

Submission

By

Business|NZ

To

**The Transport and Industrial Relations
Select Committee**

On the

Holidays Amendment Bill

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1. INTRODUCTION

- 1.1 Business New Zealand is owned by Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association. Together with its shareholders and the Affiliated Industries Group which covers in excess of 76,000 businesses Business New Zealand is New Zealand's largest business advocacy body.
- 1.2 Business New Zealand supports the remedial measures the Holidays Amendment Bill (the Bill) promotes but points out these are manifestly insufficient to cure the major defects of the Holidays Act 2003. The Act urgently needs fundamental reform. Further, although the changes are largely promoted as curing "unintended consequences" - the explanatory Note to the Bill says that the changes to the Holidays Act (with the exception of the changed proof of sickness) are needed to correct unintended consequences - this is incorrect and the Bill should not be so promoted. The Bill represents a partial shift in Government policy which (apart from the proof of sickness issue) should be acknowledged as such.
- 1.3 The reason for an ad hoc meeting of some interested parties in July 2004 was to discuss unintended consequences and discussion of policy changes was expressly ruled out at that time.
- 1.4 However, among the major defects of the Holidays Act 2003 referred to above, the inherently costly, disincentivising and anti-productivity notion of "relevant daily pay" looms large. The legislative process through which this concept emerged leaves much to be desired in a fair and democratic society.
- 1.5 There are four changes the Bill makes to the Holidays Act 2003:
 - (a) The payment for working a public holiday will now be the greater of relevant daily pay for the hours worked less any penal rates (rates already agreed for working a statutory holiday or particular day) plus 50% of that amount or the relevant daily pay for the hours worked;
 - (b) If a rostered employee is sick on a public holiday the sick leave payment is relevant daily pay only (not plus 50%) and the day is not counted as sick leave but as a public holiday.
 - (c) The section 51 transitional date (regular pay may incorporate statutory holiday pay) is extended to 1 April 2007 in relation to collective agreements.
 - (d) Medical certificates may be required by employers within three days' absence so long as a three-stage test is met.
- 1.6 There is nothing in the above changes that correct any unintended consequences arising from the Act. Rather the changes are in response to a

general outcry over the extent of the policy changes implemented under the Act.

- 1.7 As to the first change, section 51 of the Act was intended to allow an employer to decline to factor into holiday pay a penal rate already genuinely negotiated. The one additional aspect the Bill addresses is that "penal rates" also include rates for working that particular day, eg a Sunday (no doubt partly in response to the fact ANZAC day fell on a Sunday this year). That can hardly be said to be unintended as the penal rate is in recognition of working the particular day not for working the statutory holiday.
- 1.8 The second change amends Government policy and (Department of Labour advice) that an employee rostered to work a public holiday who is sick should receive the penal rate that a colleague who works the day receives. Although attempting to ensure a consistent approach across all types of leave under the Act, the absurdity of the policy (in creating perverse incentives not to work) is plain.
- 1.9 The third change amends policy by giving those in collective agreements (as compared to those on individual agreements) a further two years to agree a section 51 exemption.
- 1.10 The final change amends the policy on requiring proof of sickness. Many employers submitted before the original Bill that prohibiting proof of sickness would lead to increased absenteeism.
- 1.11 Indeed, increased absenteeism, increased costs, and double dipping were all predicted by employer submitters to the original Holidays Bill. Holidays legislation can create innumerable problems if the framework is not built for modern workplace practices. Although modernisation was a key driver behind holidays legislation reform what has emerged is significantly flawed.
- 1.12 A clause-by-clause analysis of the Bill follows the next section which addresses what Business New Zealand sees as a fundamental problem with the Holidays Act 2003.

2. RELEVANT DAILY PAY

- 2.1 The release by the Minister of Labour dated 31 August 2004 said:

"The Government's core policies have not changed. What we wanted to do was to ensure employees are guaranteed an additional payment for working on a public holiday. Most New Zealanders think this is fair. We also wanted to introduce four weeks' annual leave from 2007, to bring us into line with our key trading partners, notably Australia. Australia has had four weeks' annual leave for about 30 years."

- 2.2 However a core policy is also Relevant Daily Pay, which is the amount an employee receives for all statutory holiday pay, days in lieu, sick leave and bereavement leave. The amount equates to what was otherwise payable for

working the day. As for working a public holiday an employee is paid Relevant Daily Pay plus a 50% premium.

