

Parliament swiftly passed changes to the Holidays Act 2003 and introduced another Bill to amend the Employment Relations Act 2000 last month. Proposed changes include a broader application of the terms and conditions of collective employment agreements to employees of non-party employers, and the expansion of the powers of Labour Inspectors to determine what type of employment relationship employees are in. As amended, the Holidays Act allows shift workers to agree with their employer to transfer public holidays to another day in limited circumstances. This issue of *Inform* outlines these changes in more detail.

HOLIDAYS (TRANSFER OF PUBLIC HOLIDAYS) AMENDMENT ACT 2008

The Holidays (Transfer of Public Holidays) Amendment Act amends the Holidays Act 2003 to allow employees and employees to transfer public holidays to different days in limited circumstances. This reduces the impact of the *New Zealand Airline Pilots' Association Industrial Union of Workers Incorporated v Air New Zealand Limited* [2007] NZSC 89 decision ("Air NZ").

The Act came into effect on 29 September 2008 and redefines public holiday to include a day listed in s 44(1) of the Holidays Act and, with written agreement, an alternative 24 hour period. A transfer may only occur where an employee works a shift covering at least some time in a public holiday and this shift extends across midnight to a normal working day that is not a public holiday. The amendment effectively restores the exchange day practice in limited circumstances.

In the explanatory note to the Bill, Parliament stated that:

The original intention of the Holidays Act 2003 was to give employees and employers the flexibility to transfer a public holiday, from a day listed in the Act, for reasons of cultural or personal significance or reasons of convenience. The reduction in flexibility has a significant impact for shift-based operations and means that businesses do not have the flexibility to agree to redefine a public holiday in line with the operational needs of the employer or the needs of the employee... Because of the Supreme Court decision, the Act no longer accommodates these non-standard working conditions in relation to entitlements to public holidays.

POINTS TO NOTE:

- If your employees work shifts that are partially worked on a public holiday and partially on a normal day, you may wish to negotiate the transfer of the public holiday to a 24 hour period that totally covers one shift.
- If you do agree to transfer the public holiday to another 24 hour period, ensure that it does not reduce the total number of public holidays that an employee becomes entitled to.
- For example: Joanne works the nightshift at the local freezing works, starting at 11pm and finishing at 7am the following day. With Queens Birthday coming up, she would normally work 1 hour on Queens Birthday and 7 on the following day. Similarly, on Anzac Day in April this year, she would have normally worked 1 hour the day before Anzac day and 7 on Anzac Day itself. Her employer, Freezing Meats Ltd, obtain her agreement in writing to redefine each public holiday as starting at midday the day before the public holiday and finishing at midday on the public holiday. This means that on Queens Birthday she would be treated as having worked no hours on Queens Birthday (because her shift normally starts on the night prior at 11pm). However, for the purposes of Anzac Day, she would have been treated as having worked a full 8 hours (because she worked from 11pm on the night prior until 7am on the Anzac day - the 24 hour period of the public holiday started at midday the day prior to Anzac day and finished at midday on Anzac day itself).
- Written agreements as described above allow employers like Freezing Meats Ltd to agree with employees like Joanne that they will treat shifts in a way that means they cover the entirety of a public holiday, rather than partially a public holiday and a normal working day. If employers want to reduce their wage bill on public holidays they no longer need to require employees like Joanne to work 1 hour on the day before a public holiday, and 7 hours on the day after the public holiday (to avoid paying time and a half and an alternative holiday) The Act ensures flexibility for both employer and employee without affecting employee's entitlements nor compelling employees to split shifts unnecessarily to reduce the business cost of public holidays.

PROPOSED CHANGES TO EMPLOYMENT RELATIONS ACT 2000

Parliament introduced the Employment Relations Amendment Bill (No 3) on 9 September 2008 (the "Bill") to alter the way that parties in a triangular employment relationship can deal with each other. The Bill also extends the powers of Labour Inspectors to include the power to determine what type of employment relationship parties are in and what the terms and conditions of employment are.

TRIANGULAR EMPLOYMENT:

- The Bill defines a "controlling third party" as a person who has a contract or some other arrangement with an employer under which an employee of the employer performs work for the benefit of that person. The person must exercise or be entitled to exercise control over the employee in a "substantially similar" manner when compared with an employer to be a controlling third party.
- The Bill deals with the terms and conditions of employment for employees performing work for a controlling third party where no collective employment agreement applies to their relationship with their employer. An employee will enjoy the same terms and conditions as those working for the controlling third party (if those terms and conditions are inconsistent with the terms and conditions operating between the employee and their employer). This is so only if the work done by the employee for the controlling third party falls within the coverage clause of the collective employment agreement operating at the workplace, and the employee is a member of the relevant union.
- The Bill also creates the ability for an employer and/or employee to join a controlling third party as a party to an action for a personal grievance (where the personal grievance relates to work performed for the controlling third party). Similar time limits apply as with other personal grievance actions and the controlling third party will only be joined if the Authority or Employment Court considers that it may have contributed to the personal grievance.
- Through mediation a personal grievance involving a controlling third party may be resolved, but the controlling third party may still be liable for the reimbursement of lost wages and compensation at the Authority level.

Points to Note:

- The Bill only applies where the employee is a member of a union and their employer is not a party to a collective agreement that covers the work done by the employee. Conversely, the controlling third party must be a party to a collective agreement that covers the work done by the employee for the changes to apply.
- The Bill may affect Independent Contractors and Recruitment Agencies (and other employers) where employees are working for a controlling third party pursuant to a contract or arrangement between the controlling third party and the Independent Contractor or Recruitment Agency.
- Despite the existence of concluded terms and conditions between an employee and employer, if the terms and conditions are inconsistent with those of the employee's of the controlling third party, the terms of the collective agreement may apply.

CAUSAL AND TEMPORARY EMPLOYEES

Where an employee and employer cannot agree about whether the employee works on a casual or temporary basis and/or what terms and conditions apply, either party may ask the Labour Inspector or the Authority to determine these matters on their behalf.

The Inspector and/or the Authority must take into account the written employment agreement (if any), whether s 66 of the Employment Relations Act 2000 has been complied with (if applicable) and:

- Patterns of work;
- Whether the employee works for the employer only when work is available;
- Rosters or other ways of allocating work;
- Expectations on the employee to work when requested; and
- Any other relevant factors.

The Inspector and/or the Authority must observe the principles of natural justice and cannot treat the written agreement as determinative of the employee's terms and conditions. Once determined the parties are bound by the result as it forms a term and condition of employment.

The Bill also extends the scope of the topics possible for Codes of Employment Practice. Codes may include guidance on the Holidays Act 2003, Minimum Wage Act 1983, Parental Leave and Employment Protection Act 1987 and Wages Protection Act 1983.

We'll keep you posted for any developments to this, but please contact us if you have any questions.