IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 113
EMPC 193/2015
EMPC 293/2015

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of proceedings removed from the Employment Relations Authority
BETWEEN	THE PULP AND PAPER INDUSTRY COUNCIL OF THE MANUFACTURING AND CONSTRUCTION WORKERS UNION Plaintiff
AND	THE PERSONS LISTED IN SCHEDULE A Second Plaintiffs
AND	OJI FIBRE SOLUTIONS (NZ) LTD (FORMERLY CARTER HOLT HARVEY PULP AND PAPER LTD) First Defendant
AND	CARTER HOLT HARVEY LIMITED Second Defendant

Hearing: 18 and 19 April 2016
(Heard at Auckland)

Appearances: T Oldfield, counsel for plaintiffs
D France and M Bialostocki, counsel for first defendant
R Towner and E Coats, counsel for second defendant

Judgment: 31 August 2016

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority) dated 25 June 2015 and proceedings removed to the Employment Court by a determination of the Authority dated 7 October 2015. Both sets of proceedings before the Authority involved the same parties and the same, similar or related issues.

[2] The matters in dispute are over the application, operation and interpretation of a collective agreement and also require a consideration of the provisions of the Holidays Act 2003 (the Act).

[3] Following the commencement of the proceedings in the Employment Court, the first defendant (previously Carter Holt Harvey Pulp and Paper Ltd) changed its name to Oji Fibre Solutions (NZ) Ltd (Oji). An order was accordingly made altering the name of the first defendant.

[4] The second plaintiffs in Schedule A to the amended statement of claim are all members of the first plaintiff union. While the intituling for the challenge and the proceedings removed differ in sequence, in this judgment I shall refer to Oji as the first defendant and Carter Holt Harvey Ltd (CHH) as the second defendant.

[5] The parties have agreed that the Court at this stage will make findings on methods of calculation and liability only. The parties will deal with quantification once the Court's findings are made.

Factual background

[6] A Collective Agreement (the CA) covers the employment of the second plaintiffs. They were previously employees of the second defendant, CHH, and are currently employed by the first defendant Oji. The CA commenced on 1 October 2012 and was expressed to expire on 4 October 2015, although it thereafter continued in force pursuant to the provisions of the Employment Relations Act 2000. The workplace covered by the CA, which is the site of the present dispute, is the Tasman Pulp and Paper Mill at Kawerau.

[7] The second defendant sold its pulp, paper and packaging business to Carter Holt Harvey Pulp and Paper Ltd with effect from 1 December 2014. That company was named as first respondent in the proceedings in the Authority and was originally named as first defendant in the proceedings filed in the Court by way of challenge to the Authority's determination.

[8] The second defendant's employees had their employment terminated and were then transferred to the first defendant. The second plaintiffs, who do not represent the entire workforce, were included in the process. Some issues arise from the process adopted as to whether in fact there was a termination of employment and then re-employment or alternatively a straight transfer of employment by agreement. That issue will be discussed further in this judgment.

[9] Following termination of employment from CHH the second plaintiffs were employed by Oji under the same terms and conditions of the CA. Oji became a party to the CA. The employees were entitled to holidays in accordance with the CA and the Act. Agreement was reached that employees could elect to have some or all of their untaken annual leave, long service leave, and alternative leave for working on public holidays paid out or transferred to the new employer.

[10] The following clauses from the CA are relevant to the dispute, which has now arisen, as to the method of calculation of the payment to those employees who have elected to be paid out for untaken leave in whole or part.

> **CLAUSE 10 – PAYMENT OF SALARY**
>
> 10.1 The salaries and allowances specified in Clause 34 are total annual amounts. The intent is that these amounts shall be divided up and paid by direct credit in equal amounts.
>
> …
>
> **CLAUSE 13 - ANNUAL LEAVE**
>
> 13.1 It is agreed that leave is continuous and an Employee is not required to work at any time between the last rostered hour of work before the leave period and the first rostered hour of work after the leave period. In extreme circumstances an employee may be called back from leave to work but only after consultation between the Company & the Union.

13.2 For payroll purposes, a "week's leave" shall be fixed at 5 x 8 hour days for day workers and 4 x 12 hour shift for shift workers.

13.3 Employees are entitled to annual leave on pay according to the Holidays Act 2003.

13.4 Only those employees named in Schedule 9 are entitled to one (1) weeks additional leave as specified by Schedule 9.

13.5 All employees on Clause 34.1 – Shift Workers are entitled to an additional annual holiday of one (1) week's leave per year.

13.6 Annual leave will not accrue from one leave year to the next without consultation or agreement between the Company and Union.

CLAUSE 14 – LONG SERVICE LEAVE

14.1 In addition to annual leave, subject to Clause 14.2, Employees shall be entitled to Long Service Leave (LSL) based on the completion of continuous service with the Company. The entitlement shall be as follows:

After 10 years of service	1 special holiday of 4 week's leave.
After 15 years of service	1 special holiday of 4 week's leave.
After 20 years of service	1 special holiday of 4 week's leave.
After 25 years of service	1 special holiday of 4 week's leave.
After 30 years of service	1 special holiday of 4 week's leave.
After 35 years of service	1 special holiday of 4 week's leave.
After 40 years of service	1 special holiday of 5 week's leave.

