IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 147
3118674

	BETWEEN	ENTERPRISE MOTOR GROUP (NEW LYNN) LIMITED Applicant
	AND	A LABOUR INSPECTOR OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT Respondent

Member of Authority:	Nicola Craig
Representatives:	Paul Wicks QC, Liz Coats and Rosemary Wooders, counsel for the applicant Sarah Blick, counsel for the respondent
Investigation Meeting:	On the papers
Submissions Received:	18 February 2021 for the applicant 5 March 2021 for the respondent
Date of Determination:	14 April 2021

DETERMINATION OF THE AUTHORITY

A. The application for removal of this matter for the Employment Court to hear and determine is granted.

B. Costs are to lie where they fall.

Employment Relationship Problem

[1] Enterprise Motor Group (New Lynn) Limited (Enterprise or the company) operates a vehicle retailing business in Auckland. It employs sales people who are

remunerated via commissions and bonuses only, based on their work during any given month.

[2] The company lodged a claim in the Authority against a Labour Inspector of the Ministry of Business, Innovation and Employment.[1] Enterprise objected to aspects of the Inspector's improvement notice issued on 11 October 2018 (the notice).

[3] The notice included the Inspector's conclusion that Enterprise breached s 6 of the Minimum Wage Act 1983 (MWA) by failing to pay two employees at least the minimum wage for every hour worked. Enterprise was required under s 6.1.2 of the notice to review wage and time records and undertake calculations of commissions and bonuses. In my words, this pinned each individual commission and bonus to a date earned. An assessment was required of whether employees received the minimum wage for every hour worked each calendar week.

[4] The company asserted that when assessed on a monthly basis, the employees' remuneration exceeds that required by the MWA and the Minimum Wage Orders (MWOs). Thus Enterprise considered its remuneration structure complied with that Act and those Orders.

[5] Enterprise's objection was that s 6.1.2 of the notice describes a step which the company considered it is not obliged to take to comply with s 6 of the MWA. There is also a secondary issue regarding the notice's review period but I do not need to detail that.

[6] The Labour Inspector asked the Authority to confirm the notice.

[7] The Authority proceeding was not progressed for some time in order to allow the parties to attend mediation and have other discussions in an attempt to resolve the dispute or find an agreed way to progress it.

[8] Enterprise now applies for the whole matter to be removed to the Employment Court. The application relies on s 178(2)(a) and (d) of the Employment Relations Act (the Act). The Inspector does not oppose removal.

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[1] File no 3044252.

[9] The parties agreed that the removal application could be dealt with on the papers. Submissions were received from both parties.

[10] I have not recorded everything received from the parties but have stated findings, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.[2]

What is the test for important questions of law?

[11] Chief Judge Goddard provided guidance on the predecessor to s 178(2)(a) of the Act in *Hanlon v International Educational Foundation (NZ) Inc***:**

> … a question of law will obviously be important if its resolution can affect large numbers of employers or employees or both, or if the consequences of the answer to the question are of major significance to employment law in general. Most questions of law that could be described as important will be far less momentous. … 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.[3]

[12] Questions of law need not be complex, tricky or novel to be important.[4]

[13] To meet the test under s 178(2)(a) the issue must arise other than incidentally, so that the outcome will turn on the answer.[5]

Is there an important question of law?

[14] The parties have explored whether they could agree on the important question/s of law which should be removed to the Court. They could not. Instead they each present two questions which they regard as important questions warranting removal.

[15] Enterprise raises the following two questions:

(a) Do s 6 of the MWA and cl 4 of the Minimum Wage Orders (MWO) (in relation to the minimum rates of wages payable to an adult worker "in all other cases") require an employer to specify the total amount that will be

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2 The Act, s 174E.

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

4 *Johnston v Fletcher Construction Co Ltd* [2017] NZEmpC 157 at [22].

5 *Tourism Holdings Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment* [2018] NZEmpC 95 at [22].

paid to a worker for a period of work before that period of work has been commenced and/or completed?

(b) Is s 6 of the MWA and cl 4 of the MWO (in relation to minimum rates of wages payable "in all other cases") satisfied if, in relation to hours worked over a month, a worker receives payments during the month, and a further payment that relates to that month after the month has concluded, which together meet or exceed the prescribed rate under the MWO for the hours worked that month?

[16] The Inspector's response is that Enterprise's first question is not one in issue in these proceedings, nor will it be determinative of the outcome of these proceedings. The Labour Inspectorate's position is not that an employer must specify the total amount to be paid to an employee for a period of work before it has been commenced or completed. As regards Enterprise's second question, the Inspector does not consider this question accurately describes the question of law at issue in relation to the MWA.

