IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 87
EMPC 264/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	TOURISM HOLDINGS LIMITED Plaintiff
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Defendant

Hearing:	26 February 2019 (Heard at Auckland)
Appearances:	S Langton and S Maxfield, counsel for plaintiff S Blick, counsel for defendant
Judgment:	26 July 2019

JUDGMENT OF JUDGE K G SMITH

---

[1] Tourism Holdings Ltd operates a tour bus business throughout New Zealand called Kiwi Experience. A dispute has arisen between Tourism Holdings and a Labour Inspector about how to calculate holiday pay for the company's drivers.

[2] The disagreement is about how to treat the drivers commissions when calculating annual holidays once an entitlement to a paid holiday has accrued. The parties agreed that this proceeding is a test case about applying s 8(2) of the Holidays Act 2003 (the Act).

[3] An agreed statement of facts was relied on supplemented by evidence from Joshua Northcott, the company's Operations Manager, and from the Inspector.

The business

[4] Tourism Holdings operates bus tours over different routes to destinations throughout the country. The trips are of varying duration taking in popular tourist spots. Some trips are a circuit, starting and finishing in Auckland. Other trips start in one location and finish in another. The shortest trip is one day and the longest one currently available is a minimum of 30 days. Trips that are longer than one day are described in minimum days because a feature of them is their flexibility as a "hop on, hop off" service. Passengers can complete a trip on the same bus or, instead, "hop off" at some point and "hop on" another bus travelling on the same route to complete the trip at a later time. The only restriction on this flexibility is that the trip must be completed within 365 days.

The driver's work

[5] Each trip is assigned to a driver who also acts as a tour guide. One of a driver's tasks is to assist in selling additional activities to passengers during the trip. Some of those activities are offered by Tourism Holdings, such as another bus trip to a different destination, but most of them are offered by third parties. Tourism Holdings has commission arrangements with over 100 of these third-party operators.

[6] Each driver is able to make reservations for passengers to participate in an activity offered by these operators. The cost of the activities is not included in the price of the bus trip. A typical inducement for making a booking through a driver is a discount on the price of the activity. One example of this booking system is a Tongariro expedition where the driver can book shuttle transport to the beginning of the Tongariro Alpine Crossing.

Driver remuneration

[7] The drivers are paid a daily rate of pay during a trip and earn commission on the sale of activities booked by them for passengers. The rate of commission is included as an addendum to each driver's individual employment agreement. In

addition they receive alternative daily rates of pay for "non-usual" driving duties and for non-driving work. They are paid the daily rate weekly in arrears.

[8] The commission paid to the drivers is derived from what the third-party operators pay Tourism Holdings and is based on each sale made from a booking, where the activity is paid for and undertaken. That arrangement allows for the possibility that passengers who made bookings change their minds, do not show up, or cancel and ask for a refund. Each driver is paid 50 per cent of the amount paid by the operators after GST is provided for, and 10 per cent on the sale of additional Tourism Holdings' activities.

[9] Tourism Holdings considers its drivers have not earned commission until several steps have been taken:

(a) the activity attracting commission has been booked by the driver;

(b) the activity has been paid for;

(c) the activity has been undertaken (this condition does not apply to sales of Tourism Holdings' activities);

(d) the driver has obtained documents from the operator confirming the activity has been paid for and undertaken;

(e) where commission is for the sale of a Tourism Holdings activity, confirmation has been obtained from the company's reservations service;

(f) the company's commission documentation has been completed by the driver; and

(g) the driver has attended a debriefing session with the company and submitted completed commission documents to it.

[10] Some flexibility is recognised by Tourism Holdings, however, because there are occasions when the debriefing session is reduced to an opportunity for the driver to provide the completed documentation.

The booking system

[11] When the driver books an activity the exercise goes no further than making a reservation. The passenger is not committed to undertaking the activity or to paying for it. Consequently, there is an inherent uncertainty about if and when commission has become payable. Despite a passenger expressing an intention to undertake an activity by making a booking, it might not occur on the anticipated day or at all. Obvious examples are a delay caused by bad weather or a change of plans.

