

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 466  
3131535

BETWEEN JOANNE THOMSON  
Applicant

AND MANIOTOTO HEALTH  
SERVICES LTD  
Respondent

Member of Authority: Peter van Keulen

Representatives: Maryline Suchley, advocate for the Applicant  
Geoffrey Foster, advocate for the Respondent

Investigation Meeting: On the papers

Submissions Received: 19 July 2021 from the Applicant  
26 July 2021 from the Respondent

Date of Determination: 21 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Joanne Thomson was employed by Maniototo Health Services Ltd from 22 December 2017 until 17 November 2020. Ms Thomson's resignation from Maniototo came about as part of a settlement of an employment relationship problem she had raised with Maniototo; the employment relationship problem was resolved in mediation and recorded in a record of settlement dated 17 November 2020 (the Record of Settlement).

[2] A term of the Record of Settlement was that Ms Thomson would be paid all outstanding entitlements including all holiday pay – this is set out at clause 2 of the Record of Settlement.

[3] Ms Thomson claims Maniototo has not paid her all of her holiday pay as agreed under the Record of Settlement. In particular Ms Thomson says she is owed 11 days holiday pay

which was recorded as accrued leave in a pay slip for the period ending 27 September 2020 but was then deducted, without being paid to her, and the subsequent pay slip recorded her accrued leave as 1.5 days. Ms Thomson says Maniototo also deducted \$52.48 from her final pay without authorisation, and she says this sum should be paid to her.

[4] Maniototo says it has paid all of Ms Thomson's holiday pay:

- (a) Firstly, it paid all of Ms Thomson's holiday pay entitlements up to 16 February 2020 to Ms Thomson when she was on a period of extended sick leave – this included two years of actual entitlement under the Holidays Act 2003 (22 December 2017 until 21 December 2019) and an advance payment of \$52.48 as part of the accrued holiday pay for the period 22 December 2019 until 16 February 2020.
- (b) Then secondly, it paid Ms Thomson the balance of her holiday pay after her employment came to an end calculated as 8% of her gross earnings for the period 22 December 2019 until 17 November 2020 less the amount paid in advance in the 16 February 2020 payment (\$52.48) – this being the basis for paying holiday pay at the end of an employee's employment as set out in s 25 of the Holidays Act 2003.
- (c) And thirdly, it says the 11 days accrued leave recorded in the pay slip for the period ending 27 September 2020 was a mistake as the payroll system had not been updated to reflect the reduced hours Ms Thomson was working in 2020. When the payroll system was updated after 27 September 2020 the accrued leave for Ms Thomson was reset. In any event the accrued leave recorded in the payslips is not a record of what was payable to Ms Thomson when she left her employment – payment of the part-year of accrued holiday pay was correctly calculated and paid at 8% of Ms Thomson's gross earnings for that period.

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

[5] It is Ms Thomson's claim for unpaid holiday pay that she says should have been paid to her under the Record of Settlement and her claim for payment of the unauthorised

deduction that I have investigated. I did this investigation “on the papers”, that is by receiving affidavit evidence and documents and then written submissions from the parties’ representatives.

[6] As permitted by 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I set out the outcome I reached as a result.

### **Ms Thomson’s claim**

[7] Ms Thomson’s claim has been expressed in the statement of problem as a failure to pay holiday pay owing and an unjustified action causing disadvantage personal grievance.

[8] In written submissions the advocate for Ms Thomson claimed:

- (a) 11 days accrued leave plus interest pursuant to ss 137 and 151 of the Act.
- (b) Payment of \$52.48, plus interest, for an amount deducted without authorisation from Ms Thomson’s final pay.
- (c) Compensation for hurt, humiliation and disadvantage caused by the non-payment of annual leave required under clause 2 of the Record of Settlement.

[9] As to the claim for 11 days accrued leave, ss 137 and 151 of the Act enable enforcement of the terms of a record of settlement by way of a compliance order. So Ms Thomson is seeking an order that Maniototo comply with clause 2 of the Record of Settlement and pay her the unpaid accrued holiday pay she says she is entitled to, being 11 days.

[10] The basis for the claim for payment of \$52.48 is not articulated but in my view it must also be a claim for compliance with clause 2 of the Record of Settlement on the basis that an unauthorised deduction means Ms Thomson has not been paid her full entitlements as required. The alternative is that it is a claim based on an unauthorised deduction and a wages recovery claim pursuant to ss 4, 5 and 11 of the Wages Protection Act 1983, which may well be precluded by the settlement in the Record of Settlement itself. So I will treat this claim as a compliance claim also.

[11] The claim for compensation is not a claim that can be made for a breach of a record of settlement. Compensation is a remedy available for a personal grievance. In this case the personal grievance raised in relation to the unpaid holiday pay cannot be pursued because of the Record of Settlement. So I have not considered the claim for compensation as part of my investigation and determination of this employment relationship problem.

[12] Ms Thomson's claim for compliance with clause 2 of the Record of Settlement involves an assessment of her holiday pay entitlements to establish if what Maniototo paid her in her final pay met that assessment or if more is required to be paid, which Ms Thomson says is 11 days of holiday pay and the \$52.48 deducted from her final pay.

### **Analysis of Ms Thomson's holiday pay entitlement**

[13] Ms Thomson was employed from 22 December 2017, so she was entitled to four weeks holiday on 21 December of every subsequent year – pursuant to s 16 of the Holidays Act.