14.2 To be eligible for each LSL entitlement, Employees must not have any outstanding LSL on the scheduled entitlement date. Failure to do so shall result in forfeiture of that immediate scheduled entitlement for the full five year period.

…

SCHEDULE 4: SHIFT WORKERS' SALARIES

…

Formula for Calculating RDP Payments for Statutory Holidays

- **5 Shift Roster**

Base Salary + Qualifications / 52 (weeks) / 33.69 (hours) = Hourly Rate (for the purposes of RDP calculations)
Weekly salary includes this rate.
The extra payment for working a Stat Day is 0.5 of the Hourly Rate, i.e. Work Labour Day – Calculate Hourly Rate as above and divide by 0.5 and

multiply by hours worked on the Stat Day.[1] This gives the total extra payment for working Labour Day.

- **4 Shift Roster**

Base Salary + Qualifications / 52 (weeks) / 42 (hours) = Hourly Rate (for the purposes of RDP calculations)
Weekly salary includes this rate.
The extra payment for working a Stat Day is 0.5 of the Hourly Rate, i.e. Work Labour Day – Calculate Hourly Rate as above and divide by 0.5 and multiply by hours worked on the Stat Day.[2] This gives the total extra payment for working Labour Day.

[11] The additional leave in Clause 13.4 and the annual leave in Clause 13.5 were referred to in the evidence as company leave. The agreement to pay out for accrued leave did not include company leave, which had to be carried forward into the new employment with Oji.

[12] The CA does not prescribe in Clause 14 how payment for long service leave is to be calculated. In the sequential context of the clauses and use of the words "In addition to annual leave" in Clause 14 it would seem that the methodology contained in Clauses 13.2 and 13.3 would also apply to long service leave.

The issues in dispute

[13] There were originally four issues to be considered by the Court in this case. These were:

(a) When the employees ended their employment with CHH and continued with Oji the weekly payment for their accrued and unpaid annual leave and long service leave cash up was calculated on the basis of annual salary plus increments divided by 52 weeks. The formulae adopted by CHH were arrived at by applying the CA and the Act. The plaintiffs argue that this was in error in respect of the employees who were shift workers. The pleaded error is that the wrong divisor was used resulting

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1 This formula is incorrect if the intent is to pay time and a half on public holidays. Dividing by 0.5 in fact doubles the rate. The formula should be expressed as "multiplying" by 0.5 rather than "dividing" by 0.5.

2 See n 1.

in a payment lower than their actual entitlements. The employees present two different methods of correcting this alleged error.

(b) The plaintiffs argue in respect of the second issue that the payment for the cashed up lieu days or alternative holidays accrued and untaken for working on a public holiday should have been calculated on the same basis as that used for the public holiday itself. This claim relies upon the formula for calculation of relevant daily pay on a public holiday contained in the provisions of Schedule 4 to the CA referred to earlier. The issue here is whether the relevant daily pay for the lieu day or alternative holiday is calculated in accordance with the CA Schedule 4 formula or in accordance with the method of calculation for relevant daily pay or, in the alternative average daily pay, as provided in the Act.

(c) The third issue relates to s 40 of the Act and whether that deeming provision means the plaintiffs are entitled to be paid, in addition to accrued annual and long service leave, for public holidays occurring in the period of total accrued leave outstanding as if it were being taken immediately after the termination of employment.

(d) The fourth issue relates to s 25 of the Act which provides for calculation of annual holiday pay for the period, if less than 12 months, between the last anniversary of commencement of employment and the date of termination of employment.

[14] These issues are a combination of the original issue considered by the Authority's determination and subject to the challenge and three issues separately raised in the Authority but subject to the determination ordering removal to the Court dated 7 October 2015.

[15] In respect of the fourth issue, which upon removal needed to be resolved by this Court, the second defendant filed an admission of cause of action dated 13 April 2016 in the following terms:

The second defendant admits that:

1. those of the second plaintiffs who chose to have any or all of their accrued annual holidays paid to them in cash upon termination of their employment with the second defendant are entitled to judgment against the second defendant, in relation to the cause of action set out in paragraphs 35, 36 and 37 of the amended statement of claim dated 12 October 2015; and

2. the amount of any wage arrears payable (pursuant to paragraph 42.b. of the amended statement of claim) by the second defendant to the second plaintiffs who chose to have any or all of their accrued annual holidays paid to them in cash upon termination of their employment cannot yet be quantified, pending the Court's judgment in relation to the other causes of action set out in the amended statement of claim.

[16] There is no need to deal further with liability on this issue. The question of quantification pursuant to paragraph 42b of the amended statement of claim (which relies upon the calculation of gross earnings) is mainly resolved by the findings in this judgment in respect of the remaining issues. This judgment will deal with each of the three remaining issues in turn. However, it is necessary following the findings to return to the issue of what parts of the relief sought in paragraph 42b are claimable.

