



## Enforceable Undertaking under section 223B of the Employment Relations Act 2000

### 1. Introduction

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- 1.1. The Labour Inspectorate ('the Inspectorate') is conducting a programme of compliance audits in respect of the *Holidays Act 2003* ('the Act'), and other applicable employment legislation.
- 1.2. As part of this programme, the Inspectorate identified all McDonald's Restaurants in New Zealand as potential auditees.
- 1.3. Discussions with McDonald's Restaurants (New Zealand) Limited ('the employer') identified that the employer was already undertaking their own review.
- 1.4. The Inspectorate worked with the employer to determine that the criteria addressed in their review met the Inspectorate's expectations and gained the employer's agreement to provide the Inspectorate with the following:
  - regular progress updates
  - results for review for testing
  - remediation and rectification information and evidence.
- 1.5. The review is complete; areas of non-compliance have been identified by the employer.
- 1.6. The employer shared the findings from the review with the Labour Inspector and the subsequent breaches found by the employer are listed in 2.1.
- 1.7. Discussions with the employer have culminated in this Enforceable Undertaking ('undertaking') being offered to Kim Baldwin, a Labour Inspector, for acceptance under s223B of the *Employment Relations Act 2000* ('the employer').

# Out of Scope

### 2. Breaches

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- 2.1. The employer acknowledges that the following breaches of the Act have occurred.

- 2.1.1. Section 16 Entitlement to Annual Holidays

**s 9(2)(b)(ii)**

- 2.1.2. Section 21 Calculation of annual holiday pay and section 22 calculation of annual holiday pay if holiday taken in advance

# s 9(2)(b)(ii)

- 2.1.3. Section 24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen and section 25 Calculation of annual holiday pay if employment ends before further entitlement has arisen

## s 9(2)(b)(ii)

- 2.1.4. Section 49 Payment if employee does not work on public holiday

## s 9(2)(b)(ii)

- 2.1.5. Section 56 Alternative holiday must be provided if employee works on public holiday and section 60 Payment for alternative holiday

## s 9(2)(b)(ii)

- 2.1.6. Section 71 Payment for sick leave and bereavement leave.

## s 9(2)(b)(ii)

### 3. Actions to Rectify Breaches

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- 3.1. The employer will rectify the breaches listed in 2.1 of this undertaking and take the actions listed below, being ones that the Labour Inspector determines are appropriate having regard to the nature of those breaches.
- 3.1.1. For the purposes of this review and calculation of any potential arrears, the employer is required to review records for all current and past employees from **1 November 2009**.
- 3.1.2. All entitlements must be calculated sequentially by date as each entitlement affects the gross earnings of the next one calculated.
- 3.1.3. Review the wages and time records and holiday and leave records for all current employees and past employees and identify periods of:
- Sick Leave
  - Bereavement Leave
  - Public holidays not worked and paid for
  - Alternative holidays provided.

- 3.1.4. Calculate the correct Relevant Daily Pay (RDP) for all of these periods, or if RDP is not appropriate, calculate Average Daily Pay (ADP) for these periods. Where the employer does not have the information to correctly apply RDP or ADP then estimation will be used. When estimation is used the employer will follow the principles published in the attached "Position Statement – Estimating the value of Holidays Act 2003 Underpayment" (Appendix A). When ADP is used, it **must** be calculated using the formula set down in s9A of the Act:

*The employee's average daily pay must be calculated in accordance with the following formula:*

$$\frac{A}{B}$$

where—

**a**

*is the employee's gross earnings for the 52 calendar weeks before the end of the pay period immediately before the calculation is made*

**b**

*is the number of whole or part days during which the employee earned those gross earnings, including any day on which the employee was on a paid holiday or paid leave; but excluding any other day on which the employee did not actually work.*

- 3.1.5. Review the wages and time records and holiday and leave records for all current employees and past employees and identify periods of annual holidays.
- 3.1.6. Calculate the correct holiday pay for these employees. This **must** be calculated using the formula set down in s21(2)(b) or s22(2)(b). OWP **must** meet the criteria set down in s8, and when a calculation is done it **must** be using the formula set down in the same section. s 9(2)(b)(ii)