[12] For those sorts of reasons the commission due to Tourism Holdings is not payable until the booked activity has been paid for and has taken place. The uncertainties in this system also mean it is necessary for Tourism Holdings to be able to reconcile what is owed to it, and the drivers, from its records and other sources. That reconciliation is made possible because each driver keeps a record of bookings and each operator provides information about the date on which the activity was booked, paid for and undertaken. To provide some uniformity, Tourism Holdings issues vouchers to operators so a consistent record of this information can be kept, although they are not always used.

The debriefing

[13] At the end of each trip drivers generally attend a paid debriefing one purpose of which is to deal with commission. For the debriefing the driver must complete a commission sheet providing information about the trip, the activities booked, the total commission due to Tourism Holdings and the commission payable to him or her. This sheet includes information provided by the operators and enables a reconciliation to be completed. Tourism Holdings' attitude is that, until this step is completed, the driver has not earned commission for the trip. Once commission is earned it is paid to the driver in the next pay period.

Driver example

[14] The parties agreed that this proceeding concentrated on commission payments to drivers prior to an audit by the Inspector. To illustrate the differences in their positions they selected information relating to commission earned by one named driver whose circumstances were representative of all drivers before the audit.

[15] Copies of the driver's employment agreements, and a schedule of payments made for commissions she earned, were used. The driver in this example signed her first employment agreement in January 2014 and a second one in September 2016. Both agreements provided for commission. The first agreement included as one of the driver's responsibilities the completion of administrative duties as required and to attend a debriefing session after the completion of each trip. The commission entitlement and rates were in a company policy attached to the agreement and provided that it would be paid on the "total activity commissions earned per trip" after GST had been paid. The commission scheme was repeated in an addendum to the driver's second employment agreement.

[16] The agreed statement of facts contained a table stating the commission earned by this driver corresponding to the dates when each of her trips started and ended. From the start of her employment the average length of her trips, and what Tourism Holdings called the average commission period, was 18.6 days. The median length of her trips was 21 days and the longest of them was 44 days. There were three occasions over the four years of her employment where she undertook a trip that was shorter than seven days.

Holidays Act 2003

[17] This is a test case because s 8(2) of the Act has not previously been considered by the Court while s 8(1) has been considered in one case.[1]

[18] Where an employee has an entitlement to a paid annual holiday, and takes it, his or her holiday pay must be calculated under s 21(2). Compliance is mandatory.

---

1 *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115.

Two methods are provided to work out how much to pay, by calculating the employee's ordinary weekly pay as at the beginning of the annual holiday, or his or her average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday. Those methods are in s 21(2)(b), the relevant part of which reads:

> …
>
> (2) Annual holiday pay must be—
>
> (a) …
>
> (b) at a rate that is based on the greater of—
>
> (i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or
>
> (ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[19] Section 21(2)(b), therefore, requires a comparative assessment and, once the two methods have been considered, the employer must pay holiday pay using the method that produces the greater dollar value amount.

[20] Both of the phrases "ordinary weekly pay" and "average weekly earnings" used in s 21(2)(b) are defined in the Act. The words "ordinary weekly pay" are defined in s 8, while "average weekly earnings" is defined in s 5 as 1/52 of the employee's gross earnings.[2]

[21] Section 8 reads:

> **8 Meaning of ordinary weekly pay**
>
> (1) In this Act, unless the context otherwise requires, **ordinary weekly pay**, for the purposes of calculating annual holiday pay,—
>
> (a) means the amount of pay that the employee receives under his or her employment agreement for an ordinary working week; and
>
> (b) includes—
>
> (i) productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay:
>
> (ii) payments for overtime if those payments are a regular part of the employee's pay:
>
> (iii) the cash value of any board or lodgings provided by the employer to the employee; but

[2] The words "gross earnings" are defined in s 5 with an expanded definition in s 14.

