

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 64
EMPC 178/2019**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN MAX PENNINGTON MOTORS LIMITED
 Plaintiff

AND A LABOUR INSPECTOR, MINISTRY OF
 BUSINESS, INNOVATION AND
 EMPLOYMENT
 Defendant

Hearing: 5 November 2019
 (Heard at New Plymouth)

Appearances: A Laursen, counsel for plaintiff
 C English, counsel for defendant

Judgment: 15 May 2020

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Max Pennington Motors Ltd (MPML) operates two motor vehicle dealerships in the Taranaki region. The business is open Monday to Saturday inclusive. Neither dealership is open for business on Sundays or public holidays.

[2] MPML's salespeople receive a base salary paid fortnightly. The fortnightly pay is processed on a Thursday in the pay week. Salespeople also receive commission, the calculation of which is based on the number of motor vehicles sold. The commission is calculated to the end of each month and paid on the 20th of the following month, that date enabling the calculation to be made. If that date falls on a public

holiday or during a weekend the payment is made on the immediately preceding business day. The commission is calculated by two separate methods depending upon the franchise under which MPML is trading. The first arrangement operates on a sliding scale against gross profit on the sale with commission increasing incrementally as the number of vehicles sold over a month increases. Such commission can be earned up to a maximum of 15 per cent of gross profit on the sales. The second arrangement is that commission is based on a set dollar figure for each vehicle sold. Salespeople will therefore each receive varied total commission after the end of each month depending upon the type of vehicles sold and the number of sales they make during the month. Because of this method, commission can only accrue and crystallise on the last day of each month. The evidence in this case disclosed that sales occur spasmodically throughout the month and there will be numerous days when a salesperson would sell no vehicles.

[3] Commission for sales of motor vehicles is only received by a salesperson when the vehicles are delivered to the customer. Even though MPML does not open on a public holiday, and while that is not material to the issues in this case, a vehicle could never be delivered on that day anyway because the necessary legislative requirements and practical requirements to deliver a vehicle to a customer cannot be undertaken on a public holiday. The system of payment of fortnightly salary and monthly commission is incorporated in individual employment agreements for each of the salespeople.

This challenge

[4] The Labour Inspector carried out a workplace compliance investigation into MPML's business. This investigation uncovered irregularities. The scope of the investigation was into all minimum employment standards with a focus on payment for holidays and leave in accordance with the Holidays Act 2003 (HA). MPML cooperated with the investigation and provided all records required by the Labour Inspector. Because of the irregularities uncovered, the Labour Inspector issued an improvement notice. Of the irregularities included in the notice, all were resolved between MPML and the Labour Inspector apart from pay for public holidays for motor vehicle salespersons, whose income included the commission. The improvement notice required MPML to calculate and pay allegedly unpaid commission on public

holidays to its motor vehicle salespersons, and to continue to include such commission in their future pay for public holidays. The notice required this to be done by calculating relevant daily pay (RDP) or, if this was not possible or practicable, by calculating and paying average daily pay (ADP).

[5] MPML lodged an objection to the remaining issue covered by the improvement notice pursuant to s 223E(1) of the Employment Relations Act 2000. That matter came before the Employment Relations Authority (the Authority). In a determination dated 20 May 2019, in finding in favour of the Labour Inspector, the following conclusions of the Authority were reached:¹

[20] Once it is established that a public holiday would be an otherwise working day for an employee, ss 9 and 9A concern how payment for the public holiday should be calculated.

[21] Taking into account the overall scheme of the HA, and that entitlement to payment for a public holiday rests on whether the day would have otherwise been a working day for the employee, I am satisfied that once an employee becomes eligible for payment for a public holiday, the payment must be calculated on the basis that the public holiday – “the day concerned” was an otherwise working day for the particular employee.

Conclusion

[22] It follows from the above that MPML must, for the purposes of calculating payments for a public holiday, seek to establish the relevant daily pay an employee would have received on a public holiday as if it were an otherwise working day. Payment includes any amount of commission an employee would have received in addition to the base salary amount payable. I note there is no evidence that vehicles cannot be delivered to or by MPML on any other days on which salespeople work.

[23] Where it is not possible or practical for MPML to determine an employee’s relevant daily pay including commission as a component of the pay, then the average formula at s 9A must be used for the purposes of calculating the quantum of payment an employee is entitled to for a public holiday.

[24] MPML’s application for orders to revoke the enforcement of the Improvement Notice dated 13 March 2018 is dismissed.

[25] Costs are reserved.

¹ *Max Pennington Motors Ltd v A Labour Inspector (Ministry of Business, Innovation and Employment)* [2019] NZERA 293 (Member Ryan).

[6] MPML challenged the determination by way of a hearing de novo. The issue to be determined arises from the combined effect of ss 9, 9A, 14, 46, 48 and 49 of the HA. The Labour Inspector maintains that when pay for a public holiday is calculated it must include not only a single day's apportionment of the base salary, which is paid fortnightly, but also include a day's apportionment of that commission which crystallises on the last day of the month and is then calculated and paid on the 20th of the following month. If that is not possible, which is what is being argued, then the commission to be apportioned is ADP. That combination of pay would then need to be included in the fortnightly salary for the pay period in which the public holiday falls. The Labour Inspector concedes that, whatever sum is included for commission for the public holiday, it would have to be paid in addition to the total commission calculated and required to be paid on the 20th of each month by the provisions of the employment agreements. This, as I understand the submission made by the Labour Inspector, is argued on the basis that the effects of the statutory overlay of the HA procure this consequence as part of the requirement to calculate and pay RDP, or as an alternative ADP, as those terms are defined by ss 9 and 9A of the HA. That statutory overlay, designed to ensure the payment of minimum entitlements, does not alter the contractual obligation under the agreements.

Legislative provisions involved in this dispute

[7] The relevant statutory provisions contained in the HA read as follows:

9 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).

9A 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:

$$\frac{a}{b}$$

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).

14 Meaning of gross earnings

In this Act, unless the context otherwise requires, *gross earnings*, in relation to an employee for the period during which the earnings are being assessed, —

(a) means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example—

(i) salary or wages:

...

(iv) productivity or incentive-based payments (including commission):

...

46 Entitlement to public holidays

(1) An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.

(2) Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.

48 Compliance with section 46

(1) If a public holiday falls on a day that would not otherwise be a working day for an employee, section 46 is complied with if—

(a) the employee does not work on the day; or

(b) the employee works on any part of the day and the employer pays the employee in accordance with section 50.

(2) If a public holiday falls on a day that would otherwise be a working day for an employee, section 46 is complied with if—

(a) the employee—

(i) does not work on that day; and

(ii) the employer pays the employee in accordance with section 49;
or

(b) the employee—

(i) works (in accordance with his or her employment agreement) on any part of that day; and

(ii) the employer pays the employee in accordance with section 50;
and

- (iii) the employer provides the employee with an alternative holiday under section 56.

49 Payment if employee does not work on public holiday

If an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's relevant daily pay or average daily pay for that day.

The application of the legislative provisions to the facts of this case

[8] On the facts of this case, the argument of the Labour Inspector, working through the requirements of ss 9 and 9A of the HA and ultimately reaching a requirement on MPML to pay ADP on a public holiday, relies upon a fiction. It involves the assumption that had the public holiday been worked, the salespersons would have otherwise received commission on that day in addition to that day's portion of ordinary salary. This in turn requires an assumption that the salespersons would have sold and had delivered one or more motor vehicles on that day. In trying to calculate their pay, as it is not possible until the end of the period in which commission accrues to know the number of vehicles which might have been sold and delivered, it is not possible to calculate the exact RDP which would have been received on the public holiday had it otherwise been a working day. On this basis the Labour Inspector argues that MPML must elect to apply s 9A and ADP is to be paid.

