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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 15/2021
[2021] NZSC Trans 10

BETWEEN

TOURISM HOLDINGS LIMITED

Appellant

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

Respondent

Hearing: 1 July 2021

Coram: William Young J
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: P G Skelton QC, S C Langton and S L Mudafar for
the Appellant
A E Scott-Howman and S P Connolly for the
Respondent

CIVIL APPEAL

MR SKELTON QC:

May it please your Honours, I appear with my learned friends, Mr Langton and Ms Mudafar, for the appellant.

WILLIAM YOUNG J:

Thank you, Mr Skelton.

MR SCOTT-HOWMAN:

E te Kōti, ko Andrew Scott-Howman ahau. Ko au te rōia mō te kaiwhakahē, māua ko taku hoa, Shaun Connolly.

WILLIAM YOUNG J:

Tēnā kōrua, Mr Scott-Howman. Mr Skelton.

MR SKELTON QC:

May it please your Honours, hopefully you have a copy of my outline for the oral submissions in front of you. I'd like to begin, if I may, by just going straight to the key statutory provisions. They are found in the authorities bundle, your Honour, the Holidays Act 2003, and if we could just turn quickly to section 16. Section 16 is the statutory provision that provides for entitlements to annual holidays and your Honours will note that at the end of each complete 12 months of continuous employment, an employee is entitled to not less than four weeks' paid annual holidays. I just stress the word there "weeks", your Honour. Entitlements to holidays are given in weeks. They are not given in days, they are not given in hours, and this is a theme that goes through the Holidays Act, that unit of time is the week.

If we then go to section 21, which deals with payments for annual holidays and the calculation of pay, your Honours will see at subsection (2) annual holiday pay must be, and if we drop down to (2)(b), rate that is the greater of, and then there are two concepts there, "employee's ordinary weekly pay" and under the next paragraph down "average weekly earnings", the greater of those two concepts.

Before we start delving into the niceties of commissions and the complexities of how that's all taken into account, just in the ordinary course, in the usual situation where this applies, there's really two situations, one, where an employee may get a pay rise or, secondly, where they move from say a part-time to full-time employee. So if you take the first example of an employee who's paid \$52,000 a year, \$1,000 a week, normally average weekly earnings will be the greater of those two numbers because that will cover the \$52,000 a year plus any additional entitlements they may have received. But if, for example, the employee gets a pay rise, on 1 July they go up to \$75,000 per year and they take a holiday on 1 August, ordinary weekly pay is calculated at their new pay rate, \$75,000, and that, of course, will be a lot higher than average weekly earnings. So they get the benefit of that pay rise.

Likewise, an employee who is working three days a week and then on the 1st of July becomes full-time five days a week, then they take a holiday 1 August, they get paid out at their new ordinary weekly pay rate. They don't say: "Well, you've only had one month of that extra additional two days a week." In that case ordinary weekly pay will be much greater than average weekly earnings.

So that's how it works in the usual situation.

I want to now take you to section 14 where you'll see there the statutory definition of "gross earnings" and 14(a) and 14(b), if we contrast those two paragraphs you'll see in 14(a) it means all payments required to be paid to the employee under the employee's employment agreement, and if we look down to paragraph (iv), productivity, incentive payments (including commissions) are all included, whereas if you go to 14(b), excludes any payment the employer is not bound, by the terms of the employment agreement, to pay, discretionary payments, et cetera.

So the difference is if you have a legal obligation to pay under your employment agreement then all of those payments are included. If you don't

have a legal obligation to pay, you're not bound, then it doesn't come into gross earnings. So an employer at Christmas tells the workforce: "You've done great work for the year. I want to give you a Christmas bonus, \$500 each," the employer's not bound to pay that. It's not part of the employment contract. It doesn't come within earnings, gross earnings. It's that concept of "do you have a legal obligation to pay" and that, I will expand on, is going to be significant in this context of this case.

If we then move to section 8, which is the statutory definition of "ordinary weekly pay" you've got the opening words, 8(1)(a), the general definition if you like, "means the amount of pay that the employee receives under his or her employment agreement," and it's for an ordinary working week. That concept isn't a defined term. But the focus again is on that unit of time of the week, the same unit of time that the entitlement comes forward. It then includes and excludes certain items. And so, as your Honours will appreciate, the appellant's case is very much that 8(1)(a), the definition, informs the meaning of the next paragraphs, 8(1)(b) and 8(1)(c).

8(1)(b), incentive payments, including commission, are included if a regular part of employee's pay, and this case turns on an issue of what does "regular" mean, and excludes under (c) productivity, incentive payments, that are not a regular part of employee's pay. The appellant says that that has to be read as "for an ordinary working week", going back again to that unit of time that is referred to up in 8(1)(a).

But there are other exclusions as well in 8(1)(c). The payment of overtime, it's not a regular part of employee's pay, and then one-off or exceptional payments. So if we can just focus for a second on those other exclusions. You don't count as ordinary weekly pay one-off or exceptional payments. An example of that, your Honours, might be near the end of an employment relationship the parties want to part company and they enter into a severance agreement or an exit package and the employee could receive three months or six months' pay to leave. Now it's part of their gross earnings, but it's a one-off exceptional payment. It's not part of the ordinary weekly pay.

Now overtime, take an example, ordinary hours for someone who works 40 hours a week, but they may consistently work two hours overtime every week. Two hours overtime, so they effectively work 42 hours a week. But in that four week period before they take their holiday, they do a special project, they put in an extra 10 hours work over and above that. Well, how do you calculate ordinary weekly pay? Well you see under 8(1)(b) includes payments for overtime if they are regular. The two hours of overtime a week is included. But excludes, under (c)(ii): "Payments for overtime that are not a regular part of the employee's pay."

WILLIAM YOUNG J:

Mr Skelton, just pausing there. Say on average the employee works eight hours overtime a month, but it's sometimes six hours one week, one another, and none for two. How would you deal with that?

MR SKELTON QC:

Well you have to look at the regularity under the measure of the week.

WILLIAM YOUNG J:

I know you have to, but say it's "regular" in one sense but the actual incidents, it's a regular component of the pay in that every month there is around eight hours of overtime paid for, but the way in which those hours of overtime fall week to week varies.

MR SKELTON QC:

It would be excluded, I submit your Honour, if unless you have regular overtime per week, if it was variable over time and there wasn't a regular weekly pattern, I submit you would exclude it.

WILLIAM YOUNG J:

So you say the regularity has to be measured week-by-week.

MR SKELTON QC:

Yes, that's that unit of time in the Act is the week. So you're trying to work out what is the usual ordinary rate of pay for a person in a week. Now as I say if they regularly work two hours overtime a week, it's included. But, you know, if it was a one-off situation where they did 10 hours –

WILLIAM YOUNG J:

You say if they regularly work an average of two hours a week, then it's excluded?

MR SKELTON QC:

I think, your Honour, you have to look at the pattern, really, the frequency, because averaging is a problem because if you start averaging in that context, they might have worked, you know, 20 hours one week and nothing over the other period. So the regularity or frequency in that weekly period. But my point is, that's an example of where, you know, overtime is frequently worked. If you looked at the whole year, yes, they worked overtime, but the Act contemplates, I submit, that you exclude unusual overtime, or exceptional type overtime that isn't in a normal ordinary week that is worked.

WILLIAMS J:

Would that have the effect of meaning, for example, a commission or piece work, which generally speaking by its nature is irregular in amount, is excluded?

MR SKELTON QC:

No your Honour. Again it depends on whether a legal entitlement to pay arises in a weekly period. Now it's a good example of –

WILLIAM YOUNG J:

So why do you say "legal entitlement to pay". Why can't it just be pay that's referable to the weekly period?

MR SKELTON QC:

Because it's a question of when was the entitlement earned.

WILLIAM YOUNG J:

Why? Why do you say that?

MR SKELTON QC:

Because the definition I took –

WILLIAM YOUNG J:

To give you an example, I'm a real estate salesman, I get commission on the sale of a house. I do the work week 1. Week 3 the sale is confirmed. I have nothing to do with it after I have, as it were, had the agreement executed. You say that that's not a regular part of a real estate salesman's income because there's a disconnect between the work done and the point in time at which it becomes payable?

MR SKELTON QC:

The starting point is I certainly accept that those commissions come into the calculation of holiday pay because they're part of your earnings, so it comes into the average weekly earnings, no doubt about that, because that looks at –

WILLIAM YOUNG J:

It comes into the average weekly earnings?

MR SKELTON QC:

Comes into the annual weekly earnings calculation because it's your earnings over a 12 month period. But the example of the piece worker is a good one, like a freezing worker will often get paid on a tally, you know, if you kill so many animals a day you get paid this piece rate. Now that's clearly in for ordinary working pay because it's paid on a daily basis or you can calculate it in a week. There's a legal obligation to pay at the end of the week for that. A call operator, your Honour, down at –

WILLIAMS J:

How is it calculated?

MR SKELTON QC:

Well, under the employment agreement it would be, you know, how many animals were slaughtered in that day times the rate.

WILLIAMS J:

No, I understand how piece work is calculated. How is the leave pay calculated then if piece work varies, for example, in June almost nil and in February huge?

MR SKELTON QC:

Well, it can't be calculated under 8(1), right, because it's variable.

WILLIAMS J:

Correct.

MR SKELTON QC:

So you have to go into 8(2), and then you look at the four-week period before the holiday is taken and your earnings for that four weeks divide by four and that gives you your answer. It's that formula in 8(2).

WILLIAMS J:

So the only difference between that case and the bus drivers is the amount of time it takes to get paid?

MR SKELTON QC:

No, it's not about time it takes to get paid. It's whether under the provisions of their employment agreement the commission is earned during a week or whether it's earned over a longer period. In the case of the bus drivers it was earned per trip. That's the contractual provision. It says it's earned per trip, it's earned after you've done your debrief and your reconciliation, and it's not earned every day you turn up at work.

WILLIAM YOUNG J:

The word “earn” isn’t in the statute, is it?

MR SKELTON QC:

Well, “earning” is, your Honour. “Earnings” is –

WILLIAM YOUNG J:

No, the word is “pay”. Is “earnings” defined?

MR SKELTON QC:

Well, I took your Honour to “gross earnings”, the definition of “gross earnings” in 14, and in 14 you saw there the distinction is between having a requirement to pay it under an employment agreement, that’s part of gross earnings, or if you’re not bound to pay under the terms of the employment agreement it’s not earnings. So it’s that concept, your Honour, of having a legal obligation to pay and then it’s a question of –

WILLIAM YOUNG J:

But that’s gross earnings. What about in section 8, it just says pay for the week, pay for an ordinary working week? Why does the right to payment have to crystallise in that week? Why can’t the pay be earned in that week in a loose sense but the right to actual payment crystallise later when the paperwork is finished?

MR SKELTON QC:

Your Honour, it’s not about like when it’s paid. That’s not the deciding test, like –

WILLIAM YOUNG J:

You say the payment doesn’t become due until the paperwork is finalised?

MR SKELTON QC:

Well, until the payment is contractually due as a term of the employment agreement. Now in the case of the drivers here, that was after the debrief and

the reconciliation. But in the case of *Schollum v Corporate Consumables Ltd* [2017] ERNZ 668, [2017] NZEmpC 115 it was after a monthly target had been achieved. So, you know, there wasn't a contractual obligation to pay her commission until after the month. Now she was working every day of that month and in that loose sense you were talking about, your Honour, she was working and accruing but she didn't have any contractual right to pay until the end of the month.

WILLIAM YOUNG J:

I understand that. I understand that the money doesn't become payable. She couldn't sue for it in *Schollum* until everything had happened, including targets had been met.

MR SKELTON QC:

Yes, but it's not – it is contractual obligation to pay. It doesn't matter that it hasn't been paid. The example that my friend gives, and I totally agree with it, say someone's on a fortnightly salary of – gets paid fortnightly, but they obviously do have an ordinary weekly pay which is half the amount of their fortnightly salary. They mightn't in fact have got paid till the end of the two weeks but they have earned that week's pay at the end of the week. Now that's quite different from the facts of this case where the commission wasn't earned until the end of each trip. It was on a per trip basis, and your Honours, I can take you to that now. If we just have a quick look at the employment agreement because the contractual terms are important in terms of these issues, and they were very much at the forefront of the Employment Court's judgment. So if we go to the employment agreement, it's at tab 32.

WILLIAM YOUNG J:

If you can give the volume and page number. Can you do that or not?

MR SKELTON QC:

Yes I think I can your Honour.

WILLIAM YOUNG J:

So it'll be 201 something or other. 301 sorry.

MR SKELTON QC:

It's 301.0134. So if we look at that, your Honours, you'll see it's a letter of offer that sets out and the terms and conditions, and then there are a number of schedules, these are referred to the Court terms and conditions, the position description driver guide, and then there's an appendix B, daily rates defined there, \$141, and days of work set by a roster. If you go over the page to "Responsibilities" you see about three-quarters of the way down: "To complete the debriefing session within 7 days."

O'REGAN J:

What page is this?

MR SKELTON QC:

It's at page 19 of the bottom, do you see that?

WILLIAMS J:

Of the agreement itself?

MR SKELTON QC:

Yes.

WILLIAM YOUNG J:

It's 301.0152, the electronic, you'll see down there, you know, "Complete debriefings and at 154 in the electronic bundle, that's the rate of pay schedule for a trip based on a daily rate, and that sets out the daily rates for the driving. Now your Honours if we go to the next document, it's at 0155, this is the addendum, and these set out – sorry your Honours I've just lost that. You'll see at 155 it talks about additional employment terms relating to the Kiwi Experience drivers. The objective/purpose, to drive the buses and then to pass on their knowledge, sell activities and accommodation where possible.

Now if I can just pause there for a second because the ordinary weekly work of the bus driver in this case is driving buses, selling activities. That's clear. You, for example, if this driver was asked not to drive the buses but to go to the workshop and help with mechanical maintenance, or go to head office and do administrative work, that would not be part of the driver's ordinary weekly work. You couldn't force the driver to do that, they'd have to agree to doing that, but what is ordinary weekly work is defined by the terms of this agreement and their duties et cetera.

