IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA419/2019
[2021] NZCA 1

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

Hearing:	24 September 2020
Court:	Cooper, Brown and Clifford JJ
Counsel:	A E Scott-Howman and S E Blick for Appellant S C Langton and S L Maxfield for Respondent
Judgment:	18 January 2021 at 12 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B We answer the questions of law submitted for determination by the Court:

(a) What is the meaning of "not a regular part of the employee's pay" in s 8(1)(c)(i) of the Holidays Act 2003 for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

Payments are "a regular part of the employee's pay" if they are made (i) substantively regularly, being made systematically and according to rules; or (ii) temporally regularly, being made uniformly in time and manner.

(b) If productivity or incentive-based payments are a regular part of the employee's pay, do those payments have to be "pay the employee

receives under his or her employment agreement for an ordinary working week" for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

No.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The Holidays Act 2003 (the Act) entitles employees to minimum periods of paid annual holidays.[1] Sub-part 1 of pt 2 sets out, amongst other things, the basis upon which annual holiday pay is to be calculated.

[2] This appeal from a decision of the Employment Court concerns the calculation of annual holiday pay for employees whose pay includes payments of commission.[2]

[3] Section 214 of the Employment Relations Act 2000 provides for appeals to this Court on questions of law. Leave from this Court is required for such appeals. This Court granted leave on the following questions:[3]

(a) What is the meaning of "not a regular part of the employee's pay" in s 8(1)(c)(i) of the Holidays Act 2003 for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

(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 purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

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1 All references in this judgment to parts, sub-parts, sections and subsections are, unless otherwise stated, references to provisions of the Act.

2 *Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2019] NZEmpC 87, [2019] ERNZ 239 [Judgment under appeal].

3 *A Labour Inspector of the Ministry of Business, Innovation and Employment v Tourism Holdings Ltd* [2019] NZCA 569.

Context

Factual

[4] The respondent, Tourism Holdings Ltd (Tourism Holdings or the Company), operates guided bus tours throughout New Zealand under the brand name "Kiwi Experience". To do so, it employs "driver guides". As that title reflects, those employees both drive the buses which carry the Company's customers on its tours and act as the customers' guides for those tours. Kiwi Experience tours are operated on a "hop-on/hop-off" basis: customers may "hop-off" a tour in one place and "hop-on" another like tour in that place, to suit the speed at which they wish to travel around the country. Tours are of varying lengths, generally between seven and 31 days. They cover the whole country.

[5] Driver guides have a variety of duties designed to ensure, as far as possible, that Tourism Holdings' customers enjoy their tour and the "kiwi experience" it promises them. It is one of the driver guides' tasks to sell additional activities, tourist experiences, to the Company's customers whilst they are on tour. Those experiences are provided both by third parties and the Company itself. They comprise the wide range of activities which, together with the delights of touring itself, can colloquially be said to constitute a key part of the "kiwi experience". Examples include an overnight stay and hāngi at a Rotorua marae, shuttle transport and guided hikes of the Tongariro Crossing and helicopter flights over Franz Josef glacier. Given the relatively informal and "hop-on/hop-off" basis of Kiwi Experience tours, the Company does not pre-sell those activities at the point the tour itself is booked and paid for. Rather, those activities are booked and sold by driver guides as a tour progresses.

[6] In consideration for performing their general duties, driver guides are paid weekly in arrears at a daily rate whilst on tour. That rate depends on the type and location of a tour and a number of other variables. In exchange for their particular work of selling additional activities, driver guides are also paid commission. Where an additional activity is one provided by Tourism Holdings, it pays driver guides 10 per cent of the price the customer pays. Where the activity is one provided by a third party, the third party pays commission — generally 50 per cent of the price the

customer pays — to Tourism Holdings. Tourism Holdings itself separately pays an amount equal to half of that amount, namely 25 per cent of the purchase price paid by the customer, as commission to driver guides. Importantly for this appeal, driver guides are not paid commission whilst they are on tour. Rather, they receive payments of commission once a tour has finished and after they have completed certain administrative procedures required by the Company. That is, whilst on tour driver guides do not receive payments of commission at the same time as they receive their weekly payment, based on the applicable daily rate. Rather they receive lump sum payments of commission for each tour. Those amounts vary, necessarily, based on the length of a tour and hence the opportunity a driver guide has to sell additional experiences, and their success (or otherwise) in doing so.

[7] We return to the detail of those arrangements when considering the parties' arguments.

