MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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LABOUR INSPECTORATE
FAIR WORKPLACES

Managing a "Payroll" Case

Labour Inspectorate

Contents

Introduction

The purpose of this Guide is to outline the approach an Inspector should take when managing a case that meets the criteria to have "Payroll issue" selected as a strategic focus in TIKA[1]. It sits alongside the Labour Inspectorate's Investigation & Enforcement Guide and processes in Process Manager.

From November 2015 to 30 June 2020 the Labour Inspectorate had a specialist team known as the Payroll Team (referred to in this Guide as "the team") that focused on investigating and enforcing systemic Holidays Act issues. The approach described in this Guide reflects the way the team managed proactive payroll audits and watching brief cases. It is expected that Inspectors around the regions will manage their cases in a way that it is consistent with approach described in this Guide. To help achieve consistency the team established a standard set of templates for use in this work. The relevant templates are available in TIKA.

Example documentation is provided in Appendices 1 to 7.

Background

From about 2014 the Labour Inspectorate became aware that issues with holiday and leave calculations had resulted in many employers failing to meet the requirements of the Holidays Act 2003 (the Act). Holiday and leave payments and entitlements were being miscalculated and often underpaid. It also became apparent that many employers were unaware of their non-compliance, as they assumed that their payroll system automatically took care of their compliance requirements. In any event, employers remain responsible for ensuring their compliance with the Act, regardless of whether or not they are using a computerised payroll system or a third-party payroll provider.

Many aspects of the Act require employers to make judgements based on an individual employee's working arrangements and pay, rather than being prescriptive and easily systematised. There is often a need for employers to engage with both their employees and with their payroll system to ensure compliance. This is particularly the case for employers with employees who:

- work variable hours and/or
- receive additional pay on top of their normal wages or salary – eg. Commission payments, overtime and/or allowances.

When breaches are compounded across a large number of employees the cumulative effect in terms of underpayments can be substantial. Given this, and the Inspectorate's role to contribute to workplace productivity through fair treatment of workers and fair competition between businesses, "Payroll" has been a strategic focus area for the Inspectorate. This fits with the Inspectorate's focus on systemic breaches, alongside worker exploitation and non-compliant business models.

It is noted that while systemic breaches are breaches that do not necessarily have large consequences for individuals when they are aggregated across a workplace the consequences are significant ($100,000 in arrears or more).

[1] This Guide replaces the Payroll Project Guide - Chapters 1 to 3.

Watching Briefs

A number of the cases managed by the team have "watching brief" as their Case Type in TIKA. These cases related to large employers who, when contacted by the team:

- advised that they knew they had issues with compliance with the Act and that they were already undertaking (or planning to begin) their own review; and
- agreed to share information regarding their review with the Inspectorate.

Audit reports were not completed for watching brief cases as the team relied on the employer's review to identify breaches. To ensure that an employer's review has identified all the relevant issues or breaches, the Inspector managing the case checked what testing had been undertaken and considered whether the approach taken had been appropriate given the nature of the employer's business and the working arrangements in place for employees.

Once satisfied that all of the breaches affecting the employer had been identified, the Inspector drafted an enforcement tool requiring the employer to address the breaches. Given that funding for the team ceased in June 2020 it is not expected that cases received after that date will be categorised as watching briefs.

Strategic Focus – "Payroll Issue"

All cases that met or meet the following criteria must be recorded as having "Payroll issue" as a strategic focus (regardless of the genesis of the case):

- *testing whether, or finding that, an employer is systemically calculating employee annual holiday entitlements and payments for FBAPS (family violence leave, bereavement leave, alternative holiday, public holidays and sick leave) in respect of multiple employees in a manner that is non-compliant with the Holidays Act 2003; and*
- *the organisation has at least **200 employees***; and*
- *the payroll system is **electronic**.*

** Prior to July 2020 this was 20 employees*

As soon as the Inspector managing a case has identified that the case meets this criteria they should select "Payroll issue" as a Strategic focus in the Case Info & Assignments tab of the TIKA case.

6(c)

- 6(c) [redacted]
- [redacted]
- [redacted]

[redacted]

6(c) [redacted]

[redacted]

Review of Records - testing

When reviewing records received from an employer the Inspector should test all of the following requirements.

General

a. Were employment agreements retained and if so were they compliant?

b. Were accurate and complete wages and time, and holiday and leave, records kept and used in calculations?

Holidays & Leave

c. Was the correct gross earnings figure used for the calculation of holiday and leave payments?

d. Did employees receive what genuinely constituted at least 4 weeks' annual holiday entitlement for each year of work?

e. Was the deduction of time from the entitlement for the annual holidays taken appropriately calculated based on the time taken and what appropriately constitutes a week for the employee?

f. Was *average weekly earnings* (AWE) vs *ordinary weekly pay* (OWP) used for the annual holiday pay calculation? Was the calculation correct? Was the greater rate applied?

g. Was "pay as you go" – PAYG (8%) used? If so, did the employee meet the criteria to receive their entitlement this way and was the calculation correct?

h. Was a whole day's alternative holiday provided where applicable?

i. Were alternative holidays paid correctly on termination?

j. Were any "notional" public holidays accounted for on termination?

k. Was the 8% accounted for on termination?

Family violence leave, bereavement leave, alternative holidays, public holidays and sick leave (FBAPS)

l. Has the employer specified a RDP rate in its employment agreement (as per section 9(2) of the Act)? If so, is the rate equal to, or greater than, the rate that would otherwise be required by the Act?

m. Was *relevant daily pay/average daily pay* (ADP) used for unworked public holidays, sick leave, bereavement leave and alternate holidays? Was the correct approach (RDP or ADP) applied? Was the calculation correct?

n. For employees who have been treated as "casual" did their ADP calculations include the 8% holiday pay component of their pay?

o. Was at least time & a half paid for worked public holidays? Was the calculation correct?

To test the requirements relating to holiday and leave entitlements, detailed calculations are required. Inspectors should use the Payroll Calculation Spreadsheet (available on the Practice Site) that was developed by the team.

Further sample records can be requested if the Inspector believes that records for additional employees would provide better insight into any potential compliance issues. In addition, the Inspector should ask the employer any questions that arise from the review of records and any initial calculations completed to ensure that they have a complete understanding of the employer's business, the types of working arrangements in place and the payroll practices and processes the employer uses.

Examples of the types of questions it can be helpful to ask are below.

- Whether there is any documentation, in addition to the employment agreement, that records an employee's terms and conditions? Examples of additional documents that should be requested include any appendices and policy documents relating to incentive payments, commission payments and bonus schemes.
- What payments have been included in gross earnings? To understand this, a list of the codes of the payments included **and** excluded in gross earnings should be requested. Note: reviewing what is included in gross earnings is likely to require careful checking of the employee's terms and conditions of employment and legal advice may be required if it is unclear whether specific payments should be included or excluded. To help in your assessment refer to Annex 1 of the MBIE Holidays Act 2003 Guidance (pages 89 to 93) regarding the payments that should be included in gross earnings.
- How does the employer assess what genuinely constitutes a working week for employees with variable working patterns; and how is the portion of a week assessed for those employees when less than a week of annual holidays is taken?
- Are there any agreements in place with employees with variable working patterns about "what is a week"?
- Is there a process in place to ensure what was agreed still accurately reflects what is happening in practice?
- If allowances, overtime and commissions are paid to some employees, how does the employer decide whether such payments are "regular" for the different categories of employees?
- How does the employer decide whether the day a public holiday falls on is an otherwise working day, particularly for any employees with variable working patterns (including those who receive holiday pay on a pay as you go basis)?
- If rosters are used, how far in advance are they issued and how does the rostering system work? Are the rosters generally adhered to or is there often unrostered overtime?

- Whether the employer has an annual closedown and if so, what is the anniversary date that has been used for this purpose?
- How has the employer calculated AWE, OWP and ADP in specific pay periods for an example employee?

Although the focus of payroll cases is on compliance with the Act, where other breaches of minimum employment standards have been identified during the course of an investigation, these should not be ignored and steps should be taken to address the breaches appropriately. This includes addressing issues with incomplete records, non-compliant employment agreements and potential breaches of the Wages Protection Act 1983 and the Minimum Wage Act 1983. For instance, where record keeping breaches are identified for payroll cases it is expected that infringement notices will be considered and recommended if to do so is consistent with the enforcement approach set out in the Chapter of the Investigation & Enforcement Guide covering Infringement Notices (available on the Practice site).

Multiple jobs with one employer (or 'Multi-jobbers')

On occasion the team came across situations where an employee had more than one role – and more than one employment agreement – with a single employer. In response, the team advised employers that whether these types of working arrangements are compliant will be considered be on a case-by-case basis.

In general terms, the Inspectorate accepts employees can have multiple jobs with the same employer when the roles are substantially different and are covered by different collective or individual employment agreements that provide different entitlements. Issues will arise when multi roles or jobs are used in a way that precludes or limits an employee's entitlements under the Act.

An assessment of employees who have more than one job with the same employer should consider the following questions.

- Are there multiple employment agreements/collective agreements (one for each role)?
- Is the employee receiving minimum entitlements under the Act?
- How are record keeping requirements being fulfilled?
- How is the arrangement working in practice?
- Where one of the roles is 'casual', does the employer have checks in place to ensure the employee satisfies the requirements of section 28 of the Act?

The Inspectorate is more likely to consider an arrangement to be non-compliant if any of the following are found.

- The arrangement is a 'sham' and the jobs are 'tangled' in practice.
- The employment agreements are entered into on the same day or within a short period of time.
- The employee is being disadvantaged and not receiving entitlements due to the arrangement.

Audit Report

Once records have been reviewed, testing of the various requirements of the Act has been completed and any further information required has been obtained to fully understand whether the employer complies with employment standards, the Inspector managing the case completes a draft report using the Payroll Audit Report template in TIKA to set out their findings and the enforcement action that is proposed to address any breaches identified.

Quality Assurance

When the Inspector's Principal Inspector reviews the draft report (either through the Quality Assurance or proof-read process), the Principal should consider whether it needs to be referred to a Practice Leader for a further review. If the Principal decides that a further review is required, then they should advise the Inspector of this when returning the report and confirm that the Inspector must refer it to the Practice Leader.

An additional review by the Practice Leader is recommended where the issues are complex or where the case has been identified as high risk. Principal Inspectors can discuss the specifics of a case with the Practice Leader when considering whether a further review is required.

Any review of the draft audit report should include consideration of the following:

- whether the report uses the correct Payroll audit report template (available in TIKA) and all the sections of the report are completed in full
- whether the report is free of typos and the grammar is correct
- whether the report is consistent with the style points set out in Chapter 1.9 of the Investigation & Enforcement Guide
- whether information about the employer's payroll system and how it is processed is covered in the background section of the report
- whether all relevant aspects of the Act have been adequately tested and commented on
- whether examples of breaches identified have been provided and clearly explained using tables to show a comparison of the employer's calculations with calculations under the Act.

Audit reports should identify any issues that have resulted in the underpayment of holiday and leave entitlements rather than identifying 'consequential' issues that occur due to the flow effect on gross earnings as breaches. While adjusting gross earnings to account for underpayments is something employers need to understand when they complete remediation calculations, referring to miscalculation of gross earnings as a breach can take focus away from the real or underlying issue. For example, an Inspector should not say that there has been a breach of section 25 due to the miscalculation of annual holiday entitlements under section 24 - unless there is some other issue with the way the employer calculates gross earnings for termination holiday pay.

An example report can be found in Appendix 1.

Opportunity for the employer to comment

Once the report has been approved, the Inspector forwards it to the employer with a covering email, attaching a fact sheet regarding any enforcement tool that is proposed and the employer is advised it has a set number of working days to make comment. The Inspector can consider extending the timeframe provided if the employer requests it and provides reasoning to support the proposed extended timeframe. For example, employers may wish to take legal advice before responding to a report and an extension for this purpose will usually be agreed provided that the timeframe proposed is reasonable given factors such as the number and complexity of the breaches outlined in the report.

Once the Inspector sends the report to the employer, the Inspectorate considers the investigation is completed for the purposes of reporting. This does not mean the case is closed as any comment from the employer would need to be considered and in many cases there will be compliance/enforcement action to be worked through.

Reporting Measures

One of the key measures that the Labour Inspectorate reports on is the percentage of investigations that are completed within six months and twelve months. This means that it is very important that Inspectors record the fact that an investigation is completed immediately upon reaching this point so that reporting is accurate. This important date is set to the day it is entered into TIKA and is not

able to be edited or back dated. Refer to *TIKA for Labour Inspectors: Investigation* on the Practice site for more information about this.

Questions of Law

There are a number of aspects of the Act that are unclear. The Inspectorate has attempted to clarify some of these "grey" areas in the Act by pursuing questions of law.

Payments incorrectly treated as "Discretionary" by employers - sections 5 and 14

One question that came up when auditing a number of large employers is whether certain bonus payments need to be included in gross earnings for the purposes of holiday and leave calculations. Section 14 of the Act requires productivity or incentive-based payments (including commission) payments that are payable under an employee's employment to be included in gross earnings but also specifies that "discretionary" payments are excluded.

As a result, many employers operate "bonus" schemes which they argue sit outside the employment agreement document itself, and are run according to separate policy documents, which state that the employer reserves the right to change any and all aspects of the scheme at its discretion. These employers say that the bonus scheme is not a part of the employment agreement, and therefore is a "discretionary" payment (as defined in section 5) and does not need to be included in gross earnings.

