Employer Bulletin

Our Weekly News Digest for Employers

Friday, 22 May 2020

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Cases

Employment Court: One Case

Narrow Interpretation of discretionary payments and closedown provision

A Labour Inspector did a compliance audit of a payroll system for Metropolitan Glass & Glazing Limited (Metropolitan Glass). The question that arose for interpretation was whether payments made under Metropolitan Glass's Short-Term Incentive Schemes (STI Schemes) comes within the definition of gross earnings under section 14 of the Holidays Act 2003 (the Act). The second question that arose was whether Metropolitan Glasses complied with the closedown provision in the Act.

Metropolitan Glass's individual employment agreement had a provision for payment of discretionary bonuses that are payable on achievement of agreed Key Performance Indicators or the completion of projects on time and on budget. Metropolitan Glass does not consider that the STI Schemes are part of gross earnings. The Labour Inspector considers that they are and need to be included when calculating holiday pay under the Act.

Metropolitan Glass argued that the STI Scheme expressly states that no payment is required to be made and therefore they fall under "discretionary payments" in section 14 (b)(i). The definition of discretionary payments was added to section 5 of the Act from 1 April 2011. The scheme of section 14 when considered with the words and purpose of the amendments to section 5 in 2011 is to capture all remuneration for an employee's job. Gross earnings do not capture reimbursement of payments or truly gratuitous payments. However this does not exclude payments where the amount is yet to be determined by the employer or because they are only payable if certain conditions are met.

The STI Schemes are to provide an incentive for performance and are tied to productivity targets. Therefore it falls within section 14 (a(iv). Metropolitan Glass cannot contract out of the Act so statements such as "*bonus payments made under this Scheme will not come within the definition of total gross earnings, for the purposes of holiday pay calculations under the Holidays Act 2003*" carry no legal weight. Metropolitan cannot avoid responsibility by labelling the STI Schemes as discretionary.

The amendment in section 5 in 2011 was to address employers avoiding variable and conditional payments that formed part of an employee's remuneration. The STI Scheme is determined by Metropolitan Glass and payment is conditional on several factors mainly relating to company performance and approval by the Board. The Variability of the amount of the payment and the conditional nature of the payment does not make it a discretionary payment for the purposes of the Act.

The second issue was whether Metropolitan Glass complied to the closedown provision in the Act. Metropolitan Glass has a closedown each year for approximately two weeks. The purpose of the Act is to promote the balance between work and other aspects of an employee's life and to provide an employee with minimum entitlements to annual holidays for the opportunity for rest and recreation.

Section 34 of the Act has been noted by the Holidays Act Taskforce that it lacks clarity. However in considering section 34 of the Act as a whole it must be read in context of the Act's scheme for closedown provisions. Metropolitan Glass allows employees to take annual holidays on pay for the period of the closedown up to the employees annual holiday entitlement. If there are any remaining entitled annual holidays at the end of the closedown period they will continue to be available until the employee takes it. If an employee does not have enough entitled annual holidays to cover the period then they can take annual holidays in advance. Otherwise the employee is on unpaid leave for the remainder of the closedown period. Metropolitan does not pay them eight per cent of their gross earning on the closedown date. Metropolitan Glass accepts that in the absence of an application for annual leave in advance they must pay the employee eight per cent of their gross earnings as at the closedown date as holiday pay.

In summary employees who at the commencement of a closedown period are not entitled to annual holidays they must be paid eight per cent of gross earnings as required in section 34(2). Their service is then treated as commencing on the date which the closedown begins. The employer and the employee may agree that leave can also be taken in advance for some or all of the closedown period.

The Court concluded that payments made under the STI Scheme are captured by section 14 (a)(iv) and they form part of gross earnings for the purposes of the Act. Metropolitan Glass's approach to the closedown provision is not inconsistent with the general purpose of the Act, however it does not comply with s 34 of the Act. Cost should lie where they fall, if the Labour Inspector seeks costs and they cannot agree a memorandum is to be filed within 14 days of this judgement. Metropolitan Glass then has 14 days to respond.