Issue one

[17] This is the most complex of the three remaining issues. The evidence of the plaintiffs consisted of statements from two employees of Oji, who are members of the plaintiff union. They were previously employees of CHH and upon termination with CHH, and re-employment with Oji, elected to have accrued leave cashed up. One of the witnesses was working on a five shift roster. Shift workers work both day and night shifts on four or five shift rotating rosters. The other was a day worker on 40 hours per week. On the first issue, their evidence was directed at the fact that the cash up of annual holiday pay and long service leave (based on a divisor of the annual salary) was less than it would be if the accumulated leave was paid out on the basis of an hourly rate for actual shift hours worked during a 12 month period. This method results in a lower divisor and thereby higher payments. This evidence highlights the primary difference between the plaintiffs and the defendants on this first issue. What the plaintiffs are arguing is that whereas the CA provided for their

shift work payments to be evened out on an annual salary basis for the purposes of recovering the same payment each week, for the purposes of calculating the cash up of accrued annual holiday pay and long service pay the position should revert to calculation based on annual wages plus increments divided by the annual shift hours actually worked. Alternatively, the calculation can be based on the weekly wage divided by the weekly shift hours worked. There is no suggestion, however, that the entitlement to annual holidays or long service leave should be accrued on anything other than 48 hours per week for shift workers and 40 hours per week for day workers which total hours on average the plaintiffs agree they do not work. That means that there is an inconsistency in the approach adopted by the plaintiffs. The problem with adopting this approach arises from the fact that the CA (cl 13.3) incorporates the methods of calculation provided by the Act, which do not support the plaintiffs' methodology.

[18] The evidence for the defendants was first from Stephanie Mackie, Human Resource Manager-Projects for Oji. She had previously worked for CHH in various human resources positions. Secondly, there was evidence from Alan Renowden, Remuneration Manager for Oji. He had previously worked for CHH in various payroll and human resources functions. Ms Mackie and Mr Renowden gave evidence supporting the methodology of calculations they say is in accordance with a combination of the sections of the Act and the CA which is the position argued for by the defendants in this case.

[19] The third witness for the defendants was Joanne Ogg, a partner in the accounting firm of Ernst & Young Limited (EY), who are the auditors for Oji. Ms Ogg emphasised that her evidence was provided as a factual witness and not an expert. To illustrate her evidence she helpfully provided various calculations of the annual holiday and long service leave payments made by CHH to a selected sample of employees and upon which CHH relies as being the correct method of calculation.

Pleadings and arguments on first issue

[20] The plaintiffs presented two arguments in support of their contention that cashed up entitlement to annual holidays (and long service leave) had been paid out

incorrectly when cashed up upon termination of employment. The first argument, which was that pleaded in the statement of claim, presented before the Authority and to which evidence before the Court was directed, relates to the divisor for the purposes of calculating the entitlements pursuant to the Act. Whereas the employees were paid on salary, the plaintiffs allege now that for the purposes of calculating the value of accrued annual and long service leave, regard must be had to the actual hours and hourly rate worked and not that prescribed in the CA in combination with the Act. Whereas in the CA the working week for annual leave payroll purposes for shift workers (whether on a 4 x 12 hour shift or a 5 x 8 hour shift) is defined as 4 x 12 hour shifts, the workers on both the four day and five day shifts work less than 48 hours per week. In the case of those on a four day shift the divisor is alleged to be an average of 42 hours per week. In respect of workers on a five day shift the divisor is alleged to be an average of 33.69 hours per week. Nevertheless the basis of accruing leave as it is earned would remain under this method at 48 hours per week. Using a lower divisor in this way would result in a greater hourly rate being required to reimburse accrued annual holiday and long service leave. However, it results in an alteration to the agreement to convert the payment for shift work to a weekly salaried basis. It would also result in the payment for accrued leave upon termination substantially increasing the salary for the year or years when the holidays were accrued; the holidays being accrued in arrears. It does not take into account the fact that with the evened out payment by salary the weekly salary included payment for days not actually worked and during which periods the leave entitlements accrued in arrears. The fact that annual leave entitlement is accrued on the basis of 48 hours per week means that introducing the lower divisors argued for then distorts the payment to be made contrary to the provisions of the CA in combination with the Act. Ms Ogg set out examples of calculations in her evidence showing the substantial increase above agreed annual salary and the resulting effect on the calculation of holiday pay to be cashed up resulting from this distortion.

[21] This point also shows the fallacy in the second or alternative argument, which was not pleaded or specifically covered by the plaintiffs' witnesses, and appears to have been raised for the first time in the hearing. Mr Oldfield submitted that the accrued leave days should be inserted into a hypothetical roster to reflect the way that annual leave was taken during employment with CHH. This would be an easy

task as the new employer, Oji, when the transfer took place continued on with the CHH roster in any event. Mr Oldfield submitted that for the weeks that the employees would then be hypothetically working through that leave they would be paid weekly salaries.

