IN THE EMPLOYMENT COURT
WELLINGTON

[2017] NZEmpC 115
EMPC 204/2016

IN THE MATTER OF	A referral of a question of law from the Employment Relations Authority
BETWEEN	MARY KATHLEEN SCHOLLUM First Plaintiff
AND	JONATHAN WAYNE HASTINGS Second Plaintiff
AND	CORPORATE CONSUMABLES LIMITED Defendant

Hearing:	27 - 30 March 2017 (Heard at Wellington)
Appearances:	S C Langton and R M Tomkinson, counsel for plaintiffs S Cates and C Cartwright, counsel for defendant
Judgment:	27 September 2017

JUDGMENT OF JUDGE K G SMITH

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[1] When Mary Schollum and Jonathan Hastings took annual holidays from their work for Corporate Consumables Ltd they were paid holiday pay calculated using their annual salaries. Excluded from that calculation was the commission they each earned on sales made for the company before taking their holidays.

[2] Ms Schollum and Mr Hastings say that Corporate Consumables should have included their commission in its calculations of their holiday pay because it was part of their remuneration. The company says it has complied with the Holidays Act 2003 and, for holidays which were taken before that Act came into force, the Holidays Act 1981.

[3] Ms Schollum has been employed by Corporate Consumables for approximately 20 years. Mr Hastings was employed by the company for 15 years or so before ending his employment by resigning. They say that any liability Corporate Consumables has to them for unpaid holiday pay stretches back to when they each started working for the company and that, when confronted about not paying them properly, it agreed to pay them what was owed from the beginning of their employment.

[4] Corporate Consumables denies it wrongly calculated holiday pay or that it is liable for any unpaid holiday pay. It says that if it wrongly calculated holiday pay its liability is limited by s 142 of the Employment Relations Act 2000 (the Act) to any sum owing over the six years before this proceeding was filed in the Employment Relations Authority.

[5] Ms Schollum and Mr Hastings issued proceedings in the Authority as did several other employees of Corporate Consumables. Ms Schollum and Mr Hastings successfully applied to the Authority to remove the proceeding relating to them to the Court.[1]

[6] At the request of the parties this judgment is concerned only with potential liability.[2] This course of action was taken because the parties considered that, if the plaintiffs succeed, establishing quantum will be a straightforward exercise and agreement may be possible without a further hearing. Conversely, if the defendant succeeds the parties will have avoided what are likely to be substantial costs for preparing detailed financial evidence covering many years of employment.

The issues

[7] In this case the following issues arise:

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1 *Weir v Corporate Consumables Ltd* [2016] NZERA Wellington 88.
2 Employment Court minute to parties, 19 October 2016.

(a) Did Corporate Consumables' method of calculating and paying holiday pay comply with the Holidays Act 2003 and the Holidays Act 1981?

(b) Was an agreement reached to pay Ms Schollum and Mr Hastings any unpaid holiday pay from the beginning of their employment?

(c) If no agreement was reached is Corporate Consumables nevertheless estopped from denying that it would pay them any unpaid holiday pay from the beginning of their employment?

(d) If s 142 of the Act applies, does the Court have power to extend the time within which Ms Schollum and Mr Hastings may bring proceedings for the recovery of any unpaid holiday pay and, if it does, should the time be extended?

(a) Did Corporate Consumables' method of calculating and paying holiday pay comply?

[8] To place the method of calculating holiday pay into context it is necessary to describe the employment agreements between Ms Schollum, Mr Hastings and Corporate Consumables. Both Ms Schollum and Mr Hastings have been long standing employees of Corporate Consumables.

[9] Ms Schollum started working for Corporate Consumables on 1 May 1996 as an account manager. Her letter of appointment provided for remuneration by way of a salary and commission. The commission was 20 per cent of gross profit after sales of $30,000 per month had been achieved.

[10] On 8 February 2013 Ms Schollum and Corporate Consumables entered into a replacement employment agreement when she became a team leader. Despite this alteration to Ms Schollum's position the structure of her remuneration remained unchanged. She was still paid a base salary and commission but the formula for her entitlement to commission became:

(a) no commission was payable for gross margin contributions of up to $25,000 per month;

(b) for gross margin contributions above that sum, and up to 100 per cent of a monthly target, commission of 20 per cent of that gross margin;

(c) for all sales over this monthly target the commission rate was 25 per cent.[3]

[11] Commission was paid at the end of the following month.

[12] Mr Hastings worked for Corporate Consumables for two periods of time. He began work on 11 October 1996 and was employed until 28 April 1998. For the following three years he worked elsewhere before being employed again by Corporate Consumables on 11 June 2001. He resigned with effect from 24 November 2016.

[13] There was no written employment agreement between Mr Hastings and Corporate Consumables but there is no disagreement over how his remuneration was earned. The same structure was used to pay Mr Hastings as Corporate Consumables used to pay Ms Schollum although their salaries, and the thresholds to earn commission, were different. On top of his base salary Mr Hastings was paid commission of 20 per cent of the gross margin on all sales that he made above $30,000 per month.

[14] Both Ms Schollum and Mr Hastings were employed to sell IT and consumable products to customers of Corporate Consumables. The sort of products sold included tablets, laptops, computer memory, telephone headsets, and digital signage.

[15] Commission was earned on sales but there was no requirement that Ms Schollum or Mr Hastings had to personally make each sale. Ms Schollum and Mr Hastings were each allocated a "rep code" against which sales to customers they

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[3] Gross profit and gross margin mean the same thing.

dealt with were recorded. One purpose of that code was to track sales attributed to each sales person.

[16] Sales were made in a variety of ways, by direct communication with customers and by responses to business proposals from customers. Some sales were made by online ordering and were dispatched without direct intervention or action by Ms Schollum or Mr Hastings. However, no matter how the sale was generated all sales were recorded against each of their "rep codes" and attracted commission. They earned commission on any sale to a customer on their "rep code" even if that sale was concluded by someone else or was made through an online transaction. They continued to be contractually entitled to commission even while absent from work or on holiday.

[17] To complete this picture, Corporate Consumables took the risk of any bad debts arising from sales and any commission was not adjusted if a customer failed to pay.

[18] Despite commission forming a significant part of their remuneration, when Ms Schollum and Mr Hastings took annual holidays, their holiday pay was calculated using just their base salary. Commission earned on sales made while they were on holiday was paid, as usual, at the end of the following month.

[19] Mr Roger Blaylock, Corporate Consumables' Managing Director, explained that this method of payment was implemented by the company's former accountant and was considered to comply with the Holidays Act 2003 and, for holidays taken before 1 April 2004, the Holidays Act 1981. While Mr Blaylock did not take an active part in that decision-making, he understood this method was designed to ensure that the company met its contractual and statutory obligations to its employees.

[20] The cases for Ms Schollum and Mr Hastings are identical. They say that the Holidays Act 2003 and the Holidays Act 1981 required their holiday pay to be calculated using both their salary and commission. Where that did not happen they have not been properly paid holiday pay.

Holidays Act 2003

[21] The starting point is s 21 of the Holidays Act which reads:

> **21 Calculation of annual holiday pay**
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> (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
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> (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.

