Tourism Holdings decision: In search of the ordinary…

Geoff Bevan, Jenna Riddle, Diccon Sim and Gerrad Brimble

The Court of Appeal's recent decision in *A Labour Inspector v Tourism Holdings Limited*[1] has reversed the Employment Court's previous decision which found that, on the facts of the case, commission payments did not need to be taken into account for the purpose of determining employees' ordinary weekly pay.

The Court of Appeal decision confirms that commission payments do need to be taken into account when determining ordinary weekly pay, where those payments are:

a) subject to a set of rules, and paid systematically and according to those rules; and (or perhaps "or" – see below)

b) paid uniformly or habitually in time.

The facts

The case involved tour bus drivers employed by Tourism Holdings Limited (THL), and how their holiday pay was to be calculated.

The bus drivers were paid a daily rate for performing their general duties (i.e. driving the tour bus and related duties). They were also able to earn commission by selling additional activities to tour group members. Commission payments were not calculated and paid until after the tours were completed, and a reconciliation and driver debrief had been carried out (payment was only made if the activities were actually undertaken and paid for).

The parties agreed to use a particular employee as a representative example of the commission payments that bus drivers received. That employee had been paid commissions in 26 of the 28 months she had been employed by THL.

[1] [2021] NZCA 1

The law

Employees are entitled under the Holidays Act 2003 (Act) to be paid for annual holidays at the higher of their ordinary weekly pay, or average weekly earnings.

Ordinary weekly pay means what it says – what does the employee get in an ordinary week.

Often that's obvious. But where it is not possible to determine an employee's ordinary weekly pay (because, for example, the employee's overtime, or commission/incentive payments change from week to week) the Act says that a four week formula must be applied. That formula starts with the employee's gross pay for the previous four weeks and then subtracts (relevantly here) the value of any incentive payments that are wholly discretionary and / or are not a regular part of the employee's pay. It then divides the total by four to get a weekly figure.

The bus drivers have varying work patterns (tours range in length from one day up to over 30 days), and commission payments vary from trip to trip. Therefore the parties agreed that the four week formula had to be applied.

The question for the Court was whether the commission payments were a regular part of the employees pay and therefore included in the four week ordinary weekly pay calculation. (As an aside, it's clear that the payments had to be included in the average weekly earnings calculation, which is a 52 week average).

The Employment Court decision

The Employment Court held that the commission payments were not a part of the drivers' ordinary weekly pay because they were not a regular part of the drivers' pay *for an ordinary working week*. The Employment Court essentially held that, to be regular, payments had to be earned weekly.

Court of Appeal disagreed

The Court of Appeal said this was wrong. The formula in question has to be applied precisely because there is no ordinary working week. In essence the Court of Appeal found that "regular" doesn't mean "weekly" – it just means "regular."

It found the commission payments here were "regular" because:

a) they are subject to a set of rules set out in the drivers' employment agreements – and are paid systematically and according to those rules; and

b) they are regular in time (they are a "regular and habitual" part of the employee's pay).

What does the decision mean?

We think the Court of Appeal's decision has produced the right result in this case. The commission payments here were "regular", and they should have been included in the ordinary weekly pay calculation.

However, with respect, we think the decision swings the pendulum too far and potentially creates real problems for employers.

Part of the issue seems to be a dissonance between the way in which the Court of Appeal reached its decision, and the way in which it has then answered the question of law posed by the appeal at the end of its decision.

To explain, the Court of Appeal said (correctly, in our view) that the incentive payment was "regular" because it was both paid in a systematic way, according to rules, and paid regularly in time (it was a "regular and habitual" part of the drivers' pay).

However when it summarised the answer to the question of law at the end of the case, the Court said that a payment is regular if it is made "systematically and according to rules" or temporally regularly, being made uniformly in time and manner.

The "and" has therefore, inexplicably, become an "or".

Why is the "or" a big problem?

Some employees receive large bonus payments, perhaps on a yearly or three- or six-monthly basis. Those payments are almost always made "systematically and according to rules." According to the Court's summary at the end of the case, those payments are arguably part of the ordinary weekly pay calculation.

Therefore if Jan (a senior executive) takes one week's leave within four weeks of receiving her $80,000 annual incentive payment, she is automatically entitled to an additional $20,000 in holiday pay.

Obviously that can't be right, but it will be the result if the Court of Appeal's summary in paragraph 40 of the decision is applied literally.

What should the law be?

We think the correct answer here is found in the way in which the Court of Appeal actually addressed the problem in the body of the case (paragraph 37). "Regular" means both a payment that is made in a systematic way, and one which is made habitually or regularly in the temporal sense.

How often does a payment have to be made to be "temporally regular?" (i.e. "regular in time").

That's the $64 dollar question and neither the Act nor any of the cases give a direct answer (although we do now know for certain that a payment does not have to be made every week to be "regular").

In our view, the answer is indirectly contained in both the text and purpose of the statute.

- The ordinary weekly pay formula in section 8(2) covers a four-week period. This at least implies that payments made (or usually made) at least every four weeks (or, in our view, at least every month) should generally be included in the formula, but payments made less frequently generally shouldn't be.

- The formula is trying to calculate a substitute ordinary weekly pay. Therefore the incentive payment being included in the formula should (when divided by four) reasonably equate to the incentive that the employee could potentially have generated if they had in fact worked during a week where they instead took leave. It's not, and not meant to be, an exact science. However if the incentive amount is out of proportion to what could have been generated during a working week then that points to the payment being excluded from the section 8(2) formula.

- In a similar vein, the overall purpose of the law is to ensure that employees do not miss out on pay when they take leave. Employees on leave therefore receive pay (incentives, overtime, normal salary or wages) for work they *could have done* (and sales they *could have made*), but didn't, because they were sitting on a beach. Again, it's not an exact science, but if the formulas instead result in an employee getting a clear windfall, or some sort of double payment, or equally an underpayment, then this suggests the legislation isn't being applied properly.

Putting that all together, if a non-discretionary incentive payment is made or usually made at least every four weeks (or every month), then we think it is probably "regular." In that case it should be included in the section 8(2) ordinary weekly pay formula. Employers should check this is happening.

Payments made or usually made every two months are, in our view, in the "grey zone" – we think they would normally not be "regular", absent compelling circumstances. However employers in this position should be taking specific advice, and the law here is very uncertain.

Incentive payments which are made every three or six months in our view are not (or should not be) 'regular', and therefore they should not be included in the ordinary weekly pay formula[2]. That point has been thrown into doubt by aspects of the *THL* decision, but we don't think employers should be rushing out to make significant changes. A 'watch this space' approach is probably warranted here. Take advice!

We can't emphasise enough how important it is for employers to get specific legal advice about these issues, particularly if they are thinking of changing the way in which they calculate holiday pay, or they are concerned that their approach might not be compliant. The law here is inherently uncertain and applying the Act requires judgment calls. Therefore the general comments and judgments we make in this article may well not apply to you, because of factors that are specific to your situation.

[2] Noting these payments will be included in average weekly earnings formula, which is a 52-week average.

However don't ignore holiday pay issues because we know (after literally hundreds of millions of dollars of back payments[3]) that they don't go away, and in fact get more expensive to deal with.

[3] https://www.nzherald.co.nz/nz/dhbs-owe-health-workers-up-to-650m-for-holidays-act-errors/MLEBZRE7SAGKOZCAXNFDNYXZEM/