[22] This again would mean that CHH would be paying a substantially increased annual salary for the annual leave accrued in arrears. The hypothetical scenario presented by Mr Oldfield again fails to recognise the fact that the holiday accruals were earned in arrears and the total leave owing crystallised and conflated into a total number of hours or days at termination of employment. Under this hypothetical method salary would also be paid in addition for days when the employee would not otherwise have been working a shift. This would also mean salary for the period required to work through the accrued leave would be paid in addition to the salary the employees would then have received from Oji after the transfer.

[23] Mr Oldfield could not point to any provision in either the CA or the Act which would support these contentions of the plaintiffs except to rely on the words "unless the context otherwise requires" in the definition of ordinary weekly pay and relevant daily pay in the Act. He submitted that in this case the context does otherwise require a departure from the Act's provisions. He also relied upon the principles contained in international conventions.

Consideration of issue one

[24] While the principles contained in the conventions and those ratified and adopted into New Zealand law set out desirable objectives, they are of little assistance in solving the present problem which requires an interpretation of what the parties agreed to and intended by their CA and the provisions of the Act which is specific and in unambiguous terms adopted in the CA.

[25] The CA and the Act meet the objectives of the international conventions. In this case the employees have received entitlements to generous periods of annual leave in compliance with the Act, long service leave and other company leave incorporated into the CA by negotiation. There are proper provisions for payment of

such leave consistent with the definition of a working week for the employees and the payment of those weeks by salary. To accede to either of the methods of calculation for the payment submitted for by the employees would abrogate the agreed basis of payment and result in a serious distortion of the total salary agreed to between the parties. This would be to the serious detriment of the employer and would be contrary to the parties' mutual intentions expressed in the CA.

[26] Not only would these matters ignore the basis of the leave being accrued in arrears on the basis of 48 hours per week of leave, which the plaintiffs, for obvious reasons wish to leave unchanged, but they ignore the fact that the salaries when paid during employment covered not only the shifts worked but the days when an employee was not required to work while off shift. This was fairly met when an employee took annual or long service leave, by the system of only reducing the total accrued leave by the shift days included in the period of annual or long service leave being taken even though a full weeks' salary continued to be paid while the employee was on leave. The accrued leave balance would only be reduced by 12 hours per otherwise rostered shift day occurring during the leave.

[27] By virtue of a combination of cls 13.2-13.3 of the CA the method of calculating entitlement to annual leave and payment therefore is prescribed. Under s 16 of the Act, at the end of each completed 12 months of continuous employment an employee is entitled to not less than four weeks' paid annual leave. Under s 17 of the Act the employer and employee may agree on what genuinely constituted a working week for the employee. Clause 13.2 of the CA is the parties' method of providing this for the plaintiff employees in this case. Once that is established the method of calculation of annual leave is prescribed in ss 21-28 of the Act with ss 23-26 relating to calculations in payment upon termination of employment.

[28] As the CA provided what the parties had agreed as genuinely constituting a working week for the employee, CHH turned to the Act to calculate what each of the employees was entitled to by way of payment for annual leave cashed up at the termination of employment. Accordingly, it applied the provisions of s 24 of the Act to calculate the entitlement to untaken annual holidays as at the last anniversary of commencement of employment prior to the termination taking effect. In respect of

any broken period between that anniversary and the actual date of termination the second defendant now regards itself as bound by s 25 of the Act but, as set out earlier, is unable to calculate that until the outcome of the present dispute is known. That is because the 8 per cent needs to be weighed against gross earnings and in total that will include the payment for annual holidays calculated under s 24 of the Act.[3]

[29] It is helpful at this point to set out the provisions of ss, 24-26 of the Act. These read as follows:

> **24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen**
>
> (1) Subsection (2) applies if—
>
> (a) the employment of an employee comes to an end; and
>
> (b) the employee is entitled to annual holidays; and
>
> (c) the employee has not taken annual holidays or has taken only some of them.
>
> (2) An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of—
>
> (a) the employee's ordinary weekly pay as at the date of the end of the employee's employment; or
>
> (b) 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 Calculation of annual holiday pay if employment ends before further entitlement has arisen**
>
> (1) Subsection (2) applies if—
>
> (a) the employment of an employee comes to an end; and
>
> (b) the employee is not entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not worked for the whole of the second or subsequent 12 months for the purposes of section 16.
>
> (2) An employer must pay the employee 8% of the employee's gross earnings since the employee last became entitled to the annual holidays, less any amount—
>
> (a) paid to the employee for annual holidays taken in advance; or
>
> (b) paid in accordance with section 28.
>
> **26 Payments may be cumulative**
>
> To avoid doubt,—
>
> (a) gross earnings for the purposes of section 25(2) includes any payments under section 24(2); and
>
> (b) an employee may be entitled to payments for annual holidays under both section 24 and section 25.

[3] By virtue of the Holidays Act 2003, s 26(a).

