

Supreme Court on Commission payments and holiday pay

In the February newsletter we wrote about an employer's travails with the Holidays Act, which at that stage had gone as far as the Court of Appeal (CA). At issue was whether commissions paid to a bus driver guide formed part of gross earnings for holiday pay calculations. The CA said it did. The company, Tourism Holdings Ltd (THL), appealed to the Supreme Court (SC).

Last month the SC considered the appeal (*Tourism Holdings Ltd v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2021] NZSC 157). The full judgement is available [here](#) and a media release from the Court [here](#).

Background

The Holidays Act 2003 entitles employees to at least four weeks' paid holidays each year. Holiday pay is based on the greater of the employee's "ordinary weekly pay" as at the beginning of the holiday and their "average weekly earnings" for the 12 months immediately before the end of the last pay period before the holiday.

The case is about the calculation of holiday pay - particularly the ordinary weekly pay figure - for two periods of leave taken by a tour company bus driver guide whose -

- work pattern depended on the length of bus tours rather than a calendar week; and
- pay included commission which varied by tour and was paid after each tour ended.

Generally, the trips, and therefore the periods for which commission was paid, were longer than a week.

The Holidays Act defines ordinary weekly pay as "the amount of pay that the employee receives under his or her employment agreement for an ordinary working week".

Where it is not possible to determine an employee's ordinary weekly pay, it is calculated in accordance with the formula: (a less b) divided by c. In this formula:

- a) a is the employee's gross earnings for the four weeks before the end of the pay period immediately before the calculation is made, a figure which includes commissions;
- b) b subtracts certain payments, including "productivity or incentive-based payments that are not a regular part of the employee's pay"; and
- c) c is four.

Commissions are productivity or incentive-based payments received under the employment agreement. The central question was therefore whether commission payments received by the employee are "not a regular part of the employee's pay".

Lower Court judgments

The EC agreed with the employer's interpretation and said that "not a regular part of the employee's pay" should be construed as "not a regular part of the employee's pay *for an ordinary working week*".

It also said that the commission payments were not earned by the driver guides, until a debriefing and reconciliation process had taken place. This having happened in the same week as the commission was generated on only three occasions, the EC said that commission was *not a regular part of the employee's pay for an ordinary working week*.

An MBIE Labour Inspector appealed to the Court of Appeal, who allowed the appeal and held that the commission payments did not need to be a part of the pay for an ordinary working week; they could be earned over a longer period of time. It only needed to be a regular part of the employee's pay. THL appealed.

SC Decision

The appeal failed. The SC said that *payments are a regular part of the employee's pay if they are made regularly when assessed against the standard of a four-week period*. (That is the 4-week average set out in the formula above.)

The commission payments in this case, which were made monthly on average, were sufficiently regular so as not to be subtracted in the formula. The employee's ordinary weekly pay figure would therefore include commission payments.

Last word

Coming from the highest court in the land, that is the last word on the matter, really.

Applications open for new 2021 Resident Visa

The first round of applications for New Zealand's new 2021 Resident visa are now open.

Announcing the development, Minister of Immigration Kris Faafoi said "This one-off pathway provides certainty for a great many migrant families who have faced disruption because of COVID-19 and it will help retain the skills New Zealand businesses need to support the economic recovery,".

It's estimated up to 15,000 migrants who have lived in New Zealand for the last three years or who work in skilled or scarce jobs, and were in New Zealand on 29 September 2021, will be able to apply in this first round.

To be eligible for this first phase a person must also have already submitted either a:

- Skilled Migrant Category (SMC) application; or
- Residence from Work application; or

- SMC Expression of Interest (EOI) which includes dependent children who were 17 years or older as at 29 September 2021.

“The Government has created this new one-off residence pathway recognising the immense contribution migrants have made to New Zealand during COVID-19 and appreciating the uncertainty they have faced with border restrictions,” Kris Faafoi said.

“We are expecting high demand in the first few weeks, with lots of people wanting to submit their application early, but we ask people to be patient. We recognise that some of these individuals have been waiting for residence for a long time and are eager to get their applications in quickly, but they have plenty of time to apply. Applications for both Phase One and Phase Two will be open until 31 July 2022.

“The Government has been working hard to make sure the new 2021 Resident Visa application process is simple, streamlined and easy for individuals, and Immigration New Zealand is committed to processing the vast majority of these applications within 12 months, with some much sooner,” Kris Faafoi said.

It’s estimated that around another 150,000 migrants could be eligible for the 2021 Resident Visa in Phase Two which opens for applications from 1 March 2022.

More information about the 2021 Resident Visa is available [here](#). The webpage includes –

- An [eligibility checker](#)
- A [video on how to apply](#) and an application checklist.

This article is brought to you by AdviceWise People, who provide WGANZ’s free employment helpline 0800 692 384. If you have any questions or would like to discuss the article, please call Philip or Anthony.