[22] Payment of holiday pay under s 21(1) is mandatory. That payment must be calculated using one of the methods in s 21(2)(b)(i) or (ii). Calculating annual holiday pay requires that the employee be paid the greater of his or her ordinary weekly pay as at the beginning of the holiday or average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[23] Determining which method creates the higher payment, and therefore the amount to pay, requires a comparison between ordinary weekly pay and average weekly earnings for each employee.

Ordinary weekly pay

[24] The meaning of "ordinary weekly pay" used in s 21(2)(b)(i) is contained in s 8(1) which 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

(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.

[25] Ms Schollum's and Mr Hastings' case is that, when calculating their ordinary weekly pay the only part of their remuneration to take into account is their base salary. That is because commission was not earned on a weekly basis, but on a monthly basis, and depended on the value of sales over the qualifying month. At least theoretically, it was possible commission was not earned at all, or not earned until towards the end of the month, after sales exceeded the required gross margin for payment (that is $25,000 and $30,000 respectively).

[26] I accept Mr Langton's submission that commission was not part of the remuneration Ms Schollum and Mr Hastings received for an ordinary working week. All commissions were calculated on an aggregate of monthly sales. Before either of them became entitled to commission they first had to secure sales sufficient to trigger payment. That trigger was set monthly, not weekly, and commission was not

paid weekly. I conclude commissions were not a regular part of the pay received by Ms Schollum and Mr Hastings for an ordinary working week.

[27] That conclusion means commissions earned by Ms Schollum and Mr Hastings are to be excluded from a calculation of ordinary weekly pay when assessing annual holiday pay under s 21(2)(b)(i). That conclusion suggests the average weekly earnings in s 21(2)(b)(ii) will be the greater of the two methods for calculating annual holiday pay if it includes commissions.

Average weekly earnings

[28] The second method of calculating annual holiday pay in s 21(2)(b)(ii), is the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

[29] Establishing an employee's average weekly earnings necessitates taking into account two further sections of the Holidays Act. First, s 5 which defines "average weekly earnings" as 1/52 of an employee's gross earnings.

[30] Second, s 14 which defines "gross earnings":

> **14 Meaning of gross earnings**
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> 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:
>
> (ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment):
>
> (iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period:
>
> (iv) productivity or incentive-based payments (including commission):

(v) payments for overtime:

(vi) the cash value of any board or lodgings provided by the employer as agreed or determined under section 10:

(vii) first week compensation payable by the employer under section 97 of the Injury Prevention, Rehabilitation, and Compensation Act or former Act: but

(b) excludes any payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee, for example—

(i) any discretionary payments:

(ii) any weekly compensation payable under the Injury Prevention, Rehabilitation, and Compensation Act or former Act:

(iii) any payment for absence from work while the employee is on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; and

(c) also excludes—

(i) any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment:

(ii) any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment:

(iii) any payment of any employer contribution to a superannuation scheme for the benefit of the employee:

(iv) any payment made in accordance with section 28B.

[31] To determine Ms Schollum's and Mr Hastings' average weekly earnings means compiling the information required by the definition of gross earnings in s 14 and dividing that total amount by 52 as required by s 5.

[32] On a plain reading of s 14(a) the combined total of salary and commission is to be used, because of the reference to "all payments" the employer is required to pay the employee under the employees' employment agreement.

[33] There is no dispute that Corporate Consumables is contractually committed to paying both salary and commission to the plaintiffs. There is also no dispute that

the terms and conditions of their employment agreements do not provide for any adjustment to commission when they take annual holidays. However, there is a disagreement over how to interpret, and apply, s 14 because of the expression "unless the context otherwise requires" in that section. Corporate Consumables considers that those words are a significant qualification. In the circumstances of this case, it considers commissions should be excluded from gross earnings when calculating holiday pay.

Unless the context otherwise requires

[34] Ms Cates', counsel for Corporate Consumables, submitted that the legal and factual context could be taken into account when considering gross earnings under s 14 and that, properly construed, that context meant it was appropriate to exclude commission from gross earnings in this case.

[35] Corporate Consumables' case was that Parliament's intention was employees should be paid holiday pay at a rate equivalent to what they would normally have received had they worked instead of taking holidays. It was said that paying annual holiday pay using the method advocated for by Ms Schollum and Mr Hastings would produce a result that would see them being paid more for taking an annual holiday than they would have received had they worked on the days on which annual holidays were taken and, therefore, was incorrect.

[36] The company considered that without excluding commission from gross earnings, Ms Schollum and Mr Hastings would receive a windfall benefit by getting the value of the commission twice, once in the calculation of average weekly earnings and again when paid the commission, which it called "double dipping". This "double dipping" was said to compound over time which effect was colourfully called a "snowball effect".

[37] The introduction to s 14 contemplates that there are circumstances in which the definition of gross earnings may not apply. Several examples of cases were relied on to illustrate the circumstances in which a contextual analysis of words or phrases in a statute had been taken into account to depart from an extended (or stipulative) definition.

[38] The first example was *Hixon v Campbell*.[4] *Hixon* was a proceeding removed to the Court from the Employment Relations Authority. The case involved two issues arising from proceedings brought under s 11 of the Wages Protection Act 1983 to recover unlawful deductions made by the employer, a company, from wages due to its employees. The company was in liquidation. One issue was whether a Labour Inspector was entitled to bring recovery proceedings. The other issue was whether the extended definition of employer in s 2 of that Act entitled a Labour Inspector (and/or an employee) to bring those proceedings against persons whose positions fell within that definition. The first issue is not relevant but the second was used as an example of the Court taking into account relevant context.

[39] The Wages Protection Act contained a definition of "employer" that extended its meaning as follows:

> In this Act, unless the context otherwise requires,—
> **employer** means a person employing any worker or workers; and includes any manager, foreman, clerk, agent, or other person engaged on behalf of that person in the hiring, employment, or supervision of the service or work of any worker[5]

[40] The Court noted that this extended definition can only be displaced if the context gives strong indications to the contrary:[6]

> All words and phrases defined in s 2 are subject to the qualifying words "In this Act, unless the context otherwise requires…". That is a common qualifier of statutory definitions in many Acts. The words "In this Act" make it clear that the definitions and the catch-all qualifying phrase apply to that legislation, the Wages Protection Act. The "context" referred to is the context of the use of the defined words or phrases within that Act. So, in this case, the definition of "employer" must be considered in the context of the relevant section or sections in which it appears. … Put another way, if the statutory definition of the word can apply sensibly in the context in which it is used (here s 11), then the catch-all exemption is inapplicable and the Court must apply the s 2 definition of "employer".

[41] The Court also noted that an extended definition can only be displaced by what was referred to as "… the proceeding caveat (unless the context otherwise required…) if the context gives strong indications to the contrary".[7]

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4 *Hixon v Campbell* [2014] NZEmpC 213, [2014] ERNZ 5354 at [49].
5 Replaced by Wages Protection Amended Act 2016, s 4.
6 *Hixon v Campbell*, above n 4, at [49].
7 At [50].

[42] In the Court's analysis of the meaning of "employer" in s 11 it acknowledged that using the extended definition, led to a counter-intuitive result.[8] The Court said:[9]

> So, for example, the plaintiffs' interpretation would allow recovery from a wages clerk or a work supervisor although the employing entity is both identified and exists in a legal sense for the purpose of recovery against that employing entity. We were asked to question seriously whether Parliament would have intended such a result. The implication of this rhetorical question is that Parliament could not possibly have so intended and the definition of "employer" in a s 11 claim must be interpreted accordingly.

