IN THE EMPLOYMENT COURT
AUCKLAND REGISTRY

[2014] NZEmpC 68
ARC 58/13

UNDER	the Holidays Act 2003 and the Employment Relations Act 2000
IN THE MATTER OF	proceedings removed
AND IN THE MATTER	of an action for recovery of wages
BETWEEN	TODD HOWELL Plaintiff
AND	MSG INVESTMENTS LIMITED (FORMERLY KNOWN AS ZEE TAGS LIMITED) Defendant

Hearing: 17 February 2014
(Heard at Auckland)

Appearances: S Langton and K Phelan, counsel for plaintiff
P Skelton QC and M McGoldrick, counsel for defendant

Judgment: 12 May 2014

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr Howell was formerly employed by the defendant at a time when it was known as Zee Tags Limited. The company has, since the Employment Court hearing, changed its name to MSG Investments Limited (MSG). Mr Howell's employment commenced on 18 June 2002 and concluded on 3 February 2012.

[2] MSG made Mr Howell redundant in November 2011 and he was then given three months' notice, which he worked until the date of final termination on 3 February 2012.

[3] In conjunction with his written individual employment agreement (the IEA), Mr Howell and MSG entered into a Growth Incentive Agreement (the GIA). The issue in this proceeding is whether the holiday pay payable to Mr Howell upon termination of his employment should have been calculated upon a sum that included an incentive payment he received under the GIA.

[4] A statement of problem raising two claims was filed with the Employment Relations Authority on 18 April 2013. The second of those claims related to the issue now before the Court. The first claim was subsequently resolved. As an important question of law was likely to arise in the remaining matter other than incidentally, it was removed to the Court in a determination dated 5 August 2013.[1]

[5] This complicated dispute has proceeded before the Court on the basis of a statement of agreed facts and presentation of legal submissions. A bundle of agreed documents has been helpfully supplied by counsel for the assistance of the Court.

Agreed Facts

[6] The agreed facts are set out in the statement as follows:

> 1. The plaintiff ("Mr Howell") lives in Auckland.
>
> 2. The defendant ("Zeetags") develops, designs and sells animal identification products in New Zealand and overseas.
>
> 3. Mr Howell worked for Zeetags from June 2002 to 3 February 2012, when he was made redundant.
>
> 4. Mr Howell's most recent position he held was General Manager – Finance and Administration.
>
> 5. During 2009 Mr Howell and Zeetags negotiated new terms and conditions of employment. These were recorded in a written individual employment agreement (the "IEA") dated 11September 2009. …
>
> 6. Under the IEA, Mr Howell was entitled to four weeks' annual holidays per annum.
>
> 7. Mr Howell, Zeetags and the shareholders of Zeetags negotiated an agreement dated 11 September 2009 named the "Growth Incentive Agreement'. The Growth Incentive Agreement comprised additional terms and conditions of Mr Howell's employment. …

[1] *Howell v Zee Tags Ltd* [2013] NZERA Auckland 337.

8. Under the Growth Incentive Agreement, it was intended that Mr Howell would participate in the value of Zeetags' and its related entities' assets and shares by payment of an incentive payment to him in certain defined circumstances.

9. Relevantly, those circumstances included if Mr Howell's employment terminated on the grounds of redundancy before 1 April 2013 and:

    a. Zeetags' assets and assets of the partnership Z Tags North America LP (the "LP"); or

    b. shares in Zeetags and interests of the LP were not sold in the meantime.

10. In the above circumstances, the incentive payment was to be paid as remuneration and calculated according to a formula; specifically, the fair market value of 20% of the shares in Zeetags as at the date of termination of Mr Howell's employment.

11. Payment of any incentive payment was to be made by Zeetags within 30 days of determination of the fair market value of 20% of the shares.

12. On 4 November 2011 Zeetags gave Mr Howell notice of termination of his employment on the grounds of redundancy, effective 3 February 2012.

13. On 3 February 2012 Mr Howell's employment ended and Zeetags paid him:

    a. his salary up until that date;

    b. holiday pay to that date; and

    c. redundancy compensation in accordance with the IEA.

    …

14. Following the determination of a dispute over the quantum of the incentive payment, on 22 January 2013, Zeetags paid Mr Howell an incentive payment of $3.2 million, less PAYE and KiwiSaver contributions pursuant to the Growth Incentive Agreement. …

15. The dispute that requires determination is whether Zeetags has any outstanding obligation to pay holiday pay to Mr Howell in respect of the incentive payment. While there are other parties to the Growth Incentive Agreement, Zeetags and Mr Howell agree that in the event that any holiday pay is payable to Mr Howell in relation to the Growth Incentive payment, Zeetags is liable for such payment and not the other parties.

