IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2020] NZEmpC 39
EMPC 90/2019

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	METROPOLITAN GLASS & GLAZING LIMITED Plaintiff
AND	LABOUR INSPECTOR, MINISTRY OF BUSINESS AND INNOVATION AND EMPLOYMENT Defendant

Hearing:	20 August 2019 (Heard at Auckland) Further written submissions filed on 26 November, 16 December 2019 and 23 January 2020
Court:	Chief Judge Inglis Judge Holden Judge Perkins
Appearances:	J M Roberts and E Callister-Baker, counsel for plaintiff C English, counsel for defendant
Judgment:	14 April 2020

JUDGMENT OF THE FULL COURT

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[1] This judgment resolves two distinct questions that arose out of the Labour Inspector's 2017 compliance audit of the payroll systems of the plaintiff, Metropolitan Glass & Glazing Ltd (Metropolitan Glass). Those questions are:

(a) Do the payments made under Metropolitan Glass's Short-Term Incentive Schemes (STI Schemes) come within the definition of "gross

earnings" for the purposes of s 14 of the Holidays Act 2003 (the Act)? (Bonus Question)

(b) Does Metropolitan Glass's treatment of annual holidays when there is a closedown period comply with the closedown provisions of the Act? (Closedown Question)

[2] The Labour Inspector supplied Metropolitan Glass with her draft audit report for comment. Metropolitan Glass responded, but the parties remained in disagreement over the two issues now before the Court.

The Bonus Question relates to Metropolitan Glass's STI Schemes

[3] Metropolitan Glass's individual employment agreements make provision for payment of "discretionary" bonuses, which are payable on achievement of agreed Key Performance Indicators and/or the completion of projects on time and on budget.

[4] Since 2016, it also has had STI Schemes, but these are not referred to in its individual employment agreements.

[5] Metropolitan Glass does not consider that payments made under these STI Schemes are part of gross earnings under s 14 of the Act; the Labour Inspector considers that they are and need to be included for the purposes of calculating holiday pay under the Act.

Employees invited to join STI Schemes

[6] The STI Scheme for 2016 was promulgated by way of a letter dated 28 January 2016. In that letter, the Board of Directors of Metropolitan Glass confirmed the details of the STI Scheme and invited the recipient employees to participate in what was described as a "discretionary bonus scheme".

[7] The letter advises that the basics of the STI Scheme for 2016 were:

> 1. The Scheme has a non-negotiable condition that there must be no significant health and safety incidents which result in death or permanent material disability of any worker or that are caused by any worker of [Metropolitan Glass].
>
> 2. The Scheme will be aligned to the achievement of three key deliverable targets:
>
> a) EBIT targets - 75% weighting
>
> b) Retrofit Sales Revenue - 12.5% weighting
>
> c) DIFOT - 12.5% weighting
>
> 3. The targets in point two are independent of one another, therefore if one target is not met, the employee may still receive payment under the Scheme upon achievement of one or more of the remaining targets.
>
> 4. Any payment made under the Scheme will be based on a full 12 months of your base salary (assuming you have been employed since at least 1 April 2015).
>
> 5. If you have been employed after 1 April 2015 any payment will be pro-rated for the number of months employed.
>
> 6. For those who are based in the regions and their roles have a regional only focus, any bonus payment will be based on the regional financial performance.
>
> 7. Any payments made under this Scheme this year will have a maximum payment amount of 120% based on achieving 110% of the relevant target deliverables.
>
> 8. Any payments made under this Scheme are totally at the discretion of Metro's Board of Directors and there is no guarantee of any payment even if the DIFOT, Retrofit & EBIT performance targets are achieved.

[8] The letter outlined the targets for that year's STI Scheme, with incentive payments calculated as a percentage of base salary where the targets were met.

[9] The letter also attached the terms and conditions of the STI Scheme. Those terms and conditions include:

> Any payments made under this Scheme are totally at the discretion of [Metropolitan Glass] and there is no guarantee of any payment in any year. [Metropolitan Glass] has the sole discretion not to make any payment even where the criteria in this Scheme are met. This Scheme is not a term and condition of your employment agreement.

> Accordingly, any bonus payments made under this Scheme will not come within the definition of "total gross earnings" for the purposes of holiday pay calculations under the Holidays Act 2003.

