IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 88
5601676

	BETWEEN	ALAN BROWN WEIR First Applicant
	AN D	CAREY RACHEL NEEDHAM Second Applicant
	A N D	JILL BUCKLEY BROTHWELL Third Applicant
	A N D	JOHN FRANCIS HEGGARTY Fourth Applicant
	A N D	JONATHAN WAYNE HASTINGS Fifth Applicant
	A N D	MARY KATHLEEN SCHOLLUM Sixth Applicant
	A N D	REMUS HIRA McFADYEN Seventh Applicant
	A N D	CORPORATE CONSUMABLES LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Stephen Langton, Counsel for Fifth and Sixth Applicants David Burton, Counsel for Respondent
Investigation Meeting:	On the papers
Memoranda received:	4 March and 13 April 2016 from the Applicants 8 April 2016 from the Respondent
Determination:	26 July 2016

DETERMINATION OF THE AUTHORITY

Application for removal

[1] The applicants have brought claims for annual holiday pay arrears to the Authority. Two of the applicants, Mrs Schollum and Mr Hastings, seek to have part of the matter, comprising their respective claims, removed to the Employment Court. They seek to have the Court determine whether their employer was, and is, obliged, under holidays legislation, and an agreement with them reached in July 2015, to include commission payments when calculating their annual holiday pay.

[2] If the Court determines in their favour, they further ask the Court to determine what each of them is owed in annual holiday pay and interest as a result of the employer not having included commission payments in the calculations of their annual holiday pay. Mrs Schollum and Mr Hastings say there is an important question of law to be answered which can be answered more efficiently by referring only their two claims to the Court. The other five applicants have not applied to have their claims for annual holiday pay arrears removed to the Court.

[3] The respondent employer, Corporate Consumables Limited (CCL), sells office stationery and supplies. It is not opposed to the matter being removed in its entirety to the Employment Court. It is opposed to a part of the matter being removed as sought by Mrs Schollum and Mr Hastings.

[4] Ms Schollum and Mr Hasting have filed affidavits in support of the application for removal of part of this matter to the Employment Court. By agreement between the parties the application for removal is to be determined on the papers.

[5] This determination has been issued eight days outside the statutory period of three months after receiving the last communication from one of the parties. I record that when I advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Relevant background

[6] The applicants are employed in sales-related positions. Each is paid a base salary plus a commission with the base salary being paid weekly, and the commission paid at the end of each month. They have worked for CCL for periods between 10

and 18 plus years, in the course of which each has accrued and taken annual holidays. Some have also had annual holidays cashed up by CCL.

[7] Mrs Schollum and Mr Hastings' affidavits each state that the amounts of their commission payments have varied but have frequently been between $7,500 and $10,000 per month. Their commission payments, and those of the other five applicants, have not been included in calculations of their annual holiday pay throughout the majority of their employment with CCL. The matter was raised with CCL's management when one or more of the applicants became aware of this around December 2014. CCL reviewed its method of calculating holiday pay and, between July and October 2015, changed the way it calculated holiday pay to include commission payments.

CCL received a report in October 2015 from a Labour Inspector employed by the Ministry of Business, Innovation and Employment (MBIE) informing it that its holiday pay practice was not compliant with legislative annual holidays provisions. The report was based on the employer's practice before it had changed its method of calculation in July 2015.

[8] By letter dated 25 November 2015 CCL, through its legal representatives, notified the Labour Inspector it did not agree with her advice in respect of payment for annual holidays. It said that advice would result in it paying sales employees commission on sales made while they were on leave as well as paying them the greater of ordinary weekly pay or average weekly earnings[1]. CCL stated its view that "*the calculation of entitlements set out in* (the Labour Inspector's) *report goes beyond the purpose of the* (Holidays) *Act and would result in unjust enrichment (double dipping) unintended by the Act*".