If an employer is bound by the employment agreement to make a payment, then it is not a discretionary payment. Discretionary payments are ex-gratia payments that an employer doesn't have to pay the employee under the employment agreement.

The following factors for consideration have been developed as a result of the team's work in this area:

- When considering a payment in terms of the above paragraph, the term 'employment agreement' should be considered wider than just the written employment agreement document itself. It can include variations of employment agreements, letters of offer, rules of commission schemes, bonus scheme rules, policies, etc - as well as reference in the remuneration section of the employment agreement.
- If the terms of a payment scheme are intended to be binding on the employer and employee, it is unlikely to be a discretionary payment.
- If an employment agreement states that a payment is a discretionary payment for the purposes of the Holidays Act, this labelling in itself doesn't make the payment discretionary. Whether the employer is bound under the employment agreement to make the payment is what determines whether or not it is discretionary.
- If an employer is bound by the employment agreement to make a payment to the employee, even if the amount is discretionary (and could be zero), it is not a discretionary payment.
- If the payment is dependent on the employee and/or the organisation meeting any type of targets, hurdles, or performance criteria this does not make it a discretionary payment.
- If the purpose of the bonus (or incentive) scheme is for employees to be incentivised to achieve the employer's business goals, and/or where the performance standards against which employee success is judged are part of the employee's duties, then it is unlikely to be a discretionary payment, unless the employment agreement includes an express term that even if all of the conditions were met, the employer retains the discretion not to make any payment.

- If employees have a reasonable expectation of payment based on past practice, to the extent that the payment forms part of the employment agreement, it is unlikely to be a discretionary payment, unless the employment agreement includes an express term that even if all of the conditions were met, the employer retains the discretion not to make any payment.

As the above points suggest it is not that common for payments to employees to be genuinely discretionary payments. Where an employer argues that payments of a particular nature are discretionary the Inspector should ask for examples of occasions when the employer's discretion has been exercised, unless the employment agreement includes an express term that even if all of the conditions were met, the employer retains the discretion not to make any payment.

Examples of payments which are unlikely to be discretionary payments for the purposes of the Act.

- An employee's remuneration statement includes a bonus amount at 100%. The bonus is covered by bonus rules that state that payment of and amount of the bonus is dependent on company and employee performance.
- An employee's employment agreement has an amount for on target earnings (OTE) for commission. The actual amount of commission earned by the employee will depend on how many sales they make.
- Each year the company decides who will be participating in the bonus scheme. Letters are sent out to employees who will be participating telling them that they are eligible to participate this year. The letters state that the amount they receive depends on their performance and could be zero.
- A company gives all employees a Christmas bonus of $500 every year. This helps them recruit and keep good staff and employees are told about it by their employer when they start work with the company. The employer does not state anywhere that they retain a discretion not to pay the bonus to any/all employees.

Examples of payments which are likely to be discretionary payments for the purposes of the Act.

- A business has had a really good year and the owner decides to give everyone a one-off Christmas bonus to reward their hard work. They do not do this regularly and it is not mentioned in any employment agreement or policy.
- A company gives all employees a small bonus from time to time after a particularly busy period of work. It is not regular and the amounts vary.
- An employee raises a personal grievance and the employer decides to make an ex-gratia payment to resolve it.
- A company has a bonus scheme that provides for bonuses based on performance. The scheme is very clear that any payments made under the scheme are totally at the discretion of the company (this example is based on the *Metropolitan Glass* case discussed below).

Due to the limited case law on this issue, the Inspectorate and an employer agreed to go to the Employment Court to clarify the position, in a case called *Metropolitan Glass & Glazing Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2020] NZEmpC 39 heard by the full court at Auckland.

In this case, the employer had implemented discretionary bonus schemes for employees in a document separate to employees' employment agreements. Employees were eligible for bonuses if

they met certain performance targets. The employer however retained discretion over payments of bonuses:

> *Any payments made under this Scheme are totally at the discretion of Metro's Board of Directors and there is no guarantee of any payment even if the DIFOT, Retrofit & EBIT performance targets are achieved.*

The employer considered payments made under the schemes were not part of "gross earnings" as the payments were discretionary and also not made under the employees' employment agreements.

The Employment Court found in favour of the Inspectorate, stating that employers cannot contract out of the Act simply by labelling schemes "discretionary". The court noted that Metropolitan Glass put the bonus schemes in place to incentivise employees to meet key deliverable targets and that the resulting payments received under the Schemes are remuneration for effort put in by the employee.

The employer appealed to the Court of Appeal, who issued its decision on 26 October 2021. The Court found for the employer, holding that the Employment Court was wrong to conclude that the payments were part of employees' "gross earnings" under section 14 of the Act. The Court of Appeal relied on the express term in the bonus schemes quoted above, which stated that the employer retained the discretion whether to make any bonus payment even when all of the conditions required by the schemes had been met.

The Court of Appeal rejected the employer's argument that payments under the schemes could not be gross earnings because they were not paid under the employment agreement. The Court confirmed that "employment agreement" for the purposes of section 14 encompassed terms of the contract of service that fell outside of the formal written employment agreement:[2]

> *"The hallmark of a discretionary payment and what distinguishes it from gross earnings is that it is a payment the employer is not contractually bound to make. If the employer was contractually bound to make the payment, then subject to a limited number of specified exceptions, it is gross earnings. The source of the employer's contractual obligation is irrelevant."*

The Court's judgment can be found here.

Maintaining progress while waiting for the Court of Appeal's decision

While waiting for the outcome of *Metropolitan Glass & Glazing* the team was reluctant to stall the progress that employers with bonus schemes had been making to remediate historic breaches of the Act and related legislation. To that end, the approach taken was to agree to put this issue to one side and require the employer to deal with its other compliance issues on the basis that the employer is on notice that further remediation work may be required (ie. to include bonus payments in gross earnings) depending on the outcome of the question of law case.

For some employers this involved including a paragraph in the acknowledgement section of the Enforceable Undertaking (EU) recording that the issue of payments treated as "discretionary" by the employer may need to be addressed in the future depending on the outcome of the question of law. Another approach has been to record this expectation in the letter sent to the employer following completion of its remediation.

[2] At [29].

Two examples of paragraphs that were included in EUs are below.

- *That this undertaking does not address issues directly related to the discretionary payments which subsequently have a flow on effect on gross earnings as per section 14 of the Holidays Act. This issue will continue to be discussed, where a subsequent undertaking may be negotiated if non-compliance is identified.*

- *That this undertaking does not address any issues related to the annual incentive plan policy. The parties are waiting on further guidance from the Courts in a test case on the definition of "discretionary payments" under section 5 of the Holidays Act 2003. The parties will engage in separate discussions regarding this once a final judgment in the test case is available and the parties have each had a reasonable opportunity to consider this and take independent advice on it.*

An example of the type of statement included in letter closing a case once remediation has been completed is below.

- *It is important to note that during this process the Labour Inspectorate and [the employer] have held differing views regarding the treatment of some payments (e.g. the short term incentive) being excluded from gross earnings. [The employer] and the Labour Inspectorate agreed not to include this in the Enforceable Undertaking but to continue to work together to achieve a resolution, namely through the Inspectorate seeking clarity from the court via a question of law. If the Inspectorate obtains a decision indicating that such payments should be included in gross earnings [the employer] will need to reconsider its position and take any additional actions necessary to achieve compliance with the Holidays Act.*

Calculation of holiday pay during a closedown - section 34

Section 34 of the Act requires employers to pay employees who are not entitled to annual holidays at the start of a closedown period 8% of their gross earnings since the commencement of the employee's employment or since the employee last became entitled to annual holidays (less any amount paid to the employee for annual holidays taken in advance, or paid as part of pay under section 28). Later, in subsection (4), the Act also says that the employer and employee can agree to the employee taking annual holidays in advance during the closedown.

It is not an either/or choice where the employee must either receive the 8%, or instead, can take annual holiday pay in advance. The employee must receive their 8% and then on top of this they can agree to take annual holidays in advance if needed to "cover" the duration of the closedown.[3] This is because subsection (2) of the section uses the word ***must*** in relation to the payment of the 8% amount and subsection (4) provides specifically states that section 34 does not prevent the employer and employee from agreeing that the employee can take holidays in advance under section 20 of the Act. The employee's anniversary date must also be re-set to the closedown date (per section 35). For more information relating to this issue refer to page 51 of the MBIE Holidays Act 2003 Guidance (link).

Meaning of "a regular part of the employee's pay" in OWP - section 8

Another aspect of the Act that has been the subject of opposing points of view is the question of what is required to make payments of overtime, allowances and commission "regular" for the purpose of section 8 of the Act. The Inspectorate tends to view frequency as indicating that a

[3] This position was confirmed by the Employment Court in *Metropolitan Glass & Glazing*. The Court's determination of this question was not appealed.

payment is "regular" whereas employers often consider whether the payment is consistent and in the case of overtime whether it has been scheduled and/or occurs on the same days each week.

In *Tourism Holdings Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2019] NZEmpC 87 (link) the Employment Court considered whether commission payments made to tour bus drivers under their employment agreements were a "regular" part of their pay and therefore should be included in calculations of OWP under section 8(2) of the Act.

Drivers earned commissions by selling activities to bus passengers. For activities supplied by Tourism Holdings, drivers became entitled to commission once activities were booked (with later adjustments for cancellations). For activities supplied by third parties, drivers became entitled to commission once activities were paid for and taken. At the end of each trip, drivers generally attended a paid debriefing where commissions were agreed on and paid.

The Inspectorate's view was that commissions were a regular part of employees' pay. The Inspector advanced two approaches to the timing of the commission payment: either the commission was earned on the day it was paid, or the commission was earned on a daily basis, calculated by averaging the commission over the number of driving days of the trip. On the first approach, the commission was a regular part of employees' pay when assessed against the pattern of the trips (rather than assessed week-by-week). On the second approach, the commission was regular whether assessed week-by-week or trip-by-trip, because it was spread out over the driving days. It is noted that the driver who was used as an example in the case received commission payments in 26 out of the 28 months of the period analysed.

The employer's view was that commissions earned by the drivers were not a regular part of employees' pay. The employer submitted that commissions were allocated only once all steps required to earn commission had been completed, including the paid debriefing. Accordingly, the commissions were paid trip-by-trip, and were not regular when assessed against a standard period of one week.

The Employment Court adopted the employer's view. The effect of the judgment was that regularity was to be assessed against the standard of a one-week period. The Inspectorate appealed the Employment Court's decision to the Court of Appeal, who heard the matter on 24 September 2020. The Court of Appeal overturned the Employment Court's decision and the employer subsequently obtained leave to appeal to the Supreme Court.

On 15 November 2021 the Supreme Court issued its decision, dismissing the employer's appeal and upholding the Court of Appeal's decision. The Supreme Court rejected the employer's argument that regularity must be assessed against an ordinary working week. In s 8(1)(c)(i), "regular part" is most sensibly construed in relation to the time period under consideration, which is the four calendar weeks before the end of the pay period immediately before the calculation is made.[4] Payments that are insufficiently regular to be material to an assessment of "the amount" of pay for an "ordinary working week" may nonetheless be sufficiently regular to be included in a calculation of earnings over a four-week period.

The Supreme Court also considered the secondary issue of which week that commission should be allocated to. On that issue the Court held that the periods the commissions in question are allocated to, should be based on when the payments became payable (or were "earned") rather than when the employee was paid the commission. In the particular case before the Court, that meant the commissions were paid when the activities were sold and, in the case of third-party activities, taken.

[4] Or, if the employee's normal pay period is longer than 4 weeks, that pay period immediately before the calculation is made.

Accordingly, when Labour Inspectors are considering whether productivity or incentive-based payments (like commission) should be included in a section 8(2) calculation for a particular period of annual holidays they may first need to clarify with the employer when the relevant payments became payable or were earned if that information is not clear from the wages and time records and/or holiday and leave records provided.

RDP or ADP - sections 9 and 9A

Disputes have arisen with some employers about how to correctly calculate payment for unworked public holidays for employees who are paid commission or other incentive payments. In particular, the question arises as to whether employees who receive commission should be paid using RDP as defined by section 9 or ADP as defined in section 9A of the Act, and to what extent commission and other incentive payments should be included in those calculations.

In *Max Pennington Motors Limited v A Labour Inspector of the Ministry of Business, Innovation and Employment* [2020] NZEmpC 64 (link) the Employment Court considered whether it is a breach of the Act for an employer to pay its salespeople public holiday pay using RDP based on their base salary (paid fortnightly) where those employees also received commission payments on the 20th day each month. The Inspectorate's argument was that public holiday pay calculated using RDP should include a day's apportionment of the commission for that month, and if that amount could not be determined then ADP should be used, which would also include the commission per the definition of 'gross earnings'.

In his decision Judge Perkins followed the approach in *GD (Tauranga) Limited v Clayton Price* [2019] NZEmpC 101, expressing that view that if the Inspectorate's argument was accepted it would lead to a '*perverse result contrary to the express intention of the legislation*'. The Court considered that the inclusion of commission in payment for a public holiday would be a '*substantial windfall'* over and above what was provided for in the employees' employment agreements, because the employees would receive a portion of the commission for a month through holiday pay, plus the full commission on the 20th day of the following month. The Court rejected the Inspectorate's position as resting on a fiction that had the public holiday in question been worked by the employee, the employee would have earned a commission on that day.