Contractual provisions

[7] The IEA, in view of the link with the other agreement, contained a clause ensuring that the restrictive covenants in the IEA (being restraint of trade provisions) did not derogate from, limit, or vary the obligations under the GIA. The GIA in turn contained a provision that:

> This agreement is intended to be an additional term of the Employment Agreement, and to the extent necessary, varies that Employment Agreement accordingly.

[8] It is the provisions of the GIA rather than the IEA which give rise to the subject of this dispute. The IEA contained the usual provisions to be expected for a position of employment of the kind occupied by Mr Howell. While he was made redundant, there is no suggestion that any breach of the IEA occurred. The sole issue to be determined is whether he is now entitled to holiday pay on the incentive payment, pursuant to the provisions of the Holidays Act 2003 (the HA).

[9] Clause 7 of the IEA provided for termination of employment, including for reason of redundancy. Clause 7(f) of the IEA provided that in the event that Mr Howell was made redundant, he would be given three months' notice or pay in lieu of notice. The statement of agreed facts discloses that Mr Howell was given notice of his redundancy on 4 November 2011. He was required to work the period of notice until his employment terminated on 3 February 2012.

[10] The provisions of the GIA pertinent to a consideration of this dispute are:

a) Clause 1.1 that defined the Target Date as 1 April 2013;

b) Clauses 2, 3 and 4, which incorporated the method of quantification and payment of the incentive payment;

c) Clause 3.6, which dealt with the consequences of Mr Howell's redundancy. It reads:

> **Redundancy/Unjustified Dismissal:** In the event that the Company makes the Employee redundant or his employment is terminated and

> the termination constitutes an Unjustified Dismissal, the Employee will be entitled to receive an Incentive Payment under either of clauses 3.2(b)(i) or 3.5(a) (as the case may require having regard to any prior Part Disposal) as if the Target Date had been reached without a Full Disposal occurring. In such an event the Employee will not be entitled to receive any Shares pursuant to either of clauses 3.2(b)(ii) or 3.5(b).

d) Clause 3.7, which contained assumptions necessary and provisions applicable for the purposes of determining the fair market value of the shares in the company at the appropriate date. This in turn enabled the quantum calculation of the incentive payment.

Interest

[11] The issue of interest is simply mentioned for the sake of completeness. Presumably in a situation where the parties were immediately unable to agree on the value of the payment, interest would be payable to Mr Howell over the period of delay in settlement. This is not dealt with in the agreed statement of facts. The interest rate to cover this period was not specifically contained in the GIA. Interest was mentioned in other unrelated provisions of the GIA and for those purposes was defined in cl 1.1. The IEA did not mention interest at all. In view of the fact that any incentive payment was in reality made under the IEA, the interest specified in s 84 of the HA and cl 14 of sch 3 to the Employment Relations Act 2000 (the ERA) would apply to any further payments ordered to be paid to Mr Howell.

Submissions of counsel

[12] The plaintiff's position is that he is entitled to holiday pay in respect of the incentive payment. In addition, he seeks interest from the date that the incentive payment was made until the date of judgment. Presumably, the issue of interest up to the date of payment has been resolved or is not claimed. However, if holiday pay is now payable on the incentive payment one would have thought that interest on that pay could be backdated to the date of the termination of employment.

[13] Mr Howell's position is based on the relationship between ss 21–27 and s 14 of the HA. In addition general sections of that Act including the definition section

have been referred to and are relied upon. Mr Langton submitted on behalf of Mr Howell that the incentive payment needs to be included in the calculation of gross earnings for the purposes of determining Mr Howell's holiday pay entitlement at termination of employment. He particularly relied upon s 25(2) of the HA, which he submitted applies, because at the date of termination of Mr Howell's employment on the grounds of redundancy he had not worked for a 12 month period of employment since last becoming entitled to annual holidays. In fact it appears that Mr Howell was owed holiday pay for untaken holiday entitlement pursuant to s 24 of the HA as well. The issue arising in this case relating to the incentive payment would not apply to the period covered by that section.

[14] The position argued by Mr Skelton QC, on behalf of MSG, was as follows:

a) The period for which gross earnings were to be assessed was not open ended. In this case it was submitted that it ended on the date of Mr Howell's termination of employment on 3 February 2012.

b) The incentive payment occurred after that date as provided in the GIA and therefore was not included in gross earnings. Mr Skelton submitted that this is confirmed by the words in s 14 of the HA "for the period during which the earnings are being assessed". He submitted this can only include a period up to termination of employment and not after.

c) There is no statutory obligation to provide holidays or pay holiday pay after employment ends.

d) As at 22 January 2013, when the incentive payment was made to Mr Howell, he had no holidays due or owing for which holiday pay should be paid.

