Submission

by

Business|NZ

to the

Transport and Industrial Relations Select Committee

on the

Holidays Bill

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HOLIDAYS BILL

1. INTRODUCTION

1.1 Encompassing five regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, Canterbury Manufacturers' Association, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 50-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into 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.

1.2 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD.

1.3 The reason for the focus on a "top ten" position is that a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services such as increased statutory minimum holiday entitlements. Currently New Zealand is number 21 out of the 30 OECD countries.

1.4 It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve the goal of attaining a place in the top third of the OECD in the medium term.

1.5 To achieve such a 4% growth rate business must be encouraged by having a legislative framework to operate within that is conducive to supporting that growth. Legislation which impacts on every employer and employee in the country such as legislation relating to leave entitlements, must be as clear and coherent as possible while at all times recognising the reality of the

widely variable workplaces and practices throughout the country. Unfortunately, once prescription is favoured over leaving details to the parties to an employment agreement to sort out for themselves, then the resultant legislation is unnecessarily complex and the time spent by those having to try and apply it, increases exponentially.

1.6 This latest focus on the holidays legislation is but one in a series of attempts to move a piece of legislation that was written to reflect a standard employment context of eight-hour days, five-day weeks with such limited exceptions that they could be individually named (bakeries, dairy factories and newspapers) to a piece of legislation that reflects the dynamics of workplaces and work practices in the 21st century.

1.7 Despite the Minister of Labour's Advisory Group on the Holidays Act commencing its work in 2001 with the admirable intention of simplifying the Act's many technical provisions and making it more relevant to employers and employees, the end result is, in Business New Zealand's submission, still overly prescriptive and suffering from an attempt at trying to impose a one-size-fits-all approach.

1.8 Ideally, the legislation should state clear principles only. This is because its function is to set out minimum statutory requirements that underpin freely negotiated employment agreements entered into between consenting adults – adults who are well able to organise every other aspect of their lives, contractual arrangements outside the employment sphere included.

- That three weeks' paid annual leave accrues during any 12-month period to be taken at times to suit the employee and employer.

- That 11 days of significance be granted as holidays on pay either on the days that they fall (if they are otherwise working days for the employee) or when work is required to be undertaken at some other time as agreed between the employer and employee.

- That five paid days' leave be granted in each 12 month period following a six month qualifying period of employment when the employee or a dependant of the employee is sick, plus paid leave to recognise that the employee has suffered a bereavement of a close relative.

1.9 Issues such as calculation of entitlement and pay, of accumulation or proof, and the myriad other technicalities can be left to the parties themselves to determine.

1.10 Despite its obvious attraction, it was clear that such an approach was not going to find favour, and with the best will in the world by those on the Advisory Group, the draft legislation will likely fully satisfy neither employer nor employee. Although many areas – particularly the more seriously flawed and/or outdated aspects of the old Act – were dealt with by agreed recommendations by the Advisory Group, when the Second Report was presented to the Minister of Labour on 17 September 2001, of the 51 issues identified, full agreement was reached on only 28. Similarly, although much useful work was done in preparing drafting briefs for the legislation, there remain areas where the intention of a provision could be more clearly expressed for the benefit of all parties who will need to apply the legislation to their best ability.

1.11 We strongly commend our suggested wording changes to the Select Committee. They have been formulated after extensive consultation with employers from all sectors and of all sizes. Without exception those employers say that legislation covering leave entitlements must be simple, clear and able to be applied in a commonsense, practical way to all work places regardless of their operational differences.

CLAUSE BY CLAUSE ANALYSIS

The amendments set out below are considered by Business New Zealand to be essential if the changes to existing holidays' legislation proposed by the Bill are to prove workable.

Part 1
Preliminary provisions

5. Interpretation

Recommendation

"Average earnings" – insert "weekly or" before "daily"

Comment

Pay is not normally calculated on a daily basis but on a "pay period" basis. Computer programmes can easily identify weekly pay periods but would not so easily deal with daily pay period calculations. For many employers the calculation of annual holiday pay on a daily basis would present considerable difficulty just because many pay systems are unable to accommodate a calculation of this complexity. Inserting the words "weekly or" provides a choice which assists in dealing with this problem.