[10] The terms and conditions go on:

> The payment of any amounts pursuant to this Scheme are subject to various conditions which may be amended by [Metropolitan Glass] from time to time ...

[11] Some conditions are listed including that:

> Following the completion of the year-end financial statements [Metropolitan Glass] will calculate any bonus and determine whether a bonus payment will be made. If [Metropolitan Glass] decides to make a bonus payment, this will not occur until the Board of Directors has approved the bonus payment.

[12] The terms and conditions again say that the STI Scheme is discretionary and therefore that Metropolitan Glass may choose to make, or not make, payments under the STI Scheme at its discretion. Metropolitan Glass also was able to amend, revoke or discontinue the STI Scheme at any time at its sole discretion, including during a fiscal year.

[13] The terms and conditions gave some examples of when Metropolitan Glass might choose to exercise its discretion to change the terms of the scheme and/or not make payments, even where criteria are met, being:

- The employee has been subject to disciplinary action during the period of the Scheme.
- The employee has been involved in, responsible for or failed to prevent a significant Health & Safety incident or breach.
- The employee's overall performance appraisal result was Needs Improvement.

[14] When accepting the offer, the employee signed the letter of invitation acknowledging that payment under the STI Scheme:

> ... is completely discretionary and [Metropolitan Glass] can at its sole discretion decide not [to] make any payment under this scheme, or amend, revoke or discontinue this Scheme at any time. ...

[15] The invitation to participate in the STI Scheme for 2017 similarly described it as a "discretionary bonus scheme". The letter, dated 26 July 2016, advises that the STI Scheme is designed to pay up to a set percentage of base salary if the targets are met. The letter goes on:

> For this FY17 Scheme your "meets" target bonus is 10% of your base salary.

[16] The STI Scheme for 2017 added an additional provision whereby, in consideration for the invitation to participate in the STI Scheme, the employee agreed to an extended restraint of trade clause so that the area covered by the restraint of trade expanded to cover New Zealand. The employee acknowledged that the opportunity to participate in the STI Scheme was "adequate consideration for [his/her] agreement to extend the restraint area in [his/her] employment agreement".

[17] The terms and conditions of the STI Scheme for 2017 were virtually identical to those for the 2016 STI Scheme.

The Holidays Act 2003 includes a definition of gross earnings

[18] The key provisions that must be considered to answer the Bonus Question are ss 5 and 14 of the Act. Section 14 provides that gross earnings:

> (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, bereavement leave, or family violence 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 Accident Compensation Act 2001 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 Accident Compensation Act 2001 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.

[19] Section 5 includes a definition of discretionary payment:

discretionary payment—

(a) means a payment that the employer is not bound, by the employee's employment agreement, to pay the employee; but

(b) does not include a payment that the employer is bound, by the employee's employment agreement, to pay the employee, even though—

(i) the amount to be paid is not specified in that employment agreement and the employer may determine the amount to be paid; or

(ii) the employer is required under that employment agreement to make the payment only if certain conditions are met.

The parties' arguments, in summary

[20] Metropolitan Glass says, in summary:

(a) The STI schemes are not part of the employees' employment agreements; and

(b) Metropolitan Glass is not required to pay any moneys under the STI Schemes as they are discretionary.

(c) This means that payments made under the STI Schemes do not form part of the employee's gross earnings upon which holiday pay calculations are made.

[21] The Labour Inspector says that the payments made under the STI Schemes are earnings the employer is required to pay in relation to work performed by the employee if certain conditions are met. She says they fit squarely within s 14(a)(iv) of the Act, as they are productivity or incentive-based payments; they do not come within the exception of "discretionary payments" as defined in s 5.

[22] She says that characterising the payments made under the STI Schemes as "discretionary" does not take them outside the scope of "gross earnings" under s 14 of the Act.

STI Schemes form part of the employees' employment agreements

[23] Metropolitan Glass argues that "employment agreement" in s 14 of the Act must be read narrowly, to mean, here, the written individual employment agreement. It submits that the term does not extend to every policy or rights, benefits and obligations arising out of the employment relationship.