[30] How the second defendant carried out its calculation of the cash-up of annual leave for each of the employees involved is set out in the following passages from the evidence of Mr Renowden. He first explained the basis of the salarisation and leave under the CA and then set out in detail the way in which calculation of holiday pay was then made. These parts of his evidence read as follows:

> Systems
> …
> 13. For example, if an employee took a week of annual leave:
>
> (a) An administrator would receive the employee's timesheets and manually enter the employee's week of leave into KRONOS.
>
> (b) If the employee was due to work for three days that week (because of the way that the roster fell), KRONOS would show that their annual leave balance was reduced by three days; if the employee was due to work for four days that week, KRONOS would show that their annual leave balance was reduced by four days.
>
> (c) The employee would be paid on the basis of the greater of ordinary weekly pay or average weekly earnings, regardless of whether three or four days were deducted from their annual leave balance. This is as a result of the salarisation of pay at the Tasman Mill, which I discuss below.
>
> Salarisation and leave
>
> 14. All of the second plaintiffs are paid annual salaries. Employees are paid on a weekly basis (every Tuesday), and they receive 1/52nd of their annual salary irrespective of the hours actually worked in any particular week. This is in accordance with clause 10 of the CA, which provides for consistency of employees' pay from week to week.
>
> 15. The second plaintiffs are either shift workers (who work 12 hour shifts) or day workers (who work 8 hour shifts). The employees' shift patterns mean that employees do not work the same number of shifts in any particular calendar week. For example, a shift worker may work three 12 hour shifts in one week, but then work four 12 hour shifts in another week.
>
> 16. For shift workers, the Chris21 payroll system is set up so that each week of pay equates to 48 hours of work, and leave is accrued at the rate of 48 hours per week. This is because clause 13.2 of the CA provides: "For payroll purposes, a "week's leave" shall be fixed at…4x12 hour shifts for shift workers."
>
> 17. For day workers, the Chris21 payroll system is set up so that each week of pay equates to 40 hours of work, and leave is accrued at the rate of 40 hours per week. This is because clause 13.2 of the CA provides: "For payroll purposes, a "week's leave" shall be fixed at 5x8 hour days for day workers."

18. Under the CA, employees at Tasman Mill get a minimum of four weeks' annual leave. Shift workers are entitled to an additional week of paid leave. There is another week of paid leave available for employees named in Schedule 9 of the CA (known as "company leave").

19. CA employees are also eligible for long service leave, after completing the relevant qualifying period of service.

Calculation of holiday pay

20. In relation to holiday pay that was paid to each of the second plaintiffs upon termination of their employment with CHH as a result of the Transaction, the calculation by CHH was as follows:

(a) The employee's previous 12 months' earnings was divided by 52 to get their average weekly earnings.

(b) The employee's average weekly earnings amount was then divided by either 48 or 40 (depending on whether they were a shift or day worker) to get an hourly rate.

(c) The hourly rate was then multiplied by the number of hours of accrued leave that the employee had at the date of termination.

21. The above calculation was then compared against a calculation of holiday pay based on the employee's ordinary weekly pay (in order to determine which of average weekly earnings or ordinary weekly pay was greater). This calculation was undertaken as follows:

(a) The employee's salary (together with the value of any allowances under the CA) was divided by 52 to get their ordinary weekly pay.

(b) The employee's ordinary weekly pay amount was then divided by either 48 or 40 (depending on whether they were a shift or day worker) to get an hourly rate.

(c) The hourly rate was then multiplied by the number of hours of accrued leave that the employee had at the date of termination.

[31] The approach taken by CHH, endorsed by the determination of the Authority and the evidence of its human resource and payroll managers and auditors, is clearly one that complies with the requirements of the CA in combination with the Act.

[32] In Ms Ogg's final report which was produced as document 23 Ms Ogg set out a table of findings and sample calculations for calculating untaken annual leave, long service leave and alternative holiday leave arising from the times when employees were rostered to work on public holidays. This is referred to in the CA as lieu days as opposed to being referred to as the separate category of alternative holidays under the Act. They amount to the same thing.

[33] Ms Ogg's methodology for the calculation of payment for annual leave and long service leave is the same calculation as that set out by Mr Renowden.

[34] I differ in a minor way from how the equation adopted by Mr Renowden and Ms Ogg is expressed. Even though the end result in terms of quantum is virtually the same, the equation could be expressed more consistently with the language of the Act.

[35] Under the Act each employee is entitled to four weeks' annual leave per year. For those working on a four or five day shift, the week's leave is 4 x 12 hour shifts. The CA is clear that the deemed working week applies to all shift workers whether working a 4 x 12 hour or 5 x 8 hour shift. In calculating holiday pay owing each four shifts earn one week's salary for those on the shifts. Each day when the employee would have been on shift work earns 25 per cent of a week's salary, 50 per cent for every two days, and 75 per cent for every three days. Some anomaly arises from this for the 5 x 8 hour shift workers. However, the CA is clear that the deemed "week's leave" accrual applies to all shift workers.

[36] An example of the calculation done by EY is the employee WP, one of the employees used by Ms Ogg in her samples. The result of the methodology can be seen from this example which follows the process set out by Mr Renowden discussed previously. WP's entitlement to outstanding annual leave was calculated to be $14,064.62. This was calculated on the basis of hourly rate multiplied by accrued annual leave hours. The hourly rate was determined by dividing the annual salary by 52 weeks and then dividing that by the weekly hours (being 48 on the basis of the CA). The salary was $112,399.00. When this is divided by 52 and then further divided by 48 the hourly rate is shown to be 45.031651. The accrued annual leave hours in WP's wage and time records were 312.3275. When this figure is multiplied by 45.03165 the total is $14,064.62.

