IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 310
3163843

	BETWEEN	NEIL BLISSETT Applicant
	AND	ABSOLUTE SCAFFOLDING (2019) LIMITED Respondent
Member of Authority:	Lucia Vincent	
Representatives:	Jay Lovely, counsel for the Applicant Douglas Mitchell, counsel for the Respondent	
Investigation Meeting:	1 February 2023 at Timaru	
Submissions Received:	1 and 29 March 2023 from the Applicant 16 March 2023 from the Respondent	
Date of Determination:	13 June 2023	

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Neil Blissett has career scaffolded for fifteen years of his working life. Unfortunately, a series of shoulder injuries and lack of progress in recovery have prevented him from working in the profession he hopes to return to.

[2] Mr Blissett claims his former employer, Absolute Scaffolding (2019) Limited, a Timaru based company, unjustifiably dismissed him in July 2021. He says Absolute did this for a number of reasons, including his time off work on ACC due to his shoulder injury and a

personal vendetta against him after he asked for his holiday pay. Mr Blissett seeks lost wages, compensation and annual holiday pay.

[3] Absolute says it justifiably dismissed Mr Blissett for medical incapacity after following a fair process. It says it calculated and paid his annual holiday pay correctly.

How did the Authority investigate?

[4] The parties attended an investigation meeting on 1 February 2023. Three witnesses attended and answered questions under oath or affirmation. Mr Blissett gave evidence. Mr Stephen Murphy, Absolute's director and shareholder, attended with Mr Colin Cameron, Absolute's Timaru based manager. Both gave evidence on behalf of Absolute.

[5] I have read and considered all the lodged documents including the statement of problem, statement in reply (and amended versions of these), statements of evidence, supporting documents and written submissions.

[6] As permitted by section 174E of the Employment Relations Act 2000 (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.

What were the issues?

[7] The issues requiring determination were:

(a) Did Absolute unjustifiably dismiss Mr Blissett?[1]

(i) Was Absolute's reason for dismissing Mr Blissett fair and reasonable in all the circumstances?

(ii) Did Absolute follow a fair and reasonable process when deciding to dismiss Mr Blissett? (If not, were any procedural defects so minor that the overall justice remains?)

[1] Sections 103(1)(a) and 103A of the Act.

(b) Did Absolute pay Mr Blissett his annual holiday pay in accordance with the Holidays Act 2003?

(c) If Absolute unjustifiably dismissed Mr Blissett or failed to pay his annual holiday pay correctly, what (if any) remedies should I award, such as:

(i) Reimbursement of a sum equal to the whole or any part of the wages or other money lost by Mr Blissett as a result of his grievance?[2]

(ii) Compensation of humiliation, loss of dignity, and injury to Mr Blissett's feelings?[3]

(iii) Should I reduce remedies due to any blameworthy behaviour by Mr Blissett contributing to the circumstances giving rise to his grievance?[4]

(iv) If the annual holiday pay paid to Mr Blissett is incorrect, what is the amount owing?

(v) Costs?[5]

Did Absolute unjustifiably dismiss Mr Blissett?

Test of justification

[8] The Employment Court has confirmed the test of justification set out in section 103A of the Act applies to medical incapacity dismissals even though the compulsory factors fit uncomfortably with dismissals of a no-fault nature.[6] Therefore, in determining whether Absolute unjustifiably dismissed Mr Blissett I must ask if how Absolute acted and what it decided were, on an objective basis, what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This requires me to have regard to how Absolute acted before dismissing Mr Blissett:

(a) Whether, having regard to Absolute's resources, it sufficiently investigated allegations against Mr Blissett;

[2] Sections 123(1)(b) and 128 of the Act.
[3] Section 123(1)(c)(i) of the Act.
[4] Section 124 of the Act.
[5] Clause 15, Schedule 2 of the Act.
[6] At [32], *Lal v The Warehouse Limited* [2017] NZEmpC 66.