[24] An employment agreement may be comprised of components in more than one place. To determine whether a policy or scheme forms part of an employment agreement will require analysis. Often policies are incorporated into an employment agreement by reference;[1] but where it is reasonable to infer from the circumstances that the parties must have intended the relevant terms to have contractual force, those terms may be incorporated by inference.[2]

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1 *Mathews v Bay of Plenty District Health Board* [2019] NZEmpC 49 at [69].
2 *Petrie v MacFisheries Ltd* [1940] 1 KB 258 (CA).

[25] Metropolitan Glass put in place the STI Schemes to incentivise employees to meet key deliverable targets. The payments received under the Schemes are remuneration for effort put in by the employee. It is notable that, in the STI Scheme 2017, in exchange for Metropolitan Glass accepting them into the Scheme, the employees agreed to the extension of their restraint of trade. It can be inferred that the Schemes were intended to have contractual force.

[26] In any event, at least in the context of s 14, we do not accept the narrow approach argued by Metropolitan Glass can have been intended. The inclusion of productivity and incentive payments in s 14(a)(iv) clearly contemplates that such payments are captured. That is so whether those payments arise out of provisions in the written individual employment agreement or from policy documents, or are contained in a separate, standalone document.

"Discretionary payments" clarified in 2011

[27] Metropolitan Glass then submits that the STI Scheme expressly states that no payment is required to be made; any payments are "discretionary payments" for the purposes of the Act and so excluded by s 14(b)(i).

[28] While we acknowledge the argument, it runs counter to the purpose of the section, as is clear when the Parliamentary history is considered.

[29] The definition of discretionary payments was added to s 5 of the Act from 1 April 2011.[3]

[30] In proposing the definition be added, the Minister described the policy intent as:[4]

> 89. The policy intent is that discretionary payments should be excluded from gross earnings because they are payments that the employer is not bound by the terms of the employee's employment agreement to pay the employee (section 14(b) of the Act). Because the term is not further defined in the Act, it is being interpreted in some cases as excluding payments where the amount

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3 Holidays Amendment Act 2010, s 4(1).

4 Office of the Minister of Labour – Cabinet Business Committee *Review of the Holidays Act 2003* (2009) at 11.

> to be paid is discretionary even if the payment itself is provided for in the employment agreement (for example, if the employment agreement provides for a bonus payment, even if the amount is discretionary, it should be included in gross earnings). To ensure that the term is better understood and applied correctly, I recommend that a definition of discretionary payments is included in the Act.

[31] When the Transport and Industrial Relations Committee reported back on the Holidays Act Amendment Bill, it said:[5]

> The intent of this clause is that discretionary payments should be excluded from gross earnings, because the employer is not bound to pay them to the employee by the terms of the employment agreement. The term is not defined in the principal Act, and it is being interpreted by some people as excluding payments where the amount to be paid is variable but the payment itself is provided for in the employment agreement.

[32] The Committee majority went on to give as an example bonuses that are contractually payable, providing certain conditions are met, even though a bonus may not be payable every year because the employee may not meet the conditions every year. It stated:[6]

> It should be included in the calculation of an employee's gross earnings (and therefore not treated as a discretionary payment) because it is part of the employment agreement, and it will be paid if the employee meets the conditions. An example of a discretionary payment by contrast is a Christmas bonus paid on an employer's own initiative to an employee where there is no provision for it in the employment agreement. Such a payment should not be included in an employee's gross earnings.

[33] The scheme of s 14, particularly when considered with the words and purpose of the amendment to s 5 in 2011, is to capture all remuneration for an employee's job. Gross earnings do not capture reimbursing payments or truly gratuitous payments, for example, where an employer, of its own initiative, decides to pay a Christmas bonus. But it is apparent from the definition of "discretionary payments" that payments are not excluded just because the amount of the payment is determined by the employer, or because they only are payable if certain conditions are met.

[34] While the drafting of the sections, including the definition of "discretionary payment" is not perfect, in context, the intent is that, where productivity or incentive-

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5 Holidays Amendment Bill 2010 (195-2) (explanatory note) at 2.

6 At 2-3.

based payments are made, they are part of gross earnings. This is apparent from their inclusion in s 14(a)(iv) of the Act.