[37] Using a calculation more specifically adopting the terminology of the Act in combination with the CA the result is similar. This equation is as follows for WP. Accrued annual leave hours of 312.3275 are divided by 48 to determine the number of weeks of annual leave owing. The result is 6.51 weeks. The weekly salary is calculated by dividing the annual salary of $112,399.00 by 52 resulting in $2,161.52 dollars per week. This weekly salary multiplied by 6.51 weeks totals $14,071.50. The minor difference arises from the rounding of the decimal points.

[38] It can be seen therefore that the result of the two calculations is virtually the same. It also assumes that division of annual salary in this way equates to or is greater than the greater of ordinary weekly pay or average weekly earnings as required by s 24 of the Act.

[39] Therefore the CHH methodology correctly calculates the allocation of holidays applying under the combination of the CA and the Act as found by the determination of the Authority. This methodology applies to annual leave and long service leave and would also apply to company leave. For reasons set out later, the basis of calculating pay on an alternative day arising from working on a public holiday, if relevant daily pay cannot be calculated in terms of the Act, would be the same as or similar to the calculation for annual leave if that is equal to or greater than is prescribed in the Act. The Act of course only sets out minimum entitlements.

[40] This methodology will also assist with calculations on the fourth issue of the quantum of 8 per cent of gross earnings for the balance of holidays owing between the last anniversary of an employee commencing employment and the date of termination now conceded as owing pursuant to s 25 of the Act. This is because gross earnings can now be calculated and must include both the payment required to be made under s 24 and long service leave owing.

[41] The key to the issue is that when employees took leave they got a full week's salary per week of leave but their accrued leave entitlement was only reduced by the number of rostered shifts they did not in fact work during the period of leave. This meant that at the time of transfer their accrued leave was higher than if they simply had a week of taken leave deducted. To then pay them on a basis other than averaged salary would mean that they would effectively be compensated twice. The company's argument is therefore correct. To accept the union's argument would be to undermine and alter the basis of calculation in an unprincipled way from the way the salaried basis is prescribed by both the CA and a proper application of the Act provisions.

Issue two

[42] The second issue relates to the correct payment for the alternative holidays as referred to in the Act or lieu days as they are referred to in the CA. It is significant in the context of the plaintiffs' arguments on this point that both the CA and the Act categorise and provide separately for public holidays and alternative holidays.

[43] While the provisions of the CA refer to statutory holidays, it is clear that this is referring to public holidays as defined in the Act. Clause 15 of the CA names each of the statutory holidays covered in the CA and which exactly equate with the named public holidays in the Act.

[44] Clause 15.4 of the CA provides:

> All Employees on call on any of the recognised statutory holidays shall be eligible for a lieu day as per Section 59 of the Holidays Act 2003. On call numbers are described in Appendix B.

[45] Section 60 of the Act provides for the method of payment for alternative holidays which are separately categorised in the Act from public holidays. Lieu days being the same as alternative holidays are not equated with the named public holidays. Nothing in s 60 requires penal rates required for working on public holidays to be paid for alternative holidays.

[46] These provisions provide a basis for resolving the plaintiffs' argument on the second issue. The parts of Schedule 4 of the CA set out earlier contain a formula (albeit with a mathematical error) for calculating relevant daily pay for work on statutory holidays. It is an enhanced entitlement to that provided under the definition for relevant daily pay in the Act. Because lower divisors are prescribed in the CA, a higher relevant daily pay results from the equation which is required to be made in accordance with the schedule. The plaintiffs argue that the enhanced payment resulting from this relevant daily pay formula applies to working on both statutory or public holidays and lieu or alternative holidays. The schedule makes no mention of the relevant daily pay for lieu days or alternative holidays. Further, cl 15 of the CA makes a distinction between the named statutory holidays and lieu days. If the enhanced relevant daily pay was also to apply to the alternative holidays, it would

need to be specifically provided for in that way in the schedule or in other provisions of the CA. Further, by incorporating the Act as it does, cl 15 and the fourth schedule would need to provide a specific departure from the provisions of the Act. Section 60 of the Act applies to payment for alternative holidays in this case. Payment has to be not less than either relevant daily pay or average daily pay as they are defined in the Act. The enhanced benefit under the fourth schedule, applying to working on statutory or public holidays does not apply to alternative holidays as has been argued.

Issue three

[47] The third issue relates to s 40 of the Act which provides:

> **40 Relationship between annual holidays and public holidays**
> (1) A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual holidays.
> (2) Subsection (3) applies if—
> (a) the employment of an employee comes to an end; and
> (b) the employee is entitled to annual holidays; and
> (c) the employee has not taken the annual holidays or has taken only some of them.
> (3) The employee is entitled to be paid for a public holiday if the holiday would have—
> (a) otherwise been a working day for the employee; and
> (b) occurred during the employee's annual holidays had the employee taken his or her remaining annual holidays entitlement immediately after the date on which the employee's employment came to an end.