- 2.3 Prior to 1 April this year there was a difference between the amount payable for the two major types of paid leave under holidays legislation, annual leave and public holiday pay. The pay for special leave (sick and bereavement leave) was the same as the amount payable for public holidays. The differential in payment calculation reflected the different purposes behind the two types of leave and, in fact, until 1981 there were two distinct Acts of Parliament reflecting the different types of leave.
- 2.4 Annual leave was designed to allow an employee rest and recreation and the employee was paid on the basis of current or average earnings, whichever was the greater. The idea was that the employee was in a sense indemnified and could enjoy days or weeks off work with no real decrease in earnings.
- 2.5 Public holidays on the other hand are not designed for rest and recreation but are days of national, cultural, or religious significance and the payment at ordinary or base rates previously reflected a defraying or mitigation of an employee's loss of pay. The same was true for sickness and bereavement where the leave was akin to a non-indemnifying insurance policy [where an excess was payable]. For over 50 years "ordinary pay" was the historical default for public holiday payment as set out in National Awards and agreements, and confirmed in the 1981 consolidating Act. The beauty of the system was its simplicity - parties could negotiate and agree in advance a rate that would apply for all public holidays irrespective of the individual employee circumstances, and irrespective of when the holiday occurred.
- 2.6 With the introduction of relevant daily pay, an employer is unable to pay an employee more for being at work than for being away from work. This must have an impact on productivity because employers will be less likely to incentivise employees to produce knowing that some non-workers will benefit and employees will be less likely to produce more at work knowing they will get the same payment for not being at work. Notably, at the Workplace Productivity Working Group convened by the Government over the course of this year, there was no discussion of the legislative constraints on productivity nor did it discuss remuneration systems which might lead to greater productivity. Hence the Holidays Act was not even considered.
- 2.7 Relevant daily pay swept aside the ordinary pay system and now affects not only waged workers but also salaried and commission only employees. Each and every statutory holiday (or alternative holiday or sick leave or bereavement leave application) a different calculation for each employee needs to be undertaken to satisfy the Act. This is a radical change from the previous law which allowed the parties to agree in advance what would be payable. Relevant daily pay is a prime example of how the Holidays Act fails to recognise the variety of shift and work patterns that currently exist.
- 2.8 Business New Zealand also has serious concerns with the way in which relevant daily pay became law. A [tripartite] working group had been

established by the Government, made up of business and union representatives, to work out the best way of modernising the Holidays Act 1981 and, over the course of several months, had debated the various issues, one of which was ordinary pay. In the end the Working Group had agreed to codify the Ports of Auckland case which had dealt with the ordinary pay issue. The following is taken from the September 2001 report of the Working Group:

4.6 What rate of pay should an employee be paid for a public holiday (where the employee does not work on that public holiday)?

(a) *Policy Recommendation* (subject to Employer exception see below):

- Codify Ports of Auckland based on the following principles:
 - an employee must be paid what he/she would receive for an ordinary working day;
 - the pay for an ordinary working day is a matter of construction of each particular employment agreement;
 - there is no scope for bargaining for a lesser special rate solely for the purposes of calculating statutory holiday pay;
 - anything which is clearly payable only in defined circumstances or at defined times is excluded, such as overtime, bonuses and allowances. Productivity and incentive based payments which are dependent on actual working results need not be notionally calculated and paid;
 - allowances that are payable as of course should be distinguished from those payable only in particular circumstances, even if they occur regularly and even if they would have been payable if the employee had worked that day.

(b) *Employer Exception*:

- The third point (above) does not include situations where there is a negotiated ordinary rate of pay applicable to all non-working time when payment for work is based, for example, on piece rate, productivity incentive based payments, commission or bonus payments.

2.9 Special leave was agreed on the same basis:

6.7 What rate of pay should an employee be paid for a day taken as special leave?

(a) *Policy Recommendation*:

- Payment for special leave should be the same as for public holidays (see 4.6 above).

2.10 The December 2002 Greenlea case in the Court of Appeal confirmed the Ports of Auckland rationale that a flat rate could be agreed which did not equate to average earnings which included all incentive rates. When the Holidays Bill was introduced the particular effect of Greenlea was negated (by introducing a daily average calculation for incentive rate remuneration systems) but had left the ordinary pay system in tact.

