

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 106  
3037314

BETWEEN                      REX NEWTON  
   Applicant  
  
AND                                VECTOR LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Helen White, Counsel for the Applicant  
   Stephen Langton, Counsel for the Respondent  
  
Investigation Meeting:        23 January 2020  
  
Submissions and/or further    24 January 2020  
evidence  
  
Determination:                04 March 2020

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1]     The Applicant, Mr Rex Newton, claims that his annual holiday entitlements have not been correctly calculated by the Respondent, Vector Limited (Vector), in circumstances in which his hours and days of work vary according to a 22-week roster cycle.

[2]     The parties are in agreement that Mr Newton is entitled to five weeks' annual holidays each year. However the parties disagree as to whether an agreement has been reached pursuant to s17 of the Holidays Act 2003 (the HA) on how the entitlement is to be met, and whether the five week entitlement has, in fact, been met.

**The Authority's investigation**

[3]     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.

## Issues

[4] The issues requiring investigation are whether or not:

- There is an agreement between the parties as to how the entitlement to annual holidays is to be met pursuant to s17 of the HA, and if so, the terms of that agreement;
- Either under the terms of the agreement if found to exist, or in compliance with the HA, Mr Newton has been provided with five weeks' annual leave;
- Mr Newton is owed outstanding holiday entitlement as a result of Vector not incorporating regular overtime when calculating holiday entitlement; and
- There has been a breach of good faith by Vector, and if so, whether a penalty is merited.

## Background

[5] Mr Newton has had a long period of employment with what is now known as Vector. He commenced employment with the Auckland Electric Power Board in 1975 and was subsequently employed by Mercury Energy Limited. In 1999, following changes to Mercury Energy Limited's business and name change to Vector Limited, Mr Newton was appointed to the position of Operations Engineer and accepted new terms and conditions of employment.

[6] In the letter dated 17 May 1999 Vector confirmed:

### **PERSONAL CARRY FORWARD TERMS AND CONDITIONS**

There may also be some employment provisions that you carry forward as additional to your new contract. Details of these are attached. They represent employment provisions that you personally had in your earlier contract that are over and above the new base Employment terms and Conditions document.

[7] Clause 35 -60 of the attached employment provisions stated:

An employee who has been required to undertake standby or shift roster duties shall be entitled to an extra week of annual leave each year, pro-rated where the period of standby/shift duties has been for less than a year.

[8] Mr Newton had always worked shifts during his employment.

[9] In or about 2003, Vector acquired part of UnitedNetworks Limited's business, and the two businesses merged to form a new business. Mr Newton accepted an offer of re-employment and new terms and conditions with Vector on 13 June 2003, commencing on 16 June 2003.

[10] The 13 June 2003 letter and the General Terms and Conditions of Employment included the following terms:

**13 June 2003 Letter**

14 Extra leave for Standby and Shifts

An employee who has been required to undertake standby or shift roster duties shall be entitled to an extra week of annual leave each year, pro rated where the period of standby/shift duties has been for less than a year.

**General terms and Conditions of Employment**

6 HOURS OF WORK

You will work such hours as are necessary to discharge and perform the duties and responsibilities of the position which shall include normal hours of not less than 40 hours per week in accordance with ECTOR policy.

14 ANNUAL LEAVE

- (a) Annual leave shall be allowed in accordance with the Holidays Act 1981 or any amendment or replacement Act. Your annual leave entitlement will be four weeks per year and will accrue over the year, excluding periods of unpaid leave.

[11] In March 2005 Mr Newton was offered and accepted updated terms and conditions.. There were no changes material to annual leave entitlements made at that time, apart from a reference to the Holidays Act 1981 being updated to the Holidays Act 2003.

*Roster pattern*

[12] Mr Newton currently works as an Electricity Operation Controller (EOC) and is one of 14 EOCs. An EOC is a critical job for Vector because the EOCs manage and control what is energised and not energised in Vector's network.

[13] Ms Amanda Roscoe, Senior HR Advisor, explained that the EOC roster is fixed and covers a 22-week duration. Each week in the roster operates Monday to Sunday. At any given time, the EOCs will be working different weeks in the roster, but they work through the roster sequentially. Once an EOC has completed week 22 of the roster, they restart at week one.

[14] The days of work per week and shift lengths vary throughout the roster. As the roster follows a fixed pattern, for any given week, the EOCs will be working one of the following combinations:

- a) 12 hours x 4 days (48 hours total, repeated 8 times in 22 weeks);
- b) 12 hours x 3 days (36 hours total, repeated 8 times in 22 weeks);
- c) 8.5 hours x 5 days (42.5 hours total, repeated 4 times in 22 weeks); or

d) 8 hours x 5 days (40 hours total, repeated twice in 22 weeks.)