[14] Ms Thomson did not work full time and her hours varied each week. In terms of holiday pay entitlement this is not problematic as the entitlement is in weeks and then paid on the basis of average weekly earnings.

[15] The problem that arose, and is often the case with employees, is that holidays are generally taken as days and paid daily; and holiday pay accruing is recorded on pay slips in days of holiday, not weeks. This means that the holiday pay entitlements accruing in weekly amounts and paid at average weekly earnings are often calculated into daily amounts. Over her first two years of employment Ms Thomson's weekly holiday entitlement accrued at a rate of 3.545 days per week of holiday pay based on an average four hour day of work – so for every week of holiday pay entitlement Ms Thomson was recorded as accruing 3.545 days, with those days being on average four hours of work. <sup>1</sup>

[16] From the commencement of her employment until 10 November 2019 Ms Thomson took 13 days holiday and was paid for these holidays, either in advance of her entitlement to holiday pay or from her entitlement.

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<sup>1</sup> Based on the wage and time records produced by Maniototo.

[17] From October 2019, Ms Thomson was off work on sick leave. From this time she was paid her sick leave entitlement and when that ran out, and Ms Thomson remained on sick leave, she requested to be paid her holiday pay entitlement. By 16 February 2020 Ms Thomson had been paid an additional 16 days holiday pay.

[18] The 16 days of holiday pay was calculated as follows:

- (a) From the commencement of her employment until 16 February 2020 Ms Thomson has an entitlement of eight weeks holiday pay for the period 22 December 2017 until 21 December 2019 – the equivalent of 28.36 days (8 weeks x 3.545 days).
- (b) Ms Thomson had taken 13 days holiday and been paid for those days leaving an entitlement of 15.36 days.
- (c) Maniototo added .64 of a day's holiday pay as an advance payment of holiday pay based on what had been accrued between 22 December 2019 and February 2020.

[19] From 17 February 2020 Ms Thomson continued to accrue holidays notwithstanding she remained off work on sick leave. This accrual of holiday pay was recorded on Ms Thomson's pay slips as days of leave. The starting point for this accrual was 1.36 days and then added to that was the accrual of holiday days based on Ms Thomson's average hours and days worked per week. The problem here is Ms Thomson was not working so there was no accurate way of calculating the weekly holiday entitlement into days. It appears from the pay slips that a daily accrual rate slightly higher than the previous average rate was applied – it is unclear why – meaning the accrual of holiday recorded as days of leave on Ms Thomson's pay slip was not an accurate estimate of actual holiday pay accrual.

[20] On 20 June 2020 Ms Thomson then returned to work on reduced hours working three days of three hours each day in a fortnight. However from 20 June her pay slips continued to record her holiday pay accruing based on the higher rate of days per week of holiday entitlement. It was not until September 2020 that Maniototo realised the accrual rate was incorrect – based on the reduced hours of work the accrual rate should have been at the rate of one and a half days per week with those days being three hours of work.

[21] So Maniototo adjusted the accrual rate recorded in Ms Thomson's payslip, reducing the recorded accrued leave down to 1.5 days as at the week ending 11 October 2020. Based on my calculations of what the accrual rate should have been with Ms Thomson working 3 days per fortnight this was an overcompensation i.e. at this time the accrued holiday pay was higher than 1.5 days leave.

[22] This overcompensation was of no consequence other than to confuse Ms Thomson as to what her actual entitlement to holiday pay was at the end of her employment, primarily because she could not reconcile the 11 days of accrued leave that was recorded in her pay slip in September 2020 being reduced to 1.5 days of accrued leave in October 2020.

[23] The reason the overcompensation was of no consequence was that Maniototo did not calculate Ms Thomson's holiday pay entitlement at the end of her employment based on the record of accrued days of leave. Rather Maniototo calculated and paid Ms Thomson's holiday pay entitlement at the end of her employment based on s 25 of the Holidays Act:

(a) It took the amount of Ms Thomson's gross earnings in the period 22 December 2019 to 17 November 2020 as this was the remaining period of holiday pay entitlement – Ms Thomson's previous holiday pay entitlement for the two years 22 December 2017 to 21 December 2019 having already been paid to her by 16 February 2020. This gross amount was \$3,509.80.

(b) It calculated 8% of this amount – based on s 25 of the Holidays Act. This was \$280.78.

(c) It then deducted the .64 day holiday pay paid in advance to Ms Thomson on 16 February 2020 – this being \$52.48 – leaving a total of \$228.30.

[24] Maniototo then paid Ms Thomson \$228.30 as the balance of her holiday pay entitlement due to her at the end of her employment.

[25] Based on my findings set out above I conclude that Maniototo has correctly calculated Ms Thomson's holiday pay entitlements according to the Holidays Act. It follows that I am satisfied that Maniototo has paid all of Ms Thomson's holiday pay entitlement due to her at the end of her employment and it correctly deducted the sum of \$52.48 from her final pay.

[26] As a rough cross check I have also calculated Ms Thomson's overall holiday pay entitlement at a rate of 8% of her gross earnings for the whole of her employment and this amount is slightly less than the amount of holiday pay she has been paid – this reinforces my view that Maniototo has correctly paid Ms Thomson's holiday pay entitlements owing at the end of her employment.

### **Outcome**

[27] Ms Thomson has been paid all of her holiday pay entitlements and there has been no unauthorised deduction from her final pay. Ms Thomson's claim against Maniototo for compliance with clause 2 of the Record of Settlement is dismissed.

### **Costs**

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

[29] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority