

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Paul Geraint Phillips (Applicant)  
**AND** Hauraki Marine Limited (Respondent)  
**REPRESENTATIVES** Paul Geraint Phillips In person  
Peter Kiely, Counsel for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 27 February 2006  
**DATE OF DETERMINATION** 5 April 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] On 4 June 2005 Paul Phillips was made redundant from his position as general manager with Hauraki Marine Limited. Mr Phillips had held this position since 1 October 2003. Mr Phillips and Hauraki Marine have a long association; he was first employed by the company from 1988 to 1989 and rejoined in 1992, remaining until his dismissal. Mr Phillips' terms of employment were set out in a written employment agreement and a job description. This employment relationship problem concerns the calculation of Mr Phillips holiday pay under the Holidays Act 2003, which he disputes, and the recovery of payment for lieu days (accumulated, on agreed terms, for work in excess of base hours) which Mr Phillips says should have been paid out to him when his employment with Hauraki Marine ended.

[2] Hauraki Marine says it has correctly applied the relevant provisions of the Holidays Act 2003 to calculate Mr Phillips' holiday pay entitlement and that Mr Phillips has no entitlement, under the terms of his employment agreement, to payment of outstanding lieu days upon termination.

[3] At the investigation meeting I received evidence from Mr Phillips and Bruce McLeod, Hauraki Marine's managing director. Closing submissions were presented at the conclusion of the investigation meeting.

**Issues**

**(i) Holiday Pay Calculation**

[4] Mr Phillips' employment agreement provides for a bonus payment on the following terms:

"A bonus will be paid yearly as follows;  
The bonus will be paid on the Net Profit Before Tax, (NPBT), on all stores owned by Hauraki Marine Ltd.

The bonus will be calculated at 8% of the NPBT after \$75000 is deducted together with a sum of \$100000 to cover shareholder salaries and Management fees. Payment will be made in one sum within one month of the financial accounts being made available.

Should the General Manager leave during the year the bonus for the part of the year worked should be paid on a pro rata basis. However the bonus would not be paid until the financial accounts for that year have been made available after the year-end.”

[5] Mr Phillips received his holiday pay on 3 June 2005. He wrote to Mr McLeod on 16 June querying the holiday pay calculation and setting out the asserted correct calculation as follows:

“40/3.5 [days per week worked by Mr Phillips] x 1/52 [s 24(2)(b) Holidays Act 2003] x (\$105,000 [Mr Phillips annual salary] + \$114,885 [Mr Phillips bonus entitlement]) = \$48,326.37

Less amount already paid; \$23,076.92

Balance owing; \$25,249.75”

[6] Mr Phillips says his salary plus bonus payment should have been used as the divisor to calculate his average weekly earnings during the 12 months before the last pay period prior to his employment ending (section 24(2)(b) Holidays Act).

[7] Mr McLeod replied to Mr Phillips’ on 24 August setting out the reasoning behind Hauraki Marine’s calculation of his holiday pay:

“Two payments need to be made to you: one under section 24 of the Holidays Act 2003, relating to a 12 month period based on your start date, and one under section 25, relating to the remainder of your employment at Burnsco [Hauraki Marine]. The section 24 payment does not include the bonus as it does not fall within the relevant 12 month period (1 June 2004 to 31 May 2005). However, the section 25 payment does include the bonus as part of the calculation of “gross earnings”.

[8] Using section 24 Holidays Act Hauraki Marine calculated Mr Phillips’ holiday pay entitlement for existing unused annual leave at 6 January 2005 (Mr Phillips’ anniversary date) as follows:

“\$105,000 (Mr Phillips annual salary) x 1/52 (gross earnings divisor) x 34.35 (unused annual leave up to 6 January 2005) = \$19,817.30”

[9] From 7 January 2005 until 4 June 2005, Mr Phillips’ last day of employment, Mr Phillips accrued 5.65 days annual leave. Using section 25 Holidays Act Hauraki Marine calculated the holiday pay owed on those holidays as follows:

“0.06 (6% of gross earnings since last accrual date) x [(\$105,000 (annual salary) x 21/52 (number of weeks up to 6 June) ie, salary earned in that calendar year) + (\$114,885 – bonus paid ) + (\$19,817 – outstanding holiday pay from preceding year) = \$10,626.35”

**(a) Bonus - regular part of ordinary weekly pay?**

[10] Hauraki Marine has not included the \$114,885 bonus payment Mr Phillips received on 3 June 2005 in its calculation of his gross earnings for the year ending 6 January 2005.

[11] Section 24(2) Holidays Act provides:

“An employer must pay the employee for the portion of the annual holidays entitlement not taken at a rate that is based on the greater of:

- (a) the employee’s ordinary weekly pay as at the date of the end of the employee’s employment; or
- (b) the employee’s average weekly earnings during the 12 months immediately before the end of the employee’s employment.”

[12] Section 8(1)(c)(i) of the Holidays Act excludes from the definition of ordinary weekly pay:

“productivity or incentive-based payments that are not a regular part of the employee’s pay:  
...”

[13] Mr Keily submits that Mr Phillips’ bonus was not a regular part of his pay and, therefore, should not be included in the calculation of ordinary weekly pay, because:

- (i) the payment of the bonus was dependant on the profit made at the end of the financial year;
- (ii) if such a payment was considered as part of the section 8 four week snap-shot figure, it would alter the outcome of the calculation, grossly inflating the ordinary weekly pay and creating an anomaly with the rest of the year; and
- (iii) the intention of the legislation was to set such yearly payments, payments entirely dependant on company performance, outside the ordinary weekly pay category of section 8.

[14] The terms of Ms Phillips’ bonus scheme are set out in the employment agreement. It is not a discretionary bonus. The payment of the bonus cannot be described as one-off or unusual because the employment agreement anticipates its annual payment once express conditions are met.

