Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

15 NOVEMBER 2021

MEDIA RELEASE

TOURISM HOLDINGS LTD v A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

(SC 15/2021) [2021] NZSC 157

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

The Holidays Act 2003 confers on employees the right to a minimum of four weeks of paid holidays each year after 12 months of continuous employment. An employee is entitled to holiday pay for this period based on the greater of the employee's "ordinary weekly pay" as at the beginning of the annual holiday and the employee's "average weekly earnings" for the 12 months immediately before the end of the last pay period before the annual holiday.

This appeal concerns the calculation of holiday pay—and, more specifically, the relevant ordinary weekly pay figure—for two periods of leave taken by a tour company bus driver guide whose (a) work pattern was dictated by the length of bus tours rather than the calendar week; and (b) remuneration included commission which varied in amount from tour to tour and was paid after the conclusion of each tour. Generally, the trips, and therefore the periods for which commission was paid, were longer than a week. In issue is how commission payments made shortly before the commencement of annual holidays are taken into account in calculating ordinary weekly pay.

Section 8(1)(a) of the Holidays Act defines ordinary weekly pay as "the amount of pay that the employee receives under his or her employment agreement for an ordinary working week". Where it is not possible to determine an employee's ordinary weekly pay under subs (1)(a) (as

both parties agreed was the case here), s 8(2) provides that it is to be calculated in accordance with a formula, $\frac{a-b}{c}$. In this formula:

- **a** is (relevantly) the employee's gross earnings for the four weeks before the end of the pay period immediately before the calculation is made, a figure which includes commissions;
- **b** subtracts certain payments, including those in s 8(1)(c)(i): "productivity or incentive-based payments that are not a regular part of the employee's pay"; and
- **c** is four, to average the earnings in the four weeks considered.

Commissions are productivity or incentive-based payments received under the employment agreement. The central question in the appeal was therefore whether commission payments of the nature received by the employee are "not a regular part of the employee's pay".

Lower Court judgments

The Employment Court agreed with the interpretation argued for by Tourism Holdings Ltd. The Court said that "not a regular part of the employee's pay" should be construed as "not a regular part of the employee's pay *for an ordinary working week*". It also said that the commission payments were not earned by the driver guides, in the sense that they became payable under the employment agreement, until a debriefing and reconciliation process took place. There being only three occasions on which this process may have been completed in the same week as commission had been generated, the Employment Court concluded that commission was not a regular part of the employee's pay (for an ordinary working week) and so ought to be subtracted in the s 8(2) formula.

A Labour Inspector of the Ministry of Business, Innovation and Employment appealed. The Court of Appeal unanimously allowed the Labour Inspector's appeal. The Court held that the commission payments did not need to be a part of the pay *for an ordinary working week*; they could be earned over a longer period of time. Therefore, in order not to be subtracted in the s 8(2) formula, the payments needed only to be a regular part of the employee's pay. In its formal orders, the Court of Appeal said that payments would amount to a regular part of the employee's pay and fall outside **b** 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". The Court considered that the commission payments in question were earned both substantively and temporally regularly, and therefore should not be subtracted in the s 8(2) formula.

The Supreme Court granted Tourism Holdings leave to appeal on the question of whether the Court of Appeal correctly answered the questions of law submitted for determination by it.

Decision

The Supreme Court agreed with the Court of Appeal that s 8(2) should not be construed as reading "not a regular part of the employee's pay *for an ordinary working week*." The Supreme Court noted that s 8(1)(a) refers to "the amount" of pay for an ordinary working week, indicating a figure that has a reasonable measure of specificity. But this degree of specificity is not required under s 8(2), which involves an averaging exercise in respect of actual remuneration received over a four-week period. Payments that are insufficiently regular to be material to an assessment of "the amount" of pay for an "ordinary working week" under

s 8(1)(a) may nonetheless be sufficiently regular to be included in a calculation of earnings over a four-week period under s 8(2). So, in this context, "regular part" is most sensibly construed in relation to the time period under consideration—that is, a four-week period—rather than the one-week standard considered in s 8(1)(a).

Looking at the Court of Appeal's reasoning, the Supreme Court considered that the "or" in the Court of Appeal's formal orders, which suggested either substantive regularity *or* temporal regularity were sufficient, was a slip. Instead, the Supreme Court considered it was apparent that the Court of Appeal intended that both requirements had to be satisfied. On the Supreme Court's part, it did not regard substantive regularity as material to the issue, as payments must be earned under the employment agreement to be taken into account.

In the result, the Supreme Court amended the answer given by the Court of Appeal to one of the questions submitted for its determination to say that *Payments are "a regular part of the employee's pay" if they are of a kind made regularly when assessed against the standard of a four-week period*, and otherwise unanimously dismissed the appeal. The Court noted that this means that the commission payments in this case, which were made monthly on average, were sufficiently regular so as not to be subtracted in the s 8(2) formula, with the result that the employee's ordinary weekly pay figure would include them.

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