(b) Whether Absolute raised its concerns with him;

(c) Whether Absolute gave Mr Blissett a reasonable opportunity to respond to its concerns; and

(d) Whether Absolute genuinely considered Mr Blissett's explanation (if any) about the allegations against him.

[9] I will also consider Mr Blissett's claims about:

(a) Absolute's decision-maker demonstrating bias or predetermination due to a personal vendetta against him because he asked for his holiday pay;

(b) Absolute unfairly failing to meet with him before dismissing him;

(c) Whether Absolute dismissed him for a different reason i.e. redundancy; and

(d) Whether Absolute failed to fairly consider and consult him over reasonable redeployment options.

Good faith

[10] Good faith plays a role – the parties were required to be active and constructive in establishing and maintaining a productive employment relationship in which they were (among other things), responsive and communicative.[7] As an employer proposing to dismiss, Absolute had a specific duty to provide Mr Blissett as an affected employee with access to relevant information and an opportunity to comment before deciding on his dismissal.[8]

Medical incapacity principles

[11] In contrast to Mr Blissett's view that Absolute should have waited for "as long as it takes" for him to return to work, that is not the legal position:[9]

> It is well established that an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing the employee for long term absence where it can be shown that the decision was substantively and procedurally justified.

[7] Section 4(1A)(b) of the Act.
[8] Section 4(1A)(c) of the Act.
[9] At [30], *Lal*, above at note 6, footnotes omitted.

[12] Case law has been clear for some time that an employer can fairly cry "halt" to an employment relationship if an employee has been unfit for work for an extended period of time. Exactly when an employer can fairly make that call has been the subject of several recent cases in the Employment Court. The key legal principles in those cases apply to Absolute and Mr Blissett's situation.

[13] The Employment Court has approached medical incapacity with the following framework:[10]

> The employer must give the employee a reasonable opportunity to recover. The terms of the employment agreement, any relevant policy, the nature of the position held by the employee and the length of time they have been employed with the employer are factors which are likely to inform an assessment of what is reasonable in the particular circumstances.
>
> The employer must undertake a fair and reasonable inquiry into the prognosis for a return to work, engaging appropriately with the employee. This will likely involve seeking and considering relevant medical information. It will also involve explaining the reasons for the inquiry, the possible outcome of it, and providing the employee with an opportunity for input and comment.
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> The employer must fairly consider what the employee has to say before terminating their employment. An employer is entitled to have regard to its business needs in deciding an appropriate response to the situation and any applicable time-frames. An employer is not obliged to keep a job open indefinitely, no matter how long an employee has been employed or how large the organisation is. For their part, an employee is obliged to be responsive and communicative.
>
> In cases of medical incapacity, and a reduced ability to undertake certain tasks, a level of engagement with attempts to facilitate a return to work may reasonably be expected. Fairness cuts both ways, consistently with the mutual obligations which exist in employment relationships.

[14] The final point made by the Court about the duty of good faith is an important one in medical incapacity situations – it requires active engagement from both parties, not solely an employer:[11]

> Employment relationships involve a two-way street. Both parties have an obligation to be responsive and communicative and to deal with each other in good faith. It ill-behoves an employee to complain about a failure to adequately progress a rehabilitative process when they themselves fail to engage in constructive dialogue in a genuine attempt to resolve issues.

[10] At [33]-[36], *Lal*, above at note 6, footnote omitted. Applied in *Lyttelton Port Company Limited v Arthurs* [2018] NZEmpC 9.
[11] At [43], *Dunn v Waitemata District Health Board* [2014] NZEmpC 201.

[15] With these legal principles in mind, I now consider how and why Absolute dismissed Mr Blissett.

How and why did Absolute dismiss Mr Blissett?

[16] Prior to being dismissed by Absolute (effective 15 July 2021), Mr Blissett had remained off work for more than 18 months due to medical incapacity. To understand how and why Absolute dismissed Mr Blissett, I have found it helpful to put that timeframe in context.