Legal

[8] In general an employee becomes entitled to not less than four weeks' paid annual holidays after the end of each 12 months of continuous employment.[4] This appeal concerns employees so entitled.[5] Section 21 provides for the calculation of the annual holiday pay of such employees as follows:

> **21 Calculation of annual holiday pay**
>
> (1) If an employee takes an annual holiday after the employee's entitlement to the holiday has arisen, the employer must calculate the employee's annual holiday pay in accordance with subsection (2).
>
> (2) Annual holiday pay must be—
>
> (a) for the agreed portion of the annual holidays entitlement; and
>
> (b) at a rate that is based on the greater of—
>
> (i) the employee's *ordinary weekly pay* as at the beginning of the annual holiday; or

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4 Holidays Act 2003, s 16(1).

5 Driver guides are employed on a permanent basis but, due to the seasonality of the industry, are not guaranteed work throughout the entire year. Notwithstanding, the entitlement to four weeks' annual holidays will accrue following 12 months' continuous employment, as opposed to 12 months' actual touring.

(ii) the employee's *average weekly earnings* for the 12 months immediately before the end of the last pay period before the annual holiday.

(Emphasis added.)

[9] Pursuant to s 21(2), the employer must therefore calculate both the rate of "ordinary weekly pay" as at the beginning of the annual holiday and the rate of "average weekly earnings" for the 12 months immediately before the annual holiday. Holiday pay is then to be calculated by reference to the higher of those two rates.

[10] As we go on to explain, commission earnt by employees — which is the focus of this appeal — will always be included in the second calculation, as that calculation is based on gross pay for the 12 months immediately before the employee takes their annual holiday. However, commission is only included in an employee's ordinary weekly pay, that is their pay for an ordinary working week, where it is a regular part of that pay.

[11] The Act recognises that employees may not, however, have an ordinary working week. In those circumstances an alternative way of calculating ordinary weekly pay for the purposes of s 21(2)(b)(i) is provided. This appeal concerns the way commission is treated in that alternative calculation.

[12] The phrases "ordinary weekly pay" and "average weekly earnings" are both defined. The correct interpretation of those phrases as a matter of law in the context of the Company's obligations for the payment of commission to driver guides is the issue we must determine in this appeal.

[13] "Ordinary weekly pay" is defined in s 8(1):

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. (emphasis added)

[14] The phrase "average weekly earnings", is defined in s 5 to mean "1/52 of an employee's gross earnings". "[G]ross earnings" is, in turn, defined in s 14 as follows:

> **14 Meaning of gross earnings**
>
> In this Act, unless the context otherwise requires, **gross earnings**, in relation to an employee for the period during which the earnings are being assessed,—
>
> (a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—
>
> (i) salary or wages:
>
> …
>
> (iv) productivity or incentive-based payments (including commission): …

[15] Thus, and as can be seen, commission can become part of an employee's base weekly rate for holiday purposes in two different ways. First, in terms of "ordinary weekly pay", and s 8(2): there it is the actual commission earnt in the week immediately preceding the employee's annual holiday that counts. Secondly, in terms

of “average weekly earnings”: there it is the total amount of commission earnt over the preceding 52 weeks, prorated to a weekly basis, that counts.

[16] The provision of those alternative calculations would appear to reflect the intention that holiday pay should be based on a rate which includes commission, however regularly or irregularly it is in fact paid. If regularly paid, but less than weekly, commission would only be included in the first calculation if — as a matter of fact — commission had been earnt by the employee in the week before they took their annual leave, irrespective of how much commission they had earnt in the rest of the preceding year. Similarly, even if paid in that week, the payment for that week might not fairly reflect commission earnt in the rest of the year. Hence the second calculation, which averages the year’s commission to a weekly rate.

[17] Section 8(2) provides an alternative way to calculate “ordinary weekly pay” where it is not possible to apply the definition found in s 8(1).

[18] Section 8(2) provides:

> (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.

[19] The Labour Inspector and the Company agree that s 8(2) applies here because driver guides do not have an ordinary working week by reference to which their

"ordinary weekly pay" can be calculated. Essentially, that is due to the variable periods which driver guides work during the course of their employment. Those periods reflect the differing lengths of the range of tours Kiwi Experience provides.

[20] The issue here is how commission received by driver guides as part of their pay under their employment agreements is to be treated in the s 8(2) calculation.

[21] The parties agree such commission is, pursuant to the s 14 definition, to be initially included in the calculation $\frac{a - b}{c}$ as part of factor *a*. That is, it is part of driver guides' "gross earnings". But they disagree when it comes to factor *b*. Remember, factor *b* is the total amount of payments described in s 8(1)(c)(i)–(iii), namely:

> (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:

[22] The Company says that driver guides' commissions are covered by (i) above: they are productivity or incentive-based payments which *are not* a regular part of the employee's pay, and so *are* to be deducted — as part of factor *b* — from ordinary weekly pay when holiday pay is calculated and s 8(2) applies. The Labour Inspector says that such commissions *are* a regular part of the employee's pay, and so *are not* to be deducted.

