

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 201
3030792

	BETWEEN	GD (TAURANGA) LIMITED Applicant
	A N D	CLAYTON PRICE First Respondent
	A N D	PAUL KEOWN Second Respondent
	A N D	STEPHEN LIM-YOCK Third Respondent
Member of Authority:	Rachel Larmer	
Representatives:	Tania Waikato, Counsel for Applicant Andrew Foster, Counsel for Respondents	
Investigation Meeting:	On the papers	
Date of Determination:	25 June 2018	

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment Relationship Problem

[1] GD (Tauranga) Limited (“GD”) in its statement of problem asks for the Authority’s determination regarding its interpretation of s.9 and s.9A of the Holidays Act 2003 (“HA03”) in relation to each of the three respondents’ statutory entitlements under s.49 (public holiday not worked), s.50 (public holiday that is worked), s.60 (alternative holiday) and s.71 (sick leave and bereavement leave) (collectively referred to in this determination as “*other leave*”) under HA03.

[2] GD contends that it is entitled to pay the respondents their “*relevant daily pay*” (“RDP”) as calculated under s.9 HA03 for each day that other leave is taken by the

three respondents. The three respondents contend that GD is required to pay them their “*average daily pay*” (“ADP”) as calculated under s.9A HA03.

[3] GD is a building company which sells houses and land packages to the public. All three respondents are sales consultants employed by GD.

[4] GD is a licensee under a licence agreement with Generation Group Limited (“GGL”) which has other licence agreements with other licensees throughout New Zealand.

[5] The other licensees like GD remunerate their sales consultants in the same way that GD does. There are therefore seventeen other sales consultants employed by other licensees with GGL who will be directly affected by the outcome of this matter.

[6] GD also has two other sales consultants that it employs in addition to the three respondents in this matter meaning there is a total of twenty three sales consultants and six GGL licensees who will be directly affected by the outcome of GD’s current application.

[7] GD further says that it is aware of other building companies throughout New Zealand who sell house and land packages that also employ sales people and remunerate them in the same or substantially similar way as GD does.

[8] GD therefore says that those other employers and their sales employees are therefore also likely to be interested in and potentially affected by the outcome of this matter.

[9] GD sees this case as a “test case” on whether employers who employ and pay sales staff in the same way as GD does are entitled to pay their sales employees using RDP when they take other leave under HA03.

[10] Subsequent to filing its statement of problem GD filed an application for removal of the substantive matter to the Employment Court on the basis that an important question of law is likely to arise in the matter other than incidentally in accordance with s.178(2) of the Employment Relations Act 2000 (“the Act”).

[11] The specified question of law is whether for the purposes of making payments to the respondents under ss.49, 50, 60 and 71 of HA03:

- (a) GD is permitted to pay the respondents their RDP as calculated under s.9 of HA03; or
- (b) GD is required to pay the respondents their ADP as calculated in s.9A of HA03;

[12] GD says that the question of law is important because it:

- (a) Asks the Court to determine and clarify the correct applications of ss.9 and 9A of HA03 in relation to employees who are paid a base salary plus event trigger commissions and bonuses and therefore is likely to be applicable to a large number of employees and employers¹;
- (b) The correct interpretation and application of ss.9 and 9A ought to be resolved by the Employment Court²;
- (c) The question of law arising is a major significance to employment law generally³;
- (d) The question of law arising will be determinative of the entire proceedings and has not previously been decided by the Employment Court⁴.

[13] GD further says there are additional discretionary considerations that favour the removal of the matter to the Employment Court, namely:

- (a) Ruling on this matter has been sought from a Labour Inspector under s.11 HA03 on two occasions but was declined;
- (b) The parties have agreed that the removal of the matter to the Employment Court is preferable in the interests of efficiency and saving costs;

¹ *Transpacific Industries Group (NZ) Limited v Harris* [2012] NZEmpC 17.

² See *Postal Workers Union of Aotearoa Incorporated v NZ Post Limited* [2012] NZCA, *McLeod v Te Apiti Trust* [2013] NZERA Auckland 228 and *New Zealand Airline Pilots Association v Mount Cook Airlines Limited* [2013] NZCA 174.

³ *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

⁴ *Roach v Nazareth Care Charitable Trust Board* [2017] NZEmpC 165.

- (c) There are no disputed questions of fact that should be dealt with at first instance by the Authority⁵;
- (d) The parties have agreed that they will not seek costs against each other because they consider this matter to be in the nature of a test case;
- (e) GD has agreed to pay the respondents up to \$10,000 as a contribution towards their actual legal costs on the basis that this matter is considered by the parties to be a test case;
- (f) In order to achieve to certainty and to have a substantive decisions of the Court, it is more economical to have one hearing of this matter in the Employment Court rather than an investigation meeting and the prospect of a hearing de novo challenge by either party⁶

[14] Ms Michelle Hulme Finance Manager GD provided a sworn affidavit in support of the removal application.

[15] The three named respondents advised the Authority in a statement in reply filed on 18 June 2018 that they agreed that there was an important question of law that should be resolved by the Employment Court in the first instance. The respondents also consented to the making of the removal order sought by GD.

[16] I am satisfied that the grounds for removal under s.178(2) are made out on the basis that there is an important question of law which is likely to arise other than incidentally.

[17] I consider there are no discretionary factors which would weigh against the exercise of the Authority's discretion to remove this matter to the Employment Court in the first instance.

[18] I further accept that the discretionary considerations identified by GD in its removal application are factors which also support the removal of this matter to the Employment Court in the first instance.

⁵ *NZ Amalgamated Engineering, Printing and Manufacturing Union Inc v Carter Holt Harvey Limited* [2011] 1 ERNZ 74.

⁶ *Transpacific Industries Group (NZ) Limited v Harris* [2012] NZEmpC 17.

[19] Even if I am wrong about there being an important question of law under s.178(2)(a) of the Act I am nevertheless satisfied that this is an appropriate under s.178(2)(d) of the Act on the basis that the Authority is of the opinion that in all the circumstances set out in GD's removal application the Employment Court should determine this matter.

[20] Accordingly the Authority orders that matter AEA3029458 be removed in its entirety to the Employment Court in the first instance.

[21] In accordance with the parties' expressed wishes no order is made regarding the costs of this removal application.

Rachel Larmer
Member of the Employment Relations Authority