Attached as Appendix 1(a) is a comparison of average earnings calculations under the present Act and under the current Bill, together with examples of calculations based on possible interpretations of the Bill's provisions (Appendix 1(b)).

Recommendation

Insert definitions of casual employee and fixed term employee.

"casual employee", means a person employed to work on an as and when required basis with no guaranteed hours or guaranteed pattern of work."

"fixed term employee", means an employee who is employed for a specified period of time or for the completion of a particular task in accordance with section 66 of the Employment Relations Act 2000."

Comment

The definitions of "casual employee" and "fixed term employee" are necessary in view of the amendments proposed to clause 27 of the Bill.

5(1) "employee"

Recommendation

Add further exceptions (in addition to subsection (1)(b)(ii) of section 6 of the Employment Relations Act 2000") in respect to homeworkers and volunteers:

"(except subsection (1)(b)(i) and (ii) and subsection (1)(c)(i) and (ii)."

Comment

"Employee" is defined in the Interpretation section as having the same meaning as in the Employment Relations Act 2000 with the exception of subsection (1)(b)(ii) of that Act (person intending to work). Further exceptions are required in respect to homeworkers and volunteers who are deemed by the ERA to be employees. This is because an employer has no control over the time worked by a homeworker and is unable to grant a holiday to a volunteer since a volunteer is not an employee as such. In any event, volunteers are specifically excluded by ERA section 6 from the category of employee.

7. Meaning of ordinary pay

(3) **Recommendation**

Delete subclause (3)

Comment

It is entirely unacceptable (as well as a contradiction in terms) to provide that for holiday pay purposes a special rate of ordinary pay must not be specified. If an employment agreement sets out an ordinary rate of pay that must be the amount payable for whatever purpose the agreement specifies that an ordinary rate will be paid. To require the payment of a higher "ordinary" rate for holidays is simply to confuse the issue of what constitutes ordinary pay. If this provision is intended to refer to situations where an ordinary pay rate is specified for holidays only, that is far from clear.

Moreover, subclause (3) is manifestly contrary to the decision of the Court of Appeal in *Greenelea Premier Meats Ltd v Horn* CA98/02 (unreported)) which clearly determines that payment of an agreed ordinary rate of pay is permissible for holidays as well as for the other purposes for which it is specified.

If the Bill's intention is to codify decisions of the Court of Appeal (and that was certainly the understanding of the employer representatives on the Advisory Group) the conclusion to be drawn from subclause (3) is that this will happen only where the decision in question favours the employee and not the employer. If retained, the economic implications of this subclause for New Zealand businesses which currently pay on a piece work basis or in terms of some other production-based system will be alarming to say the least. Such businesses need to be able to specify an hourly rate for non-production time such as public holidays, special leave etc. What is proposed flies in the face of much long-established practice.

(4) **Recommendation**

Delete subclause (4) and replace with subsection (2) of section 4 of the Holidays Act 1981 (to become subsection (3) of clause 7), namely:

> "Where –
> (a) No ordinary time rate of pay is fixed for any employee's work under the terms of the employee's employment; or
> (b) No normal weekly number of hours of work is fixed for any employee under the terms of the employee's employment, -
> the rate or number, as the case may be, shall be such as is agreed by the employer and the employee, or, failing such agreement, as is determined by a Labour Inspector."

Comment

Again, this is a provision directed to overturning the *Greenlea* decision where the use of an averaging process for determining ordinary pay was specifically disallowed. As under the current Holidays Act, where ordinary rates of pay or number of hours of work are not fixed, these should be as determined between the employer and the employee, or failing agreement, by a Labour Inspector. The fact that clause 9 provides for the deduction of certain payments (a provision which, of course, is supported if subclause (4) is retained) effectively means that it is envisaged that an ordinary pay rate of holiday pay will have been agreed (a somewhat contradictory notion in view of subclause (3)). The question then arises whether this is the "ordinary" ordinary rate or whether the rate for holiday purposes must be greater than the ordinary rate established for general purposes. It also means that what is paid for any holiday will vary depending upon previous time worked, a likely source of potential conflict as well as a considerable cost to businesses in terms of both money and time.