[15] There is a conceptual inconvenience for the defendant with the argument that the incentive payment was not part of final pay for the purposes of gross earnings. The entitlement to the payment vested in Mr Howell upon the date of termination of his employment. The payment by virtue of the GIA was remuneration subject to

PAYE, rather than a capital payment. As the payment was made after termination, for the defendant's argument to be consistent, it should have been a capital payment not subject to tax. The defendant cannot say that it is remuneration for one purpose but not remuneration for another. If holiday pay cannot be due and owing after the employments ends, then there is an inference, on the defendant's argument, that income cannot be earned for that period either.

[16] It is noted that Mr Skelton relied upon the timelines in cl 3 of the GIA as a basis for the submission that holiday pay was not payable, as the incentive payment was paid, or payable, after employment ended. This is by virtue of the fact that while Mr Howell became entitled to the payment when he was made redundant, which is assumed was the date of termination, it was not actually payable to him until calculated and even then after a period of 30 days had expired. Again there is an inconvenience for the defendant in that argument. Clause 3 of the GIA is a method used for calculation purposes only. Timelines were required and hypotheticals assumed under the clause simply for the purpose of enabling the share value to be set. Nevertheless, Mr Skelton submitted that as the payment was to be made 30 days after the valuation was set that means the payment is not assessable for holiday pay. This, however, is inconsistent with the other conditions of the GIA, in particular, cl 4, which dealt with the treatment of the payment as remuneration and therefore amenable to tax.

[17] Both counsel agree that s 25(2) of the HA prescribes the starting point applicable in this case for the calculation of gross earnings, however, the parties disagree as to when this period ends. The plaintiff submitted that the period is open ended, whereas the defendant's position was that the period is fixed and ends with the employee's last date of employment. As already stated, the defendant's position was based on the fact that the incentive payment could not be calculated and paid until after the plaintiff's employment terminated. Mr Skelton submitted that the period within which gross earnings are to be assessed for the purposes of calculating holiday pay under ss 25(2) and 27(2) began on the plaintiff's leave anniversary being 18 June 2011, and ended on the date of the plaintiff's final date of employment being 3 February 2012. In view of the fact that there was a dispute on quantum, the incentive payment was not made until 22 January 2013. Mr Skelton submitted that

the payment therefore does not fall within the period when gross earnings are to be calculated. There was no submission from either counsel that the payment itself was not an incentive payment otherwise covered by s 14 of the HA.

[18] Mr Skelton made three submissions on behalf of MSG with which I disagree. He submitted that there is no statutory obligation to provide holidays or holiday pay after employment has ended. This is not strictly correct in respect of holiday pay. Quite often the situation will arise where an employee will have earned income not capable of being exactly calculated as at the termination date. An example of this is a situation where an employee, by virtue of contractual entitlements, may be entitled, for instance, to commission on sales actually executed prior to employment ending, but which for accounting reasons cannot be exactly calculated until after the date of the termination of employment. Another example would be the entitlement to a non-discretionary productivity bonus not capable of calculation prior to termination of employment. These examples, indeed, demonstrate by analogy in the present circumstances, that by virtue of his entire employment period, Mr Howell has in fact earned the incentive payment. His entitlement to it vested on the day he ceased employment. It is simply that by virtue of the formula based on share value for quantifying the incentive payment, it could not be calculated and therefore paid out on the exact date of termination of employment.

[19] Mr Skelton also submitted that as at 22 January 2013, when the incentive payment was made to Mr Howell, he had no holidays owing for which holiday pay should be paid. That rather begs the question somewhat, and does not seem to be a relevant consideration. The issue is not whether he had holidays owing when the quantum of the incentive payment was agreed, but what payment he should have received on or after termination for holidays not taken at that point in time. The question involves the calculation of the appropriate amount for them. Presumably if a different formula and method of payment had been applied to the incentive payment so that, for example, it was indeed capable of being exactly calculated, and paid out on the day of the termination of employment there could be no argument to it being included in the assessment of gross earnings for the purposes of calculation of holiday pay.

[20] For this reason also I disagree with Mr Skelton's submission that if Mr Howell had taken annual holidays at any point during his employment, then the incentive payment would never have been taken into account in calculating his holiday pay. That would be true if he had only remained in employment to a point in time prior to the target date in the GIA (1 April 2013) and then voluntarily resigned or was justifiably dismissed. However, it would not be correct if Mr Howell had remained in employment beyond the target date, received the incentive payment, and had then taken annual leave from the appropriate anniversary date or indeed had terminated his employment after that time. That is something which will be more fully discussed later in this judgment. Mr Skelton, in his oral submissions, also stated that Mr Howell, when taking annual holidays during his employment, would simply have received continuity of his salary. Section 14(a)(i) of the HA, however, means that salary (or wages) is merely one of the factors to be used in calculating gross earnings and thence average weekly earnings for the purposes of holiday pay.

