



Submission

Of the

New Zealand Retailers Association

For the

Transport and Industrial Select Committee

On the

Holidays Amendment Bill 2010

September 2010

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Introduction

These submissions are presented by the New Zealand Retailers Association (“The Association”).

The Association is the largest Association representing the retail industry in New Zealand.

Our members include the major supermarket and general merchandise chains, specialised chains, traditional department stores and thousands of owner operators spread throughout the country.

Our membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.

Retail sales currently total some \$65b per annum and the industry employs approximately 325,000 people (20% of the workforce) in over 49,000 outlets spread throughout the country.

Background

Nationally, the retail sector is the largest in terms of turnover (second only to manufacturing), and the biggest employer group. The Association represents an industry that is not a 9am – 5pm, Monday to Friday, 5-day a week business environment. Staff working in retail may be full time, part time, fixed term or casual, and no matter if you’re a small employer or a large national chain, you may experience any combination, or all of these in your store/s. Employment legislation can cause complexities when applied practically in a retail environment and the Association operates an employment advisory service for its members to assist retailers to navigate through the numerous issues that arise. That service handles on average over 13,000 calls per annum.

Submissions

The Association is supportive of the purpose of the Bill which is to introduce changes that seek to provide greater choice for employers and employees, make the principal Act easier for employers and employees to understand and comply with, and improve the balance of fairness between employees and employers.

We generally endorse the Bill and recommend that it proceeds.

We have made comment on the main provisions of the Bill as follows:

- 1. New Relevant Daily Pay (RDP) meaning and provision of a new Average Daily Pay (ADP), *Clause 5***

The Bill removes the 4 week averaging formula and inserts a new 52 week average (ADP) which may be used in some situations for calculating pay for a public holiday, an alternative holiday, sick leave or bereavement leave. ADP may be used if “it is not possible or practicable to determine an employee’s” RDP or “the employee’s daily pay varies within the pay period when the holiday or leave falls”.

The word “or” allows for the ADP to be used where daily pay varies but where RDP could easily be calculated and we wonder whether this is actually intended. For example, an employee might work regular hours on different days of the week, or work to a pre-written roster. If the employer knows an employee would have worked eight hours on a particular day, say Wednesday, despite working six and five hours on the Tuesday before and the Thursday after respectively, pay for the leave should be based on the usual eight hour Wednesday. The “or” allows the employer to use ADP where it is not necessary.

If this was not the intention we suggest some careful rewording.

Additionally, this change does not remedy the double-dipping problems created by RDP for commission payments when the employee *works* on a public holiday. With RDP, including commissions, still the point of reference for calculating time and a half pay for work on a public holiday, nothing has changed here.

The effect of double dipping is a serious issue for the retail sector, which is likely the one area where commission employees typically work on a public holiday. This continued problem is a major one and needs addressing.

Our previous argument relating to the double dipping, from our August 2009 submission on the Review of the Holidays Act **is appended**.

Under the Bill, annual leave is still paid at the higher of ordinary weekly pay or the 12 month average, (section 21). This calculation has not got any easier and still allows for what has been termed ‘gaming’ – timing annual leave directly after a period of higher earnings (or shortly after a commission payment, for example).

One last observation relating to ADP is that those employers still operating a manual pay system will need to track and count actual *days* worked which is a more difficult and timely data collection than counting weeks.

We are supportive of a move to simplification but are not convinced that the intended simplification will be achieved by this Bill.

2. Clarifying determination of an ‘otherwise working day,’ including employee entitlements during a closedown *Clause 7*

This proposed clarification is helpful. It is as the Association has always interpreted this situation and, we believe, what was always intended.

3. Enable employee request for up to one week of annual leave to be paid out, *Clause 10*

We support the provision for an employee and employer to agree to trade for cash up to one week of annual leave entitlement, on the employee’s written request and with the employer able to decline.

The safeguards to ensure genuine, informed, agreement appear sufficient.

While the Bill makes provision for employers to put in place a policy on this issue, we would prefer to see only one request allowed per entitlement year. Several requests for one or two days at a time will not lead to simplification or to reduced costs.