[48] The second defendant argues that this section, which is now relied upon by the plaintiffs, does not apply as the employment for the purposes of this section has not come to an end. The argument put forward for the second defendant is that the use of the words "comes to an end" in this section does not have the same meaning as that contained in other sections of the Act such as s 24(1). The reason for this is submitted to be that as the employees have been offered continuous employment with the new employer upon the same terms and conditions as applying previously while employed by CHH, they have merely transferred to Oji. Reliance is placed on s 6 of the Interpretation Act 1999 to make the submission that the section of the Interpretation Act allows for the possibility that different circumstances could

produce different interpretations of the same words used in a statute. Section 6 of the Interpretation Act reads:

> **6 Enactments apply to circumstances as they arise**
>
> An enactment applies to circumstances as they arise.

[49] Section 6 of the Interpretation Act adopts the ambulatory approach to statutory interpretation whereby a statute is regarded as 'always speaking'. However, this approach applies to the same words and varies the meaning of those words over time in the light of new circumstances rather than varying the meaning of the same words within an instrument.

[50] The proposition made by the second defendant, having regard to the facts of this case, would not justify a departure from s 5 of the Interpretation Act which reads:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[51] Applying those principles the meaning of the text is clear as is the purpose, which is to ensure the integrity of an employee's right to the minimum entitlement to annual leave provided in the Act without deduction on account of other days of leave which the employee is absolutely entitled to receive such as a public holiday. That integrity is also preserved in the period immediately following termination of employment when accrued leave is being paid up. Obviously, s 40 would be more beneficial to an employee who does not acquire new employment immediately after termination of existing employment. Section 40(3) may not be particularly convenient for CHH in this case where the employees are immediately upon termination taking up employment with Oji which will be liable to pay for the same public holidays if they occur. However, that inconvenience is not to be avoided by

applying a strained difference in interpretation to the same words occurring in different places within the same statute.

[52] The second defendant also relied upon an analogy with Part 6A[4] of the Employment Relations Act 2000 dealing with the transfer of disadvantaged employees with low bargaining power within specified categories in the Act who are transferred upon redundancy to a replacement employer. That part of the Employment Relations Act has an entirely different purpose from s 40 of the Act as is stated in s 69A(1) as follows:

> **69A Object of this subpart**
>
> (1) The object of this subpart is to provide protection to specified categories of employees if, as a result of a proposed restructuring, their work is to be performed by another person.

[53] Section 40 must be read in the context of the Act as a whole and its meaning interpreted from its text and in light of its purpose which in each case, in the present circumstances, is clear. To give s 40 the meaning proposed by the second defendant would be to create conceptually difficult conflict between it and other sections of the Act using identical text and context. If the employees are not ending their employment for any purpose under the Act it would also mean that in most if not all of the instances in this case the agreement to pay out the whole or a major part of their unused annual leave would be unlawful under s 28A, which limits the extent to which annual leave can be paid out while employment is continuing.

[54] This approach to s 40 of the Act is confirmed in the following statement in Brookers Employment Law.[5]

> **Clarification of relationship between annual holidays and public holidays**
>
> In terms of s 40(1) a public holiday that falls during an employee's annual holidays must be treated as a public holiday and not as part of the employee's annual leave.
>
> …

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4 In particular s 69J dealing with how accrued holidays and leave are to be treated upon transfer.

5 *Employment Law – Westlaw NZ* (online looseleaf ed, Thomson Reuters) at [HA40.01].

> The effect of s 40(2)–(3) is that, if the employee's employment comes to an end and the employee is entitled to annual leave, the employee must be paid for any public holiday that would otherwise have been a working day for him or her, and which would have occurred during the annual leave had that been taken immediately after the date on which the employment terminated. Accordingly, in the hypothetical case of an employee whose employment terminates on Christmas Eve, and who has 10 days' annual leave owing, he or she will have to be paid for any of the public holidays over the Christmas and New Year period that would otherwise have been a working day.

[55] The arguments put forward by the second defendant as to the application of s 40 are untenable and not accepted. However, all of the criteria under s 40(2) and (3) must be present to entitle the public holiday to be excluded from the calculations of annual leave and paid for separately in accordance with s 40. The question of whether the public holiday would have otherwise been a working holiday for a particular employee can easily be ascertained by virtue of what has already been discussed in this judgment that the roster following re-employment of work with Oji, continued on in the same format as that which had been applied by CHH in accordance with the CA up to the date of transfer of the business.

Disposition

[56] In conclusion the findings in respect of the relief sought in paragraph 42 of the amended statement of claim are:

a) A judgment that the second defendant cashed up shift employees' annual and long service leave incorrectly is declined. The method of calculation used by the second defendant was in accordance with the provisions of the CA and the Act.

b) A judgment that the second plaintiffs were entitled to be paid 8 per cent of their gross earnings since the last anniversary of their employment on termination is granted. The second defendant has admitted this cause and is now able to calculate the amounts of such entitlements. Gross earnings in accordance with s 14 of the Act include:

i) The annual holidays (annual leave) entitlements that were paid on termination of employment.

ii) The alternative holidays (lieu days) that were paid on termination of employment.

iii) Any public holidays paid under s 40 of the Act.

iv) The long service leave entitlements that were paid on termination of employment.

