

Submission

to the

Department of Labour

on the

Review of the Holidays Act 2003

from

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21 August 2009

Review of the Holidays Act 2003

This submission is from the Employers and Manufacturers Association (Central) Inc. (hereafter “EMA Central” and “we”)

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About EMA Central

EMA Central represents the interests of approximately 2,400 enterprises in the central and lower North Island and upper South Island regions. Collectively our members employ 120,000 employees.

Overview

Anecdotally, a large number of the enquiries into our advice line relate to Holidays Act entitlements and in particular issues around RDP. In order to provide these submissions we posted the Review questionnaire on our website, and in our regular electronic newspaper called “The Network”. We also approached members from across the following sectors, to obtain feed back from a broad cross-section of our membership:

- energy
- food production
- transport
- care

- hospitality
- retail
- labour hire

The calculation of relevant daily pay (RDP)

1. *Discuss any specific complexities and costs associated with calculating RDP.*

- For many of our members the RDP issue is the one of most concern. As well as specific problems relevant to their sector or industry, there is also a general attitude of frustration and confusion, and a feeling that the RDP calculation is not practical or fair for many businesses. For many it is seen as inherently unfair and wrong that someone should potentially be able to receive more money for not being at work than if they were actually at work.
- One of the main concerns for members is the situation of bonuses et al payments being caught by the RDP calculation and thereby inflating leave payments. Members have expressed this being an issue when leave is taken shortly after such bonus payments. This is a particular problem for industries such as the energy sector where a number of different bonus type payments are made. For example, one member in this sector provides several such payments such as annual bonuses, market competitiveness allowances on an ongoing monthly basis, retention payments, etc. Depending on when these payments are made and their proximity to annual holiday taken, some or all of these payments can be captured by the RDP calculation. This can lead to distorted inflated leave payments where there is a large workforce or large periodic incentive payments, and huge additional costs to the business.
- Common complaints from members as to the RDP calculation are that it is unfair, confusing, complicated, unnecessary, over-descriptive etc, and there is a definite desire for the situation to be simplified and clarified.
- Many members have indicated a preference for a simpler calculation. We recommend that it reflects more accurately what

the employee would at face value have received on the day concerned, i.e. exclude all bonus payments and only include allowances specified in the employment agreement.

2. *Is there an alternative calculation that would be easier to make without returning to the ordinary pay calculation under the Holidays Act 1981?*

- Employers have expressed a desire for one clear interpretation of how all types of leave calculations should be made, in particular RDP where it is seen by many that there are too many variable interpretations.
- EMA Central favours an approach that would give greater certainty for both parties to the employment relationship. It suggests the removal in s9(4) of “if the rate is equal to, or greater than” to encourage the use of agreed contractual leave rates.
- Alternatively, EMA Central suggests a purely hours worked basis with no penal rates and only allowances regularly paid in each pay period to be included in the RDP calculation. The only exception to this would be commission-paid people who would receive either a contractual pre-agreed rate or the minimum wage, i.e. essentially an ordinary pay calculation without all the variables associated with irregular commission payments.

Trading the fourth week of annual leave for cash at the employee’s request

3. *What are your views on an employee and employer agreeing to trade the employee’s fourth week of annual leave (or some other part of the employee’s minimum annual leave entitlement) for cash?*

- Some of our members say they oppose this idea because they want their employees to take the leave for health and welfare reasons. However, there seems to be quite a lot of interest amongst employers for the cashing up proposition. They express a feeling that many of their employees would be interested in taking up this option. One even said they would like to see this go further to include cashing up alternate days too.
- EMA Central would support an employee and employer being able to agree to trade the employee’s fourth week of annual

holiday for cash provided the necessary protections for both parties are in place.

- We believe this would need to apply only to cashing up annual leave entitlements, not those in advance, in order to avoid any confusion or misunderstandings that may arise over accrued leave entitlement.
 - However, there have been contrasting views from some of our members on this matter. Some (e.g. in the transport sector) can see it leading to wage costs being increased by a week. Many employers do not employ temporary cover during annual holiday periods. So, if an employee worked the fourth week's annual holiday and cashed it up the employee would be paid for 53 weeks instead of 52. On the other hand, other members (e.g. in the food production sector) see it as a potential reduction in costs by removing the need to arrange cover for this week in the form of higher temporary labour rates or overtime.
4. *Are there any specific issues, for example, criteria or costs and benefits that the Group should take into consideration?*
- In order to avoid potential disadvantage claims, it would be helpful for the employer to have the absolute discretion to say no to a cashing up request without this decision being subject to s103A Employment Relations Act 2000.
 - Notice requirements should be included in any statutory cashing up provisions in an attempt to try and avoid serious cash flow situations for employers if large numbers of employees want to cash up at the same time.
 - The suggestion is that cashed up annual holidays is paid out at an agreed contractual annual holiday rate and not RDP.
 - Members have also expressed concern at the cashed up payment will be caught up in calculations for other leave.
 - Members, especially in the energy sector where multiple incentive payments are commonplace, have expressed desire for clear rules as to how this fourth week will be calculated. Similarly, we recommend that the cash up excludes all bonus payments and only includes allowances regularly paid each pay period.

5. *If you think an employer and an employee should be able to agree to trade the fourth week's leave for cash, what protections do you see would be necessary to ensure entitlements are not reduced and employees' choice to trade the fourth week is genuine?*

- Being clear that it is at the employee's request and is completely voluntary. We believe it is important that there is no expectation on either party and that a situation of precedence is not set. We believe it is also important that it not be allowed as part of the contractual agreement – it must be requested and agreed to on each occasion.