4. Transferring observance of Public Holidays to another day, *Clause 12*

This restores the position to what it was prior to the November 2007 Supreme Court Decision and subsequent September 2008 Amendment. The protections for genuine agreement and employee entitlement are appropriate.

The Association supports this provision.

5. Allowing an employer to direct when alternative holidays may be taken if no agreement reached, *Clause 13*

This proposed change treats alternative holidays in the same manner as annual holidays, where no agreement can be reached about when the holiday will be taken.

The Association supports this provision.

6. Proof of sickness, *Clause 14*

The ability to request proof of sickness or injury earlier than three days already exists under the current Act, where the employer has reasonable grounds for suspecting abuse, informs the employee of that opinion and meets reasonable expenses in obtaining that proof. In practice this facility is not typically used. The ‘reasonable’ grounds will usually be enough for an employer to tackle this issue from a performance and possibly disciplinary angle, without incurring medical costs.

We are not confident the benefits of this change will outweigh the negative reaction from employees.

Employers are still unlikely to want to pay for many medical visits, particularly as a doctor's opinion, possibly days later, is unlikely to produce a definitive result. Genuinely ill employees – or those with sick children – may feel threatened or not trusted.

We do not see the need for this change and do not support it.

7. Increase maximum penalties, *Clause 15*

We have seen no evidence to suggest that penalties act as a deterrent to employers who may be tempted to abuse the law. They should, and we believe an increase in penalties may aid in forming a deterrent. The importance of compliance in this area of employee entitlement should not be downplayed.

We support this change.

The Association wishes to appear to speak to our submissions.

New Zealand Retailers Association
September 2010

Appendix 1

Extract on Relevant Daily Pay Calculations from New Zealand Retailers Association submission to the Department of Labour on the Review of the Holidays Act 2003

The Calculation Of Relevant Daily Pay (RDP)

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

RDP is the base for payment for all leave entitlements other than annual holidays. It is a confusing concept that ignores the purpose of penal rates and other additional wage related payments provided to reward work actually performed and results achieved. Such payments are fundamentally different from core wage entitlements.

RDP causes particular problems in the retail industry where sales incentives and commissions are sometimes paid. The Relevant Daily Pay calculation, when paid at one half time extra for working on a public holiday has the effect of 'double dipping' for a significant number of employees in the retail sector.

Take the example, (which is common in retail) where an employee is paid on a weekly or fortnightly base rate, and then in addition is paid a monthly commission based on sales for that month. When that employee works on a public holiday, and many retail employees do, then that employee is entitled to Relevant Daily Pay (including commission), relating to the time actually worked on the day, plus half that rate again. At the end of the month however the employee is paid a commission based on sales, including the sales for the public holiday, which has already been paid at half time extra.

The net result of this approach is that the employee receives two and a half times the commission for the public holiday.

Under the current rules, the only way to avoid this is to recalculate and adjust commissions paid at month end which becomes a complicated exercise. In many cases these calculations are beyond the scope of payroll packages, and it needs to be kept in mind that in some cases there are hundreds of employees involved.

*If the employee does **not** work on the public holiday, the employer will have to use the default 4-week average formula to determine the commission portion due for the day. This may bear little relation to what would have actually happened on the day and will be affected by the timing of commission cycles.*

The payment cycle for incentives is often separate from the wage payment cycle, further complicating the situation. Wages are usually paid weekly or fortnightly, but typically commissions are paid monthly after payment is made for the goods. In some cases, commissions may be paid on a three monthly or annual cycle.

Retail employers have to try to make sense of the Act and if the rate of RDP cannot be otherwise resolved they are required to apply the default formula. This requires the employer to calculate a nominal average daily rate using the employee's gross earnings for the previous four weeks. It is readily apparent that the rate of RDP may vary significantly depending on whether a commission payment was made in that four week period or not.

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

We previously supported a calculation formula presented by Business NZ, and consider this to be relevant and preferential to that currently used.