Now if we turn to page 1593, there's rates of pay, do you see that your Honours, and it says "other payments" and there's a whole list, and there's then a bullet point "commission" do you have that?

GLAZEBROOK J:

You're going to have to give me the page number of the document?

MR SKELTON QC:

Yes it's 301.0159. I'm in the core...

GLAZEBROOK J:

It's page 26 if you're looking at the addendum.

MR SKELTON QC:

It's page 26 your Honour.

WILLIAMS J:

You say rates of pay?

MR SKELTON QC:

Yes, it's the "Rates of Pay" that heading there your Honour. Do your Honours have that?

O'REGAN J:

It's 159, you said 195, that's what threw us.

MR SKELTON QC:

I apologise. The heading "Commission", you'll see the heading "Commission" there: "As per the commission schedules each driver guide shall be paid 50% of the total activity commissions earned per trip," so that's the point I was making, your Honours, that you earn commission per trip. It's not, you know, earned per day or per week.

ELLEN FRANCE J:

Sorry, so what's the significance of that?

MR SKELTON QC:

Well, because it's earned per trip you don't have a legal obligation to pay the commission until after the debrief has happened and the reconciliation has happened at the end of the trip. The driver doesn't earn commission each day they turn up to work and they earn it at the end of the trip. It's per trip, unlike the driving activities which are daily and they get paid a daily rate. Each day they turn up to work they have a legal entitlement to be paid for that day.

WILLIAM YOUNG J:

But sometimes they get paid more if they do training, for instance.

MR SKELTON QC:

That's right. The employment agreement provides a greater allowance for training, so they'd have a legal right for training. But they –

WILLIAMS J:

But that means the drivers that do trips of less than a week get paid this thing and the driver's that don't, don't. That's not that satisfactory, is it, as an outcome?

MR SKELTON QC:

Well, that gets, and I'll come to that, because that gets to that regularity test which is the second filter.

WILLIAMS J:

I know but just the practical outcome of that is if you are lucky enough to be on short trips you are in and if you're unlucky enough to be touring the South Island you're out.

MR SKELTON QC:

Well, the factual finding in this case was there were three occasions over four years.

WILLIAMS J:

Yes, I see that, but obviously there are some situations where drivers are doing short trips, out of Auckland to wherever, and somewhere they're doing big ones.

MR SKELTON QC:

Yes.

WILLIAMS J:

Mostly big ones in the case of this driver and that apparently is an average, but you see the administrative as well as sense problem with that outcome.

MR SKELTON QC:

There are huge problems with this whole Act, your Honour. I started by –

WILLIAMS J:

You're adding to them, aren't you?

MR SKELTON QC:

No, no. Thankfully the Act is going to be repealed and altered. But the big one is entitlements are per week and yet all computer systems who do payroll accrue holidays hourly basis and there's a mix-match and that will be a case coming your way at some stage. There's hundreds of millions, hundreds of millions of dollars, because if you calculate it holidays on an hourly or day basis, not per week as the Act, you're non-complying. You have to go back

and recalculate your payroll for six years for your whole workforce and Deloitte charge a million bucks for that.

So these are the sorts of problems. So you are right, your Honour, but in this case the point is the Act I submit talks about the period of a week, we're stuck with that, and it's earnings in the sense of a legal obligation to pay. If they fall within that week they are in. If they don't, so it's a quarterly bonus or a yearly bonus, they're out. And that makes complete sense. The chief executive of this company gets an incentive payment based on KPIs achieving, company achieving a certain outcome. Now he might have got that four, five years in a row. It's regular. But on the Court of Appeal's definition of "regular", well, they would have to be in his weekly pay calculation because it's substantively regular, and that just can't be right. It's not – you know, you're looking at –

WILLIAM YOUNG J:

Well, you don't want to have a –

GLAZEBROOK J:

Aren't you mixing up regular and whether something's been earned, because I'm having trouble with saying they haven't earned the commission as soon as all of the requirements to earn it have been done, and I don't mean accounting or claiming. I mean as soon as the people have taken the trip, because I understand it's not payable to – the commissions aren't payable to the company until the individual has taken the trip, is that right?

MR SKELTON QC:

Well, that is correct. The company doesn't get the commission –

GLAZEBROOK J:

So I can understand the argument if – just if you let me finish. I can understand the argument there, that it's not earned until there's a legal obligation for the commission to be paid to the company, but I have difficulty in understanding an argument that it's not legally obliged to be paid to the person until they've filled in a form.

MR SKELTON QC:

But that's just a function of what the parties have agreed in terms of their employment agreement. I mean if you have the *Schollum* commission, you don't get your commission under the sales over a month of X dollars have been achieved, the parties can agree that.

GLAZEBROOK J:

But that is because the commission is not legally obliged to be paid until those sales have been made.

MR SKELTON QC:

Correct.

GLAZEBROOK J:

Here you are, aren't you? Just filling in a form doesn't seem to me to – because if the person doesn't fill in a form is the employer allowed to say: "Oh sorry you haven't filled in the form, I'm not going to pay something that's clearly due to you."

MR SKELTON QC:

Well it's –

GLAZEBROOK J:

That's the argument you seem to be making.

MR SKELTON QC:

The argument is that parties to an employment agreement can agree amongst themselves what are the requirements before a commission becomes earned and payable, and in this case it was you have to attend the debrief and you have to do a reconciliation. Now that wasn't simply an administrative issue. It's highly important for THL because in this case, as you know, there were hop-on/hop-off buses, people could book a trip and then decide, well I'm going to spend a week down in Queenstown and then take the trip at some later date, and then of course you heard about, you know, weather cancellations,

the trip might not go ahead, it might go ahead at a later date. So until the reconciliation is done, THL doesn't know how much commission is due and owing, and it would be bizarre, I submit, that holiday pay obligations would arise before then, and that was the point that Judge Smith was making in the Employment Court about the practicality issue. You know, if commission accrues just because they've sold an activity, your Honours' point is the company might not get paid that because they might decide never to do the trip, they might never pay for it, or it might be cancelled due to weather, or they might take two months before they do the trip. The company doesn't know that and can't calculate pay if it arises at that point, that's the requirement to do the debrief and the reconciliation before the holiday, before the commission becomes due is actually more than just administrative, it's actually practically very important for the company.

GLAZEBROOK J:

So the company doesn't actually know what commission is due to it until, is that the argument?

MR SKELTON QC:

Yes well –

GLAZEBROOK J:

But, I mean that's an odd argument as well because I would have thought that it was extremely odd that the company was dependent on drivers rather than dependent on some other form of knowing what commission is due from the people who are paying commissions to it.

MR SKELTON QC:

There's a cross-check your Honour because at the debrief the driver's prepare their commission sheet, which is that what they have sold, and they've also got the vouchers back from the operators, then the operators also send information to THL and they compare the two.

GLAZEBROOK J:

Well that's exactly the point I'm making.

MR SKELTON QC:

Yes.

GLAZEBROOK J:

That they do know what's been sold because they would have to have a record from the operators, wouldn't they?

MR SKELTON QC:

But they don't know that within that period of a week, your Honour, that working week. That's why the commission is, it's payable but it's not payable for, referable to that particular week. It's payable for a period over a week and it's, this doesn't deprive employees of having it in the calculation for their holiday entitlements, because it's clearly part of average weekly earnings, their average weekly earnings, so it's not that the employer here is trying to do employees out, it's the method of calculation. It's in average weekly earnings. They get the benefit of their commissions for payment of holidays, but it's not referable to that particular week, and your Honour the agreed statement of facts that was relied on in this case, there's some important agreements there that I want to just take you too briefly if I may. It's in the evidence bundle, tab 16, it's page 201.0001. It's the amended agreed statement of facts, 8 February 2019. If we go to paragraph 18 of the agreed statement of facts, you'll see there: "Driver guides can earn commission on third party activities that have been booked via the driver guide, and paid for an undertaken by passengers."

At 22: "Kiwi Experience considers that... driver guide earns a commission," and there's requirements. The one we've been focusing on is the last one (f): "Driver guide attends a trip 'debrief' at... head office... and submits completed commission documentation..."

Then at 44, after trip's been completed and prior to debrief they have to complete that commission form. 45, driver guide must complete the commission sheet in order to be eligible to receive the commission payments.

55 to 59 are the debriefing procedures and you'll see at 58, for third party activities, driver guides must have gathered the vouchers, the operating confirm forms, and they must have completed the document. And at 59, in order for the drivers to earn a commission, the driver guide must have obtained the vouchers, confirmations, completed and submitted the documentation, and attended the debrief for the trip.

WILLIAMS J:

Is there a provision in any addendum? I see it refers to commission procedures or schedules in that addendum you took us to. Is this agreement as to entitlement and when recorded in the agreement itself anywhere, because when you took us to the commissions material in the addendum it didn't suggest that entitlement crystallised at that point, so is there something else somewhere else?

MR SKELTON QC:

I took you to that provision in the employment agreement addendum that you referred to about it being earned per trip, your Honour, and that's what I –

WILLIAMS J:

That's right, it's per trip, but it doesn't say you don't get it until the debrief.

MR SKELTON QC:

Well, there was the obligation also to do the debrief, et cetera, and I...

WILLIAMS J:

Yes, but it doesn't say that's the crystallisation point, which is your point. Is that somewhere else in the agreement?

MR SKELTON QC:

Well, it was in the agreed statement of facts, your Honour, an important –

WILLIAMS J:

All right, okay.

GLAZEBROOK J:

Well, as an assertion by Kiwi Experience though. So it's not an agreed statement of fact other than an assertion.

WILLIAMS J:

And anyway it's a question of law, isn't it?

MR SKELTON QC:

Your Honour, the Employment Court Judge made a finding on when the commission became earned. That's at paragraph 38 of the Employment Court's judgment.

WILLIAM YOUNG J:

That's a decision presumably as to at what point the employee could sue for it?

MR SKELTON QC:

Yes, it was when was the commission legally – when was the employer legally obliged to pay.

WILLIAM YOUNG J:

Okay, but your assumption is that that determines the question as to whether it was paid for the week?

MR SKELTON QC:

Well, my first point, your Honour, is that as a matter of construction of the employment agreement in this case –

WILLIAM YOUNG J:

The Employment Court's decision is final, yes.

MR SKELTON QC:

– there is a finding by the Employment Court as to when the commission was earned and his Honour, and I submit correctly, said that it's not earned until there was a legal obligation to pay it and that was at the debrief after that and the reconciliation, and...

WILLIAMS J:

But that's a question of law, isn't it?

ELLEN FRANCE J:

I was going to say it's slightly different.

WILLIAM YOUNG J:

Yes, he's saying that if –

O'REGAN J:

No, it's interpretation of agreement. That's out – that's –

WILLIAMS J:

I see.

O'REGAN J:

You can't review that on appeal.

MR SKELTON QC:

It may be, your Honours, may be a question of mixed fact in law but it's law but section 214 says you can only appeal questions of law other than, and it carves out construction of employment agreements. So our submission is that that is the finding. The Court of Appeal strayed from that in its judgment, but also I submit the finding is actually correct because when commission is due and owing is a question of construction of the agreement and clearly here it was a on a per trip basis. Now –

GLAZEBROOK J:

But I suppose there's still the issue as to what that means because nobody I think is disputing that that's when it's payable under the employment agreement and in fact one probably couldn't because they do need that debrief in order to calculate, but...

MR SKELTON QC:

Yes, your Honour, and –

GLAZEBROOK J:

I'm not sure it necessarily gets you home on what that means in terms of the Act, knowing that the Act is appallingly difficult to apply.

MR SKELTON QC:

I might come back to that because it is important, this concept of when it's earned and when it's payable, and we're certainly not saying it has to have been payable. It's a question of when it was earned.

GLAZEBROOK J:

Yes, I think that is what I was asking you to...

MR SKELTON QC:

Now if we could turn to the Employment Court judgment, your Honour. It's the electronic bundle. It's 101.0041. So if your Honours have the Employment Court judgment, and we look at paragraph 15. It's on page 041 and you will see three-quarters of the way down Judge Smith notes that "the commission entitlements and rates were in a company policy attached to the agreement" provided that was "paid on the 'total activity commission earned per trip'". So he notes that.

GLAZEBROOK J:

Sorry, what paragraph were you...

MR SKELTON QC:

15. It's the point we've just been discussing that commission is earned per trip. So he's making that point three-quarters of the way down. And then at last line of 16: "There were three occasions over four years of her employment where she undertook a trip that was shorter than seven days," and that's an important finding of fact in terms of the regularity argument that I wish to come on to.

The reasoning in the judgment starts at 29 and his Honour started with the text of section 8 and what is to be ascertained is the employee's ordinary weekly pay for an ordinary working week. "What is to be included, and excluded, from that calculation is designed to enable a calculation representative of an ordinary working week."

And if we go then to 31, this is where his Honour considers what does the word "regular" mean, and his Honour notes it's ambiguous. There's two possible definitions he cites there. The first one: "What is regular could be those items of pay routinely or commonly featuring in the employee's pay regardless of when they were earned, or those items that are earned and have become payable under the employment agreement during the working week," and that distinction sums up to a large extent the difference between the parties here.

He then looks at 32. Paragraph 32 he looks at the text of 8(1)(a) and says there it's "intended to mean what is received under the employment agreement for an ordinary working week. It is the entitlement to pay earned under the agreement for that week," and then further down: "The intention was to capture contractual entitlements earned and payable over an ordinary working week."

And at 35 he then looks at the purpose. So he's looked at the text, he looks at the purpose, and the bottom of 35 there, what is usually payable to the employee for that ordinary working week.

Then the key finding at 38. Commission not earned until reconciliation completed. You will see it's about half way down, your Honours. It says: "The commission was not earned by the driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed." The "step was more than a purely administrative task." Now at this point he starts considering the practical issues that your Honour, Justice Williams, was talking about. So it's more than just an administrative task. It was not until driver completes the trip and the paperwork the amount due and owing could be ascertained. "The commissions were, as a matter of agreement, based on completing tasks at irregular intervals having no reference at all to what was earned for having completed an ordinary working week," and the ratio or the finding at 40 that the commission is earned by the driver's do not form part of their ordinary working week.

