Employment Court of New Zealand

GD (Tauranga) Limited v Price [2019] NZEmpC 101 (19 August 2019)

Last Updated: 22 August 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA TĀMAKI MAKAURAU

[2019] NZEmpC 101
EMPC 187/2018

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	GD (TAURANGA) LIMITED Plaintiff
AND	CLAYTON PRICE First Defendant
AND	PAUL KEOWN Second Defendant
AND	STEPHEN LIM-YOCK Third Defendant

Hearing:	13 March 2019 (Heard at Tauranga)
Court:	Judge Corkill Judge Holden Judge Perkins
Appearances:	P Crombie and T Waikato, counsel for plaintiff A B Foster, counsel for defendants
Judgment:	19 August 2019

JUDGMENT OF THE FULL COURT

Introduction

[1] These proceedings, which have been removed from the Employment Relations Authority (the Authority) to the Employment Court, involve a dispute as to the correct entitlement to remuneration of the defendants for public holidays, alternative holidays,

sick leave and bereavement leave (other leave).1 The dispute relates to whether relevant daily pay (RDP) or average daily pay (ADP) is the correct remuneration when the employees concerned take other leave.

[2] The decision the Court needs to make involves an interpretation of s 9 and s 9A of the Holidays Act 2003 (the Act) in relation to the defendants' entitlements under s 49, 50, 60 and 71 of the Act.

[3] While this matter needs to be resolved on its own facts, the Court's decision may have wider ramifications in the workforce. Hence the proceedings have been heard by a full Court. Even though an interpretation of the provisions of the Act is required, in other cases different factual situations may lead to different outcomes than that resolved for the employees in this case.2

Pleadings

[4] It is helpful to set out the relief and remedies which the plaintiff GD (Tauranga) Limited (GD Tauranga) seeks in this matter. These are set out in the amended statement of claim as follows:

20. The plaintiff seeks determinations that for the purposes of calculating payments to each of the defendants pursuant to sections 49, 50, 60 and 71 of the Act for each day of Other Leave that is taken by them under the Act:
    20.1 The plaintiff is permitted to pay the defendants their RDP as calculated under section 9 of the Act; and
    20.2 That each defendant's RDP is correctly calculated under s9 of the Act as follows:
        (a) On any day of the month, except a day that a commission is earned, the RDP is a sum equivalent to the daily portion of each defendant's base salary, which is calculated by the plaintiff's payroll system as follows:
            (i) The defendant's usual hours of work are 40 hours per week, 5 days per week, based on an

1 *G D (Tauranga) Ltd v Price* [2018] NZERA Auckland 201.

2. The issue appears to be of wider concern. We note that it was touched on recently by the Holidays Act Taskforce, which commented that s 9A was not "explicit" about what is required in those circumstances where an employer may be able to determine both RDP or ADP: *Holidays Act 2003 Review: Issues Paper* (August 2018) at [55].

8-hour work day. Each defendant's hourly base salary rate is calculated by dividing their annual base salary by 52 weeks, and then dividing the result by 40 hours per week **(Hourly Base Salary Rate)**. The current annual base salary of each defendant is

$34,320.00 divided by 52 weeks =$660.00 per week, divided by 40 hrs= $16.50 per hour.

(ii) The defendant's RDP is then calculated by multiplying their Hourly Base Salary Rate by 8 hours. The Hourly Base Salary Rate $16.50 per hour is multiplied by 8 hours which equals $132 per day. This is the current RDP for the defendant's for each day of the month except a day that a commission is earned.

(b) On a day of the month that a commission or bonus is earned, the RDP for each of the defendants includes the daily portion of their base salary, plus any commission or bonus entitlements due that day, if such payments would have otherwise been received, had the sales consultant worked on the day concerned. A sales consultant's RDP on a commission earning day therefore includes:

(i) The daily portion of each their base salary as calculated above. This is currently $132; plus
(ii) Any commission or bonus payment that they would have otherwise received, had they worked on the day concerned. For example, if a sales consultant made one sale of a house and land package that becomes an unconditional sale on the 15th of the month and takes sick leave that day, he/she would have earned a $3,000 commission payment if they had worked that day, in addition to the daily portion of his/her monthly base salary.

[5] The defendants have pleaded as affirmative defences that, through usage, leave taken was calculated according to ADP as against RDP and accordingly, has become incorporated into the contractual terms. Alternatively, the defendants raise affirmative defences that the facts as pleaded constitute a waiver or give rise to an equitable estoppel and/or estoppel by convention, given mutual assent to a common assumption as to the relevant facts such that it would be unjust to allow GD Tauranga to unilaterally go back on a mutual assumption.

