

Submission

By the

National Association of Retail Grocers and
Supermarkets of New Zealand

to the

**Transport and Industrial Relations
Select Committee**

on the

Holidays Amendment Bill

September 2010

PO Box 1925

Wellington

Ph: 04 471 1338

Fax: 04 496 6550

1. INTRODUCTION

- 1.1 This submission is made on behalf of the National Association of Retail Grocers and Supermarkets of New Zealand (NARGON), an organisation representing approximately 40% of New Zealand's food retailing industry.
- 1.2 NARGON has around 500 retail members who are owner-operators of retail food warehouses, supermarkets and grocery and convenience stores. In the main NARGON's retail members are aligned to a banner advertising group of stores such as Pak'N Save, New World, Fresh Choice, Super Value, Four Square and Shoprite.
- 1.3 NARGON is pleased to support this bill which should help to overcome some of the difficulties that employers in the retail grocery industry have recently experienced.
- 1.4 However, NARGON has concerns about aspects of the proposed legislation that if considers some further amendment would improve.

2. RECOMMENDATIONS

It is recommended that:

1. Section 9 be deleted and the reference to relevant daily pay in section 5 of the principal Act be removed
2. The deleted section 9 be replaced by new section 9A (which would then become section 9), with corresponding consequential amendments
3. Section 21 of the principal Act be amended by omitting paragraphs (a) and (b) of subsection (2) and rewording subsection (2) as follows (with consequential amendments):

21(2) *Annual holiday pay must be for the agreed portion of the annual holiday entitlement and at a rate that is based on average daily pay*

4. Paragraph (b) of new section 11(1), together with paragraph (c), be deleted and paragraph (b) reworded as follows:

11 (1)(b) average daily pay under section 9.

3. COMMENT

Clause 2 Commencement

- 3.1 The reference in subclause (1) to section 7(2) should be a reference to clause 7(2).

Clause 5 new sections 9 and 9A substituted

- 3.2 The retention of the section 9 relevant daily pay (RDP) formula (though amended) adds an unnecessary complexity to the calculation of leave and holiday payments whereas use in every case, of the proposed average daily calculation would simplify matters for all concerned. Payment on the basis of average daily pay would avoid the miscalculations too often a consequence of the difficulties associated with RDP. It needs to be remembered that the RDP concept was introduced into the 2003 Holidays Bill following the select committee process, with no ability to provide evidence of likely adverse effects. Since the bill became law both employers and pay roll companies have struggled to comply with the RDP requirement since this involves working out what each individual employee must be paid for public and alternative holidays sick or bereavement leave. A time-consuming process of this kind benefits no-one.

It is recommended that section 9 be deleted and the reference to relevant daily pay in section 5 of the principal Act be removed.

3.3 Average daily pay as set out in a new section 9A is a relatively simple concept, enabling employees to be paid for holidays and leave on the basis of the amount they have earned during their period of employment, whether this is 52 weeks or some lesser number. It avoids the problems inherent in RDP while allowing for extra earnings such as overtime and productivity or incentive-based payments to be taken into account. What is paid for holiday and leave taking is therefore a reflection of actual employee earnings over the period in question; it is a less time-consuming calculation that will ensure leave and holiday payments are made with far greater accuracy than is often possible at present. For that reason, as recommended below, it makes sense also to amend section 21 of the principal Act so that average daily pay can be used as the basis for calculating annual holiday payment as well. That would as simplify the whole process of holiday and leave payment, recalling that simplification was principal Act's stated purpose.

It is recommended that the deleted section 9 be replaced by new section 9A (which would then become section 9).

It is recommended that section 21 of the principal Act be amended by omitting paragraphs (a) and (b) of subsection (2) and rewording subsection (2) as follows (with consequential amendments):

21(2) Annual holiday pay must be for the agreed portion of the annual holiday entitlement and at a rate that is based on average daily pay.

Clause 6 New section 11 substituted

3.4 On the basis of the above discussion, the reference to RDP in new section 11(1) (b), together with paragraph (c) should be deleted, and paragraph (b) reworded:

(b) *average daily pay under section 9.*

It is recommended that paragraph (b) of new section 11(1), together with paragraph (c), be deleted, and paragraph (b) reworded:

11 (1)(b) *average daily pay under section 9.*

Clause 10 New heading and sections 28A to 28F inserted

3.5 The right for employees to seek a payout of any or all of their fourth week's annual holiday is supported. For many years – even before all employees were granted a fourth week of annual holiday - employers have fielded requests from employees wanting some of their annual leave to be paid out. Now that a fourth week of leave is available (ILO Convention 132 requires three weeks' annual leave), it has become reasonable to allow employers to respond positively to such requests if they wish to do so. The amendment hedges the right to request with a number of protections that will ensure no employee is required to have all or any of the fourth week's leave paid out. But in any event, it needs to be recognised that a leave pay out is a cost to the employer who effectively pays the employee both for being on 'holiday' and for being at work.

Clause 12 New sections 44A to 44C substituted

3.6 Prior to the decisions of the Court of Appeal and the Supreme Court in *NZ Airline Pilots Assn v Air NZ* (respectively [2006] ERNZ, 956 and [2007] NZSC 89), the ability to transfer the public holidays listed in the Act to other days had been widely accepted. Following those decisions, transfer as previously envisaged was no longer possible, causing difficulties for continuous process industries in particular. Consequently, the inclusion in the principal Act of a clear ability to transfer is to be welcomed as clarifying what appears was always meant to be permissible. A clear ability to transfer will allow employers

and employees to agree to working arrangements that make sense for industries beyond those operating on an 8.30/9.00 a.m. to 5/5.30 p.m. basis.

Clause 14 Proof of sickness or injury

- 3.7 Under the principal Act current subsection (1A) of section 68 already allows an employer to ask for proof of sickness or injury after a one-day absence. The essential difference between the amendment and current subsection is that under the amendment, the employer does not have to have 'reasonable grounds to suspect' a misuse of sick leave. It would seem this omission is the likely cause of the objections that have been raised to the amended version of (1A) and yet it is most unlikely that any employer would ask – and pay – for proof of sickness or injury without good cause to suspect. Employers do not spend their time setting traps for employees since unhappy employees do not make for a productive workplace. However, the amendment may well help some employers who are experiencing difficulties with frequently absent employees and is therefore supported.