

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 246/08
5111465

BETWEEN WELLA NEW ZEALAND
 LTD
 Applicant

AND SEAMUS COONEY
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Anne Shirley for Applicant
 Mark Donovan for Respondent

Investigation Meeting: 8 May 2008

Submissions received: 15 May, 20 May 2008 from Applicant
 15 May 2008 from Respondent

Determination: 11 July 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns a dispute about how to calculate holiday pay for a commission based sales consultant.

[2] Throughout his employment with the applicant (Wella) Mr Cooney has been paid a retainer¹ but has derived most of his income from commission on orders placed by customers within his territory. In recognition of the effort sales consultants put in to building a loyal customer base, commission is paid whenever and however orders are placed. It is not contingent upon payment by the customer. Many customers place orders by emailing or calling Wella's order centre rather than directly with Mr Cooney but either way, he receives commission on the order.

¹ The retainer (currently set at \$7,000.00 per annum) forms a small proportion of Mr Cooney's total remuneration, most of which is derived from commission payments. In addition to these he also has access to bonus schemes, vertical distribution schemes and company wide award schemes.

[3] I was told that from March 1998, when Mr Cooney was first employed by Wella, he was paid:

- i. For annual leave, his base retainer and commission for orders processed by Wella while he was on his leave, and
- ii. For public holidays, his retainer only (on the basis that no orders were taken while the office was closed for the holiday.)

[4] These practices continued until 2005 when (after another commission based sales consultant made a successful claim for unpaid holiday pay) Wella accepted that the arrangements had not met the requirements of the Holidays Act 1981 or the Holidays Act 2003. Thereafter in respect of each week's annual leave consultants received retainer plus a commission component which was either an average of what had been paid in commission over the previous twelve months or the commission on orders processed during the leave, whichever was the greater. It acknowledged that back pay would be due if payments made to consultants in the past had been lower than average commission payments.

[5] Mr Cooney does not accept Wella's current approach to the calculation of pay for annual leave. He says he should be paid his retainer, a weekly commission payment based on the previous year's average, and in addition, the commission on orders processed while he is away.

[6] As for statutory holidays, Wella now includes commission payments in its calculation of relevant daily rate and accepts that it has been obliged to do so since the coming into force of the Holidays Act 2003. It does not accept that it was required to do so under the Holidays Act 1981. Mr Cooney disagrees.

[7] In total Wella estimated that it owed Mr Cooney arrears of annual and statutory holiday pay in the sum of \$14,506.46 and on 14 September 2007 undertook to remedy the situation by paying Mr Cooney this amount. Mr Cooney's acceptance is without prejudice to his claim for the balance of the arrears he believes he is owed.

[8] The parties have not been able to resolve their differences and Wella has asked the Authority to:

“Ascertain the amount of annual leave and public holiday pay the applicant (Wella) owes Seamus Cooney, a current employee of Wella, for the period from March 1998 to 30 April 2005.”

[9] In his reply, Mr Cooney asserted that he saw the issues between the parties as being wider than Wella did. As well as seeking orders for all outstanding payments for annual and public holidays Mr Cooney sought orders for outstanding payment for sick and bereavement leave (during which the applicant had been paid retainer and commission on orders processed) interest on all of these payments, orders to correct sick leave and holiday balances, and orders directing how future holiday payments should be calculated.

[10] Finally he claimed that the applicant’s failure to pay his contractual and statutory entitlements and the excessive delays associated with attempts to resolve the dispute gave rise to a disadvantage grievance in respect of which he sought compensation of \$10,000.00.

Issues

[11] Wella has asserted that Mr Cooney is not able to lodge a personal grievance by way of counter claim and should have lodged that as a fresh application. In addition it claimed that Mr Cooney had failed to raise his personal grievance within 90 days. These issues were discussed with the representatives in the scheduling conference. I advised that I was satisfied that the alleged personal grievance and the holiday pay issues were so closely related that a further statement of problem was not required.

[12] However at the applicant’s suggestion I have agreed to “park” the personal grievance and 90 day issues along with the questions of leave balances and quantum. I proceed at this stage to determine only the principles by which statutory and annual holiday pay (past and future) should be calculated, specifically the following issues:

- i. Whether Mr Cooney is entitled to receive commission for the orders that Wella receives while he is on annual holiday in addition to his holiday pay;
- ii. Whether Wella was required to include commission payments in the calculation of public holiday pay under the Holidays Act 1981, and
- iii. Whether Wella was required to include commission payments in the calculation of pay for sick and bereavement leave.