Statutory provisions relied upon

[21] By virtue of s 16 of the HA an employee becomes entitled to holidays at the end of each 12 month period of employment, or, on his or her leave anniversary. The calculation of holiday pay is set out under ss 21–25. Section 21 applies if any employee takes annual holidays after the entitlement arises. Section 23 applies if an employee has been employed for less than 12 months. It provides for calculation of annual holiday pay if the employment ends within that time. Section 24 applies if an employee is entitled to paid annual holidays under s 16 but the employment ends without the employee taking the entitlement to leave. Section 25, which is the pivotal provision in the present dispute, applies to provide the calculation of annual holiday pay if the employment is terminated in the period between the employee's last leave anniversary and the date of termination and that period is less than 12 months. That section recognises that an employee has accrued, but has not become entitled to a period of leave. Section 25(2) provides that an employer must pay the employee 8 per cent of gross earnings since the employee last became entitled to annual holidays. If average weekly earnings are the applicable criteria under any of these sections, gross earnings are included in the calculation.

[22] Gross earnings is defined in s 14 of the HA. The definition has particular relevance to s 25(2) as already mentioned. It also applies to s 21, because under that section annual holiday pay, taken in the normal course of events after entitlement to annual holiday has arisen, is to be at a rate that is based on the greater of the employee's ordinary weekly pay as at the beginning of the annual holiday or (as probably applies in this case) the employee's average weekly earnings for the 12 months immediately before the last pay period before the annual holiday.

[23] Section 5 of the HA defines average weekly earnings as 1/52 of an employee's gross earnings, thereby incorporating the definition contained in s 14. Because of its importance in the context of the present dispute, s 14 is set out in full as follows:

> **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:
>
> (ii) allowances (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to his or her employment):
>
> (iii) payment for an annual holiday, a public holiday, an alternative holiday, sick leave, or bereavement leave taken by the employee during the period:
>
> (iv) productivity or incentive-based payments (including commission):
>
> (v) payments for overtime:
>
> (vi) the cash value of any board or lodgings provided by the employer as agreed or determined under section 10:
>
> (vii) first week compensation payable by the employer under section 97 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act; but
>
> (b) excludes any payments that the employer is not bound, by the terms of the employee's employment agreement, to pay the employee, for example—
>
> (i) any discretionary payments:

(ii) any weekly compensation payable under the Injury Prevention, Rehabilitation, and Compensation Act 2001 or former Act:

(iii) any payment for absence from work while the employee is on volunteers leave within the meaning of the Volunteers Employment Protection Act 1973; and

(c) also excludes—

(i) any payment to reimburse the employee for any actual costs incurred by the employee related to his or her employment:

(ii) any payment of a reasonably assessed amount to reimburse the employee for any costs incurred by the employee related to his or her employment:

(iii) any payment of any employer contribution to a superannuation scheme for the benefit of the employee:

(iv) any payment made in accordance with section 28B.

Principles applying and further discussion of submissions

[24] The legal arguments put forward by both parties in support of their submissions boil down to the correct interpretation of s 25(2) of the HA in particular and its relationship to s 14. Both parties correctly identified that the starting point for an interpretation exercise such as this is s 5(1) of the Interpretation Act 1999 which provides:

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The text in light of its purpose

[25] This dispute relates to that period covered by s 25(2) of the HA being the period between the date of Mr Howell's last anniversary of commencement of

employment being 18 June 2011 and the date when his employment ended on the basis of redundancy on 3 February 2012. This is a broken period of approximately eight months. The key phrase to be interpreted in s 25(2) is "gross earnings since the employee last became entitled to the annual holidays". The plaintiff submitted that this phrase should be interpreted literally in the sense that since the legislature has specified a start date for the period, it must be assumed that the omission of an end date is deliberate such that it is to be interpreted as an open ended period. The plaintiff also submitted that as an incentive payment such as the one Mr Howell received comes within the definition of gross earnings in s 14, the fact that the actual payment was not calculated or payable until after the termination of employment is irrelevant.

[26] The plaintiff's entitlement to the incentive payment under the GIA of course accrued during a substantial period of high performance by Mr Howell. While the payment did not become payable until the target date in the agreement if Mr Howell remained in employment, or upon termination by virtue of his redundancy or his unjustifiable dismissal, his loyalty to the employer and the efforts he made on its behalf all occurred and continued over the several years leading up to the date of termination. As indicated already the incentive payment itself was regarded by the parties, by virtue of the provisions of the GIA, as income and not a capital payment even though calculated on the basis of the capital value of the company's shares.

[27] Mr Langton supported his argument that the omission of an end date in s 25(2) is deliberate by looking to the wording of s 25(1)(b). Subsection (1) provides two qualifying requirements before the calculation under subs (2) can apply: the employment of an employee must come to an end and the employee must not be entitled to annual holidays for a second or subsequent 12-month period of employment because the employee has not yet reached their next leave anniversary date. He argued that since subs (1)(b) contains an end date for the period for which an employee must be employed to qualify for holiday pay on termination under s 25, this means that the omission of an end date in subs (2) is deliberate.

