

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 165  
3024907

BETWEEN                      TOURISM HOLDINGS  
                                         LIMITED  
                                         Applicant

AND                              A LABOUR INSPECTOR  
                                         Respondent

Member of Authority:      Jenni-Maree Trotman

Representatives:            S Langton, Counsel for the Applicant  
                                         A Dumbleton, Counsel for the Respondent

Investigation Meeting:     On the papers

Submissions:                13 April 2018 from Applicant  
                                         20 April 2018 from Respondent

Determination:              22 May 2018

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**DETERMINATION OF THE AUTHORITY**

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**A. Tourism Holdings Limited’s application to remove this matter to the Employment Court to hear and determine without prior investigation by the Authority is declined.**

**Employment Relationship Problem**

[1]     The Applicant is Tourism Holdings Limited (THL). THL operates a bus adventure tour business called Kiwi Experience. Kiwi Experience employs bus drivers (Driver Guides).

[2]     Driver Guides are paid a daily rate for the work they perform. This is paid weekly. In addition, they earn commission on third party tourism experiences that they offer, and that are booked, while passengers are travelling on their bus. The timing of those payments differs between Driver Guides.

[3] A dispute has arisen between THL and the Labour Inspector as to whether Driver Guides' commission payments should be included in gross earnings when section 8(2) of the Holidays Act 2003 is used to calculate ordinary weekly pay. This dispute forms part of a claim under File No. 3012405 *Tourism Holdings Limited v A Labour Inspector*.

[4] THL contends that the commission payments it pays to its Driver Guides are not "a regular part of the employee's pay" for an ordinary week. It submits the correct approach, when calculating ordinary weekly pay under s 8(2) of the Holidays Act, is therefore to deduct these payments from gross earnings during the four week period immediately preceding the taking of the annual holidays. The Labour Inspector regards commissions as part of Driver Guides' gross earnings for any four week period to which the s 8(2) formula is applied.

[5] To address this issue, THL has applied to the Authority to remove the following question of law to the Employment Court. THL's application is supported by the Labour Inspector.

What amounts to a "regular" productivity and incentive-based payment under s.8(2) of the Holidays Act 2003 and, in particular, whether the commission payments in issue in this case qualify and should be included in the employee's (and other employees') ordinary weekly pay, or not.

[6] By consent the Authority has determined the application for removal on the papers. These being the statement of problem, the statement in reply and the parties' submissions.

### **The legal position**

[7] Sections 178(1) and (2) of the Employment Relations Act (2000) govern applications for removal of matters by the Authority to the Court. The grounds of relevance in this case are whether an important question of law is likely to arise in the matter other than incidentally (s178(2)(a)) or in the Authority's opinion, in all the circumstances, the Court should determine the matter ((s178(2)(d)).

### **Important question of law arising other than incidentally?**

[8] I am satisfied that the question posed by THL is not an important question of law that arises other than incidentally such that the Court should determine the matter.

[9] In reaching this finding, I have considered the decision of *Johnston v The Fletcher Construction Co Ltd*.<sup>1</sup> In that case Judge Inglis (as she then was) stated:

A question of law need not be complex, tricky, or novel to warrant use of the descriptor “important”. It may be important if the answer to the question is likely to have a broad effect, or assume significance in employment law generally. Previous cases have made it clear that it is not necessary for resolution of the question to have an impact beyond the particular parties. Rather, a question may be regarded as important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision in the case or a material part of it. The latter point cannot, of course, be taken too literally. For example, a legal question as to whether a dismissal is justified under s 103A may well not suffice. Nor is it necessary for there to be an absence of previous authority on the particular point.

[10] The answer to the question posed by THL is a relatively straight forward question that is unlikely to have a broad effect, or assume significance in employment law generally. Whether or not the commission paid to Driver Guides is a regular part of their weekly pay will turn on the facts of this case and the wording of the employment agreement.

[11] This will involve a factual, rather than a legal, enquiry similar to that undertaken by Judge Smith in *Schollum v Corporate Consumables Limited*.<sup>2</sup> In *Schollum*, as with the present, the employer contended that commission did not need to be taken into account as it was not a regular part of the pay received by the employees for an ordinary week. This, it said, was because it was not earned on a weekly basis, but on a monthly basis and depended on the value of sales over the qualifying month. The Employment Court agreed with the employer based on the facts of that case.

[12] Whilst I acknowledge THL’s submission that the question it has posed is likely to determine the case, I do not consider this sufficient reason to remove the case to the Employment Court. In the words of Former Chief Judge Goddard:<sup>3</sup>

It goes without saying that every question of law that needs to be resolved in the course of deciding a case is important in the sense that the fate of the case may depend upon the way in which the question of law is resolved. That is not enough by itself to render the question of law an important one for the purposes of s 94.

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<sup>1</sup> [2017] NZEmpC 157

<sup>2</sup> [2017] NZEmpC 115

<sup>3</sup> *Hanlon v International Education Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7

## **Residual discretion?**

[13] As observed in *Johnston*:

[39] Section 178(2)(d) leaves open the possibility that there will be some cases, not clearly falling within (a)-(c), which might otherwise appropriately be removed to the Court where the Authority considers it appropriate to do so. Section 178(2)(d) is to be interpreted in light of its text and its purpose. The overarching point will be whether a particular case is best suited for resolution by the Authority's investigative processes or by the more formal adversarial processes of the Court. This may engage issues of cost and proportionality. A case which, for example, is likely to consume weeks of hearing time in the Authority, requiring a more formal, procedure-laden approach, and where the unsuccessful party is likely to wish to pursue their statutory right of de novo challenge, may well be better suited for hearing in the Court. Much will depend on the circumstances of each case.

[14] I am satisfied that this particular case is best suited for resolution by the Authority's investigative processes. It is unlikely to take a significant amount of time to investigate, and may well be able to be heard on the papers. This will save the parties legal costs and time. The parties are likely to receive a determination well in advance of when the Employment Court will have the capacity to hear their claim. In those circumstances I decline to exercise my discretion under s 178(2)(d).

## **Conclusion**

[15] THL's application to have this matter removed to the Employment Court is declined.

## **Costs**

[16] Costs are reserved. However, in light of the positions taken by the parties it may be appropriate for each party to bear its own costs.

Jenni-Maree Trotman

Member of the Employment Relations Authority