

NEW ZEALAND BUSINESS ROUNDTABLE

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Holidays Amendment Bill

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September 2010

## 1. Introduction

- 1.1 This submission is made by the New Zealand Business Roundtable, an organisation comprising primarily chief executives of major New Zealand businesses. The purpose of the organisation is to contribute to the development of sound public policies that reflect overall New Zealand interests.
- 1.2 In our submission on the 2003 Holidays Bill and the Holidays (Four Weeks Annual Leave) Amendment Bill, we stated:
  - (a) The proposed changes lack a sound policy basis. In particular, they are not derived from a first-principles assessment of the rationale for regulating holidays or the role of holidays legislation in a modern labour market;
  - (b) the proposed changes will achieve only minor, if any, reductions in compliance costs for employers; and
  - (c) the increased entitlements will have a detrimental impact on New Zealand firms, and will work against government efforts to move New Zealand into the top half of the OECD income rankings.
- 1.3 These concerns have been borne out. Holidays legislation remains complex and difficult to administer. It is far less problematical in many countries, including Australia. Moreover, the costs associated with the additional week's leave have slowed the rate of real wage growth for affected workers.
- 1.4 Regrettably, the proposed amendments will leave the Holidays Act almost as complicated as it is now. They depart substantially from the recommendations of the employer representatives on the recent Ministerial Advisory Group. In submissions on the bill business organisations have made numerous suggestions for improvements that we endorse. We summarise key points in section 4 of this submission.
- 1.5 Given the level of criticisms of the bill, however, it may be preferable to go back to the drawing board and design a much simpler and more flexible regime from first principles. In the following two sections of this submission we lay out a principles-based framework for considering holidays legislation.

## **2. The rationale for regulating holidays**

- 2.1 Two principal arguments are typically advanced for government regulation of labour market decisions concerning holidays. First, it is argued that employees are in an unequal bargaining position relative to employers and need to be protected by holidays and other labour market regulation in order to avoid 'unfair' outcomes. Second, it is argued that holidays must be regulated in order to help protect the health and safety of workers. Each of these is discussed in turn.

### ***Protection against unequal bargaining power***

- 2.2 This argument, which permeates other aspects of employment law, is fallacious. It misunderstands the nature of markets and competition. In particular, it does not recognise the important role that competition plays in protecting workers against 'exploitation' by employers. In competitive labour markets, firms compete with other firms for workers' services, and wages and working conditions are set through voluntary exchanges that yield mutual gains. The extent of bargaining power held by each side depends on the availability of alternatives. At any given time, labour market conditions may appear to favour employees or employers. However, there is no systematic long-run bias in favour of employers.
- 2.3 Employees and employers are not involved in a 'zero-sum' game in which they compete with one another, as seems to be assumed by those who subscribe to the unequal bargaining position view. Employees do not compete with employers, but with each other and with the unemployed for jobs. Similarly, employers compete with other employers for labour services. As one authority on labour law has stated:

If such an inequality did govern the employment relationship, we should expect to see conditions that exist in no labour market. Wages would be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies the employee will be bound for a term while

the employer ... retains the power to dismiss at will. Yet in practice we observe both positive wages and the right to quit at will.<sup>1</sup>

2.4 In the context of holidays, if the unequal bargaining position argument were true it would have the following implications:

- holidays and leisure time in general would have been driven down internationally, whereas the trend has been in the opposite direction;
- the government should regulate all aspects of the employment contract, not just holidays; and
- it would apply just as much to the self-employed who deal with large firms as clients. The logic of this argument therefore is that self-employed people should also be obliged to have a set number of holidays.

### ***Health and safety***

2.5 A second key argument is that regulation of holidays is necessary to safeguard the health and safety of New Zealand workers. However, the health and safety argument does not stand up to analysis for several reasons:

- the number of leave days represents a small percentage of the 104 days that employees regularly have off as weekends or equivalent days off. The contribution that these 20 days would make to overall health and safety outcomes is therefore likely to be small;
- workers who take leave may in fact be using the time for other activities (eg working at a second job, running a business part-time, engaging in education and training or undertaking home improvements). Therefore, the amount of 'rest and recreation' that people enjoy while on leave may be small or even non-existent. For this argument to carry much weight, the government would

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<sup>1</sup> Epstein, Richard A (1984) 'In Defense of the Contract at Will', *University of Chicago Law Review*, 51, p 972.

need to restrict employees' activities while on leave – an impossible task; and

- legislation that is specially designed to protect the safety of workers, such as the Health and Safety in Employment Act 1992, already addresses this issue.

### **3. Holidays legislation in a modern and diversified labour market**

3.1 Existing holidays legislation largely relates to the traditional labour market of a generation ago, where many individuals worked 8 hours per day, 5 days per week and the nature of work was quite different from that of today. The reality of today's labour market is that increasing proportions of the population:

- are self-employed and not covered by holidays legislation at all;
- are salary earners rather than wage earners. Increasingly, they have their work defined by outputs rather than inputs and are left some discretion about how and when to achieve their outputs; and
- work with their brains rather than their hands. For many people the idea of set amounts of holidays is largely meaningless, as they may well continue to think, talk and write about work-related matters while formally on holiday.

3.2 The flexible working arrangements and greater diversity of lifestyles that characterise society today mean that holidays legislation is becoming less relevant. As a result, the benefits that might flow from the Holidays Act are declining, while the costs to employers who operate under it increase as such rigidities become more of an obstacle to succeeding in the global marketplace.

