

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 188
3057472

BETWEEN METROPOLITAN GLASS
& GLAZING LIMITED
Applicant

AND A LABOUR INSPECTOR
Respondent

Member of Authority: Robin Arthur
Representatives: Jim Roberts, counsel for the applicant
Claire English, counsel for the Respondent
Investigation: On the papers
Determination: 1 April 2019

DETERMINATION OF THE AUTHORITY

A. This matter is removed to the Employment Court to hear and determine.

[1] Metropolitan Glass & Glazing Limited (MGGL) and Labour Inspector Mayce Wong jointly applied for removal to the Employment Court of this matter involving the interpretation and application of specific provisions in the Holidays Act 2003.

[2] Under s 178 of the Employment Relations Act 2000 the Authority may order removal of a matter for the Court to hear and determine if an important question of law is likely to arise in the matter other than incidentally.

[3] The application has been determined on the papers. Those papers comprised MGGL's statement of problem, the Inspector's statement in reply, an agreed statement of facts and the parties' joint application for removal.

The questions

[4] In 2017 the Inspector conducted an audit of MGGL's payroll system for compliance with the Holidays Act and other employment legislation. Through discussion on a draft audit report and a final audit report the parties resolved all issues identified except for two questions.

[5] Firstly, there is what they describe as the Bonus Question. This question concerns whether payments made to employees under MGGL's bonus scheme are "payments that the employer is required to pay to the employee under the employee's employment agreement". If so, the payments would come within the definition of "gross earnings" under s 14 of the Holidays Act. Payments to one employee, part of a sample examined in the Inspector's audit, were made under what MGGL called short term incentives schemes not referred to in his employment agreement but set out in later invitations to participate in those schemes. The question for resolution requires a detailed analysis of the interrelation of the subsections of s 14 and their application to the terms of the employee's employment and the arrangements for payments under the incentive schemes.

[6] Secondly, the parties seek an answer to what they call the Closedown Question. The question relates only to employees who began work for MGGL during the year and have yet to reach the 12 month anniversary date for annual holiday entitlements. It concerns the effect of MGGL's annual closedown, for around two weeks over the Christmas and New Year period, on those employees' holiday entitlements. For affected employees MGGL calculates what it calls "entitled annual holidays" up to its nominated annual closedown date of 21 December. They may then elect to take paid annual holidays during the closedown up to the balance of that calculation. Those affected employees who do not have a balance sufficient to cover the full closedown period on pay, due to being more recent recruits, must then take annual leave in advance or be on unpaid leave for the remainder of the closedown.

[7] The Inspector does not agree those arrangements meet the requirements of s 34(2) of the Holidays Act. The section states employers must pay employees eight per cent of their gross earnings if an employee, at the start of a closedown, has not completed the 12 months of continuous employment that triggers the entitlement to annual holidays. However MGGL considers its actions meet the requirements of s 35 of the Holidays Act. That latter section provides for a nominated date to set the

anniversary date of those employees as starting from the beginning of the closedown period.

[8] Broadly put, the Closedown question is whether MGGL's provision of annual holidays, to those affected employees – either as an entitlement due to the change of anniversary date under s 35 or, alternatively, in advance for a closedown period under s 34(4) – is a permissible alternative to the eight per cent an employer must pay under s 34(2).

Important questions of law

[9] Both the Bonus question and the Closedown question easily meet the relative standard of being important questions of law. The answers to those questions will be of wider application rather than only to the parties.¹ As they jointly submitted, the answers will inform the approach of Labour Inspectors in their audits of employers' records. Clarifying the application of those provisions in the Holidays Act will be of wider value to employers, workers, unions and Labour Inspectors. And, while the various relevant sections of that Act have been previously considered in some Authority determinations, there are presently no decisions of the Court giving detailed and specific guidance on either question.

[10] The application plainly satisfied the requirements of s 178(2)(a). Exercise of the Authority's discretionary power to order removal also required a check of whether, despite meeting one of the statutory tests, there might nevertheless be some good and sufficient reason not to remove this particular matter.² No such reason is apparent. Removal has been ordered as set out in paragraph A at the head of this determination.

No order prohibiting publication of certain information

[11] As a last point, MGGL's statement of problem had sought an order prohibiting publication of the names and identifying details of three employees and of some confidential financial information referred to in the Inspector's audit reports. As this whole matter is now removed to the Court, whatever orders may be appropriate to protect the privacy of the information of those three employees and the confidentiality

¹ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.

² *Auckland District Health Board v X (No. 2)* [2005] ERNZ 551 at [30].

of MGGL's financial information is left for the Court to consider and make. MGGL's application, and attached relevant documents, already had employee information redacted or anonymised.

Robin Arthur
Member of the Employment Relations Authority