

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 196/09
5133181

BETWEEN JOHN EDWARD ROBINSON,
LABOUR INSPECTOR
Applicant

AND AUCKLAND AUTO
COLLECTION LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: John Robinson, in person
Stephen Langton , Counsel for Respondent

Investigation Meeting: 26 May 2009

Determination: 18 June 2009

DETERMINATION OF THE AUTHORITY

[1] The Holidays Act 2003 provides that employees must be paid their relevant daily pay on a public holiday, alternative holiday, sick or bereavement leave. This employment relationship problem concerns the calculation of relevant daily pay.

[2] The Labour Inspector has investigated complaints from employees of Auckland Auto Collection Ltd (“AAC”) and formed the opinion that from 1 April 2008 the relevant daily pay for public holidays, alternative holidays, sick and bereavement leave has been incorrectly calculated and employees have been consequently disadvantaged. The Labour Inspector says commission payments should be included in the calculation of relevant daily pay.

[3] AAC says prior to 1 April 2008 the calculation of relevant daily pay was incorrect and the adjustment to a retainer-only payment for sick leave, bereavement leave and public holidays is correct.

[4] Section 9 of the Holidays Act 2003 provides that relevant daily pay is either the amount of money the employee would have received had they worked the day in question¹ or, if it is not possible to determine the relevant daily pay using that method, then a specified formula is to be applied². The question for the Authority to resolve is - is it possible to calculate the amount of pay the employee would have received had the employee worked on the day concerned?

Inspector's position

[5] Prior to 1 April 2008 AAC's salespeople were paid the daily average of their previous four weeks commission payments in addition to their retainer for public holidays, sick or bereavement leave. Monthly commission payments are made in addition.

[6] The Labour Inspector says this is correct for two reasons:

- (i) But for sick leave and bereavement leave commission payments would have been received on the day concerned (section 9 (1)(b)(i) Holidays Act 2003); and
- (ii) But for the public holiday the day concerned would have otherwise been a working day (section 12 Holidays Act 2003) and commission could be earned on a working day.

AAC's position

[7] AAC says there is no need to invoke the section 9(b) formula to calculate relevant daily pay because it is possible to calculate, with a very high degree of certainty, what payment a salesperson would have received had they worked on the day concerned. This is because:

- (i) for the purposes of calculating commission, a vehicle is not "sold" until after delivery;

¹ Section 9(1)(a) Holidays Act 2003

² Section 9(1)(b) Holidays Act 2003

- (ii) no vehicles are delivered on public holidays because the business is closed; and
- (iii) commission on vehicles delivered during sick or bereavement leave is credited to the absent salesperson.

[8] AAC says its salespeople are not disadvantaged by its calculation of relevant daily pay because commission payments are calculated at the end of the month based on the volume of vehicles sold over the preceding month. The respondent says the previously used method of calculating relevant daily pay incentivised absences because salespeople received commission payments calculated for the day in question and again in the monthly commission calculation.

Discussion

[9] Section 9 of the Holidays Act provides two methods of calculating relevant daily pay - the first is invoked when the amount of pay that would have been received but for the statutory delineated absence is readily calculable (section 9(1)), the second when it is not possible to determine what the relevant daily pay would have been on the day concerned (section 9(3)).

[10] AAC's salespeople can be certain about delivery of a vehicle (the final step in securing commission for a salesperson) – there will be no deliveries on public holidays and an originating salesperson's monthly commission calculation will be credited though a sale is completed on a day they are absent from work for the purposes of section 9. Salespersons can be certain that the relevant daily pay they *would have* received but for their absence is their retainer. They can also be certain that they *would [not] have* received any commission payments on the day concerned because such payments are calculated on a monthly basis.

[11] The commission calculation method employed by AAC does not disadvantage those salespeople absent for public holidays, alternative holidays, sick or bereavement leave. They are paid what they *would have* received had they worked on the day concerned. The purpose of section 9 of the Holidays Act³ is thereby met.

³ *Postal Workers' Union of Aotearoa And New Zealand Post Limited 3/4/09*, A Dumbleton (member), AA 105/09

Determination

[12] Auckland Auto Collection Limited calculation of relevant daily pay as retainer-only is not in breach of the Holidays Act 2003.

Costs

[13] I do not understand that there is any issue as to costs.

Marija Urlich

Member of the Employment Relations Authority