[13] I have also been asked to consider how the six year limitation period is to be applied in this case, and whether interest should be awarded and for what period.

Payment for annual holidays

[14] Section 21 (2) of the Holidays Act 2003 says this:

“(2) Annual holiday pay must be...

(b) at a rate that is based on the greater of-

(i) the employee’s ordinary weekly pay as at the beginning of the annual holiday; or

(ii) the employee’s average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.”

And average weekly earnings:

“means 1/52 of an employee’s gross earnings.” (Section 5 (1).)

[15] Wella understands that it is obliged to pay annual leave at the higher of average weekly earnings and ordinary weekly pay. Former Finance Director Rob Morrison explained to me that commission is paid on a monthly basis and the commission payment in any given month relates to orders which came in during the previous month. Payday falls in the middle of the month and retainer is paid half in

arrears and half in advance. This has been the pattern ever since Mr Cooney started work. On his very first pay day, part way through his first month of employment, Mr Cooney received an estimated commission payment because there had been no previous month of sales.

[16] In a month during which leave actually falls, therefore, Mr Cooney receives retainer for the current month and commission for orders placed the previous month. In the month after he comes back he gets either retainer plus commission on orders placed the previous month (during which he was away) or average weekly earnings, whichever is the greater. Average weekly earnings are calculated using the total earnings (commission plus retainer) for the twelve months immediately prior to the leave.

[17] Mr Cooney's position is that while he is on holiday he should receive average weekly earnings (calculated as Wella has been doing) in addition to actual commission arising in the period. He asks for a declaration to that effect, and for his back pay to be calculated on the same basis (that is, he says that only the retainer, and not commissions paid on orders which came in during his holidays, should be treated as part payment of 'average weekly earnings.')

[18] It is submitted for Mr Cooney that whether or not he is entitled to receive his commission in addition to his holiday pay is a bare contractual question. His employment agreement provides that he is entitled to receive commission "*on all net sales gained by the sales consultant in [his] sales territory for the term of the agreement.*" It is submitted that this entitles him to continue to receive commission in addition to annual holiday pay because:

- i.* There is no express statement that he must be at work on the day concerned in order to receive his commission;
- ii.* It is possible for him to receive commission on days that he is not at work because clients can lodge orders in ways which do not require him to be involved, and

- iii. There is no express statement in the employment agreement to the effect that payment of annual holiday pay excludes payment of commission.

[19] Wella says in submissions that Mr Cooney is not entitled to receive holiday pay as well as the commission on orders placed while he is on leave. It is noted in submissions that the purpose of annual leave as set out in the Holidays Act 2003 is to enable an employee to take holidays “*to promote balance between work and other aspects of employees lives²*” and suffer no financial disadvantage as a result of doing so. Wella says the purpose is not to enable an employee to receive more than what he otherwise would have, had he actually worked.

[20] I accept the position set out by the applicant. I do not accept that either the contract of employment or the statutory provisions support Mr Cooney’s claim to be paid commission on top of average weekly earnings which already contain a commission component. To put it very simply, employees on holiday are to be paid holiday pay instead of (not as well as) normal contractual entitlements.

[21] **The approach Wella currently adopts is consistent with its statutory obligations. In calculating arrears of holiday pay owed Wella is entitled to deduct the payments already made for periods of leave in respect of retainer and commission.**

[22] There remains one further matter under this heading. In relation to Mr Cooney’s back pay, Mr Morrison told me:

“Working out the actual commission that related to the period of annual leave between 1998 and 2005 was a very arduous task. Instead of going back and ascertaining what commission payments related to the period Seamus was on annual leave, Wella offered to pay him his annual leave payments calculated in accordance with the Holidays Act 1981 and Holidays Act 2003 less an adjustment for what he had actually received as holiday pay at...

His retainer; and...

² Section 3 of the Holidays Act 2003.

A reduction using an estimate off the actual total amount owing to take into account commission payments Seamus received relating to the period of annual leave.”

[23] I was told that the applicant estimated commission payments received during annual leave in the period 1998-2005 at 40% of the average level of commission payments, and that 40% was therefore deducted from arrears to pay. It is also the applicant’s position that this estimate is likely to have favoured Mr Cooney.