The Court noted that the intention of the legislation was to make RDP the primary method of calculation, but to give the option of ADP when RDP was too difficult to calculate. The employer has discretion whether to use RDP or ADP calculations.

In dealing with cases involving payment of commission, other incentive payments, or other additional payments such as overtime, each case must be considered on its own facts. Where an employee earns commission sporadically and unpredictably, *Max Pennington Motors* and *GD (Tauranga) Limited* have held that the commission is not to be included in either RDP or ADP calculations. However, depending on the facts of each case, more regular payments may be included, such as regular overtime payments that must be included in wages for the applicable pay period, or commission or other incentive payments that are invariably included and received in every periodic payment of wages or salary.

If it is unclear whether a commission or other payment should be included in RDP or ADP calculations, an Inspector should seek advice from their Principal Inspector and, if required, Legal to ensure a consistent approach is taken.

Remediation

To date the Inspectorate has generally sought to resolve breaches of the Act by entering into EUs with employers. Going forward it is likely that other enforcement tools may be considered particularly where record keeping breaches are found. The reason for this is that employers can no longer claim to be unaware of any potential compliance issues they may have, given extensive coverage in the media regarding widespread non-compliance with the Act and clear messaging from the Inspectorate that employers are expected to remediate any arrears.

An EU gives employers the opportunity to agree with the Inspectorate how they will remediate past breaches and rectify their systems by amending their practices for the future. Typically, the team used two EUs when managing employers' remediation processes. The first EU usually required the employer to review records and calculate arrears (the Calculation EU) and the second, subsequent EU required the employer to make payment of identified arrears to employees (the Payment EU).

On occasion employers indicated that they wish to clarify the extent of their compliance issues before beginning any remediation work (such as the calculation of arrears). In those circumstances the team required the employer to enter into a "scoping" EU as a first step rather than waiting for the employer to complete that process without any agreed accountability.

In addition, the Inspectorate has entered into the following arrangements:

- an EU with an employer who agreed to act as agent for other employers within a group of related companies.
- A Memorandum of Understanding with two large public sector organisations that were each acting as the lead agency for a group of employers within their sector (ie. Education, where the employers are individual Boards of Trustees; and Health, where the employers are individual District Health Boards and the New Zealand Blood Service).

Any enforcement tool drafted should use the wording developed by the team. In particular if an EU is negotiated there should be minimal deviation from wording in the payroll EU templates (available in TIKA) as EUs cannot be withdrawn or varied without agreement. Where issues are raised by employers with the wording of the templates, Inspectors should discuss those issues with their Principal Inspector who may wish to discuss the issues with a Practice Leader before making any changes to the standard wording.[5]

There is an example of a Calculation EU and a Payment EU attached as Appendix 2 and 3.

It is noted that for the payment EU although usually total arrears are specified (at paragraph 2.2) on occasion employers have asked to have this left out of the document. If this occurs the following wording should be used:

> *2.2 The arrears resulting from these breaches have been notified to the Labour Inspector by the employer as specified in Appendix B for the period of [specify start date for review period] to [end of review period] for one or a combination of; annual holiday entitlements, bereavement leave, alternative holidays, public holidays and sick leave entitlements.*

When reviewing any enforcement tools (ie. EUs, improvement notices and court proceedings) relating to payroll cases, Principal Inspectors should consider whether the document needs to be

[5] For example, on occasion employers ask that breaches be described as 'inadvertent'. The addition of wording of this nature has not been accepted.

referred to a Practice Leader for a further review. If the Principal decides that a further review is required, then they should advise the Inspector of this when returning the document and confirm that the Inspector must refer it to the Practice Leader.

An additional review by the Practice Leader is recommended where the issues are complex or where the wording of a payroll EU template has been changed.

Review Periods

Following the Employment Court's decision in *Enterprise Motor Group (New Lynn) Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment*[6] the Inspectorate's practice is to require employers to go back six years from the date an improvement notice is issued, or the EU is signed by an Inspector.

Prior to *Enterprise Motor Group* the Inspectorate's practice when setting a review period for EUs and improvement notices was that employers would be required to remediate all current and past employees from the date that was at least six years back from the date of the Inspector's first request for records. Using this date was intended to avoid providing employers with an incentive to push out the timeframe to remediate by delaying an investigation or a payroll audit.

It is noted that before *Enterprise Motor Group* the team typically took a broad approach when negotiating review periods in EUs to address historic breaches of the Act. The rationale for this approach was that once non-compliance with the Act is known, or should reasonably have been known, an employer's duty of good faith towards all affected employees will be triggered. This approach also recognised that while some employers may require additional time to plan their remediation process, the time used for planning should not disadvantage employees by reducing the review period used to calculate any arrears owing.

Where an Inspector managing a payroll case believes that it may be appropriate in the circumstances of the case[7], to ask an employer whether it is willing to enter into an EU requiring remediation for a period longer than six years from the date of signing, they should first discuss this with their Regional Manager[8].

Wording for EUs regarding consequential breaches

On occasion the breaches identified for a particular employer have related only to annual holidays or only to FBAPS. As arrears resulting from such breaches will affect the gross earnings for any pay period where arrears are identified, holiday and leave payments made in subsequent pay periods may need to be recalculated. These recalculations will achieve compliance with the Act by accounting for corrections made to gross earnings, even when payments for some of those holiday and leave types do not relate to one of the sections that has been identified as a breach.

In this situation the team recommends that a clause be included in the acknowledgment part of the calculation EU to ensure that the employer understands that to fully comply with the Act it may need to re-calculate payments that relate to sections where breaches were not identified. An example of a clause that has been used where the only breaches found related to the calculation of FBAPS is below.

[6] [2022] NZEmpC 194.
[7] For example, if an employee or Union raised an issue with the employer before an investigation was started by the Inspectorate and the employer failed to take any steps to address the issue.
[8] Refer to Chapter 2.2 of the Investigation and Enforcement Guide.

4.2 *That although no breaches were identified in regard to the payment of annual holidays for the sample tested, the process of remediation required by this undertaking will have a flow on effect to payments for annual holidays as any arrears identified as owing for unworked public holidays, alternative holidays, sick leave and bereavement leave should have been included in the gross earnings used to calculate annual holiday payments at the time the holidays were taken by affected employees. To achieve compliance and as part of the process of remediation required by this undertaking the employer will recalculate payments for annual holidays from [start of review period] onwards for employees affected by the breaches in [paragraph setting out FBAPS breaches] to ensure that no employee has been disadvantaged.*

Checking calculations

Where possible the Inspector should encourage employers to provide a limited number of example calculations for review before calculations are completed for all employees. This will allow the Inspector to understand the employer's approach to the calculations, provide feedback regarding any issues identified, and reduce the time involved in any re-work required as a result of the Inspector's feedback. It is noted that as at 30 June 2020 none of the employers the team had worked with had succeeded in getting their calculations correct the first time. Feedback on calculations is a key part of working with employers to achieve compliance.

To ensure employers are clear about what an Inspector needs to see when checking calculations, it is recommended that the Inspector provides the employer with a copy of the "Remediation Calculations Checklist" (available on the Employment NZ website).

The Calculation EU requires employers to provide a list of current and past employees who have had their holiday and leave payments reviewed along with the amounts owing to them. When requesting the employee lists the Inspector may find it helpful to ask the employer to include an indication of the nature of each employee's employment (ie. whether they work full time, part time, variable hours or on a "casual" basis). This enables the Inspector to request a sample calculation from each of the different categories of employees. Checking calculations at this point may not be required if the Inspector has already reviewed a reasonable cross section of example calculations and is satisfied that the employer's methodologies are providing employees with at least the minimum required by the Act.

When checking calculations, the Inspector should be prepared to perform their own manual checks to see if the employer's calculations comply with the Act. It may be that such manual checks can be on a 'spot' basis, just looking at a number of pay periods where different types of holidays and/or leave have been taken to assess whether the employer's calculations match the Inspector's. In most cases this will be sufficient to identify any problems with the way calculations have been performed.

One option is for the Inspector to ask the employer to demonstrate how they have completed their calculations by talking the Inspector through the methodology that has been used.

Some things to look out for.

- How has the employer dealt with portions of a week?
- Have the correct formulae been used for AWE, OWP and ADP and do the gross earnings used for these calculations include the payments required?
- If RDP was used was it appropriate to do so and was it accurate for the day concerned?

- If “pay-as-you-go” annual holiday payments were paid incorrectly to some employees, has the 8% component been removed from gross earnings[9]?
- Has the employer adjusted gross earnings for each pay period where underpayments of holiday and/or leave were found?
- How has the employer dealt with any missing data or records? What approach has the employer taken if the calculations can not be completed as per the Act due to incomplete data or records?
- Has the employer adjusted gross earnings to account for overpayments? If the employer has adjusted gross earnings to account for overpayments then follow up questions will be required to find out if the employer complied with its good faith obligations to consult with employees and if so, the process it used. Refer to the *Position Statement - Accounting for Overpayments through Holidays Act Re-calculations* (link).
- Has the employer offset overpayments against underpayments? If so, how will the employer obtain written consent, or consult with employees, before any deductions made for overpayments?

Off-setting - overpayments vs underpayments

The Inspectorate ensures underpayments are repaid but does **not** allow employers to off-set any overpayments in the calculation of arrears without first obtaining written consent from the affected employee. The reason for this is that employees are entitled to minimum entitlements under the Act but the Act does not prevent an employer from providing an employee with enhanced or additional entitlements. If an employer wishes to recover any overpayments from any of its employees, the employer is required to comply with the requirements of the Wages Protection Act 1983 (WPA).

The Inspectorate has developed a Position Statement on *“Accounting for overpayments through Holidays Act Re-calculations”* that confirms that an employer must comply with the WPA and outlines that gross earnings used for remediation calculations can be adjusted to account for **genuine** mistaken overpayments provided that the employer consults with affected employees in good faith. This Position Statement is referred to in the team’s EU templates and is available on the employment.govt.nz website.

It is noted that it is the Inspectorate’s position that “genuine mistaken” overpayments do not include “pay-as-you-go” annual holiday payments made to employees where the criteria for section 28 of the Act has not been met.

If an employer advises that they intend to offset any overpayments against arrears owing, the Inspector should ask how they intend to ensure they comply with the WPA. This is likely to involve reviewing the employer’s draft communication to employees and, if required, providing feedback on that the draft. The table below sets out what an Inspector should think about when reviewing an employer’s draft communication.

Indicators the employer’s communication complies with the WPA	**Indicators the employer’s communication does not comply with the WPA**
Consent is actively being sought	Imply that consent is mandatory or assumed – ie. a “let us know if you don’t agree” type of approach is not sufficient

[9] Refer to the commentary on section 28 in the Reference Book - Holidays Act 2003 for the Inspectorate’s view on this.

It is clear the employee does not have to consent to the offsetting or deduction of any overpayment	Employees are told that overpayments will be offset (or deducted)
Details of all the relevant amounts calculated (ie., unders, overs, net amounts) will be provided to individuals - particularly the underpayment amount as this is the employee's minimum entitlement under the Act (ie., the amount the employee will receive if they do not consent to the deduction should be clear)	Only provide the net amount when overpayments have been offset or deducted
A form is attached that the employee can fill out to confirm whether they agree to the deduction or not – and both options are clear on the form	Employees are only asked to make contact if they don't consent to the deduction - or a form is provided but it only includes consent for the deduction as an option

In addition, the Inspector should ensure that the communication does not say that MBIE or the Labour Inspectorate has "approved" or "signed off" of the calculations. The following are some phrases that may be useful when providing feedback to employers.

- I have reviewed the letter and found it does not meet the requirements of the Wages Protection Act 1983. Offsetting overpayments against underpayments is a deduction which requires written consent. The draft letter does not contain a request for consent, and it does not set out clearly that the employee has no obligation to agree to the offsetting (deduction).
- Employees to do not have to agree to the deduction. Therefore, the letter should make it clear that they do not have to agree and that they will receive their full underpayment if the netting approach is not accepted. As currently worded, many employees would interpret the letter to mean they will not be paid anything if they do not accept the netting approach. In good faith, employers should be open and transparent about this process.
- The letter should also include the amounts. It should be clear to the employee the amount they were underpaid, the amount they were "overpaid" and the amounts they will receive depending on whether they agree to offset or not.
- Many employers have attached a form to the letter with the options of offsetting or not. Others provide an email address for the employee to email whether they consent to the deduction or not.
- The Labour Inspectorate expects employers to clearly set out the employees' rights and options, be open and transparent about the process, and act in good faith.
- I understand that from a financial perspective you are hoping many employees will agree to off-set, however if you are not clear about their options and an employee finds out later that they did not have to consent to the deduction they may raise a complaint or lodge a personal grievance.
- Please revise and send me an amended version for further review.

Two example letters from employers to employees regarding proposed offsetting along with comments on those letters can be found in Appendix 4.

Methods accepted in remediation vs compliance going forward

For the purposes of remediation, the team accepted methods that may not align completely with the requirements of the Act. This allowed employers and/or their third-party providers to apply a series of 'rules' (through a systematised remediation programme or something similar) to their data so that assessment of entitlements and calculation of arrears for large numbers of employees would be expedited.

It is for the employer to develop any rules or alternative methods, it is not for the Inspector to suggest an approach given that the employer has the best understanding of its own business and the working arrangements within the business.

