

Are commissions part of gross earnings? – Another change

In November 2019 we reported on a test case before the Employment Court (*Tourism Holdings Limited (THL) v A Labour Inspector [2019] NZEmpC 87*), in which the Court found that commissions paid to bus drivers were not part of regular pay and that THL was not required to include it when calculating annual holiday pay.

The Labour Inspector appealed to the Court of Appeal, who overturned the Employment Court's decision last month (*Labour Inspector of the Ministry of Business, Innovation and Employment v Tourism Holdings Ltd [2021] NZCA 1*).

The issue was whether, as a question of law, productivity or incentive-based payments were a regular part of an employee's pay for the purposes of calculating ordinary weekly pay under the Holidays Act 2003 (Act).

Tourism Holdings Ltd (THL) employed "driver guides" for their Kiwi Experience tours. The driver guides, among other tasks, sold additional tourist experiences to their clients whilst on tour. The driver guides earned commission for each tourist experience sold. The commission was not paid with their usual wages but was paid in a lump sum after the end of that tour.

When an employee takes a portion of their paid annual leave, the employer must pay the employee at a rate that is based on the greater of:

- the employee's ordinary weekly pay (OWP) under section 8 of the Act; or
- the employee's average weekly earnings (AWE), being 1/52 of their gross earnings under section 14 of the Act.

Commission is always included in the AWE calculation. However, the Labour Inspector and THL disputed whether the driver guides' commission should be included in the OWP.

Section 8(1)b(i) stipulates that productivity or incentive-based payments are included "if those payments are a regular part the employee's pay". The Employment Court found that the commission payments were not a regular part of their pay, and therefore need not be included.

The Court of Appeal overturned the Employment Court's decision, finding that the commission should be included in the OWP calculation). In coming to its decision, the Court of Appeal noted the following:

- Employees who earned commission should enjoy an equivalent benefit in their leave entitlement, which is consistent with the purpose of the Act.
- The word "regular" means both substantive and temporal regularity. In this case, both meanings applied to the commission earned by the driver guides. Their commission was both regular and habitual.
- The entitlement to commission arose when the driver guide booked an additional tourist experience for a client, rather than when they completed the documentation process.

Source: [Employment NZ](#).

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