[43] The Court concluded that the context in which "employer" was used in s 11 meant the company that had been placed in liquidation not the class, or category, of persons listed in the extended definition in s 2. The extended definition did not apply. What drove that conclusion, and established the relevant context, was that the Wages Protection Act is employee-protection legislation. It would have been ironic, and absurd, to interpret the meaning of employer in s 11 so that one group of employees could become liable for payment to another group of employees.[10] The unavailability of the employer company, because of its liquidation, did not mean that the context required the Court to apply the extended definition of employer in s 2.[11]

[44] The second example, *Police v Thompson*[12], was referred to and relied on in *Hixon*. In that case the Court of Appeal had to decide whether a minor had committed an offence under the former Sale of Liquor Act 1962, of being under age in any bar of any licensed premises.

[45] That legislation defined "bar" very broadly, including any bottle store. The minor was found in the bottle store of the hotel where liquor was sold for consumption off the premises only. The issue was whether the extended definition of bar applied. North P held that a Court should start by assuming the statutory meaning should apply:[13]

> Even where an Act contains a definition section it does not necessarily apply in all the contexts in which a defined word may be found. If a defined

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8 At [108].
9 At [108].
10 At [116].
11 At [116].
12 *Police v Thompson* [1966] NZLR 813 (CA).
13 At 818 (citations omitted).

> expression is used in a context which the definition will not fit, the context must be allowed to prevail over the "artificial conceptions" of the definition clause, and the word must be given its ordinary meaning.

[46] In considering the context in which the word "bar" was used, Turner J said:

> "If "context" is used in its broadest sense, it may perhaps include the policy of the Act, and the history of the legislation, and the consequences of a given interpretation, as well as the text surrounding the provisions under examination".[14]

[47] He went on to observe that the policy of that legislation, and its history, supported the application of the extended definition. He concluded there was nothing in the section creating the offence, or in any neighbouring or connecting provisions in that legislation, to lead to a different conclusion.[15]

[48] The third example was the recent decision of the full Court of the Employment Court in *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd*[16] when looking at the definitions of employer and employee in the lockout provisions to the Act.[17] The Court referred to *Statute Law in New Zealand* and approved the following passage: [18]

> This kind of qualification (that is, one relating to context, such as "unless the context otherwise requires) indicates that, particularly in a long Act where the word in question appears several times, there may be occasions where it does not bear its defined meaning. This usage is productive of uncertainty, and has been criticised by the Law Commission, but it does provide a useful flexibility, including when a term has a different meaning assigned to it by another Act…. A statutory definition is only displaced where there are strong indications to the contrary in the context. That is particularly so where the definition is of the stipulative kind that extends the meaning of the word.

[49] Using these examples Ms Cates submitted that there was a basis to conclude that the context in this case required a narrow definition of gross earnings by not taking into account commissions earned by the plaintiffs. Her submission was:

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14 At 820 – 821.

15 At 821.

16 *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204, (2015) 10 NZELC 79-057.

17 The subsequent Court of Appeal decision did not interfere with the Employment Court's extended definition.

18 J F Burrows and R I Carter, *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington 2015) at 438-439 (footnotes omitted).

> It is submitted that it **exceeds the purpose** of the Act to give employees a significant **financial advantage** by taking holidays; by conferring entitlements significantly above what they would receive normally had they worked the day(s) in question (besides entitlements explicitly stated such as penalty rates).
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> [original emphasis]

[50] From that submission I assume the legal context relied on is the perception that the Holidays Act is not intended to provide a financial advantage to an employee when being paid for annual holidays (in the sense of being paid more than he or she would have earned by working instead). Any result of applying gross earnings in a way that might do so illustrates a context justifying not using the extended definition.

[51] I reject that submission. What those cases used as examples show is that the context in which words are used in a statute may mean that an extended definition does not apply to every use of that word in the statute. In that situation the usual, or commonly understood, meaning is applied.

[52] There is nothing in the policy of the Holidays Act, its history, the surrounding text to s 14, or the consequences of using the extended definition of gross earnings that supports not taking into account commissions earned by the plaintiffs. Excluding commission from the definition of gross earnings in the way Corporate Consumables seeks would not be to conclude the context required the extended definition to be displaced by the usual or ordinarily understood meaning of those words. It would require adopting a definition at odds with any commonly understood meaning of gross earnings. Applying the definition of gross earnings in s 14 to the circumstances here does not produce a result which is inconsistent with the purpose of the Holidays Act or could be said, in the sense used in *Hixon*, to produce an absurd or unjust result. The result is, in fact, consistent with the plaintiffs' employment agreements and the Holidays Act.

[53] The decision in *Marine Helicopters v Stevenson*[19] was said to support Corporate Consumables proposition because the Court in that case observed, in

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[19] *Marine Helicopters v Stevenson* [1996] 1 ERNZ 472 (EmpC).

passing, that s 16 of the Holidays Act 1981 (dealing with calculating holiday pay), ensured the employee did not suffer a reduction in another benefit meaning income.

[54] The unusual circumstance commented on by the Court in *Marine Helicopters* arose from the employee managing his own workload and on days when he was entitled to take a holiday working instead. In discussing that work pattern, and whether or not anything was due to the employee, the decision said:[20]

> Annual holidays require separate consideration, but the result is the same. The entitlement was in the employment contract and [the employee] was free to cease working and to take annual holidays when he chose. In that circumstance, there can be no accumulation of annual holidays under s 12(1)(A), because that provision applies only "where an employer fails to allow a worker to take … any holiday", and provides specifically for the employer's obligation to remain in force until its allowed. Those are not the facts here. As for payment, for any days which may have been allowed to him but on which he chose to work, [the employee] has again been fully paid. Holiday pay, calculated in accordance with s 16, is specifically provided for times when an employee is deemed to be at work and working, but is not at work and working. That provision merely ensures that the employee, enjoying a benefit bestowed upon him by the Holidays Act 1981, does not suffer thereby a reduction in another benefit, ie the income from the job. In [the employee's] case, the income from the job continued, he chose not to enjoy the benefit bestowed on him by the Act and by his employment contract. Neither the Act nor the employment contract provide any further benefit to him.

[55] The comments in that passage, about a reduction in benefits, do not show holiday pay should equate to what would have been earned had the employee worked instead. Those remarks addressed the unusual circumstances of that case and to apply them more widely would take them out of context.

[56] The company also sought to draw some support from *Wella New Zealand Ltd v Cooney* which is a determination by the Employment Relations Authority.[21] The employee in that case sold products for Wella and was paid a retainer and commission on sales. The employee received commission for sales made while he was on holiday.

[57] In *Wella*, the employer had applied the definition of gross earnings in s 14 and included commissions in the calculation of average weekly earnings. However, I

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20 At 497.

21 *Wella New Zealand Ltd v Cooney* ERA Auckland AA246/08, 11 July 2008.

do not agree with the Authority's conclusion that the employee's actual commission should be reduced by the sales received when he was on holiday. That conclusion was reached without an analysis of s 14 or the relevant employment agreement. *Wella* does not assist in establishing a legal context to depart from the extended definition of gross earnings in s 14.