When rules or alternative methods are proposed to assess entitlements or calculate payments, the Inspector should ask the employer for the rationale for the methods proposed. It is also worth asking for the details of any testing completed by the employer to check whether the rules proposed result in the expected outcomes for the various categories of employees working for the employer – that is, do these methods provide minimum entitlements for employees who were subject to the testing? If the employer has not undertaken any testing, then the Inspector is more likely to insist on exceptions to the proposed rules being developed and included in the employer's process.

If after providing any relevant feedback the employer's methods are accepted, then the Inspector should record in writing:

- that the rules or alternative methods must only be used for the purposes of remediation; and
- that these will not necessarily ensure that minimum entitlements pursuant to the Act are provided for all employees in all circumstances.

In addition, the Inspector engaging with the employer advises that in its communication with employees it must:

- be open and transparent about how it has determined entitlements to, and payments for, holidays and leave; and
- provide a clear process for employees to raise questions with the employer if they believe their entitlements have not being met or if they have additional information for the employer to consider, which will then be considered in good faith.

Some examples of alternative methods that have been accepted by the team for remediation are attached to this Guide as Appendix 5.

Estimation

In October 2017 the Inspectorate released a position statement in relation to the estimation of holiday pay arrears. It is available on the employment.govt.nz website here.

This position statement provides guidance for employers in cases where it is impossible, impractical and/or highly costly to fully calculate each employee's arrears. It is helpful to provide employers with a copy of this position statement when they advise that due to incomplete record keeping it is not possible to calculate arrears accurately or when they advise that the cost involved in completing accurate calculations is prohibitive. For example, where payment for FBAPS should be calculated using ADP but the employer has not recorded the number of days worked by the affected employees then the employer should consider developing a method to estimate arrears owing.

When an employer proposes to use estimation for any or all of the calculations required by an EU this should be recorded in the EU and a copy of the position statement attached as an appendix to the EU. As the position statement available on the website may be updated in the future it is important that a copy of the position statement that is current at the time the EU is negotiated is attached as an appendix within the document (rather than simply providing a link which may later change).

Past Employees

There is an expectation that employers will attempt to remediate arrears owing to past employees as well as current employees. In addition, employers are expected to continue to make payment to any past employees who contact the employer after the Inspector has confirmed that an EU has been complied with.

This expectation is recorded in the following clause found in the acknowledgment section of the Payment EU template:

> *That past employees may fail to make contact or provide the correct information to make payment by the completion date in [3.3]. If past employees provide the required information after the date in [3.3], the employer will endeavour to make payment within a reasonable timeframe of receiving the employees' information.*

In reality, the employer may not be able to locate or contact all past employees. In these circumstances, the Inspectorate requires the employer to use "reasonable endeavours" to contact past employees and provide evidence of those efforts to make contact (on a sample basis) as part of compliance with the EU. Use of the last known contact details (ie. email, postal address or phone) the employer holds is the logical starting point for these endeavours. Some employers also put advertisements in the paper, release media statements, use social media and establish portals on their website for past employees to make contact and provide their updated details.

For past employees who no longer live in New Zealand the Inspectorate expects employers to ask those employees how they wish payment of arrears to be made to them. For instance, if a past employee no longer has a bank account in New Zealand, then that employee may ask that payment is made as an international money transfer.

Inspectors should be aware that as some employers (predominately those within the public service) have received legal advice suggesting that there is no duty of good faith owed to past employees, there has at times been variation in the way past employees have been dealt with in the EUs negotiated by the team.

Broadly, three different approaches to dealing with past employees have been taken by the team depending upon the response of the employer to the issue of remediating breaches for past employees. These approaches can be summarised as:

- The employer completes remediation calculations for all employees – both current and past employees.
- The employer completes remediation calculations for all current employees and those past employees who make contact following communication by the employer (either through direct correspondence, social media or advertisements) and provide the required details (eg. bank account numbers).
- As a last resort, the employer completes remediation calculations only for current employees and "holds the risk" that past employees may come forward to claim any arrears

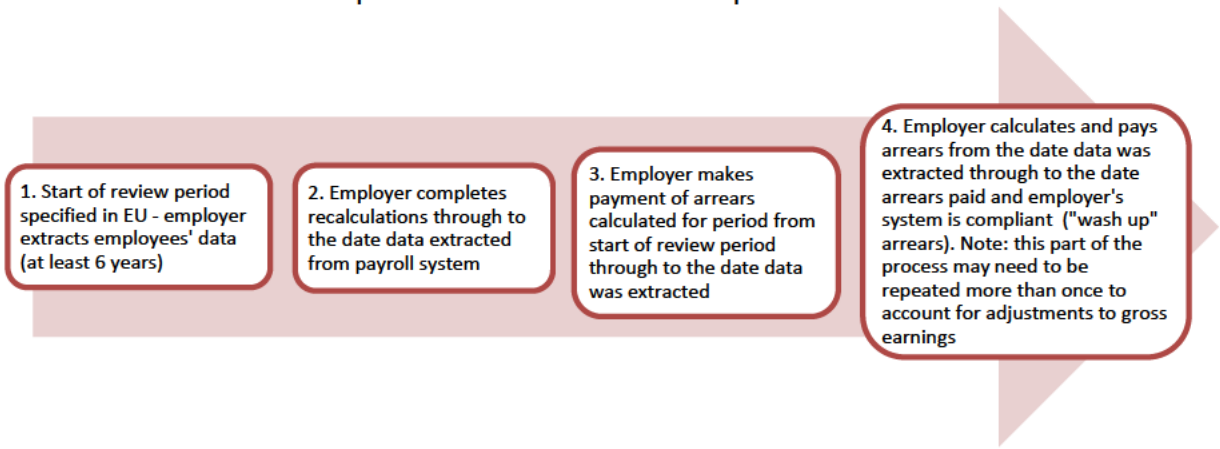
owing. It should be noted that the team accepted this approach very rarely, and only where there appeared to be a good reason to do so. For example, where there were serious concerns about the affordability of the remediation process if past employees are included, or where it was impossible to locate past employees given the transient nature of the workforce. An Inspector should seek advice from their Principal Inspector before taking this approach.

Evidence of Payment

The second EU used by the team (the Payment EU) requires employers to pay arrears that have been identified in the course of completing the work required by the Calculation EU. The arrears to be paid are set out in an appendix to the Payment EU. The Payment EU also requires the employer to provide the Inspector with evidence once payment has been made to employees. Once again, the Inspector will request evidence on a sample basis rather than seeking evidence for all payments that have been made.

"Wash Up" Payments

Remediation calculations completed by an employer are usually completed to a specific date and it may then be some time until payment of those arrears is made and the employer has made the changes required their end-to-end payroll system to ensure that it is compliant with the Act. This means that employers will also be required to calculate and pay further remediation arrears (sometimes referred to as "wash up" arrears) for the period from the date the remediation calculations were completed until their end-to-end payroll system complies with the Act. The timeline below shows the steps involved in the recalculation process.



To record this requirement the team has developed the following paragraph that should be included in the acknowledgment section of the Payment EU:

> *That in addition to the arrears specified in [2.2.1] the employer is required to calculate and pay "wash up" arrears to employees for any periods of holidays or leave taken (or paid at the end of employment) in the pay periods from [specified date] onwards and ensure any underpayments identified in the calculations performed for the purposes of the previous Enforceable Undertaking (Appendix A) are included in individual employees' gross earnings.*

Historically some of the team's EUs included the requirement that the employer fix their systems to ensure system compliance going forward. The team moved away from including this requirement in its EUs given the length of time it can take for system fixes to be implemented. Inspectors who inherit cases that include these types of requirements should speak to their Principal about how to approach this issue.

Minimum Payments

After working through their remediation calculations some employers ask if there is a minimum amount of arrears that they are required to pay out to employees (for example, amounts less than a nominal amount such as $1.00). The response to questions of this nature is that the Inspectorate expects payment to be made to any employee owed arrears irrespective of the amount involved. The reason for this is that any arrears identified are **minimum** entitlements under the Act. If an employer chooses not to pay amounts less than a particular minimum amount then that employer will hold the risk of affected employees coming forward to seek payment, and payment will then be required.

Rounding

Where rounding occurs due to the use of electronic time recording or particular settings in a payroll system and that has a flow on effect to the calculations required by the Act the Inspectorate will have no concerns where any amounts payable are rounded up. Where amounts payable are rounded down then the approach is the same as the one outlined above for minimum payments and the Inspector should advise the employer that the minimum amounts under the Act should be paid even if the difference is only a few cents.

By way of illustration the table below shows the impact of rounding in time recording on an employee's wages and the holiday pay received each fortnight with those wages. In the circumstances shown, the employer will be advised that rounding down in the periods ending 11/8/2018 and 17/11/2018 results in breaches of the Act.

Fortnight ending	Total hours worked actual	Total hours worked rounded	Difference	Wages paid ($22.20/hr)	Wages actual	Difference	8% Holiday paid	8 % Holiday pay actual	Difference
28/7/2018	113.21	113.25	0.04	2,514.15	2,513.26	0.89	201.13	201.06	0.07
11/8/2018	107.27	107.25	0.02	2,380.95	2,381.39	-0.44	190.48	190.51	-0.03
8/9/2018	99.91	100.00	0.09	2220.00	2,218.02	1.98	177.60	177.44	0.16
17/11/2018	72.88	72.75	0.13	1,615.05	1,617.94	-2.89	129.20	129.44	-0.24

Unpaid Arrears

When employees cannot be contacted the Inspectorate does not require employers to pay any unpaid arrears to the MBIE trust account as there is no authority in the legislation for Inspectors to do so. Similarly, Inspectors should **not** advise employers to pay any unclaimed arrears to the Inland Revenue Department (IRD) under the Unclaimed Monies Act 1971. If an employer asks about the requirements of the Unclaimed Monies Act the Inspector should refer the employer to the IRD's website and recommend the employer takes advice on the matter as this Act is outside our jurisdiction.

Compliance moving forward

The team found that the process involved in the large employers addressing breaches of the Act is often a lengthy one. In the course of its engagement with an employer the Inspector managing the case will usually have had discussions about the way the employer intends to ensure compliance with the Act going forward. Such discussions often centred around any fixes that may be required to

payroll system being used (for example, changes so that annual holiday entitlement can be held in weeks rather than hours); the replacement of an existing system with a new system; and the introduction of any manual business processes that may be required to regularly check compliance with the Act.

Given that the steps involved in ensuring ongoing compliance may take longer than the process involved in calculating and paying identified arrears the team moved away from requiring an employer to provide evidence that its system has become compliant before it closes a case. This approach has at times been referred to as the "Pivot Approach". There a number of reasons for this approach, including the following.

- The role of the Inspectorate is that of a regulator rather than an advisor or consultant.
- Remaining engaged with an employer while it changes its system or goes to market to purchase a new system is resource intensive and has the potential to extend the time a case remains open for an indefinite period of time.
- There is a risk that employers may believe that as the Inspectorate has "approved" any system or process changes that they do not have to actively take responsibility for monitoring and maintaining their own compliance.
- A significant number of tools and resources have been created to assist employers with their obligations to achieve compliance including information about how employers can create an appropriate Assurance Framework for their business. The link for the Holidays Act Assurance Framework is here.

Closing a case

Once the remediation process has been completed for a payroll case, the Inspector should advise the employer that the case will be closed and make it clear that the employer is responsible for monitoring and maintaining its own compliance with the Act moving forward.

The following statement should be used to finalise the Inspectorate's involvement and indicate the Inspectorate's enforcement approach if breaches are found in the future:

> *The Labour Inspectorate has been working with **[insert employer name]** regarding their breaches of the Holidays Act 2003 (the Act) and other employment legislation. Given the **[delete as appropriate:** nature of the breaches, the time periods involved, the varying types of employees, the number of employees, the incomplete records for some employees, and the evidence that the employer has engaged with their employees over the approach taken**]**, the Labour Inspectorate is satisfied the employer has used best endeavours to rectify and remediate the breaches identified.*
>
> *The Labour Inspectorate has carried out a sampling method when assessing the measures taken by the employer to remedy its breaches. While this cannot guarantee that employees' minimum entitlements have been met in each individual case, the Labour Inspectorate is satisfied any margin of error is small.*
>
> *The employer will advise employees of the methodology used to calculate arrears and entitlements, and provide employees with an opportunity to escalate queries regarding their specific entitlements in good faith.*

The Labour Inspectorate does not intend to take further enforcement action regarding the breaches of the legislation outlined in the [enter enforcement tool(s) used] dated [enter date or dates where more than one EU has been used].

Moving forward the employer will ensure accurate records are being kept and the necessary processes for the end-to-end payroll system to meet compliance with the Act continue. If non-compliance regarding recording keeping is found in future interactions the Inspectorate will look to issue an infringement notice, along with considering other appropriate responses bearing in mind the full suite of enforcement tools at their disposal.

It is also important to ensure that all the relevant information has been captured in TIKA for reporting purposes. An example of a letter, incorporating the above statement and closing a case, is attached as Appendix 6.

Closing a case using a 'pivot' approach

As funding for the team ceased on 30 June 2020, on a case-by-case basis the Inspectorate has been ceasing its involvement in payroll cases (or "pivoting") before the employer has completed its remediation process. To date this approach is being used where the employer has reached a milestone in their process (e.g., they have complied with a calculation EU and have not yet entered into a payment EU) and we are confident that they will continue to complete their remediation without the Inspectorate being directly involved.