[35] Here, the payment under the STI Schemes are to provide an incentive (for performance – as the name suggests) and are tied to productivity targets. They fall within s 14(a)(iv).

[36] Metropolitan Glass cannot contract out of the Act,[7] so statements that "…bonus payments made under this Scheme will not come within the definition of "total gross earnings" for the purposes of holiday pay calculations under the Holidays Act 2003" carry no legal weight.

[37] Metropolitan Glass also cannot avoid responsibility simply by labelling the STI Schemes as "discretionary". The amendment to the Act effective from April 2011 was directed to concerns about employers avoiding including variable and conditional payments that formed part of an employee's remuneration, which is precisely what Metropolitan Glass is trying to do here.

[38] Here, the amount paid under the Schemes, while guided by formula, is determined by Metropolitan Glass. Payment also is conditional on several factors, mainly related to company performance but including approval by the Board. Neither the variability of the amount of the payment, nor the conditional nature of it, makes the payment a discretionary payment for the purposes of the Act.

Section 14 captures payments made pursuant to the STI Schemes

[39] In conclusion, the payments made under the STI Schemes are captured by s 14(a)(iv). They are not excluded by s 14(b). They form part of gross earnings for the purposes of the Act.

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7 Holidays Act 2003, s 6.

The Closedown Question arises from Metropolitan Glass's end of year closedown

[40] Metropolitan Glass has a closedown each year for approximately two weeks. The closedown commences shortly before Christmas. It includes the four public holidays and approximately six other working days.

[41] Metropolitan Glass has nominated 21 December as its closedown date each year (the nominated date). From the nominated date, via its payroll system, Metropolitan Glass provides an "annual holiday entitlement" to each of its employees who have less than one year's service (the affected employees) proportionate to the amount of time the affected employee has been working for Metropolitan Glass (entitled annual holidays).

[42] The effect of this is that, in Metropolitan Glass's payroll system, each of its affected employees has entitled annual holidays calculated as at the nominated date.

[43] Each affected employee can apply to take entitled annual holidays for the closedown period.

[44] Metropolitan Glass permits its affected employees to take annual holidays on pay for the period of the closedown up to the employee's annual holiday entitlement balance.

[45] If there are any remaining entitled annual holidays at the end of the closedown period, they continue to be available to the affected employees until they are taken.

[46] If an affected employee does not have enough entitled annual holidays to cover the period of the closedown, the affected employee can apply to take annual holidays in advance. Otherwise, the affected employee is on unpaid leave for the remainder of the closedown period.

[47] Where affected employees apply for annual leave in this way, Metropolitan Glass does not pay them eight per cent of their gross earnings on the closedown date.

[48] Metropolitan Glass accepts that, in the absence of an application for annual leave in advance, it must pay affected employees eight per cent of their gross earnings as at the closedown date as holiday pay.

The Act specifically deals with closedowns

[49] The sections of the Act dealing with the treatment of annual holidays in the context of a closedown comprise:

> **32 Requirement to take annual holidays during closedown period**
>
> (1) An employee who is entitled to annual holidays at the commencement of a closedown period must, if required to do so by his or her employer, take annual holidays during the closedown period whether or not the employee agrees to take the holidays.
>
> (2) An employee who is not yet entitled to annual holidays at the commencement of a closedown period must, if required to do so by his or her employer, discontinue the employee's work during a closedown period.
>
> (3) If this section applies, the employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays or to discontinue the work (as the case may be).
>
> **33 Payment of annual holiday pay during closedown period for employee entitled to annual holidays**
>
> (1) This section applies to an employee who, at the commencement of a closedown period, is entitled to annual holidays under section 16.
>
> (2) To the extent that the employee has an annual holiday entitlement, the period of the closedown must be taken by the employee as annual holidays.
>
> (3) If an employee does not have an annual holidays entitlement that covers the whole period of the closedown, the employer and employee may agree that the employee—
>
> (a) may take some of the closedown period as annual holidays in advance under section 20; and
>
> (b) be paid for that period in accordance with section 22.
>
> (4) The employer must pay the employee annual holiday pay calculated in accordance with section 21.

34 Calculation of pay during closedown period for employee not entitled to annual holidays

(1) This section applies to an employee who, at the commencement of a closedown period, is not entitled to annual holidays under section 16.

