

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Dean Fletcher (Applicant)
AND	ATL Systems Limited (Respondent)
REPRESENTATIVES	Garry Pollak for Applicant Richard Upton for Respondent
MEMBER OF AUTHORITY	Robin Arthur
CONFERENCE AND SUBMISSIONS	12 December 2006 (telephone conference with counsel); 13 December 2006 (applicant's submissions) and 20 December 2006 (respondent's submissions)
DATE OF DETERMINATION	24 January 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant seeks removal of his employment relationship problem to the Employment Court on the grounds that it raises an an important question of law. The respondent opposes the removal.

[2] By agreement with counsel in a telephone conference on 12 December 2006, the parties have filed written submissions regarding the removal application which is to be determined on the papers.

The employment relationship problem

[3] The applicant alleges that his former employer, the respondent company, failed to properly pay him holiday pay during nine years of employment which ended on 31 December 2005. He says he is entitled to arrears of wages of \$79,356 under the Holidays Act 1981 ("the 1981 Act") and \$11,838 under the Holidays Act 2003 ("the 2003 Act").

[4] He was employed as a sales representative with a base salary but earned a substantial proportion of his income through commission on sales made.

[5] The applicant's case is that when he was on annual leave the respondent continued to pay him his usual salary rather than properly calculate and pay to him holiday pay as defined under the respective Acts, particularly the commission portion of his income.

[6] The respondent replies that all annual leave payments were correctly calculated and recognised the applicant's base salary and commission payments. This included paying to the applicant commissions payments that fell due to him while he was annual leave. It says payments made were consistent with the requirements of the applicable legislation, including the definition of 'gross earnings'.

[7] The applicant relies in his claim on the report of a Labour Inspector's investigation into a complaint made by the applicant.

[8] By letter to the respondent dated 15 September 2006 the Inspector expresses the view that continuing to pay regular pay during a period of annual leave did not meet the requirement under section 11 of the 1981 Act to calculate and pay "holiday pay".

[9] Having reviewed records available to her and using calculations based on average weekly earnings during periods to which the 1981 Act and 2003 Act apply, the Inspector has concluded that the applicant is owed \$52,666 in holiday pay. This was after allowing for \$26,408 already paid to him as base salary during periods of annual leave and \$12,119 paid for accrued entitlements on the termination of his employment.

The removal application

[10] In considering a removal application under s178 of the Employment Relations Act 2000 the Authority does not have the benefit of having conducted an investigation to establish or confirm the facts. Rather it must assess the merits of the application on the information provided by the parties and the criteria in the Act.

[11] Here the parties agree that removal question must be answered within the terms of two of the four statutory criteria:

- (a) whether an important question of law is likely to arise in the matter other than incidentally - s178(2)(a), or;
- (b) whether the Authority is of the opinion that in all the circumstances the Court should determine the matter - s178(2)(d)?

The applicant's argument for removal

[12] The applicant says important questions of law arise regarding the precise meaning of "holiday pay" and "on pay" under the respective legislation.

[13] It submits that the central issue between the parties can be put in this form:

When an employee receives, as part of his or her remuneration a significant portion of commissions, how is holiday pay and payment for the taking of holidays [to] be treated pursuant to the Holidays Act 1981 and Holidays Act 2003?

[14] It notes that the Inspector's written opinion on the applicant's claim depends on particular views or interpretations of the phrases "holiday pay", "regular pay" and "pay" and refers to sections of both Acts.

[15] The applicant accepts that the Authority could determine the matter but submits that the questions of law involved are important on two levels - firstly, because a significant arrears claim depends on determination of the legal issues, and secondly, because the interpretation may be of widespread effect for a reasonably large but unspecified percentage of the workforce whose income is derived substantially from commissions.

[16] Applicant counsel says his research has not revealed any previous Authority or Employment Court decisions which have directly considered the issues in relation to commission payments. He also notes that key issues of interpretation and application of the 2003 Act have had the benefit of judicial consideration.

[17] For these reasons the applicant submits that even if his case did not meet the criteria as an important question of law, the Authority should nevertheless exercise its discretion to remove the matter to the Court.

The respondent's argument against removal

[18] The respondent accepts that the questions of law arising in the case are more than incidental. It does not argue that the questions of law are not central to the case but rather disputes whether they are important enough to warrant removal.

