

Holidays Amendment Bill

Government Bill

As reported from the Transport and Industrial Relations
Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Holidays Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

The Holidays Amendment Bill amends the Holidays Act 2003 (the principal Act). In particular, the bill addresses unintended consequences that arose or may have arisen as a result of the implementation of the principal Act.

In view of the short reporting time, we invited submissions and heard evidence from several representative groups in order to come to a thorough understanding of the differing points of view on the provisions of the bill.

At the closing date for submissions, we had received 25 substantive submissions and approximately 500 form submissions. In general, employers supported the intent of the bill which is to address the unintended consequences of the principal Act, but considered it does not go far enough, particularly in relation to relevant daily pay. While unions generally opposed the bill, because they considered that it detracts from employees' existing rights under the principal Act, the majority accepted that some of the amendments are

designed to address the unintended consequences of the principal Act.

The commentary details the substantive changes the majority is recommending to the bill, but does not specify any consequential changes that were necessary.

Penal rates

After the principal Act came into force, conflicting views on the relationship between public holiday penal rates in employment agreements and any requirement in the Act to pay time and a half for work on a public holiday became apparent.

The bill as introduced provides that where an employee works on a public holiday, the employee must be paid the greater of:

- the portion of relevant daily pay, less penal rates, that relates to the time worked, plus half that amount again; or
- the portion of relevant daily pay that relates to the time worked.

“Penal rates” is defined in new section 50(2). The majority recommends an amendment to new section 50(2) substituted by clause 4, to clarify that the definition of “penal rates” includes only payments for particular days of the week or for public holidays. “Penal rates” does not include payments for other types of days, such as payments for the sixth or seventh day of work, and the amendment will ensure that they are not included.

Proof of sickness or injury

Choice of doctor

The majority recommends an amendment to new subsection 68(1A), as inserted by clause 9. The majority considers this amendment necessary to clarify that in the event where an employer requires an employee to obtain a medical certificate within the 3-day period, the employer does not have the right to determine the health provider the employee must go to for proof of illness or injury.

Difficulties in obtaining a medical certificate

Some submitters expressed concerns that some employees may be unable to provide proof that the sick leave taken is genuine because they cannot afford to, or because a dependant that an employee has taken sick leave to care for refuses to go to a doctor.

Under the principal Act, an employer is currently not required to pay an employee for sick leave where proof of illness or injury is required, if the employee has not provided the proof. The majority considers this could create unfairness if the employee is genuinely unable to provide the proof.

The majority, therefore, recommends the insertion of new clause 10, which amends section 72(2) of the principal Act. This provides that an employer does not have to pay an employee for sick leave if an employee is required to produce proof of illness or injury and “without reasonable excuse”, fails to do so.

Expenses for obtaining a medical certificate

The majority recommends an amendment to new subsection 68(1A), as inserted by clause 9, to ensure that an employer will only have to meet an employee’s “reasonable” expenses associated with obtaining proof of sickness.

The majority considers that such expenses should be subject to a “reasonable” test, so that employers are not liable to pay for any unnecessary expenses incurred by the employee in obtaining the proof. What the employee’s reasonable expenses are will be a matter for each individual situation.

Transitional period

Some submitters considered that the extension of the transitional period during which employers may pay the additional half time entitlement for work on public holidays with an employee’s regular pay should apply to individual employment agreements as well as collective agreements.

The majority accordingly recommends an amendment to clause 5, which substitutes subsection 51(1)(b), to extend the transitional period in respect of individual employment agreements to 1 April 2007.

The majority considers this amendment will provide for consistency and recognises that many individual employment agreements are modelled on collective agreements.

New Zealand National minority view

New Zealand National believes this bill represents a missed opportunity. What was required was a substantial review of the Holidays

Act 2003, not just of the “unintended consequences”, but also the serious problems that have already emerged, especially as a consequence of the new definition of “relevant daily pay”. It would have been better to have spent more time fixing the more serious problems, rather than rushing through the legislation prior to Labour weekend fixing peripheral issues.

There are a number of examples of the problems of relevant daily pay. For instance, New Zealand National considers there was clear evidence presented that there has been much greater use made of sick leave, especially on Mondays. In the case of the meat industry, where the negotiated sick days is typically 10 days per year, with substantial accumulations over the years, there have been large increases in sick leave taken, to the point that the viability of the work chain is reduced. There is a real suspicion that the payment of sick leave on the basis of relevant daily pay to include overtime and productivity bonuses has encouraged greater use of sick leave. It has even had the effect of meaning a sick leave day can pay more than working, if the number of people at work is too low to enable those at work to achieve productivity bonuses.