10. Determination of ordinary working day

11. Labour Inspector may determine ordinary working day

Recommendation

Delete both clauses.
If clause 10 is retained, add a third subclause, namely:

> "(3) For the avoidance of doubt, where the employee works a shift that overlaps two public holidays, the shift, for the purposes of an alternative holiday under section 49, shall constitute an ordinary working day."

Comment

If subsection (2) of section 4of the current Holidays Act is inserted into clause 7 as subsection (3) of that clause, neither clause 9 nor clause 10 will be required.

As clause 10 currently reads it is unclear how it is to be interpreted for the purposes of calculating entitlement to alternative days off pursuant to clause 49 where overlapping shifts are worked (as from 10 p.m. one day to 4 a.m. the following day where both days are pubic holidays). While the reference in (2)(b) to "the employee's work patterns" may lead to he conclusion that only one day is worked and therefore only one alternative day (not two) must be allowed, this conclusion is not inevitable. If clause 10 is to be retained, it should be amended to make clear that where an overlapping shift is worked this will constitute the employee's ordinary working day for alternative holiday purposes.

Part 2

Holiday and leave entitlements

Subpart 1 – Annual holidays

16. Entitlement to annual holidays

(2)(i),(ii) **Recommendation**

Delete

Replace with the following:

> "Where an employee returns to his or her employment following an absence during which the employee was in receipt of accident compensation or was on unpaid sick leave for more than one week, the calculation of that employee's annual leave entitlement shall exclude the period of absence."

Amend section 42 of the Parental Leave and Employment Protection Act 1987 to provide as follows"

> "Where an employee returns to his or her employment following an absence on parental leave, the calculation of that employee's annual leave entitlement shall exclude the period of parental leave taken."

Comment

Employers have long been concerned about the ability of employees to return from a lengthy period on accident compensation and immediately take annual leave. Since there is no requirement in such circumstances to return to work before the employee is fully recovered, the need for a holiday on return should not arise. It has to be recognised that during the period of absence the employee is not performing services for the employer and does not therefore need rest and recuperation from work – the reason why an

employee is entitled to annual leave. Similar comments apply in respect to unpaid sick leave of longer than one week where, too, it may become a question of leave on top of leave.

Where an employer has had to employ someone else to do the work of an absent employee that person will have accrued leave entitlements of his or her own. An employer should not then be faced with providing leave entitlements for two employees, when only one of them has been performing work for the employer.

Whether or not an employee can take leave on returning from an absence should be a matter for the employee and employer to agree on, not statutorily imposed. It should not be an automatic right, as it is if the period of absence is used to calculate the 12-month period at the end of which leave entitlement will accrue. The same is also true where an employee has been on parental leave and section 42 of the Parental Leave and Employment Protection Act 1987 should be amended accordingly.

18. Taking of annual holidays

(1)(b) **Recommendation**

Amend by inserting at the beginning of this paragraph the words:

"if the employee so requests .... ."

Comment

(1)(b) It is noted that the current Holidays Act's wording "shall allow" (section 12(1)) is here reproduced as "must allow", requiring employers still to provide their employees with at least 2 weeks of their annual holiday entitlement in a continuous period. It must be recognised, however, that many employees do not wish to take a full two weeks holiday at any one time. In order, therefore,

to ensure that no employer is found in breach of this provision unnecessarily, this paragraph should be amended as proposed.

21. Calculation of annual holiday pay

(2)(i) **Recommendation**

Clarify that "ordinary pay" in this context is the rate prescribed in an employment agreement as the ordinary pay rate (if such a rate *is* specified) by inserting after "ordinary pay" the words:

> ".... however the rate of ordinary pay is specified in the employment agreement, ..."

Make changes consequent upon this change to clauses 22, 24, 45, 46, 53, 54 and 64.

Comment

If annual holiday pay is calculated on the basis of ordinary pay what, given clause 7(3), is the rate on which the calculation is to be based? The problem arises because clause 7(3**)** indicates that if a special ordinary rate of pay is provided for the purpose of calculating holiday pay, holiday pay must be paid at a higher rate. However, it is unclear whether this refers to an ordinary rate payable for holidays only or if the rate to be paid for a holiday must always be higher any specified ordinary pay rate. The problem does not arise if clause 7(3) is deleted.