[15] Over the 22 week roster, the total number of rostered hours worked is 922 hours, or 86 days. The average number of rostered hours worked per week over the 22-week roster is 42 hours, and the average number of days worked per week is 3.91 days. The weighted average hours per shift is 10.7 hours.

[16] Mr Newton confirmed during the Investigation Meeting that his standard working week is 42 hours.

[17] Mr Newton said that up until 2003 his annual leave entitlements were accounted for in weeks comprising five paid days and two unpaid days. The effect was that he believed and understood that four weeks annual leave equated to 20 days, and five weeks of annual leave equated to 25 days, paid at the length of the shift applicable at the time of the leave.

[18] Mr Newton wrote to Vector on or about March 2018 setting out his concerns:

Under my General Terms & Conditions of Employment May 2003, I am entitled to 4 weeks per year plus 1 week for shift roster duties being 25 days in total.

Unfortunately, under some circumstances, this can be as low as 17.5 days, not the 25 days as required by the Holidays Act 2003.....

This provision for 11 hrs for day in lieu as calculated by Vector has been in force since before our current contract from 2003.

In order to get 25 days leave a year the weighted working day should be used in calculating annual leave i.e. 25 days x 11 hrs = 275 hours. This entitlement should have been from May 2003 when the contract started.

[19] Ms Roscoe said she was tasked with looking into the concerns raised by Mr Newton and as a result carried out an extensive investigation into them during which she:

- (i) spoke to the current EOC Manager to help her understand the EOC roster;
- (ii) she reviewed all Mr Newton's offer letters and terms and conditions on file;
- (iii) spoke to payroll and requested that it put the EOC roster into a visual pattern;
- (iv) checked Mr Newton's calculation of weighted average hours per shift from which it appeared that Mr Newton was averaging his shifts over a 52 week period; and
- (v) queried why days in lieu were being credited as 11 hours.

[20] Ms Roscoe said her findings were:

a) Salary payments

[21] The EOCs ordinary hours of work are averaged over the 22-week roster to provide a regular, consistent fortnightly salary payment. As the average rostered hours per week comprise 40 ordinary rostered hours and 2 hours rostered overtime, the Vector payroll system is set up to pay 80 ordinary hours at base salary and 4 hours rostered overtime at T1.6 per fortnight.

[22] The Vector payroll system is programmed for pay purposes to pay salary based on an eight hour workday (regardless of shift length). Any hours that may be worked beyond roster are claimed separately.

b) Annual Holidays

[23] Mr Newton's (and the other EOCs) annual holiday entitlement was being provided in hours, due to the roster pattern, variable days of work per week and hours of work per day, and because Vector's payroll system operates in hours.

[24] The annual holiday entitlement in hours was based on the average number of ordinary working hours per week across the 22-week roster. Ms Roscoe said that she found that Mr Newton's annual holiday entitlement was 200 hours per year, calculated by taking the average rostered ordinary hours per week of 40 hours and multiplying it by 5 weeks, being the number of weeks of annual holidays that Mr Newton is entitled to (40 ordinary hours x 5 weeks = 200 hours).

[25] Ms Roscoe said she had been concerned that the 2 hours per week of rostered overtime was not being taken into account when determining the five week annual holiday entitlement in hours, given that the overtime hours were rostered and regular.

[26] As a result Vector sought advice from the EMA in June 2018. The advice received was that Vector should take the two hours into account when determining how the five week annual holiday entitlement was provided in hours because it was rostered and regular.

[27] The EMA had also advised that an employer and an employee can agree pursuant to s 17 of the HA what a regular working week is for the purposes of the annual holiday entitlement.

[28] Vector acting on this advice sought Mr Newton's agreement that a regular working week for the purposes of s 17 of the HA was 42 hours. It offered him a credit of 10 hours of

annual leave for each of the prior six years if he agreed that 42 hours was a regular working week.

[29] Mr Newton did not accept the offer because he said he considered it to be a breach of good faith on the part of Vector to withhold an entitlement to holiday entitlement which the employer considered should have been accrued.

c) *Error in deduction of annual holidays*

[30] Ms Roscoe said that during the course of her investigation she had discovered a documented error in the way annual holidays were deducted from Mr Newton's balance between June 2011 and October 2013. The error was that if Mr Newton had taken an annual holiday when he worked a 12 hour shift, only eight hours had been deducted from his annual holiday balance. This had resulted in Mr Newton having taken 196 hours of annual holiday which had not been deducted from his annual leave balance.