[24] I have not been provided with any information which would enable me to indicate whether the 40% estimate was reasonable. I note that Wella has accepted that it is Mr Cooney’s prerogative to require a precise calculation if he wishes.

Payment for public holidays under the Holiday Act 1981

[25] Section 7A (1) of the Holidays Act 1981 provides that:

“Every employment contract shall provide, in relation to every worker bound by it, for the grant to the worker in each year of not less than 11 whole holidays which shall, where they fall on days that would otherwise be working days for the worker, be holidays, on pay, in addition to annual holidays.”

[26] Wella submits that (during the period this provision was in effect) it was not required to include commission payments in the calculation of public holiday pay. In making this submission it relies on the Court of Appeal’s decision in Ports of Auckland Limited v NZ Waterfront Workers Union Inc [1996] 2 ERNZ 25, where at page 31 it was held:

“the focus is on pay for the ordinary working day, anything which is clearly payable only in defined circumstances or at defined times is excluded. Overtime, bonuses and allowances of various kinds are usually add-ons and...productivity and incentive based payments which are dependent on actual working results need not be notionally calculated and paid...”

The work pattern and remuneration arrangements may have reached the point under the employment contract where, instead of a traditional separation between ordinary time rates and other payments referable to particular times and conditions, a composite made up of a number of components applies generally and covers the ordinary working day... It will be a matter of interpreting the particular employment contract to determine on what side of the line the particular case falls. That will require distinguishing allowances which have been incorporated into a global rate or are payable only in particular circumstances, even if they recur regularly and even if they would have been payable if the employee had worked that day.”

[27] Wella says that commission is a productivity or incentive based payment that is payable to Mr Cooney only in defined circumstances (when an order is placed) and is not payable “as of course.” Therefore it says it was not required to notionally calculate and pay commission for public holidays.

[28] For Mr Cooney it is argued that his commission should not be regarded as a “productivity or incentive based payment.” It is noted that this reasoning would deprive commission only employees of any payment for public holidays while others whose income is derived primarily from commission might be paid at less than the minimum wage. It is submitted that the phrase “productivity or incentive based payments” is more properly construed as referring to lump sum special payments such as end-of-year bonuses.

[29] Mr Donovan goes on to note that at page 31 of the Ports of Auckland case the Court noted that it would be “*a matter of interpreting the particular employment contract to determine on what side of the line the particular case falls.*” He argues that Mr Cooney’s commission payments should be taken to form part of a global composite rate that makes up for his pay for an ordinary working day because:

- i. His regular monthly pay has included commission since he began with Wella;
- ii. Commission often represents as much as 90% of his total monthly remuneration, and

iii. *“If all Seamus was entitled to for a particular public holiday was his retainer, then he may have received less than the minimum wage in respect of the week that contained the public holiday.”*

[30] Finally Mr Donovan argues that the Court of Appeal was not dealing in the *Ports of Auckland* case with a commission based employee and did not turn its mind to commission-based employment arrangements. Mr Donovan notes that the concept of commission payments does not fit neatly into the categories identified by the court and nowhere in the decision is any specific reference made to the term. He has suggested that a notional daily rate should be applied and that it might be calculated by dividing total earnings for the previous twelve months (inclusive of commission) by 234.

[31] I consider Mr Donovan’s arguments about the applicability of *Ports of Auckland* to this case to have considerable force. It does not appear that the Court turned its mind there to the question of payment for employees whose income is derived solely or mainly from commission payments. However, I am not satisfied that the circumstances of this particular case call for consideration of the composite rate issue or a notional daily rate. My reasons are as follows.

[32] In considering how this matter should be resolved, I have returned to the following statements at p.30 of the Court’s decision in *Ports of Auckland*:

“the purpose of s 7A and s.25 is to enable workers observing statutory holidays falling on what would otherwise be working days to have the pay they would otherwise have earned on an ordinary working day...”

They are entitled to observe public holidays without loss of what they habitually receive for ordinary working days...”

[33] Section 7A is actually about holidays, not about pay. Its purpose is to give workers a day off without losing pay. My starting point has therefore been to ask whether Mr Cooney has lost pay as a result of taking his public holidays. If he has, it will be necessary to work out whether or how that is to be rectified (such as by the

calculation of a notional daily or composite rate.) If not, then no issue arises. The requirements of s.7A will have been met.

