



New Zealand Chambers of Commerce Inc

Submission to

Ministerial Advisory Group

Review of the Holidays Act 2003

August 2009

Introduction

The New Zealand Chambers of Commerce (Inc), NZCCI, is an umbrella organisation serving the interests of 30 Chambers of Commerce nationwide. These, in turn, represent over 24,000 businesses around the country. While many of our members are in the SME category our membership includes most of the largest corporations in New Zealand.

We welcome this opportunity to provide input into the Review of the Holidays Act. NZCCI has been calling for a review of the Holidays Act for some time (e.g. in our 2008 Election Manifesto.)

General Comment

The Holidays Act has been problematic for businesses since its inception. Surveys of our members consistently find that the Act ranks amongst their most significant concerns. Specifically it has caused administrative costs and difficulties in a number of areas including calculation and payment of holiday pay and entitlements to casual workers. The Act also diminishes the level of workplace flexibility which is not only necessary to maximise business productivity and output but is also in the best interests of both employers and employees.

Generally, NZCCI believes that employers and employees should have the right to agree on holiday arrangements that suit both parties.

The Holidays Act is a classic case of a well meaning piece of legislation which in trying to address a range of circumstances creates unintended consequences and other problems elsewhere.

In this regard, we do not think that the Review's terms of reference are broad enough and in our view the Act needs a fundamental rethink. As the labour market has become more complex with, for example, the conventional

working relationship of “9 to 5 - Monday to Friday” becoming less common, writing legislation to adequately deal with all situations becomes more difficult to the extent that the question needs to be asked as to why there needs to be prescriptive regulation of holidays at all. There is a role for government in specifying holiday entitlements but within that we think employers and employees should be then given the right to negotiate whatever works best for that individual workplace. Other employment legislation could then provide any necessary protections. This is preferable to trying to prescribe detailed rules which will never be able to adequately cover each unique workplace circumstance.

Notwithstanding this view, our submission focuses on each of the topic areas as set out in the material provided by the Ministerial Advisory Group.

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

Consistent with the principle of supporting greater flexibility in the workplace, NZCCI supports the right of employers and employees to agree to trading annual leave for cash.

An Auckland Chamber of Commerce survey found clear support amongst both employers and employees for this¹. The key point being, however, it must be optional and mutually agreed between individual employers and employees i.e. it should not be at the whim of the employee.

Trading leave for cash could have benefits to both employer and employee. Provision of four week’s leave is often very difficult to accommodate especially for small businesses. The smaller the business and the fewer the employees, the more this is the case with pressure often put on the business owner and other employees to fill the gaps. From an employee’s perspective, many employees, especially lower income ones, would also often prefer to be able to trade the leave for cash (sometimes perhaps so they can afford a holiday in their remaining leave!)

On the other hand, there are cases where trading leave for cash would not be desirable - for neither employer nor employee. Cash flow problems and administrative complexities around record keeping mean some employers may have a preference for providing the full four week’s leave rather than paying extra cash and there are productivity and health benefits for both employer and employee which can result from having a full four week’s leave.

At the end of the day every employer and employees’ needs will be different and the best solution is to introduce the right to negotiate at the workplace level and let the employer and employee agree on what is best for them.

¹ To the question “Should an employee be able to trade the fourth week of annual leave for cash?”, 69.1% of employers and 67.3% of employees said yes.

It should not be forgotten that business originally opposed the decision to bring in the fourth week's annual leave in 2003. The move was effectively a government-imposed pay rise of roughly 2% which was very costly to employers. The Auckland Chamber's survey results, as well as other anecdotal evidence, suggest that employees are likely to take up the opportunity to trade the week's leave for cash. This implies that many employees did not want the extra week's leave that employers had to pay for. At the time, it was argued that the fourth week was necessary for regenerative reasons and employers would benefit from having more healthy and productive employees. If it is now not deemed so essential to have a fourth week's holiday, this makes a mockery of the original decision to impose the additional week.

If the right of employers and employees to agree to trading annual leave for cash is introduced (as we think it should be), government would need to give careful consideration to a number of things around accruals and the tax implications of the swap. For example the extra week paid as cash may be taxed at a higher rate. Also the rate the extra week is cashed in at will be an issue if a pay rise has occurred in the intervening year. There is also the issue of allowing the leave to accumulate i.e. should several weeks leave accumulated after several years be able to be cashed in and if so at what rate (current salary or average over the period etc).

Why limit it to just one week? There is also a case for giving employers and employees the ability to agree to trade all holiday leave on occasion if that is what suits them.

In conclusion NZCCI supports the proposal to give employers and employees the right to trade the fourth week, or part of it, for cash.

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

Consistent with our overall stance, transferring the observance of a public holiday listed in the Act to another day should only be allowed with the agreement of both the employer and employee. Obviously there will be some workplaces where this would be appropriate and others where it would not. We would totally oppose the right to transfer being given to employees alone.

An Auckland Chamber of Commerce survey found clear opposition to the proposal if it was up to the employee alone and revealed that three quarters of respondents said that it is necessary in their workplaces that all employees observe the same public holidays².

