IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 15/2021
[2021] NZSC 157

BETWEEN	TOURISM HOLDINGS LIMITED Appellant
AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Hearing:	1 July 2021
Further Submissions:	20 July 2021
Court:	William Young, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	P G Skelton QC, S C Langton and S L Mudafar for Appellant A E Scott-Howman and S P Connolly for Respondent
Judgment:	15 November 2021

JUDGMENT OF THE COURT

A **We amend the answer given by the Court of Appeal to the first of the questions submitted for determination by that Court so that it reads:**

Payments are "a regular part of the employee's pay" if they are of a kind made regularly when assessed against the standard of a four-week period.

That apart, the appeal is dismissed.

B **The appellant must pay the respondent costs of $15,000 plus usual disbursements.**

REASONS
(Given by William Young J)

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Overview

What the case is about

[1] The Holidays Act 2003 confers on employees the right to a minimum of four weeks of paid holidays each year after 12 months of continuous employment.[1] The Act stipulates how these entitlements may be exercised.[2] More importantly for present purposes, it also provides for the calculation of holiday pay. Under s 21, the employee is entitled to holiday pay based on the greater of the employee's ordinary weekly pay as at the beginning of the annual holiday and the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[2] This appeal concerns the calculation of holiday pay for a tour company bus "driver guide" whose (a) work pattern was dictated by the length of tours rather than

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1 Holidays Act 2003, s 16(1).
2 See ss 16–20.

the calendar week; and (b) remuneration included commission which varied in amount from tour to tour and was paid after the conclusion of each tour. In issue in this appeal is how commission payments paid shortly before commencement of annual holidays are taken into account in calculating ordinary weekly pay.

The factual context

[3] The appellant, Tourism Holdings Ltd, operates bus tours over different routes and of varying duration to destinations throughout the country. Passengers can "hop on and hop off". So they will not necessarily finish on the bus on which they started. The driver guides are paid a daily rate of pay during a trip and can earn commission on the sale of activities booked by them for passengers. For activities supplied by Tourism Holdings, driver guides receive commissions on bookings but with later adjustments for cancellations. For activities supplied by third parties, the right to commission depends on the activity being both paid for and taken. At the end of each trip, driver guides generally attend a paid debriefing. Ahead of the debriefing, the driver guide completes commission documentation providing information about the trip and calculating the commission payable to them. Once agreed, commission is paid.

[4] The case focuses on one particular employee and holiday pay for two periods of leave which she took, the first commencing on 4 August 2015 and the second on 26 July 2016. On 3 August 2015, that is, just before the first period of leave, the employee received a commission payment of $4,237.72. And on 11 July 2016, just over two weeks before the second period of leave commenced, she received a commission payment of $2,681.65. The dispute is primarily about how the first of these payments should be allowed for in the calculation of holiday pay.

[5] Commission payments of this kind were a significant component of the employee's remuneration. The pay figures we have for her cover 11 February 2014 to 22 August 2016, a period of just over 30 months.[3] Over that time she received 29 commission payments (covering 31 commission periods). The pay per commission

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[3] The date range of the spreadsheet we have is through to 26 September 2016 but the last payment recorded was on 22 August 2016.

period ranged from $186.28 to $5,514.16. The average amount paid per commission period was $2,571.93.

[6] The commission payment of $4,237.72 was larger than usual. Taking it into account in calculating the employee's ordinary weekly pay means that the holiday pay to which she is entitled in respect of the first of the two holidays is appreciably higher than it would be if calculated on her weekly earnings (including commissions) averaged over a year.

The issues

[7] Everything that the employer is required to pay to the employee under the employee's employment agreement is taken into account in calculating an employee's average weekly earnings.[4] The averaging out of all pay earned over a 52-week period smooths away the significance of lumpy remuneration. But, as noted, employees are entitled to holiday pay calculated on the higher of their average weekly earnings and their ordinary weekly pay at the start of the holiday. When it comes to the calculation of ordinary weekly pay, lumpiness of remuneration is dealt with by reference to whether payments of the kind in question are "a regular part of the employee's pay".[5] If they are, they must be taken into account in assessing ordinary weekly pay.