27. When annual holiday pay may be paid with the employee's pay

(1)(a) **Recommendation**

either

Replace subclause (1) with the following:

"Where any person is employed by an employer as a casual, or temporary employee, or as a fixed term employee in accordance with section 66 of the Employment Relations Act 2000, whether or not that employee is employed by the employer for more than 12 months, the employee may agree with the employer in writing, or as part of the applicable collective employment agreement, that the employer will –

(a) Pay 6% of the gross pay to such an employee at the termination of the employee's employment, in which case the payment of holiday pay shall be satisfied and the provision of any annual holiday shall not be required; or

(b) Add a separately identified amount equal to 6% of gross earnings to the employee's total hourly or weekly pay in satisfaction for any requirement to provide either payment of holiday pay or an annual holiday; or

(c) Where an employee does not agree in writing under paragraph (b), the provisions of paragraph (a) shall apply.

Provided that, if an employee who has agreed with the employer in terms of paragraph (b) obtains regular employment with the employer, either part-time or full-time, the entitlement to pay for leave under section 21 or section 22 of this Act shall be offset by the amounts paid in terms of paragraph (a) or (b) of this section."

or, at the least,

Omit the words "... to work for less than 12 months".

(2) Omit subclause (2)).

Comment

Employment on the basis of a fixed term employment agreement or as a casual or temporary employee is quite unlike employment on a permanent

basis and individuals who work in this way will frequently find it more acceptable to be paid a holiday pay allowance than to accrue annual holidays since, in such circumstances, their time is clearly at their own disposal. There are many instances where part-time or casual work suits both the employer and employee – the student who, for example, works in a restaurant for two days every fortnight. Such a person would much prefer the extra money even though the employment may continue for more than a 12-month period.

Furthermore, such an employee may well leave at a moment's notice, leaving the employer to try to track down his or her whereabouts so that any holiday pay owing can be paid - not necessarily an easy task.

While casual employment of this kind may be considered as a discrete arrangement where the employee is separately engaged on each occasion, this is quite a complicated concept for people to understand, particularly when linked to the 12-month rule. The 12-month rule will also have the effect of limiting periods of fixed term employment to less than 12 months.

It is, therefore, appropriate for persons engaged on a casual, temporary or fixed term basis to have the right to agree, if they wish, to be paid a 6% holiday pay loading either with their pay or when their employment terminates, whether their agreement runs for more than a year or not. There will be many instances where fixed term employment may well run for longer than a year, as, for example, where the fixed term agreement is to end on the occurrence of a specified event and that event occurs at a later time than originally anticipated. Unnecessary complications ensue if a 6% loading has been paid in the expectation that the employment will not be for longer than a year but subsequently extends beyond 12 months. It is far from fair for an employer who has paid a 6% loading then, in terms of subclause (2), to have to grant paid annual holidays as well. A double whammy of this kind is entirely unacceptable.

29. Frequency of closedown periods

Recommendation

Add at the end of this clause the words “or two closedown periods if the nature of the work requires two closedown periods and the employees agree to a second closedown period.”

Comment

As some employers have indicated that the work in which they are engaged requires a second closedown period, this should be possible by agreement although a single closedown period will remain the norm.`

32. Calculation of pay during closedown period for employee not entitled to annual holidays

Comment

Note the earlier comment regarding the difficulties of the ordinary pay concept in the context of holiday pay (clauses 7 and 21in particular).

Recommendation

Insert a new clause 37 and renumber the Bill accordingly:

37. Termination of employment

“For the avoidance of doubt, the relationship of employer and employee ceases as at the date the employee’s employment is terminated and is not extended by the amount of any unused annual holiday that may accrue to the employee.”

Comment

As the recommended provision states, this clause is necessary in order to avoid any confusion that might otherwise arise.

Subpart 2 - Public holidays

39. Public holidays over Christmas and New Year

Recommendation

1. Delete existing clause and replace with:

> "Unless it has been agreed in the relevant employment agreement that when Christmas Day, Boxing Day, New Year's Day, or 2 January falls on either a Saturday or a Sunday it will be observed on the day on which it falls, the public holiday in question will not be observed on that day but will be transferred to the following Monday or following Tuesday, as the case may be."