[9] On the issue of calculating average weekly earnings, CCL asserts the Holidays Act allows for flexibility to avoid accidental unjust enrichment while ensuring there is no disadvantage to employees taking their annual leave. It notes section 14 of that Act provides, where the context requires, for circumstances in which commission would not be taken into account in calculating gross earnings.

[10] The employer's proposed resolution of the issue, as notified to the Labour Inspector in its letter of 25 November 2015, was to pay sales staff their regular base

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1 In accordance with s 21 of the Holidays Act 2003

salaries plus the greater of either commission for orders received while on annual leave or the average commission based on the last 12 months. It has not implemented this proposal.

[11] From November 2015 CCL reverted to its original method of calculating holiday pay, i.e. not including commission payments in its calculations. That remains the situation today.

Removal to the Court

[12] The Authority has the discretion to remove a matter, or any part of a matter, to the Court without first investigating it if:

> (a) an important question of law is likely to arise in the matter other than incidentally; or
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> (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
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> (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
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> (d) the Authority is of the opinion that in all the circumstances the court should determine the matter.[2]

[13] Former Chief Judge Goddard considered whether questions of law likely to arise in a matter were important questions of law in *Hanlon v International Educational Foundation (NZ) Inc*[3]. He noted:

> It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s 94.[4]

[14] That was not enough by itself, however to render the question of law an important one. He went on to say:

> 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.

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2 Section 178 of the Employment Relations Act 2000

3 [1995] 1 ERNZ 1 at 7

4 Section 94 of the Employment Contracts Act 1991 was the equivalent provision to s 178 of the Employment Relations Act

[15] Mrs Schollum and Mr Hastings rely primarily on the ground that an important question of law is likely to arise, other than incidentally. Their formulation of the question is whether an employer can rely on the words "*unless the context otherwise requires*" in the definition of "*gross earnings*" in s 14 of the Holidays Act 2003 to exclude commission payments (or other contractual payments) when calculating employees' gross earnings for the purpose of annual holiday pay.

[16] The applicants submit the question of law is important in that it has not previously been determined by the Authority, the Employment Court or any higher Court, and the answer to the question has wider ramifications than just this case. It may impact on how the same words ("*unless the context otherwise requires*") are interpreted in other sections of the Holidays Act 2003 (namely, ss 5, 8 and 9).

[17] They further submit the question of law arises other than incidentally as the answer to it will determine whether their claims for holiday pay will succeed. They state that, if the matter were not to be removed to the Employment Court, the Authority's determination would likely be challenged by the unsuccessful party given the materiality of the issue and the amount of money in issue.

[18] Mrs Schollum and Mr Hastings say the answer to the question of law affects all employees of the respondent, both in terms of how their holiday pay has been treated historically, and how it is to be treated in the future. It is their view that all CCL's employees would benefit from the annual holiday pay question being resolved expediently.

[19] CCL agrees an important question of law is likely to arise in the matter other than incidentally. It submits the important question is wider than that framed by Mrs Schollum and Mr Hastings and arises out of the contextual factual matrix relating to the calculation of holiday pay from commission payments.

[20] In the respondent's view the entire matter should be heard by the Court for two reasons. Firstly, to give finality to the issues raised by the applicants and, secondly, to resolve the issues expeditiously without the parties being put to further litigation expense in the Authority once the Court has determined the important issues of law.

Should the matter relating to Mrs Schollum and Mr Hastings be removed to the Court?

[21] Mrs Schollum and Mr Hasting rightly say that the phrase "*unless the context otherwise requires*" has not been the subject of judicial scrutiny in relation to s 14 of the Holidays Act. The phrase has of course been considered in different legislative contexts. One recent such case entailed a Full Court of the Employment Court considering the phrase in *Hixon v Campbell* in relation to the definition of "*employer*" in s 2 of the Wages Protection Act 1983.[5] The focus of the Court was how "*employer*" was to be interpreted in s 11 of that Act.[6]

[22] Part of the Court's deliberation is helpful to the interpretation of the phrase in question in relation to its use in legislation generally. For example, the Court's evaluation of the breadth of "*the context*", and its analysis of the high threshold imposed by "*requires*", are both useful in considering the current matter. I do not consider, however, that an application of the Court's guidance is sufficient to dispose of the matter.