[9] If the HA is applied in this way it ignores the realities of the way the individual employment agreements provide for the methods by which commission is calculated and received as earlier discussed in this judgment. Rather than enforcing the purposes of the HA to ensure minimum standards are complied with, this argument, if accepted and applied, procures a substantial windfall for the salespersons involved beyond their contractual entitlements.

[10] Ms English, counsel for the Labour Inspector, particularly relied upon the decision of the Court of Appeal in *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*.² That case dealt with a similar argument to that now made by the

² *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66.

Labour Inspector but related to the inclusion of overtime in RDP rather than commission. It dealt with s 9 of the HA prior to the amendments enacted in 2011. Ms English did not refer in her submissions to the Supreme Court's decision in that case, *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc*, which dealt with but refused leave to appeal.³ The statements made by the Supreme Court, nevertheless, have considerable relevance to the interpretation question arising in the present case, insofar as they dealt with a consequence which may follow from the 2011 amendments to s 9 of the HA.

[11] In the Court of Appeal decision, the Court held that, in calculating RDP, overtime had to be included. As it was not possible to calculate such overtime on a day by day basis RDP, therefore, could not be accurately calculated for a public holiday and a statutory averaging formula had to be applied. This case arose under and was considered upon the provisions of the HA that applied at that time. In the circumstances of that case the now repealed s 9(3) of the HA made the application of an averaging formula based on gross earnings mandatory. The Court of Appeal and the Supreme Court in the application for leave to appeal both stated that they could take no cognisance of the 2011 amendments.

[12] The Supreme Court, while dismissing leave to appeal, however, commented in its decision as follows:

[6] Given the amendments made in 2011, the correct interpretation of s 9(1) in relation to the former s 9(3) is principally only of historical interest. How s 9(1) is to be applied in relation to the new s 9A will have to be determined if and when issues arise as to their application. Both applicant and respondent could plausibly draw some support from the legislative history if it were relevant, thus reducing considerably what might otherwise be the importance of the question whether such history should be taken into account in interpreting the former provisions.

...

[13] Some inference can be taken from the fact that both the Court of Appeal and the Supreme Court referred to the 2011 amendments in the way they did.

³ *New Zealand Post Ltd v Postal Workers Union of Aotearoa Inc* [2013] NZSC 15.

[14] The legislative history referred to in the Supreme Court's judgment and parliamentary materials associated with it were considered in a full Court decision of the Employment Court in *GD (Tauranga) Ltd v Price and others*.⁴ The facts of that case were similar in many respects to the present case although it involved a different issue. It was, however, also an attempt by the employees concerned, who received substantial commission payments, to achieve a windfall on public holidays by arguing that ADP was required. That case revolved around the question of the employer's discretion to choose RDP or ADP for the purposes of calculating pay to be received on a public holiday. The employees in that case were not represented by the Labour Inspector and the intricate argument now presented by the Labour Inspector in the present case was not before the Court.

[15] Ms English in her oral submissions in this case stated that she regarded the *GD (Tauranga) Ltd* case as correctly decided. She conceded that the salespersons employed by MPML suffer no loss on public holidays from the method it adopts for calculation and payment of commission. She went on to submit though that *GD (Tauranga) Ltd* is merely the starting point for a consideration in the present case and the employees are entitled to the additional gain the argument provides. Because of that the Labour Inspector brings the case as part of the obligation to enforce minimum standards. I do not agree with that approach.