[58] Corporate Consumables also submitted that assistance can be derived from the way in which the Holidays Act provides for other types of leave for public holidays, sick leave and bereavement leave. Those types of leave are designed to compensate an employee for being absent from work at a rate commensurate with what had been received had they continued to work.

[59] Ms Cates also referred to s 23(2) which provides that, where an employee's employment comes to an end where an annual holiday has not been taken, the employee is entitled to be paid eight per cent of his or her gross earnings. It was submitted a calculation based on eight per cent is a mechanism to pro rata an employee's entitlement to four weeks annual holiday.

[60] Little assistance that can be gleaned from considering those statutory entitlements because the circumstances in which they arise, or payment is required, do not involve assessments under s 21. They are not comparable and are not an indication of the purpose of the Holidays Act.

[61] The idea that Ms Schollum and Mr Hastings might be financially advantaged by being paid holiday pay is both erroneous and irrelevant. What they are entitled to is the product of their employment agreements and statutory entitlements. There are any number of situations where the way an employee is remunerated may cause a variation in the amount payable for holiday pay. *Howell v MSG Investments Ltd* illustrates that point.[22] The issue in *Howell* was whether holiday pay, payable on the termination of employment, should have taken into account an incentive payment earned by the employee as part of his employment.

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[22] *Howell v MSG Investments Ltd (formerly known as Zee Tags Ltd)* [2014] NZEmpC 68, [2014] ERNZ 21.

[62] Mr Howell had an incentive agreement with his employer entitling him to a payment over and above his usual remuneration in certain circumstances. On 22 January 2013, after his employment ended, he was paid $3.2 million less PAYE and Kiwisaver contributions pursuant to that incentive agreement. The subsequent dispute was whether his employer owed him holiday pay taking into account the impact of that incentive payment on his earnings.

[63] The Court in *Howell* considered s 14 and noted that it applies to s 21. The Court considered the incentive payment would have been included in annual holidays had Mr Howell's employment continued. The employer was indebted to him for holiday pay because the incentive payment was properly part of his gross earnings in the relevant qualifying period. It was immaterial that the amount of the incentive payment could not be calculated until after his employment ended. *Howell* demonstrates how the amount payable for holiday pay can vary depending on an employee's earnings over time.

[64] Ms Cates sought to distinguish *Howell* because, she said, it did not analyse the phrase "unless the context otherwise requires". I do not agree that *Howell* can be distinguished on this basis. In *Howell*, the Court considered ss 14 and 21 entirely consistently with the text of those sections and the purpose of the Holidays Act.

[65] The next reason given by Corporate Consumables to depart from the extended definition of gross earnings was the factual context said to arise from double dipping and the snowball effect mentioned earlier.

[66] The company called Lorraine Bartley to explain what it meant by "double-dipping" and a "snowball effect". She is experienced in dealing with payrolls and compliance with the Holidays Act.

[67] Ms Bartley was engaged to review the way in which the company calculated annual holiday pay for commission-based employees including Ms Schollum and Mr Hastings. She was not involved in instituting the method of paying holiday pay used by the company. Her instructions were to:

(a) review Corporate Consumables use of its payroll system;

(b) reach her own independent findings about whether Corporate Consumables had been paying staff leave correctly;

(c) complete calculations for what the Labour Inspector (who was separately investigating) believed Corporate Consumables should have paid for annual holiday pay;

(d) determine what arrears, according to the Labour Inspector's opinion, were due;

(e) prepare presentations and tables to enable what she referred to as a better understanding of the annual leave calculations and solutions; and

(f) provide an opinion on the financial viability of different solutions, as well as the merits of those solutions.

[68] Importantly, Ms Bartley stated her understanding about what she referred to as the "intent of the Holidays Act" by saying it was to ensure an employee enjoyed the same standard of living while on leave as they would have had while at work. She explained that this was the basis upon which Corporate Consumables calculated annual holidays and that view underpinned her evidence.

[69] This approach led to a conclusion that paying holiday pay calculated by totalling base salary and commissions, and then subsequently paying commission the employee was contractually entitled to, created an unjustified windfall; the double-dipping.

[70] As part of this exercise Ms Bartley "annualised" the amount to be paid to Ms Schollum and Mr Hastings. Undertaking this exercise was said to create a type of cross-check on holiday pay to determine whether an employee received less or more than his or her average income for the periods when they took annual holidays. In this exercise the amount that would be payable for holiday pay using salary and

commission was projected out for a year. She said that this sort of projection should be approximately equivalent to the employee's annual income. She did not explain the source of that opinion.

[71] Beginning with Mr Hastings, this annualised calculation used his gross remuneration from 29 August 2015 until 27 August 2016. Ms Bartley calculated that if he was paid the higher of his average weekly earnings, or ordinary weekly pay, the annualised figure would be 116 per cent of his remuneration. She concluded that if actual commission paid was taken into account, the annualised amount for Mr Hastings, would be 153 per cent of his remuneration.

[72] For Ms Schollum over the same period of time (29 August 2015 until 27 August 2016), the annualised amount was 103 per cent of her gross annual remuneration. The higher of average weekly earnings, and ordinary weekly pay, annualised was 111 per cent of Ms Schollum's annual remuneration. Ms Bartley calculated that taking into account commissions actually paid increased this annualised amount to 153% of remuneration.

[73] From this analysis Ms Bartley concluded that, in both cases, the annualised amounts were disproportionate indicating a financial advantage for Ms Schollum and Mr Hastings. Those comparisons were intended to show that the Company's position was consistent with the Holidays Act and what was sought by the plaintiffs would be a windfall.

[74] Moving on from this annualised calculation Ms Bartley also gave evidence about the "snowball effect". Her evidence was that this compounding effect inflated what would be calculated for each subsequent week when an annual holiday is taken and paid for.

[75] Ms Bartley made several concessions in her evidence. First, she accepted that to make a calculation of average weekly earnings, information from the payroll system about gross earnings for the 52 weeks previously is used. She also accepted that the only other way in which holiday pay can be calculated is by using ordinary weekly pay if it is higher than average weekly earnings.

[76] Second, Corporate Consumables proprietary payroll system, Ace Payroll, provides for commissions to be included in calculating holiday pay. The payroll system captures that data, however, she explained that the company elected to exclude commissions from the automated field in that system.

[77] Thirdly, Ms Bartley accepted that, because of the way in which commission was calculated monthly, it would not be identified as payable until the end of the month had been reached. On that basis, it must follow, that where she had undertaken calculations based on being able to trace actual sales to a particular day when Ms Schollum or Mr Hastings were on holiday that was misplaced.

[78] This evidence was not helpful in establishing any context that could be said to justify departing from the definition of gross earnings in s 14 of the Holidays Act. Concerns about double-dipping and the snowball effect were misplaced. They were addressed by Ms Bartley's acceptance that the amount payable was dictated by a combination of statutory entitlements and what was provided for by each employment agreement.

[79] Finally, Ms Bartley had undertaken her calculations to annualise entitlements to comply with the instructions she received. An annualised figure does not assist in determining the appropriate way to calculate holiday pay. It causes an exaggeration that has no bearing on the contractual entitlements in each plaintiff's employment agreement or the statutory entitlements they have.