(2) An employer must, in respect of the closedown period, pay the employee 8% of the employee's gross earnings since the commencement of the employee's employment or since the employee last became entitled to annual holidays (as the case may be), less any amount—

(a) paid to the employee for annual holidays taken in advance; or

(b) paid in accordance with section 28.

(3) An employee who is paid annual holiday pay calculated in accordance with subsection (2) is not otherwise entitled—

(a) to any annual holidays for the period of employment up to the date of the beginning of the closedown period; or

(b) to any remuneration for the period of the closure or discontinuance of work.

(4) This section does not prevent an employer and employee from agreeing that the employee may take the period of the closedown as annual holidays in advance under section 20 and be paid for the period in accordance with section 22.

35 Effect of closedown period on anniversary date of employee not entitled to annual holidays

(1) If an employee is required under section 32(2) to discontinue his or her work during a closedown period, the employee's 12 months of continuous employment must, for the purposes of section 16(1) or 28A(5), be treated as commencing on the date on which the closedown began.

(2) However, to avoid having a different date in each year on which the employee becomes entitled to annual holidays, the employer may nominate a date which must be treated as the date on which the closedown begins provided that the date nominated is reasonably proximate to the actual beginning of the closedown period.

The parties have different views on the closedown provisions

[50] At the hearing, Metropolitan Glass submitted its actions comply with the provisions of the Act and that either:

(a) its affected employees become entitled to annual holidays because their anniversary date has changed under s 35 of the Act; or

(b) its affected employees can apply for and take annual holidays in advance as permitted by s 34(4) of the Act; and in either case

(c) any remaining annual holidays balance continues as an annual holiday entitlement, which an affected employee may then take at some other time during the holiday year.

[51] The Labour Inspector submitted that s 34 of the Act provides for two options for the affected employees:

(a) The first option is set out in subs 34(2) and (3). It provides for the affected employee to be paid eight per cent of their gross earnings calculated up to the closedown date, and then extinguishes the affected employee's entitlement to other entitlements or payments for that period. The employer must use this option if it 'resets' the employee's anniversary date using s 35.

(b) The second option is that in s 34(4). It allows the employer and affected employee to agree that the affected employee may take annual holidays in advance. With this option, there is no referencing to the "extinguishing" of entitlements for the prior period, because the parties have agreed that they should be used, either in whole or in part. There also is no change to the employee's original anniversary date – it is not 'reset'.

[52] After the hearing, the Court sought further submissions to address the possibility that s 34(2) must be complied with, but that, in addition, by agreement between the employer and the employee, s 34(4) may be used.

[53] In response, Metropolitan Glass maintained its position that s 34(2) and s 34(4) are, and can only be, alternatives. It says affected employees with a notional annual holiday accrual that exceeds the six days required for the closedown may take the eight per cent payment under s 34(2), which would exceed the amount of remuneration that would correspond with the period of the closedown or, alternatively, they may take annual holidays on pay in advance for the whole period of the closedown and maintain a notional annual holiday balance that may be used later.

[54] Metropolitan Glass points to the different language used in ss 33 and 34, with s 33(3)(a) saying the employer and employee may agree that "the employee may take *some* of the closedown period as annual holidays in advance" (emphasis added), whereas s 34(4) simply refers to the employer and employee agreeing that "the employee may take the period of the closedown as annual holidays in advance". Metropolitan Glass submits that, if s 34(4) is meant to provide for a payment of eight per cent and for a top-up of annual leave in advance for "some of the closedown period", then it would have said so using the same or substantially similar language as s 33(3).

[55] In her supplementary submissions, the Labour Inspector submits that the employer *must* pay the eight per cent provided for in s 34(2), and *may* also agree to leave in advance under s 34(4). This, she says, mirrors the approach in both s 32 and s 33. The proper approach she says is that the eight per cent calculation required by s 34(2) is to be calculated up to "the commencement of the closedown period";[8] once this is done and paid, the employee is then no longer entitled to "any annual holidays for the period of employment up to the date of the beginning of the closedown period".[9] Then, because the employee's start date resets pursuant to s 35(1), any payment for the period of the closedown is for annual holidays in advance. This last point would seem to mark a departure from the position the Labour Inspector took at

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8 Holidays Act 2003, s 34(1).
9 Holidays Act 2003, s 34(3)(a).

the hearing, which was that, if the employer elected option 2, as identified in [51](b), the employee's original anniversary date would be preserved.