[17] When Mr Blissett started working for Absolute on 29 October 2019, he had already suffered several injuries to his right shoulder. Mr Blissett had sustained some of these injuries when he worked for scaffolding businesses like the one in Timaru that Absolute bought in late October 2019 - a different legal entity to Absolute. Mr Blissett's ACC file provided after his dismissal showed the circumstances of his injuries were caused by both work and non-work-related factors, but none during his work duties performed for Absolute.

[18] Mr Cameron knew of Mr Blissett's shoulder injury in broad terms but believed he was fully fit and capable of performing the role of scaffolder when he offered him role as a scaffolder with Absolute.

[19] It took some time before documenting the employment arrangements in an individual employment agreement.[12] The Agreement included a position description that described Mr Blissett's duties as including planning, building and erecting scaffolds of various types.[13] Witnesses agreed scaffolders must be physically fit. Mr Murphy described the role as follows:[14]

> … The position requires someone to be physically fit as they are required to undertake heavy lifting and climbing scaffolding. If a scaffolder is physically unable to safely lift heavy items and climb scaffolding, not only will they put themselves in danger of incurring serious injury they may also seriously injure other people on a work site including other ASL scaffolders, other construction workers and visitors to a site.
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> It is absolutely essential that a scaffolder is fit and able to perform the physically demanding work safely.

[12] Signed on 3 and 5 December 2019 by Mr Blissett and Absolute respectively.
[13] First Schedule of the Agreement.
[14] At [6] to [7], Mr Murphy's statement of evidence, numbering omitted.

[20] If for any reason Mr Blissett became unable to work for a continuous period exceeding three weeks or for an aggregate of more than 30 days in a six-month period, Absolute were entitled to terminate his employment on two weeks' notice.[15]

[21] Unfortunately, Mr Blissett only worked for Absolute for about two weeks before he went off work due to problems related to his shoulder injury, a condition covered by ACC. Payslips show he worked for 36.5 hours during the week ending 5 November 2019 and 47 hours during the week ending 12 November 2019. However, it was not until 9 December 2019 when Mr Cameron says Mr Blissett contacted Absolute to say he was unfit for work and later left a medical certificate at the office (on 19 December 2019). The medical certificate was dated 18 December 2019 and confirmed Mr Blissett could not work until 28 February 2020.

[22] The parties disputed the extent to which Mr Blissett communicated and provided information to Absolute about his absence from work between December 2019 and December 2020 when the parties agree Mr Blissett approached Absolute about his holiday pay. Mr Blissett recalled providing further medical certificates but it was unclear how many medical certificates he believed he had provided and when. It seemed Mr Blissett believed he had kept Absolute informed by providing medical certificates to another employee at Absolute. Mr Cameron was clear he had kept and provided copies of the medical certificates he received from Mr Blissett – the first received in December 2019 when Mr Blissett went off work, and two dated 6 October 2020 and 12 May 2021 provided in late May 2021.[16] None of these medical certificates provided much needed detail for Absolute to assess whether and when Mr Blissett would be able to return to work fully fit. Mr Cameron recalled relatively few and brief discussions with Mr Blissett over the phone or in person that at times became tense when he requested more information and Mr Blissett said he had provided this information to another employee. It would be fair to say that from when Mr Blissett went off work (in mid-November 2019), and when he says he attended work to request Absolute pay him his annual holiday pay (December 2020), neither party communicated well nor often.

[23] When Absolute started the process to address its concerns about Mr Blissett's absence in early January 2021, Mr Blissett had been absent for more than 12 months (from mid-

[15] Clauses 16.1 and 16.7 of the Agreement.
[16] At [15] and [17], Mr Cameron's statement of evidence.