[8] As will become apparent, the main issue in the case is whether regularity must be assessed against a standard period of a week, which is what Tourism Holdings maintains, or whether it can also be assessed against a longer time period, most plausibly four weeks or, as was suggested in the Court of Appeal and contended for by the Labour Inspector of the Ministry of Business, Innovation and Employment before this Court, against the pattern of the trips.[6]

[9] There is a secondary issue which we must also address. This requires determining the particular week to which commission should be allocated.

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4 Holidays Act, s 5(1) definition of "average weekly earnings"; and s 14. Section 14(b) excludes payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee—for example, discretionary payments.

5 Section 8(1)(b)(i)–(ii) and (c)(i)–(ii).

6 *Labour Inspector v Tourism Holdings Ltd* [2021] NZCA 1, [2021] ERNZ 1 (Cooper, Brown and Clifford JJ) [CA judgment] at [37].

Legislation

[10] Section 21 of the Holidays Act provides:

> **21 Calculation of annual holiday pay**
>
> (1) If an employee takes an annual holiday after the employee's entitlement to the holiday has arisen, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).
>
> (2) Annual holiday pay must be—
>
> (a) for the agreed portion of the annual holidays entitlement; and
>
> (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.

[11] The case is focused on "ordinary weekly pay" under s 21(2)(b)(i).

[12] Ordinary weekly pay is defined in s 8 in this way:

> **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
>
> (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.

(3) However, an employment agreement may specify a special rate of ordinary weekly pay for the purpose of calculating annual holiday pay if the rate is equal to, or greater than, what would otherwise be calculated under subsection (1) or subsection (2).

[13] Gross earnings is defined by s 14:

14 Meaning of gross earnings

In this Act, unless the context otherwise requires, **gross earnings**, in relation to an employee for the period during which the earnings are being assessed,—

(a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—

(i) salary or wages:

…

(iv) productivity or incentive-based payments (including commission):

(v) payments for overtime:

…

[14] It is common ground that it is not possible to determine the employee's ordinary weekly pay under s 8(1), albeit there is some dispute as to why this is so. We will revert to this shortly.

[15] Under s 8(2), commissions are included in **a**, as part of the employee's gross earnings. The issue concerns **b**, and whether commissions are within s 8(1)(c)(i), "productivity or incentive-based payments that are not a regular part of the employee's pay". If so, it means that they are not included in the **a – b** numerator. The primary point in issue is whether s 8(1)(c)(i) should be construed as if it read "are not a regular part of the employee's pay *for an ordinary working week*".

[16] As will be apparent, the language of s 8 is, in some respects, indeterminate and thus leaves some scope for legitimate differences of opinion. Recognising this, the Act provides a bespoke mechanism for resolving such differences. This is by s 11, which relevantly provides:

> **11 Labour Inspector may determine ordinary weekly pay, relevant daily pay, and average daily pay**
>
> (1) This section applies if an employer and employee cannot agree on the amount of the employee's—
>
> (a) ordinary weekly pay under section 8; or
>
> …
>
> (2) A Labour Inspector may determine the amount of the employee's ordinary weekly pay, …
>
> (3) In making a determination, a Labour Inspector must apply the provisions of section 8, … to the circumstances of the employee as determined by the Labour Inspector.

[17] It is common ground that the "average weekly earnings" approach under s 21(2)(b)(ii) takes into account commissions.

How the different approaches work out

[18] On the Tourism Holdings approach, commission is allocated to the period in which all steps that it says are required to earn commission have been completed, including debriefing and reconciliation (which occur after the trip). On the basis of this approach and its argument that regularity must be assessed against a standard period of one week, the commission in this case is excluded from the final figure representing ordinary weekly pay reached using the s 8(2) calculation.[7] This means that the average weekly earnings figure (which takes into account commission earned over a yearly period) is always higher than ordinary weekly pay as calculated by Tourism Holdings.

[19] On the approach proposed by the Labour Inspector, commissions are included in the final figure calculated through s 8(2). This is on two alternative bases:

(a) One basis (Labour Inspector 1) treats commission as earned on the day it was paid.