The most obvious reason as to why transferring observance of a public holiday would not work is that most businesses that close on public holidays (the majority) would not be able to accommodate someone wanting to work

² 74.2% of respondents replied yes to the question, "Is it necessary in your workplace that all employees observe the same public holidays."

on that public holiday while they are closed. The right to take annual leave on any day exists for those wishing to have a holiday on a culturally significant day.

Having employees take days off at a time which is inconvenient to the employer can be problematic and while the employer would have the right to say no just as s/he has the right to approve or otherwise an annual leave day at an inconvenient day, employers must not be allowed to be pressured into allowing large numbers of workers to take certain days off. There would also be additional administrative and compliance costs keeping track of days and holiday pay owing.

On the positive side, increased flexibility on the part of the employer would enhance both workplace relations and productivity.

On balance employers and employees should be allowed to agree to transfer the observance of a public holiday to another day if it suits both parties but the employer must retain the right to say no.

If the change were introduced, obviously those workplaces which *do* allow the transfer should not be required to pay penal rates for employees who voluntarily work on a public holiday in exchange for their special day.

3. The accumulation of alternative holidays (days in lieu)

Currently when an employee works on a public holiday, an alternative day off is able to be accrued and taken on a day agreed to by the employer and employee. If a day cannot be agreed, however, the employee has the right to nominate the day. Clearly this is unfair for the employer and can severely disrupt the business operations. It is an anomaly that must be fixed.

Introducing the ability to accumulate these days in lieu beyond the existing 12 month period could make it easier for both the employers and employee to find a suitable date. It would also go some way toward increasing the flexibility for individual workplaces to decide what is best for them. On the other hand many employers would want some kind of limitation as to when the day in lieu can be taken to prevent the alternate days being accumulated over a long period so that when the person actually takes them there is a big liability. There should also be consistency between annual and public holidays with regard to accumulation of holidays.

NZCCI recommends that the ability to accumulate alternative holidays and the day taken should be able to be agreed to by both the employer and employee. The employer must retain the right to say no to certain days.

4. Calculation of relevant daily pay

The formula for relevant daily pay causes significant administration costs and difficulties for many businesses. It is used to ascertain the amount of pay that an employee would have received had they worked the day concerned when taking public holidays or leave. The Act uses four defined terms of rates for pay for leave and holidays including relevant daily pay, average weekly earnings, gross earnings and ordinary weekly pay.

The process is less of a problem for businesses where employees earn a salary or a regular amount weekly but it causes major difficulties for the increasing number situations where employees are outside the traditional '9 to 5, Monday to Friday' model where daily pay fluctuates e.g. shift workers and commission earners.

It is difficult to offer a legislative solution to this problem as circumstances will vary from work place to work place and employee to employee. It may be that rather than prescriptive regulation, giving employers and employees the right to negotiate whatever works best for that individual workplace is the only solution.

Notwithstanding this, using a single rate based on historic earnings in the previous 12 month period would be an improvement on the status quo. This provides certainty and accurately reflects the rate at which the most recent leave was accrued. The problem with a four week period is that it is susceptible to a "blip" such as a one-off bonus.

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

Casual employees are those whose hours are "intermittent and irregular" There is an important distinction between casual and part time workers. Casual employees are paid holiday leave of an additional 8% of their gross earnings as an alternative to paid leave. This calculation works relatively well in practice and it does not have the same complications and compliance costs as say the calculation of relevant daily pay as discussed above.

However, there is an issue as to whether the employers and employees would prefer an alternative arrangement where the employee receives days off rather than cash. The issues are the same as those around trading leave for cash generally and we think there is a case for giving individual employers and employees the right to negotiate what works best for them.

We do not think that casual workers need to be given paid sick leave and other entitlements under legislation.

6. Treatment of Public Holidays

There are 11 public holidays under the Holidays Act. There is a large body of opinion which says that these days should be replaced by 11 statutory annual leave days which can be taken on days agreed by the employer and employee. There are arguments for and against this. Most of the arguments against it are for sentimental or religious reasons with some days being more relevant than others to different people. This is a sensitive area and NZCCI does not have a mandate to recommend change but we support a public debate on the issue.

Again, because of the sensitivity, we do not see a compelling need to replace any of the eleven days with alternative public holiday days which have been floated.

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

NZCCI believes that any business wanting to trade on Easter Sunday should be allowed to. We acknowledge the vexed issues as to the cultural, social and religious significance of Easter Sunday for many people, as well as the employment issues associated with the day not being a public holiday and employees wanting to be with their families on this day.

With regard to the former, shops and businesses will only open their doors on this day if there is a demand and many customers will chose not to shop or eat out etc because of the day's significance to them. Consequently many businesses will remain closed. Certain sectors and geographical areas, e.g. areas with high visitor numbers, are more likely to want open. We do not believe there is a case for preventing such businesses from opening in these circumstances. If people want to shop on Easter Sunday retailers should be allowed to meet that demand.

We oppose Easter Sunday becoming a public holiday under the Holidays Act. We think that the existing 11 statutory holidays is sufficient. With regard to the issue of how to treat employees working on Easter Sunday, consistent with our overall stance, we consider that employers and their staff should be able to work out between them the optimal employment arrangements for this day. Good employers will accommodate those staff who do not want to work on Easter Sunday for family or religious reasons against those who don't have a problem. There is scope for such an arrangement, including provision of additional compensation or entitlements, to be formalised into employment agreements.