Factors to consider when deciding whether a case is suitable to "pivot" can include:

- the employer's progress to date
- the timeframe for completion of remediation (ie. a longer timeframe would mean we are more likely to cease our involvement whereas if they are due to complete their process within a couple of months then we would be more inclined to keep the case open)
- the involvement of a third party provider to assist with calculations
- information that suggests the employer is actively engaging with employees and their representatives.

If an Inspector identifies a case as being suitable to "pivot" then the next step is to draft a letter to the employer outlining what has occurred to date with the case, the Inspectorate's expectations regarding the work that still needs to be completed and advice that the file will be closed. That letter should be referred to the Manager who leads the Payroll strategy for approval. In the details tab of the relevant case note the Inspector should set out their reasoning for their recommendation that the case be closed

An example of a letter closing a case before remediation has been completed is attached as Appendix 7.

Enforcement from 1 July 2020

Information has been disseminated publicly through the media and other targeted channels highlighting the wide-spread risk of Holidays Act non-compliance for employers and employees.

It is no longer reasonable for employers to say they did not know there were issues in terms of Holidays Act compliance. Accordingly, the Inspectorate is moving its regulatory response from a

narrow audit/watching brief approach to a multi-faceted response that seeks to address Holidays Act non-compliance in a range of ways including:

- completing work on open audit and watching brief cases, and closing the cases in a manner that ensures that employers are aware that the inherent risks associated with Holidays Act compliance remains with them.

- continuing to investigate Holidays Act breaches through reactive and proactive payroll investigations as a by-product of other Sector Strategy work.

- redirecting any employers who approach the Ministry about Holidays Act non-compliance to guidance that can help them undertake their own payroll review, remediation, and rectification project (see below under heading "Requests from employers").

- signalling the importance of mandatory record keeping and proper employment agreements by routinely pursuing infringements.

- seeking increasingly high levels of penalties for employers found to be non-compliant with the Act who have done nothing to identify and address Holidays Act breaches within their business; and actively promoting these cases through media releases.

- seeking penalties against "persons involved" (as per sections 142W and 142X of the Employment Relations Act 2000), and particularly in respect of professional service providers (including payroll providers) to drive a more consistent approach toward compliant behaviour.

Requests from Employers

Occasionally employers may approach the Inspectorate asking to engage with us regarding a proposed review of their non-compliance with the Act.

From 1 July 2020 the response to such requests will be to refer the employer to the resources available on the employment.govt.nz website to assist with their review but not to actively engage in the employer's process. One reason for this is that to make the best use of its resources the Inspectorate needs to be able choose where it directs those resources rather than responding reactively to requests from employers and taking on roles that are more akin to being a consultant than a regulator.

The response to such requests should be signed out by the Manager who leads the Payroll strategy. A suggested response to such requests is as follows:

> *Thank you for getting in touch with us regarding your Holidays Act compliance. That you have chosen to contact us regarding this matter shows the Ministry that you want to comply with the Act, and that you are taking your responsibilities as an employer seriously.*
>
> *We encourage you to progress your remediation and rectification work in a timely manner; and want to make you aware that there is a range of guidance available from the employment.govt.nz website on implementing the Act, including the Holidays Act 2003 Guidance on annual holidays, bereavement leave, alternative holidays, public holidays and sick leave; and the Position Statement - Estimating the Value of Holidays Act 2003 Underpayments (see links below).*

https://www.employment.govt.nz/about/news-and-updates/updated-holidays-act-2003-guidance-now-available/
https://www.employment.govt.nz/assets/Uploads/NEW-PS-Payroll-Estimating-Holidays-Act-Underpayments-Doc.pdf

When taking steps to remediate your Holidays Act compliance we recommend you communicate with your employees and their representatives regarding the work that is being undertaken. Transparent communication with employees will ensure that you are meeting your good faith obligations as an employer.

In addition, it will be helpful to provide the following statement around compliant record keeping moving forward and Inspectorate's likely approach if we are engaged in the future and find non-compliance.

Moving forward the Labour Inspectorate's focus is on accurate and complete record keeping as a primary and critical element of compliance for all employers.

Proper record keeping is a longstanding and basic requirement for proper payment of workers. In the Holidays Act context, it is also the foundation for remediation of any calculation errors. Employers who have not maintained, and who are not continuing to maintain, necessary records are likely to face penalties.

Review of the Holidays Act

The work of the Inspectorate drew attention to the extent of the difficulties that employers face when trying to comply with the Act. This combined with approaches from Business NZ and the Council of Trade Unions led the the Minister for Workplace Relations and Safety in May 2018 to establish a taskforce to recommend changes to the Act.
In October 2019 the Holidays Act Taskforce reported to the Minister who has accepted its recommendations. Work then began to design the new Act. More information about this work can be found here.

Remediation is outside the scope of the review of the Act. Employers are required to remediate employees for current and historic underpayments and must be compliant with the current Act until new legislation comes into effect.

Appendices

Appendix 1: Example Payroll Audit Report

Audit Report
Labour Inspectorate

Details

Employer:	Bright Glazing Limited (the employer)
Strategy:	Payroll
Inspector:	Ellen Right
File number:	LS32071
Date:	01 August 2022

Executive Summary

The employer initially came to the Labour Inspector's attention through a complaint alleging that it was incorrectly calculating final holiday pay for employees.

An audit of this employer has been conducted in line with the programme of compliance audits in respect to the Holidays Act 2003 and other applicable employment legislation. The audit included a review of selected employment agreements, wages and time records, holiday and leave records and other relevant records provided by the employer.

The purpose of this report is to outline the Labour Inspector's findings and recommend appropriate tools to achieve compliance where applicable. Based on the information provided by the employer, the Inspector has the following findings:

- the employer did not have holiday and leave records that included all of the information required
- the employer did not calculate and pay annual holidays correctly
- the employer did not calculate and pay employees' annual holiday pay correctly when their employment ended
- the employer included an employee's annual holiday pay regularly in their wages when the employee did not meet the criteria
- the employer failed to recognise an "otherwise working day" and did not correctly calculate payment for an unworked public holiday
- the employer did not pay at least time and half for working on a public holiday

- the employer failed to provide an alternative holiday for a public holiday worked which was an otherwise working day.

The employer has been cooperative throughout the audit process and will be offered the opportunity to enter into an Enforceable Undertaking to rectify the breaches and achieve compliance.

Background

The employer operates a glazing business with four locations in North Island. It was incorporated on 28 November 2014. The employer has two directors, Isaac GREEN and Abha REDDY. Abha REDDY manages the day to day running of the business.

A list of employees was requested from the employer. From this list a sample of employees was selected and their employment agreements, wages and time records, holiday and leave records, and other relevant documentation were requested and reviewed. The following employees were selected:

- Zara OPAQUE
- Emma MISTY
- Paul CLEAR
- Marcel SPECKEL

Based on the information provided, the employer has approximately 685 current employees and uses the OneandDone payroll system. The employer processes its payroll in-house.

1. Employment Agreements

1.1 Employment Relations Act 2000 ("ERA") section 64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment

It was found that the employer has individual employment agreements in place.

Section 64 requires the employer to retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment.

Based on the information provided, it is the Inspector's opinion that no breach of this section has occurred.

1.2 Employment Relations Act 2000 section 65 Form and content of individual employment agreement

It was found that the individual employment agreements did contain all the necessary information of an employment agreement.

Section 65 stipulates the minimum requirements of written individual employment agreements. The employer appears to have met the requirements of this section.

Based on the information provided, it is the Inspector's opinion that no breach of this section has occurred.

2. Records

2.1 Employment Relations Act 2000 section 130 Wages and time record

It was found that the employer has sufficient wages and time record in place.

Section 130 stipulates the information a wages and time record must contain for each employee. The documentation supplied by the employer meet the requirements of this section.

Based on the information provided, it is the Inspector's opinion that no breach of this section has occurred.

2.2 Holidays Act 2003 section 81 Holiday and leave record

It was found that the employer does not have a sufficient holiday and leave record in place.

Section 81 stipulates the information a holiday and leave record must contain for each employee. The documentation supplied by the employer for two employees who had been employed for more than 12 months did not include the date on which the employee last became entitled to annual holidays as required by section 81(2)(e).

Based on the information provided, it is the Inspector's opinion that a breach of this section has occurred.

3. Holidays

Note: For section 3 of this report the Holidays Act 2003 will be referred to as 'the Act'.

3.1 Holidays Act 2003 section 21 Calculation of annual holiday pay and section 22 Calculation of annual holiday pay if taken in advance

It was found that the employer miscalculated payments for annual holidays taken.

Section 21 of the Act states an employer is to calculate the employee's annual holiday pay at a rate that is based on the greater of the employee's ordinary weekly pay (OWP) as at the beginning of the annual holiday or the employee's average weekly earnings (AWE) for the 12 months immediately before the end of the last pay period before the annual holiday.

Section 8 defines OWP, under subsection (1) as what the employee would normally have received for an ordinary working week. Section 8(2) provides that where it is not possible to determine an employee's weekly pay under section 8(1) the pay must be calculated using a four-week formula.

AWE is calculated using the gross earnings for the 12 months immediately before the end of the last pay period before the holiday is taken and dividing by 52.

The Inspector found the employer did not consistently use the correct OWP under section 8 of the Act. There were occasions where the employer incorrectly used the OWP under section 8(1) of the Act rather than the formula in section 8(2) for employees with irregular and unpredictable hours and pay.

Table 1.1 below shows an example of the employer using the incorrect OWP for Zara OPAQUE's annual holidays taken in the pay period ending 4 February 2019.

Table 1.1: Employee Zara OPAQUE's payment for four days of annual holidays taken in pay period ending 4 February 2019

	Employer's Calculation	Calculation as per the Act	
Calculation Method	OWP (as per s8(1))	OWP (as per s8(2)*	AWE
Portion of leave taken	30 hours / 4 days	0.8 week	0.8 week
Numerator (Gross Earnings)	-	$3,706.50	$35,084.25**
Divisor	-	4	46
Rate	$21.00 per hour	$926.63 per week	$762.70 per week
Higher of the rates	-	OWP (as per s8(2))	-
Payment Amount	**$630.00**	**$741.30**	N/A

* Zara OPAQUE's records show that at the time they took annual holidays, they were working irregular hours which fluctuated each week. Therefore, it appears it is not possible to determine OWP as per section 8(1) and OWP as per s8(2) should be used.

**The numerator is based on the gross earnings going back to the date the employee started their employment.

The above table shows how the use of the incorrect OWP has resulted in an underpayment of $111.30.

The Inspector also found instances where the employer did not pay employees the greater of OWP and AWE for annual holidays taken as required by sections 21 and 22 of the Act.

Table 1.2 on the next page is an example of the employer using the OWP under section 8(1) of the Act in to pay for Marcel SPECKEL's annual holidays taken in the pay period ending 31 March 2019 when their AWE is the greater of OWP and AWE. This resulted in an underpayment of $15.42.

Table 1.2: Employee Marcel SPECKEL's payment for annual holidays taken in pay period ending 31 March 2019

	Employer's Calculation	Calculation as per the Act	
Calculation Method	OWP (as per s 8(1))	OWP (as per s8(1))*	AWE
Portion of leave taken	69.75 hours	2 weeks**	2 weeks
Numerator (Gross Earnings)	-	-	$58,432.94
Divisor	-	-	52
Rate	$1,1.00 per week	$1,120.00 per week	$1,123.71 per week
Higher of the rates	-	-	AWE
Payment Amount	**$2,232.00**	-	**$2,247.42**

*Marcel SPECKEL's OWP could be determined under section 8(1) based on their standard hours of work of 35 hours per week, multiplied by their hourly rate of $32.00.
**Marcel SPECKEL's portion of annual holidays taken is based on an ordinary working week of 4 days.

Based on the information provided, it is the Inspector's opinion that a breach of sections 21 and 22 has occurred.

3.2 Holidays Act 2003 section 23 Calculation of annual holiday pay if employment ends within 12 months

Section 23 of the Act states that if an employee's employment ends within 12 months and the employee is not entitled to annual holidays because they have worked less than 12 months, the employer must pay the employee 8% of their gross earnings since commencement of employment less any amount paid to the employee for annual holidays taken in advance.

Of the employees sampled, none of the employees had ended their employment within 12 months.

Based on the information provided, the Inspector has not been able to assess the employer's compliance with this section.

3.3 Holidays Act 2003 section 24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen

It was found that the employer miscalculated the payment for an employee's annual holiday entitlement when their employment ended.

Section 24 provides that the employees must be paid the greater of the OWP or AWE for the whole or part of their annual holiday entitlement not taken when the employment ends.

The information provided for Emma MISTY, shows their employment ended on 19 February 2019 and that they had an entitlement of annual holidays remaining of 51.5 hours. Emma MISTY also received annual incentive payments, which have been excluded from their gross earning

and this has had a flow on effect on the calculation of their payment for annual holiday entitlement remaining upon their employment ending.

Table 1.3 on the next page shows a comparison of the employer's calculation and calculation as per the Act. The miscalculation of the payment for Emma MISTY's annual holiday entitlement when her employment ended resulted in an underpayment of $92.44.