[23] The significance of that disagreement is that if commission is not deducted as part of factor *b* then the weekly holiday pay rate calculated under s 8(2) may be greater than that calculated under s 21(2)(b)(ii). That would occur where the amount of commission earnt by a driver guide in the four-week period referenced in s 8(2) is greater, as a component of ordinary weekly pay,[6] than the 1/52 portion used to calculate "average weekly earnings" under s 21(2)(b)(ii).

[24] There was some suggestion by the Company that, if the approach taken by the Labour Inspector is correct, employees may be able to act strategically and time their

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6 That is, when divided by four.

annual holidays so as to maximise their holiday pay. There was, however, no evidence as to the likely incidence or monetary significance of such behaviour. The Labour Inspector noted, moreover, that other provisions of the Act give the employer an ability to manage the timing of annual holidays. The parties accepted that issue was of little or no significance for the task of statutory interpretation raised by this appeal.

[25] Against that background we turn now to the issues in this appeal.

The competing arguments — the significance of how driver guides' commission is calculated and when it is paid

[26] The Company's procedures for selling and recording the sale of additional activities to support receiving commission from third party providers and paying driver guides their commission earnings are complicated. Very much in summary:

(a) Driver guides take bookings from tour customers for additional activities provided by both third parties and the Company.

(b) Customers do not pay for third party activities at the time their booking is made, because bookings can generally be cancelled or rescheduled by either the third party provider or the customer. Customers therefore generally pay third party providers at the time they undertake the activity. Where the additional activity is provided by the Company rather than a third party, payment is sometimes made upfront but still subject to a right of cancellation by the customer.

(c) Third parties return commission payments, with supporting documentation, to the Company at regular intervals.

(d) The Company pays commission to drivers, following a debrief and reconciliation process after the completion of tours. The Company pays driver guides commission earnt from the sale of third party activities before it receives its commission from the third party providers.

[27] Thus, and as the parties recorded in their agreed statement of facts for their hearing in the Employment Court:

> Accordingly, for the majority of activities, the booking, payment and undertaking of the activity can all happen on different dates. Due to the ability for passengers to cancel the booking, reschedule when they undertake the activity (before or after paying for it), or not show up, while the Driver Guide will be aware of how many bookings he or she made, the Driver Guide is unlikely to be aware of how many passengers actually undertook the activity … or when payment was made, until documentation has been obtained from the third party operator.

[28] Various standard forms of record-keeping support this process. Most third party providers use Company-provided vouchers to record activities paid for and taken by Kiwi Experience customers, and to return commission to the Company. Driver guides also use copies of those vouchers, or details from those vouchers, obtained from third party providers during a tour as the basis for their claim for third party commission to the Company. The Company reconciles the details provided by driver guides with the commission returned by third party providers.

[29] On that basis the Company argues commission payments are not earnt by driver guides until the debrief and reconciliation process has been completed. When so earnt, the commission paid is either not pay "for an ordinary working week" or is not "regular", as to be "regular" it must be pay received under the employee's employment agreement "for an ordinary working week".

[30] That is, the phrase at s 8(1)(b)(i) and (c)(i), "a regular part of the employee's pay", is to be read as meaning "a regular part of the employee's pay *for an ordinary working week*" both (i) where an employee has an "ordinary working week", and s 8(1) applies, and (ii) where they do not, and s 8(2) and the formula $\frac{a - b}{c}$ is used.

[31] In the decision under appeal the Employment Court, agreeing with the position taken by Tourism Holdings, reasoned that commission payments were not a regular part of driver guides' pay because they did not form part of their pay for an ordinary working week. As the Judge put it, what was to be included or excluded from the calculation required by s 8 was designed to enable a calculation "representative of an

ordinary working week".[7] The Court agreed that commission was not earnt by a driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed.[8] That was more than a purely administrative task. It was not until the driver had completed the tour and the corresponding paperwork that the amount due and owing could be ascertained. Thus:[9]

> The commissions were, as a matter of agreement, based on completing tasks at a regular intervals having no reference at all to what was earned for having completed an ordinary working week.

