

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 86  
5563601

BETWEEN

STEPHEN McPHERSON  
Applicant

A N D

CARTER HOLT HARVEY  
LIMITED  
First Respondent

CARTER HOLT HARVEY PULP  
AND PAPER LIMITED [now OJI  
FIBRE SOLUTIONS (NEW  
ZEALAND) LIMITED]  
Second Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Lou Yukich, Advocate for Applicant  
Rob Towner, Counsel for First Respondent  
David France, Counsel for Second Respondent

Investigation Meeting: On the papers

Submissions Received: 2 February 2016 from Applicant  
26 February 2016 from First and Second Respondents

Date of Determination: 16 March 2016

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**DETERMINATION (No 3) OF THE EMPLOYMENT RELATIONS  
AUTHORITY**

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- A. The first respondent, Carter Holt Harvey Limited (Carter Holt), correctly calculated the applicant's, Mr McPherson's, annual leave entitlement when it paid his annual leave to him upon termination of his employment by it on 30 November 2014.**
- B. Carter Holt correctly calculated Mr McPherson's entitlement when it paid alternative holidays to him upon termination of his employment by it on 30 November 2014.**

**C. The second respondent, Carter Holt Harvey Pulp & Paper Limited [now Oji Fibre Solutions (New Zealand) Limited] (Carter Holt Pulp & Paper) has correctly applied the Holidays Act 2003 in respect of Mr McPherson's annual leave during his employment by it.**

**D. Costs are reserved.**

### **Interpretation dispute**

[1] This matter is a dispute between Mr McPherson and Carter Holt and Carter Holt Pulp & Paper. The dispute relates to the interpretation of the Holidays Act 2003 (Holidays Act) and its application to Mr McPherson's leave entitlements, firstly when his employment by Carter Holt ended, and secondly during his current employment by Carter Holt Pulp & Paper.

[2] The relevant background is set out in the Authority's first determination between these parties and related to this matter<sup>1</sup>.

### **Mr McPherson's claims**

**Did Carter Holt correctly calculate Mr McPherson's annual leave and alternative holidays at the date his employment by it ended?**

[3] Mr McPherson claims the outstanding annual holidays and outstanding alternative holidays paid out to him by Carter Holt when his employment by it ended were incorrectly calculated. Mr McPherson disputes amounts paid to him and seeks arrears of wages together with interest and costs.

**Is Mr McPherson's current employer, Carter Holt Pulp & Paper, correctly calculating his annual leave entitlement?**

[4] Mr McPherson claims that from 1 December 2014 when he was employed by his current employer, Carter Holt Pulp & Paper, his annual leave has not been correctly calculated. Mr McPherson seeks payment of arrears of wages he says he is owed.

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<sup>1</sup> NZERA [2015] Auckland 227, paras. [8] to [18]

**Is Mr McPherson entitled to remedies against Carter Holt and Carter Holt Pulp & Paper?**

[5] Mr McPherson says both Carter Holt and Carter Holt Pulp & Paper have breached his employment agreement and the Holidays Act and seeks orders accordingly from the Authority.

**Carter Holt and Carter Holt Pulp & Paper deny Mr McPherson's claims.**

[6] Carter Holt denies Mr McPherson's claims and says Mr McPherson's annual leave and alternative holiday entitlements were correctly calculated when his employment ended on 30 November 2014.

[7] Carter Holt Pulp & Paper denies Mr McPherson claim against it and says it has correctly calculated Mr McPherson's annual leave during his current employment by it.

**Investigation meeting – on the papers**

[8] The parties agreed that the Authority could investigate and determine the issues concerning their dispute on the papers.

[9] In order for the Authority to deal with the matter as expeditiously as possible, Mr McPherson filed an affidavit and Mr Ross Pilkington and Mr Alan Renowden both filed affidavits on behalf of both Carter Holt and Carter Holt Pulp & Paper.

[10] Mr Yukich for Mr McPherson and Mr Towner and Mr France for Carter Holt and Carter Holt Pulp & Paper respectively filed comprehensive submissions.

[11] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence. The determination states findings and relevant facts and legal issues and makes conclusions in order to deliver speedy, informal and practical justice.

**Mr McPherson's initial employment by Carter Holt from 1979- 2003**

[12] Mr McPherson was employed by Carter Holt as a Second Assistant Reelerman in the Paper Mill at Kinleith from 8 October 1979 until his employment was terminated for redundancy on 17 January 2003.

**Mr McPherson's reemployment by Carter Holt from 2005 - 2014**

[13] Mr McPherson was re-employed by Carter Holt on 14 February 2005 as a Dry-end Operator in the Pulp Dryer area at Kinleith Mill. Mr McPherson's employment ended on 30 November 2014.