WILLIAMS J:

Can you just help me with some facts. So on a 44 day trip these people, is it more usual that they're jumping off the bus, and then dangling off a bridge, paying AJ Hackett and then getting back on the bus?

MR SKELTON QC:

There's a real mixtures. Some people will jump off the bus and stay in the location for a week, and then jump on the next bus.

WILLIAMS J:

Right.

MR SKELTON QC:

But others will do the bungy and then get back on the bus and carry on.

WILLIAMS J:

So in some cases the money is spent by the punter during the course of the tour?

MR SKELTON QC:

Yes, that would be correct, and in some cases that would be so.

WILLIAMS J:

So the bus driver could just ring home base and say: "Three spends today."
If he wanted to.

MR SKELTON QC:

Well the bus driver will fill out the voucher that they have booked for three people.

WILLIAMS J:

Sure, those people that have paid during the course of the trip.

MR SKELTON QC:

They don't pay the bus driver, they pay the operator.

WILLIAMS J:

No I know, but they paid the operator and that would be the trigger, but for this requirement of debrief at the end of the tour, correct?

MR SKELTON QC:

Well, yes, but the commission, they don't pay just on the number of passengers. They look at the end of the trip as to all of those passengers. As you say, some may complete that bungy jump on that same day, jump back on the bus. Others will book it through the driver and wait a week and then take the activity later.

WILLIAMS J:

Sure, but for the ones that have paid and got back on, the driver could easily ring home base and say: "Three spends today. Give me the commissions."

MR SKELTON QC:

Well that's not the process that was followed.

WILLIAMS J:

No but could but for this administrative way of dealing with it.

MR SKELTON QC:

Well it's, but for the contractually agreed procedure that is to be followed at the end of each trip, to calculate how commission is due and owing.

WILLIAMS J:

Yes.

O'REGAN J:

You have to do the debrief, that's your point isn't it?

WILLIAMS J:

Yes.

O'REGAN J:

You can only claim it when you've done the debrief and the reconciliation.

MR SKELTON QC:

Yes you can, and of course, you know, weather comes into this as well. The operator cancels the activity because of weather or the person books it but actually hasn't paid and decides I'm not going to do it after all, or actually bungies are a bit high for me, I'm not going to jump off that, which would be me.

WILLIAMS J:

Me too.

MR SKELTON QC:

I might book it, but then would I do it, I doubt it.

GLAZEBROOK J:

The driver won't know whether people have done it, will they?

MR SKELTON QC:

No.

GLAZEBROOK J:

So I'm not quite sure why they need a reconciliation in respect of that, because it's not the driver that's going to say: "Is this payable or not". They have to have something from the operator.

MR SKELTON QC:

But the driver collects a voucher from the operator, okay, to confirm that –

GLAZEBROOK J:

To confirm the booking?

MR SKELTON QC:

Well, no, they've done the booking, but to confirm whether or not the passenger has actually taken the activity and done that. So you see that might be the next trip, or coming through the next time round, they've got the vouchers that confirm the passenger did the trip –

WILLIAMS J:

But that wasn't invariably the case, was it? Vouchers weren't always used?

MR SKELTON QC:

Most of the occasions I believe.

WILLIAMS J:

I thought there was a finding of fact that in fact vouchers weren't always used, some drivers did it without it.

MR SKELTON QC:

I do accept the point that I think different operators operated different systems. THL had their vouchers.

WILLIAMS J:

They did, yes.

MR SKELTON QC:

And they encouraged operators to, you know, fill out the voucher and give them back to the driver.

WILLIAMS J:

But THL wasn't going to say: "We don't want your money because there's no voucher."

MR SKELTON QC:

No, no, and –

GLAZEBROOK J:

They must have had, they surely weren't just relying on those vouchers to see where the commission was payable. They must have had something directly from the operators as well.

MR SKELTON QC:

Yes, the operator then sends their accounts and, of course, hopefully a cheque with it for the commission, and THL can then check on what the drivers say they booked, versus what the operator has recovered –

GLAZEBROOK J:

So it's a cross-check –

MR SKELTON QC:

It's a cross-check.

GLAZEBROOK J:

– it's not actually the accounting.

MR SKELTON QC:

Sorry?

GLAZEBROOK J:

It's a cross-check?

MR SKELTON QC:

That's right, it's a cross-check both ways because they don't, they check that drivers aren't just saying they booked a whole lot of activities when they haven't, because it's not on the operators' documents. Likewise that the operators have actually recorded all the trips that were booked by the drivers. So it is an important cross-check. You are right, your Honour.

Just the final paragraph I take you to in that judgment is at 41 and at the last sentence of 41: "It would be inconsistent with section 8(2) to require holiday pay to be calculated, and to be payable, before her work had matured into a contractual obligation to pay," and again that's that emphasis in the Employment Court judgment that you don't earn commission until there is a contractual obligation to pay and it would be inconsistent that you paid out holiday pay to a worker before that point of time.

Now, your Honours, the existing case law, there's one case on the interpretation of 8(1)(c)(i), that issue of regularity. It's the judgment of *Schollum* and it's in tab 2. Do your Honours have *Schollum*? It's 101.0041. The facts are straightforward. The employees are claiming they didn't get paid their holiday pay, it's paragraphs 1 and 2, because commissions weren't taken into account.

You have at paragraph 8 of the judgment the first issue. Did the employer, Corporate Consumables', method of calculation comply with the Act? They set out there the commission arrangement. So again, step 1, what does the contract say? You get a commission, a base salary plus a commission, if you achieved sales over a particular margin per month.

WILLIAM YOUNG J:

So this was an average weekly earnings calculation, wasn't it?

MR SKELTON QC:

Yes, this is the average weekly earnings calculation. It's an 8(1) case, your Honour. So it's not 8(2) because this employee worked a week but it had commission in it. So the question was do the commission payments, are they included in the ordinary weekly pay or not? The finding is at 26, paragraph 26 of the judgment, where his Honour accepted Mr Langton's submission commission was not part of remuneration for Ms Schollum that she received for an ordinary working week. "All commissions were calculated on an aggregate of monthly sales. Before either of them became entitled to commission they first had to secure sale sufficient to trigger payment. That trigger was monthly, not weekly," commissions were not paid during that week. "I conclude commissions were not a regular part of pay received...for an ordinary working week," but at 32 the Judge had no doubt that the commission should have been included as part of average weekly earnings. So they weren't paid.

The finding on regularity and what "regular" meant is at 85 of the judgment, your Honour. The employer there, Corporate Consumables, had a fallback position that holiday pay could be assessed using ordinary weekly pay under 8(1). They said that that's based on the argument that commission should have been included in the assessment if it was a regular payment. And there's no doubt this woman did get commissions every month.

Now at 89, submission has already been addressed at 26. "The answer is that section 8(1) identifies what is meant by ordinary weekly pay. Section 8(1)(a) defines that expression to mean the amount of pay that the employee receives under his or her employment agreement for an ordinary working week."

And then at 90: "Any commission earned contractually can be described as being part of an employee's regular income or pay. However, the purpose of section 8 is to provide a method for use in the calculation of holiday pay... It is designed to provide an alternative, and is clearly established as being what an employee is paid for a week of work," and you'll see at the end of that

paragraph, last sentence, "In any given week the employee could not establish what they were entitled to for a weekly payment beyond their base salary. Commission was not earned and paid weekly. It was earned and paid monthly and only once the qualifying contribution had been achieved."

WILLIAM YOUNG J:

Did the judge look at section 8(1) and 8(2)?

MR SKELTON QC:

At 8(2)?

WILLIAM YOUNG J:

Yes. I don't think he has, has he?

MR SKELTON QC:

Yes your Honour?

WILLIAM YOUNG J:

Did he look at 8(2)?

MR SKELTON QC:

No. No he didn't look at 8(2). It was not, because there wasn't any variable days of work here. It's not like the drivers who –

WILLIAM YOUNG J:

Well except it would've been available to the plaintiffs in that case perhaps to argue that our pay period is really a monthly one, and that section 8(1) doesn't work because the way our work and remuneration operates, you've got to look at a four week period, or a monthly period, and on that basis we could go to 8(2). Because I mean in the present case the pay period really is per trip isn't it?

MR SKELTON QC:

Yes. I mean the driving duties are paid daily, and paid at the end of each week, but the commissions are contractually due at the end of the trip.

WILLIAM YOUNG J:

I mean if it's a regular part of their remuneration for the work cycle in which they're engaged in, isn't there something to be said for the view that it falls within section 8(2)?

MR SKELTON QC:

No because you have to read 8(2). It's informed by the opening words in 8(1)(a).

WILLIAM YOUNG J:

But you normally go to 8(2) because the employee isn't working on a weekly basis, there isn't a weekly standard against which the employee's pay can be assessed. You say well there is, it's just a daily rate, a driving rate.

MR SKELTON QC:

Yes, you don't go to 8(2) unless the word says it's not possible to determine an employee's ordinary weekly pay –

WILLIAM YOUNG J:

And that's normally going to be because that's not the basis they're paid. They're not paid on the basis of a week-by-week basis.

MR SKELTON QC:

It's in situations where there are variable pay. They might work, like these drivers they might work three days one week, and then they might work seven days the next week if they're on a long trip, or five days the week after.

WILLIAM YOUNG J:

Or the whole pay structure is calculated otherwise and by reference to weeks.

MR SKELTON QC:

Well the first point is, your Honour, you only get to 8(2), it's about if you can't calculate a pay –

WILLIAM YOUNG J:

But you agree you can't do 8(1) don't you? You agree that 8(1) doesn't apply?

MR SKELTON QC:

In this case, yes. That was common –

WILLIAM YOUNG J:

And that's because they're not working on a basis that enables the concept of pay for an ordinary working week to have much meaning?

MR SKELTON QC:

Well we say that all permanent employees have an ordinary working week that's defined by the terms of their employment agreement, but in this case it wasn't possible to calculate the pay for their ordinary working week, so you're into 8(2). Now this is an important issue as to why we say the Court of Appeal judgment is in error here, because the Court of Appeal judgment said that these employees didn't have an ordinary working week, and therefore you go into 8(2), and that was the reason why the Court of Appeal said, oh we don't have to give any meaning or substance to the wording in 8(1)(a) because they said that would reintroduce that concept of ordinary working week back into the –

WILLIAM YOUNG J:

Is this at paragraph 34 of the judgment?

MR SKELTON QC:

Yes, your Honour. I'm going to take you through that. The reason here we can't use 8(1) is the days that each driver worked each week would vary so as I say –

WILLIAM YOUNG J:

Couldn't you do it because a pay period isn't really on a week-by-week basis, isn't that another reason why section 8(1) doesn't work?

MR SKELTON QC:

Well, the drivers were all paid every week. So every Friday they got paid weekly for their driving.

WILLIAM YOUNG J:

They got some of their pay.

MR SKELTON QC:

Well, yes, that's right, they got a pay cheque in their bank every week and, of course, some weeks it would just be the driving duties. After – if it was a long trip they'd then debrief. Then the next week they'd get those driving duties plus their commission paid.

WILLIAMS J:

It is perhaps possible to read that “if it is not possible” in (2) to mean if the calculation of ordinary weekly pay artificially excludes money regularly earned then go to (2), because they both include commissions, don't they? And otherwise you're encouraging employers to say: “We will pay our commissions to you on an other than weekly basis because that's how we avoid having to pay you big holiday pay.” Was that really the intention of the Holidays Act?

MR SKELTON QC:

No, your Honour, but they don't avoid paying commissions, big holiday pay, because it has to be included in their average weekly earnings. So all of these payments – this isn't about an employer trying to avoid holiday pay. It's about avoiding spikes. You know, if you get a quarterly bonus or a yearly bonus, you know, and then you take your holiday a week later, that's not the intention of saying: “Well, I calculate it with this massive payment that I got that week before.” That's not my ordinary weekly pay. It's averaged out to average weekly earnings. That's what's intended here.

On the other hand, if you're getting commissions every week it's included. The example I gave you of the freezing worker, you know, getting paid on a

piece-rate basis, or a call operator who gets paid so much per call, those are incentive-based payments that are included as part of your ordinary weekly pay because you'd always get them every week and they become contractually due and owing every week.

WILLIAM YOUNG J:

But say they don't become contractually due and owing until there's a reconciliation at the end of the month, would you say that would take them out?

MR SKELTON QC:

Well, if that's what the parties were silly enough to agree. But that's, you know, you have to again look at what's the employment agreement and there were good reasons why THC says: "I'm not going to pay commissions until at the end of the trip and we've done the reconciliation." There's good reasons in the *Schollum* case to say you don't get paid your bonus –

WILLIAM YOUNG J:

I agree. I don't have a problem with it. It's just that it's a bit random because some commissions are going to crystallise on the spot, others only when other events affecting third parties occur.

MR SKELTON QC:

Yes, and if they crystallise during the ordinary working week, they are in. If they crystallise longer than an ordinary working week – monthly, quarterly, yearly – they're not in ordinary pay.

WILLIAM YOUNG J:

So in the real estate industry where commission will not normally accrue the moment a conditional sale agreement is signed, that would be out, I take it?

MR SKELTON QC:

Yes, it –

WILLIAM YOUNG J:

And so –

O'REGAN J:

Well, your holiday pay gets done on your average commissions over the year.

WILLIAM YOUNG J:

But it's not much good if you only work three or four days a week though. Say you're working three days a week that's not going to help.

O'REGAN J:

Well, it is if you work three days a week for the whole year.

MR SKELTON QC:

I mean if you were working three days a week for a whole year and you were selling houses –

WILLIAM YOUNG J:

Doesn't the holiday you get get pro-rated to the number of days you work?

MR SKELTON QC:

Well, no, you get four weeks' holiday but because you're only working three days a week your earnings are lower so you only get the holiday pay that's based on the three days that you've earned –

WILLIAM YOUNG J:

I'm sorry, I may have this wrong. I assumed that someone who worked three days a week would get – who worked, when on the average earnings, the start point would be average earnings with the one/52nd per week of their total income and that that would then get pro-rated further down to say they're only getting three days instead of five days for the week.

MR SKELTON QC:

That would be taking into account twice.

WILLIAM YOUNG J:

I know it would be.