3.3 An additional factor is that individuals' work preferences will differ markedly according to their age and family circumstances. For example:

- young single people may well be willing to work six or seven days a week, including public holidays, at least over some period, in

order to save a deposit for a house, save for their education or accrue sufficient leave to take a long trip overseas. They may therefore be willing to trade off leave for pay on a different basis from any specified in legislation; and

- parents with children may have other priorities, calling for more regular time off, and may demand a higher payment for having to work on holidays, especially at short notice.

3.4 Given the diversity of work patterns, changes in the operation of firms, and the differing needs of employers and employees, labour market regulations that limit the flexibility to negotiate over holidays can harm the interests of all parties – employees, employers and consumers. Employers may face higher costs as a result of inefficient working arrangements. Consumers may have to pay higher prices or miss out on goods and services that are no longer profitable for firms to produce (this has been seen in the café and restaurant trade). Employees may not be able to obtain the working arrangements they prefer. Firms in today's open capital markets must obtain returns that cover the costs of investors' capital. As a result, the cost of inefficient arrangements will ultimately be passed back to workers in lower wages or reduced benefits, to the unemployed if labour costs are not adjusted, or perhaps, in the case of non-traded goods and services, partly to consumers.

3.5 In our view there is ample scope for employers and employees to structure work, pay and holiday arrangements in a way that is satisfactory to both sides. The starting point for any legislative re-design should be the proposition that holiday arrangements are a matter for negotiation between employer and employee. If this is not acceptable, then the Holidays Act should simply set out minimum leave entitlements for workers and allow employers and employees to negotiate over appropriate compensation and other details (such as whether they wish to contract out of these entitlements, take higher pay in lieu of leave, etc).

#### **4. Specific comments on the bill**

- 4.1 We endorse points that have been made in submissions by other business organisations.
- 4.2 The business reality is that the Holidays Act is now implemented by computerised automatic payroll systems. Anything that requires manual calculation is inflexible, costly and harmful to productivity.
- 4.3 There are presently seven calculations which apply depending on the kind of leave. That is a ridiculous situation. There should be one single rate. For example, someone who earns \$1,000 a week (\$200 a day) should get \$200 whether for sickness, day in lieu, annual holiday or other reason. The actual arithmetical difference as produced by relevant daily pay calculations is small, but the cost of administration (given that some of the formulas cannot be computerised) can be very high.
- 4.4 Leave entitlement needs to be accrued consistently. It might be hours or weeks or months or years. The reality is that payroll systems now calculate in hours or days. The Act needs to provide consistency in terms of the unit of calculation.
- 4.5 The most contentious aspect of the bill has been the medical certificate issue. The reality is that the current three day exemption does not fit all workplaces. Operational flexibility and productivity require the employer to have the right to request a medical certificate in relevant circumstances, for example from employees who are away the Friday before every long weekend. If an employee knew they might be asked, improper absenteeism would reduce. Employers are not going to request medical certificates for every day's absence – another aspect of the union campaign which (like the trial period debate) simply shows a lack of understanding of how firms operate.
- 4.6 The merits of the cashing-up provision are self-evident. Employees lose nothing and gain another option, and individual employers may be happy to grant their requests. Similar provisions are available in collective and individual agreements in Australia, under law enacted

by Julia Gillard, and are widely accepted. The opposition of unions to this provision defies comprehension – the motivation may be to recruit members on the false premise that employees cannot make choices in their own best interest and that only unions can secure benefits for them. It is certainly not in employees' interests.

- 4.7 A final point is that if parliament is going to dramatically increase penalties for non-compliance then the other side of the coin is that it should ensure that the law is clear. It is grossly unfair to increase penalties and make 'criminals' out of employers if the law isn't easy to comply with. The proposed relevant daily pay provision is an example of highly problematic drafting.

## **5. Conclusions and recommendations**

- 5.1 The objectives of the Holidays Bill are laudable. The Holidays Act is a source of concern and frustration to many employers. It is complex and significantly out of step with the needs of a modern and diverse labour market.
- 5.2 However, we do not think the changes outlined in the Holidays Bill solve the widely acknowledged problems. In the end, the proposed changes will reduce complexity only a little, if at all. We commend the Committee's attention to the points raised in section 4 of this submission and the remedies proposed in submissions by other business organisations.
- 5.3 We submit, however, that there is a case for going further and reforming the Act on a first-principles basis. The government has made an ambitious commitment to achieve income parity with Australia by 2015. Only exceptionally good institutions and policies in all areas, including employment law, will enable that goal to be met.
- 5.4 In our view, the most appropriate reform would be to repeal the Holidays Act. Such a move would not represent a step into the unknown. The world's richest and most productive economy, the United States, has no statutory provisions at all governing annual leave or the terms of employment relating to public holidays. Nor did

the United Kingdom until a few years ago when it was forced to accept a European Union directive.

- 5.5 If the government is to have any role at all with regard to holidays, it should be limited to stating – simply, clearly and definitively – what the entitlements are and then allowing individual employees and employers to negotiate whatever exchanges they like. There should be no constraints (eg prescribed minimum rates of pay) on the terms of those exchanges. This would leave employers and employees free to negotiate employment contracts reflecting their own preferences for work, pay and leisure. If unrestricted opting-out of centrally mandated holiday arrangements is not favoured, any restrictions on such opting out should be kept to a minimum.