November 2019 until January 2021). Mr Cameron consulted Absolute's lawyer who wrote to Mr Blissett to begin a process that it was said from the outset could result in Mr Blissett's employment ending.[17] Mr Blissett alleges Absolute started the process because he had asked for his holiday pay causing Mr Cameron to have a personal vendetta against him (which Mr Cameron denied). I accept the request for holiday pay was a factor in Absolute starting the process – Absolute's lawyers letter dated 11 January 2021 refers to this request. But I do not accept Mr Cameron had a personal vendetta against Mr Blissett because of that. Absolute fairly started a process to address Mr Blissett's absence from work (it could have reasonably started it earlier).

[24] In the letter starting the process, Absolute cautioned it could not keep the position open indefinitely. It requested Mr Blissett provide information that would enable it to assess the prospects of his return to work i.e. an update on his medical condition with supporting documentation and a date when he expected to return to work. After receiving the required information (within nine days), Absolute could then address any entitlements owing regarding holiday pay.

[25] Mr Blissett visited Mr Cameron on 19 February 2021 at work saying he had another specialist medical appointment in a few weeks and wanted to return to work. Mr Cameron told him Absolute needed more information (as set out in their letter) to enable it to make an informed decision about whether he could safely return to work.

[26] Mr Blissett did not provide the requested information. Mr Cameron gave evidence that there were no non-safety sensitive roles available at that time that it could offer to Mr Blissett.

[27] In a letter dated 25 February 2021, Mr Campbell wrote to Mr Blissett, this time highlighting health and safety and saying he wanted to ensure he could safely return to work. He said Absolute could not allow a return to work until he provided a copy of the medical/surgical reports on his condition or alternatively, permitted Absolute to arrange to have him assessed by their own doctor. Mr Cameron hand delivered this to Mr Blissett's home.

[28] Mr Blissett did not respond to the letter. Nor did he provide the information requested.

[17] Letter from Douglas Mitchell Lawyer to Mr Blissett dated 11 January 2021.

[29] In a further letter dated 13 April 2021, Mr Cameron referred to his prior requests and asked for a response within 14 days.

[30] Mr Blissett instructed a lawyer who responded on his behalf by email on 23 April 2021, saying Mr Blissett remained unfit for work, had provided medical certificates, and was waiting for an operation.

[31] Five days later, Mr Cameron responded to Mr Blissett's lawyer's email saying (among other things):[18]

(a) Absolute could not keep Mr Blissett's position open indefinitely;

(b) It had patiently accommodated Mr Blissett to date by keeping his job open and waiting for medical records or permission for Absolute's doctor to assess him;

(c) It requested this information to assess Mr Blissett's condition to establish whether and when he would be able to return to work; and

(d) It repeated its request asking for information detailing Mr Blissett's medical condition including medical certificates, medical reports and expected return to work date (within ten working days).

[32] Mr Blissett's lawyer emailed Mr Cameron on 5 May 2021 saying Mr Blissett was "in the process of getting the report you require." He forwarded an email from Mr Blissett saying:

> Just had an update from surgeon, he has advised me and Acc that I should start looking for another job as to his knowledge the next step for me is prosthetic surgery to fix this injury fully. As im still young they don't want to do this at this stage of my life. Ive also talked to Acc and have requested to see another surgeon for a second opinion. I will have another medical and a copy of surgeons report hopefully soon (sic).

[33] Mr Cameron recalled that on about 27 May 2021 Mr Blissett provided two further medical certificates. An expired medical certificate, dated 6 October 2020, confirmed he could have performed some work at that time but referred to a further shoulder injury in August 2020. Mr Blissett confirmed in evidence he had tried to get fit for work performing personal scaffolding at home but had unfortunately injured himself in the process, setting him back in his recovery. The medical certificate dated 12 May 2021 confirmed Mr Blissett was "Awaiting

[18] Letter dated 28 April 2021.

vocational reassessment and second orthopaedic opinion" and unable to resume any duties at work from that date for 90 days i.e. on around 10 August 2021. Neither of these medical certificates gave Absolute any certainty about when and whether Mr Blissett might be fully fit to return to work. Nor was there any firm timeframe for reassessment and the second opinion. Mr Cameron recalled there were no positions at the time that he could consider for Mr Blissett for light duties either.