[80] There is no contextual basis to conclude that holiday pay for each of Ms Schollum and Mr Hastings should exclude commissions they earned under their employment agreements.

[81] I agree with Mr Langton that what Corporate Consumables is attempting to achieve is to displace the extended definition of gross earnings in s 14 to justify what has happened.

[82] Furthermore, adopting Corporate Consumables' interpretation of gross earnings is inconsistent with s 6(3) of the Holidays Act because it would exclude, restrict, or reduce an employee's entitlements under that Act.

[83] There is also a flaw in Corporate Consumables assumptions. It has assumed that the amount to be paid as holiday pay must be the same (or perhaps substantially the same) as the employee would have earned for working instead of taking a holiday. The Holidays Act does not say that. The method of payment in s 21, does not qualify or restrict annual holiday pay by reference to what an employee may have earned by working instead of taking a holiday. Section 14 is explicit. Gross earnings means all payments. The exclusions are only those payments the employer is not bound to make, such as discretionary payments, or where holidays have been paid out.[23]

[84] Commission is part of the plaintiffs' income. Corporate Consumables was required to pay holiday pay taking into account commissions because of the employment agreements it has with Ms Schollum and Mr Hastings. Those agreements make no allowance or adjustment to the commission for any period when they are on annual holidays.

Was holiday pay actually paid?

[85] Corporate Consumables had a fall-back position as an alternative. This submission was that the holiday pay for the plaintiffs could be assessed using ordinary weekly pay in s 8(1).

[86] The basis for this argument was that commission should be included in that assessment if it is a regular payment. It was said that commission was a regular payment because it occurred in a predictable way and the Holidays Act did not refer to a regular weekly payment.

[87] The plaintiffs' holiday pay was paid during the normal pay cycle when base salary was paid as a weekly payment and the commission was paid the following

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[23] See s 14(b) and (c).

month in arrears. Ms Schollum's employment agreement stated that annual leave would be paid as part of the normal pay cycle. She and Mr Hastings accepted that they knew throughout their employment that when taking holidays they would be paid their base salary and actual commission would be credited in their normal pay cycle.

[88] If this submission is accepted Corporate Consumables considers that its liability would be limited to the difference between the average weekly pay assessed in this way and average weekly earnings calculated under s 21(2)(b)(ii).

[89] This submission has already been addressed in [26]. The answer is that s 8(1) identifies what is meant by ordinary weekly pay. Section 8(1)(a) defines that expression to mean the amount of pay that the employee receives under his or her employment agreement for an ordinary working week. What follows, in the balance of s 8(1)(b), is for the sake of clarity, ensuring that productivity or incentive based payments are included if they are a regular part of the employees' pay.

[90] Any commission earned contractually can be described as being part of an employee's regular income or pay. However, the purpose of s 8 is to provide a method for use in the calculation of holiday pay in s 21. It is designed to provide an alternative, and is clearly established as being what an employee is paid for a week of work. In this case Ms Schollum and Mr Hastings were not paid commission on a weekly basis. While it was always possible, and in fact Corporate Consumables did, trace commission sales made to particular days when contracts were entered into with its customers, that is not determinative or helpful. In any given week the plaintiffs could not establish what they were entitled to for a weekly payment beyond their base salary.

[91] Commission was not earned and paid weekly. It was earned and paid monthly and only once the qualifying contribution to the gross margin of Corporate Consumables had been achieved.

[92] I do not accept that the holiday pay Corporate Consumables was required to pay Ms Schollum and Mr Hastings was, in fact, paid but in arrears.

[93] For completeness, I also do not accept that regularly paid commission was, in fact, the plaintiffs' holiday pay and that it was just being paid late. That is not how this issue was approached or dealt with by the company and it is inconsistent with s 21.

Holidays Act 1981

[94] In respect of the Holidays Act 1981, the same arguments which were used by the plaintiffs and the defendant in relation to the Holidays Act 2003 were repeated.

[95] The plaintiffs' claim is that for holidays they took before the Holidays Act 2003 came into effect, on 1 April 2004, their employer was required to pay them annual holiday pay based on the greater of their average weekly earnings or their ordinary pay. The Holidays Act 1981, in s 16, mandated how that calculation was to be undertaken. Section 16(2) reads:

> In respect of each week of his annual holiday, the holiday pay of a worker shall be at the rate of his average weekly earnings during the year in respect of which he has become entitled to the holiday.

[96] Section 16(4) of the 1981 Act reads:

> Notwithstanding subsections (2) and (3) of this section, the holiday pay of a worker in respect of any period of his annual holiday shall in any event be at a rate not less than the rate of his ordinary pay at the date when he begins to take that period of his holiday.

[97] Section 4 defines "ordinary pay". It means the remuneration for the worker's normal weekly number of hours of work calculated at the ordinary time rate of pay and can include (where relevant) the cash value of board or lodgings. Mr Langton submitted that this definition is the same as ordinary weekly pay in the Holidays Act 2003. I agree.

[98] Section 2 defined average weekly earnings as 1/52 of his gross earnings.

[99] Finally, s 3 provided a meaning of gross earnings which in relevant parts was:

> **3 Meaning of term "gross earnings"**
>
> (1) For the purposes of this Act, the term gross earnings means,—
>
> (a) In relation to any worker … in respect of any specified period, the total amount of remuneration payable to him by his employer by way of salary, wages, allowances, or commission (whether in cash or otherwise) in respect of his employment by the employer during that period, and includes any holiday pay payable to him by the employer in respect of any holiday taken by the worker during that period; and, where the worker is provided with board or lodging by the employer, also includes the cash value of that board or lodging as determined under section 5 of this Act:
>
> (b) Repealed.
>
> (2) Notwithstanding subsection (1) of this section but subject to sections 18(7) and 21(3) of this Act, the term "gross earnings" does not include any sum (including a bonus, gratuity, or other lump sum special payment) that the employer is not bound by the terms of the employment to pay to the worker, nor, in the case of a worker who, during the period of employment, is unable to work because of sickness or injury, or is absent from work while on protected voluntary service or training (within the meaning of the Volunteers Employment Protection Act 1973), any sick pay or pay in respect of any such service or training received by the worker in respect of every complete week of inability to work or training.

[100] In the Holidays Act 1981 the meaning of gross earnings included salary, wages, allowances or commissions. That must mean the combined remuneration earned by Ms Schollum and Mr Hastings.

[101] Ms Cates submitted that the same arguments which were used to resist the case for the plaintiffs in dealing with the Holidays Act 2003 should apply in relation to the 1981 legislation. The submission was that the reference in s 4 of the 1981 Act to the "remuneration for the workers normal weekly hours of work calculated at the ordinary time rate of pay" means the plaintiffs' base salary.

[102] I reject that submission. The wording of ss 2, 3 and 16 is unequivocal. All of the employee's earnings must be included in calculating gross earnings. There is no basis to displace the extended definition of gross earnings when determining Ms Schollum's and Mr Hastings' holiday pay. In relation to holidays before 1 April 2004 the calculation of holiday pay required taking into account their base salary and commission.

(b) Was agreement to pay reached?

[103] The significance of a possible agreement between Corporate Consumables, Ms Schollum and Mr Hastings over payment to them of any unpaid holiday pay lies in the limitation in s 142 of the Act. That section provides no action may be commenced in relation to an employment relationship problem that is not a personal grievance more than six years after the date on which the cause of action arose.