Table 1.3: Emma MISTY's payment of annual holiday entitlement remaining at termination

	Employer's calculation		Calculations as per the Act	
Calculation method	AWE	OWP	AWE	OWP (as per s8(1))*
Portion of entitlement	51.5 hours	51.5 hours	1.29 weeks**	1.29 weeks**
Gross earnings	$60,220.96***	-	$63,954.96***	
Divisor	2,080 hours		52	-
Rate	$28.95 per hour	$29.01 per hour	$1,229.90 per week	$1,160.40 per week*
Greater of the rates	-	$29.01 per hour	$1,229.90 per week	-
Payment amount	-	$1,494.03	$1,586.47	-

** Emma MISTY's OWP could be determined based on their standard hours of 40 hours per week and their hourly rate of $29.01.*

*** Emma MISTY's records show their standard hours were 40 hours per week, five days per week. Therefore, their remaining entitlement of 51.5 hours is equivalent to 1.29 weeks (i.e. 51.5 hours/40 hours per week).*

****The difference in gross earnings is the annual bonus payment Emma MISTY received in the pay period ending 21 August 2015 of $3,734.00.*

Based on the information provided, it is my opinion that a breach of this section has occurred.

3.4 Holidays Act 2003 section 25 Calculation of annual holiday pay if employment ends before further entitlement has arisen

It was found that the employer had correctly calculated and paid annual holiday pay for an employee where employment ended before further entitlement had arisen.

Section 25 of the Act provides that where an employee's employment ends before they become entitled to their next annual holiday entitlement, they must be paid 8% of their gross earnings for the date of the last entitlement date to the date of termination, less any amount for holidays taken in advance or already paid in the employee's regular pay.

Based on the information provided, the Inspector did not identify a breach of this section.

3.5 Holidays Act 2003 section 28 When annual holiday pay may be paid with employee's pay

It was found that the employer included holiday pay in the regular pay of an employee when they did not meet the criteria to receive their annual holiday entitlement that way.

Section 28 sets out the criteria for when annual holiday pay may be included in an employee's wages. This criteria includes that the employee is:

- on a fixed-term agreement of less than 12 months; or

- works on a basis that is so intermittent or irregular that is impracticable for the employer to provide the employee with four weeks' annual holidays.

Paul CLEAR was not on a fixed-term agreement and was treated by the employer as 'casual'. Their wages and time records show that they worked regularly from Monday to Friday each week between the period of 20 April 2019 and 9 August 2020. This meant that it was practicable to provide Paul CLEAR with four weeks of annual holidays and therefore, the criteria to include holiday pay in Paul CLEAR's regular pay has not been met.

Based on the information provided, it the Inspector's opinion that a breach of this section has occurred.

3.6 Holidays Act 2003 section 28A Employee may request portion of annual holidays to be paid out

Section 28A states an employee may request, in writing, for their annual holidays entitlement to be paid out up to a maximum of one week per entitlement year.

The employer advised that employees are able to cash up their fourth week of their annual holiday entitlement with a written request.

There were no instances of annual holidays being paid out in the sample of records reviewed and therefore the Inspector has not been able to check whether the employer complies with this section.

3.7 Holidays Act 2003 section 49 Payment if employee does not work on public holiday

It was found that the employer did not correctly pay employees for public holidays not worked.

Section 49 requires employers to pay public holidays not worked if the public holiday not worked was an "otherwise working day" for the employee. The payment of the public holiday must be at a rate that is no less than the employee's relevant daily pay (RDP) or average daily pay (ADP).

An employee's RDP is the amount the employee would have received had they worked on the day concerned, while ADP is a formula which divides the employee's gross earnings for the 52 weeks before the end of the pay period by the number of whole or part days which the employee worked during this period.

For Zara OPAQUE, it was identified that the employer did not pay them for the unworked Good Friday public holiday which fell on 30 March 2018, despite Fridays being an otherwise working day for them given they consistently worked on Fridays. Accordingly, the employer should have paid Zara OPAQUE at a rate no less than their RDP or ADP for this unworked public holiday.

The Inspector also found an instance where Zara OPAQUE appears to have been underpaid for an unworked public holiday on Waitangi Day which fell on Tuesday, 6 February 2018. In this case, the employer calculated RDP based on 7.5 hours at Zara OPAQUE's hourly rate despite the employee having worked 11 hours on most Tuesdays in the four month period before the public holiday. It is therefore the Inspector's view that the employee's RDP should be $231.00 as they likely would have received pay at their hourly rate for 11 hours had they worked on Tuesday, 6 February 2018. Table 1.4 on the next page shows how the incorrect RDP rate has resulted in an underpayment of $73.50.

Table 1.4: Employee Zara OPAQUE's payment for an unworked public holiday (Waitangi Day 2018)

	Employer's calculation	Calculation as per the Act
Calculation method	RDP	RDP
Hours not worked on the public holiday	7.5 hours	11 hours
Hourly rate	$21.00	$21.00
Payment amount	**$157.50**	**$231.00**

Based on the information provided, it is the Inspector's opinion that a breach of this section has occurred.

3.8 Holidays Act 2003 section 50 Employer must pay employee at least time and a half for working on public holiday

It was found that the employer did not pay at least time and half for the hours worked on a public holiday.

Section 50 stipulates that an employee who works on a public holiday must receive at least time and half for the actual hours worked on that particular day.

Table 1.5 – Employee Zara OPAQUE's payment for working on a public holiday (Auckland Anniversary Day 2017)

	Employer's calculation	Calculation as per the Act
Calculation method	Hourly rate	RDP
Hours worked on public holiday	7.5 hours	7.5 hours
Hourly rate	$19.00	$19.00
Payment amount for hours actually worked	$142.50	$142.50
Half time amount	-	$71.25
Total payment amount	**$142.50**	**$213.75**

As seen in the table, Zara OPAQUE did not receive at least time and half for the hours worked on Auckland Anniversary Day in 2017 which was observed on Monday, 30 January 2017. This resulted in an underpayment of $71.25.

Based on the information provided, it is the Inspector's opinion that a breach of this section has occurred.

3.9 Holidays Act 2003 section 56 Alternative holiday must be provided if employee works on public holiday

It was found that the employer did not provide alternative holidays when an employee worked on a public holiday and that day was an otherwise working day for the employee.

Section 56 requires that if an employee works on a public holiday that would be their "otherwise working day" the employer must provide the employee with an alternative holiday. Section 12 of the Act sets out the factors to consider when deciding if a public holiday is a day that is otherwise working day. These factors include the employee's employment agreement, the employee's work patterns, whether the employee works only when work is available, the employer's roster, the reasonable expectations of the employer and employee regarding whether they would work on the day concerned, and whether "but for" the day being a public holiday the employee would have worked on that day.

Based on the information provided, it appears the employer did not provide Emma MISTY with an alternative holiday for working on New Year's Day and the Day After New Year's Day which fell on Monday, 1 January 2018 and Tuesday, 2 January 2018, respectively. Emma MISTY had consistently worked Mondays and Tuesdays in the eight weeks lead up to these two public holidays and these days were therefore "otherwise working days" for them. It is noted that the employer provided alternative holidays for the previous two public holidays worked (i.e., Christmas Day 2017 and Boxing Day 2017) which similarly fell on a Monday and Tuesday.

Based on the information provided, it is the Inspector's opinion that a breach of this section has occurred.

3.10 Holidays Act 2003 section 71 Payment for sick leave and bereavement leave

It was found that the employer correctly paid employees' sick leave and bereavement leave taken.

Section 71 requires that sick leave and bereavement leave is paid at a rate not less than the employee's RDP or ADP.

Based on the sample of records reviewed, it appears the employer has paid employees correctly when they have taken sick leave. For example, Marcel SPECKEL took two days of sick leave in on Monday, 17 September and Tuesday, 18 September 2018 and received a total payment of $540. At the time Marcel SPECKEL took this sick leave they were working nine hours per day Monday to Thursday each week and their hourly rate was $30.00. Therefore, their RDP was $270 for each day (i.e. 9 hours x $30 per hour).

The employer has advised that the methodology used to calculate sick leave is also used to calculate the payment for when an employee takes bereavement leave.

Based on the information provided, it is the Inspector's opinion that no breach of this section has occurred.

Conclusion

On reviewing the employment agreements, records and other relevant documentation, the Inspector is satisfied the employer has retained copies of the individual employment agreements and has sufficient wages and time records.

However, the Inspector's review has identified areas where the employer's end-to-end payroll system is non-compliant with the applicable legislation and areas where they may be at risk of non-compliance.

The following breaches of the Holidays Act were identified:

- The employer miscalculated the payment for annual holidays taken (sections 21 and 22).
- The employer miscalculated termination holiday pay where an entitlement to holidays had arisen (section 24).
- The employer included annual holiday pay regularly in the employee's pay when they did not meet the criteria (section 28).
- The employer failed to recognise an "otherwise working day" and did not correctly calculate payment for an unworked public holiday (section 49).
- The employer did not pay an employee at least time and a half for working on a public holiday (section 50).
- The employer failed to provide employees with an alternative holiday for working on a public holiday which fell on an "otherwise working day" (section 56).
- The employer did not keep sufficient holiday and leave records as it did not include the date on which the employee last became entitled to annual holidays (section 81).

Given the scope of the breaches identified in this audit, it is appropriate for the employer and the Labour Inspector to consider entering into an Enforceable Undertaking to obtain compliance.

Inspector name: Ellen Right

Inspector signature: *Ellen Right*

Date: 01/08/2022

Enforceable Undertaking

under section 223B of the Employment Relations Act 2000

1. Introduction

1.1. This undertaking is offered to Ellen Right a Labour Inspector for acceptance under section 223B of the *Employment Relations Act 2000* by Hospo Café Limited ("the employer").

1.2. During the course of the audit undertaken by the Labour Inspector, a very small sample of the employee base was selected.

1.3. Given the scope of the *Employment Relations Act 2000* and the *Holidays Act 2003,* there is a possibility that the employees selected may not be indicative of the entire workforce. It is probable that due to the small sample size of employees reviewed, the payroll issues identified do not cover all issues in the end-to-end payroll system and with all employees.

2. Breaches

2.1. The employer acknowledges the following breaches of employment legislation have been performed by the employer.

Holidays Act 2003 ('the Act')

2.1.1. Section 21 Calculation of annual holiday pay, section 22 Calculation of annual holiday pay if taken in advance

- Average Weekly Earnings (AWE) versus Ordinary Weekly Pay (OWP) calculation not used.

2.1.2. Section 28A Employee may request portion of annual holidays to be paid out, section 28B Payment for annual holidays paid out

- Requests were not in writing
- Payments were not calculated as stipulated by section 21(2).

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

- Incorrect calculation of Relevant Daily Pay (RDP) as stipulated by s9.
- Incorrect calculation of Average Daily Pay (ADP) as stipulated by s9A.

2.1.4. Section 50 Employer must pay employee at least time and a half for working on public holiday

- Incorrect calculation of time and a half for the time actually worked on the public holiday.

2.1.5. Section 57 Requirements of alternative holiday

- Less than a whole working day off work provided.

2.1.6. Section 60 Payment for alternative holiday

- Incorrect calculation of RDP as stipulated by section 9.
- Incorrect calculation of ADP as stipulated by section 9A.

2.1.7. Section 61 Alternative holiday may be exchanged for payment

- Payments were made before 12 months had passed since the employee's entitlement to the alternative holiday arose.

2.1.8. Section 71 Payment for sick leave and bereavement leave

- Incorrect calculation of RDP as stipulated by section 9.
- Incorrect calculation of ADP as stipulated by section 9A.

2.1.9. Section 81 Holiday and leave record

- Holidays and leave not recorded in accordance with the criteria set out in the Act.

Employment Relations Act 2000

2.1.10. Section 65 Form and content of individual employment agreement

- Employment agreements did not include an indication of where the employee is required to work.
- Employment agreements for employees who are paid annual holidays with their pay included clauses contrary to law.

3. Actions to Rectify Breaches

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.

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 May 2012[10].

It is important to note that all of these entitlements must be calculated sequentially by date as each entitlement affects the gross earnings of the next one calculated.

3.1.1. Review the wages and time records and holiday and leave records for all current employees and past employees and identify periods of:

- Public Holidays
- Sick Leave
- Alternative Holidays
- Bereavement Leave
- Notional Public Holidays.

[10] Refer to Chapter 2.2 of the Investigation and Enforcement Guide regarding the Inspectorate's approach to review periods following the Employment Court's decision in *Enterprise Motor Group*.

3.1.2. Calculate the correct RDP for all of these periods, or if RDP is not appropriate, calculate ADP for these periods. When ADP is used, it **must** be calculated using the formula set down in section 9A 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.

3.1.3. Ensure holiday and leave records have the correct entitlements recorded. E.g. a whole day for alternative holidays.

3.1.4. Review the wages and time records and holiday and leave records for all current employees and past employees and identify periods of annual holidays.

3.1.5. Calculate the correct holiday pay for these employees. This **must** be calculated using the formula set down in section 21(2)(b):

at a rate that is based on the greater of—

(i) the employee's ordinary weekly pay as at the beginning of the annual holiday; or

(ii) the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

OWP **must** meet the criteria set down in section 8, and when a calculation is done it **must** be using the formula set down in the same section.

3.1.6. Review the wages and time records and holiday and leave records for all current employees and identify any occasions where annual holidays and alternative holidays have been paid out

3.1.7. For employees in 3.1.6 who had annual holidays paid out identify the portion of annual holidays paid out and assess if it meets the requirements of section 28A(2) of the Act, that the request is in writing and is not more than 1 week of an employee's entitlement and in the correct entitlement year.