[32] In this appeal, the Labour Inspector argues there is no proper basis for that approach. The calculation called for under s 8(2) is required as there is *no* "ordinary working week". On that basis the Labour Inspector says it makes no sense, when calculating factor *b*, to do so as if s 8(1)(c)(i) referred to "payments that are not a regular part of the employee's pay *for an ordinary working week*". Rather, the qualifying concept used is simply "regular", in the context of the phrase "a regular part of the employee's pay".

Analysis

[33] We proceed on the basis of the well-understood New Zealand principles of statutory interpretation. The meaning of the provisions in question must be ascertained from their text and in light of their purpose,[10] including the overall social and cultural objective of the Act.[11]

[34] In terms of the scheme and purpose of the Act, and of ss 5, 8 and 14 in particular, we prefer the interpretation of the Labour Inspector. That is, the purpose of the alternative approach found in s 8(2) is to provide for the calculation of "ordinary weekly" pay where the definition found in s 8(1) cannot be applied. One of those circumstances is, as here, where there is no "ordinary working week". It would be surprising if a central element of the definition that does not fit, namely that of an

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7 Judgment under appeal, above n 2, at [29].
8 At [38].
9 At [38].
10 Interpretation Act 1999, s 5(1).
11 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

"ordinary working week", was in those circumstances to be reintroduced into the alternative calculation under s 8(2) as regards included and excluded commission.

[35] Nor do we think the possible outcome of that interpretation, namely that the rate calculated under s 8(2) may produce a higher holiday pay base rate than the "gross earnings" calculation, is inconsistent with the operation of s 8. If an employee who is paid hourly and works seasonal or fluctuating hours takes an annual holiday after a busy four-week period in which they have worked somewhat more than usual, then they will already enjoy the benefit of those hours accrue when calculating their holiday pay under s 8(2).[12] We do not see why employees regularly paid by commission should not enjoy an equivalent benefit, which is itself consistent with the scheme and purpose of the Act. After all, s 21 is drafted to give employees the benefit of the greater of the "ordinary weekly pay" and "average weekly earnings" calculations.

[36] The interpretation the Labour Inspector supports is also consistent with the qualifying word "regular" in s 8(1)(c)(i). The dictionaries give us a number of meanings for the word regular. As relevant, the word means both (i) "conforming to a rule or principle; systematic", or what might be called substantive regularity; and (ii) "acting or done or recurring uniformly or calculably in time or manner; habitual, constant, orderly", or what might be called temporal regularity.[13]

[37] In our assessment, both those meanings apply to commission as earnt by the Company's driver guides. Commission is provided for as part of the "rule" represented by the individual's employment contract for promoting and organising bookings for additional activities as a specific duty of an employee. The terms for payment of commission, the "rules" for payment of commission, are set in that employment agreement. Moreover, and on the basis of the pattern of driver guides' employment — that is the pattern of the "trips" (albeit of varying lengths) they are responsible for — commission is a regular and habitual part of their pay. While it is not part of the payment of daily rate compensation for each week of a tour a guide receives during the tour, it does form the part of their pay in the week after the tour in

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12 Excluding, of course, overtime or other special payments deducted by s 8(1)(c)(i)–(iii).

13 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 947.

which it its paid, and regularly — that regularity fitting the pattern of the tours a driver guide is responsible for over time.

[38] Finally, and to the extent this involves a question of law,[14] we are not persuaded by the Company's "earnt" proposition. By the Company's own explanation, a driver guide earns commission when two things happen: the driver guide books an additional activity for the customer, and the customer, in the case of third party providers only however, takes and pays for that activity. The entitlement to the commission accrues, is earnt, at that point. The subsequent debrief procedures provide the paperwork by which (i) the Company and the driver guide can agree on the amount of commission earnt, and (ii) the Company can use that information as a cross check on third party commission returns. Those are processes of calculation of the amount earnt, rather than the earning of that amount.

Result

[39] The appeal is allowed.

[40] We answer the questions of law submitted for determination by the Court:

(a) What is the meaning of "not a regular part of the employee's pay" in s 8(1)(c)(i) of the Holidays Act 2003 for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

Payments are "a regular part of the employee's pay" if they are made (i) substantively regularly, being made systematically and according to rules; or (ii) temporally regularly, being made uniformly in time and manner.

(b) If productivity or incentive-based payments are a regular part of the employee's pay, do those payments have to be "pay the employee

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

receives under his or her employment agreement for an ordinary working week" for the purpose of calculating ordinary weekly pay under s 8(2) of the Holidays Act?

No.

[41] The parties agreed that, in the event the Labour Inspector was successful, costs would lie where they fall and accordingly we make no order as to costs.

Solicitors:
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Langton Hudson Butcher, Auckland for Respondent