Metropolitan Glass & Glazing Limited v Labour Inspector, Ministry of Business and Innovation and Employment [[2020] NZEmpC 39; 14/04/2020; Chief Judge Inglis, Judge Holden, Judge Perkins]

Employment Relations Authority: Four Cases

Loss of trust and confidence lead to dismissal

Mr Smith worked as a merchandising manager for The Vet Centre Marlborough Limited (The Vet Centre) from September 2005. Over the years at intermittent times, issues with Mr Smith's performance and conduct were dealt with relatively informally when they arose. In 2018 various allegations relating to Mr Smith's performance and conduct were subject to a disciplinary and performance process which commenced in June and resulted in Mr Smith's dismissal in September.

Following his dismissal, Mr Smith raised a personal grievance for unjustified dismissal and unjustified disadvantage. Mr Smith believed the decision was predetermined. He said the allegations changed throughout the process, he was treated differently from other employees and the process canvassed historic matters that had been dealt with. Mr Smith also complained that the conduct alleged did not justify dismissal.

The Vet Centre's concerns covered incidents where Mr Smith was allegedly intoxicated and acted in a way which reflected badly on the Vet Centre and also performance issues. The performance issues related to time keeping, excessive time spent dealing with personal matters during work time and not following procedures and protocols in relation to selling products.

The Authority considered whether the Vet Centre carried out a fair process and if the decision to dismiss was substantively justified. The Authority considered each of the specific concerns and concluded overall that the Vet Centre conducted a fair process, it acted as a fair and reasonable employer could in the circumstances in relation to its obligations to investigate and how it advanced the issues it had with Mr Smith.

The Authority considered the substantive justification for dismissal as it related to each area in turn and then overall, as the Vet Centre did in its analysis and decision making. The Authority determined dismissal was an appropriate sanction having reflected on the evidence and the arguments advanced in respect of each aspect of

the Vet Centre's decision. The Authority found that a fair and reasonable employer could have concluded the events that occurred amounted to serious misconduct, which justified dismissal.

The Authority found that a fair and reasonable employer could have concluded that it had lost trust and confidence in Mr Smith because he did as he saw fit and then made excuses often blaming others and his lack of contrition and failure to accept responsibility meant Mr Smith was unlikely to change his behaviour. The Authority determined dismissal was an appropriate sanction.

Smith v The Vet Centre Marlborough Limited [[2020] NZERA 12; 14/01/2020; P van Keulen]

Settlement of Costs

On 20 August 2019 Employment Relations Authority (the Authority) Member Christine Hickey issued a determination concluding Mrs Marshall had personal grievances in that she had been unjustifiably disadvantaged and unjustifiably dismissed. Costs were reserved and the parties were encouraged to resolve costs between themselves. They were unable to do so and Mrs Marshall as the successful party then sought a contribution towards costs incurred.

Mrs Marshall sought contribution which exceeded the daily tariff of $4,500 for the first day and $3,500 for the second day, with appropriate adjustments being made. She sought a daily tariff of $8,500, an uplift of 15 percent GST as Mrs Marshall is not registered for GST and a disbursement for photocopying and binding in relation to bundles of documents amounting to $596.96.

Mrs Marshall's representative forwarded invoices totalling $32,832.50. Whilst the invoices did not break down time that may have been spent in mediation, it was clear that Mrs Marshall had incurred costs well above the $10,000 she asked for in the Calderbank.

Mrs Marshall's claim for the uplift was primarily based on the Calderbank offer made on her behalf on 24 October 2017 or 25 October 2017. Two letters were put before the Authority which were identical apart from a one day date difference. There was no dispute that the respondent received the Calderbank offer, which it rejected.

