

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 293
3027813

BETWEEN MAX PENNINGTON MOTORS
 LIMITED
 Applicant

AND A LABOUR INSPECTOR
 (MINISTRY OF BUSINESS,
 INNOVATION AND
 EMPLOYMENT)
 Respondent

Member of Authority: Michele Ryan

Representatives: Andrew Laurenson, counsel for the Applicant
 Claire English, counsel the Respondent

Investigation Meeting: On the papers

Submissions Received: 25 October 2018 from the Applicant
 8 November 2018 from the Respondent
 30 November 2018 from the Applicant

Date of Determination: 20 May 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Max Pennington Motors Limited (MPML) trading as AutoCity, and a Labour Inspector dispute the correct approach MPML should take to payment for public holidays.

[2] MPML operates two car dealerships in the Taranaki region. Salespeople receive a base salary, paid fortnightly. They are also paid commission corresponding to the number, or brand, of vehicles sold. Commission is paid monthly and is variable.

[3] The businesses operate Monday to Saturday inclusive. Neither dealership is open for business on public holidays.

[4] When a public holiday occurs MPML pays salespeople the sum equal to a day's pay based on the employee's individual annual salary. Commission is not included as a component of payment.

[5] Following an investigation, and exchange of correspondence, on 13 March 2018 Labour Inspector, Ms Cheryl Put, served MPML with an Improvement Notice.¹

[6] The Improvement Notice indicated MPML's calculation of unworked public holidays did not comply with the HA.² The Labour Inspector required MPML to recalculate public holiday payments as these concerned salespeople: commission was to be included in the calculations. The Labour Inspector recommended MPML apply the "average daily pay" methodology set out at s 9A of the HA.

[7] MPML does not accept it miscalculates payments for unworked public holidays. It says it pays 'relevant daily pay' in accordance with s 9 HA, but is not obliged to include commission in the payment. MPML says commission can never be received on a public holiday. This is because commission can only be earned when a vehicle is delivered. MPML says vehicles cannot be delivered on a public holiday.

[8] This application was lodged by MPML as an Objection to Improvement Notice.³ MPML asks the Authority to revoke enforcement of the Improvement Notice.

The Authority's investigation

[9] A meeting was initially scheduled by the Authority to investigate MPML's application. On receipt of the parties' written statements, it was agreed written submissions would be provided, and the matter would be determined on the papers.

¹ Pursuant to the Employment Relations Act 2000, s 223D

² The Improvement Notice required MPML to comply with the Act on a range of matters. Between the Authority's receipt of the statement of problem and statement of reply, all matters in dispute between the parties were resolved with the exception as to whether MPML is compliant with the Holidays Act regarding payment of public holidays.

³ In accordance with the Employment Relations Act 2000 at s 223E(1).

[10] This determination has been issued outside the timeframe set out at s 174C(3)(b). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.⁴

Discussion

[11] The parties dispute the meaning of s 9 - Relevant daily pay.

[12] For the purposes of calculating payment for a public holiday, an alternative holiday, sick leave or bereavement leave, the HA provides two separate formulae: ‘relevant daily pay’ at s 9, or ‘average daily pay’ at s 9A. The material portions of each section are set out below.

9 Meaning of relevant daily pay

- (1) In this Act, unless the context otherwise requires, relevant daily pay, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, or bereavement leave,—
- (a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
 - (b) includes—
 - (i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:

...

[13] Section 9A provides that if it is not possible or practicable to determine an employee’s relevant daily pay or an employee’s daily pay varies within the pay period when the holiday or leave falls, then the employer may use an employee’s average daily pay for the purposes of calculating payment. Average daily pay is calculated by assessing the employee’s gross earnings over the previous 52 calendar weeks and dividing that sum by the number of days over which the employee has worked (including days in which the employee was on paid holiday or paid leave days) within the same period.

[14] The meaning of s 9 must be ascertained from the words used in the section, in light of its purpose and in the context of the Act as a whole. In *Commerce Commission v Fonterra Co-operative Group Ltd*, Tipping J emphasised text and purpose as key drivers of statutory interpretation.⁵ He also noted:⁶

⁴ Employment Relations Act 2000, s 174C(4)

⁵ [2007] NZSC 36, [2007] 3 NZLR 767

“Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s.5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.”

[15] MPML’s focus is directed towards the references at s 9(1)(a) and (b) regarding the amount of pay / commission “*the employee would have received had the employee worked on the day concerned*”. It says, to the effect, that s 9 requires the Act requires it calculate the payment for the employee if s/he had worked the public holiday itself.

[16] Turning firstly to the text, the plain words used at s 9 tend to support MPML’s position that the quantum of payment for a public holiday is linked directly to what the employee would have received on the public holiday - “the day concerned” for which the payment is made.

[17] This assessment does not end the inquiry however. At the crux of this dispute is what is meant by “the day concerned” in the context of calculating relevant daily pay for a public holiday. It is necessary to consider the provisions regarding public holiday entitlements, the purpose of these and the scheme of the HA as a whole.

[18] Section 3 of the HA states its purpose is to promote balance between work and other aspects of the employee’s lives by providing employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave. Subpart 3 of the HA concerns the provision of public holidays. Section 46 confers on employees an entitlement to, and payment for, public holidays.

[19] For an employee who does not work on a public holiday, the threshold on which s/he is entitled to receive payment for the public holiday is if the public holiday occurs on a day that would “otherwise be a working day” for the employee. That payment for an unworked public holiday is dependent on the day of the holiday happening on an “otherwise working day” for the employee is reiterated throughout the HA. For example: s 43 records one purpose of subpart 3 is to provide employees with an entitlement to public holidays if the holidays fall on days that would otherwise be working days for the employee; s 12 sets out factors that must be taken into account to determine whether the public holiday would be an

⁶ At [22]

otherwise working day for the employee; s 49 obliges an employer to pay an employee for an unworked holiday if the day would otherwise be a working day for the employee.⁷

[20] Once it is established that a public holiday would be an otherwise working day for an employee, ss 9 and 9A concern how payment for the public holiday should be calculated.

[21] Taking into account the overall scheme of the HA, and that entitlement to payment for a public holiday rests on whether the day would have otherwise been a working day for the employee, I am satisfied that once an employee becomes eligible for payment for a public holiday, the payment must be calculated on the basis that the public holiday - “the day concerned” was an otherwise working day for the particular employee.

Conclusion

[22] It follows from the above that MPML must, for the purposes of calculating payments for a public holiday, seek to establish the relevant daily pay an employee would have received on a public holiday as if it were an otherwise working day. Payment includes any amount of commission an employee would have received in addition to the base salary amount payable. I note there is no evidence that vehicles cannot be delivered to or by MPML on any other days on which salespeople work.

[23] Where it is not possible or practical for MPML to determine an employee’s relevant daily pay including commission as a component of the pay, then the averaging formula at s 9A must be used for the purposes of calculating the quantum of payment an employee is entitled to for a public holiday.

[24] MPML’s application for orders to revoke the enforcement of the Improvement Notice dated 13 March 2018 is dismissed.

[25] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority

⁷ See also Holidays Act 2003 at s 40(3) and s 48(2).