[28] This argument is not all that easy to follow. The "end date" in subs (1)(b) is the employee's next leave anniversary date. The purpose of this end date is to

determine whether the employee's holiday pay is to be calculated under s 24 or s 25. If the employee has not yet reached their next leave anniversary date (the "end date") prior to the employment ending then s 25 applies because they have not become entitled to holiday pay under s 16. The "end date" referred to in subs (1)(b) simply reinforces the fact that the whole of the HA is premised on the basis that an employee is entitled to leave after each 12 months of continuous employment. The fact that no specific end date is prescribed in s 25(2) is because the actual period to be covered is variable and may cover any period short of twelve months. It is not a particularly convincing argument to suggest that Parliament's intention and purpose can be gleaned through what has *not* been provided in the statute. This argument does not therefore take the matter much further.

[29] The plaintiff argued that the heading of s 25 also supports his submission. The heading of s 25 is: "Calculation of annual holiday pay if employment ends before further entitlement has arisen". The plaintiff submitted that if the legislature had intended to limit the calculation to when the employment was terminated then this could have been achieved by the heading "Calculation of annual holiday pay *upon* termination of employment". Although this may be the case, I am not sure that the primary purpose of s 25 is to define a period of employment for which annual holiday pay is to be calculated. Rather, it is to provide a formula for calculating the annual holiday pay if the employee's employment has come to an end but they have not yet become entitled to annual holidays by virtue of not having reached their next leave anniversary. It therefore provides a formula for calculating the pay for a broken period but cannot necessarily define a period for which this formula is to be applied to in view of the fact that the period is variable depending upon the last anniversary in relation to the date of termination of employment.

The surrounding sections

[30] If the meaning of an enactment cannot be directly determined from the wording of the section then it may be ascertained from the surrounding sections.

[31] Section 14 is directly relevant because it provides the definition of "gross earnings" that is referred to in s 25(2).

[32] The plaintiff submitted that the phrase "in relation to an employee for the period during which the earnings are assessed" in s 14 contemplates that gross earnings may be earned and paid during the open-ended period provided for in s 25(2).

[33] The defendant submitted that "gross earnings" are calculated on a payments basis (payments that have been received by the employee up to the date of calculation) and not on accrual basis (payments an employee may be entitled to receive at a future date).

[34] The defendant has not provided a reason or explanation for why gross earnings in such a case as the present are to be assessed on a payments basis rather than an accrual basis.

[35] If anything, and as submitted by the plaintiff, the wording of s 14 favours a broader interpretation of gross earnings. Section 14(a) defines gross earnings as "all payments that the employer is required to pay to the employee under the employee's employment agreement" and then provides a list of non-exhaustive examples of payments that would be included in gross earnings under such an agreement.

[36] The wording of s 14 therefore favours the plaintiff's submission that the period in s 25(2) does not end when the employment is terminated. Instead, it must include all payments that the employer is contractually obliged to pay to the employee regardless of whether the calculation of their quantum must await actual termination of employment and the calculation being made in the period after such termination.

[37] Whether a payment is included in the employee's gross earnings does not therefore depend on *when* the payment was made and received. Instead, it turns on whether the employer was *required* to pay it to the employee under the agreement.

[38] Section 27 specifies when payments for annual holidays must be made. Subsection (1) provides that the employer must pay the employee for an annual holiday before the holiday is taken unless the parties agree that the employee will be

paid in the pay that relates to the period during which the holiday is taken or if the employee's employment has come to an end. Subsection (2) applies if the employee's employment has come to an end. The employer must then pay the annual holiday pay in the pay that relates to the employee's final period of employment. Clearly that could not have been complied with in the present case if the plaintiff is entitled to holiday pay on the incentive payment.

[39] The plaintiff argued that s 27 only applies to annual holiday pay calculated under s 24 and not payment of holiday pay under ss 23 and 25. The plaintiff seemed to suggest that holiday pay under s 24 is for "entitled leave" and that this is distinct from the holiday pay under ss 23 and 25 because the entitlement has not yet arisen. The plaintiff submitted that this is because entitled leave (under s 24) is the only holiday pay able to be conclusively calculated at that point in time. The plaintiff therefore concluded that s 27 contemplates that holiday pay pursuant to ss 23 and 25 may have to be paid at a later date, after an employment ends.

[40] The defendant on the other hand claimed s 27 is to be interpreted as applying to ss 21–26. It argued that the calculations produced by ss 23 and 25 are still "annual holiday pay". Simply because the entitlement to annual holidays has not been reached does not mean that the payment under ss 23 and 25 is not for annual holidays.