The applicant offered to settle the matter with six months' salary including three per cent employer contribution towards KiwiSaver, $15,000 in compensation and $10,000 towards legal costs. The Authority decided instead with 26 weeks' wages, $20,000 compensation and costs were reserved but noted tariff costs would equate to $8,000.

Mrs Marshall's settlement offer needed to be considered in light of whether or not its acceptance would have put the recipient in a better place. If the answer was yes then costs incurred by the other party as a result of the rejection is an issue warranting consideration and will often see an increase in the resulting award.

The purpose of a Calderbank offer is to attempt to settle matters between parties at an early stage in a dispute. The Authority did not agree with the submission that they should ignore settlement offers made at an early stage. As previously noted, the offer was timely in that it was sent at an early part of the proceedings and should be considered. The Authority noted that Mrs Marshall would have incurred costs in defending counterclaims which lacked substance.

Though the offer was made early in the proceedings, it was made after mediation and after the parties were well aware of their respective positions. It was noted that both parties would have been better off if the matter settled on the basis of the 24 (or 25) October 2017 Calderbank offer.

The Authority noted that Mrs Marshall incurred some unnecessary costs through the need to prepare for and address counterclaims which were not supported by evidence. Bearing in mind the nature of the claims, the Authority decided that not much time would have been spent rebutting them.

The Authority ordered the respondent to pay a contribution towards costs incurred by Mrs Marshall of $11,000 and $581.06 towards other costs.

Marshall v Nelson English Centre Limited [[2019] NZERA 594; 17/10/2019; G O'Sullivan]

Non Publication order sought

Mr Owen made numerous claims against his former employer Rocket Lab Limited (Rocket Lab). During the Employment Relation Authority's (the Authority) investigation into these claims, Rocket Lab sought a non-publication order of a company name that was included in a witness statement containing commercially sensitive and confidential information that was exchanged during the investigation. Mr Owen did not challenge the non-publication order application.

Clause 10(1) of the Second Schedule of the Employment Relations Act 2000 (the Act) gives the Authority discretion to grant non-publication orders. The Authority may order that any part of evidence given, pleadings filed or the name of any party, witness or other person not be published.

The Authority noted that the Employment Court has recognised that a party seeking to depart from the fundamental principle of open justice is required to provide evidence of specific adverse consequences that should result in a non-publication order being issued.

The Authority received highly confidential and commercially sensitive proprietary information belonging to Rocket Lab. The Authority noted that there was no public interest in that material being made publically available and that parties to Authority investigations must be confident that their sensitive and confidential proprietary information will not be placed in the public domain if claims are made against them. The Authority considered that it was appropriate to issue a non-publication order. The Authority ordered that the name of the company referred to in the documents and the relevant identified documents not be published in connection with the proceedings.

Owen v Rocket Lab Limited [[2020] NZERA 137; 31/3/2020; R Larmer]

Claims of a breach of a settlement agreement

Mr Grauman was employed by Westcon Group NZ Limited (Westcon) as the National Manager. Westcon began a restructuring process in February 2019 which resulted in Mr Grauman's employment ending by way of redundancy. Before his employment ended, Mr Grauman met with Mr Corcoran, the Chief Financial Officer and Ms Lesley-Pryor, Westcon's HR representative to discuss the restructuring process. During that meeting, the parties reached a settlement resolving the employment relationship problems between the parties. The settlement terms were put into a Record of Settlement (the settlement agreement) under section 149 of the Employment Relations Act 2000 (the Act). The settlement agreement was signed by a Mediator employed by the Ministry of Business, Innovation and Employment.

The settlement agreement provided for payment to Mr Grauman of sums of money including redundancy compensation, compensation for hurt and humiliation, any unpaid salary including holiday pay, unpaid expenses and payment under the Executive Compensation Plan (ECP) for the previous fiscal year. Mr Grauman claimed that the terms of the settlement agreement were breached when Westcon failed to pay him the complete payment owed to him from the previous fiscal year. Westcon denied this and said it correctly calculated the ECP payment.