[34] Mr Cameron wrote to Mr Blissett's lawyer on 15 June 2021, referring to the medical certificates. By this time, Mr Blissett had been absent for around 18 months. He had provided limited information about his injury prognosis. Mr Cameron told Mr Blissett that Absolute could not hold his scaffolding position open indefinitely and held a preliminary view it would end his employment due to medical incapacity because:

(a) Absolute viewed Mr Blissett's scaffolding role as a safety sensitive one requiring a person to be physically fit to ensure that they and others remained safe.

(b) Based on the information Absolute had to hand, it seemed unlikely Mr Blissett could perform the role safely.

(c) Absolute could not offer Mr Blissett any other positions because there were none available that were not safety sensitive. Nor were there any lighter duties.

(d) Although Absolute had been patient by keeping his role open, Absolute considered it unreasonable to continue to hold the position open for another two months (when Mr Blissett's medical certificate ran out), because it was an unreasonable period in the overall circumstances (noting also even at that point, Mr Blissett was still waiting for a vocational reassessment and second orthopaedic opinion).

(e) Mr Blissett's role would be highly unlikely to replaced given the downturn in work that had been experienced in 2021.

[35] Mr Cameron gave Mr Blissett five working days from the date of the letter to respond.

[36] Mr Blissett's lawyer forwarded a reply from Mr Blissett dated 25 June 2021, saying that he had got onto the waiting list for a new surgeon to try to fix his shoulder with surgery.

[37] Mr Cameron decided to dismiss Mr Blissett based on the information he had to hand as of 30 June 2021, when he wrote to him confirming this decision. He explained Absolute had considered the matters he and his lawyer had raised but that Absolute still had insufficient information to know when he would be fit and able to return to work. Mr Cameron said Absolute could not hold his position open any longer and did not consider other viable options existed. He provided two weeks notice, making the final day of employment 15 July 2021.

[38] Based on the correspondence and information outlined above, it is reasonable to conclude Absolute dismissed Mr Blissett because of his absence from work due to his medical incapacity. I now consider whether Absolute's reason for dismissing Mr Blissett was fair and reasonable in all the circumstances.

Was Absolute's reason for dismissing Mr Blissett fair and reasonable in all the circumstances?

[39] Although Mr Blissett believed Absolute ought to have waited longer ("as long as it takes"), an employer is not legally required to wait longer than what is fair and reasonable in the circumstances. An employer need not give unlimited opportunities to an absent employee to provide information and responses to concerns reasonably raised about an employee's absence, including information that could help an employer assess the likelihood of a return to work and when. Good faith in most instances would require an employee to provide that information.

[40] Absolute asked for and Mr Blissett had several months to provide information about his injury prognosis. He chose to give only limited information – three medical certificates and a couple of emails about upcoming appointments over the course of more than 18 months. Whilst Mr Blissett could choose not to provide any more information than he did, he cannot criticise Absolute for later making a decision based on the limited information it had.

[41] Unfortunately for Mr Blissett, at the time of the investigation meeting, more than three years after he went off work from Absolute, he had still not recovered. Relevant documents from Mr Blissett's ACC file (provided after his dismissal) revealed reports and information from relevant medical practitioners and specialists that could have assisted Absolute in making its decision about Mr Blissett's employment. This included information about Mr Blissett wanting to get back to his work as a scaffolder. As admirable as a desire to return to scaffolding

may be, Absolute did not have to wait for as long as it took for Mr Blissett to recover. Even with the various surgeries and opinions, starkly absent was a promise of a full recovery that would have enabled a reasonable time frame to return to work. In fact, it was highly recommended Mr Blissett retrain for a physically less demanding job than scaffolding and that he should avoid heavy impact, especially overhead work (which scaffolding requires).[19] Although Absolute did not have that detailed report when it dismissed Mr Blissett, it did have emails from Mr Blissett indicating as much. In those circumstances, it was reasonable for Absolute to conclude Mr Blissett could not return to work fully fit within a reasonable timeframe, and may never do so.