[34] Pursuant to Mr Cooney's employment agreement both commission and retainer were paid on a monthly basis. He received commission on every order from within his territory, without deduction, whenever and however it was placed. Orders were not dependent on visits or calls from Mr Cooney and most customers made regular orders often at monthly intervals. The principal impact of a statutory holiday was that an order might be placed, and processed, earlier or later than usual. Although his payslips show that his pay fluctuated from month to month as the level of orders varied slightly, nothing indicated that the observance of any statutory holiday resulted in the loss of orders and hence, of pay. (Indeed, even when he took annual leave of more substantial periods, the commissions on orders processed during that leave were often as much or more than "average weekly earnings".) Statutory holidays came and went but Mr Cooney's monthly pay always went into the bank just the same. His situation was more akin to that of a salaried employee than it was to that of a wage worker for whom each day's pay is calculated separately.

[35] In short, there was no evidence of any reduction in Mr Cooney's monthly pay arising out of the taking of statutory holidays. If he has not lost pay as a result of taking public holidays it follows that he has had public holidays "on pay" and the issue of whether a composite rate should be applied does not arise.

[36] In relation to the question I was asked to determine ("whether Wella was required to include commission payments in the calculation of public holiday pay under the Holidays Act 1981") the answer is that, considered over a month rather than a day, they effectively already have.

[37] I note however that the conclusion I have reached is particular to these facts. For some commission agents the taking of public holidays might well mean the loss of opportunities to earn commission. In such a case the question of how to effect a "top-up" might fall to be considered. It is not necessary here however. No injustice has been done to Mr Cooney, as he was able to take his public holidays, like anyone else, without reduction in his pay.

Payment for sick and bereavement leave

[38] I was told that in relation to sick leave, Mr Cooney is paid his retainer and commission on any orders that come in. Mr Donovan argues that Mr Cooney was entitled to be paid in accordance with s 30 (a) (iv) of the Holidays Act which provides that he should receive an amount:

“equivalent to the pay at the ordinary time rate of pay for the normal number of hours that the worker normally works in that day.”

[39] Mr Donovan submits that this payment “at the ordinary time rate of pay” is essentially the same as the payment required for public holidays.

[40] I accept this argument insofar as I accept the principle that Mr Cooney should not lose pay as a result of taking special leave. Once again, however, I note that I received nothing to indicate that what Mr Cooney was paid for months when he took special leave amounted to less than he would ordinarily have received.

Statute of limitations

[41] Wella lodged the statement of problem in this case in December 2007. Mr Donovan argues that the Authority should be able to make a determination in respect of Mr Cooney’s entitlements prior to December 2001, being the date which is 6 years before Wella lodged its statement of problem. In support of this position he notes:

- i. Wella has consented to this (in its statement of problem) by asking the Authority to determine what is owed to Mr Cooney since March 1998;
- ii. Alternatively, time runs from when Mr Cooney first became aware that he was being paid incorrectly (during 2002.)
- iii. Alternatively, time should run from May 2003 when Wella asserted that it had paid Mr Cooney correctly;

- iv. Alternatively the Authority should exercise its discretion to extend the time limit so that a determination as to underpayments for the entire period can be made.

[42] These arguments are all rejected. I do not accept that Wella has consented to an extension of time. What it has done, in a responsible way, is to attempt to clarify its obligations to Mr Cooney. I also accept Ms Shirley's submission that the Authority's powers to validate informal proceedings under s.219 of the Employment Relations Act do not override a specific time period such as that in s 142 which provides:

"no action may be commenced in the Authority or the Court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose."

Interest

[43] Mr Donovan also requests that I give an indication now of what interest would be payable on any arrears owed. I will say only the following for the assistance of the parties. The discretion to award interest is exercised in order to put the recipient back in the position they would have been in had the underpayment not occurred. The level and period of interest awarded in such circumstances is determined on the same basis, and not in order to punish or to compensate for inconvenience.

Further investigation of the employment relationship problem.

[44] As set out at the commencement of this determination, a number of issues remain outstanding and are reserved. Before proceeding further the Authority will await advice from the parties as to their intentions in respect of those matters. In the meantime, costs also are reserved.

Yvonne Oldfield

Member of the Employment Relations Authority