[23] It is the unusual factual matrix of this case, which is unlikely to be unique to sales-related positions in the respondent company, that leads me to this view. In particular, it is the ability of the applicants to earn commission payments during their periods of annual leave, regardless of any efforts they make during that time. This leads to the "*double dipping*" concern of CCL if it pays holiday pay in accordance with the provisions of the Holidays Act. I have attempted to illustrate the effect by calculating what the annual holiday pay of one of the applicants would have been if he had taken annual leave from a particular date in 2015. The salary and commission information was provided by that applicant in an annexure to his affidavit.

[24] Taking a random 12 month period from 1 March 2014 to 28 February 2015 for that applicant, his total gross remuneration for the period was $135,990.51. This comprised $39,999.96 gross base salary and $95,990.55 gross commission. If he took annual holidays from 1 March 2015, s 21 of the Holidays Act provides that the employer must pay him for those holidays at a rate based on the greater of his ordinary weekly pay as at the beginning of the holiday, or his average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

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5 [2014] NZEmpC 213 at [49] – [51]

6 n6 at [49] to [52]

[25] The meaning of ordinary weekly pay is set out in s 8 of the Holidays Act and includes commission if those payments are a regular part of the employee's pay. A formula is provided at s 8(2) if it is not possible to determine what the ordinary pay is.

[26] The Interpretation section (s 5) of the Holidays Act provides the meaning of a number of words and phrases used in the statute and is prefaced by the words "*In this Act, unless the context otherwise requires*". It defines average weekly earnings as "*1/52 of an employee's gross earnings*". The section provides that "*gross earnings has the meaning given to it by section 14*".

[27] Section 14 is also prefaced by the words "*In this Act, unless the context otherwise requires*" and, with that qualifier, gives the meaning of gross earnings, "*in relation to an employee for the period during which the earnings are being assessed*" as being:

> (a) ..all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example-
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> (i) salary or wages:
>
> (ii) …
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> (iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period:
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> (iv) productivity or incentive-based payments (including commission):
>
> (v) …

[28] If unaffected by context requiring otherwise, the employee's ordinary weekly pay at 1 March 2015 would be $2551.81 gross. His average weekly earnings for the preceding 12 month period were $2,615.20 gross and he would accordingly be paid for his annual holiday at that weekly rate, in accordance with s 21. He would also be paid his monthly commission at the end of the month, which was $5,128.98 gross.

[29] Had the employee not gone on his annual holidays, he would have been paid at his base rate of $769.23 per week, and received the commission at the end of the month.

[30] I have included this example in an attempt to encapsulate CCL's reference to the particular factual matrix leading to its concerns about "*double dipping*". CCL questions whether the consequences of including commission payments into the

calculation of gross earnings in this type of situation are intended under the Holidays Act, or whether those consequences form part of the context which requires that commission payments be treated otherwise.

[31] I consider there is an important question of law here. It is key to the determining the applicants' claims, and it does not arise incidentally. I consider there is no good and sufficient reason not to remove the matter, or part of it, to the Court.[7] I agree with Mrs Schollum and Mr Hastings that only their claims should be removed, rather than the claims of all applicants. There are currently seven applicants in total, with another CCL employee seeking to be joined.

[32] The applicants have varying lengths of service and rates of pay. I consider it likely that, once the question of law and entitlements, if any, have been determined in respect of Mrs Schollum and Mr Hastings, the claims of the other applicants will be capable of resolution between the parties. Failing that, the Authority will be in a position to apply the Court's judgment to the remaining applicants.

Determination

[33] I am satisfied that it is appropriate for Mrs Schollum and Mr Hasting's claims to be removed to the Court under s 178(2)(a) of the Act.

Costs

[34] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

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7 *Auckland DHB v X (No 2)* [2005] ERNZ 551 at [30]