Comment

This clause will effectively impose a double liability on employers in seven-day a week industries who will be required to provide four rather than the current alternative two days' leave as well as paying penal rates for the days worked in terms of clause 46.

The history of the current Act's "Mondayising" provisions is interesting in the light of the change proposed by this clause. Section 95(1) of the 1973 Industrial Relations Act provided for the current 11 public holidays in addition to annual holidays but in subsection (3) stated that awards and agreements could make other provision in respect to these holidays if there were "special reasons" for doing so, including the nature of the industry. In 1983 a new

subsection (4) was inserted into the current Holidays Act to the effect that the Act's Mondayising provisions would not apply if a dairy factory employee worked on Christmas or Boxing Day etc. and not on the day to which the holiday would otherwise have been transferred. A new subsection (5) confirmed that if any provisions of an award or agreement (later changed to "employment contract" and, in 2000, to "employment agreement"') were made, either before or after the commencement of the Holidays Act, in accordance with section 95(3) of the Industrial Relations Act and provided for all or any of the circumstances set out in subsections (1) to (4) of the Holidays Act then subsections (1) to (4) would not apply.

In 1996 the Court of Appeal in *Barrycourt Motel & Tourist Flats v Mitchell* [1996] 1 ERNZ 158 confirmed that the Holidays Act's reference to section 95 of the Industrial Relations Act must be construed as referring to section 7A of the Holidays Act (inserted in 1991). The ability to contract out of section 9(1) to (4) of the Holidays Act was now to be found in section 7A(2). Therefore the parties to an employment contract were able under section 9(5) and section 7A(2) to make their own provision in their employment contract as to the days to be provided as the 11 whole holidays each year. In that case the Mondayising provisions would not apply. "Contract", as noted above, became "agreement" in 2000 so the current situation is still that Mondayising notwithstanding, it can be agreed in an employment agreement that for seven-day-a-week enterprises, holidays falling on a Saturday and/or Sunday will *not* be Mondayised but will instead be observed on the days on which they fall .

Current Holidays Act "Mondayising" provisions mean that employees who work on a Monday and/or Tuesday are entitled to penal rates for those days and "alternative" days off. That is not the case for those who work on Saturdays and Sundays unless there has been agreement that the Mondaysising provisions will not apply and the public holidays will be observed on the days themselves. In that case, where work is performed, penal rates apply and alternative days off will be available for those days but not for work on Monday or Tuesday.

Under the Bill, however, penal rates and alternative days off will apply both where work is performed on Saturday and Sunday and where it is performed on Monday and Tuesday. It is no longer and either/or situation. For example, one employee might work Wednesday to Sunday and be entitled to penal rates and alternative days off for working on the Saturday and Sunday. Another employee in the same enterprise working Monday to Friday would also be entitled to penal rates and alternative days' leave for working on the Monday and Tuesday. Consequently, under the Bill employers will now be required to count four days, not two days, as currently (for employees two days counted are counted).

Making provision both for Mondayising and for observance on the actual public holiday represents, for employers, a considerable extra expense and may well lead – particularly in the service sector – to decisions to close on public holidays, with adverse consequences both for employers and employees in terms of cost and lost job opportunities.

40. Determination of what would otherwise be working day

Recommendation

2(c)(iii) Insert the word "otherwise" before work.

Add an additional factor and a proviso to subclause (2)(c), namely:

> "(iv) the definition in the relevant employment agreement of the employee's day of work, where an employee's work day/shift work straddles two calendar days.
>
> "Provided that where the employment agreement provides no definition of an employee's day of work that day, for the purposes of this section, must be the day on which the employee works the greater number of hours. Where an equal number of hours is worked

by the employee on each calendar day, the day of work shall be the day on which work commences."

Comment

Notwithstanding the proviso in clause (3), the above change should be made for the avoidance of doubt.

An additional factor and a proviso are required to cover the situation where a shift straddles two calendar days so that it is quite clear when an employee has worked on a public holiday and so is entitled to an alternative day's holiday.

