

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2018] NZEmpC 95
EMPC 173/2018**

IN THE MATTER OF an application for special leave to remove
 matter to the Employment Court

BETWEEN TOURISM HOLDINGS LIMITED
 Applicant

AND A LABOUR INSPECTOR OF THE
 MINISTRY OF BUSINESS, INNOVATION
 AND EMPLOYMENT
 Respondent

Hearing: On the papers filed 25 July and 1 August 2018

Appearances: S Langton and S L Maxfield, counsel for the applicant
 A Dumbleton, counsel for the respondent

Judgment: 14 August 2018

JUDGMENT OF JUDGE K G SMITH

[1] Tourism Holdings Ltd filed proceedings in the Employment Relations Authority, against a Labour Inspector, to resolve a dispute over how to calculate holiday pay for its employees when s 8(2) of the Holidays Act 2003 applied.

[2] Tourism Holdings applied unsuccessfully to the Authority to remove the matter to the Court to hear and determine without a prior investigation.¹ It has now applied for special leave to remove the matter to the Court. The Inspector does not oppose the application.

[3] The following brief description of the circumstances giving rise to this application is drawn from the Authority's determination and an agreed statement of

¹ *Tourism Holdings Ltd v A Labour Inspector* [2018] NZERA Auckland 165.

facts. Tourism Holdings operates a business called Kiwi Experience.² It employs driver guides for the duration of a Kiwi Experience bus trip that can range in length from one day to nine weeks. They are paid a daily rate for the work. In addition they earn commission on selling third-party tourism experiences to passengers when that activity is booked and undertaken while on the bus trip. Information about what was booked by passengers is provided to Tourism Holdings when the driver guide completes the trip's paperwork. Commission can then be calculated.

[4] A copy of a 2016 employment agreement for one driver guide was part of the agreed statement of facts. In this agreement the employee was to be paid a rate per day for the bus trip. An addendum to the agreement specified commission was able to be earned in two ways. First, it was earned as 50 per cent of the "total activity commissions" earned per trip after GST had been paid calculated according to a schedule. Commissions earned in this way would be included in the employee's gross earnings for the purposes of calculating holiday pay.

[5] Second, commission was earned where the driver guide acted as sales representatives to sell to passengers certain activities offered by "third party operators"; businesses other than Tourism Holdings providing holiday activities. Commission earned in this way was not paid until the third party operator confirmed the activity had taken place, been paid for, and the paperwork for the trip on which it had been sold was completed. Claims for payment were made at varying intervals ranging from one week to nine weeks and sometimes at considerably longer intervals. Under this arrangement commission payments were not payable until Tourism Holdings had been paid by the third party. In the employment agreement that was supplied, commission was not included in the employee's ordinary weekly pay, under s 8(2) of the Holidays Act, for the purposes of calculating her holiday pay.

[6] Tourism Holdings was audited by the Labour Inspector. The company and the Inspector are in the process of agreeing about an enforceable undertaking which will, among other things, make remediation payments in respect of leave.

² At [1].

This application

[7] The dispute between Tourism Holdings and the Labour Inspector is about whether commission payments should be included within relevant earnings, when holiday pay is calculated under s 8(2) of the Holidays Act.

[8] Sections 8(1) and (2) read:

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.

[9] The issue described in the application was whether commission payments are “not a regular part of the employee’s pay” and are excluded from the calculation of gross earnings undertaken to calculate ordinary weekly pay under s 8(2). Tourism

Holdings' position is that commission is excluded from the calculation. The Inspector disagrees and considers it should be included.

[10] The questions of law arising from this dispute were described in the application as:

- a. What is the meaning of the words "*not a regular part of the employee's pay*" in s 8(1)(c)(i) of the Holidays Act, for the purposes of calculating ordinary weekly pay under s 8(2) of the Holidays Act.
- 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 receives under his or her employment agreement for an ordinary working week,*" for the purposes of calculating ordinary weekly pay under s 8(2) of the Holidays Act.
- c. Whether, as a matter of law, the commission payments in issue in the proceedings are required to be included in the employee's (and other employees') ordinary weekly pay calculated under s 8(2) of the Holidays Act, or not.

[11] Section 178(2)(a)-(d) of the Employment Relations Act 2000 (the Act) empowers the Authority to remove a matter, or part of a matter, to the Court on either an application or as a result of its own motion.³ It reads:

- (2) The Authority may order the removal of the matter, or any part of it, to the court if—
 - (a) an important question of law is likely to arise in the matter other than incidentally; or
 - (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
 - (c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
 - (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[12] To succeed in an application for special leave the Court is required, by s 178(3) of the Act, to take into account the criteria in s 178(2)(a)-(c). The discretion available to the Authority in s 178(2)(d) is not repeated in s 178(3).

[13] Mr Langton's submissions, for Tourism Holdings, relied on establishing the criteria in s 178(2)(a): an important question of law is likely to arise in the matter other

³ Employment Relations Act 2000, s 178(1).

than incidentally. He broke down his submission into three elements that need to be established:

- (a) a question of law must arise in the proceeding;
- (b) the question must be important; and
- (c) the question must arise other than incidentally.