**Mr McPherson's employment by Carter Holt Pulp & Paper from 2014 - current**

[14] From 1 December 2014, Mr McPherson agreed to become an employee of Carter Holt Pulp & Paper. The background to the transfer of Mr McPherson's employment from Carter Holt to Carter Holt Pulp & Paper is set out in the Authority's first determination between these parties<sup>2</sup>.

**Determination of claims against Carter Holt****Mr McPherson's terms of employment**

[15] At the time of the termination of Mr McPherson's employment by Carter Holt on 30 November 2014, his employment was under the collective agreement.

[16] From 1 December 2014, Mr McPherson was employed and continues to be employed by Carter Holt Pulp & Paper. Following his resignation from the Engineering Printing & Manufacturing Union (EPMU) on 17 May 2015<sup>3</sup>, Mr McPherson's employment by Carter Holt Pulp & Paper was and is under an individual employment agreement based on the terms and conditions of the collective agreement.

**Payment by Carter Holt for annual leave and alternative holidays on termination of employment**

[17] The Kinleith Mill operates 365 days a year. As a shift worker in the pulp dryer area of the Mill, Mr McPherson worked a four on four off, 12 hour shift pattern. Mr McPherson's employment with Carter Holt ended on 30 November 2014. Mr McPherson elected to have his annual leave and alternative holiday entitlements paid out when his employment ended.

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<sup>2</sup> Ibid

<sup>3</sup> Incorrectly dated as 2014 in the Authority's first determination, footnote 1 above at para.[16]

**Mr McPherson disputes the cashed up amount**

[18] Carter Holt calculated and paid out his entitlements. Mr McPherson disputes the amount he was paid. At paragraph 19 of his affidavit, Mr McPherson says under s.16 of the Holidays Act his minimum entitlement was to 4 weeks annual leave a year and therefore:

*1 week of annual leave is 4 rostered days which are 12 hour shifts  
hence 4 weeks annual leave is 16x12 hour rostered days.*

[19] Mr Yukich on behalf of Mr McPherson submits that upon termination of McPherson's employment he received 22.85 calendar weeks salary as the assessed cash value from Carter Holt, when he should have received 28 calendar weeks salary being the amount he would have received if he had actually taken the leave.

**Carter Holt says the cashed up amount was correct**

[20] Carter Holt disagrees with the submission. It says the collective agreement did not define the number of hours a week that a week's annual leave equated to and did not define how annual holiday pay was to be calculated. Carter Holt says the payment to Mr McPherson was correct and has been approached in this manner since 2003 without objection by Mr McPherson.

**Payment of salary to shift workers by Carter Holt**

[21] All employees received an annual salary. Employees, including Mr McPherson were not paid by actual shifts or hours worked. Depending on the shift and roster pattern, sometimes employees on a four on four off shift roster worked 4 days a week and sometimes 3 days a week. Their pay did not fluctuate based on whether they worked 3 shifts or 4 shifts over a week.

[22] Salary was paid to ensure employees received a consistent income and could make financial plans accordingly. If an employee took one week's leave, he received 1/52 of his annual salary as pay. The employee's leave balance was then reduced by the days he would have worked on the roster that week – sometimes that would have been 3 days and sometimes 4 days.

## **Collective Agreement**

[23] Under clause 16.1 of the Collective Agreement each employee is entitled to four weeks of annual leave in accordance with the Holidays Act on completion of 12 months of service. For an employee working 12 hour shifts, a week's leave is defined as four rostered days. This is also the definition of a "leave week" in clause 11 of the Collective Agreement. There is no methodology in the Collective Agreement for calculating holiday pay.

## **Holidays Act 2003**

[24] Section 24 states:

*An employer must pay the employee for the portion of their annual holidays entitlement not taken at a rate that is based on the greater of*

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- (a) *The employee's ordinary weekly pay as at the date of the end of the employee's employment or;*
- (b)
- (c) *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.*

[25] Ordinary weekly pay is defined by s.8(1)(a) of the Holidays Act as meaning:

*The amount of pay that the employee receives under his or her employment agreement for an ordinary working week.*

[26] Section 8(3) of the Holidays Act allows parties to specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay. There is no such formula in the Collective Agreement.

## **Carter Holt and Carter Holt Pulp & Paper's methodology for calculating holiday pay**

[27] Mr McPherson worked an average of 42 hours per week. Mr Ross Pilkington, HR Manager and who up until 30 November 2014 was employed by Carter Holt until his employment transferred by agreement to Carter Holt Pulp & Paper, gives details in his affidavit about how the average of 42 hours a week work has been arrived at.