MR SKELTON QC:

They don't pro rata it because your earnings over the year –

GLAZEBROOK J:

It's just your pay.

O'REGAN J:

You just get one/52nd.

MR SKELTON QC:

Your earnings over the year has only been for three days.

WILLIAM YOUNG J:

All right, I understand that.

MR SKELTON QC:

And so you get that four weeks but you're getting it paid out on that basis. So if you've sold your house in week 1 and then it might be another sale in week 4 and another sale in week 6, all those commissions go in to your average weekly earnings, but you can't say: "My ordinary weekly pay is that I'm going to get commission that week," because you don't – the commission is not regularly paid to you on that weekly basis.

GLAZEBROOK J:

Can we just go to piecework?

MR SKELTON QC:

Yes.

GLAZEBROOK J:

So the contract says you get paid by the number of beasts you slaughter in a week, and some weeks you might do 25, some weeks you might do 10, some

weeks you might do one. Is it possible to calculate – and you're paid every week. But is it possible to calculate the amount you receive for an ordinary working week on your analysis in that circumstance?

MR SKELTON QC:

Well, yes. You can't do it under 8(1) because the pay is irregular. It depends on how many animals –

GLAZEBROOK J:

Well, no, it's regular pay. It's regular every week.

MR SKELTON QC:

Well, yes.

GLAZEBROOK J:

So there you say you do go on week 2.

MR SKELTON QC:

You go to 8(2).

GLAZEBROOK J:

But doesn't that take away your argument that you can't go to 8(2)?

MR SKELTON QC:

No, for the slaughterman example –

GLAZEBROOK J:

Because you do have an ordinary – you do have an amount you received for an ordinary working week under your employment agreement.

MR SKELTON QC:

Yes.

GLAZEBROOK J:

And under your employment agreement you get whatever you've killed.

MR SKELTON QC:

Yes, and we would say the commissions in that situation or the incentive payment is in, absolutely.

GLAZEBROOK J:

Well, it's certainly in but is it in via (1), subsection (1) or subsection (2)?

MR SKELTON QC:

Subsection (2).

GLAZEBROOK J:

You say subsection (2) and that's because there's an irregular amount of money that you get?

MR SKELTON QC:

Yes, so you have to use the formula to average it out over the four weeks. So the 8(2) –

GLAZEBROOK J:

But I mean the problem with that is, isn't it, that you said to us before that if you had an irregular amount of overtime you actually don't go to 8(2)?

MR SKELTON QC:

Well, that...

GLAZEBROOK J:

When Justice Young asked you that question.

MR SKELTON QC:

Yes. I mean first of all you have to work out is this an 8(1) question or an 8(2) question. Now because the person isn't getting the same amount of pay each week, they're not just on a salary, the slaughterman example, it's by piece rates, you can't use 8(1) because it's irregular. So you go to 8(2). You say: "Are these payments, these incentive payments for killing the animals, are they part of your ordinary weekly pay, what you get paid in a week?" Answer:

“Yes, they are.” Then the next question is: “Well, are they in or out because of the regularity test?” and they are in because you are regularly getting paid per week for slaughtering animals. So that example is an example where the slaughterman who gets paid by piece rates or incentive payments, yes, they do use 8(2) formula for that purpose.

Now the difference is if you're calculating your commission over a period longer than a week, get a monthly commission or a quarterly commission or the CEO, you know, a yearly incentive payment based on the performance of the business, that's not referable to an ordinary working week so it's out.

WILLIAMS J:

So anything more than seven days basically? An eight-day cycle, a 10-day cycle, a 14-day cycle, three-month cycle, all excluded?

MR SKELTON QC:

If the commission isn't contractually due and owing within that week then it's out.

WILLIAMS J:

No, but it's not within that week. It's within a seven-day cycle.

MR SKELTON QC:

Seven-day...

WILLIAMS J:

If the cycle is larger than seven days it's not included in section 8 in any form?

MR SKELTON QC:

That's right. It's included in average weekly earnings instead. It's spread through that mechanism.

And, your Honours, we summarise the submission just on this final point in paragraphs 47 and 48 of the appellant's submission. The appellant submits

that 8(1)(c)(i) should be interpreted to mean “not regular part of employee’s pay for an ordinary working week”.

In other words, “pay” should be interpreted to mean “pay for the ordinary working week”, not for a longer time period, whether a month, quarterly or annually.

And that argument, your Honour, is based on text really, the language in 8(1)(b) and 8(1)(c), both informed by the wording in 8(1)(a).

O’REGAN J:

Your example of the chief executive’s three-monthly or yearly bonus, do you say on the Court of Appeal decision that that has to basically stay within the calculation made under section 8(2) and therefore if you get a very large bubble payment in one week and take a holiday two weeks later you get a massive holiday pay payment?

MR SKELTON QC:

That’s the consequence of the Court of Appeal’s judgment. They say it just has to be substantively regular, ie, in accordance with rules. The short term –

O’REGAN J:

Well, they say “substantively regular” or “temporally regular”.

MR SKELTON QC:

Yes –

O’REGAN J:

I mean I know they say “or” in their order but earlier they say “and”, don’t they, so –

MR SKELTON QC:

Well...

O'REGAN J:

I mean is it "regular" if it's once a year?

MR SKELTON QC:

Well, for the chief executive for the last 10 years he's received an annual bonus.

O'REGAN J:

So are you'd say that that's caught by the Court of Appeal judgment because it's determined by reference to rules?

MR SKELTON QC:

Well, my interpretation of the Court of Appeal judgment was if it was regular in the sense of substantively regular in accordance with rules, as all of these incentive schemes have rules, it would catch everything, including the CEO's yearly bonus if he achieves certain KPIs, and that would have a massive spike in that situation, whereas if it's temporally regular then you have to ask yourself, well, what is the period of time against which you judge the regularity or frequency, and our submission is it's that period of time is the week.

O'REGAN J:

It's a week.

GLAZEBROOK J:

Even though people aren't often paid by week, because many people are going to be paid by month, aren't they?

MR SKELTON QC:

Sure. I don't – as I say, it's not a question of when it's paid. As long as it's contractually earned during the week that's fine because, as you say, someone gets paid a monthly salary or a fortnightly salary they've still earned the wages during that fortnightly period, that weekly period, so...

So should a monthly, quarterly, yearly incentive payment be included in ordinary weekly pay if received regularly? No, because not earned over the ordinary working week.

And the argument, your Honours, we submit is that regularity has to be assessed against an interval of time, namely the week, meanings informed by that text of 8(1)(a), what is frequently received or earned under the employment agreement for the ordinary working week, and Parliament is unlikely to have intended to include monthly, quarterly or annual commission payments in the calculation of “ordinary working week”. That could lead to spikes. Exclusion does not unfairly disadvantage employees because the commission is included in the average weekly earnings and the averaging procedure and the calculation of AWE spreads such payments across yearly period.

Now, your Honour, 66 of the written submissions just gives an example of “regular”. A monthly bonus earned and payable in respect of work performed in a month might follow a uniform and predictable monthly pattern.

WILLIAM YOUNG J:

Sorry, what paragraph are you looking at?

O'REGAN J:

66.

MR SKELTON QC:

Of the appellant's submissions. The submission that the appellant makes is that the word “regular” should be interpreted to mean “recurring at uniform intervals”. In other words, referring to regularity in the sense of there being a pattern and that the interval of time is the week.

WILLIAM YOUNG J:

So you say a pattern referable to trips is not irregular?

MR SKELTON QC:

Well, it's a form of regularity but it's not within the ordinary working week. It's longer than an ordinary working week, just like a monthly or quarterly bonus, it's paid every quarter but you can't say that it is regular in relation to an ordinary working week. So, you know, an employee goes on a week-long sales trip once per quarter every quarter, not a regular part of the employee's ordinary weekly pay when frequency is considered. So I've just given those examples of the two to contrast there.

Your Honour, I realise time is ticking on and I really want to finish before the interval if I can. So I just want to take you to the Court of Appeal judgment and what I say is the errors of reasoning and conclusions in that judgment. So it's tab 13, Court of Appeal. It's 101.0112, and if your Honours have that, if we could start with paragraph 11 of the Court of Appeal judgment because the first sentence of paragraph 11: "The Act recognises that employees may not, however, have an ordinary working week." Now we say that all employees, all permanent employees, have an ordinary working week. Now the respondents in this case, they concede that at least for the purpose of what they say is the alternative argument, they concede that that situation – you might wish to note their submissions at 67, your Honour.

Now at 19: "The Labour Inspector and the company agree that section 8(2) applies here because driver guides do not have an ordinary working week," the appellant didn't agree that it was because drivers didn't have an ordinary working week. It was because their pay could not be calculated as a result of variable pay. So that misstates the position that was taken by the appellant.

34, half way down: "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 'ordinary working week', was in those circumstances to be reintroduced into the alternative calculation under section 8(2)..."

WILLIAMS J:

What paragraph are you on?

MR SKELTON QC:

It's 34, your Honour. So this is key to the Court of Appeal's reasoning as to why the language in 8(1)(a) shouldn't be used in an 8(2) exercise to inform the meaning of "regular". They say, well, be surprising if for employees who don't have an ordinary working week that it would be reintroduced. And I say that that's the fallacy that they started from that premise that permanent employees don't have ordinary working weeks. They do.

And then you will see at 36 and 37 of the judgment, that's where they discuss the meaning of the word "regular" and the Court of Appeal adopts an expansive definition of "regular", both the substantive regularity test and the temporal regularity test.

O'REGAN J:

But in 37 they seem to say both of those are required, don't they, whereas in the order they say it's either/or.

MR SKELTON QC:

Well, in 37 in our assessment both those meanings apply to commissions as earned by the driver. So they were saying, well, it was both substantively regular because it was paid in accordance with the rules of the commission scheme and they were saying they thought it was also temporally regular.

O'REGAN J:

So they're saying both, both of their tests? I mean as I read 37, the order to correspond with that needs to have "and" between the paragraphs rather than "or", doesn't it?

MR SKELTON QC:

Well, we certainly accept and agree that the temporal regularity is key to this, and that's again because that interval of time that's specified in the

legislation, under “entitlements” it’s a week and under “payments” it’s ordinary weekly pay.

WILLIAM YOUNG J:

But “regular” is probably best seen as temporal because discretionary payments aren’t, ie, payments not required by a rule in the employment agreement are generally excluded, aren’t they?

MR SKELTON QC:

Yes, I totally agree. It’s a temporal – it’s frequency. But then you have to ask yourself against what period of time do you judge that. Is it judged over a year? Is it judged over a month or is it judged over a week?

WILLIAM YOUNG J:

Sorry, you’ve said this but just remind me again, why do you accept that section 8(1) doesn’t apply? Because there isn’t –

MR SKELTON QC:

Because these drivers, one week they might work three days a week, next week they might work seven days a week. They don’t have a fixed – they’ve got variable number of hours, of days, variable number of days that they work.

WILLIAM YOUNG J:

But it is also the case that their pay cycle, as it were, is variable? It relates to – it’s on a trip-by-trip basis?

MR SKELTON QC:

Well, they get paid every week weekly. So they get paid every week weekly, but their commissions aren’t paid for that working week because they’re only –

WILLIAM YOUNG J:

How are the commissions paid? Are they just paid as part of the next week’s – as part of the...

MR SKELTON QC:

The next pay cycle, in the next weekly pay cycle.

WILLIAM YOUNG J:

So they do form part of the regular – of the pay cycle but in irregular amounts?

MR SKELTON QC:

Yes, so these drivers get paid every week but it's only after the trip has been completed and the reconciliations does the commission come in.

O'REGAN J:

So the commission earned in week 1 might get paid in week 2 or week 3 or week 4, depending on how long the trip was?

MR SKELTON QC:

Yes, I mean the evidence was that they got paid in the next cycle after the debrief and the reconciliation had been done, but they may do the trip and it might be 30 days before they are at head office in that they sit down and do the paperwork. Then they'll get paid shortly thereafter. But the point I make is that they don't earn the commissions. They don't become legally payable under the contract until the end of the trip. It's per trip.

O'REGAN J:

There seems to be a possible middle ground which is that the payments have to be according to rules so they meet the Court of Appeal's first systematic and the second is they have to be paid often, ie, not yearly but, say, monthly, and that if that happens the fact that it's not within a week is just, you know, that means there might be some variability or what you call spikes but they won't be that great so it doesn't matter.

MR SKELTON QC:

But the Act doesn't say "not yearly" and the Act doesn't say "monthly".

O'REGAN J:

Well, it just says "regularly".

MR SKELTON QC:

It says "weekly" and that's the point.

O'REGAN J:

Well, it says "regularly".

WILLIAMS J:

But it doesn't say "weekly". It says "regular". If they meant "weekly" they could have said so.

MR SKELTON QC:

Well, the whole heading of section 8, with respect, is "ordinary weekly pay" and that's the task of –

WILLIAMS J:

Of course, but where it says paid "a regular part of the employee's pay" in 8(1), and then if we can't work that out, in 8(2), calculated on the following formula, it does seem to presuppose that some things are not being paid weekly, but regularly.

MR SKELTON QC:

Well, we say you have to interpret that 8(2) regularly for an ordinary working week. That's – if you read 8(1)(a) and those sections together because those sections, 8(1)(a) is your definition, 8(1)(b) and 8(1)(c) is just what's in and out, but you have to then say, well, what is their regular pay? Pay for what? Pay for an ordinary working week, not pay for a year or pay for a month.

WILLIAM YOUNG J:

One of your concerns with the approach of the Court of Appeal is the spike effect, is that right?

MR SKELTON QC:

Well, that's a consequence, yes, your Honour.

WILLIAM YOUNG J:

Another concern that I think I might have picked up from *Schollum* is that aspects of remuneration aren't closely, sometimes aren't closely tied to the work an individual does on a day and that may be an all-of-year bonus for a chief executive based on KPIs achieved by the company and in a sense, and this was picked up in *Schollum*, there can be – giving holiday pay in relation to some incentive payments may involve in doubling up because they're going to get the incentive payment anyway because it's not referable to what they do on the day but also they're getting it built into the holiday pay. Now that didn't seem to trouble – it didn't trouble Judge Smith in *Schollum* or, in any event, it wasn't controlling, but that would be another issue of concern you might have.