[16] In the *GD (Tauranga) Ltd* case the employees were salespersons selling land and residential homes to customers of GD (Tauranga) Ltd which is a housing developer and builder. Salespersons were employed on a basic salary based on the annualised minimum wage. In addition, however, they received valuable commission when residences were sold. Somewhat like the situation relating to sales of motor vehicles in the present case, commission was not automatically paid when the residence was sold. Commission was only paid to the salesperson when the agreement for sale and purchase between GD (Tauranga) Ltd and its client became unconditional. It only crystallised at that point. This meant that RDP could be accurately calculated because the periodic days when commission was paid could be accurately predicted. It also meant that commission might be payable on a public holiday if the respective

⁴ *GD (Tauranga) Ltd v Price and others* [2019] NZEmpC 101.

date when a sale became unconditional fell on a public holiday. If that was not the case, then ordinary salary without commission would be received by the salesperson for the public holiday in the usual way, with the payment being at the end of the pay period involved. That is an almost identical position to the present case, where commission is not received until conditions are met and the ability to calculate the accumulated total of commissions to be received has crystallised.

[17] In *GD (Tauranga) Ltd* the issue was whether, even though RDP could be accurately calculated for a public holiday, ADP should nevertheless be received because, as the argument ran, the salesperson's daily pay varied within the pay period when the public holiday or leave fell. Such variations arose as commission for varied amounts became payable. It was submitted, therefore, that s 9A(1)(b) of the HA applied even though it was possible and practicable to determine RDP. The employer argued, and the Court accepted, that the sections gave it a discretion as to whether to elect RDP or ADP and this was confirmed by the legislative materials. The employees argued that once the criteria in s 9A(1)(b) was met no discretion existed. While no argument was presented in that case like that raised in the present case, a windfall was similarly contemplated if ADP was applied.

[18] In *GD (Tauranga) Ltd* the Employment Court held that the parliamentary materials referred to in the Supreme Court's decision in *New Zealand Post Ltd* assisted in interpreting the interrelationship between s 9 and s 9A of the HA. The Court held that the sections gave the employer a discretion and that where RDP could be calculated, and it was practicable to do so, there could be no compulsion to nevertheless apply ADP simply because daily pay varied within the pay period.

[19] While the parliamentary materials, so far as relevant, are set out in the *GD (Tauranga) Ltd* judgment, they assist in being repeated.

[20] The Explanatory Note to the Bill states:⁵

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

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

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)

[21] In the third reading of the Holidays Amendment Bill containing the amendment, the Hon Kate Wilkinson (Minister of Labour) stated:⁶

... 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 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.

[22] The purpose of the amendments, and confirmed in the parliamentary materials, was to make RDP the primary method of calculating wages and salary for a public holiday and the other forms of leave where RDP applies. If it is not possible to so calculate it, or the compliance costs of doing so are so high that it is impracticable, the employer could, under s 9A of the HA, elect the option of applying the newly introduced ADP. RDP must include commission if that would otherwise have been received by an employee in addition to wages or salary as if the public holiday was

⁶ (23 November 2010) 669 NZPD 15673.

otherwise a normal working day. In this case the question is whether MPML must pay its salespersons hypothetical commission on sales, which do not occur, in addition to payment of full commission in accordance with the arrangement reached and contained in their employment agreements.

[23] The Court's decision in *GD (Tauranga) Ltd* showed the arguments put forward by the employees in that case would lead to a perverse result if accepted. The same applies to the argument presented by the Labour Inspector in the present case. What it would mean would be that, in addition to receiving full commission in accordance with the provisions of their respective employment agreements for actual sales, the employees would receive a windfall on public holidays from the employer also having to pay ADP containing a portion of the same commission. In the case of *GD (Tauranga) Ltd* commission would still be required to be received when contracts became unconditional and, in the present case, required to be received on the 20th of the month by which time total commission is only capable of being calculated and paid. This consequence would be compounded when more than one public holiday fell within the pay period for which commission was calculated. An even more absurd result would be occasioned if in the present case the 20th of the month fell on the public holiday, which could occur during the Easter break or for some provincial anniversary holidays. In *GD (Tauranga) Ltd* also it was not unusual for commission to be received by the salespersons on a public holiday. When that occurred, if the Labour Inspector's argument was to be accepted, the employee would not only receive their full commission but also ADP containing more commission on the same day. That perverse result in my view would be totally contrary to the express intention of the legislature in introducing s 9A into the HA in 2011. That purpose, in introducing the new concept of ADP, was to endeavour to give employers a discretion to use a cost-effective compliance alternative to endeavouring to calculate RDP where it was not possible or impracticable to do so; but RDP is the default position.