The settlement agreement also contained clauses protecting the confidentiality of the settlement agreement and prohibiting parties from making disparaging comments about each other. Westcon lodged a counter-claim against Mr Grauman and alleged that he had breached both the confidentiality and non-disparaging clauses. Mr Grauman denied this claim.

Clause 5(a) of the settlement agreement stated that the ECP payment would be paid in accordance with Westcon's policy. ECP calculations were made using financial data extracted from Westcon's accounting software system, SAP and a tool called Hyperion. In accordance with the settlement agreement, Westcon calculated and paid Mr Grauman the ECP payment on 5 April 2019. Mr Grauman questioned the calculation claiming it was incorrect and requested it be recalculated. After investigating, Westcon accepted that a further payment was owed and advised Mr Grauman that the additional amount would be made to him. Mr Grauman disputed the calculation of the additional amount and argued it was still less than what he was entitled to. Mr

Grauman advised the Employment Relations Authority of the figure he believed he should have received as a payment under the scheme. This figure was based on a spreadsheet of data by Westcon's Chief Financial Officer. Mr Grauman acknowledged and agreed that this figure was estimation only. Based on the evidence, the Authority was satisfied that Westcon had paid Mr Grauman correctly in accordance with its policy. Westcon had not breached the settlement agreement.

In its counter-claim, Westcon claimed that Mr Grauman had breached the settlement agreement by making disparaging comments and breaching confidentiality. Westcon claimed that Mr Grauman breached these terms of the settlement agreement when he had a conversation with Mr Prasad, the Financial Controller of Westcon, while on holiday in Fiji. In July 2019, both Mr Prasad and Mr Grauman were holidaying in Fiji when they had an encounter with one another. Mr Prasad claimed that Mr Grauman said he was taking Westcon to court for underpaying him. Mr Grauman denied that he said this. Rather, he claimed that Mr Prasad asked him how life was outside of Westcon in which Mr Grauman replied saying that it was great, but that it was a pity that there was litigation in progress. The Authority was satisfied that comments made to Mr Prasad by Mr Grauman were not disparaging and there had been no breach of the agreement. The statement was factual and was said to a person who was responsible for ensuring that he was paid any money owing to him.

Westcon's application for compliance orders and penalties was declined on that basis.

Grauman v Westcon Group NZ Limited [[2020] NZERA 149; 15/04/2020; V Campbell]

For further information about the issues raised in this week's cases, please refer to the following resources:

Discipline

Holidays Act

Full and Final Settlement

Labour Inspector

Performance Management

Employer News

Balance about right in Rebuilding Together budget

The EMA says the Government's budget amidst COVID-19 was always going to have to strike the right balance between spending and debt levels to regenerate the economy for the benefit of all.

Chief Executive Brett O'Riley believes it does provide a first step in doing this, but is keen to continue to work together with the Government on long term economic recovery and additional sector-specific plans.

"We are particularly pleased with the $4 billion business support package, the $3b for shovel-ready infrastructure projects, and the focus on innovation and digitisation and vocational education and training," he says.

"For businesses who have suffered a 50 per cent downturn since this time last year the extension of the wage subsidy by eight weeks will be welcome news, and for SMEs $10m target for them to improve their e-commerce offering and additional incentives and grants to encourage e-commerce adoption will be crucial."

The EMA says the combination of immediate and ongoing support, especially in the digital space, does help especially in the short term.

"We know it's hard for businesses, especially SMEs to look at innovation when they're struggling to stay solvent, but now is the time to capitalise on the things they've had to do differently and use the Government's support to do things better into the future," says Mr O'Riley.

The EMA believes that increased support for R&D including the short-term temporary loan scheme to incentivise businesses to continue with plans, with the help of one-off finance administered by Callaghan Innovation, is the key for many to be able to pivot and regenerate.