Allowing all employers and employees to agree to transfer the observance of a public holiday listed in the Act to another day

6. *What are your views on employees being able to transfer public holidays to another day, for example, observing the final day of Ramadan instead of Good Friday?*

- EMA Central would support this provided there was an actual day transferred to, and not just a cashing up situation. We would agree that it could be covered contractually.
- A question as to how much notice is required, i.e. how far in advance should there be agreement to transfer – we suggest at least 14 days notice.

7. *If you have done this previously have there been any issues with transferring?*

- There will always be problems with observance of public holidays for those with continuous operation industries.
- Feedback from members included the issue of not being able to offer work on the alternate public holiday. They wish all staff to take leave on the existing public holiday because they are closed down and therefore cannot provide work to an employee wanting to work that day. Many employers felt it was going to be very difficult to manage in practice. One employer raised the concern of complications if an employee works on a public holiday and then leaves before the transferring day. Other businesses mentioned problems relating to meeting customers' demands. Some employers have flagged that it may become a Human

Rights issue if requests are not granted for religious or cultural reasons. Many other employers are concerned with administrative cost and complication.

8. *What protections do you see would be necessary to ensure entitlements are not reduced and employees' choice to transfer the public holiday is genuine?*
- We recognise the potential for abuse by some employers and would agree that the employee must initiate their request in writing, or by a Collective Agreement, giving the required notice (say 14 days) with agreement from the employer required.
 - While this transferring option has been available historically, it has been a little known provision and therefore past use is probably not an accurate gauge of how much it would be taken up if its availability became much more publicised.

The accumulation of alternative holidays (days in lieu)

9. *What are your views on employees accumulating a number of days in lieu (alternative holidays)?*
- Most members didn't have too much of a problem with alternative holidays. A problem for some employers at the moment is that they have no right to direct employees when to take their alternative holiday (ie. before 12 months). Many of our members expressed a wish to be able to direct employees to take their alternative holidays on 14 days' notice.
 - Under s57(2)(a) the employee gets to set the alternative day. We would recommend this is deleted and it is just changed back to mutual agreement between the employer and the employee.
 - Some members expressed a wish to require them to be taken before annual holiday could be taken. Others suggested the possibility of being able to cash out the alternative holiday (ie. before 12 months) or paying it out automatically if not taken within "x" amount of time, say 3 months.
 - There was certainly a preference from members for alternative holidays to be taken within a specified time, and likewise a preference against the accumulation of such holidays.

The treatment and entitlements of casual employees in relation to holidays and leave

10. *Discuss your understanding of what casual employees are entitled to under the Act.*
- A true casual employee who just works each separate engagement without any expectation of ongoing employment, is eligible for the 8% loading to cover annual holiday, public holidays only when they work on them but no alternative holiday, and sick/bereavement leave if the s63(1)(b) criteria can be met and if it can be shown that the day would have been an otherwise working day.
11. *Discuss any complexities associated with calculating holiday and leave entitlements and payments for casual employees.*
- The abovementioned s63(1)(b) is seen as a problematic clause in the way that it can catch casual employees that would not otherwise get the entitlement.
 - Linked in with this it is suggested that s.12(3)(iii) is unhelpful with its “other relevant factors” and it may be more useful to just have a special section allowing for the reasonable expectations of employer and employee as in s.12(3)(c)(iii).
12. *Do you have any examples of casual employees being advantaged or disadvantaged by the application of the Act?*
- None of our members provided any specific examples of casual employees being either advantaged or disadvantaged. However there was a clear desire from members for more clarity in this area of casual employees. Members have said there is confusion and a lack of certainty and understanding around casual employees and this translates to problems and potential disadvantage/advantage re employee’s entitlements.
 - EMA Central would certainly support greater legislative clarity around the issue of casual employees and their entitlements.

Treatment of public holidays

13. *What are your views on the significance of the 11 public holidays listed in the Act? (These are: Christmas Day; Boxing Day; New Year's Day; 2*

January; Waitangi Day; Good Friday; Easter Monday; ANZAC Day; Queen's Birthday; Labour Day; and Provincial Anniversary Day.)

- We believe this “significance of” question is much bigger than just an employment issue. It is a societal issue.
- We would not support any increase in the number of public holidays for cost reasons.
- Members’ views reflect what is likely to be a societal shift from the traditional public holidays, particularly the religious based ones and those whose relevance has diminished such as Queens Birthday and Labour Day. There is definitely a shift towards wanting more New Zealand culturally relevant public holidays. There is also support from some members for the “Mondayising” of Waitangi Day and Anzac Day.

Shop Trading on Easter Sunday and its interface with the Holidays Act 2003.

14. *Do you consider that Easter Sunday should be recognised as a public holiday?*

- There was very little support from members for making Easter Sunday a public holiday.
- EMA Central does not support making Easter Sunday into a public holiday due the resulting considerable increase in costs for those employers who will always have to have employees working on that day, such as hospitals, supermarkets, residential care facilities, hospitality, etc.
- As to the Shop Trading issue we believe it should be a matter for individual employers and employees whether or not they trade or work on that day.
- One suggestion raised was making Easter Sunday a second annual close down option under the Act on the standard 14 days notice in advance.

15. *If so should it be "Mondayised" in the same way as, for example, Christmas Day is under the Act and replace Easter Monday as a public holiday?*

- No - in light of our answer to question 14, but nevertheless taken in isolation EMA Central would also not support “Mondayisation” for similar cost to employer reasons combined with enhanced problems of confusion and complexity for employers.
- There was also very little support from members for the “Mondayisation” option.

We are happy to provide any further or other information to the Review Panel about this feedback either in person or in writing.