[31] In order to resolve this error Vector had put several options to Mr Newton, who agreed to the 196 hours being deducted from his lieu leave balance.

d) *Analysis of Mr Newton's calculations and assertions*

[32] Ms Roscoe said that she investigated Mr Newton's assertion that five weeks of leave equalled 25 days by analysing the assertion in relation to the 22 week roster.

[33] Ms Roscoe said she found that in all instances, if 25 days of annual holidays were taken in a row, more than five weeks of annual holidays would be taken. Ms Roscoe said that in her analysis if Mr Newton took 25 annual holidays from Monday in week 1 of the roster, he would not return to work until Monday in week 8 of the roster. He would therefore have had seven weeks' annual holidays.

[34] Ms Roscoe also performed an analysis using Mr Newton's suggestion that his five week annual holidays could be provided as 275 hours per year. The analysis showed that if holidays were taken only in weeks when the lowest number of hours are worked per week, being 36, a total of 7.63 weeks' of annual holidays could be taken per year.

[35] However Ms Roscoe said that even if annual holidays were only taken in weeks when the highest number of hours are worked per week, being 48, a total of 5.72 weeks' of annual holidays could be taken per year (275 hours/48 hours = 5.72.)

[36] Further that if 275 hours is divided by 5 weeks, this equals 55 hours per week which exceeds both the average number of rostered hours worked per week, and the highest number of rostered hours being provided per year.

[37] Ms Roscoe's conclusion after having performed her analysis was that providing the five weeks entitlement as 25 days, or alternatively as 275 hours, would result in more than five weeks of annual holidays being provided in one year.

[38] Ms Roscoe accepted however that if Mr Newton took all his annual leave in weeks where he worked 48 hours, the 200 or 210 hours would not enable him to take five weeks and a manual adjustment would be required ( $210 \text{ hours} / 48 \text{ hours} = 4.375 \text{ weeks}$ .)

[39] As a result Ms Roscoe said she performed a detailed reconstruction of the annual holidays Mr Newton has taken since 30 November 2010 using what she referred to as the 'extended method'. This analysed Mr Newton's annual holidays on the basis that what: "genuinely constitutes a working week for the employee" (s 17 of the HA) is the number of hours that would have been worked in the week when leave was taken, so that a five week entitlement at the time the leave was taken, is five times the total number of hours worked that week.

[40] Ms Roscoe commenced her analysis from 30 November 2010, Mr Newton's anniversary date with Vector and assumed that, as at that date, he had a full five week's entitlement. On each anniversary date another five weeks of annual holidays are added.

[41] Ms Roscoe said her analysis indicated that Mr Newton has received his five week annual holiday entitlement, or more, most years. In total, over an eight year period, Mr Newton took 8.7012 portions of annual holidays or 43.506 weeks of leave ( $8.7012 \text{ portions} \times 5 \text{ weeks} = 43.506 \text{ weeks}$ ). Averaged over the eight year period that was an average of 5.438 weeks of annual holidays per year ( $43.506 \text{ weeks} / 8 \text{ years} = 5.438 \text{ weeks per year}$ ). Ms Roscoe said that she had based her calculations on the correct number of hours being deducted for each leave event.

#### **Has there been an agreement on entitlement to annual holidays?**

[42] Examining the documentation provided to the Authority by the parties I find there is an express agreement between the parties that Mr Newton's annual holiday entitlement is five weeks comprising the four weeks' statutory minimum period pursuant to s 6.1 of the HA and one weeks' enhanced holiday pursuant to a 6.2 of the HA.

[43] Accordingly Mr Newton was, as a result of working a shift roster, entitled to an additional week of annual holiday. In fact Vector describe the additional week as: "an extra week of annual leave each year."

[44] I also note that in the Employment Agreement reference is made to: “annual leave”. It is reasonable to assume that the two references are intended to convey the same meaning as to what is annual leave, which means that the additional week of annual holiday is calculated on the same basis as the statutory leave entitlement.

[45] There is no written or oral agreement between the parties as required pursuant to s17(1) of the Holidays Act which states:

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.

[46] I note that in July 2018 Vector attempted to reach an agreement with Mr Newton regarding a s 17(1) of the HA agreement, however no agreement was reached.

[47] Mr Newton’s evidence is that there was an understanding between the parties that he received 25 days’ annual holidays prior to 2003, and that it was the change to the roster system and Vector’s method of calculating annual leave based on an hours-based system for calculating annual leave.