[6] In addition to their affirmative defences, the defendants have included a counter-claim requiring payment of losses suffered by way of wage arrears during the period when the plaintiff has made payment for the leave based on RDP rather than ADP.

[7] For the record it is noted that GD Tauranga filed a formal reply to the affirmative defences and the counter-claim.

[8] The pleadings adequately set out for the Court the issues which arise in this matter and upon which a decision is sought.

Statutory provisions

[9] As already indicated, the dispute in this case revolves around the effect of ss 9 and 9A of the Act. Section 9 gives the meaning of RDP and reads as follows:

Meaning of relevant daily pay

(1) In this Act, unless the context otherwise requires, **relevant daily pay**, for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave, –

(a) means the amount of pay that the employee would have received had the employee worked on the day concerned; and
(b) includes–
(i) productivity or incentive-based payments (including commission) if those payments would have otherwise been received had the employee worked on the day concerned:
(ii) payments for overtime if those payments would have otherwise been received had the employee worked on the day concerned:
(iii) the cash value of any board or lodgings provided by the employer to the employee; but
(c) excludes any payment of any employer contribution to a superannuation scheme for the benefit of the employee.

(2) However, an employment agreement may specify a special rate of relevant daily pay for the purpose of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or

family violence leave if the rate is equal to, or greater than, the rate that would otherwise be calculated under subsection (1).

(3) To avoid doubt, if subsection (1)(a) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

[10] The application of ADP is covered by s 9A of the Act, which reads as follows:

Average daily pay

(1) An employer may use an employee's average daily pay for the purposes of calculating payment for a public holiday, an alternative holiday, sick leave, bereavement leave, or family violence leave if—

(a) it is not possible or practicable to determine an employee's relevant daily pay under section 9(1); or
(b) the employee's daily pay varies within the pay period when the holiday or leave falls.

(2) The employee's average daily pay must be calculated in accordance with the following formula:

a b

where —

a. is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made
b. is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.

(3) To avoid doubt, if subsection (2) is to be applied in the case of a public holiday, the amount of pay does not include any amount that would be added by virtue of section 50(1)(a) (which relates to the requirement to pay time and a half).

Factual outline

[11] There was very little in dispute between the parties as to the facts of this matter. The defendants are employed by GD Tauranga as sales consultants. For the purposes of these proceedings they have agreed to act as defendants in the application as it is regarded as a test case. They did not give or call evidence at the hearing.

[12] In his opening submissions, Mr Crombie, counsel for GD Tauranga, submitted that the Court's decision will have wider application than just for the three defendants. The outcome of GD Tauranga's application will apply not only to all its sales consultants but also to the sales consultants employed by other licensees of Generation Homes, of which the plaintiff is one. GD Tauranga also understands that other employees in the building industry employ sales consultants on remuneration terms similar to the way in which the defendants are remunerated. Accordingly, the consequences of the decision in respect of other leave will influence the employment of sales consultants in the building industry. Nevertheless, as stated earlier, the factual circumstances existing in each case would need to be considered.

[13] GD Tauranga is a building company selling combinations of residential houses and land packages. It is a licensee under a licence agreement with Generation Group Limited (GGL). It operates a system for supplying land and houses under the Generation Home brand. The territory within which it operates its business is defined.

[14] The defendants, who were all employed under written individual employment agreements, are paid a base salary

equivalent to the minimum wage based on 40 hours per week. The salary is paid monthly in arrears. The defendants as sales consultants, are also paid commissions for the number of sales they make. The bonus payments are calculated upon the achievement of certain numbers of sales in a yearly period. Commission accrues on the date a sale and purchase agreement is declared unconditional, and is then paid on the tenth day of the month following the accrual date. That accrual may occur on other leave days.

[15] GGL has six other licensees which operate in different parts of New Zealand. Generally, the sales consultants are employed on the same or substantially the same terms and conditions as the defendants. There are approximately 20 sales consultants New Zealand-wide.

[16] The written individual employment agreements for the defendants in this case include the following provisions relevant to this dispute:

(a) The third schedule of each agreement sets out their remuneration structure which is as referred to above. Remuneration is reviewed

annually, and the amount of commission and bonuses payable is varied from time to time. The base salary necessarily increases as and when the minimum wage is increased under a Minimum Wage Order made pursuant to the Minimum Wage Act 1983;

(b) Clause 11 of each agreement (leave for public holidays) provides that the employee shall be entitled to be paid their RDP for that day; and

(c) Clause 13.5 of each agreement (bereavement leave) provides that payment for bereavement leave shall be equivalent to the employee's RDP.