[41] The defendant also argued that s 27(2) gives effect to one of the purposes of Subpart 1 of Part 2 of the HA set out in s 15. One of those purposes specified in s 15(c) is to require the employer to pay employees at the end of their employment for annual holidays not taken or paid out. This gives employees some certainty as to when they will receive their annual holiday pay when their employment is terminated. The argument, which therefore follows, is that payments which cannot be made until after termination are not contemplated as being included in the calculation of final holiday pay.

[42] The plaintiff's argument that s 27 only applies to s 24 and not to ss 23 and 25 is not persuasive. There is no principled reason for distinguishing payments

calculated under s 24 from ss 23 and 25. The only difference is whether the employment was terminated before or after entitlement to holidays has arisen.

[43] However, the fact that s 27(2) states that the employer must pay the annual holiday pay in the employee's final pay does not necessarily rule out the possibility of later including pay that was received after the date of termination. It would be illogical, for instance, that an employee is deprived of holiday pay on a commission or bonus payment simply because they cannot be calculated as at the last date of employment and can only be payable later.

The purpose of the Holidays Act

[44] Mr Langton submitted that the purpose of ss 25 and 14 is to ensure that the payment of total remuneration to which an employee is contractually entitled is included in the calculation of their holiday pay, regardless of when it is paid. It was argued that this purpose is consistent with the principles of fairness and justice that are essential to the raft of statutory provisions that provide employees with protections and minimum entitlements.

[45] The plaintiff argued that it would be unjust for non-discretionary contractual payments to be excluded from an employee's holiday pay simply because the employment was terminated prior to the date of payment.

[46] Mr Skelton, on the other hand, submitted that requiring employers to pay holiday pay on payments that are not legally payable until after the employment has terminated is not consistent with the purpose of the Act.

[47] The defendant used the example of an employee who takes their annual holidays in January and then receives a substantial pay rise in February. This employee cannot complain that their holiday pay received in January should have been based on their new pay rate as of February. This example is not the same as the case at hand though, and does not assist in interpreting the contractual and statutory provisions now involved. The GIA stated that Mr Howell would become entitled to the incentive payment either by staying in employment and reaching the target date,

or if he was unjustifiably dismissed or made redundant. Mr Howell was therefore always going to become entitled to the incentive payment one way or the other (with the only exceptions being justifiable dismissal or resignation prior to the target date). Since the payment was almost certainly inevitable under the GIA, it is not correct to compare it to a situation where an employee subsequently received a discretionary pay rise.

[48] The defendant also argued that its submission is consistent with the broader scheme of the Act where the employer's obligations in respect of holidays end on the termination of employment.

[49] In considering the purpose of these provisions of the Act there is a distinction to be made between those sections in Subpart 1 of Part 2 which deal with entitlement as to when holidays are actually taken and paid for during the continuation of employment and those dealing with payment upon termination. The sections are not all that conveniently isolated in the subpart. However, ss 23–25 specifically deal with when "the employment of an employee comes to an end". Subsections 21, 22 and 27 onwards specifically deal with "if an employee takes an annual holiday" or "before the holiday is taken". Section 15, which deals with the purpose of the subpart, makes the same distinction in its subsections.

Legislative history

[50] The plaintiff's reply submissions relied for interpretation on the legislative history of the Act. It was submitted that prior to the 2003 Act, the previous Holidays Acts (1944, 1974 and 1981) provided that upon termination of employment, holiday pay was based on earnings *during* the period of employment and the holiday was payable *forthwith*. The 2003 Act, the plaintiff submitted, takes a different approach because there is no requirement that the earnings be earned and paid during the period of employment and the term "forthwith" is not included in s 25.

[51] The defendant did not agree that the legislative history indicated intent to move toward an open ended calculation in the 2003 Act. The defendant suggested that the primary purpose of the 2003 Act was to create certainty and simplicity and

that this is achieved by changing the word "forthwith" to "in the pay that relates to the employee's final period of employment" in s 27(2).

Various scenarios

[52] A consideration of various possible alternative scenarios arising out of the facts of this matter demonstrates a number of inconsistencies in application and effect if the defendant's arguments are accepted. Indeed these scenarios demonstrate that having regard to the factual position in this case it is only in a situation of redundancy where it can even be argued that Mr Howell is not entitled to holiday pay on the incentive payment. These scenarios assist in a final determination of the interpretation of the statutory provisions applying.

[53] The first possible scenario is where Mr Howell simply remained in employment beyond the target date for the incentive payment, received the payment and then took his annual leave upon the anniversary of his employment in the usual way. In this scenario s 21 of the HA would apply as to calculation of his annual holiday pay. Assuming Mr Howell's average weekly earnings in this event would be greater than his ordinary weekly pay, his annual holiday pay would be calculated pursuant to s 21(2)(b)(ii) of the HA on the basis of his average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday. Average weekly earnings by definition incorporate gross earnings and would include the incentive payment (whereas by virtue of s 8(1)(b)(i) of the HA Mr Howell's ordinary weekly pay would not include it). Under this formula he would have received 1/52 of his gross earnings for each of his four weeks of annual leave. It is for this reason that I do not accept Mr Skelton's submission that the incentive payment would never have been taken into account in calculating his holiday pay if he had taken annual holidays at any point during his employment. That submission would be correct in any period leading up to the target date under the GIA. However, as demonstrated it would not be correct following that date. It would be true also if his holiday pay was to be calculated on the basis of ordinary weekly pay. However, I cannot see how, once Mr Howell had received the incentive payment, ordinary weekly pay for the period in question could be greater than his average weekly earnings.