MR SKELTON QC:

Well, it does start to have a compounding effect, your Honour, because if you say, well, there are these big spikes and you then take your holiday the next week, then the holiday pay you get with the big spike, that becomes part of your gross earnings, so that adds to the situation. So it does have a compounding effect if you allow the big spikes. I say the purpose of the average weekly earnings was to spread that so that if you get the large bonus payment that it's spread over the 12-month period, so it doesn't matter when you take your holiday, you get the benefit of it.

WILLIAM YOUNG J:

So just explain to me again why the average weekly earnings system wasn't used here? Is it because they don't – why wouldn't it be...

MR SKELTON QC:

Well, it's used here but the Labour Inspector is saying you've got to take the greater of the two.

WILLIAM YOUNG J:

Yes, so compared to your argument what does “average weekly earnings” produce?

MR SKELTON QC:

The examples given at paragraph 95, your Honour, of the submissions, and I might end on this –

WILLIAM YOUNG J:

So this is your submission?

MR SKELTON QC:

No, the appellant’s submissions. If we can just have a look at 95 which is a worked example, it’s just to show the disparity that will arise if this Court of Appeal judgment is upheld between someone who’s assessed under an 8(1) and someone who’s assessed under 8(2). So the example they give is an employee earning a salary of 52,000 a year, so it’s 1,000 a week, and commissions of 10,000 per quarter. Now it’s possible in that case to determine ordinary weekly pay under 8(1). They don’t work variable hours. They work – so you apply *Schollum* and the answer is \$1,000 for ordinary weekly pay.

GLAZEBROOK J:

Isn’t *Schollum* just because you don’t earn it unless you get sales over a certain amount but if you got guaranteed commission for sales so you were guaranteed your commission payments of 10,000 because they started at the first sale, or have I misunderstood *Schollum*?

MR SKELTON QC:

Your Honour –

GLAZEBROOK J:

Schollum was a conditional payment which was only payable if you achieved a certain amount.

MR SKELTON QC:

Correct.

GLAZEBROOK J:

So it wasn't like piecework where you got it at the first kill.

MR SKELTON QC:

No, that's correct.

GLAZEBROOK J:

So there isn't a discrepancy here if you get it at first sale, is there?

MR SKELTON QC:

Well, you are correct that *Schollum* there was a trigger. You had to achieve a certain target before you got anything. But it was – the ratio of *Schollum* was that the commission was payable for a period longer than a week, for a month, and therefore not included. But you see, your Honour, on your calculation, if you do that calculation under 8(1) average weekly earnings dominates. They get the 1,769. Now if you contrast that, if this is an 8(2) situation because the employee works variable hours, you can't say what their pay would have been for that week so you have to use 8(2). The employee's wages vary each week but equal to the same amount over a year. They get the same amount over a year but not possible to determine it under 8(1) because of the variable weekly wages each week, therefore 8(2) is engaged. Then you get the spike that we're talking about. \$4,000 for the salary, \$10,000 for the commission. If the commission is included on the Court of Appeal analysis it's \$3,500. So you end up under an 8(2) analysis for what are essentially really the same type of situation, one employee's getting 3,500, the other one would be getting one seven. So that's the sort of disparity and unequal treatment that arises if the Court of Appeal judgment allows you to include monthly, quarterly or yearly commission payments into the calculation rather than simply commission payments that were due and oweable and contractually binding within the period of the week. That's the problem that arises.

WILLIAMS J:

Depending on when they take their holidays.

MR SKELTON QC:

Well, yes, I mean my learned friends –

WILLIAMS J:

Don't they need the employer's consent to that? Don't they need the employer to agree to when the holidays are taken?

MR SKELTON QC:

There are powers under the legislation for an employer to say: "Well, I'm not going to let you take your holiday at that time," but just imagine that from, you know: "I want to go to my sister's wedding." "Oh, sorry, I'm not going to give you any holidays that week because you would get a spike." I mean that sort of reasoning is not attractive and not what a good employer would do. The way we're suggesting the Act should be interpreted is to have the averaging process average weekly earnings. They get the benefit of the commission payment through that assessment but you don't get these big spikes by allowing quarterly, yearly commission payments to be calculated as ordinary –

WILLIAM YOUNG J:

Is there an average weekly – sorry, I didn't understand 96 to be an average weekly earnings basis.

MR SKELTON QC:

In 96 you see under (a)(i) the calculations done for ordinary weekly pay and then the comparative calculation for average weekly earnings.

WILLIAM YOUNG J:

So where's – I see, okay, yes.

MR SKELTON QC:

You'll see it if you go through so because you've got to take the greater of the two. So you've got to do both of those calculations.

O'REGAN J:

But if you're earning the same for all 52 weeks it won't make any difference, will it?

MR SKELTON QC:

What's that, your Honour?

O'REGAN J:

If you're earning the same for all 52 weeks of the year it won't make any difference –

MR SKELTON QC:

No.

O'REGAN J:

– whether it's ordinary weekly pay or average weekly earnings.

MR SKELTON QC:

Correct, unless you go back to what I'm saying, unless the employee gets a pay rise, which is obviously common, or they move from being a part-time to full-time, and that's what it's meant for, you know. If you were at 50 and you go up to 60, you get paid out at 60 even though you take your holiday the next week, and that's what – it's right because your ordinary weekly pay is now 60, you get paid out, or you go from three to five days you get paid out. But, yes, that's what it's aimed for, but not the situation here where you get a quarterly or a, you know, yearly bonus.

Now, your Honour, I appreciate the time is ticking.

WILLIAM YOUNG J:

All right, we'll take the adjournment now and if there's anything else you want to say after the adjournment say so and then we will call on your for any –

MR SKELTON QC:

Well, your Honour, I just had some reply submissions to the respondents I wouldn't mind just touching briefly on if that would be okay.

WILLIAM YOUNG J:

Sure.

COURT ADJOURNS: 11:34 AM

COURT RESUMES: 11.52 AM

MR SKELTON QC:

To the final page of the outline, my paragraph 13, appellant's reply to submissions by the respondent, and I'd just like to take you to those, so if you have a copy of the respondent's submissions before you. At paragraph 27 of the submissions the respondent makes the point of the important distinction between earning of commission is a separate issue to payment of commissions. And yes, that distinction between when a commission is earned and when it is paid is important and, of course, there, if your Honour's would note, the Employment Court made the findings as to where commission's earned, 38 and 41 of the Employment Court's judgment.

32, respondent has misstated, I submit, the Employment Court's reasoning, and the opening sentence in 32: "The Employment Court found that, by virtue of the sporadic payment of commission entitlements...they were neither 'regular' nor 'earned in an ordinary working week'." Now your Honour, my submission is that's not a correct summary of the Employment Court's reasoning. With the findings at 38 and 41 that as a matter of fact and construction of the employment agreement commission was not earned and

payable within the week but over a longer period of time. That was crucial. It was not the sporadic nature of the payments.

In relation to the definition of “regular”, respondent’s submissions deal with –

WILLIAM YOUNG J:

Judge Smith did talk about irregular intervals, so that may be what the reference to “sporadic” is.

GLAZEBROOK J:

Can I just check your – what was the paragraph number in terms of the difference between “payment” and “earning”, and I think you said you agreed with that?

MR SKELTON QC:

At 27 of the respondent’s submissions you’ll see second –

GLAZEBROOK J:

Yes, I’m must checking, you said you agreed with that?

MR SKELTON QC:

Yes, there is an important difference between “earnings” and “payment”. It’s the earnings that’s important. It’s not when the payment actually occurs. We agree with that. Now –

O’REGAN J:

It might be better to get this after we’ve heard from Mr Scott-Howman because he might modify some of this.

MR SKELTON QC:

I’m happy to do that, your Honour. I was just wondering whether he wanted the opportunity –

WILLIAM YOUNG J:

No, I think it would be more helpful just by way of reply.

MR SKELTON QC:

I'm happy to do that, your Honour.

WILLIAM YOUNG J:

All right, thank you, Mr Skelton.

MR SCOTT-HOWMAN:

Kia ora. May it please your Honours. During the interval the registrar has passed up a brief summary of oral submission and if it's convenient, your Honours, might I start simply with that?

Your Honours, perhaps if I give some context to the outline of oral argument, that it is with the benefit of some reflection that I thought it might be helpful to offer from the Labour Inspector's perspective some fundamental philosophy, if I can put it that way, about what the Act is intended to achieve simply because in my submission as I will develop it that gives some important perspective not only to the Labour Inspector's arguments but to some aspects of the reply to my learned friend.

You will see at paragraph 2 of my summary that what I have submitted to you is at its heart the employment agreement is a contract and it is a contract under which an employee typically agrees to provide labour for 52 weeks a year. Now I accept there are variations on that but for the purpose of this proceeding that seems to be a reasonable starting point.

Secondly, I have submitted to you that the effect of the holidays legislation is to alter that bargain. In essence, what it does is it allows an employee to be at leisure for four weeks of that contracted year during which time, however, even though he or she is not required to provide services, the Holidays Act requires the employee to nonetheless continue to be paid as if he or she were providing those services. Your Honours, that is in my submission, at least in terms of contract, an unusual feature of this legislation.

In passing I can note that indeed it was unusual in New Zealand prior to 1944 when the first legislation was passed entitling all employees to some aspect of paid leave. Prior to that if you didn't work you simply didn't get paid.

The submission I make following that at paragraph 5 is important. What the Act requires of an employer is to undertake a comparative exercise through which two calculations are committed and the employee is entitled to the greater of those two calculations.

Now if I just pause at that point, your Honours, it seems to me that the purpose of what is intended is to approximate, at least to the best extent available, what the employee might have got paid such that when at leisure the employee continues to receive the same amount and at that fundamental, philosophical level that appears to be what the legislation sets out to achieve. The devil as always, however, your Honours, is in the detail. How does one apply those calculations in a way that is "fair", and I use that word cautiously.

My learned friend has submitted eloquently to you, and I agree, there are obvious instances where it simply would not be fair to include certain payments and my submission to you will be that those are expressly excluded in the formula that are before you. However, on the other hand, if there is an entitlement to what my friend calls a "spike", the difference between us seems to be simple. My learned friend proceeds on a premise that that is somehow unfair or unintended whereas my submission in contrast is it is precisely why a comparative exercise is undertaken with the legislative intent being that the employee is entitled to benefit from the higher of the two calculations resulting.

Now I've at paragraph 6 moved on to apply the particular facts of this case which I apprehend to be of importance. If I can encourage your Honours to look at this from the perspective of the driver guide, he or she performs daily work which is defined and prescribed in the agreement and which broadly involves driving a bus and endeavouring to upsell. That's my term for

encouraging passengers to take on activities from providers with whom the employer has a commercial relationship.

The simple reality is that for the purpose of the s 8 calculation the appellant argues that remuneration for one of those tasks, ie, the upselling, should not be included but the other should, and at paragraph 7 I've observed that this is in direct contrast to the position that the appellant takes in relation to the alternative calculation being that prescribed at section 14 in which it concedes that that activity should indeed be included in the relevant calculation. I have referred to that as an apparent incongruity and I've submitted to your Honours that it is that incongruity that has led us to this Court and lies at the heart of what you are required to consider.

Your Honours, I've attempted to summarise very briefly what appear to be the parties' respective submissions. The appellant says that the incongruity is justified. It accepts that entitlement to wage payments arise on a daily basis during the period of a trip and, indeed, during all periods of work. But it says that entitlement to commission payments only arises at a trip's conclusion and following attendance at a debrief meeting. In its characterisation, it says that commission payments are not pay for an ordinary working week nor are they paid with weekly regularity which it says is what is required to satisfy the relevant provision.

On that note, if I can simply add a point that arose out of my learned friend's submissions this morning, Mr Skelton submitted that there was a contractual agreement that effectively was the foundation of the reconciliation process upon which he based his submissions, but I would challenge that, your Honours. In contrast, it does not believe that there is any contractual agreement requiring attendance at a debrief meeting as work required before an entitlement to commission payments arise. In fact, to the contrary. It appears that the reconciliation process arising out of the debrief is required as nothing more than what your Honour, Justice Glazebrook, referred to as a cross-check. It's a means of confirming whether or not the right payment is about to be made to the employee, and, indeed, as your Honour also

observed, the employer is not without some information already. Often the activities that have been upsold would have been undertaken, payments made to the –

O'REGAN J:

But aren't we bound by what the Employment Court found? We can't interfere with their interpretation of the contract.

MR SCOTT-HOWMAN:

No, of course not, Sir. That's something by which you are bound –

O'REGAN J:

So is it really open to us to engage with this?

MR SCOTT-HOWMAN:

Well, Sir, let me put it this way. I apprehend what you're saying is am I making a submission on a question of law or, indeed, one of fact.

O'REGAN J:

Well, on the construction of an agreement.

MR SCOTT-HOWMAN:

No, well, I certainly would submit with some confidence I'm not asking you to interpret the agreement nor am I suggesting that we depart from agreement around the series of steps that are required to be taken leading to the debrief. It is the application of the sections before you, primarily sections 8(1) and 8(2), to those facts which I would submit is a question of law.

ELLEN FRANCE J:

But you're basing that on saying, your submission as I noted it was that there was no contractual agreement requiring a debrief, and my question is, well, how does that fit in with what the Employment Court says at paragraph 38?

MR SCOTT-HOWMAN:

If I can take you to the Employment Court's decision, it appears to me that it's the following paragraph, 39, that lends some strength to my submission.

ELLEN FRANCE J:

39, sorry.

MR SCOTT-HOWMAN:

That in paragraph 39 what his Honour says is "each driver commonly received pay including commission but that was, as the driver example showed, earned over varying intervals of time and could not therefore be said to be the type of regular payment the Act contemplates being included in the calculation" of 8(2). The first submission I'd make is that after the word "and", in other words "could not therefore be said to be the type of regular payment", that is a legal finding that is open to appeal. As to the prior statement, the use of the word "earned" is problematic because in my submission that's not used in the section. The section that his Honour is referring to requires an assessment of what the employee receives, and again I would submit that that is a legal error and not a finding of fact.