- 2.11 However, in reporting back, the Select Committee, without any consultation, had abolished the concept of ordinary pay replacing it with mandatory relevant daily pay.
- 2.12 This particular law-making process contravened the principal of tripartism and social dialogue which the Government proudly promotes.
- 2.13 Working out Relevant Daily Pay as an average of the last four weeks' earnings is especially complex where casual work is involved and establishing actual hours worked with the employee(s) may be difficult. It is also difficult to work out Relevant Daily Pay where the hours worked include regular hours and irregular on call hours.
- 2.14 The ability for the employee to choose when to take an alternative holiday leads to the alternative day being taken on a day when a penal rate would be paid (the so-called "high rate days"), imposing a double pay burden on the employer who must find a replacement employee.
- 2.15 Relevant Daily Pay includes incentive-based (and overtime) payments and allowances agreed to in respect of work actually performed. For the employer who must employ a replacement employee for someone absent on sick or bereavement leave or who is taking an alternative holiday this means paying the same or a similar amount twice over – once for a productive and once for a non-productive outcome. This penalises companies that pay incentive pay compared with companies that don't and directly affects company productivity.
- 2.16 The result of imposing Relevant Daily Pay is now threefold:
- (a) An employer must indemnify an employee not only for annual leave, but also for public holidays, sick leave and bereavement leave. As other types of leave (eg study leave, domestic, leave, etc) are often linked with the statutory minimum these will tend also to be on an indemnity basis.
 - (b) The compliance burden of working out entitlements increases because each employee's entitlement inevitably changes with each different holiday taken.
 - (c) An employer cannot agree to pay working employees more than their counterparts who are on leave for any reason (except for working on a public holiday where a differential is mandated).

The impact of (a) and (b) above is simply a significant increase in labour costs. The impact of (c) is that productivity declines. The Explanatory Note to the Bill acknowledges that the concept of relevant daily pay creates perverse incentives (page 5). Business New Zealand agrees and adds that the Relevant Daily Pay concept should be abolished and the parties in an employment relationship be able to agree an ordinary rate ahead of time so that holiday or leave pay is simplified and cost minimised. A comparison of

costs between a company operating under the Holidays Act 1981 and the Holidays Act 2003 is attached as schedule B.

3. CLAUSE-BY-CLAUSE ANALYSIS OF THE HOLIDAYS BILL AND RECOMMENDED CHANGES TO THE EXISTING ACT

Clause 3 – Meaning of Relevant Daily Pay

3.1 Section 50(1)(a) does not relate to the requirement to pay time and a half but to the requirement to pay relevant daily pay plus half that amount again. There is a critical difference because relevant daily pay is not a time rate of pay but a fixed dollar amount.

3.2 *Recommendation: That clause 3 amending section 9(2) be amended to read:*

“...section 50(1)(a) (which relates to the requirement to pay relevant daily pay less penal rates plus half that amount again).

This recommendation is without prejudice to Business New Zealand’s view that relevant daily pay should be abolished.

Clause 4 – Payment for Working a Public Holiday

3.3 This remedy clarifies the law but imposes a further compliance burden on employers. *It will not always be as simple as looking at the agreement’s time rate of pay for working a public holiday (or that particular day) and applying that rate if it is time and a half or greater. This is because relevant daily pay is a dollar amount not a time-based rate of payment. If the payment for working a public holiday is simply an hourly rate then the correct provision to use should be obvious, but when there are other payments (eg overtime, allowances, bonuses, etc) a comparison calculation will need to be done.*

3.4 *For instance what happens if you compare two agreements both with time and a half for working a public holiday but one with various add-ons (overtime, allowances) and one without. For the first agreement the greater amount is that under section 50(1)(a) and for the second section 50(1)(b). See Schedule B.*

3.5 *A further complication arises with the direction under section 55 to pay holiday pay in the period in which the holiday occurs. Some agreements have rolled-up rates and spread public holiday pay across regular payments. The problem with this type of provision is that it prevents sensible payment systems from evolving, even where it is for the benefit of both parties.*

3.6 *Recommendation:*

Delete section 50 and allow parties to agree to pay ordinary pay for working a public holiday.

Ordinary would be that defined under the Holidays Act 1981 not the original Holidays Bill.

If that recommendation is not accepted, then without prejudice to Business New Zealand's opposition to statutory penal rates for working on a public holiday:

Insert clause 46 of the original Holidays Bill (which allows ordinary pay as a basis of payment).

Recommendation:

Delete section 55

Clause 5 – Existing penal rate in regular pay

3.7 The scope of section 51 should be clarified. If in an agreement meets the requirements of section 51(3) then the section should stipulate that this satisfies section 50 after 1 April 2005 for an individual agreement or 1 April 2007 for a collective agreement. Further, salaries have always been understood to be all-encompassing remuneration and the extension of the statutory penal rate to salaried employees is not consistent with this understanding. The provision should therefore not apply to salaried employees.

Clause 7 – Existing Agreements

3.9 All existing employment agreements were required to be amended after 1 April 2004 and a period of 12 months was given in order for this to be done. Many agreements have already been modified by now and this provision says that they must be modified yet again.