(b) The other (Labour Inspector 2) is based on an averaging process. The average daily commission for a trip is determined by taking the total trip commission and dividing it by the number of driving days in the trip. That average is then multiplied by the number of driving days in the relevant four-week period to produce an average daily commission figure. Underlying this alternative approach is the proposition that commission is earned once the driver guide has completed the activities which generated the commission.

On both bases, commission is included in the final figure calculated under s 8(2), having not been subtracted through **b**. In respect of Labour Inspector 1, this is because regularity should be assessed against the pattern of the trips. In the case of Labour Inspector 2, this is because the frequency of the driving days to which commission is

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[7] There were three commission payments which Tourism Holdings accepts may have been earned and payable within a one-week period, but these would not, on Tourism Holdings' approach, be sufficiently regular to be regarded as a "regular part of the employee's pay for an ordinary working week".

allocated is sufficient to satisfy even the regularity requirement argued for by Tourism Holdings.

[20] Labour Inspector 1 produces holiday pay figures that are on the whole more favourable to the employee than Labour Inspector 2. This is because Labour Inspector 2 tends to push back in time commission payments received just before a holiday was taken; thus reducing their significance in holiday pay calculations.[8]

The judgments of the Courts below

[21] In his judgment in the Employment Court, Judge Smith commented:[9]

> [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.
>
> …
>
> [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. …
>
> …
>
> [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 employee's entitlement to annual holidays is to what has been accrued and measured in weeks. 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.

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8 This is particularly so in the present case, where the employee took four days of annual leave and one day of leave without pay for each week she was away, meaning that calculations had to be done at the start of each new week as it amounted to a new period of annual leave. The large commission payment was made just before the first period of annual leave began, so is included in whole under Labour Inspector 1 for the first four weeks of leave. However, under Labour Inspector 2, a smaller proportion of it is included when the calculation is redone each week.

9 *Tourism Holdings Ltd v Labour Inspector, Ministry of Business, Innovation and Employment* [2019] NZEmpC 87, [2019] ERNZ 239 [EmpC judgment] (footnote omitted).

[22] He concluded that commission was not earned by the driver guide, in the sense of being payable under the employment agreement, until the debrief and reconciliation process was completed at the end of each trip.[10] There being only three occasions on which this process may have been completed in the same week as commission had been generated, commission was not a sufficiently regular part of the employee's pay for an ordinary working week to be taken into account under s 8.[11]

[23] For these reasons, he held that the commission payments did not form a regular part of an employee's pay for an ordinary working week, and therefore they come into **b** of s 8(2), with the result that they are subtracted in the s 8(2) calculation.[12]

[24] The effect of his judgment is that regularity is to be assessed against the standard of a one-week period.

[25] The Court of Appeal disagreed with this approach:[13]

> [34] … the purpose of the alternative approach found in s 8(2) is to provide for the calculation of "ordinary weekly" pay where the definition found in s 8(1) cannot be applied. One of those circumstances is, as here, where there is no "ordinary working week". It would be surprising if a central element of the definition that does not fit, namely that of an "ordinary working week", was in those circumstances to be reintroduced into the alternative calculation under s 8(2) as regards included and excluded commission.
>
> [35] Nor do we think the possible outcome of that interpretation, namely that the rate calculated under s 8(2) may produce a higher holiday pay base rate than the "gross earnings" calculation, is inconsistent with the operation of s 8. If an employee who is paid hourly and works seasonal or fluctuating hours takes an annual holiday after a busy four-week period in which they have worked somewhat more than usual, then they will already enjoy the benefit of those hours accrue when calculating their holiday pay under s 8(2).[14] We do not see why employees regularly paid by commission should not enjoy an equivalent benefit, which is itself consistent with the scheme and purpose of the Act. After all, s 21 is drafted to give employees the benefit of the greater of the "ordinary weekly pay" and "average weekly earnings" calculations.

It is at least implicit in this approach that regularity under s 8(2) can be assessed on a four-weekly basis.

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10 At [38].
11 At [41].
12 At [40]–[42].
13 CA judgment, above n 6.
14 Excluding, of course, overtime or other special payments deducted by s 8(1)(c)(i)–(iii).