**s 9(2)(b)(ii)**

# s 9(2)(b)(ii)

- 3.1.7 3.1.7. Calculate the correct termination pay of all employees who have ended their employment from 1 November 2009, ensuring that:
- the correct holiday pay has been calculated
  - the notional public holidays have been added (if any)
  - the correct alternative holiday payments (if any) have been calculated
  - the correct gross earnings figure has been applied.
- 3.2. The employer will provide the following evidence that it has remedied the breaches listed by the Labour Inspector in 2.1.
- 3.2.1. List of current employees and the arrears outstanding to them.
- 3.2.2. List of employees who have ended their employment from 1 November 2009 and the arrears outstanding to them.
- 3.2.3. From the lists provided in 3.2.1. and 3.2.2. the Labour Inspector will select a sample of employees. For the employees selected the employer will provide an actual calculation of each of the specific leave entitlements; namely
- Sick Leave
  - Bereavement Leave
  - Public holidays not worked
  - Alternative holidays provided
  - Notional Public Holidays (where applicable)
  - Holiday Pay
  - Termination Pay.
- 3.2.4. Holiday and leave records of affected employees showing that their leave entitlements have been correctly allocated.
- 3.3. Within 60 days of the completion of this undertaking, the employer agrees to enter into a subsequent Enforceable Undertaking with the Labour Inspector which encompasses a remedial plan to make payment of identified arrears to current and past employees.
- 3.4. The employer will ensure that the actions listed in 3.1 are completed, and the evidence listed in 3.2. is provided to a Labour Inspector, **by 5:00pm on 1 October 2019.**
- 3.5. The inspector may agree to a process of renegotiating the completion date specified in 3.4. should the employer provide significant and reasonable grounds for failure to meet that date.



## 4. Acknowledgements

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- 4.1. The employer has actively engaged with the Labour Inspector, and has been proactive in identifying areas of non-compliance and taking active steps to ensure employees receive their entitlements.

The employer acknowledges the following.

- 4.2. That this undertaking is given willingly by the employer and it has been given the opportunity to discuss and negotiate with the Labour Inspector about how the breaches can be rectified; and that the agreement reached with the Labour Inspector is reflected in the wording of the actions listed in 3.1.

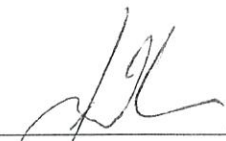
s 9(2)(b)(ii)

- 4.4. The employer has been provided a copy of the attached position statement "Accounting for Overpayments through Holidays Act Re-calculations" (Appendix B) and advised by the Labour Inspector that they cannot offset overpayments against underpayments, and that any deductions to an employee's pay needs to comply with the *Wages Protection Act 1983*.
- 4.5. That the employer will comply with its obligations of "good faith" pursuant to s4 of the *Employment Relations Act* in relation to their employees (or representatives).
- 4.6. That the use of strict rules will not ensure minimum entitlements are met for all employees in all circumstances. The employer will therefore be open and transparent with employees as to how calculations have been performed and have a process in place where employees can raise questions and or provide additional information that the employer will consider in good faith.
- 4.7. That the Labour Inspector has provided information about the full effect of not complying with this undertaking and that in the event this undertaking is not fully met the following enforcement actions can occur.
- A compliance order sought at the Employment Relations Authority under s137 of the *Employment Relations Act*, along with interest on any money owed, and a penalty under s135 of the *Employment Relations Act* not exceeding \$10,000 in the case of an individual and not exceeding \$20,000 in the case of a company or other corporation.
  - In the case of the undertaking relating to a monetary figure payable, seek enforcement under s223C and s141 of the *Employment Relations Act* as if an order which can be enforced in the District Court.
  - Should a compliance order from the Employment Relations Authority fail to be complied with, Action can sought at the Employment Court who can order: interest on money owed; a fine not exceeding \$40,000; sequestration of property; and imprisonment for up to 3 months.
- 4.8. That this undertaking does not affect a Labour Inspector's power to investigate future conduct of the employer, or to take any Action or to exercise any power under the *Employment Relations Act* and any other legislation listed at s223(1)(a) of the *Employment Relations Act*.

- 4.9. That the information held by the Ministry of Business, Innovation and Employment pertaining to the employer may be subject to release under the *Official Information Act 1982*.
- 4.10. That this undertaking does not prevent an affected employee or their representative from taking their own action if the Labour Inspector has chosen not to enforce or seek remedies to the extent that the legislation allows them to do so.