3.10 *Recommendation: Insert:*

"Where any agreement has been modified pursuant to section 53 as at 1 April 2004 that modification is deemed to comply with section 53 of this Act as amended."

Clause 8 – No penal rate in sick pay

3.11 As in clauses 3 and 4 there is an incorrect reference to "time and a half".

3.12 *Recommendation: Reword s61A(2)(b)(i):*

"...is not entitled to be paid relevant daily pay plus half that amount again in accordance..."

Clause 9- Proof of Sickness

3.13 Unfortunately the way this clause is worded is an example of the growing complexity of employment law because instead of simply permitting an

employer to require proof at anytime a prescriptive three-stage process is proposed. There will inevitably be disputes over precisely what is required under each of the three stages including:

- (a) What constitutes reasonable grounds to suspect?
- (b) What is “as early as possible” notice?
- (c) What are employee’s expenses (specialist treatment, travel, lost time off work if a certificate is sought after the period of sickness?)

3.14 The various National Awards that were freely negotiated by employers and unions up until 1990 commonly allowed the employer to require a medical certificate at any time.

3.15 As to unions’ arguments that employers will abuse such a freedom, an employer would be prevented by the good faith provisions in the Employment Relations Act from doing so.

3.16 *Recommendation: Delete new section 68(1A) and insert:*

“An employer may, as early as possible after being notified under section 64, require the employee to produce proof of sickness or injury for any period of leave taken by the employee under section 65”.

If that is not accepted Business New Zealand recommends inserting the words “*at anytime*” after the words “*has reasonable grounds*”. If this insertion is not made, there remains an ambiguity as to when an employer may require the proof of sickness (the “within three consecutive calendar days” is a qualifier of sickness or injury, not a time period relating to the requirement).

Other changes

3.17 The idea behind the 2001 Holidays Act Working Group was to modernise and simplify the Holidays Act 1981. Definitions such as “factories” and “undertakings” and notions such as the one-tenth rule were no longer relevant in a modern workplace. However with the introduction of relevant daily pay, increased Mondayisation, and penal rates for working on a public holiday, the legislation has been made more complex and burdensome for employers. In the short time available for submissions we are not able to illustrate all current problems, but the following represent the more major issues brought to our attention.

50% premium for all work on a public Holiday

3.18 Business New Zealand opposes a mandatory minimum wage solely for working public holidays. The permutations created by section 50 calculations are endless and now made more complex by the proposed remedy. Calculating extra correct payments for salaried employees remains extraordinarily difficult. Rolled-up wage payments are fairer to employees

because payments are more regular, but some of these may need changing because of section 50. The solution is simple - any penal rate for working a public holiday should be negotiable between the parties.

- 3.19 *Recommendation: That section 50 be deleted and any penal rate for working a public holiday should be a matter negotiable between the parties.*

Mondayisation

- 3.20 The Holidays Bill extended the notion of Mondayisation by determining that no matter when an employee was rostered to work over Christmas/New Year there would be an entitlement to four statutory holidays if those holidays fell in the weekend.

- 3.21 *Recommendation: Where work performed in the enterprise is normally confined to Monday-Friday working week, Christmas and New Year public holidays should be automatically transferred when those days fall in the weekend. If work is normally performed in the enterprise on a Saturday and/or Sunday, Christmas and New Year public holidays should be observed where they fall.*

Definition of a Day

- 3.22 This point relates to current sections 12(4) and 44(2). It is arguable that the current Act prevents parties agreeing that when a shift overlaps a public holiday by a short time the public holiday commences at the conclusion of that shift. This issue is emerging as an unintended consequence for various employers.

- 3.23 *Recommendation: A proviso to the current section 44(2) be added:*

“To avoid doubt, the employer and employee may agree that any public holiday specified in subsection (1) will be observed by the employee commencing at any time during a day specified in subsection (1).”

Agreements already modified in good faith

- 3.24 Prior to and since 1 April this year many employers have, in good faith, amended their employment agreements with employees to comply with section 68 of the Act (prohibition of medical certificates before three days' consecutive absence). The Government now proposes to change this provision. However, any amended provision will not assist those employers who have so altered their employment agreements.

- 3.25 *Recommendation: A proviso to the current clause 9 be added:*

“Provided that where an employment agreement has been amended to comply with section 68 of the Holidays Act 2003 as originally enacted, such a provision is no longer of effect.”

Extra Week

3.26 Some employment agreements currently refer to “an extra week” when dealing with, for instance, shift leave or long service leave. The increase to the minimum annual leave to four weeks after 1 April 2007 should not automatically mean that a reference to an “extra week” means in addition to the increased annual leave.

