



# Holidays Act Update

Long road to change

8 December 2022

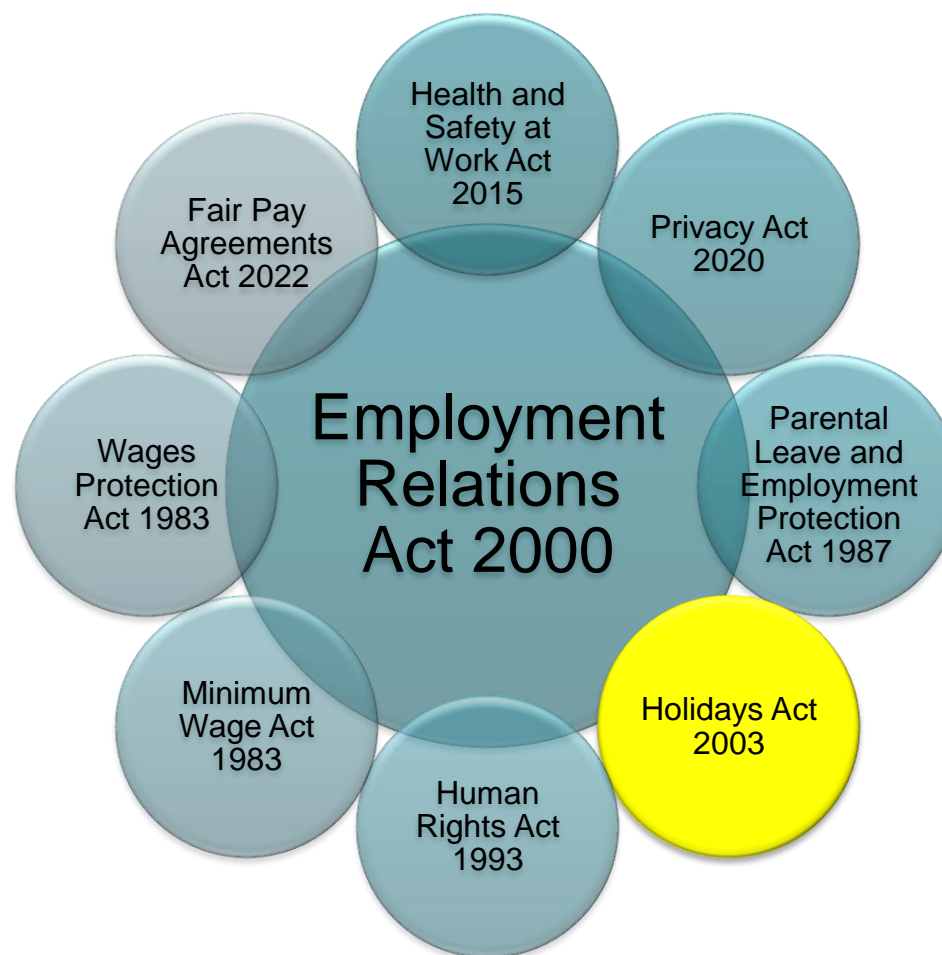
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| Specific advice should always be obtained before relying on any aspect of the content of this presentation or associated materials.

# Overview

- Existing Act and compliance
- Reasons for change
- Key proposals (Holidays Act Taskforce Report)
- Changes to leave entitlements
- Case law update

# The statutory framework



# Existing Act and compliance

- New Act not expected until end of 2023
- The 2003 Act still receiving judicial attention around interpretation
- The basic duty to pay holiday pay and FBAPS *in full* remains. So, too, the duty to pay any underpayment
- Limitation period on money claims is 6 years. Interest and costs typically sought
- Underpayment may give rise to penalty claim for breach of relevant EA. Limitation period – 12 months
- Unpaid holiday pay can give rise to a personal grievance. A successful PG can result in an award of compensation for “hurt and humiliation”
- Limitation period for PGs: 90 days to raise PG and then 3 years to file any claim

## Existing Act and compliance (continued)

- Labour Inspectorate monitoring efforts increased significantly since non-compliance identified in 2014 within government departments
- Further boost in 2017 with additional funding for the LI, following media attention
- Underpayments have generally been greater and more prevalent for waged employees, but salaried staff not immune
- LI has made clear that estimation method not acceptable
- An employer cannot contract out of duty to pay salary and holiday pay in full. This can impact records of settlement and their enforceability
- Payroll audits resulted in NZ\$237.7M being paid to workers between July 2012 and June 2020

# Holidays Act 2003 - Reasons for change

- No substantive review since coming into force
- A number of issues identified:
  - Lack of clarity as to what constitutes a working week
  - Lack of clarity about how to calculate the amount of leave to be deducted
  - Unclear how to incorporate commissions/overtime into OWP calculation
  - Outdated frameworks for bereavement leave / parental leave entitlements

*“The lack of clarity and certainty associated with the current Act make it difficult to implement for employers and hard for employees to be sure that they are receiving their statutory entitlements.” (Taskforce Report)*

# Key proposals – Taskforce

## *Annual leave pay*

### The Act (as it stands):

- 4 weeks' leave after 12 months
- Paid at the greater of
  - ordinary weekly pay; or
  - average weekly earnings over previous 12 months.