[26] The Court went on to say:[15]

> [36] … The dictionaries give us a number of meanings for the word regular. As relevant, the word means both (i) "conforming to a rule or principle; systematic", or what might be called substantive regularity; and (ii) "acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly", or what might be called temporal regularity.
>
> [37] In our assessment, both those meanings apply to commission as earnt by the Company's driver guides. Commission is provided for as part of the "rule" represented by the individual's employment contract for promoting and organising bookings for additional activities as a specific duty of an employee. The terms for payment of commission, the "rules" for payment of commission, are set in that employment agreement. Moreover, and on the basis of the pattern of driver guides' employment—that is the pattern of the "trips" (albeit of varying lengths) they are responsible for—commission is a regular and habitual part of their pay. While it is not part of the payment of daily rate compensation for each week of a tour a guide receives during the tour, it does form the part of their pay in the week after the tour in which it [is] paid, and regularly—that regularity fitting the pattern of the tours a driver guide is responsible for over time.

[27] We do not read [36] and [37] of the reasons as holding that substantive regularity alone is sufficient to bring commission into the final figure reached through s 8(2). To treat say the "substantive regularity" of an annual performance bonus paid just before a holiday is taken as coming into holiday pay calculated under s 8(2) would be inconsistent with the scheme of the provisions. We would be surprised if the Court of Appeal thought differently.

[28] The formal orders of the Court included answers (which we have placed in bold) to the questions of law before them as follows:[16]

> We answer the questions of law submitted for determination by the Court:
>
> (a) What is the meaning of "not a regular part of the employee's pay" in s 8(1)(c)(i) of the Holidays Act 2003 for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?
>
> **Payments are "a regular part of the employee's pay" if they are made (i) substantively regularly, being made systematically and according to rules; or (ii) temporally regularly, being made uniformly in time and manner.**
>
> (b) If productivity or incentive-based payments are a regular part of the employee's pay, do those payments have to be "pay the employee

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15 Footnote omitted.

16 Order B (emphasis added).

> receives under his or her employment agreement for an ordinary working week" for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?
>
> **No.**

We see the "or" in the first answer as a slip. It should read "and".

[29] The Court also addressed the pay period to which commission should be allocated. It considered that the commission was relevantly earned when everything had occurred between the driver guide and the passenger and, where necessary, between the passenger and the supplier of the activity, that generated an entitlement to payment.[17] On this basis, commission would be earned prior to debriefing, reconciliation and payment and, presumably, should be allocated to the period in which it was earned. The Court commented in a footnote as to the significance of this conclusion:[18]

> As we understand the practical implications of this appeal, noting the complexities of the Holidays Act, this would only appear to be material when a driver guide takes holidays immediately following the completion of a tour, and before the reconciliation of commission earnt during that tour has been able to be calculated. In those circumstances, appropriate "good faith" arrangements would appear to be possible to address any issue arising.

As will be noted, this takes an approach to allocation of commission to pay periods which differs from those advanced by the parties. We revert to it later in these reasons.[19]

Main issue: regularity of payments under s 8(2)

Tourism Holdings

[30] On the approach of Tourism Holdings:

(a) The employee had an "ordinary working week" even though her pattern of work is based around trips and not the calendar.

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17 At [38].
18 At [38], n 14.
19 See below at [46]–[53].

(b) Section 8(1)(a) is the "general" definition of ordinary weekly pay, defining it as "the amount of pay that the employee receives under his or her employment agreement for an ordinary working week". It informs the meaning of the next two subparagraphs, s 8(1)(b) and s 8(1)(c).

(c) Section 8(1)(b)(i) should therefore be construed as if it read "productivity or incentive-based payments (including commission) if those payments are a regular part of the employee's pay *for an ordinary working week*".

(d) Section 8(1)(c)(i) should be read in the same way as s 8(1)(b)(i), and thus as referring to "productivity or incentive-based payments that are not a regular part of the employee's pay *for an ordinary working week*".

(e) Because the entitlement to commission arises only after the post-trip debrief and reconciliation (which normally occurs after the week in which the commission is generated), such commission is generally not pay for an ordinary working week and is thus not included by s 8(1)(b)(i), is excluded by s 8(1)(c)(i) and, by virtue of that exclusion, is not included in the s 8(2) numerator.

