

## Holidays Act 2003 – Recommendations for Change

As you are likely aware the Government is undertaking a review of the Holidays Act 2003 with the aim:

- (a) of making the Act easier for businesses and employees to understand and apply;
- (b) reducing direct and compliance costs; and
- (c) making the Act more readily applicable to a range of employment patterns.

The following is a summary of the areas for review and the recommendations made by the Ministerial Advisory Group (comprising employer and union representatives) which was established to advise the Minister of Labour on options for achieving the aforementioned aims:

### A. The calculation of relevant daily pay (RDP) - (two recommendations were made):

- the employer representatives' recommendation is that the accrual and payment mechanisms for all statutory leave should be changed to simplify the legislation by providing for one rate at which all leave events are paid (i.e. annual holidays, alternative holidays, public holidays, sick leave and bereavement leave) using 52 week averages. It is proposed that this will eliminate distortions created by the use of 4 week averages. Further it was recommended that legislation should provide for the accrual of annual holidays, sick leave and taking of all leave in contractual hours or whatever time unit is best suited to the individual workplace, which could be hours, days or week/s. It is proposed that this will eliminate, for employees with variable work periods, any requirement to determine what is a 'week' (for annual holidays) or what is a 'day' (for other forms of leave).
- the union representatives strongly oppose the employer representatives proposed extension of the alternative formula to the calculation of annual holiday pay, and their proposal to accrue and record all holiday and leave entitlement in "work units" rather than the present weeks or days. The union representatives recommended that payment for sick leave, bereavement leave, public holidays and alternative holidays (but not annual holidays) is calculated using a formula whereby 'payment for a leave event' equates to the 'contractual hours of leave taken' multiplied by the 'standard leave rate'. Further, they propose that the 'standard leave rate' equates to 'annual gross earnings' divided by the 'contractual hours for the relevant period'.

### B. Trading in annual holidays for cash - (two recommendations made)

- the employer representatives recommend that employees are able to trade annual holiday entitlements provided a balance of 3 weeks of entitled annual holidays remain, subject to a raft of safeguards. The most common benefit referred to by submitters was the additional income this would provide employees.

- the union representatives recommended that the statutory minimum annual holidays entitlement should not be able to be traded for cash and were strongly opposed to such a proposal. The main objection against this is that it would reduce the employees' opportunities for rest, recreation and family time, which in turn negates work-life balance and health and safety issues in the workplace. One of the several other important issues canvassed was that of equity. It was submitted that women were more likely to want to take holidays for family reasons therefore increasing the gender pay gap.

### C. Casual Employees

The Ministerial Advisory Group recommends that the Government maintain the current entitlements for holidays and leave however recommends the Department of Labour provides more educational information for employers and employees as to casual employee's entitlements.

### D. Transferring public holidays to another day

- The most common benefit in favour of this concept (amongst others) is that it allows for recognition of and enhances cultural diversity in the workplace. The main reason for opposition to this practice is that it would be administratively complex, making it harder for businesses to plan ahead and manage staff.
- the Ministry Advisory Group recommended the ability for employers and employees to agree to transfer public holidays subject to conditions.

### E. Accumulation of alternative holidays

- the employer representatives recommend that the Act be simplified by:
  - (i) deleting the separate category of leave called "alternative holidays".
  - (ii) When an employee works on a public holiday, on a day that would otherwise be a working day, instead of accumulating a "day" of leave that the number of work units worked on the public holiday are added to the employee's annual leave entitlement.
  - (iii) Taking of time could be the same as annual holidays.
- the union representatives recommend no change to the accumulation of alternative holidays.

### F. Treatment of public holidays

The group recommends no changes to the current legislative treatment of public holidays. With regard to Easter Sunday however the union recommends that this becomes the 12<sup>th</sup> public holiday, and the employer representatives recommend the status quo.

As a result of the recommendations it is anticipated that a Bill will be drafted for introduction into the house in the near future.

## Sleepovers and the Minimum Wage Issue – Employment Court Decision 11 December 2009

Further to Issues 163 and 173 of *"The Advocate"*, the Employment Court has now issued a decision on what an employee is entitled to receive in terms of remuneration while engaged on a sleepover; this decision will have significant bearing on those employers who are in the practice of paying a sleepover allowance.

The case of ***Dickson v Idea Services Ltd*** was appealed and heard by the full bench of the Employment Court. The first question which the court made a determination on, in July 2009, was whether an employee engaged in a 'sleepover' was in fact engaging in 'work' for the purposes of the Minimum Wage Act. This was held in the affirmative. The second question of 'averaging' was determined by the full court once full submissions had been received from various interested parties, and this judgment was given on 11 December 2009.

The employer argued that the averaging approach was to be favoured whereby the amount ordinarily paid for shift work, combined with the lesser amount paid for a sleepover was averaged over the fortnightly pay period and therefore increasing the 'average' hourly rate paid during the sleepover period. This approach was supported by Business New Zealand, National Residential Intellectual Disability Providers Inc, and a Labour Inspector.

The majority of the Court however favoured the argument contended by the employee that the sufficiency of payment for a worker paid by the hour must be assessed on an hour by hour basis. The Court concluded that on a proper construction of the Minimum Wage Act and the Minimum Wage Orders, Mr Dickson was entitled to be paid not less than \$12.50 for each and every hour he worked for Idea Services, including the time spent during sleepovers.



Discussion leading to the Court's decision included, in brief, reference to the following:

- The Scheme of s.4 of the Act is clear and simple in that it creates a power to prescribe minimum rates of wages for classes of workers;
- A key expression used in both the Act and the Order is "rate of wages". A rate of wages is the amount of money payable to the worker for each unit of time. In this case the unit of time is 'by the hour' therefore he must receive not less than \$12.50 per hour;
- The Act does not require when payment of wages are to be paid.

In this case it was a term of the employment agreement that they be paid on a fortnightly basis. The Court had determined that Mr Dickson is paid by the hour which means that the only time period for calculation of his minimum rate of wages is the hour. This is consistent with the units of time included in the legislation as set out in the Order, that is hour, day and week. As the Order gives three different time periods for calculating the minimum wages payable there is no need to imply a further period, eg fortnightly, when one of those periods applies.

A dissenting judgment was passed down by Travis J who "*after considerable deliberation, and not without some hesitation*" adopted the approach argued by the employer. This dissenting judgment may very well lead to an appeal by the employer of the current decision. In the meantime it is important to note the far reaching effects of this decision in those many industries where an employee may be required to attend a sleepover.

## Congratulations !!

Alice Bradshaw-Waugh entered the world on 6 January 2010.

We wish Sarah, Colin, Finn, Connor and Alice all to best and look forward to having Sarah back on the team in June 2010.



This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson, Peter Zwart or Sarah Bradshaw.

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