For the sake of clarification the categories in s 14 of the Act are non-exclusive and while long service leave payments are not specifically mentioned they must come within the words "all payments that the employer is required to pay to the employee under the employee's employment agreement".

c) The second plaintiffs are granted a judgment:

i) That they are entitled to be paid for public holidays that would otherwise be working days for the second plaintiffs that occurred during the second plaintiffs' annual holidays (annual leave) had the second plaintiffs taken their remaining annual holidays (annual leave) entitlement immediately after 1 December 2014 under s 40 of the Act.

ii) That the rate of payment for each public holiday is relevant daily pay as set out in s 9 of the Act and the CA, including schedule 12. That schedule provides an additional calculation for the purposes of 25 and 26 December 2014.

d) A judgment that the second plaintiffs' seek in respect of payment for alternative holidays (lieu days) for the shift employees is refused. Relevant daily pay as set out in schedule 4 of the CA does not apply to alternative holidays.

e) and f) Insofar as claims under paragraph 42(e) and (f) of the amended statement of claim are concerned the Court is not required to quantify the amounts. However, to the extent that the second plaintiffs have succeeded they are entitled to arrears of wages.

f) and g) That the second plaintiffs are entitled to interest on the sums recovered by them. Such calculations of interest are to be made pursuant to cl 14 of the third schedule of the Employment Relations Act 2000 and s 84 of the Act. Interest should also be paid from the date of this judgment until the date of payment at the same rate.

[57] Costs are reserved. However, in view of the fact that the parties have each been partially successful in the proceedings they may consider that costs should lie where they fall. If agreement cannot be reached and costs are sought, then each of the parties will have 14 days from the date of this judgment to file submissions as to costs.

M E Perkins
Judge

Judgment signed at 1 pm on 31 August 2016

THE PERSONS LISTED IN SCHEDULE A

Last	**First**
Anderson	Andrew
Bain	Kirk
Bain	Ronnie
Binney	Josh
Black	Eugene
Broket	Lindsay
Brott	Marcus
Byrne	John
Christie	Tony
Coffin	Cody
Coles	William Maurice
Dalgity	M J A
Davidson	Michael Timothy
Davies	Keith
Davis	Paul
Dennis	Gavin
Douglus	William Reid
Dredge	Mike
Edwards	Chlbert
Enoka	Wallace
Enright	Scott
Falwasser	Joshua
Forward	Michael
Frahm	John
Gedson	Phillip Raimona
Giddens	Brian
Goodare	Gary
Graham	Lee
Greenfeild	Darryl
Hale	Jason
Halvorsen	Barrie
Hammond	Ian
Harawira	P J
Harawint	Rogar
Harpur	Stephen
Harrington	Simon
Harvey	Shane
Hata	G
Haylings	Nick
Hedderwick	R G
Herewini	Te Manu
Hindmarsh	Ivan
Hollowood	Graham Robert
Howarth	Peter
Hudson	Hape Trevor

Hudson	Hope
Huma	Tai Timuroa
Hunia	Tai Timuroa (Junior)
Hunia	John
Hunia	Wihaare
Hunt	Tony
Hunt	Tui
Kingi	H M
Krause	Dennis
Laing	Tony
Madden	Bruce
Mahanga	John
Matthews	Arthur
McBurnie	N
McHardy	Robert John
Mckinley	M L
McKoy	Kohl
McKoy	Patrick
Manson	Wayne
Mei	Louis
Mexted	Steve
Morris	Sam
Muncaste	Mark
Munro	B H
Ngaheu	Cearic Tene
Ngaheu	Louis
Ngaheu	Tene
Ngahuru	Beiu
Ngamotu	Horo
Nuku	Mike
O'Brien	Kris
O'Brien	Mike
O'Brien	Ren
O'Brien	Wilhelm
Peita	G
Peri	W H
Phillis	Teri
Pryor	William
Rangiaho	Frank Hamiora
Rangiaho	Nathan
Rangiaho	Puni
Rangiaho	Ricky Hati
Reedy	Daikie
Reid	Darren
Richards	Desmond
Rintouh	Jackson
Roelofs	Rick
Rush	Jason

Semmens	Paul
Shilton	Findlay
Sisley	Raymond
Smith	Ivan
Smith	Larry
Smiths	Luke
Spanhake	Alan
Span hake	Keith
Takei	Eru
Tangitu	Potaua
Teriini	C.T
Thrupp	L.T
Tuhoro	Joseph
Turei	Ben
Turei	Tane
Tuhoro	Stephen
Turnball	Colin John
Van Der Horst	Ron
Waerea	Munro
Wakelin	Jodee
Wakelin	Rick
Walker	Cliff
Wardlaw	Baden
Wesler	Garry
White	Derek