[24] Cases such as the present and *GD (Tauranga) Ltd*, however, need to be considered on their respective facts. Even though the judgments in the postal workers case implied that the 2011 amendments may lead to a different analysis, it is possible in that case for the same decision to have been reached both before and after the amendments. The absurdities which are apparent in the present case may not arise

when regular overtime payments, which must be included in wages for the applicable pay period, are the subject of the claim or in the case of commissions or other incentive payments where such payments or a divisible portion of them, are invariably included and received in every periodic payment of wages or salary. It is easy to countenance such occurrences for instance where incentive payments or commission are based on previously achieved total profit or performance but divided into equal payments within pay periods throughout the year.

[25] Sections 9 and 9A of the Act cover RDP or ADP not only for a public holiday but also an alternative holiday, sick leave, bereavement leave or family violence leave (this group of leave entitlements, which combined with public holidays, is commonly referred to as BAPS leave). The entitlements and methods of payment for such leave are the same as for public holidays but dealt with separately in each case in the HA. In the present case MPML, while using RDP for public holidays, chooses to use ADP for an alternative holiday, sick leave, bereavement leave and presumably would do so for the recently enacted family violence leave. Its rationale for doing so was explained to be because a salesperson required to take such leave, other than on a public holiday when the business is closed, loses the ability to compete for sales with other salespersons remaining at work on those days. MPML considers that ADP achieves a fairer outcome for those categories of leave, apart from public holidays. Mr Laurenson submitted that this was also the rationale for paying average weekly earnings for annual leave. That, however, cannot be correct as MPML is statutorily required to pay the greater of ordinary equal weekly pay as at the beginning of the annual holiday or the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.⁷ The HA specifically distinguishes the pay entitlements for public holidays from annual leave.

[26] Ms English submitted that as a matter of principle the fact that MPML uses ADP to calculate payment to be received for the other types of BAPS leave, but not for public holidays, is internally inconsistent. She submitted this as a reason for it not being open to MPML to use a different calculation for one type of BAPS leave and not the others. The Labour Inspector in her evidence maintained that the HA did not

⁷ Holidays Act, s 21.

permit such a variation. I do not understand the HA to impose such a requirement. Indeed s 9(2) of the HA contemplates an employment agreement specifying a special rate of RDP greater than that which would otherwise apply for any one of the categories of BAPS leave. As was decided in the *GD (Tauranga) Ltd* case, whether to pay RDP or ADP is a discretion vested in the employer (although, obviously, if it is simply not possible to calculate RDP then ADP must apply). The overriding requirement is to pay not less than the minimum entitlements. MPML makes a distinction because on public holidays the business is closed whereas on the days where the other types of BAPS leave may be taken, the business is open. I do not accept that the seeming inconsistency provides any fortification for the Labour Inspector's overall argument.

Conclusions

[27] The starting point in this case, as it was in the *GD (Tauranga) Ltd* case is s 49 of the HA. This provides that if an employee does not work on a public holiday and the day would otherwise be a working day for the employee, the employer must pay the employee not less than the employee's RDP or ADP for that day. Section 9 of the HA then defines RDP as the amount of pay the employee would have received had the employee worked on the day concerned. That also includes commission if it would otherwise have been received had the day been worked. The fact that s 49 of the HA contemplates RDP *or* ADP, confirms the decision reached in the *GD (Tauranga) Ltd* case. Applying that in the present case, MPML has a discretion whether to apply RDP or ADP for a public holiday. In the present case MPML has elected to pay RDP for public holidays and ADP for the other types of BAPS leave and is entitled to do so.