It is the adoption of a concept of Standard Daily Pay based on gross earnings in the last 4 full pay periods worked by the employee, less variable elements that are not common to every working day worked by the employee. This would have the effect of ensuring that Commission payments aren't paid twice.

On this basis, Standard Daily Pay would be calculated using the formula $\frac{a - b}{c}$

where:

***a** is the employee's gross earnings for the 4 pay periods before the end of the pay period immediately before the calculation,*

***b** is the total value of*

- penal payments,*
- overtime payments that are not part of the employee's regular pay,*
- productivity or incentive payments (including commissions) that are not part of the employee's regular pay*
- one-off or exceptional payments*
- discretionary payments that the employer under the terms of the employee's employment agreement is not bound to make.*

c** is the number of paid days in the 4 pay periods referred to in **a

Such a Standard Daily Pay concept could be used for sick leave, bereavement leave, public holidays observed and Alternative Holidays taken.

*Public holidays worked should simply entitle the employee to time and a half for any **time** actually worked, and regular payment for other actual entitlements earned on the day, eg commission on actual sales. (Plus, where the public holiday falls on a day they would otherwise work they will be entitled to an Alternative Holiday).*

Where payment of any component, eg commission, is usually paid on a different cycle, it should not be paid until the usual time, as specified and agreed in the Employment Agreement. (i.e. If commission for the month is typically paid at the end of the month, there is no need to complicate this calculation by requiring it to be paid with that week's base pay).

The following is a working example to explain the current impacts, and proposed application:

Current RDP Calculations

The employee earns

Base Rate	= \$13 / hour
Commission	= Average \$60/day (as an example)
Hours worked	= 8 hours/day
Calculation of RDP	= (\$13 x 8) + \$60 = \$104 + \$60 = \$164.00
Effective Hourly Rate	= \$20.50

Worked Example of The Current Situation

The retailer opens on a public holiday and the store achieves an “average” level of sales.

The employee receives

RDP	= \$20.50 x 8 hours x 1½ = \$246.00
Plus Commission for the day	= \$60.00
Total	= \$306
Effective Hourly Rate	= \$38.25/hr
+ Day in lieu RDP	= \$20.50 x 8 hours = \$164
Total value of the day	= \$470 = \$58.75/hr

RDP Calculation Solution

Because of the way the relevant daily pay is calculated, we have a “double dipping” situation in regards to the commission payments.

The intent of the law was to pay half as much again on the day worked, and give an alternative day off. Thus the person who **works** is paid for 20 hours, whereas the person who **doesn't work** is paid for the 8 hours they would have normally worked.

We would suggest that

In the situation where the employee works:

- The Relevant Daily Pay is calculated without past commissions
- The actual commission earned on the day is paid at the usual unit rate
- The day in lieu is paid at the historical relevant daily pay (this would also apply to those who don't work on the day but the day of the week is a normal working day for them).

Thus we have,

RDP(i) Including Commission	= \$164/day
	= \$20.50/hour
RDP(ii) Excluding Commission	= \$104/day
	= \$13.00/hour

The Employee Works the Public Holiday (8 hours)

RDP(ii) x 1.5 x 8 hours	= \$13 x 1.5 x 8
	= \$156
Plus Commission Earned on the Day	= \$60
Total	= \$216
Effective hourly rate	= \$27/hr
+ Day in lieu valued at RDP(i)	= \$20.50 x 8 hours
	= \$164
Total value of the day	= \$380 = \$47.50/hour

Therefore:

- 1) The person **who doesn't work** simply gets paid 8 hours by the full RDP (RDP (i)) or \$20.50/hr. This equates to \$164.
- 2) The person **who works** the day gets 1.5 times the base rate, plus the commission on the day, plus the day in lieu. This amounts to an equivalent of \$380 or \$47.50/hr.

This stops the current situation of "double dipping".

Note: While not relevant to this example, it is worth noting that because of the level of retail activity on most public holidays, the earnings per day (via higher commission payments) is greatly enhanced. This impacts significantly on the effective hourly rate.

We ask that the Advisory Group rigorously test any alternative solution, and in that regard, we offer our assistance in assessing the suitability for its application in the retail environment.