"We're also pleased to see the $216m boost to NZTE to expand its scope of support to businesses, particularly with digital services," says Mr O'Riley.

And although positive economic indicators are set to take a plunge in the short term – GDP will go down and unemployment and debt levels up – at least those who have lost their jobs have prospects for the future, although potentially doing different work.

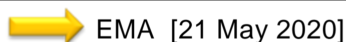
The $1.6b Trades and Apprentice Package to provide training opportunities for people of all ages is a practical measure to get people back to work, and the $50m allocated for Maori Apprentice and Trades Training is also welcomed as we're already seeing younger people join the dole queues at a faster rate than others.

"It is also pleasing to see that the Government has balanced the economic need to the country with overall wellbeing, with it addressing housing with a $5b building package through Kainga Ora, $121m for community initiatives for at risk young people, and $1b for the environment," says Mr O'Riley.

But while there is cash for key sectors such as Export and Manufacturing, the key will be in the detail of these plans.

"Manufacturing is acknowledged as an essential plank of our economic recovery going forward, and we're keen to work with the Government on a more detailed, future-focused plan for this sector, similar to the $400m Tourism Sector Investment Plan that has been announced," says Mr O'Riley.

"We are also looking forward to providing any input we can to the Infrastructure Reference Group that will govern the projects that will literally help get our economy moving, for the good of all."

 EMA [21 May 2020]

Level 2 needed for business continuity

The EMA says the survival of businesses and people's livelihoods now needs to be the focus for New Zealand.

"Only moving into Level 2 as soon as possible will provide the injection that is needed to truly start the recovery and get as many people working as possible and money flowing. We have been bold around containing COVID-19, let's show the same determination to get people working again," says EMA Chief Executive Brett O'Riley.

"The number of businesses seeking assistance with planning for survival beyond current COVID-19 restrictions underpins the need for Government to make a quick and decisive call to introduce Alert Level 2 operations from early next week."

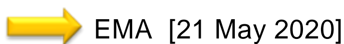
The EMA-hosted business assistance line received nearly 1,000 calls in the past week with around 50 per cent of those calls seeking advice on how to keep businesses running and position them to take advantage when COVID-19 restrictions are finally lifted.

"Comments about a managed or staged step from Alert Level 3 to 2 or even a version of Level 2.5 being introduced is confusing at a time when business really needs clarity. Why announce Level 2 guidelines only to muddy those guidelines by talking about a version 2.5 that no-one knows anything about? That's unhelpful," says Mr O'Riley.

"Businesses have demonstrated they understand health and safety and have worked hard to implement the guidelines around Alert Level 3, and are poised to do the same for Level 2. Where there are any deficiencies these have been quickly identified and remedied, businesses are desperate to be able to keep operating."

"Government needs to trust businesses to operate responsibly under Alert Level 2, as they have largely done under Levels 4 and 3. Delays because the health authorities haven't sorted their track and trace system or a half step between Levels 3 and 2 will just create resentment and confusion in the community and probably lead to more widespread breaches of guidelines as businesses and the communities around them vent their frustrations."

The EMA's AdviceLine number is 0800 300 362, and its dedicated site [covid19.ema.co.nz.](covid19.ema.co.nz)

 EMA [21 May 2020]

Level 2 a relief to many businesses

The EMA says Government's announcement that the majority of businesses will be back to work on Thursday is a relief.

Chief Executive Brett O'Riley says he is pleased for the EMA's 7000 member businesses, and for the country as a whole, that the focus has shifted to restoring people's livelihoods.

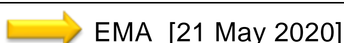
"The Government trusted businesses at Alert Levels 4 and 3, and it is good to see that trust further extended at Level 2 to allow the majority of businesses to return and begin the task of restoring their own operations and the national economy," he says.

Mr O'Riley is confident that businesses will stick to guidelines to ensure the best public health outcomes, and that businesses have plans in place to manage their Level 2 responsibilities to staff and customers.