(d) Clause 12 provides that the employee is “entitled to sick leave in accordance with the Holidays Act 2003”.

(e) Clause 1.2 provides that the agreement and the schedules to it “constitute the entire agreement between the parties and supersede all previous agreements ...” between the parties.

(f) Clause 29 provides that the contents of the agreement “can only be varied during its term by agreement of both the Employer and the Employee recorded in writing and signed by both parties”.

[17] While the agreements provide for the method of calculating payment for public holidays and bereavement leave, they do not provide for the method of calculating payment for alternative holidays or sick leave. The Act (ss 60 and 71), however, requires payment of RDP or ADP for such leave, depending upon the application of ss 9 and 9A.

[18] The external accountants for GGL advised it that ADP had to be paid for other leave, even though the agreements provided for payment of RDP for public holidays and bereavement leave. The external accountants processed all staff remuneration for each payroll cycle for all the Generation Homes Licensees, including GD Tauranga. Because of the advice, all staff employed by the licensees were paid ADP for other leave from the commencement of their employment. This advice had been received

from the accountants in 2013. To pay ADP for other leave, the external accountants had to manually override the payroll system and change the payment calculation from RDP to ADP. Accordingly, the defendants and other sales consultants were paid ADP under s 9A of the Holidays Act 2003 (the Act) for other leave.

[19] In approximately 2015, Mr Lyndon Marshall, GD Tauranga’s Managing Director, began to doubt the advice from the external accountants to pay ADP, and raised those doubts in discussions with Mr Kevin Atkinson, the CEO of Generation New Zealand Limited, a wholly owned subsidiary of GGL.

[20] Then, in May 2016, GD Tauranga employed Ms Michelle Hulme as its Finance Manager. Ms Hulme was responsible for managing the payroll of GD Tauranga’s employees. In her role she liaised with the external accountants who processed the payroll for all GD Tauranga staff. Ms Hulme noticed the manual overriding of GD Tauranga’s payroll system whereby the sales consultants of GD Tauranga were receiving ADP, instead of RDP, for public holidays, alternative holidays, sick and bereavement leave. She considered this to be incorrect.

[21] After making inquiries of the external accountants, Ms Hulme discussed her concerns with Mr Marshall, who decided to change the sales consultants’ pay for the other leave back to RDP. This decision was implemented from 1 June 2016.

[22] Mr Atkinson then decided that the change should be applied to sales consultants in other companies in the Group from 1 November 2017. A decision was also made, because of the controversy that had arisen with staff over the matter, that an application would be made by GD Tauranga to the Authority for a ruling, which as noted earlier, was removed to the Court.

[23] Mr Marshall was not aware of the overriding of the payroll system in payment of ADP to the sales consultants for other leave, until initially being alerted by Mr Atkinson. He also took legal advice before instituting the change back to RDP on 1 June 2016. Though Mr Marshall had been manager of GD Tauranga since 2013, he had only been recently appointed a director of GD Tauranga when this issue came to a head in 2015. He conceded in evidence that he did not handle well the decision to switch back to RDP. He conceded that the decision was made and notified without

proper consultation with the employees affected. Some dissension arose over this, but it is not the subject of any action by the staff.

[24] Quite a substantial sum of money is involved if GD Tauranga is required to pay ADP instead of RDP. There is another consequence. As ADP must be calculated by including the commission or bonus payments in the total annual income to be averaged on the leave days, the employees concerned will receive a portion of those payments in their average pay, but if liability for a commission or bonus accrues on the leave day, the commission or bonus will also then be payable. This would result in a partial double-payment of the commission bonuses.

Discussion

[25] This case centres on the meaning of the word "may" as it appears in s 9A(1), and whether GD Tauranga retains a discretion to pay RDP when it is still possible to calculate RDP, but the pay varies within the pay period when the other leave falls. In other words, whether use of the word "may" in the section requires payment of ADP when either one of the circumstances in s 9A(1) exist. Is the use of the word "may" in this context permissive or empowering or does use of the word "may" mean "must"?3

[26] GD Tauranga's position is that in this case it is possible and practicable to calculate RDP. This is so even though the employees' daily pay varies within the pay period when the other leave falls. In such circumstances GD Tauranga submits that it is entitled to elect whether to pay RDP or ADP. This discretion, it submits, arises under s 9A by use of the word "may". That discretion is then incorporated into the employment agreements, which provide that other leave is to be "in accordance with the Holidays Act".