[54] The second possible scenario is where Mr Howell resigned after the target date and he had received payment of the incentive payment but had not taken his annual leave entitlement following the anniversary date of commencement of his employment. In this situation, upon resignation (or for that matter even dismissal for cause) Mr Howell's final holiday pay would be calculated on the basis of s 24 of the HA. Again, the formula to be applied in calculating his final holiday pay would be the same, ie, average weekly earnings which, by virtue of the statutory definition, incorporate gross earnings. The calculation would therefore need to include the incentive payment.

[55] The third possible scenario is where Mr Howell resigned after the target date and had been paid the incentive payment but the resignation (or again dismissal for cause) occurred before further entitlements to annual leave have arisen. This situation is covered by s 25 of the HA. Any distinction between ordinary weekly pay and average weekly earnings does not apply in this scenario. Mr Howell would be entitled to eight per cent of his gross earnings since he last became entitled to annual holidays. He would therefore be entitled to have the incentive payment included in that calculation and receive holiday pay upon it.

[56] The fourth possible scenario to be considered is the position where Mr Howell had been unjustifiably dismissed, as opposed to being made redundant, before reaching the target date. Under this scenario the facts are identical to the present case in all respects except the basis for termination of employment. Realistically the decision that Mr Howell was unjustifiably dismissed would be made some time after the termination of his employment. Indeed the GIA provides for that. That decision would either be made following mediation or a determination of the Employment Relations Authority or a judgment of the Court. It is possible that the employer would not at that point have calculated the incentive payment, although by that stage it would have been possible to do so. However, so far as the issue of holiday pay on the incentive payment is concerned, if Mr Howell had not been dismissed he would have remained in employment, received the incentive payment and on the basis of the first scenario set out above, would have been entitled, when next taking annual leave, to have the incentive payment included in a calculation of his holiday pay, which would be based on gross earnings. Having missed out on that

opportunity by being unjustifiably dismissed, he would be entitled to the holiday pay on the incentive payment (plus interest) as compensation pursuant to s 123 of the ERA. The loss of the holiday pay, which he would otherwise have been entitled to under s 21 of the HA, would be the loss of a benefit pursuant to s 123(1)(c)(ii) of the ERA. This would be additional to any other compensation he would be entitled to as a result of being unjustifiably dismissed.

[57] The final scenario, which again demonstrates some inconsistency in the defendant's stance in this matter, is the situation where Mr Howell remained in employment until after the target date, became entitled to the incentive payment but was made redundant or unjustifiably dismissed before its quantum could be calculated and paid to him. There could be no argument in this scenario that the date of crystallisation was the target date within his period of employment. Again, if the defendant's arguments were accepted, Mr Howell would not be entitled to holiday pay on the incentive payment if made redundant. However, for the same reasons as the fourth scenario he would be able to claim it if unjustifiably dismissed, by taking the route via s 123 of the ERA.

[58] A consideration of these scenarios shows that if the defendant's arguments are correct, apart from a dismissal for redundancy, in every other of the variable fact scenarios discussed Mr Howell would have been entitled to holiday pay on the incentive payment. One of the scenarios, ie, unjustified dismissal, shows that there could even be a different result under cl 3.6 of the GIA itself depending upon how the dismissal occurred. This can hardly be the inferred intention of the parties at the time the GIA and the new IEA were negotiated and executed. As indicated a consideration of the matter in this way highlights an unanticipated effect on Mr Howell, if MSG's arguments are correct. The fact that the incentive payment cannot be calculated until after the triggering date (the date of dismissal where redundancy occurs) was submitted to mean that Mr Howell cannot receive holiday pay, which he would otherwise have received if remaining in employment beyond the target date in the GIA. If this is a correct interpretation of the effect of the combination of ss 16, 24, 25 and 27 of the HA as Mr Skelton has submitted, it means the HA procures an inconsistent outcome and a substantial detriment and unfairness

to Mr Howell. While that is not conclusive as to the correct interpretation of those provisions of the HA, it is relevant in the overall interpretation exercise.

Conclusions

[59] The possible scenarios discussed provide assistance in an interpretation of the provisions of the HA, the subject of this dispute and indeed the intention of the parties under the GIA itself. It would seem illogical, particularly where there is a tenable argument to the contrary, that the purpose of the HA and the GIA would be to deprive an employee of a proportion of holiday pay simply by virtue of the nature of the dismissal and the consequences this has on the timing of the calculation of the incentive payment.