Signed by (or on behalf of) **the employer**

Printed Name: David Howse

Signature: 

Dated (Day/Month/Year) 6 / May / 20<sup>19</sup>

Accepted by the **Labour Inspector** pursuant to s223B *Employment Relations Act 2000*

Signed by the Labour Inspector

Printed Name: Kim Baldwin

Signature: 

Dated (Day/Month/Year) 7 / May / 20<sup>19</sup>



October 2017

## Position Statement- Estimating the Value of Holidays Act 2003 Underpayments

### Introduction

It has become apparent that some employers in New Zealand have been underpaying minimum holiday entitlements through the end-to-end pay systems they have implemented in their businesses. Sometimes the amount of arrears involved is relatively modest for each individual employee but for employers with larger workforces the aggregate amount can involve larger amounts.

The entitlements contained in the Holidays Act are minimums that cannot be contracted out of. This means that where there is underpayment arising out of non-compliance with the Holidays Act, the only compliant approach is to fully calculate and pay each employee's Holidays Act arrears. This is the default stance which the Labour Inspectorate adopts. However, this approach may be impossible due to situations such as records failures, or impractical due to excessive time delays or cost implications. In these cases, an alternative approach may be to estimate the value of Holidays Act underpayments, and make payments in accordance with this estimation.

Although estimation may be a practical way for reducing the employer's risk in circumstances where full compliance is impossible or impractical, estimation cannot be guaranteed to achieve compliance. It should be noted that estimation of entitlements is not the way to comply with the Holidays Act going forward and what is being referred to in this statement is the estimation of arrears for past failures to comply with the legislation.

### Estimation Instead of Exact Calculation

The minimum entitlements contained in the Holidays Act cannot be contracted out of. Therefore, any payment less than the full entitlement cannot be 'settled' by agreement between employer and employee.

It is the responsibility of employers to provide for at least the minimum Holidays Act entitlements. However, employees and employers may agree to provisions that are better than the minimum entitlements, and these provisions will be compliant.

For most employers who have found themselves non-compliant with the Holidays Act, being compliant will involve re-calculating each individual employee's entitlements and paying the resulting arrears. However, in certain cases, records may be missing, or the cost or time involved in re-calculation may be so great that it adversely affects business sustainability and means employees either do not receive their full entitlements at all, or, have to wait years to do so. In such cases a better outcome may be achieved by calculating an estimated figure of underpayment for each employee and then adding a margin to make it more likely that employees are not disadvantaged. In other words, the estimated arrears are likely to meet or exceed minimum entitlements.

Acceptance of such an estimated amount by an employee can avoid the need to perform complex re-calculation across an entire workforce. However, it does rely on on-going acceptance by the employee, and genuine attempts at a reasonable calculation by the employer.



Employers need to be aware that as employees and employers are not able to contract out of their minimum entitlements, employees do not have to accept an estimated amount. Where an employee accepts an estimate but later establishes reasonable grounds that they have not received their full entitlement they may seek to have their arrears repayment revisited. In the case where the estimated arrears show an underpayment compared to the actual entitlement, the employee is entitled to receive payment for the balance of the full amount of their minimum entitlements under the Holidays Act. This is so even if they have previously received payment of a reasonably estimated amount.

Employers have varying employment conditions, business systems and Holidays Act compliance issues. This means there is not a single precise method for arriving at an estimate that would make sense in all situations. What follows are guiding principles and a general approach which may assist parties to arrive at estimated figures which are more likely to be transparent, fair, acceptable, and ultimately enduring to employees and their representatives. The resulting outcomes could be more likely to be compliant with the Holidays Act, however without performing the exact calculations for each employee, this can never be guaranteed.

#### Principles

- Employers, employees and their representatives must engage with each other in *good faith*. Where the parties are working in an open, honest and transparent manner then arriving at a solution that is acceptable to many (or most) is far more likely.
- It is important that there is *early engagement* with employees and their representatives about the issues and options for addressing the non-compliance. Creating a methodology in isolation and then presenting it to employees as a 'take it or leave it' deal is likely to lead to reduced uptake by employees. Wherever possible, agreement should be sought with employees (and representatives).
- It must be clear that *employees do not have to accept an estimated figure* and a process should be made available to those that do not agree to an estimated figure.
- Where possible *estimation should be grounded in calculations* which have been performed in full, for sample employees. Employers should be prepared to disclose the rationale behind their estimates and be open to employees who are concerned that their particular situation may not fit within the assumptions.
- Once figures are estimated, an additional *margin loaded* means that the amounts paid to employees are more likely to meet or exceed the minimum entitlements if they were calculated in full. The loading of a margin also recognises the cost to affected employees of not having the use of money they were entitled to.

