

Discretionary bonuses and holiday pay – Court of Appeal

The difference of opinion between the Labour Inspectorate and Metropolitan Glass & Glazing Limited about the company's incentive bonus schemes for 2016 and 2017 has aroused much interest among employers and employees alike. Arising from the ill-fated Holidays Act, it is about discretionary bonus payments and the effect on holiday pay.

Background

Metropolitan bonus schemes for its employees in 2016 and 2017. The schemes were called Short Term Incentive Bonus schemes (STIB schemes).

Metropolitan's approach was that payments made under its STIB schemes were discretionary payments for the purposes of section 14 (Meaning of gross earnings) of the Holidays Act 2003, and therefore excluded when calculating the amount of due to employees. A Labour Inspector disagreed, saying that the payments were gross earnings, not discretionary payments.

The dispute began in the Employment Relations Authority but at the request of both parties it was removed to the Employment Court because it was considered to raise an important question of law. The Employment Court then convened a full Court to hear the matter. The Court found in favour of the Inspector.

Metropolitan took the matter to the Court of Appeal, who also allowed BusinessNZ to participate in the appeal hearing. BusinessNZ was concerned about the wider implications of the Employment Court decision, which it said was likely to result in backpay obligations amounting to hundreds of millions of dollars for employers who believed they were acting lawfully and in accordance with the Holidays Act.

Decision

The [Court of Appeal](#) said that the Employment Court was wrong to take the view that an incentive or productivity-based payment will always be gross earnings and can never be a discretionary payment. It was wrong because it overlooked the key element of the definition of gross earnings, namely that the payment must be one the employer is **contractually bound to pay**. If the employer is not contractually bound to make the payment, it is a discretionary payment. It is irrelevant whether the obligation arises from the employment agreement or from other documents.

The Court of Appeal noted that the definition of gross earnings does not say that all employment related remuneration for the job is gross earnings, something it could easily have said.

The Court said that Metropolitan had done more than just label its scheme discretionary. It **had included an express term in the STIB scheme documentation, that even if all of the**

conditions of the STIB schemes were met, the company retained the discretion not to make any payment. It added that –

“It would of course be under an obligation to exercise that discretion fairly and reasonably, and a failure to do so could be grounds for a personal grievance, but in our view being neither guaranteed nor conditional the payment would still retain the character of a discretionary payment for the purposes of the Holidays Act.”

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