[15] For these reasons I find Mr Phillips’ bonus is a regular payment to be included in the calculation of ordinary weekly pay for the purposes of calculating annual holiday pay pursuant to section 8 of the Holidays Act 2003.

[16] Mr Phillips’ is not the notional employee, envisioned by the Holidays Act 2003, who receives the same amount every pay period. Mr Phillips’ effectively has two pay periods; his regular salary payments and his annual bonus payment. Section 8(1) provides that the context of the employment arrangements between the parties may be referred to in order to calculate ordinary weekly pay. Having found that Mr Phillips’ bonus payment is a regular part of his pay it follows that this payment must form part of a calculation of ordinary weekly pay. I agree with Mr Keily’s submission that applying the section 8(2) formula results in a grossly inflated ordinary weekly pay (in excess of \$30,000) and which cannot be correct in the context of the parties’ employment arrangements or meet the objects of the Holidays Act.

[17] The most straightforward calculation is to divide Mr Phillips’ gross salary and bonus earnings for the 12 months immediately preceding termination by 52 and add those two figures together which gives Mr Phillips’ an ordinary weekly pay of \$4228.56. I find that, given the context of the employment arrangements between the parties, this calculation provides a practical outcome for the parties, which meets the objects of the Holidays Act and neither unfairly advantages Mr Phillips nor burdens Hauraki Marine with any unfair cost.

**(b) Bonus – “average weekly earnings”?**

[18] Hauraki Marine says that the bonus payment should properly be included within the calculation of average weekly earnings (section 24(2)(b)). The Holidays Act defines average weekly earnings “[as] 1/52 of an employee’s gross earnings” (section 5(1)) but that, in any event, Mr Phillips cannot rely on the calculation of average weekly earnings including the bonus payment because he received the bonus payment after the end of the last pay period before the end of the employee’s employment.

[19] The payment of the bonus was made on 3 June 2005 after the last pay period which ended on 31 May 2005. The payment of the bonus was made immediately after Hauraki Marine received the

annual accounts enabling the calculation of Mr Phillips' bonus, in accordance with the terms of the employment agreement. The 12 months immediately before 31 May 2005 do not include the 2004 bonus payment, because that was paid to Mr Phillips' on 28 May 2004.

**[20] The ordinary weekly pay calculation of \$4228.56 is greater than the average weekly earnings calculation of \$2019.23. The greater calculation must be the one used for the purposes of section 24 of the Holidays Act.**

**(c) Section 26**

[21] Section 26 provides an incentive for holiday entitlements to be taken as they arise and requires that section 25(2) calculations of gross earnings include any payment made under section 24. Hauraki Marine should have added the section 24 total to the gross earnings for the 6 January – 6 June 2005 period, and multiplied that total of those two figures by 6%, for the purposes of section 25(2). It appears that this has not occurred.

**[22] Hauraki Marine is to recalculate Mr Phillips' holiday pay entitlement in accordance with section 26 of the Holidays Act.**

**(ii) Lieu Day Entitlement**

[23] Putting aside the parties' dispute as to the number of lieu days outstanding, the first issue to determine is whether Mr Phillips' has a contractual entitlement to payment of those lieu days upon termination.

[24] In relation to lieu days Mr Phillips' job description provides:

"ALLOCATION OF DUTIES: The general manager is expected to work 31.5 hours per week. As a member of management some extra hours may be required to achieve the smooth running of the company. However it is not appropriate for any staff member to work excessive hours and where regular extra hours are worked time in lieu must be taken. The general manager generally works 3.5 weekdays, however it is expected that he would spend at least one weekend day per month working in the stores. When this occurs a day in lieu would be taken as soon as is practical."

[25] Mr Phillips' said that during his three month notice period it was difficult to take his days in lieu because:

- (i) he was mindful that he had applied for a position within the new structure and wanted to make a good impression; and
- (ii) a brochure for the Boat Show had to be prepared prior to his last day of employment and as a time consuming task it precluded his taking his days in lieu.

[26] In response Mr McLeod said that Mr Phillips' controlled his work hours and that his (Mr Phillips') self assessment and rostering of time in lieu was never questioned.

[27] On 13 May 2005 Mr Phillips meet with an employee of Hauraki Marine's and asked if the lieu days would be treated as holidays and be paid out at the end of his notice period. He did not receive an answer to this request until 16 June 2005 when Mr McLeod wrote to Mr Phillips advising that the lieu days would be paid out to him on an ex gratia basis and that there was no entitlement to such a payment under the employment agreement. This offer was subsequently withdrawn.

[28] Mr Phillips' employment agreement did not provide for the payment of outstanding days in

lieu upon termination. Hauraki Marine was entitled to withdraw the offer of an ex gratia payment because Mr Phillips had not accepted it and it fell outside the parameters of the employment agreement. I received no evidence that Hauraki Marine stopped Mr Phillips taking his lieu day entitlement while he was employed. I accept Mr McLeod's evidence that Mr Phillips controlled his lieu days. I also accept that subtle pressures impacted on Mr Phillips decision not to take his lieu days during his notice period. However, it was Mr Phillips' decision not to take his lieu days and in the absence of agreement between the parties no entitlement exists for payment of outstanding lieu days upon termination.

[29] In these circumstances there is no need to resolve the dispute about the number of lieu days.

**(iii) Outstanding PAYE**

[30] I record Mr Phillips' advice at the investigation meeting that he would pay to the Inland Revenue Department PAYE of \$1309.04, mistakenly included in his final pay, and which remains outstanding.

**Costs**

[31] Hauraki Marine is ordered to reimburse Mr Phillips the \$70 filing fee incurred in lodging this application with the Authority.

Marija Urlich  
Member of Employment Relations Authority