(c) excludes—

(i) productivity or incentive-based payments that are not a regular part of the employee's pay:

(ii) payments for overtime that are not a regular part of the employee's pay:

(iii) any one-off or exceptional payments:

(iv) any discretionary payments that the employer is not bound, under the terms of the employee's employment agreement, to pay the employee:

(v) any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

(2) If it is not possible to determine an employee's ordinary weekly pay under subsection (1), the pay must be calculated in accordance with the following formula:

$$\frac{a - b}{c}$$

where—

a is the employee's gross earnings for—

(i) the 4 calendar weeks before the end of the pay period immediately before the calculation is made; or

(ii) if the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made

b is the total amount of payments described in subsection (1)(c)(i) to (iii)

c is 4.

…

[22] The disagreement between Tourism Holdings and the Inspector is about the words "a regular part of the employee's pay" used several times in s 8. The company says the drivers' commissions are not to be included in the calculation under s 8(2), because the amount earned in this way is not a "regular part" of her pay for an ordinary working week.

[23] The words "a regular part of the employees pay" are used in ss 8(1)(b)(i), (ii) and 8(1)(c)(i) and (ii). Each of those subsections is part of an extended definition of "…ordinary weekly pay".[3] Mr Langton submitted that the driver's commissions given in the example used fell within the exclusion in s 8(1)(c)(i) and are not "a regular part of her pay" because that subsection, when read in light of its text and purpose, should

---

[3] Section 8(1)(a).

be interpreted as referring to her pay for an ordinary working week.[4] His argument was that the section was intended to apply to what the driver was entitled to under the employment agreement for that ordinary working week and that did not apply to the commission which was earned in a different way. He drew a parallel between this case and *Schollum v Corporate Consumables Ltd*, where the employees were paid commission on sales earned on a monthly basis after satisfying contractual criterion by achieving a stipulated sales target.[5]

[24] Reading s 8(1)(c)(i) in this way was said to be consistent with the purpose of s 8, derived from the heading of the section, "Meaning of ordinary weekly pay", and from s 8(1)(a), which refers to that interval of time. Tourism Holdings' case was that the meaning given to "a regular part of her pay" in ss 8(1)(b) and 8(1)(c) must be the same regardless of whether ordinary weekly pay was being calculated under ss 8(1) or 8(2).

[25] Apart from a desire for consistency between those sections, Mr Langton argued that, if Parliament had intended different meanings to be applied to "ordinary weekly pay", depending on whether the calculation was made under s 8(1) or s 8(2), it would have said so. Instead, the sections are linked by the cross-referencing between ss 8(1) and 8(2) indicating consistency was intended. Applied to this case, Mr Langton said that the commission earned by the driver used as an example was excluded from the formula in s 8(2), because of how it was earned and became payable. It was said to not be earned weekly but at irregular intervals measured by the length of each trip and the subsequent reconciliation. Because commission was earned in this way he said it could not fall within the meaning of being "a regular part of the employee's pay" where the interval of time was an ordinary working week.

[26] For the Inspector Ms Blick submitted that:

---

4 Tourism Holdings say that, technically, they would be included in "a" in the formula and deducted as part of "b". The commissions would be included in the calculation of average weekly earnings required by s 21(2)(b)(ii).

5 *Schollum v Corporate Consumables Ltd*, above n 1.

(a) The table and data provided for the driver used as an example show that throughout her employment she was "regularly" paid commissions earned on trips.

(b) Over the 28 months of her employment she was paid commissions on 26 of those months.

(c) In the formula in s 8(2) no period of time is expressly given against which the regularity of the commission payment is to be measured.

(d) Having regard to the purpose and function of s 8(2), in relation to s 8(1), an ordinary working week is a less likely period intended under the Act to measure this frequency.