[28] Mr Alan Renowden is the remuneration manager for Carter Holt Pulp & Paper. Mr Renowden was also employed by Carter Holt until he agreed to transfer his employment following termination by it on 30 November 2014.

[29] Mr Renowden says the value of one week of leave is calculated at 1/52 of the employee's salary. Holiday pay attributed to the 4 weeks' annual leave entitlement was calculated at 4 times 1/52<sup>nd</sup> of annual salary.

[30] This approach was accepted by Member Campbell in her determination<sup>4</sup>. The applicant in that matter was The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union, of which Mr McPherson is a member. Carter Holt and Carter Holt Pulp & Paper were the respondents.

[31] Member Campbell considered that the method used by Carter Holt for accruing leave entitlements and calculating holiday pay entitlements owing as at 30 November 2014 did comply with the Holidays Act and with that collective agreement.

[32] While the collective agreement in that matter differed to the one in this matter, this does not affect the approach to be taken to the calculation of holiday pay entitlements. Both matters involve salarisation and irregular shift patterns.

[33] The same analysis as above applies to the alternative holidays claimed by Mr McPherson to be owing as at the date of termination on 30 November 2014.

[34] Accordingly, the Authority determines that Carter Holt correctly calculated Mr McPherson's annual leave entitlement when it paid his annual leave to him upon termination of his employment on 30 November 2014.

[35] Carter Holt correctly calculated Mr McPherson's alternative holidays entitlement when it paid out his alternative holidays upon termination of his employment by it on 30 November 2014.

### **Determination of claims against Carter Holt Pulp & Paper**

#### **Holiday pay to be calculated in reliance on earnings in previous 12 months**

[36] Mr McPherson's evidence is that since starting at Carter Holt Pulp & Paper on 1 December 2014, it has not calculated his holiday pay in reliance upon the previous 12 months of employment.

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<sup>4</sup> [2015] NZERA Auckland 189

[37] As a result Mr McPherson says he has been underpaid holidays and alternative days taken since 1 December 2014. Mr McPherson seeks payment of arrears he says are owing to him.

[38] Mr McPherson's reasoning for claiming that he has been underpaid by Carter Holt Pulp & Paper is that his acceptance of employment with it was that he would have:

*... continued enjoyment of all terms and conditions of employment that I had previously enjoyed whilst employed by Carter Holt Harvey Limited along with recognition of service and all service related benefits.*

[39] Therefore, Mr McPherson says that the 12 month period preceding the termination of his employment on 30 November 2014 should form the basis of the calculation of his holiday pay.

[40] Carter Holt Pulp & Paper disputes this claim and says that it is only on earnings from the employment relationship between an employer and an employee that holiday pay can be calculated. Carter Holt Pulp & Paper is not required to include in its calculation of gross earnings, income earned when Mr McPherson was employed by Carter Holt, another employer.

[41] I agree with the submission made on behalf of Carter Holt Pulp & Paper that this claim lacks merit. Gross earnings can only include those earnings an employee has received since commencing employment with his or her current employer. Section 14 of the Holidays Act defines gross earnings as:

*All payments that the employer is required to pay to the employee under the employee's employment agreement. ...*

[42] An employee's earnings from a former employer are not included in the gross earnings calculation required of a new employer.

[43] The offer which was made to Mr McPherson and others to transfer his employment to Carter Holt Pulp & Paper does not include an acceptance by Carter Holt Pulp & Paper that Mr McPherson's gross earnings for the purposes of calculating holiday pay include earnings in the previous 12 months from Carter Holt.

[44] The letter of offer states:

*Your terms and conditions of employment with CHH Pulp & Paper will be the same as those you currently have with Carter Holt Harvey Limited (CHH). Your service with, or recognised by the CHH Group will be recognised as service with CHH Pulp & Paper for the purposes of all service-related benefits, including sick leave, accrued and unused annual leave and long service leave, as well as for the purposes of redundancy, or qualifying for future related benefits and conditions.*

[45] I accept the submission that the ordinary and natural meaning of the letter of offer is that Mr McPherson's service is being recognised so that "*service-related benefits*" are maintained. The purpose of the letter of offer, considered objectively and in context, is to ensure that Mr McPherson's service with Carter Holt is included in the calculation of service-related benefits. The ongoing calculation of holiday pay is to be in accordance with the Holidays Act. That has not been changed by the acceptance by Mr McPherson of the letter of offer from Carter Holt Pulp & Paper.

[46] For the above reasons, Mr McPherson's claim against Carter Holt Pulp & Paper fails.

#### **Costs**

[47] Costs are reserved. Carter Holt and Carter Holt Pulp & Paper have 14 days from the date of this determination to file a memorandum as to costs. Mr McPherson has 14 days from receipt of the memorandum to file a reply as to costs.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**