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## ARE COMMISSIONS PART OF GROSS EARNINGS?

Holidays Act calculations remain the bane (it rhymes with pain) of employers' lives. Ordinary weekly pay and gross earnings remain as predictable as Auckland weather.

In a test case The Employment Court recently (July 2019 – Tourism Holdings Limited v A Labour Inspector [2019] NZEmpC 87) considered whether commissions paid to bus drivers employed by Tourism Holdings Ltd (THL) were a regular part of an employee's pay and should therefore be included in their holiday pay calculations.

The Court found that the commissions were **not part of regular pay** and that THL was not required to include it in ordinary weekly pay during the 4 weeks preceding annual holidays.

It is important to bear in mind that Court cases depend on the facts of that case. In this case the employment agreement and the details of the commission arrangement were specific. For that reason this article focuses on the facts rather than the legal explanation.

THL operates bus tours over different routes to destinations throughout the country. The trips are of varying duration taking in popular tourist spots. Some trips are a circuit, starting and finishing in Auckland. Other trips start in one location and finish in another. The shortest trip is one day and the longest one currently available is a minimum of 30 days. Trips that are longer than one day are described in minimum days because a feature of them is their flexibility as a "hop on, hop off" service. Passengers can complete a trip on the same bus or, instead, "hop off" at some point and "hop on" another bus travelling on the same route to complete the trip at a later time. The only restriction on this flexibility is that the trip must be completed within 365 days.

Each trip is assigned to a driver who also acts as a tour guide. One of a driver's tasks is to assist in selling additional activities to passengers during the trip. Some of those activities are offered by THL, such as another bus trip to a different destination, but most of them are offered by third parties.

The drivers are paid a daily rate of pay during a trip and earn commission on the sale of activities booked by them for passengers. The rate of commission is included as an addendum to each driver's individual employment agreement. In addition they receive alternative daily rates of pay for "non-usual" driving duties and for non-driving work. They are paid the daily rate weekly in arrears.

The commission paid to the drivers is derived from what the third-party operators pay THL and is based on each sale made from a booking, where the activity is paid for and undertaken. That arrangement allows for

the possibility that passengers who made bookings change their minds, do not show up, or cancel and ask for a refund.

THL considers its drivers have not earned commission until several steps have been taken:

- (a) the activity attracting commission has been booked by the driver;
- (b) the activity has been paid for;
- (c) the activity has been undertaken (this condition does not apply to sales of THL' activities);
- (d) the driver has obtained documents from the operator confirming the activity has been paid for and undertaken;
- (e) where commission is for the sale of a THL activity, confirmation has been obtained from the company's reservations service;
- (f) the company's commission documentation has been completed by the driver; and
- (g) the driver has attended a debriefing session with the company and submitted completed commission documents to it.

**The Inspector's case assumed commission was earned by the driver as soon as details of the extra activities booked, and undertaken, by passengers were provided to THL.** That situation could arise if, for example, an operator sent information to the company at an earlier point in time than before a reconciliation was completed by the driver.

**However, that conclusion would be inconsistent with the employment agreement. The commission was not earned by the driver, in the sense that it had become payable under the employment agreement, until the reconciliation was completed.** That step was more than a purely administrative task. It was not until the driver completed the trip, and the paperwork, that the amount due and owing could be ascertained.

**The commissions were, as a matter of agreement, based on completing tasks at irregular intervals having no reference at all to what was earned for having completed an ordinary working week.**

Each driver commonly received pay including commission but that was, as the driver example showed, earned over varying intervals of time and could not therefore be said to be the type of regular payment the Act contemplates being included in the calculation under s 8(2).

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