[48] In Mr Newton’s letter written in March 2018 he put forward a view that: “the weighted working day should be used in calculating annual leave i.e. 25 days x 11 hrs = 275 hours”. This confirms that there was no express agreement in place at that date.

[49] I find there has been no express agreement between the parties which sets out how the five weeks’ annual leave will be provided based on what genuinely constitutes Mr Newton’s working week. What is clear is that Vector must provide Mr Newton with an entitlement to five weeks annual leave, and the method of accrual is an administrative fact and irrelevant providing that Mr Newton receives his entitlement to five weeks annual holiday. The HA does not deal with the concept of accruing for holiday entitlement.

[50] The Holidays Act provides for 4 weeks of annual holiday, but does not define what constitutes a week, however pursuant to s17 (1) of HA the parties 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.

[51] From the evidence provided Vector maintains that the average rostered hours worked per week over the 22 week roster period is 42 hours that is 40 ordinary hours plus 2 hours overtime. At the Investigation Meeting Mr Newton confirmed his agreement that he works 42 rostered hours per week over the 22 week roster period.

[52] I accept Ms Roscoe's evidence that during her investigation she was unable to find any leave records that support Mr Newton's statement that around or prior to 2003, a week of annual leave was calculated as five days, or that five weeks' annual holiday equal 25 days, nor that one week of leave would be treated as five days at eleven hours per day.

[53] Vector's records indicated that by 2000 annual holidays were accrued in hours and deductions were based on the actual hours taken as leave.

[54] Vector submits that the various calculations put forward by Mr Newton infer that the parties never intended, or agreed that five weeks' annual holidays would equal 25 days or 275 hours of leave because they were not based on what genuinely constitutes Mr Newton's working week.

[55] Section 17 of the HA required Vector to discuss with Mr Newton in good faith to reach agreement on how a four-week entitlement would be quantified.

[56] I determine that there has not been an agreement (until Mr Newton agreed during the Investigation Meeting that his working week was 42 hours) on how the entitlement to annual holidays is to be met pursuant to s 17(1) of the HA.

**Has Mr Newton been provided with 5 weeks' annual holidays per annum?**

[57] Mr Newton submits that because Vector deducts the number of shift hours which would have been worked on a day taken as annual holiday rather than deducting eight hours irrespective of the shift length on the day taken as annual holiday, this resulted in a situation between the period of 31 October 2018 and 1 November 2019 of him receiving only 17.5 days of annual leave.

[58] Mr Newton submits that this is significantly short of what the parties intended when they agreed on five weeks' holiday, and would additionally appear to be less advantageous than the four weeks statutory annual leave requirement under the HA.

[59] Vector submits that following the introduction of the new roster cycle and changes to Mr Newton's days and hours of work per week, Vector continues to provide Mr Newton with five weeks' annual holidays per annum.

[60] Vector provides the entitlement in hours due to the roster pattern, variable hours of work per week, and hours of work per day, and because its payroll system operates in hours. Vector provides Mr Newton with 200 hours of annual holidays per year (average of 40 ordinary

hours per week x 5 weeks annual holidays = 200 hours. The number of hours of annual holidays deducted when leave is taken is based on the actual number of hours taken as leave.

[61] Following Mr Newton's concerns that the 2 hours of rostered overtime was not being factored into the annual holiday calculation, Vector began accruing his annual leave entitlement at 210 hours per year.

[62] This is a situation involving variable working hours. I have found that there is no agreement between the parties pursuant to s 17 of the HA, however I find that there must be a system in place to give meaning and effect to the obligation to provide at least the four weeks statutory annual holidays.

[63] Mr Newton's evidence is that his working week is five days long because he works in 'blocks' of shifts which are not constrained to Monday to Sunday because Vector requires 24 hours cover 7 days a week.

[64] Vector does not agree because a week in the roster is seven days long from Monday to Sunday. Although Mr Newton may work in 'blocks' of four to five days of work in a row, these blocks sometimes cover two separate calendar weeks. As set out in the roster, in a Monday to Sunday week, Mr Newton works either three, four or five days.

[65] Mr Newton agreed that he works a 42 hour week. Based on the 22 week roster cycle, Mr Newton works an average number of days per week of 3.91 days.

[66] Based on the analysis carried out by Ms Roscoe, Vector submits that over the eight year period between 30 November 2010 to 29 November 2018 Mr Newton took an average of 5.438 weeks of annual holidays per year.

