



Holiday Alert: New Zealand Court of Appeals Rules Discretionary Pay is Not Considered “Gross Earnings” Under Holidays Act

Insights

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The New Zealand Court of Appeals recently clarified the definition of “discretionary” pay under the Holidays Act 2003, concluding that certain bonus payments do not need to be included in the calculation of gross earnings if they are clearly described as discretionary. The decision is welcome news for employers with operations in New Zealand – and provides you with an easy-to-follow blueprint for developing bonus policies that fall under this standard.

Summary of Holidays Act

Section 14 of the Holidays Act requires that an employer include all forms or amounts of non-discretionary or required pay in its calculation of an employee’s “gross earnings.” This, in turn, affects the employee’s annual holiday pay. While the calculation includes any “productivity or incentive-based payments,” it expressly excludes discretionary payments. And that’s where the issue arises in this case – when is a bonus discretionary?

Dispute Over Bonus System

In *Metropolitan Glass & Glazing Ltd. v. Labour Inspector*, the Court of Appeal reviewed the employer’s Short-Term Incentive Bonus Scheme. Under the bonus system, employees were eligible for a bonus if they met three performance targets. However, in the relevant documents outlining the system, Metropolitan’s policy indicated that “any payments are totally at the discretion of [Metropolitan] and there is no guarantee of any payment in any year.”

The company’s written summary of the bonus plan also provided examples of instances where Metropolitan could refuse to pay the bonus. This includes situations such as when the employee had been subject to disciplinary action or had an overall performance appraisal of “Needs Improvement.” Based on these conditions, Metropolitan considered these payments “discretionary” under Section 14 of the Act, and did not include them in the calculation of the employees’ “gross earnings.”

Following a dispute regarding whether the employer should have paid out the bonus, the Employment Court ruled that the bonus payments were not discretionary and should therefore be

included in Metropolitan's gross earnings calculations. It based this determination on the fact that the parties intended the bonus scheme to have contractual force.

Court of Appeal Reverses Course and Rules for Employer

The Court of Appeal, however, viewed the bonus payments differently. Reviewing the plan comprehensively, the Court of Appeal stated that the dividing line between whether a payment is discretionary or not depends on whether the employer is contractually bound to make the payment. The Court stated that conditional payments, for example, where an employer has to make the payment if certain conditions are met, are non-discretionary and must be a part of the gross earnings calculation.

On that basis, the Court of Appeal determined that Metropolitan's payments under its bonus scheme were entirely discretionary. Not only did the employer label them as "discretionary," it also included express language within the scheme explaining that Metropolitan still retained the discretion not to make any payments even if all of the conditions were met. Therefore, the Court concluded, the bonus scheme payments were discretionary, and Metropolitan was correct to have excluded them from its employees' "gross earnings" calculations under Section 14 of the Act.

What Does This Mean for Employers?

This decision provides helpful guidance for employers with operations or employees in New Zealand in terms of calculating holiday pay under the Act. If you offer bonus schemes or additional payments, you should carefully and comprehensively review your policies to ensure all payments are properly characterized under applicable law.

We will continue to monitor developments in this area of law, including any appeals, so you should ensure you are signed up for the [Fisher Phillips Insight System](#) to receive the most up-to-date information. If your organization does business in New Zealand, please contact a member of Fisher Phillips' [International Practice Group](#) to learn more about the potential implications of this case and how your organization can mitigate any risks associated with it.

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