(e) A period of at least four weeks is intended because that is consistent with the use of the same period in value "a" in the formula for assessing gross earnings.

(f) If the relevant period is four weeks for earning commissions, there are only three instances where the commission period was greater than four calendar weeks. Payments that were made on 90 per cent of occasions within four weeks and is an indication of a very high degree of regularity or frequency.

(g) Although a longer period than four weeks may apply for the value "a" in s 8(2), when an employee's normal pay period is greater than four weeks, that situation does not arise in the present case.

(h) To review earnings in a four-week period against earnings in a one-week period is not a "balanced or harmonious approach to the formula in s 8(2)". There was no justification to be found from the purpose of the Act, or in its scheme or language, for limiting commissions to those earned or paid in a one-week period.

(i) Sections 8(1) and 8(2) are different provisions for different purposes, because they are concerned with two different periods of time in relation to remuneration; a week and four weeks.

[27] Part of Ms Blick's argument was that s 8(1) focuses on pay received whereas s 8(2) is about pay that is earned. She submitted that pay is not necessarily received at the same time it is earned and that the change in language indicated s 8(2) was intended to be "quite a different approach". The purpose of s 8(2) was said to be to provide an alternative, or fall-back, position when s 8(1) was unavailable and there was no basis for importing into it the same one-week period used under s 8(1) for determining the regularity of pay.

[28] I prefer the submissions for Tourism Holdings over those for the Inspector. The starting point is that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[6] Even if the meaning of the text may appear plain, in isolation from purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5 of the Interpretation Act.[7]

[29] The text of s 8 indicates that what is to be ascertained is the employee's ordinary weekly pay for an ordinary working week, so that holiday pay can be calculated and paid. What is to be included, and excluded, from that calculation is designed to enable a calculation representative of an ordinary working week.

[30] As is apparent from the heading of s 8 its function is to define "ordinary weekly pay" so that the mandatory calculations of holiday pay, required by s 21(2), can be completed. The text indicates that the words "ordinary weekly pay" are intended to mean what an employee receives under an employment agreement for an "ordinary working week"; that is for the work performed in that week. That is why s 8(1)(a) links the two. Further refinement of what must be regarded as pay for an ordinary working week is provided by the deliberate selection of types of payment that must fall within that week and those that are outside it.

---

6 Interpretation Act 1999, s 5.

7 See *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

[31] The word "regular" used in those subsections is not defined in the Act and could give rise to ambiguity. What is regular could be those items of pay routinely or commonly featuring in the employee's pay regardless of when they were earned, or those items that are earned and have become payable under the employment agreement during the working week. Commonly "regular" can mean systematic, or something acting or done or recurring, uniformly.[8]

[32] The text of s 8(1)(a) indicates that "regular" in the subsequent subsections is intended to mean what is received under the employment agreement for an ordinary working week. It is the entitlements to pay earned under the agreement for that week. The heading, referring to "ordinary weekly pay", read with the balance of the section, shows the intention was to capture contractual entitlements earned and payable over an ordinary working week. That reading is reinforced by what is to be included and excluded. They are to establish what is ordinarily, or usually, payable and in that sense are "regular".

[33] The text of s 8(2) indicates it is an alternative method to ascertain the employee's "ordinary weekly pay", for the purposes of the compulsory calculation required by s 21, but it applies only where it is not possible to use s 8(1). That may be where the pay period under the agreement is for a longer interval of time than an ordinary working week or where the employee's pay varies from week to week.

[34] The text of s 8(2) also indicates that what is intended is still to ascertain what is payable for "ordinary weekly pay" for an "ordinary working week". The variables in the formula require a decision to be made about what to include, and exclude, as part of the calculation in the same way, and by reference to the same things, as would have been the case if s 8(1) had been usable. That is achieved by cross-referencing to s 8(1)(c)(i)-(iii).