#### An Approach

Before attempting remediation the employer must be sure they fully understand the compliance issues they have with the Holidays Act, and how these issues are to be remedied. To be clear, estimation of entitlement is not the way to comply with the Holidays Act going forward and what is being referred to in this statement is the estimation of arrears for past failures to comply with the legislation.

It is worth noting that where there have been payments in excess of minimum entitlements these payments cannot be offset against underpayments as a matter of course. If such situations present then employers need to consider their obligations under the Wages Protection Act 1953.

Care should be taken to consider non-compliance issues that impact entitlement to leave itself as well as the payment for the leave. For example it may be that employees have not been allotted all the alternative holidays they are entitled to and so their balances need to increase.



Arrears of wages (including Holidays Act entitlements) can be sought back for six years and so the period over which any working should be performed is the past six years, on the presumption the non-compliance and employment goes back six years.

- Identify what compliance issues exist (eg. which sections of the Holidays Act have been breached).
- Identify what needs to change to ensure compliance in the future, and plan for the remedy.
- Identify what needs to change to ensure recalculations are compliant.
- Create a list of all employees (past and present) that could potentially have been affected by the non-compliance.
- Employer, employees and their representatives engage on the methodology for arriving at estimates and consider the types of employees the business has and the nature of the Holidays Act non-compliance in order to decide relevant groupings of employees. The involvement of employees and their representatives in this stage of the process is more likely to lead to estimates that are acceptable for affected employees and therefore ultimately sustainable.
- Some groups of employees are likely to be more or less affected by the non-compliance. For example, issues around inclusion of certain allowances in the gross earnings may be a bigger issue for those working as say sales reps versus those working in despatch. Another example could be that a change in pay conditions some time previously means a more pronounced effect for those that have been employed for longer in comparison to those who have been employed more recently.
- For each group select a sample of employees on which to perform full calculations.
- Document the decisions that have been made about the groupings and the samples selected.
- Perform the full calculations for the sample employees.<sup>1</sup>
- Analyse the outcome of the sample employees. If there are big variations in underpayments within the groups selected, consider what might be causing this and decide whether this means different groupings are required. If different employee groupings are decided, select further samples within these groups and perform full calculations for those selected.
- Using analysis of the sample calculations determine a mechanism for estimating underpayments. How this works will largely depend on the particular non-compliance. For many Holidays Act breaches the length of service and level of remuneration will influence the underpayment so would often be factors in arriving at a fair estimate.
- Where a margin is to be provided for extra assurance, determine a relevant way to add it to the estimated underpayment. For example where certain types of overtime have been left out of holiday pay calculations one way to add a margin could be to add a percentage to the estimated arrears. Another example could be where the non-compliance may be around non-payment for public holidays due to a lack of understanding around otherwise working days for employees with variable working patterns, the margin could be to assume that the employee would have been entitled to all public holidays.
- Ensure there is an internal process available for (and communicated to) employees who do not agree to an estimated figure and ask to have their entitlements calculated in full. It is likely that such calculations will take time and involve engagement with the individual employee (or their representative).

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<sup>1</sup> It would be expected that the sample employees for who full calculations have been performed would receive payment of no less than their full entitlement as calculated.

- Upon acceptance by any employees – ensure that detailed records are retained of how the estimate was calculated, the resulting payments and the fact of acceptance.

#### Note for employees

If Holidays Act non-compliance is identified in your workplace and affects you, remember you do not have to agree to an estimated amount.

Should your employer come to you with a 'take it or leave it' offer where the above principles and approach has not been used then you may want to seek independent advice.

#### Conclusion

The principles and approach described above are meant to assist employers and employees where large and complex repayment calculations have arisen due to systemic non-compliance with Holidays Act requirements. This is in particular where the non-compliance occurred due to misapplication of end-to-end business and pay systems. This process will not be an appropriate response to claims by individual employees where the issues are not systemic, or for issues that can be dealt with in the normal course of business. The contents of this statement are intended to help employers and employees arrive at repayments which are practically able to be calculated in a timely manner without prohibitive cost and lengthy time delays.