[27] Mr Foster, counsel for the defendants, submitted that their position on this point is that even if it is possible and practicable to calculate RDP, if the pay varies

3. For a discussion of the distinction see *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [31], citing *Tyler v Attorney-General* [1999] NZCA 217; [2000] 1 NZLR 211 (CA) at [25]– [26]; and *Finance Facilities Pty Ltd v The Commissioner of Taxation of the Commonwealth of Australia* [1971] HCA 12; (1971) 127 CLR 106 at 134.

then s 9A *requires* ADP to be paid. In other words, use of the word "may" in s 9A(1) does not vest a discretion in GD Tauranga but is used in a mandatory sense. If one of the circumstances specified in s9A(1) exists, then ADP is to be paid. Mr Foster, in his submissions, suggested that the distinction as to the interpretation to be placed upon the word "may" is unlikely to be significant. He submitted that, if it is not possible or practicable for the employer to determine the relevant daily pay under s 9, or the daily pay varies within the pay period, the employer would have little option but to use the average daily pay alternative. This is correct in the sense that employees must be paid for other leave, and if RDP cannot be calculated, then the Act makes provision for at least the minimum entitlement of ADP to be paid. This, however, begs the question which arises in the present case as to what happens when RDP can be calculated but nevertheless the pay varies within the pay period.

[28] As a guide to interpretation, Mr Crombie referred in his submissions to Parliamentary materials, including the explanatory note for the Holidays Amendment Bill in 2010 which introduced s 9A into the Act.4 He also referred to the Parliamentary debates on the Bill. Also arising from his submissions, and of some significance in our view, are the statements of the Supreme Court in *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc*,5 which drew a distinction between the then new s 9A and the now repealed previous equivalent.6

[29] The decision of *New Zealand Post Ltd* is significant because, in that case, the Supreme Court was dealing with the predecessor section in the Act while being aware of the new amendment contained in s 9A, then recently enacted. Confirming the differences between the predecessor section and the amendment the Supreme Court stated of s 9A:7

> (a) the averaging period is the preceding 52 weeks rather than the preceding four weeks;
> (b) it is cast in permissive rather than mandatory terms: "An employer may ..."; and

4 Holidays Act Amendment Bill 2010 (195-1) (explanatory note) at 5.

5 *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.

6 Holidays Act 2003, Historic Version (1 April 2004 to 31 March 2011), s 9(3).

7 *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* at [3].

(c) it is broader in its application than the former s 9(3) as it applies if either it is not possible or practicable to apply s 9(1) or the employee's daily pay rate varies during the pay period when the holiday or leave falls.

[30] As Mr Crombie submitted, the change from "must" to "may" in the current s 9A and the broadening of the circumstances in which ADP can be used were deliberate changes that must be given effect when interpreting the section.

[31] The Explanatory Note to the Bill states:8

The policy intent behind both relevant daily pay and average daily pay is to ensure a fair rate of pay for leave (particularly where a calculation is required to determine the rate of pay) and to ensure that an employer is able to assess quickly whether relevant daily pay or average daily pay applies to an employee. The policy intent of relevant daily pay remains unchanged (that is, paying employees what they would have earned had they worked on the day so that employees are not financially disadvantaged). The policy intent for the average daily pay calculation is that the method for calculating this average daily rate is simple to apply and does not create financial incentives for employers or employees to request, refuse, or require leave to be taken at any particular time or times.

Average daily pay replaces the current 4 week averaging formula provided in section 9(3) of the principal Act. When calculating payment for leave, employers are still required to attempt to determine what an employee would have earned on the day (relevant daily pay) in the first instance. *However, the trigger for when an employer may move to an averaging formula has been made more permissive. The averaging formula may be used when it is not possible or practicable to determine what the employee would have earned or where an employee's daily payment varies within the pay period in which the holiday or leave falls. In those situations, an employer may choose to continue to attempt to determine the employee's relevant daily pay or move to the average daily pay calculation.* Where it is not possible to determine the employee's relevant daily pay, the employer must pay according to the employee's average daily pay. ...

(Emphasis added)

[32] In the third reading of the Holidays Amendment Bill containing the amendment, the Hon Kate Wilkinson (Minister of Labour) stated:9

... As a result, the working-group has drawn up a new concept called average daily pay. This change will make the Holidays Act easier to understand for those who work variable hours. When relevant daily pay is not possible or practical to calculate, the employer may use average daily pay. This payment for leave is based on past identifiable earnings over the previous 52 weeks, or

8 Holidays Amendment Bill 2010 (195-1) (explanatory note) at 4-5.

9 (23 November 2010) 669 NZPD 15673.

whatever period the employee has been employed. This addresses the issue of potential fluctuations in pay. Both employees and employers will have greater certainty around what leave payments will be. This is an important change. It will give employers greater clarity and significantly reduce their compliance costs under the Act.