For example: an employee begins work for the employer on 20th April 2012. They become entitled to 4 weeks of annual holidays on 20th April 2013. During the 12 months that follow (20th April 2013 to-20th April 2014) they may have paid a maximum of 1 week of annual holidays. If they choose not to have paid out up to one week during that 12-month period, they are unable to have paid out a portion or the whole of that 4th week of annual holidays in subsequent years.

3.1.8. For annual holidays identified in 3.1.7 as meeting the requirements of section 28A(2) calculate the correct holiday pay for these employees as set out in 3.1.5. For annual holidays identified in 3.1.7 that do not meet the requirements of 28A(2) then update the affected employee's records as if the payment for the portion of annual holidays concerned had not been made.

3.1.9. For any alternative holiday paid out (in 3.1.6) identify if it meets the requirements of section 61(2)(a) of the Act. For any alternative holiday that has been paid out that does not meet the requirements of section 61(2)(a) of the Act, update the affected employee's holiday and leave record to show that the employee still has the holiday available to take.

3.1.10. Calculate the correct termination pay of all employees that have ended their employment from **1 May 2012** 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.

3.1.11. Review employment agreements of current employees and ensure they meet the requirements of section 65 of the Employment Relations Act 2000.

3.1.12. The employer will operate in a "good faith" manner advising their employees (or representatives) of the matter and involving them during the process as they identify the issues, remediate arrears and rectify their systems.

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 the employer's current employees and the arrears outstanding to them.

3.2.2. List of the employer's employees who have ended their employment from **1 May 2012** and the arrears outstanding to them.

3.2.3. List of the employer's current employees and the portions of annual holidays and alternative holidays that were paid out but did not meet the requirements of sections 28A(2) and 61(2)(a) respectively.

3.2.4. From lists referred to in 3.2.1, 3.2.2 and 3.2.3, the Labour Inspector will randomly select a number of employees, and the employer will subsequently provide for those employees selected an actual calculation of each of the specific leave entitlements; namely

- Public Holidays
- Sick Leave
- Alternative Holidays
- Bereavement Leave
- Notional Public Holidays
- Holiday Pay

- Termination Pay.

3.2.5. Copies of holiday and leave records for the selected employees in 3.2.4., showing that their leave entitlements have been correctly allocated.

3.2.6. Sample of employment agreement templates showing that they now comply with the Employment Relations Act 2000.

3.3. Within 60 days of the completion of this Enforceable Undertaking, the employer agrees to enter into a subsequent Enforceable Undertaking with the Labour Inspector which encompasses a remedial plan for 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 **30 June 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

The employer acknowledges the following.

4.1. That this undertaking is given willingly by the employer and they have 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.

4.2. The employer has been advised by the Labour Inspector that it cannot offset overpayments against underpayments, and that any deductions to an employee's pay need to comply with the Wages Protection Act 1983. In addition, the Labour Inspector has provided the employer with a copy of its Position Statement – "*Accounting for overpayments through Holidays Act Re-calculations*" (attached as Appendix A) confirming that the employer must comply with the Wages Protection Act 1983 and outlining that gross earnings used for remediation calculations can be adjusted to account for genuine mistaken overpayments provided that the employer consults with affected employees in good faith.

4.3. 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 sections 223C and 141 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 be 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.

4.4. That this Enforceable 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*.

4.5. 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*.

4.6. That this Enforceable 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: _____

Signature: _____

Dated (Day/Month/Year) _____ / _____ / 20_____

Accepted by the **Labour Inspector** pursuant to section 223B *Employment Relations Act 2000*

Signed by the Labour Inspector

Printed Name: _____

Signature: _____

Dated (Day/Month/Year) _____ / _____ / 20_____

Enforceable Undertaking

under section 223B of the Employment Relations Act 2000

1. Introduction

1.1. This undertaking is offered to Ellen Right, a Labour Inspector for acceptance under s223B of the *Employment Relations Act 2000* by Bright Glazing Limited ("the employer").

1.2. This is a subsequent Enforceable Undertaking to the attached Enforceable Undertaking entered into on 1 October 2017 (Appendix A).

1.3. This undertaking includes a remedial plan for the identified arrears.

2. Breaches

2.1. The employer acknowledges that breaches occurred in relation to minimum entitlements and that arrears resulted from these breaches.

2.2. The arrears resulting from these breaches for current employees and past employees consist of the following.

2.2.1. Total arrears of $271,638.90 for the period 1 October 2011 to 1 June 2017 for one or a combination of; annual holiday entitlements, bereavement leave, alternative holidays, public holidays and sick leave entitlements.

2.3. The breach this Enforceable Undertaking applies to is the arrears outstanding to the identified employees specified in Appendix B, through the breaches acknowledged and the actions undertaken by the employer in the attached Enforceable Undertaking entered into on 1 October 2017 (Appendix A).

3. Actions to Rectify Breaches

3.1. The employer will rectify the breach in 2.3 of this undertaking taking the actions listed below, being ones that the Labour Inspector determines are appropriate having regard to the nature of the breach.

3.1.1. Make payments of the arrears to current employees specified in Appendix B.

3.1.2. Make contact with past employees[s] specified in Appendix B using reasonable endeavours.]

3.1.3. For the past employees who respond in 3.1.2., make payment of the arrears specified in Appendix B.

3.1.4. If the employer chooses to discuss and agree with any employees as to how any demonstrated payments above the minimum entitlement and underpayments may be treated, the provisions of the *Employment Relations Act* (particularly s4) and the provisions of the *Wages Protection Act 1983* need to be fully complied with at all times, and if any employees agree that some or all demonstrated payments may offset each other, the written consent of each employee needs to be provided in accordance with these statutes.

3.1.5. The employer will continue to operate in a "good faith" manner advising their employees (or representatives) of the matter and involving them during the process as they remediate arrears [and rectify their systems].

3.2. The employer will provide the following evidence that it has rectified the breach in 2.3.

3.2.1. Evidence of arrears payment for a selection of employees randomly selected by the Labour Inspector from Appendix B. Evidence may consist of a bank statement, internet banking transaction, or pay slip etc.

3.2.2. Evidence showing that reasonable endeavours have been made to contact past employee.

3.2.3. If an employee has agreed to a deductions in relation to 3.1.4., evidence of the employee's written consent.

3.3. 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 **30 November 2018**.

4. Acknowledgements

The employer acknowledges the following.

4.1. That this undertaking is given willingly by the employer and they have 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.

4.2. That past employees may fail to make contact or provide the correct information to make payment by the completion date in 3.3. If past employees provide the required information after the date in 3.3, the employer will endeavour to make payment within a reasonable timeframe of receiving the employees' information.

4.3. That in addition to the arrears specified in 2.2.1. the employer is required to calculate and pay "wash up" arrears to employees for any periods of holidays or leave taken (or paid at the end of employment) in the pay periods from 1 June 2017 onwards and ensure any underpayments identified in the calculations performed for the purposes of the previous Enforceable Undertaking (Appendix A) are included in individual employees' gross earnings.

4.4. That the employer has been advised by the Labour Inspector that it cannot offset overpayments against underpayments, and that any deductions to an employee's pay need to comply with the *Wages Protection Act 1983.* In addition, the employer acknowledges the Labour Inspectorate's Position Statement – "*Accounting for overpayments through Holidays Act Re-calculations*" (attached as Appendix C) confirming that the employer must comply with the *Wages Protection Act,* and that this Enforceable Undertaking repeats the employer's good faith obligations where

adjustments to gross earnings have been made when performing recalculations to rectify breaches of the *Holidays Act*.

4.5. That the Labour Inspector has provided information about the effect of not complying with this undertaking and that in the event this undertaking is not fully met enforcement actions can occur, including:

- 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 sections 223C and 141 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 be 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.

4.6. That this Enforceable 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*.

4.7. 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*.

4.8. That this Enforceable 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: _____

Signature: _____

Dated (Day/Month/Year) _____ / _____ / 20_____

Accepted by the **Labour Inspector** pursuant to section 223B *Employment Relations Act 2000*

Signed by the Labour Inspector

Printed Name: _____

Signature: _____

Dated (Day/Month/Year) _____ / _____ / 20_____

Appendix 4 – Examples letters from employers regarding proposed offsetting

Example A: An example that does not comply with the Wages Protection Act 1983

Dear [employee]

Holidays Act Remediation Project

[Employer] has been working with the Labour Inspectorate of the Ministry of Business, Innovation and Employment and [third party] to comprehensively review employee leave entitlements. As part of this programme of work we have reviewed all employee leave entitlements from [date] to [date].

*The Labour Inspectorate provides guidance on the Holidays Act which can be found **here**.*

*The approach we took was to review your leave payments and leave entitlements across the period referred to above. We reviewed each period of leave to ensure the correct amount of leave was provided, ensured the payment for leave on termination was correct (if applicable), and that we have met our obligations under the Holidays Act 2003. These calculations were carried out with assistance from [third party] and have been subject to review by both the Labour Inspectorate and by us. Further detail in relation to the methodology we have applied can be found **here***

*We propose to apply a netting approach to the payment we are making. If we have overpaid you more than we have underpaid you, we propose the net result will be zero (i.e. we will not look to recoup the net overpayment we made to you). Where there has been a net underpayment, we propose to pay you the net additional amount, after overpayments have been taken into consideration. Refer to the "Net Payment" for your calculation result in the table below. To resolve your remediation case, **please click the button** below to accept this proposal or provide any feedback even if your Net Payment is zero.*

Ngā mihi

XX

Managing Director

Click to accept or provide feedback

Detailed information

*Definitions of terms can be found in the methodology **here** -*

Leave Payment Type	***Underpayments***	***Overpayments***	***Net Payment***
Annual Leave	*<< Test Annual leave-Underpayment >>*	*<< Test Annual leave-Overpayment >>*	
Annual Leave Cash-up	*<< Test Cashup leave-Underpayment >>*	*<< Test Cashup leave-Overpayment >>*	
BAPS Leave	*<< Test FBAPS amount - Underpayment >>*	*<< Test FBAPS amount - Overpayment >>*	
BAPS Worked	*<< Test FBPAS Worked amount - Underpayment >>*	*<< Test FBPAS Worked amount - Overpayment >>*	
Holiday pay at termination	*<< Test Termination payment - Underpayment >>*	*<< Test Termination payment - Overpayment >>*	
Total	*<< Test Total Underpayments >>*	*<< Test Total Overpayments >>*	*<< Test Net to Pay >>*

Please note, if we have overpaid you more than we have underpaid you, then the net payment will be zero (i.e. we are not seeking to claim back net overpayments made to you, upon acceptance of this letter). If you have a question, please click the feedback button above or email remediation@YY.co.nz.

Concerns with this example

- It does not make it clear that the employee does not have to agree to the deduction
- It only provides options for the employee to "accept" or provide "feedback" but not "decline"
- Does not make it clear the employee will receive their full underpayment amount if they do not agree to the deduction.

Example B: An example that does comply with the Wages Protection Act 1983

Dear [employee]

Holidays Act 2003 Recalculations

*As you may be aware, many organisations within New Zealand have faced challenges with the introduction of the Holidays Act 2003 (**Act**) and ABC Limited is unfortunately also in that position.*

[Employer] has been working with the Ministry of Business, Innovation and Employment (MBIE) over the past 12 months to:
1. Agree on the methodology for recalculating holiday pay; and
2. Undertake a recalculation of holiday pay for all current and past staff.
This work was undertaken on behalf of [employer] by [third party] and MBIE are satisfied that [employer] has used best endeavours to rectify the breaches.

*For [employer] this has meant recalculating holiday pay entitlements under the Act (**Entitlements**) back to [date]. The recalculation has identified that for some previous staff, Entitlements were miscalculated.*

[Employer] takes the following approach to remediation of any miscalculation of Entitlements:
1. We will not actively seek recovery at this stage from previous staff where there has been a net overpayment of Entitlements (i.e. the sum of underpayments is less than the sum of overpayments); and
2. We will negotiate individually with previous staff regarding under and overpayments, and seek consent to deduct any overpayment if applicable. We acknowledge that there is no compulsion for staff to agree to this.

We explain below what the recalculation means for you. Please seek any advice that you wish to, and then sign and return this letter to our Human Resources Officer by [date] to enable us to pay agreed amounts owing to you as set out below on [date]. We also need your bank account details (evidenced by a bank deposit slip or similar) and current IRD number to do this.

The recalculation of your Entitlements is as follows:

Item	***Amount***
Underpayment	*[ ]*
Overpayment	*[ ]*
Net Amount	***[ ]***

Should you wish to discuss or dispute the recalculation, please advise and we will meet with you to provide clarification.

We wish to apologise for any inconvenience that this process may have caused you. Please review the options below. We look forward to receipt of the one of signed agreement by [date].

Delete the options that are not applicable – and sign the one that you wish to take

---

[Option 1 – Entitlements Correct]

The payments you have received during the recalculation period show that your Entitlements have been paid correctly. As such, there is no remediation required.

Agreement
You agree that:
a. You have been provided with an opportunity to have the audit reconfirmed;
b. You are satisfied with the process used to recalculate your Entitlements;
c. There is no remediation action required;
d. You have read and understand the terms and conditions of the agreement set out above, and have been advised of the right and allowed the opportunity to seek independent advice in respect of the same; and
e. By signing below, you indicate your acceptance of the above terms of the agreement.

Signed:
[First Name] [Surname]

_____
Date:

----

*[**Option 2 – Underpaid**]*

The payments you have received during the recalculation period show that your Entitlements have been underpaid.