[19] It submits the resolution of questions of law required in this particular case would not – in the phrasing of the Court in *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1, at 7 – “affect large number of employers or employees” or have consequences “of major significance to employment law generally”. Rather it says the resolution of the case will be limited to its particular facts.

[20] It suggests most of the issues relate to the now-repealed 1981 Act and if important would have arisen during that Act's 22 years of currency.

[21] The respondent submits that the issues are simply matters of statutory interpretation appropriately dealt with by the Authority in the first instance. It also notes that the parties have not attended mediation on this matter and submits that the Authority is best placed to encourage mediation.

[22] It asks the Authority to weigh some discretionary factors against removal, particularly that removal would:

- delay prompt resolution of the matter; and
- be inconsistent with the statutory objective of reducing judicial intervention; and
- deprive the parties of one general right of appeal.

Discussion

[23] I do not accept the respondent's arguments on the factors against removal outlined in the previous paragraph. While the Employment Relations Act 2000 expresses objects of prompt resolution and reduced judicial intervention, it also provides for the prospect of removal in appropriate cases. Another object declares “that there will always be some cases that require judicial intervention” (s143(e)) and the criteria for removal given in s178(2) clearly identifies the nature of some such cases. Parliament has, in its wisdom, balanced certain needs of the parties with their needs on other occasions for the benefit of having the judges of the Employment Court apply their expertise and experience to the parties' problems at first instance.

[24] Whether this is one of those cases depends on the importance of the questions of law it raises. As the Court noted in the *Hanlon* case cited above, a question of law could be described as important even when “far less momentous” than being of “major significance to employment law generally”. It is important “if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it” (*Hanlon* at 7).

[25] It may be that findings of fact on what was or was not included in the payments made to the applicant during periods of annual leave will be decisive in the matter. However there are questions of law as to what should or should not have been included in those payments. These questions need not be novel or complex. They need not foreseeably arise very often in the future: *NZ Baking Trades Union v Foodtown Supermarkets Ltd* [1992] 3 ERNZ 305, 308 (EC)

[26] The issues are clearly important to the parties. Whichever of their respective interpretations regarding the inclusion of commission payments is correct is likely to be of wider interest to other employees receiving commission payments and to employers making them. It may be that other employees will have claims for arrears under the two Acts. With a six year limitation period, there may still be live claims to be made under the 1981 Act which was effective until 31 March 2004. That is another reason that the immediate parties and

others who may be potentially interested should have the benefit of the Court's deliberation on the issues.

[27] I accept the respondent's point that this matter has not been the subject of discussions in mediation between the parties. However the applicant fairly says there is little prospect of resolution at that level when the differences in understanding of the legal obligations are so stark and there appear to be no Employment Court decisions squarely on point to assist.¹ The Court will have its own opportunity, if this matter is removed for its attention, to consider whether an attempt at resolution through mediation should be made.

Determination

[28] After considering the parties' submissions I am satisfied that the answers to the questions of interpretation arising in respect of both the 1981 Act and the 2003 Act will be decisive to the central issue in this case – the inclusion of commission payments in the calculation of holiday pay.

[29] It may be that the issue is not as contentious as it appears as both the 1981 Act and the 2003 Act include commission payments in the definition of gross earnings which are to be assessed in identifying the average weekly earnings for the purpose of calculating annual holiday pay. However, how this has been done or not done, is clearly a contentious issue between the parties who need, in my determination, the guidance of the Employment Court on the correct method of calculation and payment to follow.

[30] I am satisfied that the issues between the parties in this matter are likely to give rise other than incidentally to important questions of law regarding the application of the 1981 and 2003 Acts. Exercising the discretion provided under s178(2) of the Employment Relations Act 2000, for reasons already discussed above, I consider there is no sufficient reason not to order removal on that ground. Having reached this view in respect of removal under the narrow criterion of s178(2)(a) there is no need to discuss whether s178(2)(d) also applies although it naturally follows from the determination under s178(2)(a).

[31] Accordingly I order the removal of this matter to be heard and determined by the Court.

Robin Arthur
Member of Employment Relations Authority

¹ Although related issues have been considered by the Authority – see *Phillips v Hauraki Marine Ltd* (unreported, ERA Auckland, AA112/06, 5 April 2006, Member Urlich).