[60] The primary purpose of the HA is to provide minimum entitlements to four varying types of holiday and leave. The primary purposes of the particular provisions of the HA already discussed, headed in the Act "Payment for annual holidays", are to ensure first, that when an employee takes annual leave all parts of that employee's income over a 12 month period are taken into account in arriving at an average and consistent rate of pay during the period of leave. Secondly, where an employee terminates their employment the same principles apply in ensuring that there is consistent and proper reimbursement for any untaken leave whether it be for the full 12 month period or any broken periods since the last leave was taken during employment. It would be incongruous therefore to those purposes if, in a situation of redundancy, the employee would be deprived of that proper reimbursement simply by virtue of the method of calculation of that average income and the fact that it has to take place after the date of termination. That incongruity is demonstrated by the fact that in virtually every other situation, as the scenarios show, the employee would receive the holiday pay he now claims.

[61] At first glance Mr Skelton's arguments as to the interpretation of the provisions have some attraction. This is by virtue of the fact that the incentive payment was calculated and paid a considerable time after the employment ended and would now require recalculation of the annual holiday pay calculated and paid at the end of Mr Howell's employment. However, upon analysis I do not accept that it

can be correct upon a consideration of the scenarios I have mentioned and also the fact that Mr Howell has earned the incentive payment and his entitlement to it has vested during the course of his actual employment by his loyalty and acumen on behalf of the employer. A black letter law argument based on a literal interpretation of the legislation, which results in him being deprived of the holiday pay when in many other situations he would have received it, is simply not tenable. That approach has inadequate regard to the intent and purpose of the holiday pay provisions to provide proper entitlements and in this case, the intention of the parties to be inferred from the provisions of the GIA. The defendant's approach in its submissions results in a completely arbitrary outcome solely because Mr Howell has been made redundant.

[62] While logically the quantum of the incentive payment cannot be calculated until the employment ends, because of the formula adopted in the GIA, that agreement, nevertheless, is careful to specify that the incentive payment is taxable remuneration even though the calculation is based upon capital values of shares.

[63] The factors which lead me to the view that Mr Langton's submissions as to the interpretation of the Act are correct are the following:

a) As indicated the incentive payment is clearly a productivity or incentive-based payment. It is a payment for the services provided by Mr Howell during his employment in promoting and protecting the company's general interest, profitability and wealth. Indeed the recitals in the GIA confirm those very matters. It would be included in the calculation of gross earnings under s 14 of the HA and therefore be taken into account in calculating average weekly earnings.

b) The incentive payment is remuneration which is taxable and is payable under Mr Howell's employment agreement. That also is specifically confirmed by the documents.

c) Mr Howell would have received holiday pay on the incentive payment if he had stayed in employment and reached the target date under the GIA.

I have specified further scenarios under all of which circumstances Mr Howell would be entitled to receive holiday pay on the incentive payment. Indeed the fact that this is the case leads to an inference that it was the intention of the parties in entering into the GIA that Mr Howell was to be paid holiday pay on the incentive payment.

d) Since the HA does not specify an end date for the period of calculation in s 25, on a purposive interpretation of s 14, particularly based on the requirement to apply the entitlements under the employment agreement, it is possible for this to extend beyond the date of termination of employment. The payment calculated relates to the period of employment being assessed, ie, the broken period between the anniversary of employment and the date of termination. That may not sit conveniently with s 27(2) of the HA but is consistent with all the other provisions.

e) There is no basis for the submission of Mr Skelton that the HA operates on a payment rather than an accrual basis if the definition of gross earnings in s 14 focuses on payments the employer is required to pay the employee under the employment agreement, rather than on payments received during a specific timeframe, and in particular the period between the commencement and end of employment.

Disposition

[64] For the reasons specified, Mr Howell's claim succeeds. I am assuming that the gross sum specified in the prayer for relief contained in the statement of claim is correct and therefore the defendant is required to pay Mr Howell gross holiday pay of $256,000. In addition, as pleaded, the defendant is to pay interest on that sum calculated in accordance with cl 14 of sch 3 to the ERA from the date of payment of the incentive payment to the date of judgment. Presumably PAYE deductions will need to be considered if the responsibility for tax, at this late stage, is not to be left to Mr Howell.

[65] The issue of costs is reserved. If this cannot be resolved between the parties then Mr Langton, on behalf of Mr Howell, is to file a memorandum of submissions on costs within 14 days. Mr Skelton, on behalf of MSG, will then have a further 14 days to file a memorandum in reply. The issue of costs will then be determined on the basis of such memoranda.

M E Perkins
Judge

Judgment signed at 10 am on 12 May 2014