[14] The three questions of law described in paragraph [10] were identified as satisfying the first part of s 178(2)(a). Counsel for the Labour Inspector, Mr Dumbleton, did not disagree with this analysis or suggest the proceeding does not give rise to these questions of law.

[15] What is placed in issue by the way commission is earned, and paid, is its variable nature. Tourism Holdings was aware of only one case which dealt with variable commission payments relating to calculating holiday pay: *Schollum v Corporate Consumables Ltd*.⁴ *Schollum* considered s8(1), rather than s 8(2), and the circumstances of that case were different. What was in issue in that case was whether commission earned and paid monthly was part of the employee's relevant earnings for the purposes of calculating holiday pay.

[16] Tourism Holdings' case was that *Schollum* may assist in establishing what s 8(2) means but it does not provide a complete answer to the questions of law presented by this case. That is because *Schollum* did not address how to deal with commission payments that are earned or paid over other intervals of time. For example, the case did not examine the situation where a commission is earned when it is paid. It followed that any precedent established by *Schollum* did not go so far as to negate the existence of important questions of law identified relating to s 8(2).

[17] In response, the Inspector contended the formula for calculating ordinary weekly pay under s 8(2) takes into account commissions that had been earned but where processing of the payment was delayed for some reason unrelated to the

⁴ *Schollum v Corporate Consumables Ltd* [2017] NZEmpC 115.

employee's entitlement to be paid. It followed, therefore, that he agreed that there were important distinctions between this case and *Schollum*.

[18] In declining to remove the matter to the Court the Authority relied on *Schollum* for the proposition that a factual inquiry is required to determine whether, in the circumstances of any particular case, an incentive-based payment forms part of the employee's ordinary weekly pay for the purposes of calculating holiday pay. I agree a factual inquiry is needed, but *Schollum* provides only limited guidance as to whether the incentive payments in this case ought to be included, or excluded, from the calculation of holiday pay Act. In *Schollum*, commission was earned at the end of the month once sales targets had been reached and it was payable on a monthly basis. That was not disputed. How that payment method should be dealt with under s 8 was in issue. However, *Schollum* did not interpret the words or phrases in the questions of law posed at a. and b. in paragraph [10] above.

[19] Tourism Holdings has established that there are questions of law arising in this proceeding that are important. The criterion in s 178(2)(a) is satisfied.

Question of law must be important

[20] A question of law is important if its resolution can affect a large number of employers or employees, or if it is decisive of the proceeding, or is strongly influential in determining it.⁵ In order for a question of law to satisfy s 178(2)(a) it need not be complex, tricky, or novel.⁶

[21] In this case answering the questions of law is likely to be determinative and, therefore, important to the proceeding. The questions of law are also important because the answers to them are likely to affect a large number of Tourism Holdings' employees who are or were paid commission. Furthermore, the resolution of these questions may have a wider impact on interpreting and applying the Holidays Act. This part of the criteria in s 178(2)(a) is met.

⁵ See *Hanlon v International Education Foundation (NZ) Ltd* [1995] 1 ERNZ 1 (EmpC) at 7; and *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

⁶ See *Johnston v Fletcher Construction*, above n 5, at [22]; and *Roche v Urgent Medical Services Homecare Ltd* [1995] 2 ERNZ 159 (EmpC) at 163.

Arising other than incidentally

[22] A question of law will arise other than incidentally where the outcome of the proceeding will turn on the answer.⁷ Mr Langton submitted the questions of law in this case satisfy this criterion because the answers provided will be determinative. Mr Dumbleton agreed.

[23] On that basis, the questions of law will arise in the proceeding other than incidentally and this part of s 178(2)(a) is satisfied.

Discretion

[24] While the Court does not enjoy the same discretion as the Authority (because s 178(2)(d) is not part of the assessment under s 178(3)), it does have to consider if the application should be declined.⁸ There are no reasons that should count against granting special leave to remove the proceeding to the Court.

[25] A removal would not cause delay, nor lead to the parties incurring further and unnecessary costs. This is not a case where there are disputed facts that should be investigated by the Authority. The parties have agreed on them. Given the nature of the dispute, the parties accepted it is likely an Authority determination would be challenged. There would be an associated delay and additional cost arising from participating in an Authority investigation and, if a challenge followed, in a proceeding before the Court.

[26] The parties acknowledged they would lose a right of appeal if the proceeding was removed to the Court but they were aware of that consequence. It is an inevitable part of including an ability to seek special leave.

[27] Tourism Holdings has satisfied the test in s 178(3) for removal of the matter to the Court. The application is granted. The company is to file a statement of claim within 15 working days of the date of this judgment.

⁷ See *Clerk of the House of Representatives v Whitcomb* [2006] ERNZ 196 (EmpC) at [32]; and *Roach v Nazareth Care Charitable Trust Board* [2017] NZEmpC 165, (2018) 15 NZELR 614.

⁸ See *Johnston v Fletcher Construction*, above n 5.

[28] Costs are reserved.

K G Smith

Judge

Judgment signed at 10:40 am on 14 August 2018