It is important to note that where this approach is used, it will not be possible to be absolutely certain that each employee has received their proper entitlement. This means that even after an agreement has been reached, there is some risk that further action by, or on behalf of, an employee may occur.

## Appendix B



May 2018

### Position Statement -

#### Accounting for Overpayments through Holidays Act Re-calculations

This statement sets out the Labour Inspectorate's position on historical re-calculation of leave entitlements, including how historical overpayments can be considered when performing Holidays Act 2003 remediation.

##### Key Points

- When there are overpayments<sup>1</sup> identified these cannot be unilaterally offset or deducted from an employee's wages<sup>2</sup>.
- The gross earnings figures used through re-calculations do not have to include the amounts which are genuine and mistaken overpayments in excess of contractual or statutory entitlements.
- Employers should consult with their employees, on the identification and treatment of any such overpayments before any readjustments or reductions to historical gross earnings figures occurs.

##### Background

Through exercises undertaken by employers to re-calculate Holidays Act entitlements, historical genuinely mistaken overpayments (in excess of contractual or statutory requirements) to employees (as well as underpayments) can be identified. Where such overpayments are identified there are two aspects to consider.

##### 1. Treatment of the overpayment itself

Employers are generally prohibited from unilaterally offsetting the value of any overpayment against any underpayment (sometimes referred to as 'netting'). The exceptions are set out in the *Wages Protection Act 1983*<sup>3</sup>, which allows employers to make deductions for certain types of overpayments in limited circumstances.

An employer may deduct an overpayment from wages if they have sought and received the written consent of the employee in advance of making the deduction<sup>4</sup>. In the absence of written consent to make a deduction, an employer who wishes to recover overpayments may seek independent legal advice about debt recovery options.

<sup>1</sup> Outside of an overpayment that occurred due to absence without leave, strike, lock out or suspension.

<sup>2</sup> As per section 86 of the *Holidays Act 2003*, holiday and leave pay is treated as wages.

<sup>3</sup> Section 6 of the *Wages Protection Act 1983*.

<sup>4</sup> Permitted by section 5 of the *Wages Protection Act 1983*.

<sup>5</sup> Note (in addition to the requirement for the employee's written consent) any deduction must not be unreasonable and where it is a general deductions clause in the employee's agreement there must also be consultation before the deduction is made.



## 2. Treatment of the overpayment in Holidays Act Re-calculations

Gross earnings are the basis for many of the calculations under the *Holidays Act 2003*. Gross earnings are defined in section 14 of the *Holidays Act* as "...all payments that the employer is required to pay the employee under the employee's employment agreement...".

The Labour Inspectorate's position is that the gross earnings figures used for remedial holiday pay calculations may be adjusted so that genuine mistaken overpayments in excess of contractual and statutory entitlements are not included in the ongoing calculations.

There is no case law on the practice of leaving overpayments out of gross earnings for re-calculations. While employers may, after consultation, adjust gross earnings figures to account for overpayments, employers are not required to make such re-calculations.

### Duty of Good Faith and Consultation

The duty of good faith applies to dealings under the *Holidays Act*, including the assessment of defining and adjusting gross earnings. Adjusting historical gross earnings figures to account for overpayments impacts the future value of holiday entitlements and so, is of significance to affected employees.

The Labour Inspectorate's position is that the duty of good faith requires employers to consult with affected employees before any overpayments can be said to be genuine and mistaken and, accordingly, before any proposed adjustment of gross earnings to account for overpayments is carried out.

Employers who do not address this issue in good faith, including consultation, face an increased risk of action being taken against them by affected employees.

Consultation should involve:

- informing affected employees that there is an apparent overpayment and the reason for it
- discussing what any proposed adjustment might look like for the employee
- listening to what the affected employees have to say
- considering the responses
- and then deciding what will be done, including seeking to reach agreement with the affected employees, and any dispute resolution processes that may be needed.

### Note for Employees

If your employer seeks your consent to deduct a genuine mistaken overpayment from your wages you are not obliged to give your consent. If you have provided written consent to your employer, you may vary or withdraw that consent at any time by giving written notice to your employer.