[42] When Absolute decided to dismiss Mr Blissett, he had been absent for more than 18 months. He had been unable to provide reliable medical information assuring Absolute that he could return work in the physically demanding and safety sensitive role of scaffolder. It reasonably considered but could not accommodate alternatives including light duties. I am satisfied that the decision that Absolute made was substantively justified and within the range of decisions a fair and reasonable employer could make in all the circumstances.

Did Absolute follow a fair and reasonable process when deciding to dismiss Mr Blissett?

[43] Mr Blissett claimed:

(a) Absolute's decision-maker demonstrated bias or predetermination due to a personal vendetta against him because he asked for his holiday pay;

(b) Absolute unfairly failed to meet with him before dismissing him;

(c) Absolute dismissed him for a different reason i.e. redundancy; and

(d) Absolute failed to fairly consider and consult him over reasonable redeployment options.

[44] I have already concluded that when Absolute started the process to address its concerns about Mr Blissett's absence in early January 2021, it did so fairly. Although the timing of Mr Blissett's request for holiday pay was a factor in Absolute starting the process – the letter dated 11 January 2021 refers to his request in December 2020, I do not accept Mr Cameron had a

[19] Letter dated 3 May 2021.

personal vendetta against Mr Blissett. The comprehensive correspondence from Absolute following that first letter focuses on Absolute's primary concern – Mr Blissett's ongoing absence from work. The overall process including repeated requests and opportunities for Mr Blissett to provide information and responses all indicate the decision maker (Mr Cameron together with Mr Murphy) kept an open mind as to outcome and remained impartial. Mr Blissett did not provide evidence that indicated otherwise.

[45] Mr Blissett expressed concern initially that Absolute dismissed him without meeting with him in person first. When asked about this, he said it did not bother him. When asked what he would have said at the meeting, he indicated what was in the file. At the same time, Mr Blissett remained of the view Absolute was not entitled to see all of his medical information which he regarded as personal.

[46] Although meeting in person may have benefitted both parties to more personally address a difficult situation, I do not consider the failure to do so unfair in the circumstances. Not meeting did not bother Mr Blissett, both parties were communicating in writing, and neither requested to meet in person.

[47] I have already concluded Absolute dismissed Mr Blissett for medical incapacity. Any reference to not replacing his role was secondary to the reason for dismissing him. It is acceptable for an employer to consider its wider business needs when deciding whether and for how long it can keep a position open for someone who is off work due to medical incapacity.

[48] I have reflected on whether Absolute failed to fairly consider and consult Mr Blissett about what he says were reasonable redeployment options. He referred to options like yard work, signing off scaffolding tickets, and the possibility of returning to work as a scaffolder as or with a fourth person on what would otherwise be a three-person scaffolding team. Absolute's evidence was that none of these roles were available, full-time or involved sufficiently light duties. I accept this evidence. Even if a fourth person could have been economically viable for Absolute, Mr Blissett has regrettably failed to provide the medical information (and assurance) needed to satisfy his employer that it could responsibly manage the risk of injury upon returning to work as a scaffolder. Mr Blissett's own evidence confirmed his rehabilitation at home scaffolding resulted in him sustaining a further injury. I am not satisfied Mr Blissett engaged in

good faith with the process in a way that could have allowed for further consideration of this as an option in any case. I find it was reasonable for Absolute to decide against the alternatives suggested in the circumstances.

[49] I am satisfied Absolute adequately investigated its concerns about Mr Blissett's ongoing absence from work. Absolute clearly communicated its concerns to Mr Blissett and sought his response. Mr Blissett had a reasonable opportunity to provide any information and responses knowing what the possible consequences were if he did not. Absolute genuinely considered the information and responses provided by Mr Blissett. Ultimately Absolute decided to dismiss Mr Blissett on reasonable grounds that it explained to Mr Blissett. I find the process followed was fair and reasonable in the circumstances.

