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HOLIDAYS ACT TROUBLES

A recent case before the Employment Court clarifies two important aspects of the Holidays Act (the Act): discretionary bonuses and closedown periods – *Metropolitan Glass & Glazing Limited v Labour Inspector, MBIE [2020] NZEmpC 39 [14 April 2020].*

In 2017 a Labour Inspector conducted a Holidays Act compliance audit at Metropolitan Glass & Glazing Ltd (Metropolitan). The Inspector provided the company with a copy of her draft report, which found that holiday pay had been calculated incorrectly because incentive bonuses were not included in employees' gross earnings. Also, the company's treatment of annual holidays at the year-end closedown did not comply with the Act. The company disagreed with the Inspector's view and the matter went to the Employment Court.

The Bonus Question

Metropolitan Glass's individual employment agreements make provision for payment of "discretionary" bonuses, which are payable on achievement of agreed Key Performance Indicators and/or the completion of projects on time and on budget.

Since 2016, the company has also had short term incentive (STI) schemes, but these are not referred to in its individual employment agreements. Employees are invited to participate in these schemes, which are described as discretionary bonus schemes.

The schemes' terms and conditions state that the scheme is not a term and condition of the employee's employment agreement, and that any bonus payments made under the scheme will not come within the definition of "total gross earnings' for the purposes of holiday pay calculations under the Act. Payments are "totally at the discretion of" the company and there is no guarantee of payment even where the criteria for the scheme are met. Board approval is required for payment.

The Court found that the STI schemes form part of the employees' employment agreements. It said that Metropolitan could not contract out of the Act by declaring that bonus payments will not come within the definition of "total gross earnings".

It referred to the 2011 amendment to the Act, when a definition for discretionary payments was added for clarification. The amendment was aimed at concerns about employers avoiding including variable and conditional payments that formed part of an employee's remuneration, which is precisely what Metropolitan Glass was trying to do. Metropolitan could therefore not avoid responsibility simply by labelling the schemes as 'discretionary".

The Court said that the definition of "discretionary payment" in Section 5 of the Act further makes it clear that it does not include a payment that the employer is bound to make under an employment agreement.

The Closedown Question

Metropolitan has a closedown each year for approximately two weeks. The closedown commences shortly before Christmas. It includes the four public holidays and approximately six other working days.

Metropolitan has nominated 21 December as its closedown date each year (the nominated date). From the nominated date, via its payroll system, Metropolitan provides an "annual holiday entitlement" to each of its employees who have less than one year's service (the affected employees) proportionate to the amount of time the affected employee has been working for Metropolitan (entitled annual holidays).

The effect of this is that, in Metropolitan's payroll system, each of its affected employees has entitled annual holidays calculated as at the nominated date. Each affected employee can apply to take entitled annual holidays for the closedown period.

Metropolitan permits its affected employees to take annual holidays on pay for the period of the closedown up to the employee's annual holiday entitlement balance. If there are any remaining entitled annual holidays at the end of the closedown period, they continue to be available to the affected employees until they are taken.

If an affected employee does not have enough entitled annual holidays to cover the period of the closedown, the affected employee can apply to take annual holidays in advance. Otherwise, the affected employee is on unpaid leave for the remainder of the closedown period.

Where affected employees apply for annual leave in this way, Metropolitan does not pay them eight per cent of their gross earnings on the closedown date.

The Inspector and Metropolitan had different views about sections 32 to 35 of the Act. After examining these sections, the Court said that the sections must be read in context.

The purpose of the Act is to promote the balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to annual holidays to provide the opportunity for rest and recreation.

While the overall purpose of the Act is aimed at providing employees with paid holidays, there are circumstances in which money can be substituted for leave. (Examples are where the employee is on a short fixed-term employment agreement, where the irregularity of employment makes providing leave impracticable or where there is agreement to pay out annual leave.)

The Court acknowledged that s 34 is not entirely clear. It ruled that:

- employees who, at the commencement of a closedown period, are not entitled to annual holidays must be paid the eight per cent of gross earnings required by s 34(2);
- their service is then treated as commencing on the date on which the closedown begins (s 35(1));
- to the extent the employer and employee agree, leave also can be taken in advance for some or all of the closedown period (s 34(4)).

In summary

So, employees who joined during the year are paid out at the start of the closedown, which becomes their anniversary date. If the 8% they received is not enough to cover the closedown period, leave in advance is an option.

This article is brought to you by the Window and Glass Association's free employment helpline 0800 692 384. If you have any questions or would like to discuss the article above, please call Philip or Anthony on the helpline.