3.27 *Recommendation: A proviso be added to section 41:*

“Provided that where an existing employment provides for an extra week’s annual leave, any increase in the minimum entitlement from three to four weeks must not be taken as providing an entitlement greater than four weeks.”

This recommendation is without prejudice to Business New Zealand’s opposition to the increase in annual leave.

Schedule A

Worked example

Holidays Act 1981 costs compared to Holidays Act 2003 costs

Assumptions:

Base hourly rate \$10.00; overtime, allowances, bonuses and incentive rates equivalent to \$10.00 per hour.

Five day operation, 10 hour shifts.

Assume 9 of the 11 public holidays are on “otherwise working days” for the employee or are “Mondayised”.

Assume 5 days’ sick leave used each year and 1 bereavement day used per year.

Per employee Public holiday/special leave costs under the Holidays Act 1981

9 public holidays on pay @ \$100	\$ 900
5 sick days @ \$100	\$ 500
1 Bereavement @ \$100	<u>\$ 100</u>
Total	\$1,500

Public holiday/sick leave/bereavement leave costs under the Holidays Act 2003

9 public holidays on pay @ \$200	\$1,800
5 sick days @ \$200	\$1,000
1 Bereavement @ \$200	<u>\$ 200</u>
Total	\$3,000

This example does not include cost increases due to:

- The need to pay for additional leave for Christmas/New Year 2004/5 under the new Mondayisation rules.
- The need to pay a 50% premium for work done on a public holiday.
- The prospect of a further 2% increase on payroll cost in 2007 with the addition of a week’s leave.

Schedule B

New section 51 - What to Pay?

The new section 51 says that an employer must pay the greater of Relevant Daily Pay less penal rates plus 50% or relevant daily pay under the agreement. In finding the correct calculation it will not be as simple as asking whether the time rate of pay in the agreement is equal to or greater than time and a half.

Agreement A

Time and half for working a public holiday
Assume \$10.00 per hour and 10 hour shift
Plus overtime/shift allowance/incentives of \$80

Calculation 1 (s50(1)(a)) is: $(\$100 \text{ (RDP – penal rate)} + \$80) + \$90 \text{ (50\% of \$180)} = \$270$
Calculation 2 (s50(1)(b)) is: $\$150 \text{ (RDP)} + \$80 = \$230$

But

Agreement B

Time and half for working a public holiday
Assume \$10.00 per hour and 10 hour shift

Calculation 1 is: $(\$100 + \$20) + \$60 \text{ (50\% of \$110)} = \$180$
Calculation 2 is $\$150 + \$20 = \$170$

Or consider the effect where the agreement says double time for working a holiday:

Agreement A

Double time for working a public holiday
Assume \$10.00 per hour and 10 hour shift
Plus overtime/shift allowance/incentives of \$150

Calculation 1 (s50(1)(a)) is: $(\$100 + \$150) + \$125 \text{ (50\% of \$250)} = \$375$
Calculation 2 (s50(1)(b)) is $\$200 + 150 = \350

But

Agreement B

Double time for working a public holiday
Assume \$10.00 per hour and 10 hour shift
Plus overtime/shift allowance/incentives of \$80

Calculation 1 is: $(\$100 + \$80) + \$90 \text{ (50\% of \$180)} = \$270$
Calculation 2 is $\$200 + \$80 = \$280$

A further complicating factor is where employees are paid a differential hourly rate for working, say, the last part of a shift period.

The following table shows the different rates to pay under section 50(1)(a) and (b) assuming an ordinary hourly rate of \$12.00 and with different penal rates in the agreement. 10 hour shifts. Correct payments in bold.

	Ordinary Rate \$12 per hour	Time 1.25 \$15 per hour	Time 1.5 \$18 per hour	Time 2 \$24 per hour
Zero extras s50(1)(a) (b)	\$180 \$120	\$180 \$150	\$180 \$180	\$180 \$240
\$10 extras (a) (b)	\$185 \$120	\$185 \$160	\$185 \$170	\$185 \$250
\$20 extras (a) (b)	\$190 \$120	\$190 \$170	\$190 \$200	\$190 \$260
\$40 extras (a) (b)	\$210 \$140	\$210 \$190	\$210 \$220	\$210 \$280
\$60 extra (a) (b)	\$240 \$160	\$240 \$210	\$240 \$240	\$240 \$300
\$80 extra (a) (b)	\$270 \$180	\$270 \$230	\$270 \$260	\$260 \$320
\$100 extra (a) (b)	\$330 \$200	\$330 \$250	\$330 \$280	\$330 \$340
\$150 extra (a) (b)	\$375 \$250	\$375 \$300	\$375 \$330	\$375 \$390