

New Zealand Law Society

SUBMISSION ON THE HOLIDAYS AMENDMENT BILL

Introduction

- 1 The New Zealand Law Society (Society) welcomes the opportunity to comment on this Bill. The Society does not express any view on the underlying policy issues which the Bill is designed to address but raises some matters which it believes will improve the certainty, effectiveness and workability of the Bill. The Society wishes to be heard.

Relevant daily pay

- 2 Clause 5 substitutes new s9 and s9A, which deal with the definition/method of calculation of the relevant daily pay and average daily pay.
- 3 New s9 restates current s9(1)(2) and s9(1)(4).
- 4 New s9A is a new provision which changes the calculation currently provided for in s9(3) of the Holidays Act 2003 (Act). The section changes what was a mandatory method of calculation, which applied when it was not possible to determine the relevant daily pay under s9(1), to a discretionary option and adds the circumstance where the employee's daily pay varies within the pay period when the holiday or leave falls.
- 5 New s9A also changes the calculation from the average of the four calendar weeks before the end of the pay period immediately before the calculation is made, to an average over the 52 calendar weeks before the calculation is made. As the clause is written as a discretionary option, i.e. it says the employer "may", it does not require the option to be adopted and nor does it prohibit any other method being used. The Society is concerned that the introduction of a discretion will create uncertainty as to the rate of daily pay to be used.
- 6 For example, when an employee's earnings vary from day to day, or season to season, due to the nature of the business and the hours the employee is required to work, the average daily relevant pay can vary substantially depending on the method of calculation. This could result in savings for the employer and losses for the employee.
- 7 The Explanatory Note to the Bill states that the policy that an employee should receive no less on leave than what they would have earned if they had worked on that day, is protected.

However, as currently worded the clause could result in that not occurring and it does not therefore implement the policy.

- 8 The discretionary nature of this clause is also likely to create employment relationship problems and disputes where the method of calculation is contested. The clause, when read with the requirements to act in good faith and being communicative and proactive in building a productive employment relationship, is likely to result in employers being open to challenge if they opt for a different method of calculation than that specified and that calculation is perceived to result in disadvantages to the employee. This clause is therefore not supported, as it will create uncertainty.

Recommendation

- 9 The clause should be amended to provide for a mandatory method of calculation, or choice of calculation, with an added protection that the employee is paid no less than what the employee would have earned on that day had the employee worked.

Gross earnings

- 10 Clause 8 amends s14(a)(ii) to exclude non-taxable reimbursement payments for actual costs from the meaning of gross earnings. It also amends s14(c) to exclude any payment made in accordance with s28B which is the ability to pay-out one week of annual leave.
- 11 The amendment to s14(1)(ii) is supported.
- 12 However, if the amendment to s14(c) is enacted, one of the four weeks annual leave that would otherwise be considered part of gross earnings would not be gross earnings if paid out.
- 13 This will create an anomaly as they will be taxed their PAYE for that week's annual leave, but that week will not be included in their gross annual earnings.

Recommendations

- 14 The amendment to s14(a)(ii) is included.
- 15 The amendment to s14(c) is not included.

Portion of annual holidays to be paid out

- 16 Clause 10 inserts sections 28A, B, C, D, E and F. Clause 10 provides for an employee to make an informed and voluntary request in writing for a maximum of more than one week's annual leave entitlement to be paid out in each entitlement year.
- 17 The phrase "informed and voluntary" is not defined and raises the question of who informs the employee and when and how is that information to be conveyed? If an employee successfully argues that the request was involuntary or they have unwittingly had a week's annual leave paid out, the employee would be entitled to recover that week's annual leave. The word "informed" leaves employers vulnerable to having to demonstrate that the employee was informed at the time of the request or at the time of the payment, and open to arguments about the level of information provided.
- 18 The first course of action for an employee who contests they were not "informed" would be for a Labour Inspector to recover that week's paid annual leave. It is the experience of Society members that the Labour Inspectorate is already working to capacity and a significant level of claims will cause difficult and raise access to justice issues.
- 19 Given that the effect of other proposed changes to employment law is to provide a statutory process to ensure procedural fairness, the current wording appears to be inconsistent with other proposed amendments.

Recommendation

- 20 Clause 28A in its current form is not supported for the above reasons. At the very least the requirement for employee requests to be "informed" should be defined but not so as to place onerous procedural obligations on employers. The Society suggests that the Bill should include a simple procedure that an employer could chose to follow to show an employee was informed but that would not rule out the employee being informed in other ways too.

Public Holidays

- 21 Clause 11 amends s43(b).
- 22 Currently s43(b) states a purpose of the subpart of the Act is "to enable employees to agree to work on a public holiday in exchange for another day's paid leave".
- 23 The amendment repeals that section and replaces it with a purpose of the subpart of the Act to "(b) provide for the transfer of public holidays (whether in whole or in part)".

- 24 This is a significant shift away from a policy of giving a voluntary choice to an employee to work on a public holiday in exchange for another day's leave to be taken at another time, to providing for the transfer of a public holiday in whole or in part.
- 25 Clause 12 repeals current s44A and substitutes new sections 44A and 44C.
- 26 New s44A allows for agreements to be reached to transfer public holidays. If an agreement is reached between the employer and employee, the agreement may result in the employee agreeing to waive one part of the working day as not part of a public holiday. Depending on the circumstances and the hours worked on either of the consecutive public holidays, the employee may be agreeing to disadvantage themselves in terms of entitlements for one of the days that would otherwise give rise to time and half payments and a full alternative day's leave.
- 27 Like clause 10 inserting new sections 28A-F, new s44A also includes the phrase "informed and voluntary". The phrase is not defined and leaves any agreement open to challenge on the basis that the employee was not informed or did not understand the implications of reaching an agreement with the employer. It raises also the issues of who informs the employee, when and how?
- 28 New clause 44B also includes the phrase "informed and voluntary".
- 29 As reaching such an agreement could result in a disadvantage to the employee, if any challenge is raised as to the validity of the agreement, the onus will be on the employer to demonstrate the employee was informed (whenever and however that should have occurred) and that agreement was voluntary. If the employee was successful in his/her claim, the employee would be awarded any entitlements the employee would have received but for the alleged agreement.
- 30 The first course of option for an employee who contests they were not "informed" would be for a Labour Inspector to recover that week's paid annual leave. It is the experience of Society members that the Labour Inspectorate is already working to capacity and a significant level of claims will cause difficult and raise access to justice issues.
- 31 Given the effect of other proposed changes to employment law is to provide a statutory process to ensure procedural fairness, the current wording appears to be inconsistent with other proposed amendments.

Recommendation

32. Clause 12 is not supported for the above reasons. At the very least the requirement for employees to be “informed” should be defined but not so as to place onerous procedural obligations on employers. The Society suggests that the Bill should include a simple procedure that an employer could chose to follow to show an employee was informed but that would not rule out the employee being informed in other ways too.

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President
1 October 2010