[33] On the basis of these materials, we agree with Mr Crombie's submission that if s 9A is interpreted in the manner contended for by Mr Foster for the defendants, and the word "may" in s 9A(1) is interpreted as meaning "must", this would be contrary to Parliament's intention to provide the employer with the discretion to pay either ADP or RDP in the specified circumstances, which in this case involve an ability to calculate RDP. That is indeed the approach which was adopted by the Supreme Court in *B v Waitemata District Health Board*, where the Court held that the use of the word "may" in the context of that case was permissive.10 The Court stated that it is the ordinary usage of the word, and went on also to state that to interpret "may" to mean "must" in that case would be inconsistent with the statutory scheme. The same position applies in the present case.

Conclusion on statutory position

[34] The intention expressed in the Parliamentary materials is clear. If RDP is capable of being calculated, then the employer can use this method of calculation for other leave even if the daily pay varies within the pay period involved. This is in accord with the Supreme Court's interpretation of s 9A at the time of its enactment in the *New Zealand Post Ltd* decision.11 To interpret the provisions otherwise, as submitted by the defendants, would be inconsistent with the clearly expressed statutory scheme and would be to depart from ordinary usage of the language.

[35] In the present case it is possible for GD Tauranga to calculate RDP even though the employees' daily pay varies within the pay period when the other leave falls, but as indicated from the authorities and materials relied upon, in that situation the employer has a discretion as to whether it applies RDP or ADP. We can see no impediment to GD Tauranga altering the previous method of payment from ADP back to RDP. That discretion vests in the employer in this case. Indeed, it is conceivable

10 *B v Waitemata District Health Board*, above n 3, at [32].

11 *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc*, above n 5.

that a need arises for an employer to change between RDP and ADP for other leave on a reasonably regular basis if the employment circumstances periodically change such that calculation of RDP becomes neither possible nor practical and s 9A comes into effect. That has not occurred in the present case, but as Minister Wilkinson stated in the parliamentary debates, the ability is there as a means of reducing compliance costs if an employer finds difficulty in calculating RDP or the daily pay varies to such an extent that calculation of RDP for the other leave is too complex to be cost efficient.

Affirmative defences

> [36] As mentioned earlier in this judgment when discussing the pleadings, the defendants have pleaded affirmative defences. These are threefold. First, it is alleged that through usage, ADP has become incorporated into the contractual terms. Secondly, the defendants raise the defence that the facts as pleaded constitute a waiver. Thirdly, the same facts give rise to an equitable estoppel and/or estoppel by convention.
>
> [37] These matters were dealt with comprehensively by Mr Crombie in his submissions. Mr Foster, however, while dealing with the defences in his written submissions, conceded in oral submissions that the evidence as it stood at the end of the hearing meant that it would not be possible for his clients to establish the affirmative defences. His primary submission was, therefore, that it was important for the parties to have a decision from the Court on the primary issue as to whether under s 9A of the Act the employer is entitled to elect either RDP or ADP in circumstances where RDP can be calculated.
>
> [38] We agree with Mr Crombie's submission that any suggestion that there has been incorporation into the contractual terms, or as he suggested, a variation, must be defeated by the condition contained in clause 1.2 that the agreement and its schedules constitute the entire agreement between the parties. Amongst the documents provided to the Court there was evidence of periodic variations to the agreement, but these have been properly recorded in writing as variations and executed by the parties and presumably, when such variations were made, consideration was provided. No such

documents exist to confirm the employees' contention as to invariable payment of ADP for other leave.

> [39] Insofar as the defence of waiver is concerned, Mr Foster agreed that there was no evidence in this case that GD Tauranga intentionally and with knowledge chose between one of the two inconsistent positions under s 9A of the Act. Accordingly, he properly conceded that an allegation of waiver must fail.
>
> [40] Similarly, with the affirmative defence of estoppel Mr Foster agreed that with no evidence from the employees, the elements which would be required to be proved for estoppel could not be established.
>
> [41] As these points were in the end not taken by Mr Foster, we do not need to consider them more fully. However, had they been pressed we would have accepted Mr Crombie's submissions that they are without foundation.

Conclusion and disposition

> [42] For reasons set out in this judgment GD Tauranga is granted the relief and remedies it seeks as set out in [4] of this judgment. The defendants have no claim arising from GD Tauranga reverting to payment of RDP for other leave in 2016.

Costs

> [43] As the parties reached an agreement as to costs in order that this matter might be referred to the Court for findings on principle, no issue as to costs arise.

M E Perkins Judge

for the Full Court

Judgment signed at 12.45 pm on 19 August 2019