

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 337
5417267

BETWEEN TODD HOWELL
 Applicant

AND ZEE TAGS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: S Langton, Counsel for Applicant
 K Beck, Counsel for Respondent

Investigation: On consideration of the papers

Determination: 5 August 2013

DETERMINATION OF THE AUTHORITY

Application for Removal of a Matter to the Employment Court

[1] This matter comes before the Authority via an application from Mr Howell received by the Authority on 18 July 2013. The application for removal is, effectively, the culmination of various proceedings before the Authority that had their origin on 18 April 2013; whereby the *Statement of Problem* raised two claims. One of the claims, relating to a dispute about the interpretation and application of certain restraint covenants contained within Mr Howell's employment agreement, has since been resolved by the parties. Hence, it is not relevant to the current removal application.

[2] It is the second claim raised by Mr Howell in his statement of problem that is the subject matter of this removal application. Mr Howell's claim against the respondent, Zee Tags Limited (Zee Tags) is that he is entitled to be paid the sum of \$256,000 as holiday pay. From June 2002 until 3 February 2012, Mr Howell was employed by Zee Tags in the role of General Manager and he says that the holiday pay entitlement arises from the (undisputed) fact that he was paid by the respondent,

an incentive payment in the gross sum of \$3,200,000 (the incentive payment). This payment was paid pursuant to the terms of the *Growth Incentive Agreement* entered into on or about 11 September 2009. The terms of this agreement, and the incentive payment made to Mr Howell under it, are not in dispute. Rather, the dispute between the parties is that Mr Howell says that he is entitled to be paid annual holiday pay of \$256,000 (the holiday pay). This sum is 8% of the incentive payment. Zee Tags rejects the claim.

The claim for holiday pay

[3] Mr Howell claims that he is entitled to the holiday pay because for the period since the last anniversary of his employment (1 December 2011), and in relation to his employment with Zee Tags, his gross earnings included the incentive payment referred to above (paragraph 2) and that this was a payment that Zee Tags was required to pay to him under his employment agreement, pursuant to s.14 of the Holidays Act 2003 (the Act).¹

[4] Mr Howell claims that pursuant to s.25 of the Act, Zee Tags was required, at the date of the termination of his employment, 3 February 2012 (the termination date), to pay to him holiday pay equivalent to 8% of his gross earnings. Mr Howell acknowledges that on the termination date, Zee Tags paid him holiday pay of \$17,054.07. However, he says that upon Zee Tags making payment of the incentive payment on 22 January 2013 (post-termination), he is entitled to a further sum of \$256,000; being 8% of the incentive payment: pursuant to s.25(2) of the Act.

[5] In regard to remedies, Mr Howell seeks an order for payment of the holiday pay and interest on that amount calculated in accordance with clause 11 of Schedule 2 of the Employment Relations Act 2000.

The rebuttal by Zee Tags

[6] Zee Tags says that in accordance with s.24 of the Act, on Mr Howell's termination date, he was paid all holiday pay owing and due to him. Zee Tags further says that the incentive payment that Mr Howell received on 22 January 2013, did not

¹ Where the meaning of gross earnings is defined. Perhaps relevant to this matter is s.14(a)(iv).

form part of his gross earnings during the 12 months immediately before the last pay period; before the termination date.

[7] In summary, Zee Tags says that the incentive payment was not and did not have to be, taken into account for the purpose of calculating holiday pay due to Mr Howell for the annual holidays that he had not taken; as at the termination of his employment.

The removal application

[8] The power of the Authority to remove a matter to the Court emanates from s.178 of the Employment Relations Act 2000 (“the Act”) whereby under subsection (2), the Authority may order the removal of the matter or any part of it, to the Court, if:

- (a) an important question of law is likely to arise in the matter other than incidentally; or
- (b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or
- (c) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- (d) the Authority is of the opinion that in all the circumstances the Court should determine the matter.

[9] Mr Howells’s application for removal (with the consent of the respondent) relies on the grounds available under s.178(2)(a) and (b). It has to be said firstly that subsection (2)(b) is not applicable. This is because two criteria have to be met. Firstly, the case must be of a particular nature and “of such urgency” that “it is in the public interest” that it be removed to the Court. This matter has not come before the Authority seeking urgency and there is nothing at all to suggest that there is any particular public interest at stake. Therefore, if it was just subsection (2)(b) that falls to be considered, the application for removal would be declined, even with the element of consent by the respondent present.

[10] However, as indicated to the parties at the conclusion of the teleconference on 31 July 2013, I accept that the application for removal satisfies the subsection (2)(a) criterion and that an important question of law is likely to arise in the matter, other

than incidentally. As set out in the removal application (and accepted by the respondent), the question of law is:

Whether an incentive payment paid to an employee pursuant to an employment agreement *after* his employment terminated (as distinct from an incentive payment paid during their employment), was a payment made “*during which the earnings are being assessed*” and therefore included in the definition of “gross earnings” under s14 Holidays Act 2003, and holiday pay is payable on it.

[11] I also accept that this is an important question of law in that it needs to be resolved in the course of deciding this case and that the outcome of the case may depend upon the way in which the question of law is resolved.² As was held in *Hanlon*:

Questions of law cannot always be categorised into important and unimportant ones. The importance of a question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. *A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.*

[Emphasis added by the Authority]

[12] It seems to me that the highlighted words (above) have particular relevance to this matter. Applied to this case, the parties have not been able to refer to, nor is the Authority aware of, legal precedent in New Zealand that goes to the issue that Mr Howell brings to the Authority. In regard to the submission for the applicant that the answer to the question of law has wider ramifications for other parties, I am not so sure about that, but perhaps it could be so.

Determination

[13] For the reasons set out above, and acknowledging that the parties, by consent, wish to have the matter before the Authority removed, I find that pursuant to s.178(2)(a) of the Employment Relations Act 2000, all matters relevant to the application of the Holidays Act 2003 and the determination of the holiday pay claim, should be removed to the Employment Court on the basis that an important question of law is likely to arise other than incidentally. It is so ordered.

² *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1

Costs:

[14] Costs are reserved.

K J Anderson
Member of the Employment Relations Authority