[35] The text of ss 8(1) and (2) indicate that what is intended is to establish what is payable to an employee for an ordinary working week. The purpose of s 8 supports that conclusion. It is to enable mandatory holiday pay calculations where the

---

8 Tony Deverson, Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (1st ed, Oxford University Press, 2005).

employee's entitlement to annual holidays is to what has been accrued and measured in weeks.[9] Both the text and purpose of s 8(2) indicate that the reference to "ordinary weekly pay" is to what is usually payable to the employee having been earned in an ordinary working week.

[36] I do not accept Ms Blick's submission that the use of the four calendar weeks in s 8(2), referring to "a" in the formula, suggests the section has a different purpose from establishing ordinary pay for a week. The formula recognises a longer pay interval, but the requirement to divide the sum by four is to arrive at a weekly amount.

[37] Nor do I accept Ms Blick's submission that a different interpretation applies to s 8(2), because it is about what an employee earns while s 8(1) is about what is received. Applied to this case, that could mean the driver may have earned commission before completing the trip, if a booking had resulted in the activity being paid for and undertaken prior to the completion of the reconciliation. The submission is misplaced for two reasons. First, while s 8(1) refers to what the employee "receives", that is a way of describing what is payable under the employment agreement and goes no further. Second, the word "earn" is not used in s 8(2). When Ms Blick was asked about that she relied on the extended definition of "gross earnings" in s 14. That extended definition encompasses all earnings during the relevant assessment period. It means all payments the employer is required to pay under the employment agreement.[10] Examples given in the statute are salary or wages and allowances and includes payment for an annual holiday, public holiday or an alternative holiday as well as sick leave or bereavement leave.[11] As with the definition in s 8, gross earnings in s 14 includes productivity or incentive-based payments, commissions, and overtime, but it excludes certain discretionary payments.[12] The definition clearly refers to all of the payment entitlements that accrue under an employment agreement. However, nothing in s 14 draws a distinction between what is earned under an employment agreement and subsequently receiving payment for what has been earned.

---

9 Section 16.
10 Section 14(a).
11 Section 14(a)(iii).
12 See ss 14(a)(iii)-(iv) inclusive and subs (b) and (c).

[38] The Inspector's case assumed commission was earned by the driver as soon as details of the extra activities booked, and undertaken, by passengers were provided to Tourism Holdings. That situation could arise if, for example, an operator sent information to the company at an earlier point in time than before a reconciliation was completed by the driver. However, that conclusion would be inconsistent with the employment agreement. The commission was not earned by the driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed. That step was more than a purely administrative task. It was not until the driver completed the trip, and the paperwork, that the amount due and owing could be ascertained. The commissions were, as a matter of agreement, based on completing tasks at irregular intervals having no reference at all to what was earned for having completed an ordinary working week.

[39] Each driver commonly received pay including commission but that was, as the driver example showed, earned over varying intervals of time and could not therefore be said to be the type of regular payment the Act contemplates being included in the calculation under s 8(2).

[40] I find that the commissions earned by Tourism Holdings drivers do not form part of their ordinary weekly pay as defined by s 8(2). That conclusion also accords with the practical situation. While the driver was on the trip there were no means by which Tourism Holdings could ascertain what commission-related activities had been booked, paid for and undertaken.

[41] The three trips of the driver used as an example that were less than seven days were not sufficient, for the amount of commission earned during them, to be categorised as a regular part of her pay within the meaning of s 8(1)(b)(i) and (1)(c)(i) and therefore under s 8(2). It would be inconsistent with s 8(2) to require holiday pay to be calculated, and to be payable, before her work had matured into a contractual obligation to pay.

Outcome

[42] Tourism Holdings sought a declaration that it was not required under the terms of this driver's employment agreement, and by the operation of s 8(2) of the Act, to

include in the calculation of her ordinary weekly pay commission payments received by her during the four-week period preceding her annual holiday. I agree and declare accordingly.

[43] By agreement there will be no order of costs.

K G Smith
Judge

Judgment signed at 3.05 pm on 26 July 2019