(f) In any event, because commissions are "not a regular part of the employee's pay *for an ordinary working week*", the s 8(1)(c)(i) exclusion applies.

[31] Associated with this argument is the contention that commission is not "earned" until debriefing and reconciliation has occurred. The appellant's argument as to this focused primarily on s 8(1)(a), where the statutory expression is "pay … for an ordinary working week". The appellant's position is that commission in this case:

(a) is not included by s 8(1)(b)(i) because it is not "pay … for" the week in which it is generated, as the employee has not carried out *in that week* all prerequisites to the entitlement to be paid; and

(b) is therefore excluded from the end result of the s 8(2) calculation because s 8(1)(c)(i) is to be construed as if it referred to "productivity or incentive-based payments that are not a regular part of the employee's pay *for an ordinary working week*".

Labour Inspector

[32] The Labour Inspector's argument proceeds on the basis that commission payments are a regular part of the employee's pay and therefore are not subtracted in the equation in s 8(2) which determines ordinary weekly pay.

[33] This approach is premised on the following propositions:

(a) It is not possible to determine the employee's pay under s 8(1) because she does not have an ordinary working week.

(b) The commission payments:

(i) fall within **a** of the s 8(2) calculation as part of her gross earnings for the four calendar week period (a proposition which is not disputed by Tourism Holdings); but

(ii) are not within **b** as they are "a regular part of the employee's pay", and so do not come within s 8(1)(c)(i).

As explained,[20] on Labour Inspector 1, this is on the basis that regularity should be assessed against the pattern of the trips. On Labour Inspector 2, it is because the commissions, by an averaging process, are attributed to the periods of time when they were generated by the driver guide, which results in them being sufficiently regular to meet the regularity standard postulated by Tourism Holdings.

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[20] See above at [19].

The purpose of the scheme

[34] Holiday entitlements are calculated primarily in weeks. Presumably for this reason, so too is holiday pay. In a very broad sense, the purpose of the holiday pay calculations is that an employee on holiday is paid an amount which is at least similar to what would have been earned if the holiday had not been taken. The more specific purpose of the s 8 ordinary weekly pay calculation is to enable the employee to tie holiday pay reasonably closely to what was earned immediately before the holiday is taken. It is in this context that s 8 allows for assessment of holiday pay against two comparator periods:

(a) an ordinary working week (s 8(1)); and

(b) if s 8(1) does not apply, the four calendar weeks preceding the taking of leave (s 8(2)).

As well, as noted above, there is provision under s 21(2)(b)(ii) for assessment by reference to the preceding 12 months, if that produces a figure which is more favourable for the employee.

[35] An obvious aim of the legislative scheme is the avoidance of artificial inflation of holiday pay entitlements that might result from the inclusion in the first two comparator periods of atypical remuneration payments, say for instance an annual bonus paid just before a holiday is taken. As we have noted, this concern does not apply in the case of the preceding 12-month comparator period; this because any lumpiness of remuneration should be averaged out over that time. On the other hand, a corollary of an employee's right to the more favourable of the ordinary weekly pay or the average weekly earnings figure is that the legislature envisaged that employees may be entitled to the benefit of some lumpiness in remuneration, an entitlement which, in the case of commission, depends on whether such payments are a regular part of remuneration.

Section 8(1)

[36] 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.

[37] We see the scope for 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".

Why s 8(1) is not applicable

[38] As noted, it is common ground that a s 8(1) assessment was not possible in relation to the employee. There was not, however, consensus as to why this is so. Mr Skelton QC argued that, notwithstanding the trip-based nature of her employment, the employee nonetheless had an "ordinary working week". On his argument, the reason why s 8(1) did not apply was simply the extent to which her weekly remuneration varied. Although the reason why s 8(1) does not apply might be thought to be something of a side issue, it is not. This is because Mr Skelton had to argue that the employee had an ordinary working week in order to bring her remuneration into the s 8(1)(c)(i) exclusion as he would have us construe it.

[39] We do not accept Mr Skelton's argument on this point. Section 8(1) addresses ordinary weekly pay by reference to an ordinary working week. The employee's variable working pattern meant that she did not have an ordinary working week. It was this variable working pattern, in conjunction with the unevenness of her remuneration (partly consequential to her working pattern), which precluded sensible assessment of "the amount of pay … for an ordinary working week".