[28] The 2011 amendments to the HA which repealed s 9(3), relied upon in the *Postal Workers Union of Aotearoa Inc* case, introduced the new category of ADP. As a matter of policy, the legislature introduced a purposeful differentiation between the payment received by employees for annual leave and that received for public holidays (and other BAPS leave). It is clear from the Parliamentary debates on the 2011 amendments that RDP is to be a primary method of calculation for a public holiday. In this case it is possible to calculate RDP for the reasons previously discussed. For public holidays, except where the holiday falls on the 20th of the month, payment to

be received by the salespersons is the same as every other day worked, that is base salary.

[29] Having regard to the meaning of RDP in s 9(1)(a) of the HA, therefore, in the present case on its facts the salespersons would not have received commission on a public holiday if that would otherwise be a working day unless that public holiday fell on the 20th of the month. If the public holiday did occur on the 20th of the month, commission then owing to the salespersons would be received by them in full in addition to normal periodic payment of salary. If the public holiday fell on a day other than the 20th of the month, then as with all days which are working days for the salespersons concerned, they would receive normal periodic payment of salary. An entire fortnightly pay period could contain no commission beyond salary and indeed this would be the case for the majority of pay periods throughout the year.

[30] Mr Laurensen made a submission relying on the fact that, as the business was always closed on a public holiday, a sale and delivery could never take place, and for that reason commission could never be received on that day. While it is correct that no commission in practice could be earned on a public holiday, even if it was being worked, that is not the issue to be determined in this case. The Court is required to consider the position as if the public holiday would otherwise have been a working day. Mr Laurensen's submission does not, therefore, advance the position in determining the complicated issue placed before the Court by the Labour Inspector in this case.

[31] In summary, s 49 of the HA and the definition of RDP are required to be applied. For the reasons discussed in this judgment, the pay which the employee would have received, if the public holiday would otherwise be a working day, would not include commission except for a public holiday falling on the 20th of the month. This is almost the same situation as existed in *GD (Tauranga) Ltd*. In that case, the same conclusion was reached by the Court's ruling that RDP had been correctly calculated.

[32] The purpose of the improvement notice issued in this case would appear to be to procure a gain, for the employees concerned, by way of extra commission on public

holidays. If that is not the Labour Inspector's intention, but is instead as a matter of principle, to enforce compliance with a perceived minimum entitlement, then the only other purpose could be to divert commission so that it is received by the employees at a time earlier than the date required in the agreement. If that is what is proposed, then it would hardly seem necessary. Any commission so diverted would then need to be deducted from the periodic commission payment to achieve a neutral position.

[33] It could not have been the intention of the legislature in enacting these provisions for protecting minimum entitlements to procure for an employee, in addition to their generous contractual entitlements, a substantial windfall or "double-dipping" as Mr Laurensen referred to it. For these reasons the plaintiff's challenge is successful. There will be an order, in terms of the relief or remedy sought in the plaintiff's statement of claim, that the plaintiff has complied with ss 9 and 49 of the HA in that it has paid its employees commission to which they are entitled and that the correct RDP has been paid on unworked public holidays.

Costs

[34] So far as costs are concerned I have given consideration as to whether costs should not be contemplated in this case on the basis that it might be argued that this was a test case. However, I am not totally satisfied that that argument should prevail. Costs will be reserved. It may well be that the parties can resolve the issue of costs between themselves but if that is not possible then submissions on costs by the plaintiff should be filed by memorandum within 14 days of the date of this judgment. The Labour Inspector will then have a further 14 days in which to file a memorandum of submissions in answer. If the plaintiff wishes to file any submissions in reply, then it will have a further seven days from the filing of the Labour Inspector's submissions to file any submissions in reply.

M E Perkins
Judge

Judgment signed at 12 noon on 15 May 2020