[104] The critical date is 21 December 2015 because that is when a statement of problem was filed in the Authority. If s 142 applies, Ms Schollum and Mr Hastings will only be able to maintain a claim for unpaid holiday pay from 21 December 2009 onwards.

[105] However, they maintain that an agreement was made with Mr Blaylock, on behalf of Corporate Consumables, to back-pay them so that the limitation does not apply. Mr Blaylock denies making that agreement.

[106] It is necessary to consider the background to what the plaintiffs say was the formation of that agreement. Concern about the way in which Corporate Consumables accounted for holiday pay had been simmering for some time before proceedings were issued. The possibility of holiday pay being owed emerged in January 2015. Ms Schollum had been assisting her partner with a pay query he had with his employer. From that work she became concerned that she was not being properly paid. She checked the Ministry of Business, Innovation and Employment website and telephoned the Ministry about it.

[107] The upshot of those inquiries was that Ms Schollum sent an email to Mr Heffernan, the company's accountant, querying her holiday pay and entitlements. She referred to her partner's entitlements including overtime and bonuses. With that background, she informed Mr Heffernan that for the whole time she had worked for the company her holiday pay had only been paid at her weekly base rate before commission. She concluded that what had been paid was incorrect and he was asked to look into the issue.

[108] On 12 January 2015 Ms Schollum sent another email to Mr Heffernan asking if he had looked into the issue. Another follow up email was sent on 27 January 2015. Regrettably there was no reply from Mr Heffernan so she took up the matter with Mr Blaylock when he was in Auckland in February 2015. The exact date of this meeting was not stated.

[109] However, an opportunity to discuss holiday pay arose during a conversation about an overpaid commission. That discussion moved on to holiday pay. Ms Schollum told Mr Blaylock that something was not right with the way in which she had been paid holiday pay previously. Mr Blaylock said he would look into it, and matters were left there, but no progress was made over the following months.

[110] The only outward acknowledgement that the issue had been considered was that, briefly, Corporate Consumables changed the way in which it was paying holiday pay. Between July 2015 and October 2015 it began to include commission in its calculation of annual holiday pay.

[111] The inquiries from Ms Schollum were not the only ones referred to Mr Blaylock. In March 2015 the company's South Island Manager, George Morris, was approached by a South Island employee, Jill Brothwell, who was also concerned about her holiday pay.

[112] Mr Morris arranged for his wife, Irene Morris, who has a background in human resources, to make inquiries about holiday pay. She did so and in an email to Mr Morris of 2 March 2015 reported having spoken to the Ministry of Business, Innovation and Employment. Mrs Morris reported that payment for annual holidays included all entitlements including commission. Mrs Morris reported that, so far as payment of commission while on annual holiday was concerned, that was part of a person's employment agreement. She ended her email by recommending obtaining advice.

[113] Mr Morris sent his wife's email, containing this advice, to Mr Blaylock on or about 2 March 2015.

[114] Meanwhile, Mr Hastings was dissatisfied with his holiday pay and instructed a lawyer to write to Mr Blaylock about it. Mr Hastings's lawyer wrote to Mr Blaylock on 29 July 2015, complaining that Mr Hastings had not been paid holiday pay correctly from the beginning of his employment with the company.

[115] That letter referred to Mr Hastings's gross earnings being considerably more than his base salary and stated that the company was indebted to him as a result. The lawyer's letter ended with a request for Mr Hastings's total entitlement to holiday pay to be calculated, for a record of those calculations to be provided, and for advice as to when he could expect payment.

[116] Mr Blaylock responded on 5 August 2015. He acknowledged that it would take time to compile the requested information because it involved both a computer and a manual payroll system stretching back to 2001. Having explained why preparing the information would take some time, Mr Blaylock went on to say that Corporate Consumables' accountant, Mr Heffernan, would advise both Mr Hastings and his lawyer, of "… the dollar amount involved and a payment schedule when he has completed the exercise."

[117] That was not the end of communication between Mr Blaylock and Mr Hastings over his claim for holiday pay. They met at a café on 13 August 2015. At this meeting Mr Blaylock asked Mr Hastings to disengage his lawyer on the basis that, if he agreed to do so, they would sort out the holiday pay issue "in-house" meaning between themselves. Mr Hastings did as requested.

[118] What followed was the preparation of a spreadsheet by Corporate Consumables calculating Mr Hastings's holiday pay, and the amount owing to him, for the years 2001-2016 (inclusive). That spreadsheet was forwarded to Mr Hastings by email on 17 August 2015. The spreadsheet had been prepared by Mr Heffernan and was sent to Mr Blaylock on 14 August 2015. In fact, it had been sent by Mr Heffernan to Mr Blaylock on 30 July 2015 so that when the meeting at the café occurred on 13 August 2015 he already knew what the company considered it owed Mr Hastings.

[119] The spreadsheet was not accurate because it stated the amount owed but deducted a sum for bad debts. That deduction more or less halved the amount of the debt but was contrary to the employment agreement between Mr Hastings and the company.

[120] The company was also being investigated by a Labour Inspector over how it paid holiday pay. By September 2015 Corporate Consumables had received legal advice about holiday pay. On 3 September 2015 Mr Blaylock wrote a letter to all staff about that advice and their holiday pay. In that letter he referred to receiving advice that the company:

> … should alter the way we calculate annual leave and sick/bereavement pay. We will now make these calculations factoring in your commission payments as well as your salary.

[121] The letter went on to say that he would like to meet with staff members to discuss the calculations and there would be a further report within two weeks.

[122] Promptly after that letter, on 9 September 2015, Mr Blaylock wrote to Ms Schollum about her holiday pay. This letter contained a significant difference from the one sent on 3 September 2015. It introduced a six-year limitation on the company's obligations to pay. He went on to say that there could be a significant detrimental effect on the business and he was hopeful of discussing, and agreeing, a pragmatic solution with her.

[123] The letter to Ms Schollum was a generic one. It was also sent, in similar form, to Mr Hastings and to other staff.

[124] Both Ms Schollum and Mr Hastings replied the same day. Each of them stated their disappointment and dissatisfaction with this letter. In Ms Schollum's response she referred to trusting Corporate Consumables to meet its obligations to her which it had not done. She expressed disappointment and considered that she was being penalised for loyalty to the company, concluding that this decision to limit back-payment to six years was upsetting, demoralising and "gut wrenching".

[125] Mr Hastings's response was short and to the point. He said it was upsetting and expressed his opinion that for his 15 years of service, through "sheer incompetence" he was being short-changed out of a significant amount of money. He stated his disgust at this decision.

[126] It was against this background that Ms Schollum met with Mr Blaylock in September 2015 to discuss her holiday pay. The exact date of that meeting was not clearly stated in evidence. Mr Blaylock thought the meeting was on 9 September 2015 shortly after his letter had been sent. Ms Schollum considered the meeting was not on that day but was soon after. There are no records of this meeting and Ms Schollum and Mr Blaylock disagree about its outcome.