46. Payment if employee works on public holiday

47. Compliance with section 46

These two clauses need to be considered together.

Clause 46

46(1) **Recommendation**

Delete subclause (2) of clause 46 and the reference to it in this subclause (subclause (1)) and replace with the following:

> "If an employee works on any part of a public holiday, the employer must pay the employee's ordinary pay plus half that rate again unless the employment agreement indicates that a rate has been struck, whether as a composite rate or on an annual salary basis or otherwise, to recognise that where the employee is required to perform work on a public holiday no extra payment will be made."

Comment

The use of the words "greater of the amounts" in this provision are misleading given that agreements currently have salaries or composite rates that have been set to incorporate recognition of the fact that work is done to complete the job, including work done on public holidays.

Because the new Holidays Act, like the current Act, will apply to all employees, it is appropriate that what is payable for work on a public holiday is as agreed in the employee's employment agreement, rather than an arbitrary penal rate imposed by statute. Consequently, subclause (1) should be amended as proposed and subclause (2) deleted.

Clause 47

Comment

Clause 47(1) is meant to enable the parties to an agreement to record the fact that there is an existing penalty component recognising work done on a public holiday. It is unlikely that this penalty rate will be specified as an identifiable amount since a salary or composite rate will have been arrived at to cover any contingency that might arise, such as work in the weekend, on a public holiday or at 6 o'clock in the morning or 11 o'clock at night. In many seven-day-a week industries, a flat rate across all hours that may be worked will have been agreed with employees in their knowledge that it incorporates a component for public holidays, weekend work, night work, and so on. Consequently, parties to an agreement must be able to establish that their agreement already recognises a component for work on public holidays.

Attached as Appendix 2 are examples of calculations based on possible interpretations of clause 46.

52. Entitlement to alternative holiday if employee on call on public holiday

(3) **Recommendation**

Delete this subsection

Comment

Given that in ordinary circumstances an employee is not entitled to an alternative holiday if the day in question is not otherwise a working day, it is extraordinary that there should be entitlement to an alternative holiday for agreeing to be on call in such circumstances.

It is also difficult to see how an employer can grant an alternative holiday to someone whom the employer does not ordinarily employ. Such time is not the employer's time and, therefore, cannot be time that the employer is able to grant as a holiday.

Recommendation

Insert an additional clause

55. Termination on notice

> "Where notice of termination of employment is given by either the employee or the employer, but not where payment is made in lieu of notice, the employer may reduce the requirement for the employee to work out the notice by the number of alternative days' leave accrued by the employee."

Comment

This additional clause would allow the employer to reduce the requirement for an employee to be present at work by the number of accrued alternative

days where either party terminated the employment on notice, although not where payment was made in lieu of notice.

Subpart 3 – Sick leave and bereavement leave

58. Sick leave

The employer members of the Holidays Working Party noted at the time that they would be happy to have sick leave accumulate if certain clear requirements were met, namely, that there should be a right to agree about the provision of medical certificates, that there should be pro-rating of sick leave for part-time employees, and that the current three-day bereavement leave provision be replaced by one providing for "up to" three days' bereavement leave.

Recommendation

(2) Replace "5 days'" with the words "one week" and add "to be used when an employee is sick or injured, or when an employee's spouse or dependent child or dependent parent, or the dependent child or dependent parent of the employee's spouse is sick or injured.

Add also:

> "For the purposes of this section "dependent" in relation to a child of the employee or the employee's spouse means a child under the age of 16 years and in relation to a parent means a parent who is reliant on the employee for care."

Comment

The entitlement to sick leave should be expressed as "one week" to enable the week to be pro-rated for less than full–time employment. The current position, where the total amount of leave available for sick and domestic

leave purposes is 5 days, should continue, with sick leave available only in the case of very close dependent relations.

Recommendation

Add a new subclause (3)

(3) "Where an employee is employed on a part-time or casual basis, the employee's entitlement to the sick leave provided for in subsection (2) shall be pro-rated in proportion to the time worked by the employee."

Comment

Providing part-time and casual employees with the same sick leave entitlement as fulltime employees is currently perceived as unfair both to the employer and to his or her full-time employees. For employees who are not full-time the sick lave entitlement should be pro-rated.