The sections must be read in context

[56] The purpose of the Act is to promote the balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to annual holidays to provide the opportunity for rest and recreation.[10]

[57] Section 15 of the Act deals with the purpose of the subpart on annual holidays. Relevantly, it provides that the purpose of this subpart is to:

> (a) provide all employees with a minimum of 4 weeks' annual holidays to be paid at the time the holidays are taken; and
>
> (b) enable an employee to request that up to 1 week of his or her annual holidays entitlement be paid out; and
>
> (c) …
>
> (d) enable employers to manage their businesses, taking into account the annual holiday entitlements of their employees.

[58] While the overall purpose of the Act is aimed at providing employees with paid holidays, there are circumstances in which money can be substituted for leave. Section 28 allows an employer to include payment for annual holidays with the employee's pay where the employee is on a short fixed-term employment agreement, or where the irregularity of employment makes providing leave impracticable; s 28A allows an employer to agree to a request from an employee that up to one week of the employee's four weeks' annual leave entitlement is paid out.

[59] We acknowledge that s 34 is not entirely clear. This lack of clarity has been noted by the Holidays Act Taskforce that currently is reviewing the Act.[11]

[60] However, as well as considering s 34 in the context of the Act as a whole, it must be read in the context of the Act's scheme for closedown periods. Section 34 is a counterpoint to s 33. Section 33 applies to employees entitled to annual holidays. Those employees are required by s 33(2) to take annual holidays for the period of the

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10 Holidays Act 2003, s 3(a).

11 Holidays Act Taskforce *Holidays Act 2003 Review: Issues Paper* (August 2018) at 35.

closedown, but, if the employee's annual holidays entitlement does not cover the whole period of the closedown, the employee may agree with the employer to top that up with annual leave in advance, pursuant to s 33(3). Where this is agreed, the employee would have a 'negative' leave balance in an accrual-based system.

[61] In a similar way, s 34(2) and s 34(4) are not alternatives, the correct approach is that s 34(4) applies in addition to s 34(2).

[62] Section 34(2) is expressed in absolute terms – "An employer *must* … pay the employee 8% of the employee's gross earnings" (emphasis added). We see no reason for the words to be read down. In this way s 34(2) aligns with s 33(2), but for employees with less than 12 months' service.

[63] Section 34(4) then allows an employer and employee to also agree to the employee taking the period of the closedown as paid annual holidays in advance.

[64] We acknowledge the point made by Metropolitan Glass, referred to in [54], that s 34(4) omits the reference to "some" of the closedown period; despite that, we do not accept that s 34(4) must be 'all or nothing'. Presumably, s 34(4) would be used in similar circumstances to those anticipated by s 33(3), where the amount paid pursuant to s 34(2) is less than the employee's usual remuneration for the period of the closedown.

[65] We are not unsympathetic with Metropolitan Glass's approach, given it is not inconsistent with the general purpose of the Act. However, it does not comply with s 34.

[66] Finally, for completeness, we note s 35(1) requires that, where there is a closedown, an affected employee's 12 months of continuous service is treated as commencing on the date on which the closedown begins. There is no alternative approach.

[67] In summary:

(a) employees who, at the commencement of a closedown period, are not entitled to annual holidays must be paid the eight per cent of gross earnings required by s 34(2);

(b) their service is then treated as commencing on the date on which the closedown begins (s 35(1));

(c) to the extent the employer and employee agree, leave also can be taken in advance for some or all of the closedown period (s 34(4)).

Costs reserved

[68] While our initial view is that this is a case in which it is appropriate for costs to lie where they fall, if the Labour Inspector seeks costs and they cannot be agreed she is to file and serve a memorandum within 14 days of the date of this judgment. Metropolitan Glass then has 14 days in which to file and serve its memorandum in response and the Labour Inspector has seven days thereafter to file and serve any memorandum in reply.

J C Holden
Judge
(for the full Court)

Judgment signed at 4 pm on 14 April 2020