[127] Ms Schollum said that at this meeting Mr Blaylock agreed to pay unpaid holiday pay back to the beginning of her employment. Her recollection was that she told Mr Blaylock she was distressed by his letter and staff were upset. She said that in response to being confronted by her being upset, and staff dissatisfied, he agreed to back-pay holiday pay to when employees started work. She said he gave her permission to relay this decision to other staff which she did. In other words when confronted with an unpopular decision in the letter of 9 September, appearing to renege on the company's obligations, he recanted and agreed to pay. She proposed to him the possibility of payment over time if necessary. Mr Blaylock agreed that Ms Schollum was upset, and said she threatened to leave, but denied making any agreement with her about payment back to the beginning of her employment.

[128] I accept Ms Schollum's recollection of that meeting and her description of the agreement that was reached at it. Her evidence was clear and concise. It was also consistent with what had taken place between Mr Blaylock and Mr Hastings. It was consistent with Mr Blaylock being aware that his company was in difficulty over not having properly calculated, and paid, holiday pay and being confronted by dissatisfied employees who were responsible for securing sales and who needed to be placated to ensure business continued.

[129] What was said by Ms Schollum was also consistent with the conversation Mr Morris had with Ms Brothwell in which he confirmed that holiday pay would be

back-paid to the beginning of her employment. Mr Morris' conversation with Ms Brothwell occurred after the meeting Ms Schollum had with Mr Blaylock. Critically what Mr Morris said to Ms Brothwell mirrored what Mr Blaylock said to Ms Schollum.

[130] Ms Schollum was adamant that Mr Blaylock had agreed that she could pass on to other staff members the company's preparedness to back-pay holiday pay to the beginning of employment for each of its employees. I am not persuaded that subsequent correspondence, sent in a letter from Corporate Consumables staff to Mr Blaylock, shows that agreement had not been reached.

[131] On 3 November 2015 Ms Schollum, Mr Hastings and other employees signed a letter addressed to Mr Blaylock about holiday and sick pay calculations. It was introduced by a subject line referring to holiday, statutory leave and sick leave pay calculations. In the opening sentence concern was expressed about calculations of these entitlements having been raised with Mr Heffernan at Christmas the previous year. The letter refers to the lack of transparency and communication and comments that the information being supplied by Mr Heffernan was vague at best. In one sentence a comment was made:

> "If we ask for an update we are getting very broad emails that are doing nothing to provide any information around time lines or expected resolution[s]."

[132] A lack of communication from staff responsible for wages was also referred to and the letter comments on the state of the investigation by a Labour Inspector.

[133] This letter from staff also asks the company to sort out the problem and includes the sentence:

> "What we require from the Company is detailed information on how much is owed to each of us and a discussion regarding how this can be paid."

[134] I do not accept that this letter supports Mr Blaylock's contention that no agreement was reached in his meeting with Ms Schollum. In submissions Ms Cates emphasized that this letter does not refer to an agreement to pay, or back-pay, having

being reached in September which might have been expected had agreement been concluded as Ms Schollum said it had been.

[135] While in an ideal world the letter of 3 November 2015 could have been expected to include that sort of observation, it is equally open to be read as the employees knowing and understanding that they are to be back-paid but looking for information about how much is to be paid and when they can expect to receive that money. The letter was not intended to establish, or to record, the legal position. It was a request for progress and resolution on behalf of all employees and cannot be seen in any other light.

[136] I find that the company agreed to make a back-payment of holiday pay and informed its staff accordingly. While it is difficult to be precise, that information was relayed after the letter of 9 September 2015 was distributed and was in direct response to Mr Blaylock being informed that staff were dissatisfied. It was intended that all staff, including Ms Schollum and Mr Hastings, were to benefit from this agreement to pay.

Was there consideration?

[137] Concluding that there was an agreement to pay holiday pay does not resolve this proceeding because Corporate Consumables contends no contract was formed in its communications with Ms Schollum, Mr Hastings or any other staff member. Consequently, whatever might be made of the September meeting, Ms Cates submitted that there was no offer, acceptance, intention to create legal relations or consideration so no binding agreement had been reached.

[138] In support of that submission it was said that all Mr Blaylock had done was to say that the company had received advice and that recalculations needed to be undertaken. The assertion was that Mr Blaylock was not sure whether that recalculation meant annual holidays had been paid wrongly.

[139] It was pointed out that the 3 September 2015 letter was a statement that calculations were being prepared and that the company would meet with its employees to discuss those calculations. Those meetings never took place.

[140] The letter of 3 September 2015 was followed, reasonably promptly, by the letter of 9 September 2015 stating again that calculations were being prepared and that a meeting would be arranged to discuss a pragmatic solution. It was said that inviting discussion was an indication that no agreement had been reached.

[141] Ms Cates submitted there was a paucity of evidence to be able to conclude that a contract had been agreed. This lack of certainty was said to be exemplified by Ms Schollum's situation because she anticipated arrears being paid over time, but did not have an amount that would be paid to her, a date about when she would be paid, or any idea of the frequency of payment.

[142] Finally, it was said no contract had been created because of an absence of consideration provided in an exchange for any promise to back-pay arrears of holiday pay. In summary, therefore, Corporate Consumables says that everything was too uncertain and that Ms Schollum staying on in her employment was merely the continuance of the "status quo".

[143] Interestingly, Corporate Consumables did not address whether consideration was provided by Mr Hastings when he agreed to discontinue instructing his solicitor.

[144] I do not accept those submissions. Mr Blaylock was dealing with disgruntled sales staff who were significant to the business. It was important to him to secure their ongoing employment and, against that background, he agreed to pay despite what was said in his letter of 9 September 2015. He made a pragmatic business decision to placate staff. An intention to be bound by that agreement was evidenced by Mr Blaylock telling Ms Schollum that she could inform her colleagues that an agreement had been reached which she did. It is immaterial that they did not agree on the amount, which required calculation, or on payment terms at that meeting. Such an agreement would have required further investigation of the extent of the debt in any event.

[145] Separately, an agreement had been reached between Mr Blaylock and Mr Hastings to pay him holiday pay. Mr Hastings was required to disengage the services of the lawyer who was then acting for him, which he did, in exchange for a promise by Corporate Consumables that it would deal with the matter "in-house". He had a spreadsheet showing the amount owed to him although it wrongly also showed a deduction for bad debts. Mr Hastings remained employed.

[146] Mr Langton not only attempted a classical analysis of offer and acceptance but said, in reply to Ms Cates' submissions, that consideration might be seen as being supplied because there was a benefit to Ms Schollum and Mr Hastings in the restoration of their trust and confidence in Corporate Consumables once the promise to pay had been made, a burden for them in the delay of receipt of payment, and a benefit to the company in restoring the employees trust as well as a burden to the company to back-pay them.

[147] In *Talley v United Food and Chemical Workers Union of New Zealand*,[24] the Court of Appeal reviewed consideration in employment agreements where a pay rise was being negotiated. Hardie Boys J observed:[25]

> … in substance the practical benefit of ensuring or encouraging the performance of an existing obligation was held to be good consideration…

[148] In the same case the Court of Appeal also observed:

> We are disposed to think that the continued performance of the contract following a variation such as a voluntary pay increase, or the practical benefit to the employer of the employee's willingness to continue to serve in the light of the incentive, should be seen as consideration sufficient for the change to become incorporated into the contractual terms.