He was pleased to hear the Government acknowledge that there was a long way to go to recovery and the reference to further assistance becoming available for business.

"Our member businesses will be looking forward to hearing details of that further assistance, as even at Level 2, some cannot see a way back to profitability."

"We are also very keen to hear about the Rebuilding Together budget on Thursday, which we are hoping will also be a comprehensive blueprint for the future, including doing things differently."

 EMA [21 May 2020]

Time for economy to move to Alert Level 2

EMA says the economy needs a return to Alert Level 2 on May 12 to get business back to work and kick-start the country's economic engine.

Chief Executive Brett O'Riley says what this week at Alert Level 3 has shown is that the vast majority of businesses are taking a responsible approach to health and safety practices in the workplace and we can expect that to continue under Level 2.

"Unless there's a compelling reason not to, the Government should announce on May 11 that we are moving immediately from Alert Level 3 to Alert Level 2," says Mr O'Riley.

He says that any extra time at Alert Level 3 will sink a number of businesses that have only just been holding on, with further detrimental flow-on effects for their people and the economy.

"We've already seen a number of businesses going to the wall and a significant jump in the numbers of unemployed – we know that more businesses are certain to fold."

"With no sign yet of any cashflow assistance package from the government we'll see many more SMEs and some larger companies make the tough decision to close if there is a further extension of Alert Level 3 restrictions, says Mr O'Riley.

"The health arguments have rightly and understandably held sway in beating back this virus and businesses have complied well with Levels 4 and 3. It's now time to trust them to continue work within Level 2 guidelines, allowing the bulk of the economy to get back underway while maintaining the required vigilance under the health guidelines."

"But it's time for business to start recovering its health."

A quick online survey of EMA members showed that only eight per cent of those who took part did not have a health and safety plan in place in the week prior to Alert Level 3 was announced.

"Businesses are clear on the rules are and have been sticking by them. All businesses have been asked to make a plan, and we know our members are following them. There's no reason to expect we won't get the same levels of co-operation under Level 2," he says.

"The survey told as that businesses are desperate to have customers back on their premises – with appropriate social distancing – because their revenue at Alert Level 3 is nowhere near what it could be and they're still in danger of not making it through," says Mr O'Riley.

"Level 2 will offer significant revenue increases for many and also allow other sectors such as retail and hospitality to operate again – but again under strict guidelines. It's timely to give businesses that opportunity

"We welcomed the move to Alert Level 3, and we look forward to confirmation from the Government that they have a level of trust in the people and businesses of New Zealand to also operate responsibly at Alert Level 2 from May 13," he says.

EMA [21 May 2020]

Legislation

Note: Bills go through several stages before becoming an Act of Parliament: Introduction; First reading; Referral to select committee; Select committee report, Consideration of report; Committee stage; Second reading; Third reading; and Royal assent.

Bills open for submissions: Six Bills

Six Bills are currently open for public submissions to select committees.

Screen Industry Workers Bill (25 May 2020)

Organic Products Bill (28 May 2020)

Regulatory Systems (Transport) Amendment Bill (01 June 2020)

Child Support Amendment Bill (24 June 2020)

Inquiry into the operation of the COVID-19 Public Health Response Act 2020 (28 June 2020)

Overseas Investment Amendment Bill (No 3) (31 August 2020)

Overviews of bills - and advice on how to make a select committee submission - available at: https://www.parliament.nz/en/pb/sc/make-a-submission/

Full text of bills available at: http://www.parliament.nz/en-nz/pb/legislation/bills

The Employer Bulletin is a weekly update on employment relations news and recently published legal decisions. It is EMA's policy to summarise cases that contain legal issues relevant to employers. The purpose of the Employer Bulletin is to provide and to promote best practice in employment relations. If you would like to provide feedback about the Employer Bulletin, contact advice@ema.co.nz