

[27] Record keeping requirements are set out in s 130 of the Act, and ss 81 and 82 of the HA2003. The full requirements of those sections detail specific information that must be kept in a written form (subs 130(1) of the Act and subs 81(2) of the HA2003). Records must be kept in a written form or able to be accessed and converted to a written form (subs 130(1A) of the Act and subs 81(3) of the HA2003). When requested an employer must provide an employee or an authorised person with records for the preceding six years, for any periods when records were required to be kept (subss 130(2) and 229(1)(c) of the Act, and subss 81(4) and 82(1) of the HA2003).

[28] The importance of compliance with record keeping requirements has been highlighted in Court judgments, including *Labour Inspector of the Ministry of Business*,

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<sup>3</sup> HA2003, subs 28(1)(a).

<sup>4</sup> HA2003, subss 28(1)(b) to (d).

<sup>5</sup> HA2003, subs 28(4).

*Innovation and Employment v Samra Holdings Ltd (t/a Te Puna Liquor Centre)* which said:<sup>6</sup>

The records required to be kept under s 130 of the Employment Relations Act and s 81 of the Holidays Act are the foundation documents on which wage and leave entitlements are based. Correct and up-to-date records inform employees of what their entitlements are, and they act as a reminder to the employer of its obligations to its employees and ongoing liabilities. They also provide the basis ... to ensure minimum entitlements are being provided to workers.

[29] Section 132 of the Act and s 83 of the HA2003 shift the burden of proof to the employer to show, on the balance of probabilities, the employee's claims as to hours, days and time worked, and holiday entitlements, are incorrect. Failure to keep records does not by itself provide proof of claims as to time worked. The burden of proving allegations made in a claim invoking s 132 of the Act or s 83 of the HA2003 is shifted but the need for them to be proved is not removed.

[30] If the employer fails to discharge the burden shifted to it, the Authority is not compelled to accept all the claims made by an employee but 'may' accept them.<sup>7</sup> Any information or evidence contradicting the employee's claims must be considered.

#### *Analysis*

[31] The Newports cannot meet the requirements of either of the two situations in paragraph [23] above to pay annual holiday pay with Mr Davies' regular pay given the duration and arrangements for Mr Davies' employment. Due to the Newports' concession they did not have an employment agreement in writing with Mr Davies, they also cannot meet the first additional requirement in paragraph [24] above. I am also not convinced the handwritten payslips provided by the Newports meet the other requirements in paragraph [24] above for annual holiday pay to be an identifiable component of Mr Davies' pay or that payments was always at least 8% of his gross earnings.

[32] Mr Davies remains entitled to paid annual holidays and not having taken them, he should have been paid them out when his employment finished.<sup>8</sup> The Newports accordingly owe Mr Davies holiday pay for the entire period of his employment, less any paid holidays he took.

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<sup>6</sup> *Labour Inspector of the Ministry of Business, Innovation and Employment v Samra Holdings Ltd (t/a Te Puna Liquor Centre)* [2022] NZEmpC 234 at [114].

<sup>7</sup> Subsection 132(2) of the Act and subs 83(4) of the HA2003.

<sup>8</sup> HA 2003, ss 24 and 25.

[33] While Mr Davies claimed for holiday pay on the basis of 8% of his total earnings, this is not the correct approach, as where an employee such as Mr Davies has worked for longer than a year, holiday pay is calculated on four weeks' pay for each year completed plus 8% of wages for the remaining part year.<sup>9</sup> The four week entitlements must be paid at the greater of the ordinary weekly pay at the end of employment or the average rate during the 12 months immediately before the end of the last pay period before the end of employment.<sup>10</sup> In Mr Davies' case, as he was paid a constant weekly amount, but had received a pay rise in the last 12 months of his employment, the greater figure is his ordinary weekly pay at the end of employment.

[34] As noted at paragraph [8] above I drew the Newports attention to the potential consequences of not providing wages and time records, and holiday and leave records prior to the investigation meeting. As described at paragraph [19] above the Newports provided handwritten notes of what they claimed were Mr Davies' annual holidays, supported by text messages. There were limited details contained in those records, which I do not consider fully comply with the requirements for wages and time records, and holiday and leave records.

### *Findings*

[35] I find the Newports failed to keep wages and time records as required under s 130 of the Act and holiday and leave records as required under s 81 of the HA2003, and those failures prejudiced Mr Davies' ability to bring accurate claims in these proceedings. As a consequence, I accept as proved the claims made by Mr Davies' about the hours, days and times he worked and the holidays or leave he took under subs 132(2) of the Act and subs 83(4) of the HA2003, except as discussed at paragraph [37] below.

[36] While the Newports said they had paid Mr Davies for annual holidays twice and were now facing a claim to be paid a third time, the simple fact is they did not comply with s 28 of the HA2003 and did not keep or provide adequate wages and time records, and holiday and leave records. The consequences of this rest with them.