[149] In *Tally* the Court of Appeal citing with approval from Cheshire Fifoot and Furmston's Law of Contract[26] and, in so doing, referred to the English Court of Appeal's decision in *Williams v Roffey Bros and Prasand Nichols (Contractors) Ltd.*[27] In *Williams v Roffey Bros & Nicholls (Contractors) Ltd* the English Court of Appeal held that the promise of the defendant to pay the plaintiff an extra amount to

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24 *Talley v United Food and Chemical Workers Union of New Zealand* [1993] 2 ERNZ 360 (CA).
25 At 376.
26 8th New Zealand Edition 1992.
27 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1

continue to do the same job, in the same amount of time, as had originally been agreed was valid and enforceable. Consideration was constituted by the fact that the defendant had secured a benefit in fact. The plaintiff's completion on time meant that they would not have to pay contractual penalties and would be spared the inconvenience of finding another sub-contractor.[28]

[150] This approach to the realities of the situation found favour in New Zealand in *Attorney-General for England and Wales v R*.[29] In that case the Court observed that a practical benefit will qualify as consideration as well as the legal benefit of an enforceable promise.

[151] I am satisfied that consideration was provided in this case by the preparedness of Ms Schollum and Mr Hastings to continue to work and not seek alternative employment. There was a practical benefit. Ms Schollum continues to be employed by the company. While Mr Hastings resigned in November 2016, he remained employed after being asked to disengage his lawyer following the meeting on 13 August 2015, and after the commitment made by Mr Blaylock to Ms Schollum in the September meeting. His subsequent resignation is immaterial.

[152] Corporate Consumables provided consideration in a practical way. It obviated the need to find replacement employees and was able to ensure a continuous working environment at least in the short term.

[153] Reaching this conclusion does not address the submission for Corporate Consumables that there was a lack of certainty about the terms of the agreement. I do not accept that the agreement was uncertain or too vague to be enforceable. The company knew, and understood, that it needed to calculate the amount payable and had the information available to it to do so. All that was needed was a calculation from its own information. What was to be calculated, and over what time, was known. Perfecting a calculation cannot be said to be a lack of certainty. Insofar as Mr Hastings is concerned, the company had already calculated how much it owed him even though it then wrongly attempted to make a deduction for bad debts.

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28 At 15-16.

29 *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA).

[154] I also do not accept anything turns on the fact that the commitment made by Corporate Consumables was only to pay what it was otherwise required to pay had it complied with both its statutory obligations under the Holidays Act 2000 and the employment agreements.[30]

(c) Is Corporate Consumables estopped?

[155] In case I am wrong in concluding that an agreement was reached to back-pay holiday pay, it is necessary to consider an alternative submission that Corporate Consumables is estopped from resiling on a promise to pay it made.

[156] What needs to be established for an estoppel was discussed in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* which is:[31]

> The three main elements relevant to relief stem from the ingredients necessary to establish equitable estoppel in the first place. These are the quality and nature of the assurances which give rise to the claimant's expectation; the extent and nature of the claimant's detrimental reliance on the assurances; and the need for the claimant to show that it would be unconscionable for the promisor to depart from the assurances given.

[157] The Court went on to say that:[32]

> As a general approach, the clearer and more explicit the assurance is, the more likely it is that a court will be willing to grant expectation-based relief.

[158] In this case the circumstances said to have created the agreement to back-pay holiday pay also represent the foundation for this claim for estoppel.[33]

[159] The promises made were three-fold. One was to Ms Schollum. Another was to Mr Hastings, arising from the meeting with Mr Blaylock in the café, and the promise made to Ms Brothwell that holiday pay would be corrected back to the first day of employment.

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30 See as example *Glasbrook Brothers v Glamorgan County Council* [1925] AC 270 and *Black White and Grey Cabs Ltd v Reid* [1980] 1 NZLR 40 (CA).

31 *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [114].

32 At [115].

33 See *Newick v Working In Ltd* [2012] NZEmpC 156, [2012] ERNZ 510 for the Court's jurisdiction.

[160] I have already accepted that there was a benefit to Corporate Consumables by making this commitment because it assisted in placating senior employees responsible for generating income for the business. Expressed in a different way, Corporate Consumables intended that promise to be relied on because it reduced the risk of staff leaving. While Mr Blaylock said that he could exercise no control over whether staff chose to remain employed, or leave, he acknowledged that he had a preference for staff to stay.

[161] There is a difficult issue to decide about whether any detriment was suffered by the plaintiffs in relying on the assurance provided to them. Ms Schollum identified the detriment to her as being the purchase of a vehicle, the payment of legal fees for a leaky home claim brought as part of a body corporate of which she is a member, and supporting her family. Those matters do not readily support any detriment. The purchase of the vehicle pre-dated the promise made by Mr Blaylock by several months. She was already committed to pay the legal fees arising from the action taken by the body corporate and there was no evidence that she made a further commitment, or that she accepted some sort of obligation with the body corporate, in reliance on the promise made to her. The financial obligations Ms Schollum continued to undertake for her family existed before the promise was made and arose, in part, because of an injury sustained by her partner and the fact that she became the primary income earner during his incapacity.

[162] However, there was a detriment to Ms Schollum in the sense that she delayed taking action from September 2015.

[163] As to the detriment for Mr Hastings he likewise delayed taking action.

[164] I do not accept that the state of uncertainty which materialised in November 2015, when Corporate Consumables communicated with its staff about payment and indicated that it would revert to its previous method, is any indication that there was a degree of uncertainty about the promise made that rendered it incapable of founding this sort of claim. All that was in issue from the time Ms Schollum had her meeting with Mr Blaylock, and for that matter when Mr Hastings met him in the café

to discuss his holiday pay, was properly calculating the amount to pay and the timing of payment.

[165] I consider it would be unconscionable, within the meaning of *Wilson Parking*, for Corporate Consumables to be allowed to resile from the commitment it made to back-pay holiday pay to the point in time where Ms Schollum and Mr Hastings began their employment.

[166] If it was necessary for me to do so I would find that Corporate Consumables is estopped from denying its commitment to back-pay in that way.

(d) Section 142 and limitations

[167] Having reached these conclusions it is not necessary to consider the applications to extend time made by the plaintiffs.

Outcome

[168] The plaintiffs have been paid holiday pay for annual holidays incorrectly because the commissions they earned were not taken into account under s 21.

[169] The plaintiffs are entitled to the declarations they seek. I declare as follows:

(a) The defendant has breached the Holidays Act 2003 by failing to include commission payments that are part of the plaintiffs' remuneration when calculating the plaintiffs' annual holiday pay from 1 April 2004.

(b) The defendant has breached the Holidays Act 1981 by failing to include commission payments that were part of the plaintiffs' remuneration when calculating the plaintiffs' holiday pay for any period of their employment up to 31 March 2004.

(c) The defendant is liable to pay the plaintiff arrears of wages, being unpaid holiday pay, as a result of the breaches referred to in

declarations (a) and (b) from when they each started work for the defendant.

(d) In case those declarations require refinement leave is reserved to apply for further declarations, or amended declarations, if required.

[170] The costs of this proceeding are reserved. In the absence of agreement the plaintiffs may file a memorandum within 20 working days and the defendant has the same amount of time to reply.

K G Smith

Judge

Judgment signed at 4.30 pm on 27 September 2017