These are the key issues that should have been dealt with, but which have not been addressed in this bill. As a consequence, New Zealand National cannot support this bill, given its failure to address the major issues arising from the application of the Holidays Act 2003.

New Zealand First minority view

Whilst New Zealand First supports the addressing of the unintended consequences, it does not believe that the legislation is comprehensive enough to deal with all of the issues around holidays.

We believe that the term “penal rates” should refer only to an increased rate of pay for overtime, as we believe it once did. This legislation should reflect that. It also should acknowledge that there are “occupational and inconvenience” rates, non-taxable reimbursements and productivity payments.

New Zealand First believes the problems surrounding relevant daily pay should be addressed as (employer) submitters suggested.

It is our opinion that payment for work on public holidays and annual holidays should largely revolve around the average hours worked and the basic hourly rate. This would not preclude an agreed allowance being paid on top, in either case. The idea being that

calculations for holiday entitlements should be transparent and easily understood. The bill as drafted might achieve a workable outcome but it is not easily understood.

Furthermore, we believe employees paid on a salary basis should be exempt from additional public holiday entitlements. Such working/payment arrangements should be catered for in the salary package.

Green Party minority view

The Green Party opposes in particular the “proof of sickness or injury” amendments to the Holidays Act 2003 as proposed in this amending legislation. We believe that these clauses are inconsistent with the intent of the principal Act and are a retrograde step, especially in the absence of any significant evidence from employer bodies of widespread abuse of sick leave under the principal Act brought into force only this year.

If the clause 9 amendments are proceeded with, we believe a whole set of new problems will arise, including the possibility workers may be unable to pay doctors’ costs upfront, questions about exactly what proof is required or adequate, a query about what exactly “reasonable” means in this context, and the fact that this provision will not only affect the employee but also children for whom sick leave is taken. Misuse of sick leave is inherently self limiting, being confined to 5 days a year, and the Green Party believes that if employers do have good reason to suspect a problem, there are other measures available to them through ordinary disciplinary and human resources procedures.

Overall we do not accept the urgency or necessity of these and other changes to the principal Act proposed in this bill, and believe it should be withdrawn.

Appendix

Committee process

The Holidays Amendment Bill was referred to the committee on 7 September 2004. The closing date for submissions was 17 September 2004. We received and considered 25 submissions from interested groups and individuals. We heard 10 submissions. Hearing of evidence took 3 hours 58 minutes and consideration took 3 hours 32 minutes.

We received advice from the Department of Labour.

Committee membership

Hon Mark Gosche (Chairperson)

Sue Bradford replaced Mike Ward for consideration of this bill

Peter Brown

Lianne Dalziel

Helen Duncan

Dr Wayne Mapp (Deputy Chairperson)

Lynne Pillay

Hon Richard Prebble replaced Deborah Coddington for consideration of this bill

Hon Roger Sowry replaced Hon Maurice Williamson for consideration of this bill

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous)

Subject to this Act,

Text struck out unanimously

New (majority)

Subject to this Act,

Text inserted by a majority

New (unanimous)

Subject to this Act,

Text inserted unanimously

<Subject to this Act,>

Words struck out by a majority

<Subject to this Act,>

Words inserted by a majority

Hon Paul Swain

Holidays Amendment Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Holidays Amendment Act **2004**.
- (2) In this Act, the Holidays Act 2003¹ is called "the principal Act".

¹ 2003 No 129

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

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Part 1
Amendments to principal Act relating to payment
for public holidays

New (majority)

2A Interpretation

Section 5(1) of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions: 5

“**existing collective agreement** means a collective agreement that was entered into before 1 April 2004

“**existing individual employment agreement** means an individual employment agreement that was entered before 1 April 2004”. 10

3 Meaning of relevant daily pay

Section 9(2) of the principal Act is amended by omitting the expression “section 50”, and substituting the *<expression>* *<words>* “**section 50(1)(a)** (which relates to the requirement to pay time and a half)”. 15

4 New section 50 substituted

The principal Act is amended by repealing section 50, and substituting the following section:

“50 Employer must pay employee at least time and a half for working on public holiday” 20

“(1) If an employee works (in accordance with his or her employment agreement) on any part of a public holiday, the employer must pay the employee the greater of—

“(a) the portion of the employee’s relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or 25

“(b) the portion of the employee’s relevant daily pay that relates to the time actually worked on the day.

Struck out (unanimous)

“(2) In **subsection (1)(a), penal rates** means an identifiable additional amount that is payable to compensate the employee for working on a particular day or a particular type of day (for example, a weekend day or a public holiday).

New (unanimous)

“(2) In **subsection (1)(a), penal rates**—
 “(a) means an identifiable additional amount that is payable to compensate the employee for working on a particular day of the week or a public holiday; but
 “(b) does not include, for example, any additional payment for a sixth or seventh day of work.”