GLAZEBROOK J:

In 38 there's a statement: "The commission was not earned by the driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed." Are you making that contrast in terms of time of payment as against earning in respect of that finding or...

MR SCOTT-HOWMAN:

Your Honour, yes. I'm not suggesting that we take issue with the facts that led to that finding. I suppose my first answer to that is the question of what is earned does not seem to be relevant to the assessment of the section 8 test which is the pay received by the employee.

WILLIAM YOUNG J:

For the week.

MR SCOTT-HOWMAN:

Yes, in other words, if I put it another way, it's not the right legal test, your Honour.

WILLIAM YOUNG J:

Yes, we have to apply – sorry.

GLAZEBROOK J:

No, I was just asking about the finding in paragraph 38 as to whether it was earned by the driver, in the sense that it had become payable under the employment agreement until the reconciliation was completed, which is an interpretation of the employment agreement.

MR SCOTT-HOWMAN:

I'm not sure it is. I don't think that necessarily that is about the construction of an employment agreement. It's about the question of when remuneration becomes –

O'REGAN J:

How else could you determine?

GLAZEBROOK J:

Well, I mean in 38: "However, that conclusion would be inconsistent with the employment agreement," I would have thought that the next sentence was –

O'REGAN J:

How else can you determine when it was legally earned except under the employment agreement?

MR SCOTT-HOWMAN:

Well, not only do I agree, your Honour, I think it illustrates that the nature of the employment contract is such that it is always bound up in fact or that some facts of the particular relationship will be –

O'REGAN J:

But section 214 makes that distinction. We're bound by it.

MR SCOTT-HOWMAN:

Yes, but only so far as it results in a question of the construction of the agreement as opposed to the surrounding facts of –

WILLIAM YOUNG J:

Isn't it a better argument that at the end of 38 the Judge was construing the agreement? He says: "The commissions were, as a matter of agreement, based," et cetera, but the test under the statute isn't the test of contractual liability. The test under the statute is: "Was he paid for an ordinary week?"

MR SCOTT-HOWMAN:

Yes.

WILLIAM YOUNG J:

And that's not controlled by what the Judge made of the employment agreement.

O'REGAN J:

Well, except that section 8(2) does talk about "gross earnings", doesn't it? Doesn't that mean it has to be earned if it's earnings?

MR SCOTT-HOWMAN:

Well, yes, it does. However, we are –

O'REGAN J:

So what's wrong with saying it's not earned?

MR SCOTT-HOWMAN:

No, my point being in the earlier part of section 8, at section 8(1)(a), we are told that "ordinary weekly pay" means the amount of pay that the employee receives. In other words, it's a different focus.

O'REGAN J:

But we're dealing with section 8(2).

GLAZEBROOK J:

It's under the employment agreement.

MR SCOTT-HOWMAN:

Well, you only engage section 8(2) if it's not possible to figure out under (1) what indeed the employee receives for an ordinary working week such as the concept of earning comes in second.

WILLIAM YOUNG J:

I think the appellant's argument is that the concept of pay for an ordinary working week is built into section 8(2) via section 8(1)(b)(i).

MR SCOTT-HOWMAN:

Yes, which is a submission with which the Labour Inspector takes issue.

O'REGAN J:

So you're relying on 8(1)(a) for one point but saying it doesn't apply for another. I mean you can't get away with that, can you?

MR SCOTT-HOWMAN:

Well, Sir, I think the point is different. Your Honour's point is when do earnings become relevant, and the answer is, as you rightly point out, in 8(2) but also in the alternative assessment of your average annual earnings which comes in through 14.

O'REGAN J:

Correct.

MR SCOTT-HOWMAN:

So really the question of what you receive, which is in my submission a different concept, is only engaged in 8(1).

GLAZEBROOK J:

But you have to receive it under the employment agreement for an ordinary working week.

MR SCOTT-HOWMAN:

Yes, but there's no issue in this case that the commission payments were entitlements in terms of the contract. The employment agreement not only prescribed them but detailed the way that they would be calculated.

O'REGAN J:

But it didn't say they'd be received in that working week, did it?

MR SCOTT-HOWMAN:

No, and indeed that's my submission that that is the question of law about the application of section 8 to those facts.

O'REGAN J:

So why were you taking issue with the Employment Court's finding then? If you agree that we are bound by it, why are we discussing it?

MR SCOTT-HOWMAN:

My apprehension was that my learned friend was arguing that because this is all a finding of fact and nothing more there is no entitlement for us even to be in this Court and it was a mistake for the Court of Appeal to entertain argument as well. My submission was directed at that feature which I say is not correct.

WILLIAM YOUNG J:

I think his complaint is towards what is a bit of a throwaway line towards the end of the Court of Appeal's judgment, isn't it? The reference in 38 of the Court of Appeal's judgment. I think the complaint that Mr Skelton makes is really confined to that. Well, largely confined to that.

MR SCOTT-HOWMAN:

I'm sure you're correct and he will correct me if I'm wrong about that but yes, I think that is the size of it, your Honour.

WILLIAM YOUNG J:

All right, carry on.

MR SCOTT-HOWMAN:

Turning now to my summary of the respondent's argument, again I've attempted to be economical in summarising what we say is a simple case. Commission payments are paid with regularity at the end of each trip. They are in this way regular in terms of the relevant legislative provisions. Furthermore, they are paid in consideration for tasks which are performed as an ordinary part of almost every day of work, and, your Honours, that seems to me to be an important point that is reflected, if I develop a submission in response to an example my friend gave. If I can encourage you to take the perspective of the driver guide, he or she has done everything that he or she can do to earn that commission after the day of driving and the attempt to upsell the activity to the passenger. What remains is simply for the employer to satisfy itself of the amount owed and it does that by way of a process of reconciliation but not exclusively so. It receives other information. My submission is that in all likelihood in relation to longer trips that might be undertaken by a driver an activity could have been undertaken, paid for, and the company, the employer, may have received payment from the third party entity well before the end of the trip is even complete and in those circumstances my submission would be that it would simply be unjust for the employer to retain the benefit to that payment and the employee's efforts without recognising them both as an entitlement, in other words as the driver I am entitled to be paid a commission on it, but also in my pay for holidays simply because the sum is known –

O'REGAN J:

Is there anything in the agreed statement of facts that deals with that? I mean you're postulating a possibility that they get paid during a trip. I thought the agreed statement of facts said you get –

MR SCOTT-HOWMAN:

No, no, sorry, your Honour, I didn't mean that, no. The agreed statement of facts suggests that payments are only made after the debrief meeting, my submission being –

WILLIAM YOUNG J:

But weren't there three exceptions?

MR SCOTT-HOWMAN:

Yes, there were, and they were for different reasons but I think one was that there were back-to-back trips. Also there is a difference in the Kiwi Experience payments. They are made as soon as they are sold, I think it being said that the reconciliation is not as important because it's the employer company that can verify whether or not the sale has been made. So there was some departure from that practice.

WILLIAMS J:

So internal upselling was paid immediately? The commission on internal upselling was paid immediately on sale?

MR SCOTT-HOWMAN:

I'm not sure if it was immediately but without the need for the reconciliation process that was required –

WILLIAMS J:

Still at the end of the trip?

MR SCOTT-HOWMAN:

Yes, yes.

WILLIAM YOUNG J:

Mr Scott-Howman, is there anywhere in the material an analysis by reference to Lisa Lui's remuneration calculations of the holiday pay she was entitled to under the average earnings scenario and the section 8 scenario?

MR SCOTT-HOWMAN:

I don't believe so, no. The comparative exercise, no.

WILLIAM YOUNG J:

Is it possible to do that?

MR SCOTT-HOWMAN:

I'm sure it would be, and it may well illustrate what I apprehend to be the likely scenario for a driver. Because there are seasons, high season, low season, work throughout a year may be so sporadic that the average annualised earnings will be lower than the most recent earnings if leave is taken after a trip.

O'REGAN J:

Presumably the Inspector only took this case because it was believed that people like her were getting lower amounts of holiday pay than they should have?

MR SCOTT-HOWMAN:

I'm sure that's correct, Sir. I'm just not aware of the calculations that confirm that.

O'REGAN J:

So there's nothing the record on that?

MR SCOTT-HOWMAN:

I don't – I'll ask my junior. Your Honour, that confirms my suspicion. We know the raw data but to your Honour's question, no, the calculations don't appear to be in the material.

WILLIAM YOUNG J:

So would it possible for you and Mr Skelton to use the raw data to provide tables showing the different interpretations by reference to her?

MR SCOTT-HOWMAN:

I'm sure we'd be capable of co-operating to do that, your Honour.

WILLIAM YOUNG J:

Okay, thank you.

MR SCOTT-HOWMAN:

Your Honours, perhaps if I can return to a point I made briefly earlier around what I submit to be the appropriate focus of section 8(1) in terms of pay that is received by the employee. It seems to me that my learned friend's attempts to bring in the concepts of what is earned and what is payable is different in concept and not consistent with the purpose of that provision. What I mean by that, your Honours, is if I do a week of work and for that week of effort I receive a particular payment, it should matter not whether that payment is made to me at the end of that week, at the end of that fortnight, or at a different period. If it is received for the work that I have performed and in consideration of that service, that is what is intended to be captured by the section.

O'REGAN J:

So Mr Skelton's example of the chief executive getting a bonus at the end of the year, you're saying that that wouldn't become part of the section 8 calculation for the chief executive's holiday pay the week after the bonus was received?

MR SCOTT-HOWMAN:

Well, I think he has some strength in that argument if, indeed, by dint of the exceptions in section 8(1) that could be established as a one-off or exceptional payment. I think the point becomes more tricky if, for example, you were paid both wage and commission on a fortnightly basis. On my

learned friend's argument, Mr Skelton's argument, that would be excluded from the analysis under 8(1) because it wasn't paid weekly whereas my submission would be, well, it would be quite easy to determine in an ordinary week of work what you earned.

O'REGAN J:

I don't think that was his point actually because I think he accepted that as long as you had an entitlement to be paid for the hourly rate and commission you earned in that week, even if you were paid monthly or fortnightly, it would come within section 8(1). I think he accepted that.

MR SCOTT-HOWMAN:

Well, I'm happy to be corrected on that. The additional submission –

GLAZEBROOK J:

I think though his point was that if the commission was going to be up and down and you didn't know what it was going to be you'd have to go to 8(2).

MR SCOTT-HOWMAN:

Yes.

GLAZEBROOK J:

That's what I understood his position to be.

MR SCOTT-HOWMAN:

And I concur with that, your Honour. Simply, I think that would be your freezing work example, your Honour, where you –

GLAZEBROOK J:

Well, probably any commission because commission's going to go up and down depending on what you sell in a particular week, isn't it?

MR SCOTT-HOWMAN:

Yes, I would agree with that and that would – going back to what I've submitted is the fundamental philosophy, that would appear to accord with

what the Act intends, that you reach a reasonable approximation of what you would have earned in a week in which you take leisure and not work.

GLAZEBROOK J:

And you either do that because you know what it is because it's weekly or you do it on the basis of the four weeks just prior to taking a holiday if it is regular but a bit up and down?

MR SCOTT-HOWMAN:

Yes, because that's the presumption that that is one way of a reasonable approximation of what you should be owed for the week of leisure. The other, of course, is the annual exercise which provides some comparison.

GLAZEBROOK J:

And probably would be relatively the same if you're paid – if your commission goes up and down by \$50 from one week to the next, for instance.

MR SCOTT-HOWMAN:

Yes, well, that would be, to use my friend's words, moved over the approximated calculation in a way that I would submit is consistent with the ambition of the Act to pay people what they would otherwise have been paid during a week when they're not required to work.

O'REGAN J:

Can I just come back to Mr Skelton's chief executive example? I mean applying the Court of Appeal decision the chief executive gets paid a bonus which is a regular part of their pay because every year they get it and it's done according to the rules in the chief executive's remuneration package, so it's systematically and according to rules, to use the Court of Appeal's words. So doesn't mean it is then part of the weekly earnings of the chief executive on which the holiday pay would be calculated?

MR SCOTT-HOWMAN:

I take your Honour's point. It could be. I tend to agreement with Mr Skelton.

O'REGAN J:

But isn't that unlikely to be intended by this legislation?

MR SCOTT-HOWMAN:

Well, no, Sir, I would say the opposite, that it is within the employer's power to choose how and when such payments are made and if it is concerned about such things as a spike it's entirely within the employer's power to avoid that in the way it structures remuneration. For example, to take your Honour's example, you could say that "congratulations, your effort last year resulted in you being entitled to a payment of 100,000. I'm going to pay that in 12 equal payments through the year that will now follow." That would eliminate the spike that your Honour is referring to.

O'REGAN J:

Yes, but if the contract says you're entitled to a lump sum why would you do that?

MR SCOTT-HOWMAN:

Well, because the employer drafts the contract and may design –

O'REGAN J:

No, they don't. They agree it. It's a contract.

MR SCOTT-HOWMAN:

No, but my point being, your Honour, it's within the employer's power to avoid that. But my second submission is more fundamental.

O'REGAN J:

But why should they? I mean paying a bonus is a completely ordinary thing to do. Why should they have to jump through a whole lot of hoops to avoid a ridiculous outcome?

MR SCOTT-HOWMAN:

Well, I'm not sure that I agree that it's necessarily ridiculous because the entire premise of this legislation is that I am entitled to benefit from the higher of two calculations such that this fundamental premise my friend relies on, that there is something objectionable to a spike, my submission is the opposite. The legislation expressly intends you to benefit from such things.

O'REGAN J:

I don't think you're going to get a lot of sympathy for that submission on the example you're giving. Surely there is an interpretation available that doesn't lead to that outcome.

MR SCOTT-HOWMAN:

Well, I can tell you, Sir, there's another case shortly to be before the Court of Appeal that deals with precisely that and you're right, in terms of the annual bonus it turns on the question of whether it is either a one-off or exceptional payment or whether it's a discretionary payment that the employer is not bound to make and therefore should not be considered in that way.

WILLIAM YOUNG J:

Is the Employment Court judgment in that case available?

MR SCOTT-HOWMAN:

It hasn't been heard yet, your Honour. It's heard next month.

