

Submission

By



to the

Transport and Industrial Relations Select Committee

on the

Holidays Amendment Bill 2010

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HOLIDAYS AMENDMENT BILL 2010

SUBMISSION BY BUSINESS NEW ZEALAND

INTRODUCTION

1. Business New Zealand welcomes the opportunity to make a submission on the Holidays Amendment Bill (the Bill). It wishes to appear before the select committee to talk to its submission.
2. Business New Zealand generally endorses the Bill and recommends that it proceeds. Notwithstanding our general support, we have some concerns that it does not deliver effectively on some of its intentions, and therefore make recommendations that we believe could improve the Bill.

RECOMMENDATIONS

3. **BusinessNZ recommends that the Bill proceeds but that**

- a. cashing up be a once only transaction of one week per year or, if cashing up of less than a week is to be inserted, be on a once per year basis to the value of any untaken leave in that years entitlement (up to a maximum of one week).
- b. that the bill make it clear that an employer's refusal to agree to cash up leave does not constitute a personal grievance in terms of section 103(1)(b) or discrimination in terms of section 104(1)(a) of the ERA.
- c. average daily pay be the basis on which all leave is calculated.
- d. clause 4 (a) be amended by adding a new subsection (aa), which includes an annual payment made in addition to the employee's normal pay in accordance with a provision of the employee's employment agreement or under the terms of an employer's scheme or policy for making such payments.
- e. clause 4(b) be amended to read "does not include payment of an amount calculated in accordance with a provision of the employee's employment agreement, except where that payment is covered by clause 4(aa)".
- f. employers and employees able to contract out of the statutory calculation provided that the intent of the Act is not compromised.
- g. if any payment agreed in lieu of the statutory calculation does not disadvantage an employee relative to the pay they would have received had they worked the day taken as leave.
- h. section 40(2) and (3) be repealed

- i. a new section 40(2) be inserted to provide that an employee is not entitled to be paid twice in respect of the same public holiday.

DISCUSSION

Cashing up of leave

4. BusinessNZ supports enabling employees to cash up some of their annual leave. However, it has reservations over the Bill's provision that the cashing up be possible on a piecemeal basis.
5. One of the objectives of reviewing and amending the Holidays Act was to simplify its operation, and to reduce compliance costs. Permitting the cashing up of single or part days is unlikely to realise this objective.
6. Moreover, while cashing up single or part days is unlikely to generate significant cash for most employees, each occasion leave is cashed up requires employers to complete a full payroll transaction. To illustrate, roughly 2/3 of New Zealand's wage and salary earners earn less than \$35,000 per year (\$16.78 per hour or \$134 gross per day). The transaction costs of cashing up the small value of days or part days increases the likelihood many if not most employers will refuse requests for smaller amounts. Nor is it likely that employees will gain real benefit from piecemeal transactions.
7. On another matter, while the bill is clear that an employer is free to refuse a request from an employee, it does not give any assurance that claims of disparity may not be made if an employer agrees to some but not all requests from different employees. It would be helpful for this to be made clear.
8. BusinessNZ recommends that
 - a. Cashing up be a once only transaction of one week per year or, if cashing up of less than a week is to be inserted, be on a once per year basis to the value of any untaken leave in that year's entitlement (up to a maximum of one week).
 - b. that the bill make it clear that an employer's refusal to agree to cash up leave does not constitute a personal grievance in terms of section 103(1)(b) or discrimination in terms of section 104(1)(a) of the ERA.

Calculating pay for public holidays, alternative holidays, sick leave and bereavement leave.

9. Simplification and reduction of compliance costs were key objectives of the 2009 review of the Holidays Act. Central to the review was the concept of Relevant Daily Pay (RDP). Many submitters to the review pointed out the costly complexities of the multiple formulae for calculating the value of leave and holidays. The review reached a consensus that RDP should be replaced by a simple formula based on averaging, but did not reach consensus on the extension of such a formula to all forms of leave, including annual leave.

10. Notwithstanding the recommendations of the review, the bill retains relevant daily pay as the default mechanism for calculating pay for public holidays, alternative holidays, sick and bereavement leave.
11. Helpfully, it does permit the use of an averaging formula when relevant daily pay is not possible or impracticable to calculate or whether the employee's pay varies during a pay period.
12. While the averaging approach can be made to work, and it does address the worst of the issues identified in the review (gaming especially), it is clearly not a simplification. Employers must still choose between one formula and another, and new grounds for litigation exist over whether or not the correct formula has been chosen.
13. Arguably, the use of relevant daily pay becomes redundant if an averaging formula is available as in the vast majority of cases the answer will be the same, e.g a salaried employee's RDP and average pay will almost always be the same.
14. The issues of gaming and complexity surrounding annual leave identified in the review have not been addressed in the bill. A consistent concern of employers is the cost of holiday pay using the four week averaging process provided in the current Act. Employees who can increase earnings in the 4 weeks prior to taking leave often do so, resulting in holiday pay per day that is higher than the normal pay if the day had been worked. The highest costs in this regard fall in organisations where overtime is common and leave is regulated through rosters. Manufacturing in the private sector and nurses, firefighters and police in the state sector are some examples.
15. There is no need for a dual formula for annual leave any more than there is a need for a dual formula approach to RDP. An annual averaging process for all leave is practicable, it is certainly simpler, and significant unnecessary cost can be avoided at all levels of the economy.
16. BusinessNZ recommends that
 - a. average daily pay be the basis on which all leave is calculated.