Section 8(2)

[40] For the purposes of the s 8(2) calculation, it is common ground that commission received in the relevant preceding four-week period comes into **a**. For **b**, there is an exclusion in respect of payments referred to in s 8(1)(c)(i), "productivity or incentive-based payments that are not a regular part of the employee's pay".

[41] As we have noted, the appellant argues that in s 8(1)(b)(i), the words "for an ordinary working week" should be read in. The language of s 8(1)(c)(i) is substantially similar (in the sense of being the other side of the coin) to that in s 8(1)(b)(i). This similarity is at the heart of the appellant's argument that, in s 8(1)(c)(i), the words "for an ordinary working week" should also be read in so that there is an exclusion for productivity or incentive-based payments that "are not a regular part of the employee's pay *for an ordinary working week*".

[42] We disagree with this line of argument:

(a) In the context of a s 8(1) exercise, s 8(1)(b)(i) operates very much as if the suggested additional words were there.[21] But this is primarily because s 8(1) is focused on the assessment of "the amount of pay" for an ordinary working week. For this purpose, commissions are only included if they have sufficient connection with, or regularity in relation to, an ordinary working week to enable such an assessment to be made.

(b) The language of s 8(1)(b)(i) and (c)(i) is substantially similar. This is because, as we have said, each of the subparagraphs is expressed as the other side of the coin to the other. The combined effect of the two subparagraphs is that what is not included is excluded. That said, for the purposes of the s 8(1) calculation, s 8(1)(c)(i) is something of a

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[21] In *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115, [2017] ERNZ 668, the Employment Court interpreted and applied s 8(1)(b)(i) in this way. The employees in that case earned commissions for exceeding monthly targets. The Judge accepted that the commissions should not be included when calculating ordinary weekly pay for the purposes of s 8(1) because they "were not a regular part of the pay received by [the employees] for an ordinary working week": at [26]–[27].

fifth wheel. If commission is not included under s 8(1)(b)(i), there would be no reason why it would be otherwise taken into account under s 8(1). The primary function of s 8(1)(c)(i) is thus in relation to s 8(2).

(c) The function of s 8(1)(c)(i) under s 8(2) is different from the function of s 8(1)(b)(i) in s 8(1). This is because the assessment of "the amount of pay … for an ordinary working week" under s 8(1) involves a degree of specificity not required for an averaging exercise in respect of actual remuneration received over a four-week period. Payments that are insufficiently regular to be material to an assessment of "the amount" of pay for an "ordinary working week" may nonetheless be sufficiently regular to be included in a calculation of earnings over a four-week period. In this context, "regular part" is most sensibly construed in relation to the time period under consideration—that is, a four-week standard.

(d) Given that the function of s 8(2) extends to filling the gap where an employee does not have "an ordinary working week", reading the additional words into s 8(1)(c)(i) would have the effect of excluding commission payments in circumstances in which their inclusion is part of the legislative purpose—to put an employee who takes a holiday in broadly the same position as if they had been working.

"Substantive" and "temporal" regularity

[43] The expression "regular part" implies a standard period against which regularity is to be assessed. In the statutory context of s 8(2) – which is addressed to the assessment of earnings over a four-week period – the appropriate standard period is four weeks. What is required is regularity in terms of that standard. At least in its application to this case, this approach is similar to that adopted by the Court of Appeal—albeit that the Court of Appeal seems to have assessed regularity by reference to the pattern of trips. The difficulty with the Court of Appeal's approach (which was adopted by the Labour Inspector before this Court) is that if the trips resulted in infrequent payments say of only three or four commission payments a year, inclusion

of one such payment in the final figure calculated through s 8(2) would produce a lumpiness in holiday pay which we see as inconsistent with the underlying policy of the statutory scheme.

[44] As will be apparent, "regular part" is an expression of indeterminate meaning. This has the consequence that there will be scope for debate under both s 8(1) and s 8(2) as to what payments are to be taken into account, that is whether the frequency of payments is sufficient to be relevantly a "regular part" of the employee's pay for the purposes of those subsections. This is contemplated by s 11, which permits a Labour Inspector to determine the amount of an employee's "ordinary weekly pay".