WILLIAM YOUNG J:

But that's in the Court of Appeal?

MR SCOTT-HOWMAN:

This month, sorry. Yes, in the Court of Appeal.

WILLIAM YOUNG J:

So there must be an Employment Court judgment?

MR SCOTT-HOWMAN:

Sorry, an Employment Court judgment, yes.

WILLIAM YOUNG J:

The only authority we've got is *Schollum*, I think.

MR SCOTT-HOWMAN:

No, and I don't believe my friend has it in his bundle. I don't think it's before the Court.

MR SKELTON QC:

No, your Honour. It's on a different topic. It's on section 14 about whether discretionary payments, whether they are bound to be paid or not, and –

GLAZEBROOK J:

Which is a different point.

MR SKELTON QC:

– you know, Christmas bonus. It's a different point. It's not on section 8. But we can certainly make that available.

WILLIAM YOUNG J:

Thank you, I think it might be helpful.

MR SCOTT-HOWMAN:

Yes, I'm sure we can do that. Your Honour, Justice O'Regan, I believe that that is a better answer to the submission that I was invited to make that if indeed it is excluded then it doesn't come into the calculation at all because it is sufficiently unusual or extraordinary not to be regarded as part of what I would ordinarily earn and therefore be required when on a period of leave.

GLAZEBROOK J:

So where do you get that exclusion?

MR SCOTT-HOWMAN:

It's in 8(1)(c). It is either under (iii) which is any one-off or exceptional payment, or (iv) which is any discretionary payment that the employer is not bound, under the terms of the agreement, to pay.

GLAZEBROOK J:

Well, what about little (i)? What do you say, that regular can be yearly?

MR SCOTT-HOWMAN:

Well, that's conceptually possible but I'm not sure that that's necessarily so.

GLAZEBROOK J:

But that must be your submission.

MR SCOTT-HOWMAN:

Yes, I think –

GLAZEBROOK J:

That if it's paid yearly, whereas isn't a better interpretation if you're looking at a regular part of the employee's pay you're looking at whatever the pay cycle is? So if it's regularly there monthly and your pay cycle's monthly or it's regularly there weekly and your pay cycle's weekly then it's not excluded, whenever it happens to be earned or whenever it happens to be paid.

MR SCOTT-HOWMAN:

I take the point, your Honour. I think a better way of it applying to the facts of the case before you would be if commissions were not assessed at the end of each trip but rather on an annual basis based on a reconciliation that happened once a year would you still say that they were regular payments, and my submission would be in that case, well, they are because the work that I do to justify them occurs daily. The fact that I receive payment for them on at least regular cycle up to annually does not mean that I don't earn them daily.

GLAZEBROOK J:

Well, they're not a regular part of your pay though if it's paid yearly, are they? I mean it just doesn't seem to make any sense to say that it's a regular part of your pay.

MR SCOTT-HOWMAN:

Well, certainly not in terms of the temporal regularity.

GLAZEBROOK J:

Well, exactly.

MR SCOTT-HOWMAN:

But in terms of substantive regularity it still represents half of everything that I earn.

GLAZEBROOK J:

Well, is your submission you look at substantive or temporal or you look at substantive and temporal?

MR SCOTT-HOWMAN:

It appears that the Court of Appeal's intention is that you can look at either/or to determine whether they're regular for the point of the assessment in section 8(1).

GLAZEBROOK J:

And what do you say? Because, of course, you don't need to submit that for this case, do you?

MR SCOTT-HOWMAN:

No, no, and because we are benefited by the fact that the Court of Appeal said that on either assessment payments were regular in this case.

WILLIAM YOUNG J:

The policy issues as I see them and as I put them to Mr Skelton is (a), involve (a) the possibility of a spike, and secondly the possibility that was addressed

in *Schollum* of where a particular payment, an entitlement to a particular payment, continues to accrue when an employee is on leave, where, to put it in another way, where the payment isn't particularly correlated to work done by the employee on a day-to-day, week-to-week basis. Do you accept that or are there other policy considerations that come into play?

MR SCOTT-HOWMAN:

I certainly accept the principle in *Schollum* is that we don't know whether or not you will be entitled to any payment until the end of the month at which point the threshold is assessed.

WILLIAM YOUNG J:

Well, no, but one of the things about *Schollum* for which I have some sympathy for the employer was that commission continued to tick over for the two employees when they're on holiday because they were entitled to commission on sales made people in their team.

MR SCOTT-HOWMAN:

Yes.

WILLIAM YOUNG J:

And so to give them that commission as part of the holiday pay entitlement did mean some doubling up.

MR SCOTT-HOWMAN:

The converse, though, your Honour, is that because of their absence if the threshold wasn't met by the team the entire team would be disadvantaged.

WILLIAM YOUNG J:

Well, that may be right. So I just see that as an issue and it may be the way of dealing with the one-off bonus for the chief executive is along those sorts of lines, that it's not really correlated to work done on a day-to-day basis, it's to do with the KPIs that the whole company achieves. On the other hand, it's all

malleable. I mean there may be no bonus at all. It just may be subsumed in the regular salary, in which case holiday pay applies.

MR SCOTT-HOWMAN:

Yes. Your Honour may be right that that is the appropriate characterisation of those examples.

WILLIAMS J:

You've still got to confront your starting point which is the Holidays Act was designed to provide some kind of reasonable approximation of one's weekly earnings for your down time and the factual reality of a spike because some spikes will be consistent with that and some spikes will be so thoroughly inconsistent with that that the Holidays Act can't possibly have intended, and I suspect that the chief executive's one-off 100k is going to be one of those.

MR SCOTT-HOWMAN:

I agree, your Honour, and in fact I would be brave to submit that I could pick the difference. It would seem to me that my mother's advice that one should always apply common sense, but the problem is it's not that common, that you will always be able to identify an example so absurd that it cannot fit the model, but on the other hand my entreaty to you is not to be distracted by that such that you disadvantage an ordinary person such as the driver guide from getting the benefit that is clearly intended expressly by the legislation that you are entitled to some spike. In other words, the greater of the two equations.

WILLIAMS J:

So we're going to have to find a line, if we end up agreeing with you and disagreeing with Mr Skelton, over his firm seven-day cycle. What would you suggest?

MR SCOTT-HOWMAN:

Well, it seems to me that at either end of the extreme you can exclude some possibilities as nonsensical. The submission that I made about the chief executive and his Honour Justice O'Regan's points about that may illustrate

that that is sufficiently extreme that common sense just dictates that it should not be included.

O'REGAN J:

But we have to come up with a coherent scheme so that employers know what their obligations are, otherwise they're going to get into this thing of having to go back six years...

MR SCOTT-HOWMAN:

Quite, and equally I would say that –

O'REGAN J:

And just saying it's common sense is not cutting the mustard with that, is it?

MR SCOTT-HOWMAN:

No, I'm not saying that that's the strategy that one should adopt in these things, but it does seem to me that some element of common sense is necessary in this case. If I can put it back to you the other way, at the extreme on my learned friend's arguments, if you were paid fortnightly or monthly, both your daily wage and your commission, you could never have weekly earnings because the frequency of weekly payment wouldn't occur.

O'REGAN J:

I honestly don't think that's the submission. He didn't say that. He accepted that if you got paid on a cycle other than weekly, it didn't matter as long as what you had, which was your salary and your commissions, were actually all earned in that week. That was what he said.

MR SCOTT-HOWMAN:

Therein, your Honour, it appears we've got some middle ground in terms of the question I was asked. How can you determine it. It would appear that if one applies what I've referred to as common sense on an assessment of –

O'REGAN J:

But you're acting for the regulator here. You're coming to us and saying: "As the regulator this person has breached the legislation." You've got to tell us what the rule is for that breach, and you're not doing it. I mean we're putting these questions to you and you're just ducking them.

MR SCOTT-HOWMAN:

I'm not sure I'm intending to duck them your Honour, because it seems to me that the answer the labour inspector gives you is that by applying the test under 8(2) it is intended to capture the commission payments that are made, and that the arguments to the opposite, that they are paid within sufficient regularity to be captured, is not fair nor appealing, and that is the substance of the submission your Honour.

WILLIAMS J:

I took Mr Skelton to be saying that the calculus is based on the entitlement, so if you didn't derive your entitlement within the seven day cycle, it couldn't be included, correct?

MR SCOTT-HOWMAN:

Yes.

WILLIAMS J:

Which is why a 40 day trip, end of a 40 day trip based entitlement was outside it. You say that's too tight. You say annual is too loose in terms of entitlement. You say common sense is the answer. What's your common sense?

MR SCOTT-HOWMAN:

I'll answer that by providing you with two examples that I think illustrate the position. Let's take first that you are paid a daily rate for days that you work, and let's say in a particular week you worked five days, but the payment cycle doesn't occur for two days after you finished that five day work. If you took a holiday the day following your five days of work, could the employer say:

“I'm not obliged to take into account the five days that you've worked because you haven't been paid for it yet, and you are only entitled to be paid on the payday, which is tomorrow. So you miss out on that week.” That would seem to me to be an unfair and absurd interpretation of the way in which –

O'REGAN J:

But I don't think it's one that Mr Skelton is putting forward, so you're shooting at an open door.

MR SCOTT-HOWMAN:

No, your Honour, I'm not putting that argument in his mouth, I'm simply answering Justice Williams' question, that that would be one way of illustrating the potential absurdity that could result. What I'm saying, your Honour, is in that case it would seem to me to be absolutely open to the employer to know what the payment will be, and that that should be reflected in the calculation that is then undertaken.

GLAZEBROOK J:

But that isn't Mr Skelton's argument. So it might be absurd but it's not one that arises from the appellant's argument. What the appellant is saying, that if it's not earned in that period, then it's not, it doesn't matter when it's payable, it's not earned in that period, then it's not earned regularly enough to come within 8(2).

MR SCOTT-HOWMAN:

I understand the point. I think the difference between us is the question around accrued entitlement and when it's payable. You may have done all of the work required to be paid, it's simply not yet payable, that may be the distinction.

GLAZEBROOK J:

And he would agree that if that's the case, and it accrues on a weekly basis, then it is calculated in part of the calculation, as I understand his argument.

MR SCOTT-HOWMAN:

And I think your Honour questioned him by effectively saying well it's possible, isn't it, that the company may well know that it is going to be obliged to pay you something because the company has already received payment from a third party such that it would therefore be unjust not to recognise that as an earning at that point.

GLAZEBROOK J:

But then we might be coming down to the interpretation of the employment contract which is what he countered with when I put that to him, and that the finding of the Employment Court is that it isn't earned until the reconciliation is done.

MR SCOTT-HOWMAN:

And I'm not sure I can help you further with that simply because I would reiterate the points made before, that that appears to me to be a question of law unrelated to the construction of the contract.

GLAZEBROOK J:

Well, when something is earned can't be irrelevant under the contract, can it?

MR SCOTT-HOWMAN:

The contract must be part of the factual background but whether that makes it an exclusive finding of fact about the construction of the contract is a different matter.

WILLIAM YOUNG J:

Well, it's not a finding of fact, it's a finding of law that if it's – it's not open to challenge in this Court but the real issue is what does the statute mean.

MR SCOTT-HOWMAN:

Yes.

WILLIAM YOUNG J:

And it doesn't necessarily – the meaning of an application or statute is not necessarily controlled by what the contract says. It's obviously going to be influenced by it.

MR SCOTT-HOWMAN:

Yes.

WILLIAM YOUNG J:

And the word "earned" is used in section 14 but that's for gross earnings, but it's not used in section 8(1), which may indicate that it's something different, that the pay for an ordinary week doesn't necessarily have the same meaning as earnings for that week.

MR SCOTT-HOWMAN:

That's my submission, Sir. The key is the word "receives".

WILLIAM YOUNG J:

Well, I think it's "pay for" actually.

MR SCOTT-HOWMAN:

Yes.

O'REGAN J:

So do you basically – your position is that the Court of Appeal answer to the question, to the first question, is a correct answer. Is that your position? That payments are "a regular part of the employee's pay" if they are made substantively regularly, being made systematically and according to rules; or are made temporally regularly, being uniformly in time and manner?

MR SCOTT-HOWMAN:

Yes. Your Honours, I'm not sure if it's necessary for me to go into further detail about the balance of the respondent's submissions. You will see at 10.2 I have submitted in keeping with the Court of Appeal's finding the

Labour Inspector says that it's incongruous to import into section 8(2) consideration of an employee's ordinary working week when the provision applies because it is not possible to determine that, and that is one of the findings that the Court of Appeal –

WILLIAM YOUNG J:

Sorry, where are you in your –

MR SCOTT-HOWMAN:

Sorry, in my oral argument at paragraph 10.2, just at the very conclusion of that, your Honour.

And the final submission is that in the alternative if that requirement is indeed imported then it is met on the facts of the case that is before you.

ELLEN FRANCE J:

Can I just check one thing? In relation to the chief executive, if she comes under 8(1)(c)(iii), for example, so it's a one-off or exceptional payment, then do you say, well, you just do the calculation otherwise under 8(1)?

MR SCOTT-HOWMAN:

That seems to be the starting point of the Act, yes.

ELLEN FRANCE J:

Right, thank you.

MR SCOTT-HOWMAN:

Unless it's not possible to do so. Yes.

ELLEN FRANCE J:

So you just take those payments out and then it is possible?

MR SCOTT-HOWMAN:

Yes. And then compare it to the annual figure which is the subject, as my friend points out, of the other litigation before the Court of Appeal.

WILLIAM YOUNG J:

Thank you, Mr Scott-Howman.

MR SCOTT-HOWMAN:

Thank you, your Honour.

MR SKELTON QC:

Your Honours, I think the answer to a number of these difficulties is to go back to the wording of 8(1)(a) because if we look at 8(1)(a), “means the amount of pay that the employee receives under his or her employment contract”, and then the key word is “for”, it’s “for an ordinary working week”, and that’s where the executive who gets the yearly performance bonus, we say it’s not referable to the working week, that’s over the whole year so would be excluded. Likewise with these drivers who get their commission payment at the end of the trip, not referable for the working week. So the word “for” is quite important in that analysis.