[37] I accept however that it is more likely than not Mr Davies took some annual holidays, including for the trip he acknowledged taking to Rotorua. Many of the other

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<sup>9</sup> Ibid.

<sup>10</sup> HA2003, s 24(2).

days the Newports claimed he took as annual holidays were Fridays, which would not have been working days based on his evidence that he generally worked Saturdays to Thursdays. I am satisfied however, on the balance of probabilities and considering the handwritten records, text messages and evidence provided at the investigation meeting by Mr Davies and the Newport, that Mr Davies more likely than not took at least two weeks annual holidays, including the trip to Rotorua. I am not satisfied on the balance of probabilities, given the limitations of the Newports' recordkeeping, that he took more than that amount of annual holidays. I consider it appropriate to reduce the order for annual holiday pay due to Mr Davies by this amount.

[38] Mr Davies worked for the Newports for two complete years and a part year. I have calculated his holiday pay entitlement as follows:

- a. Four weeks a year for two years, totalling eight weeks, reduced by two weeks for the reasons outlined in paragraph [37] above. At the ordinary weekly pay of \$1,165.50 at the end of Mr Davies' employment, this amounts to \$6,993.00 gross; and
- b. 8% of \$14,913.64 gross earnings for the part year to July 2022, totalling \$1,193.09.

[39] This totals \$8,186.09 gross.

[40] In relation to Mr Davies claims for time and a half for work on public holidays and alternative holidays, the Newports said they would provide records to support their claim other workers performed all the work on public holidays and Mr Davies did not have to work. The Newports have not done so and were aware of the obligation to provide time and a half and pay for alternative holidays, so the consequences of their failure to provide those records rests with them.

[41] As no evidence was presented to disprove Mr Davies claim, I accept as proved the number of alternative holidays he claimed are due to be paid. I also accept his calculation of a daily rate for those alternative holidays of \$194.25 based on his average weekly pay at the end of his employment of \$1,165.50, divided by six to reflect the number of days he said he worked each week. Given Mr Davies claimed for 26 alternative holidays, he is owed \$5,050.50 gross for these.

[42] I do not however accept Mr Davies' calculations for unpaid time and a half, as he based this on the same daily rate. His own IRD records show that his pay rate

increased twice during his employment. Each public holiday needs to have the extra half-time payment calculated based on Mr Davies' pay rate at the time of the public holiday. Using his IRD records and based on the public holidays he claimed to have worked, I calculate he is due an extra half-time for ten public holidays at \$88.03<sup>11</sup>, eight public holidays at \$93.79<sup>12</sup> and eight public holidays at \$97.13.<sup>13</sup> He is owed a total of \$2,407.67 gross for the extra half-time for those 26 public holidays.

[43] The combined totals due to Mr Davies, as calculated at paragraphs [38] to [42] above, is \$15,644.26 gross. I order the Newports pay Mr Davies this amount within 28 days of the date of this determination.

**Should penalties be imposed for the Newports failure to provide Mr Davies with an employment agreement?**

[44] Mr Davies' amended statement of problem sought a penalty of \$1,000 for the Newports acknowledged failure to provide him with an employment agreement as required under s 63A of the Act. Submissions for Mr Davies also referred to a penalty under s 130 of the Act, however, I decline to consider a penalty under s 130 of the Act further given it was not raised prior to submissions.

[45] As individuals the Newports are potentially liable to a penalty under subs 63A(3) and ss 133 and 135 of the Act.

[46] The Newports' former representative responded to the claim for a penalty asserting that this was barred by subs 135(5) of the Act as it had not been raised within 12 months of the date that the cause of action became known to Mr Davies or should have become known to him.

[47] The Newports and Mr Davies both attributed the failure to have an employment agreement to each other. Ultimately the responsibility for providing an employment agreement rests with the Newports under s 63A of the Act. This failure, combined with their failure to keep or provide adequate wages and time records, and holiday and leave records, has certainly contributed to the issues in this case.

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<sup>11</sup> For public holidays between April 2019 and August 2020.

<sup>12</sup> For public holidays between September 2020 and November 2021.

<sup>13</sup> For public holidays between December 2021 and July 2022.

[48] In the circumstances, however, including the early notice of a response to the claim for a penalty on behalf of the Newports that it may be time-barred, I decline to impose a penalty.

### **Orders**

[49] For the above reasons I order Kelvin Newport and Lorraine Newport to pay Caleb Davies \$15,644.26 gross within 28 days of the date of this determination, being:

- a. \$8,186.09 for unpaid annual holiday pay under ss 24 and 25 of the Holidays Act 2003 (HA2003);
- b. \$2,407.67 for unpaid time and a half pay for worked public holidays under s 50 of the HA2003; and
- c. \$5,050.50 for unpaid alternatives holidays under s 60 of the HA2003.

### **Costs**

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

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

[52] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors require an adjustment upwards or downwards.<sup>14</sup>

Shane Kinley  
Member of the Employment Relations Authority

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<sup>14</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)