“(3) This section is subject to **section 51.**”

5 Transitional provision for employers who already pay for work on public holidays in employee’s regular pay
Section 51 of the principal Act is amended by repealing subsection (1), and substituting the following subsection: 15

“(1) This section applies to—
 “(a) an existing collective agreement until the later of—
 “(i) **1 April 2007**; or
 “(ii) the date on which a collective agreement that replaces the existing collective agreement comes into force: 20

Struck out (unanimous)

“(b) all other existing employment agreements until **1 April 2005.**”

New (unanimous)

“(b) an existing individual employment agreement, until **1 April 2007.**” 25

- 6 New employment agreements must include provision relating to time and a half**
- (1) The heading to section 52 of the principal Act is amended by omitting the words “**relating to time and a half**”, and substituting the words “**that complies with section 50**”. 5
- (2) Section 52(2) of the principal Act is amended by omitting the words “at least the portion of the employee’s relevant daily pay plus half that rate again for work on a public holiday, in accordance with section 50”, and substituting the words “in accordance with **section 50** for working on a public holiday”. 10
- 7 Existing employment agreements must include provision relating to time and a half**
- (1) The heading to section 53 of the principal Act is amended by omitting the words “**relating to time and a half**”, and substituting the words “**that complies with section 50**”. 15
- (2) Section 53(2) of the principal Act is amended by omitting the words “at least the portion of the employee’s relevant daily pay plus half that rate again for work on a public holiday, in accordance with section 50”, and substituting the words “in accordance with **section 50** for working on a public holiday”. 20
- (3) Section 53 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:
- “(3) The date is,—
- “(a) for an existing collective agreement to which **section 51** applies, the later of— 25
- “(i) **1 April 2007**; or
- “(ii) the date on which a collective agreement that replaces the existing collective agreement comes into force:
- New (unanimous)**
- “(ab) for an existing individual employment agreement to which **section 51** applies, **1 April 2007**;
- “(b) for all other existing employment agreements, the earlier of—
- “(i) the date on which the existing employment agreement is next amended; or 35
- “(ii) **1 April 2005**.”

Part 2
**Amendments to principal Act relating to sick leave
and bereavement leave**

- 8 New heading and section 61A inserted**
- The principal Act is amended by inserting, after section 61, 5
the following heading and section:
- “Relationship between public holidays and
other entitlements*
- “61A Sickness, injury, or bereavement on public holiday**
- “(1) This section applies to an employee who is required, or has 10**
agreed, to work on a public holiday but who does not work on
the day because—
- “(a) the employee—**
- “(i) becomes or remains sick or injured; or**
- “(ii) has a spouse or dependant who becomes or 15**
remains sick or injured; or
- “(b) the employee suffers or has suffered a bereavement as**
described in section 69(2).
- “(2) If this section applies,—**
- “(a) the public holiday must continue to be treated as a 20**
public holiday and not as sick leave or bereavement
leave for the employee; and
- “(b) to avoid doubt, the employee—**
- “(i) must be paid for the day in accordance with 25**
section 49 and is not entitled to be paid at time
and half in accordance with **section 50(1)(a)**; and
- “(ii) is not entitled to an alternative holiday under**
section 56.”
- 9 Proof of sickness or injury**
- (1) Section 68 of the principal Act is amended by inserting, after 30**
subsection (1), the following subsection:
- “(1A) <However,> <Despite subsection (1),> the employer may**
require proof of sickness or injury within 3 consecutive calen-
dar days if the employer—
- “(a) has reasonable grounds to suspect that the sick leave 35**
being taken by the employee is not genuine because
none of the grounds in section 65(1) are met; and

- “(b) informs the employee, as early as possible after forming the suspicion that the <sick> leave being taken is not genuine, that the proof is required; and
- “(c) agrees to meet the employee’s <reasonable> expenses in obtaining the proof.” 5

New (majority)

- (2) Section 68 of the principal Act is amended by repealing subsection (4), and substituting the following subsection:
- “(4) To avoid doubt—
- “(a) this section does not prevent an employer who is otherwise legally authorised to so require, from requiring an employee to establish that there are no relevant health and safety reasons or hygiene reasons that would prevent the employee from working: 10
- “(b) subsection (1) or **subsection (1A)** does not give the employer the right to require the employee to obtain the proof from a person specified by the employer.” 15

New (unanimous)

- 10 When payment for sick leave or bereavement leave must be made**
- Section 72(2) of the principal Act is amended by inserting, after the word “fails”, the words “, without reasonable excuse,”. 20

Legislative history

31 August 2004	Introduction (Bill 182–1)
7 September 2004	First reading and referral to the Transport and Industrial Relations Committee