[50] Having concluded Absolute had good reason for and followed a fair process in dismissing Mr Blissett for medical incapacity, I find it justifiably dismissed him.

Did Absolute pay Mr Blissett his annual holiday pay in accordance with the Holidays Act 2003?

[51] Absolute paid Mr Blissett $33.70[20] in the pay period ending 20 July 2021 following his dismissal. Mr Blissett says Absolute should have paid him for four weeks annual holidays.

[52] Although Mr Blissett had not worked since mid-November 2019, the employment relationship continued until his final day - 15 July 2021 (even though he did not physically work).

[53] Mr Blissett physically worked and was paid for two weeks work as follows:

(a) During the week ending 5 November 2019, 36.5 hours, paid $1,095.00; and

(b) During the week ending 12 November 2019, 47 hours, paid $1,642.80.

[54] In written submissions, Absolute acknowledged Mr Blissett continued to accrue annual holiday entitlements whilst off work receiving weekly compensation under the Accident Compensation Act 2001.[21] Consequently, Mr Blissett earned an entitlement to four weeks

[20] All amounts are gross.
[21] Section 16(2)(a)(iv) of the Holidays Act includes this type of absence in the definition of continuous employment of 12 months duration from which a four-week entitlement to annual holidays arises.

annual holidays on his anniversary date of 29 October 2020. Absolute was required to calculate what this untaken entitlement was worth upon termination. In addition, Absolute had to calculate any further payment required for the part year after his anniversary date until his final employment date of 15 July 2021.

[55] In the normal course of an employment relationship in which earnings continue throughout, Absolute could have calculated more easily what Mr Blissett would have received for his final holiday pay by applying the greater of his average weekly earnings or ordinary weekly pay for the four weeks earned as an entitlement, plus 8% of the gross earnings for the part year worked to his effective final day of 15 July 2021, with payments being cumulative (less any annual holidays taken or paid out lawfully). However, having been off on ACC, it appears this calculation has been made on a different basis. Certainly, the payment made to Mr Blissett ($33.70 in the pay period ending 20 July 2021) did not tally with what Mr Blissett believed he was entitled to.

[56] Absolute says that because Mr Blissett did not earn anything in the 12 months immediately before his dismissal, his average weekly earnings were zero.[22] This much is correct - "gross earnings" for the purposes of holiday pay excludes any weekly compensation payable under the Accident Compensation Act 2001.[23] However for the purposes of calculating the cash value of any untaken entitlement to annual holidays upon termination, an employer must pay the greater of average weekly earnings or ordinary weekly pay.[24] Absolute says this is also zero because Mr Blissett's hours varied during the two weeks he worked, allowing it to use the four week averaging formula set out in the definition of ordinary weekly pay in section 8(2) of the Holidays Act. I disagree.

[57] Section 8 defines ordinary weekly pay for the purposes of calculating annual holiday pay as the amount of pay an employee receives under their employment agreement for an ordinary working week. It includes payments for overtime if a regular part of the employee's pay but excludes irregular payments. If it is "not possible" to determine an employee's ordinary weekly pay in that way, then it "must" be calculated in accordance with the formula Absolute

[22] Section 5 of the Holidays Act defines average weekly earnings as 1/52 of an employee's gross earnings (for the prior 12 months).
[23] Section 14(b)(ii) of the Holidays Act.
[24] Section 24(2) of the Holidays Act.

says should be applied - an average of the four calendar weeks' gross earnings immediately prior to dismissal (which would be zero for Mr Blissett). For reasons that follow, I am not satisfied the situation meets the "not possible" threshold because the parties can determine Mr Blissett's ordinary weekly pay by assessing the amount of pay he would have received under his employment agreement for an ordinary working week.