[45] As will also be apparent, we do not see "substantive regularity" as postulated by the Court of Appeal as material to the issue. The types of payments which fall to be considered must be received "under [the] employment agreement".[22] Providing this test can be satisfied, we see no need for additional requirements as to "substantive regularity".

Secondary issue: the particular week to which commission should be allocated

[46] Driver guide activities resulting in the generation of commission payments formed a regular part of their working days. So if commissions are to be attributed to the weeks in which they were generated (on either the Labour Inspector 2 or the Court of Appeal approach), there was a reasonable case to be made for the view that even on Tourism Holdings' interpretation of s 8(1)(c)(i) and (2), commission was a regular part of the employee's pay for an ordinary working week. It was in this context that Tourism Holdings argued that commission is not "earned" until debriefing and reconciliation has occurred. In what may have been intended to be an adoption of that argument, the Employment Court said that "commission was not earned by the driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed".[23] In contradistinction, the Court of Appeal expressed the view that the entitlement to commission arises (and is thus earned) earlier and

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22 This is the effect of s 8(1) in relation to holiday pay calculated under that subsection. In the case of s 8(2), this is because of the adoption of the expression "gross earnings", which is defined in s 14 as meaning all payments required to be made under the employment agreement.

23 EmpC judgment, above n 9, at [38].

therefore ahead of debriefing, reconciliation and payment; that is, when the driver guide books the activity and the customer pays for it (and, for third-party activities, when the activity has also been undertaken).[24]

[47] In relation to the primary question in the case – whether commission was sufficiently regular to be taken into account in calculating ordinary weekly pay – the significance of this issue has fallen away. This is because we have concluded that commission payments made monthly on average are sufficiently "regular" to be included in the final figure calculated through s 8(2) and that it does not matter whether they can also be said to be "regular" against the standard of an ordinary working week. But this notwithstanding, the weeks to which commission should be allocated will have at least some, although probably not very much, effect on the final calculation of the amount owing to the employee.

[48] This aspect of the case turns on the meaning of the phrase " gross earnings", in respect of which s 14 relevantly provides:

> … in relation to an employee for the period during which the earnings are being assessed,—
>
> (a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, …

[49] On our assessment of the Employment Court judgment, the Judge found, as a matter of interpretation of the employment agreement, that the right to commission did not arise until debriefing and reconciliation occurred.

[50] Under s 214(1) of the Employment Relations Act 2000, a decision of the Employment Court "on the construction of an individual employment agreement" is not subject to appellate review. So, if allocation of commission to a period turned on when it became payable under the employment agreement, commission payments are to be allocated to the period in which debriefing and reconciliation occurred.

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[24] CA judgment, above n 6, at [38].

[51] Under s 14, the issue is whether the commission is "for the period" in which:

(a) it becomes payable "under the … employment agreement"; or

(b) all preconditions to entitlement are satisfied, other than debriefing and reconciliation (which would appear to be the approach of the Court of Appeal).

We see this issue as one of statutory interpretation with the result that the Employment Court Judge's conclusion as to when the commission became payable is not necessarily controlling.

[52] The point is a short one. With the qualification that the commissions had become payable before the holidays had been taken, we see the periods to which they related as determined by when the activities were sold and, in the case of third-party activities, taken. As explained, this seems also to have been the view of the Court of Appeal.

[53] This means that we reject the allocation approach contended for by Tourism Holdings. And, for the same reasons, we reject the Labour Inspector 1 approach (which operates on a payments basis rather than the accruals basis which we see as implicit in the s 14 definition of "gross earnings") and the Labour Inspector 2 approach (which, at least in substance, treats commission as earned before the activity has even been paid for in some instances).

Disposition

[54] We amend the answer given by the Court of Appeal to the first of the questions submitted for determination by that Court so that it reads:

> Payments are "a regular part of the employee's pay" if they are of a kind made regularly when assessed against the standard of a four-week period.

That apart, the appeal is dismissed. Tourism Holdings must pay the Labour Inspector costs of $15,000 plus usual disbursements.

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