59. Sick leave may be carried over

Recommendation

Delete this provision (but see initial explanation).

Comment

The status quo should continue with no ability to carry over sick leave unless the requirements set out at the beginning of the discussion relating to this subclause are fulfilled.

61. Proof of sickness of injury

(1) **Recommendation**

That the subclause be amended by adding a new paragraph (b) allowing employers to ask for a medical certificate where it is considered necessary to do so.

"An employer may require an employee to produce proof of sickness or injury for sick leave taken under **section 58** if:

(a) the sickness or injury that gave rise to the leave is for a period of 5 or more consecutive calendar days, whether or not the days would otherwise have been working days for the employee, or

(b) if the employer has reasonable cause to suspect that the employee has used his or her sick leave for other than the purpose for which it was intended."

Add a new subclause (4):

"Notwithstanding the subsections (1) – (3) of this section, requirements for the production of proof in respect of the taking of special leave may be set out in the employee's employment agreement."

Comment

Employers frequently have cause to suspect that use is being made of sick leave for purposes other than sickness or injury. An employer should be able to request the provision of medical certificate to help to ensure that the taking of sick leave is not being abused, with sick leave regarded by the employee concerned simply as an additional variety of holiday leave. Sick

leave is akin to an insurance policy, which will only apply if applicable criteria are met. It is not, therefore, unreasonable to expect that the employee will meet the criteria established for taking sick leave.

62. Bereavement leave

Recommendation

Whether or not the recommendation in respect to clause 58 is accepted:

Insert a new subclause (4):

> "In respect to any bereavement suffered by an employee, the employer may require the employee to provide proof of entitlement to bereavement leave."

Comment

In order to ensure that an employee does not claim to be entitled to bereavement leave when a bereavement has not been suffered, the employer should be able to ask for proof of entitlement to leave as, for example, in the form of a copy of a published death notice.

63. Duration of bereavement leave

Recommendation

(a) Insert the words "up to" before "3 days'".

Comment

An absolute entitlement to 3 days' bereavement leave in respect of bereavements coming within the clause 62(2)(b) category is excessive given that this amount of leave will not necessarily be required in all such cases.

While there will be instances where three days' leave will be needed so that the employee can attend to funeral arrangements and the like – a situation traditionally accepted, for example, by the former Meat Workers award - an automatic entitlement may see employees who do not need the leave making use of it for other than the purpose for which it was intended. Rather than an absolute entitlement, therefore, ***up to*** three days' leave should be available for clause 62(a) bereavements with the employer, as with any other entitlement, able to require proof that the employee is in fact entitled to bereavement leave.

64. Payment for sick leave and bereavement leave

(1) **Recommendation**

Insert after "ordinary pay" the words: "however specified in the employment agreement, ..."

Comment

This addition is necessary to avoid the problem referred to under clause 7.

Recommendation

Insert a new provision after current clause 65

Relationship of statutory special leave entitlements to special leave entitlements agreed between the employer and the employee

"For the avoidance of doubt, where special leave entitlements are agreed between the employer and the employee the special leave provisions of this Act will not apply."

Comment

The statutory entitlement to special leave should not, by default, be additional to any other special leave entitlements agreed to by an employer and employee.

Part 3
Enforcement and other matters
Subpart 1 – Enforcement

Recommendation

Insert a new clause after clause 66

Word the new clause as follows:

> "Where entitlements to annual holidays, public holidays, and special leave are provided for in the relevant employment agreement, these will be measured against each of the corresponding entitlements provided by this Act to determine whether they are, in their overall effect, more favourable to the employee and, if so, will apply in place of the entitlements for which this Act provides."

68. Penalty for non-compliance

Recommendation

Insert the word "knowingly" before "fails".

Comment

The increase in penalty from the $500 maximum applying to an offence under the current Holidays Act to a $5,000 maximum represents a quantum leap and poses a particular problem for employers whose difficulties with

holidays' provisions are unlikely to end with the introduction of new legislation. Clarity in relation to holiday entitlements is recognisably difficult to achieve. Employers should not be harshly penalised for understandable mistakes simply because these can be classified as "offences" under the Act.