[58] Absolute employed Mr Blissett for up to 45 hours a week within the ordinary hours of work.[25] The Agreement says Mr Blissett's ordinary hours of work were between Monday to Saturday from 6:00am to 5:00pm each week, unless agreed for specific projects. The Agreement also says he would ordinarily work up to 45 hours a week. In submissions for the Respondent, Absolute claims that because Mr Blissett only worked two weeks and his hours varied, the four-week averaging formula must be used.

[59] Mr Blissett worked 36.5 hours one week and 47 hours the next. Whilst I am satisfied the hours varied, I am not satisfied it means it is "not possible" to work out what would genuinely constitute a working week and the ordinary weekly pay under the Agreement. In the circumstances I consider a reasonable amount of averaging is appropriate – of the hours and pay for the two weeks worked under section 8(1).

[60] I consider this approach consistent with the Supreme Court's decision on the Holidays Act.[26] The Court described the purpose of holiday pay calculations in a broad sense as requiring an employee on holiday to be paid an amount at least similar to what they would have earned had they not taken the holiday. Section 8 more specifically aims to enable an employee to tie holiday pay reasonably closely to what they earned immediately before taking their holiday. Given an employee's right to a more favourable ordinary weekly pay or average weekly earnings figure, "the legislature envisaged that employees may be entitled to the benefit of some lumpiness in remuneration…"[27]

[25] Clause 7.2.
[26] *Tourism Holdings Ltd v Labour Inspector* [2021] NZSC 157. Referred to in *Meiklejohn v DCM Roofing Limited* [2022] NZERA 202 at [34] in a case involving a similar scenario of an employee who claimed annual holidays accrued whilst away from work on ACC.
[27] At [34] to [35]. Above note 26.

[61] When commenting on the applicability of section 8(1) the Court said:[28]

> Where there is a pattern of work and pay which does not vary on a week-by-week basis, there will be no difficulty with the calculation under s 8(1). We do not, however, see the s 8(1) exercise as necessarily confined to that situation. This is because some variation is implicit in s 8(1)(b)(i) and (ii), as they encompass types of pay that are likely to differ from week to week. So, some averaging may be appropriate.
>
> We see the scope of averaging under s 8(1) as limited. This is because the reference to "the amount" in s 8(1)(a) indicates a reasonable measure of specificity. In this context, "regular part" in s 8(1)(b)(i) is to be applied as denoting a regularity that enables sensible assessment of "the amount of pay … for an ordinary working week".

[62] I find Absolute and Mr Blissett agreed on what an ordinary working week would look like - up to 45 hours per week between starting and finishing times. Absolute paid Mr Blissett an hourly rate which was added to for any overtime worked in excess of 45 hours per week. Despite having only worked two weeks and those hours varied, I find section 8(1) applies and an average of those two weeks can be used to correctly calculate his ordinary weekly pay i.e. 41.75 hours per week at $28.00 per hour being $1,169.00. Mr Blissett is therefore owed an amount for four weeks annual holidays totalling $4,676.00 (less what has already been paid – being $33.70).[29]

[63] Given the cumulative nature of payments under section 26 of the Holidays Act and that under section 25(2) Absolute should have also paid Mr Blissett 8% on any gross earnings for the part year 29 October 2020 to 15 July 2021, he is also owed an amount reflecting 8% of the annual holidays paid under section 24, being $374.08.

Summary of findings and orders

[64] Absolute justifiably dismissed Mr Blissett.

[28] At [36] to [37]. Above note 26.
[29] Section 24(2) of the Holidays Act.

[65] Absolute did not pay Mr Blissett in accordance with the Holidays Act. I order Absolute to pay Mr Blissett for his annual holiday pay as follows:

(a) Four weeks annual holiday pay totalling $4,642.30; and

(b) 8% of his gross earnings on that amount being $374.08.

[66] I reserve the issue of costs. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Blissett 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 Absolute 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.

[67] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[30] I leave it to the parties to return to the Authority should it be necessary to determine costs.

Lucia Vincent
Member of the Employment Relations Authority

[30] For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.