Discretionary Payments

17. Clause 4 of the bill is unclear and needs to be reworded.
18. The definition of discretionary payments falls within the overall definition of gross earnings provided at section 14 of the Act. Section 14(b)(i) excludes discretionary payments from gross earnings.
19. Paraphrased, the bill provides that gross earnings does not include an amount that the employer is not bound, by the employee's employment agreement, to pay to the employee, but *does* include payment of an amount where the

amount itself is discretionary even though the payment itself is provided for in the employee's employment agreement.

20. To illustrate, an employee whose employment agreement

- a. is silent on extra or discretionary payments, and who received a bonus of \$1000, would not have the bonus included in gross earnings
- b. provides that payment of up to \$1000 may be made if (x) criteria are met, and who received \$900 of the maximum \$1000, would have \$900 included in gross earnings.

21. Example (b) establishes that the scope, if not reality, of the employee's agreed annual remuneration includes the \$1000 maximum payment, whereas the scope of remuneration of (a) does not contemplate any payment let alone \$1000.

22. Thus interpreted, holiday pay includes any amount within the contemplated scope of remuneration and excludes anything that is not.

23. However, clause 4 can be interpreted to mean that two employees whose employer operated a bonus scheme with identical outcomes for each employee, would include the bonus in the gross earnings of the employee whose employment agreement made provision for the payment and exclude it from the employee whose agreement omitted mention of the same scheme.

24. Also to be treated with care is the situation typical of management bonuses where a single annual payment can drastically distort the value of holiday pay particularly if that payment is made just before the leave is taken. This is common around Easter for instance since it usually falls just after the end of many businesses financial year, the traditional time for bonus payments.

25. Furthermore, it is possible to interpret clause 4(b) to include payments not yet made (where the amount *to be paid* is discretionary). This should be clarified.

26. BusinessNZ recommends that

- a. clause 4 (a) be amended by adding a new subsection (aa), which includes an annual payment made in addition to the employee's normal pay in accordance with a provision of the employee's employment agreement or under the terms of an employer's scheme or policy for making such payments.
- b. clause 4(b) be amended to read "does not include payment of an amount calculated in accordance with a provision of the employee's employment agreement, except where that payment is covered by clause 4(aa)".

Contracting out

27. There will always be anomalies arising from a formulaic approach. To address these in legislation is impracticable and may be impossible. However, they must still be addressed at the workplace level. This can be achieved through recognition that where anomalies arise through the use of the averaging formula (e.g. when two employees on the same salary work a different number of days during the year), the employer and employee may agree a rate that is fair in relation to the intent of the Act.

28. BusinessNZ recommends that

- a. employers and employees able to contract out of the statutory calculation provided that the intent of the Act is not compromised.
- b. the any payment agreed in lieu of the statutory calculation does not disadvantage an employee relative to the pay they would have received had they worked the day taken as leave.

Transferring observance of whole public holiday to another working day.

29. BusinessNZ supports reinstatement of an earlier ability for employers and employees to agree to transfer recognition of a statutory holiday to another working day. Safeguards have been built in to the bill to reduce the risk of employees losing any rights that would have accrued to the original holiday, and these are appropriate in our view.

Allowing employers to direct when alternative holiday must be taken

30. BusinessNZ supports the proposed amendment.

Proof of sickness

31. BusinessNZ supports the proposed amendment. Many critics of this clause have pointed out that it is already possible for an employer to request proof of sickness for periods of less than 3 days, when they have reasonable grounds to believe that the sickness is not genuine. This is true.

32. However, the provision as it stands creates grounds for litigation over whether or not an employer did have reasonable grounds. This is simply unnecessary. Why? On one hand, removing the reasonable grounds criteria for requesting proof of sickness does enable an employer to, for instance, dictate that all sickness requires proof. On the other hand, the employer must pay for proof when the period of claimed sickness is less than three days.

33. A common reason for taking short sick leave periods is to care for dependents, e.g., taking a child to the doctor. Employers who require proof of

all short absences are likely to find themselves paying their employees' family medical bill. Simple reality suggests that this is unlikely to occur.

34. The most likely scenario in our view is that employers will avoid paying an employee's medical bill unless they have strong grounds for believing it to be necessary. Removing the 'reasonable grounds' requirement therefore is unlikely to change current practice, but it does remove a ground for unnecessary litigation.

Definition of otherwise a working day

35. BusinessNZ supports this useful clarification.

OTHER MATTERS

Payment for public holidays following termination of employment

36. While not contained in the Bill, or even mentioned in the 2009 review of the Holidays Act, there is one matter BusinessNZ believes can usefully be included in the bill.
37. Section 40 of the present Act provides that an employee must be paid for public holidays after leaving employment if those public holidays fall within the ambit of any leave the employee had available at the time of leaving their employment. However, this creates situations where employees can be paid twice for the same public holidays.
38. For example, an employee has 4 weeks annual leave left when they resign on 23 December. Section 40 requires that because Christmas Day, Boxing Day, New years Day and the day after New Years day fall within the 4 weeks the employee could have taken as leave had they not resigned, they must be paid for those 4 days (assuming they would otherwise have been working days) However if that employee starts work on 24 December for a new employer, they will also be paid for those same 4 days as public holidays.
39. BusinessNZ recommends that
- a. section 40(2) and (3) be repealed
 - b. a new section 40(2) be inserted to provide that an employee is not entitled to be paid twice in respect of the same public holiday.

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations . EMA Northern, EMA Central, Canterbury Employers Chamber of Commerce and the Otago-Southland Employers Association . and 73 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.