Agreement
You agree that:
a. You have been provided with an opportunity to have the audit reconfirmed;
b. You are satisfied with the process used to recalculate your Entitlements;
c. We will pay you the amount set out above under "Net Amount" (which in your case is the full underpayment amount);
d. You have read and understand the terms and conditions of the agreement set out above, and have been advised of the right and allowed the opportunity to seek independent advice in respect of the same;
e. This agreement is a full and final settlement of any remediation required in respect of your Entitlements; and
f. By signing below, you indicate your acceptance of the above terms of the agreement.

Signed:
[First Name] [Surname]

_____
Date:

----

*[**Option 3 – Underpayment and Overpayment**]*

*The payments you have received during the recalculation period show that your Entitlements have been underpaid **for some portions and overpaid for other portions.***

Agreement
You agree that:
a. You have been provided with an opportunity to have the audit reconfirmed;
b. You are satisfied with the process used to recalculate your Entitlements;
c. You note that you have some amounts where you have been overpaid, and other amounts underpaid;
d. You have the right to choose: (highlight which option suits)

Option One:
ABC to pay you the amount set out above under "Net Amount" and this agreement is a full and final settlement of any remediation required in respect of your Entitlements. In this option you agree to ABC subtracting overpayments from underpayments;

or

Option Two:
You elect for ABC to pay you the amount set out above under "Underpayment".

e. You have read and understand the terms and conditions of the agreement set out above, and have been advised of the right and allowed the opportunity to seek independent advice in respect of the same; and
f. By signing below, you indicate your acceptance of the above terms of the agreement.

Signed:
[First Name] [Surname]

_____
Date:

----

*[**Option 4 – Overpayment Only**]*

The payments you have received during the recalculation period show that your Entitlements have been overpaid.

Agreement
You agree that:

a. You have been provided with an opportunity to have the audit reconfirmed;
b. You are satisfied with the process used to recalculate your Entitlements;
c. ABC is not seeking reimbursement for overpayment amounts at this stage.
d. You have read and understand the terms and conditions of the agreement set out above, and have been advised of the right and allowed the opportunity to seek independent advice in respect of the same; and
e. By signing below, you indicate your acceptance of the above terms of the agreement.

Signed:
[First Name] [Surname]

_____
Date:

What's good about this example

- Express consent for the deduction is sought
- It is acknowledged that consent is options
- Underpayments are clearly set out
- It is clear the underpayment amount will be paid if the deduction is not agreed too
- The employee is given clear options.

Appendix 5 – Examples of methods accepted for remediation

Important note: These examples were accepted on the basis that the employer would be open and transparent in its communication with employees about how it determined entitlements to, and payments for, holidays and leave; and provide a clear process for employees to raise issues if they believe their entitlements are not being met or if they have additional information for the employer to consider, which will then be considered in good faith.

Regularity *(government agency employer)*

Overtime payments were assessed as being "regular" for the purposes of annual holiday calculations where the employee had been paid overtime in 3 out of the 4 weeks before the pay period when the annual holidays were taken.

What is a week

A. *For a fast food employer*

For employees working highly variable days and hours each week, what constitutes a working week will be based on the greater of average hours per week over the previous 52 weeks, and average hours per week over 4 weeks.

B. *For a meat processing employer*

For employees working highly variable days each week, what constitutes a working week will be based on the lesser of the average days worked over 52, 12 and 4 weeks.

It is noted the use of the 'lesser' of these averages was agreed as a smaller denominator benefits the employee when payment is calculated.

Note: the way a week is worked out may not necessarily match up with the way OWP and AWE are calculated as these must be calculated as prescribed by the Act. When considering the question of what constitutes a 'working week' consideration should be given to what is 'reasonable' for the employees and the nature of the business concerned.

Payments of FBAPS at RDP or ADP

- An employee's RDP is assessed as being able to be calculated where the employee has not earned any overtime, on call or commission payments in the last 12 weeks.

- An employee's RDP is deemed not practicable to determine where the employee has received any overtime, on call or commission payments in the last 12 weeks. These employees are then paid the higher of ADP or their 'standard working day' (based on profiled hours in the employer's payroll system).

Otherwise Working Days

A. *For 'casual' employees (banking employer)*

A day was assessed as being an otherwise working day for an employee where that employee had worked the day on which the public holiday fell either:
– 50% of the time in the last three months (12 weeks) OR
– 100% of the time in the last two weeks.

B. A two-step test for variable employees (fast food employer)

- **Step one**
  First, the employer will determine the day of the week on which the public holiday fell and if the employee worked on the same day of the week on at least three of the four weeks prior to the week in which the public holiday fell, that day would otherwise be a working day for that employee (the "three-out-of-four-rule").

- **Step two**

  Secondly, where, having applied the three-out-of-four-rule, the day on which the public holiday fell would not otherwise have been a working day for the employee, but the employee worked on the same day of the week on at least eight out of the twelve weeks prior to the week in which the public holiday fell, the day on which the public holiday fell may be an otherwise working day for that employee (the "eight-out-of-twelve-rule").

C. A four step test for variable employees (fast food employer)

- **Step one**

  First, the employer will determine the day of the week on which the public holiday fell (e.g. a Friday) and, if the employee worked on the same day of the week on at least three of the four weeks prior to the week in which the public holiday fell, that day would otherwise be a working day for that employee (the "three-out-of-four-rule").

- **Step two**

  Secondly, where, having applied the three-out-of-four-rule, the day on which the public holiday fell would not otherwise have been a working day for the employee, but the employee worked on the same day of the week on at least seven out of the thirteen weeks prior to the week in which the public holiday fell, the day on which the public holiday fell may be an otherwise working day for that employee (the "seven-out-of-thirteen-rule").

- **Step three**

  Thirdly, where having applied the seven-out-of-thirteen-rule and the day is not determined an otherwise working day the employer will review the employee's wages and time record employment agreement and any other relevant record or documentation regarding days of work to determine whether or not, taking into account the factors in section 12 of the Act, the day is an otherwise working day. For the avoidance of doubt, this step will be applied for any employee who had been employed for less than 13 weeks at the time the public holiday fell where the day is not an otherwise be a working day when the three-out-of-four-rule is applied (step one).

- **Step four**

  The employer will implement a process where employees can subsequently query the process and/or provide further information to the employer if the employee believes that a particular day was an otherwise working day for them and therefore entitled to receive payment for a public holiday not worked or that an alternative holiday should have been provided.

Appendix 6 - Letter closing file

30 June 2019

Attention: Danielle Cardamom
Chief People Officer
Big Bank Limited
Private Bag 39888
Wellington 5045

LS39990

Dear Danielle

HOLIDAYS ACT 2003 COMPLIANCE

The Labour Inspectorate has been working with Big Bank regarding their breaches of the Holidays Act 2003 (the Act) and other employment legislation. Given the nature of the breaches, the time periods involved, the varying types of employees, the number of employees, and the evidence that the employer has engaged with their employees over the approach taken, the Labour Inspectorate is satisfied the employer has used best endeavours to rectify and remediate the breaches identified.

The Labour Inspectorate has carried out a sampling method when assessing the measures taken by the employer to remedy its breaches. While this cannot guarantee that employees' minimum entitlements have been met in each individual case, the Labour Inspectorate is satisfied any margin of error is small.

The employer should advise employees of the methodologies used to calculate arrears and entitlements, and provide employees with an opportunity to escalate queries regarding their specific entitlements in good faith.

The Labour Inspectorate does not intend to take further enforcement action regarding the breaches of the legislation outlined in the enforceable undertaking dated 28 May 2018 and our file relating to this matter has been closed.

Moving forward the employer should ensure accurate records are being kept and the necessary processes are in place for its end-to-end payroll system to comply with the Act. If non-compliance regarding recording keeping is found in future interactions the Inspectorate will look to issue an infringement notice, along with considering other appropriate responses bearing in mind the full suite of enforcement tools at their disposal.

Thank you for your co-operation throughout the review and remediation process.

Yours sincerely

Ellen Right

Ellen Right
Senior Labour Inspector

Appendix 7 - Letter closing file as Inspectorate is ceasing its involvement

4 August 2022

Attention: Vicki Spicer
Big Government Agency
PO Box 1102
WELLINGTON 6100

LS39991

Dear Vicki

HOLIDAYS ACT 2003 COMPLIANCE

The Labour Inspectorate has been working with Big Government Agency (the employer) regarding its breaches of the *Holidays Act 2003* (the Act).

- ***The employer's remediation process to date***
  With the assistance of Biz Savvy Limited the employer has conducted a review of its end-to-end payroll system review to identify key issues relating to its compliance with the Act.

  The employer and the Inspectorate entered into an enforceable undertaking dated 1 April 2021 (the undertaking) to record the actions the employer agreed to take to remedy the breaches of the Act identified as a result of its review of its end-to-end payroll system. The undertaking required the employer to review records and recalculate holiday and leave entitlements for those current and past employees who have been paid through the employer's X2 payroll system (X2) from 1 April 2015. Employees paid from other payroll systems, such as the X3 system, were not covered by the undertaking.

  The Inspectorate carried out a sampling method when assessing the measures taken by the employer to remedy the breaches outlined in the undertaking. While this cannot guarantee that minimum entitlements of the employees covered by the undertaking have been met in each individual case, the Inspectorate is satisfied any margin of error is small.

- ***Labour Inspectorate's involvement***
  On 2 July 2022 the Inspectorate provided a draft enforceable undertaking relating to payment of the arrears calculated for the purposes of the undertaking. The employer has recently advised that it expects to complete payment of the arrears calculated by 30 August 2022. The arrears calculated cover the period from 1 April 2015 to 1 April 2021.

  Having reviewed its file and considered the nature of the breaches, progress the employer has made to date, the involvement of a third party provider to carry out remediation calculations, and the assurance the employer will engage with employees over the approach taken the Inspectorate does not believe that its continued involvement in the employer's process is required. The Inspectorate is satisfied the employer is using best endeavours to remediate the breaches identified to date and that it will continue to take the necessary steps to remediate breaches and comply with the Act.

  In the circumstances, the Inspectorate does not intend to take further enforcement action regarding the breaches of the legislation outlined in the undertaking or any breaches that may affect employees paid from payroll systems other than X2 The employer will not be asked to

sign a finalised version of the draft undertaking provided on 2 September and the Inspectorate's file will be closed.

- ***Actions still required for remediation***
  The employer is responsible for ensuring it is compliant with minimum employment standards. To complete its remediation process the actions the employer will need to complete include the following.

  - Advising employees of the methodologies used to calculate their arrears and entitlements, and providing a clear process so that employees can escalate queries regarding their specific entitlements which the employer will then consider in good faith.

  - Making payment of the arrears identified as a result of the calculations completed for the purposes of the undertaking. In this regard, the employer should take reasonable steps to contact past employees covered by the undertaking so that payment can be made to them once they provide their details.

  - Calculating and paying further arrears to the employees covered by the undertaking for any periods of holidays or leave taken (or paid at the end of employment) in the pay periods from 1 April 2021 until such time as the employer has a compliant end-to-end payroll system in place, ensuring that any underpayments identified in the calculations are included in individual employees' gross earnings.

  - Reviewing records and recalculating holiday and leave entitlements from 1 April 2015 for those current and past employees who have been paid by the employer through payroll systems other than X2. Making payment of the arrears identified as a result of the review of records and re-calculations completed for current and past employees who have been paid by the employer through payroll systems other than X2. In this regard, the employer should take all reasonable steps to contact these past employees.

  Please get in contact if any questions arise as work on the remediation process continues.

- ***Moving Forward***
  Moving forward the employer must ensure that accurate records are being kept and the necessary processes are in place for its end-to-end payroll system to comply with the Act. There are a range of resources available on the Employment New Zealand website to help employers comply with the Act and other employment legislation. Those resources include MBIE's Holidays Act Guidance (available here) and information about how employers can create an appropriate Assurance Framework for their business.

  The employer should be aware that if non-compliance regarding recording keeping is found in future interactions or if an employee complaint relating to its remediation process is received, the Inspectorate may issue an infringement notice, along with considering other appropriate responses bearing in mind the full suite of enforcement tools at their disposal.

Thank you to you and your team for your co-operation throughout the Inspectorate's involvement in the employer's remediation process.

Yours sincerely
Ellen Right
Ellen Right
Senior Labour Inspector

Document Change Log

Date	Change	Updated by
17 Nov 2020	Document published.	
4 Oct 2022	• Updated to record when an investigation is considered to be completed for reporting purposes (LILT decision on 29/09/2022). • General review of the Chapter, including an update to reflect the changed approach to Quality Assurance for payroll cases.	Kim Baldwin
21 Oct 2022	Updated to cover the decisions of higher courts in *Metropolitan Glass* and *Tourism Holdings*.	Kim Baldwin
05 Jan 2023	Updated following the decision in *Enterprise Motor Group.*	Kim Baldwin
07 Mar 2023	Updated section on Checking calculations for consistency with change to the commentary on section 28 in the Reference book – Holidays Act 2003.	Kim Baldwin
09 Jan 2024	Small grammatical corrections. Addition of considerations to check compliance for 'multi-jobbers' (pages 5 and 6).	Kim Baldwin
16 Feb 2024	Information about what an Inspector should look for when reviewing draft communication relating to offsetting.	Kim Baldwin
4 Mar 2024	This is Guide is based on Chapter 2 of the Payroll Guide and incorporates content from Chapters 1 and 3 of the Payroll Project Guide that is relevant as at 4 Mar 2024.	Kim Baldwin