My learned friend then attempted to draw a distinction between the word “receives” in 8(1)(a) and says it doesn’t say “earned”. Well, the Employment Court dealt with that submission that had been made by the Labour Inspector in its judgment, is there any difference between “received” and “earned”, and it’s at paragraph 37 of the Employment Court’s judgment. And Judge Smith rejected that argument and said “received” means –

GLAZEBROOK J:

Sorry, I didn’t catch the paragraph number.

MR SKELTON QC:

Paragraph 37, your Honour. So his Honour referred to the “gross earning” definition in section 14: “That extended definition encompasses all earnings,” and fell back on that idea that it has to be due under the terms of the employment contract. So “receives” equals “earned” in that paragraph is what he’s saying, and I submit that that is correct. It’s not when it’s paid that’s important, and we’ve talked about that. You – on the fortnightly salary you

mightn't actually get paid later but you still have earned your salary during that particular week.

That's how you draw your bright line and guidance for employers in this case. If the commissions are earned in the sense of being legally payable within the week, the freezing-worker example, then they're in and included in the ordinary weekly pay calculation.

GLAZEBROOK J:

Can I just check you mean "earned" within the week rather than "payable"?

MR SKELTON QC:

Yes, earned within the week. Yes, your Honour. If they are earned within the week then it's in. If they are earned over a longer period, a month, quarterly or annually, then they are out of that calculation but included in the average weekly earnings calculation. And that's what I submit was intended by the heading "meaning of ordinary weekly pay" by the wording in 8(1)(a) and then by the incorporation and linking of the two sections, the 8(2) to the 8(1). It's linked through that definition of b in the formula. Total amount is payable described in subsection (1)(c)(i) to (iii).

Now my learned friend discussed the chief executive example and said, well, maybe you could deal with that as a one-off or exceptional payment. The premise I put to you was the chief executive received his incentive payment each year for the last 10 years. It's not a one-off or exceptional payment. It happens all the time. So that's not really the way of excluding it out of the system.

WILLIAM YOUNG J:

But if it were built into the salary, if they said: "Why are we going through this? Let's just built it into the salary," then it would be covered by holiday – it would be brought into the holiday pay calculation.

MR SKELTON QC:

It would because then it would have been earned for him just turning up for that week and he would have a legal right to a salary. That's true. However, KPIs you have to achieve certain entitlements. As Justice O'Regan said, it might be linked to the profitability of the business. But, of course, he turns up every day and he works every day of the year towards that, so in that loose sense he's accruing it, but it's not a legal entitlement to be paid it until the end of the year until whether or not the targets have been met.

Now your Honours, I did have some responses to the written submissions from my learned friend. If that would be of assistance I could quickly run through those.

GLAZEBROOK J:

If it helps you, you were talking about paragraph 32 when we stopped you.

MR SKELTON QC:

At what, 44 is the next one I've...

GLAZEBROOK J:

44 is the next one, so you've finished on paragraph 32, so then it's a response to paragraph 44.

MR SKELTON QC:

Yes, that was in this statement of the reasoning. I think the next one I wanted to look at is 45, your Honours. That's around the definition of what does "regular" mean, and the respondents really mistake the appellant's case in relation to the meaning of "regular". If commission is earned over a period of a week or less it is not excluded, and that's the call centre operator or the freezing worker example we gave, if commission earned over a period greater than a week, it's included in average weekly earnings but excluded from ordinary weekly pay. That's the –

GLAZEBROOK J:

Can I just check, just because I indicated what I thought your argument was. So if it's earned for the week or less, but is a bit spiky, you say you have to go to 8(2)?

MR SKELTON QC:

Yes, if it's variable pay, you have to go to 8(2) to do that four week averaging process.

GLAZEBROOK J:

So essentially if it's earned week-by-week, in one week it might be \$50, one week it might be \$45, another week it might be \$52, you can't calculate under 8(1) because it's a variable amount and has to go under 8(2).

MR SKELTON QC:

You go under 8(2).

GLAZEBROOK J:

I thought that was your argument.

MR SKELTON QC:

That's correct your Honour, and of course the little (a) in the formula is the four calendar weeks before the end of the pay period. You include all of those earnings and then divide by four. You don't exclude them under (b) because they were earned in the sense of being legally payable within that week. So you just average it out.

GLAZEBROOK J:

So the same would apply to overtime. If you had two hours one week, three hours another week, one hour the other week, it would come under four, is that...

MR SKELTON QC:

Ye sit would come under four, and then you would have to decide on that issue of what does “regular” mean. If it was regular if you’d paid overtime two hours a week on a regular basis, then it’s in. But if it was a one-off situation where you had worked on a project that particular week for say 10 extra hours of overtime over and above that two, then I’d submit it would be excluded because it wouldn’t meet the regularity test.

GLAZEBROOK J:

So is your regularity test a weekly regularity test, because you can imagine a situation where you do two hours one week, none another week, four hours the next week, in terms of overtime that is. So it’s effectively a regular part of your requirement under your contract, but some weeks it might be none, some weeks it might be four.

MR SKELTON QC:

Yes, that’s correct, but it’s regular tested against the frequency of the week. So if you regularly work, you know, overtime each week, then it’s a...

GLAZEBROOK J:

What say you do it for 25 weeks out of 40.

MR SKELTON QC:

Then there’s a judgment call that has to be made as to whether that’s regular or not. That issue arises a lot.

GLAZEBROOK J:

No, that’s fine, you don’t say it has to be every week, you accept that there could be...

MR SKELTON QC:

No, no, I think you’ve got to look at the pattern. There might be a week you miss, or whatever, but if you look at it and make a judgment call, well, they regularly work, you know, two hours overtime a week, then overtime is in.

But it's the spike. It's the, they did a special project and they, you know, 10 hours overtime one week, that would be exceptional.

Now at 46 of my learned friend's written submissions, it's not contended that commission must be paid in the week to be included, and we've talked about that and the correct analysis as the Employment Court noted is that commission earned during the week is in. If it's longer than a week, it's excluded. 47 is a discussion about the spikes in my learned friend's submissions and at 47.1 the suggestion, and I think it's been repeated in oral submissions, is that, well the Act intends to benefit employees in these circumstances. The answer is, well, whatever the Act says has to be applied. It's not an issue for the Court as to what is fair and reasonable in these circumstances. But employees aren't financially disadvantaged because commissions are included in the average weekly earnings calculation.

At paragraph 61 of my learned friend's submissions the last sentence there: "The cross-referencing language in 8(2) therefore does not refer to, or require incorporation by necessary implication of, the language or concepts from 8(1)(a)." That's the key point of difference, really, between us. The appellant's submissions are that 8(1)(a) is the general definition of "ordinary weekly pay" and is central to the interpretation of the rest of the section 8, and helps to inform the meaning of those sections.

Paragraph 62, yes it's true employees are entitled to the greater but it's subject to the exclusions in (1)(c)(i) to (1)(c)(iii), and those exclusions are to moderate the spikes. That's why those exceptional payments are removed. Payments that aren't a regular part of overtime is out, and productivity incentive payments are not a regular part of pay is out. So while there will be spikes under that calculation, and that's accepted, it moderates it through that 8(c) provisions excluding the exceptional or unregular amounts.

WILLIAMS J:

It seems to me what it does is reduce –

MR SKELTON QC:

The spike?

WILLIAMS J:

– the amount that – well, to reduce the amount an employee would get to a level below that which they would normally get while working for the employer, because the average option under section 21 takes into account the downtime. So that they're getting less in their pocket for holiday pay than they would get while they're working for the employer, by reference to the three months that they're off. So it's not an approximation of their weekly pay packet, what they would, the cash they get in their pocket while they're working for the employer, it's an approximation of that less the dead part.

MR SKELTON QC:

Yes your Honour, although if they take their holiday during the dead time –

WILLIAMS J:

Well they generally would, won't they?

MR SKELTON QC:

– then they get the average. So they would have been earning nothing during the dead time, they get the benefit of the average over that period, so it is a spreading mechanism.

WILLIAMS J:

Well though you see the holiday, it seems to me in this case that's exactly the time you'd take it, the employer would want you to take it then because they'd need you during the high season, but the holiday that they take, those four weeks, are also included in the dead time. So they get disadvantaged by taking the holiday.

MR SKELTON QC:

Well they're entitled to the greater of the two calculations.

WILLIAMS J:

Yes but the averaging calculation takes account of three months' unemployment, 8(2) does not. If the purpose of section 8, or the Act generally, is to approximate what a worker is getting in their pocket while working for the employer, the question is whether it was intended that that effective period of being unemployed should be included in the calculation or not. That's the disadvantage to the employee, and your answer to that is that section 8 is a seven-day cycle calculation only, and that's just tough. And the other side says, it's not a seven-day calculation only, because that doesn't give you a fair approximation of what goes into the employee's pocket while working for the employer. Is that a fair approximation of where you two are at?

MR SKELTON QC:

Well I believe that's the effect of the legislation is to say well let's look at the ordinary working week and do a calculation on that, and then the averaging and give them the better of the two, but your Honour is correct that if there is downtime, off-season time, that will reduce the average over the period of the year. But that's, I would submit, is intended. Just like the chief executive example, if they get a big \$100,000 payment in one lump sum, it's meant to spread it over the year as well so that they can't claim it and just take a holiday the week after they got their \$100,000 payment. But it's that word "for" an ordinary working week that's crucial. That's why I say it is that seven day period that is crucial.

At 63 my learned friend's in the last part of 63 says: "In the case of the commissions they will therefore be included in item 'b' only if they are not a regular part of a driver guide's pay. It is not necessary to separately consider whether the commissions are pay for an ordinary working week." Well we submit that isn't correct. Each quarterly or yearly – there's the example of a quarterly bonus or a yearly bonus. An employee may have received commission paid regularly but not included in that calculation according to the *Schollum* test and the 8(1) test.

The concession I referred to previously in terms of the alternative argument raised by my learned friends about the driver does in fact receive commission for the ordinary working week is at 67.

WILLIAM YOUNG J:

I don't think it is a concession, is it?

MR SKELTON QC:

Well, the respondents are content for the Court to adopt that position. I accept it's for the alternative argument. They're not abandoning that issue. But the submission I submit is correct that really what is a person's ordinary working week you've got to go back to the contract, look at the duties, look at the responsibilities and hours, and that is their ordinary working week and all permanent employees have that.

GLAZEBROOK J:

Well, what about the submission that in this case their ordinary working week in terms of work includes upselling and driving?

MR SKELTON QC:

It does. We accept that.

GLAZEBROOK J:

So even if you don't get paid for the upselling until later and haven't got an entitlement to be paid, aren't you still having a productivity or incentive-based payment that is a regular part of the employee's pay?

MR SKELTON QC:

Well, their duties include driving and upselling.

GLAZEBROOK J:

But they're paid every – whenever they are paid, they are paid for driving and also for upselling, aren't they, regularly?

MR SKELTON QC:

Yes, their duties include driving and upselling, so that's...

GLAZEBROOK J:

And they're paid for that regularly, on a regular basis.

MR SKELTON QC:

Well, it's – the issue –

GLAZEBROOK J:

I'm just really saying why doesn't it – it doesn't come within the (c)(i) exclusion, does it? That's what I'm putting to you and asking for your assistance on why it doesn't.

MR SKELTON QC:

Because, I submit, you have to read there the words "the employee's pay". You have to say, well, pay for what? For the ordinary working week. That's the reference back to the 8(1)(a) language, "for an ordinary working week", and that in this case they weren't paid for the ordinary working week; they were paid on a per-trip basis. Commission was earned on a trip basis.

GLAZEBROOK J:

And the argument is that you pull that also into 8(2) as I understand it, is that right?

MR SKELTON QC:

Well, that's – yes, the Act too, it's the same. If it's not for an ordinary working week, if you're paid monthly or quarterly bonuses, then I say it's out. If it is for an ordinary working week you still have to then consider the regularity issue. So those are the two filters.

76, my learned friend just conflates the issue about earning and being paid – at 70, sorry, 70 of his submissions he says, second sentence there, the only distinguishing element between these two components of the pay is the daily

rates are paid weekly whereas commissions are paid at irregular intervals, and I submit no, the key distinguishing element is when the remuneration is earned.

WILLIAM YOUNG J:

I think we've got that actually.

MR SKELTON QC:

You've got that? And, your Honour, I think just the last points, just 80.4 and 80.5, that's a jurisdictional issue that we've covered as well, so I won't take you through that any further.

WILLIAM YOUNG J:

Mr Skelton, would it be possible, as I suggested to Mr Scott-Howman, for calculations to be prepared by reference to Ms Lisa Lui, and I guess the two holidays she took, one was in 2015 and one in 2016, as to how the different contentions play out. So those calculations would be under section 8(2) on your theory of the case, and on –

MR SKELTON QC:

Average weekly earnings to compare them?

WILLIAM YOUNG J:

Sorry, no, on your theory of the case and on Mr Scott-Howman's theory of the case, so there'd be two competing 8(2) calculations, and then there'd be a third calculation which I trust would be agreed, although if it isn't...

GLAZEBROOK J:

You'd say it's an 8(1) calculation –

MR SKELTON QC:

I expect it will be agreed your Honour, I don't think there's a dispute.

WILLIAM YOUNG J:

Okay, it's the average weekly earnings figure.

MR SKELTON QC:

I don't think there'll be dispute on that. We could do that.

WILLIAM YOUNG J:

Okay, so we'll get three sets of figures for those two holiday periods, which will show how this plays out in dollars and cents.

WILLIAMS J:

Do we know whether the Employment Court had those numbers? They did. Someone is nodding down the back.

MR SKELTON QC:

Your Honour, I wasn't acting. Apparently they did. I don't know your Honour, I can't confirm that.

WILLIAMS J:

Okay.

WILLIAM YOUNG J:

The raw data is there.

MR SKELTON QC:

Yes. But we can do those calculations and make them available.

WILLIAM YOUNG J:

How long would that take, do you think?

MR SKELTON QC:

A week your Honour.

WILLIAM YOUNG J:

Okay, if you can file those, that would be most helpful. Subject to that we will take time to consider our judgment and will retire.

COURT ADJOURNS: 1.02 PM