[67] Based on the information provided to the Authority, I find that Mr Newton has in fact taken at least five weeks annual holidays per year.

[68] I determine that Mr Newton been provided with 5 weeks' annual holidays per annum.

### **Is Mr Newton owed holiday accrual?**

[69] In a letter dated 1 July 2018 Vector discussing how holiday entitlement was arrived at stating that: "custom and practice to date is using the average working hours per week over the 22 week roster, being 40 hours with two hours of regular overtime," and confirmed to Mr Newton that: "However in conjunction with our legal advice, it has been identified that the two hours regular overtime has not been considered in this and should be. Therefore the average

working hours per week over the roster is 42 hours and annual leave entitlement should be 210 hours as opposed to the 200 hours currently accrued.”

[70] Vector confirmed that (i) it will reinstate the difference in hours being 10 hours per year for a period of 6 years prior to the effective date of 30 June 2018 pursuant to s142 of the Act, and (ii) the action was an unintentional oversight.

[71] Vector also asked Mr Newton to agree pursuant to s17 of the HA that his working week was 42 hours per week for the purpose of annual leave. During the Investigation meeting Mr Newton agreed that his working week was 42 hours per week.

[72] I find therefore that for the purposes of s17(1) of the HA, Vector and Mr Newton have agreed that Mr Newton’s entitlement to 4 weeks’ annual holidays is to be met based on what genuinely constitutes a working week for Mr Newton.

[73] Mr Newton’s view is that the period of the oversight should be ten years and not the six years proposed by Vector.

[74] S.142 of the Act states: “No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose. “

[75] An employment relationship problem is defined in s.5 of the Act and includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, excluding any problem with the fixing of new terms and conditions of employment.

[76] I find that a claim for unaccrued holiday entitlement is clearly an action in relation to an employment relationship problem, and not a personal grievance. I find that s142 of the Act applies and the effective date is 30 June 2018.

[77] I determine that Mr Newton is owed an outstanding holiday accrual of ten hours per year as a result of Vector not incorporating regular overtime when calculating holiday entitlement, and that this is for a period of six years.

### **Has there been a breach of good faith by Vector?**

[78] It is claimed by Mr Newton that in July 2018 Vector put a proposal to him to provide him with ten hours per year of annual leave covering a period of six years, being the under-

accrual, on condition that Mr Newton agreed that 42 hours constituted his working week for the purposes of s 17(1) of the HA.

[79] Mr Newton claims this was a breach of good faith and that it is not the action of a fair and reasonable employer to attempt to settle an outstanding entitlement to annual holiday arrears claim in this way.

[80] Vector's position is that there was no intention to withhold the outstanding holiday entitlement, or for it to be used as leverage to incentivise Mr Newton to agree that 42 hours was a genuine working week for the purposes of s 17 of the HA.

[81] Vector makes it clear in their letter dated 11 July 2018 under the heading 'Next Steps' that: "...Vector will reinstate the difference in hours being 10 hours per year for a period of six years effective to June 2018." The only other reference being that the offer is made in accordance with s142 of the Act, relating to the limitation period in this case, six years.

[82] Under the heading: "Solution proposed" it states that: "...Vector seeks your agreement that an average working week for the purpose of annual leave constitutes 42 hours."

[83] I do not find that Vector has attempted to compromise Mr Newton's claim, it has stated that it will reinstate the 60 hours of annual leave entitlement and seeks an agreement with Mr Newton pursuant to s17 of the HA.

[84] Mr Newton's evidence was also that he was not specifically advised that he should obtain independent legal evidence about the offer made to him by Vector.

[85] Vector submits that whilst it did not advise Mr Newton to seek advice in writing on this issue, it has urged him on previous occasions to seek legal advice.

[86] I do not find that Vector by not advising Mr Newton to obtain legal advice on the s17 HA agreement basis was a breach of good faith given its previous pattern of supporting him in that respect.

[87] I find that Vector, until it received advice from the EMA, failed to take into account the additional two hours when determining how the five week annual holiday entitlement should be determined for the purposes of s 17(1) of the HA.

[88] I accept that the reconstruction of Mr Newton's leave records demonstrates that he has in fact received five weeks' annual holiday per annum, and on that basis he has suffered no disadvantage.

[89] I determine that there has not been a breach of good faith by Vector.

### **Costs**

[90] Costs are reserved. I think this is an appropriate case for letting costs lie where they fall.

[91] However should the parties seek costs, they are encouraged to try to resolve any issue of costs between themselves.

[92] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 the Applicant 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.

[93] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**

**Member of the Employment Relations Authority**