[17] The Inspector considers that the following questions likely justify removal:

(a) How should cl 4 of the MWO be used to assess compliance with s 6 of the MWA for employees who are remunerated only by payment of commissions and bonuses and not by reference to the hours worked?

(b) Can an averaging approach be used to comply with s 6 of the MWA if wages are apportioned equally to weeks or fortnights within a calendar month for employees who are remunerated only by payment of commissions and bonuses, notwithstanding that it is possible to identify the weeks and fortnights in which specific commissions and bonuses were earned?

[18] I am drawn to an approach which has the broader important question of law as in the nature of:

(a) How should cl 4 of the MWO be used to assess compliance with s 6 of the MWA for employees who are remunerated only by payment of commissions and bonuses and not by reference to the hours worked?

[19] There would then be sub-questions made up of the remaining questions, namely:

(a) Do s 6 of the MWA and cl 4 of the MWOs (in relation to the minimum rates of wages payable to an adult worker "in all other cases") require an employer to specify the total amount that will be paid to a worker for a period of work before that period of work has been commenced and/or completed?

(b) Are s 6 of the MWA and cl 4 of the MWO (in relation to minimum rates of wages payable "in all other cases") satisfied if, in relation to hours worked over a month, a worker receives payments during the month, and a further payment that relates to that month after the month has concluded, which together meet or exceed the prescribed rate under the MWO for the hours worked that month?

(c) Can an averaging approach be used to comply with s 6 of the MWA if wages are apportioned equally to weeks or fortnights within a calendar month for employees who are remunerated only by payment of commissions and bonuses, notwithstanding that it is possible to identify the weeks and fortnights in which specific commissions and bonuses were earned?

[20] The MWA is a fundamental piece of New Zealand's statutory employment framework. Ensuring that clear interpretation of that Act is available is important. There are other employees whose remuneration structures are also not the more conventional wage or salary only remuneration arrangement. The company has not been able to identify any New Zealand decisions on its questions.

[21] The questions proposed are clearly important for the resolution of the dispute between Enterprise and the Labour Inspectorate. Resolution of these issues are holding up Enterprise's completion of the outstanding actions required under the notice.

[22] The questions do not arise only incidentally. These questions can be seen as complex and tricky as well as being novel. They also have implications for other employees on remuneration arrangements without wage or salary components. There are important questions of law.

Are there circumstances justifying removal?

[23] Somewhat overlapping with the important question discussion is the question of whether s 178(2)(d) of the Act is satisfied.

[24] Both parties consider the circumstances of the matter, namely a consideration of s 6 of the MWA and cl 4 of the MWOs, in relation to a remuneration structure which is not a conventional wage or salary-only remuneration arrangement, warrant removal.

[25] Some of the questions here are more applicable to Enterprise's situation than they may be to the specific way other employers operate their remuneration systems for

commission and bonus workers. But the crucial matter of how the MWA and the MWO apply to such workers should be applicable across employers.

[26] Enterprise is not aware of any case law from the Authority, the Court or the Court of Appeal which considers s 6 of the MWA or cl 4 of the MWO in the context of a remuneration structure such as the one in this case. Resolution of the questions here would be well served by an authoritative determination from the Court.

[27] There are decisions about averaging, a topic which arises in one of the questions here but I do not consider those decisions to fully answer all the questions in this case.[6]

[28] The Inspector submits that it may be that if the matter is removed, the Court will wish to refine the questions of law for judgment as a preliminary matter.

[29] It seems likely that the proceedings may well come before the Court on challenge by either party, if the matter is not removed in the first instance. Both parties have firmly held views and extensive efforts at resolution have not succeeded.

Should removal be granted?

[30] Both the grounds in s 178(2)(a) and (d) of the Act are established. The Authority still retains a discretion to consider any residual factors against removal.[7] However, none have been identified in this case. In the interests of justice, the entirety of the matter before the Authority is removed to the Court to hear and determine the substantive issues between the parties, without the issues first being investigated by the Authority.

Costs

[31] As the parties have agreed, costs are to lie where they fall in respect of this application.

Nicola Craig
Member of the Employment Relations Authority

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6 For example, *Idea Services Ltd v Dickson* [2011] NZCA 14, *Labour Inspector v Smiths City Group Ltd* [2018] NZEmpC 43 and *Ovation New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2018] NZEmpC 151.

7 *Auckland District Health Board v X (No 2)* [2005] 1 ERNZ 551 at [29].