### Taskforce proposal:

- 4 weeks' leave after 12 months BUT will be able to take leave in advance on pro-rata basis
- Calculated, taken, paid, and held in weeks or portions of weeks
- Paid at the greater of:
  - Ordinary Leave Pay; or
  - Average weekly earnings over last 13 weeks; or
  - Average weekly earnings over last 52 weeks.
- **'Ordinary Leave Pay'**: what the employee would have earned had they worked on the day(s) in question. Includes base rate for hours worked in relevant period, plus pay for scheduled overtime, allowances and incentive/commission payments that the employee would have received
- **Gross earnings**: change the definition so it reflects all cash-payments received, except direct reimbursement for costs. Distinction between discretionary and contractual payments to be removed



# Key proposals – Taskforce (continued)

## *Annual leave deduction*

- Current:
  - Often difficult to calculate accurately, particularly if employee works variable hours.
- Proposed:
  - Determine amount of leave being take in hours. Use roster or EA. If not available, average hours worked on corresponding day in last 13 weeks
  - Determine a week in hours, using roster or EA. If not available, use average weekly hours in last 13 weeks
  - Use this fraction (hours being taken divided by hours in a week) to determine portion of a week to be deducted from entitlement balance, held in weeks
- Useful flowchart contained in Taskforce Report



# Key proposals – Taskforce (continued)

## *Calculating FBAPS pay*

### **The Act (as it stands):**

- Pay is based on :
  - Relevant Daily Pay, or
  - Average Daily Pay over last 52 weeks

### **Taskforce Proposal:**

1. Determine day is Otherwise Working Day
2. Determine amount of leave being taken in hours using EA or roster. If not available, average hours worked on corresponding day in last 13 weeks
3. Calculate hourly rate. Total earnings divided by total hours in last 13 weeks
4. Pay greater of ADP and OLP for day in question



# Key proposals – Taskforce (continued)

## *Returning from Parental Leave*



### *The Act (as it stands)*

- Parental Leave and Employment Protection Act 1987 includes ‘override’ to Holidays Act:
  - Employees on parental leave: only average weekly earnings over last 12 months is used
  - Employee who takes 52 weeks’ parental leave entitled to \$0 per week for annual holidays because average weekly earnings during leave period is \$0

### *Taskforce proposal*

- Parental leave override = removed
- Returning employees paid at full rate for annual holidays
  - Paid as greater of OLP and AWE over last 13 weeks and 52 weeks
  - Addresses discrimination against parents who take time off to care for their young children

# Key proposals – Taskforce (continued)

## *Pay as you go*

- Currently, can be used if employee engaged on fixed term (less than 12 months) or work is so “intermittent or irregular” that it is “impractical” to provide 4 weeks’ leave
- Proposed:
  - Remove fixed term exception
  - Define intermittent/irregular
  - Employer must review status every 13 weeks
- In regards to a sale of a business, currently employees need to be paid out their leave entitlements, but this is often not observed. The Taskforce proposes that employees be able to choose

# Changes to leave entitlements

## Sick leave

- *2021 amendments*
  - Sick leave entitlement increased to 10 days.
  - Employees carry over up to 10 days to maximum entitlement of 20 days in any year.
- *Taskforce proposals*
  - One day available from first day, additional day accrues each month until minimum entitlement reached
  - Leave can be taken in a unit of less than one day (minimum of a quarter day)

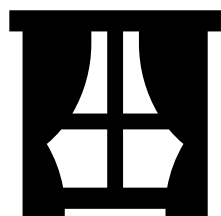
## Bereavement leave

- *2021 amendments*
  - 3 days' leave for miscarriage or still-birth
- *Taskforce proposals*
  - 3 days' bereavement leave expanded to extended family to account for "*more modern understanding of family members*"
  - Entitlement available from first day of employment

## Family violence leave

- *Current entitlement:*
  - After 6 months' service, 10 days for each 12-month period where employee affected by domestic violence
  - Not able to be carried over, but may be taken in advance with agreement of the employer
- *Taskforce recommendations:*
  - Entitlement available from first day of employment
  - Can be taken in units of less than one day

## Case law update



### ***Can a bonus ever really be a discretionary payment?***

- *Metropolitan Glass & Glazing v Labour Inspector, MBIE (July 2021)*

# Case law update (continued)

## Metropolitan Glass & Glazing Ltd v Labour Inspector

### Facts:

- Employee bonus scheme
- Payment conditional on attainment of performance targets, but also stipulated to be entirely “discretionary”
- Labour Inspector considered payments were “gross earnings” and should have been taken into account in holiday pay calculation

**Issue:** Were these payments ‘gross earnings’ for the purposes of calculating holiday pay?

### Employment Court:

- Payments not “discretionary”
- Gross earnings capture “all remuneration for an employee’s job”
- Doesn’t matter how payments arise (EA, policy documents or otherwise)
- Even where payment amount uncertain and subject to conditions (i.e targets) – payment still not discretionary

# Case law update (continued)

## Metropolitan Glass

### Court of Appeal

- Upheld appeal by Metro Glass – payments under the bonus scheme were discretionary
- Scheme contained an “express term” that the payments were discretionary even if conditions met
- Discretion not to pay had to be exercised reasonably, however

### Key Takeaways

- Decision turned on wording of the bonus scheme
- Key issue whether the employer is “contractually bound” to make the payment
- The majority of bonus schemes tied to performance will still be contractual, unless specific/clear wording to the contrary
- Prudent to audit your current bonus schemes and to determine whether they are contractual or discretionary

# Case law update (continued)

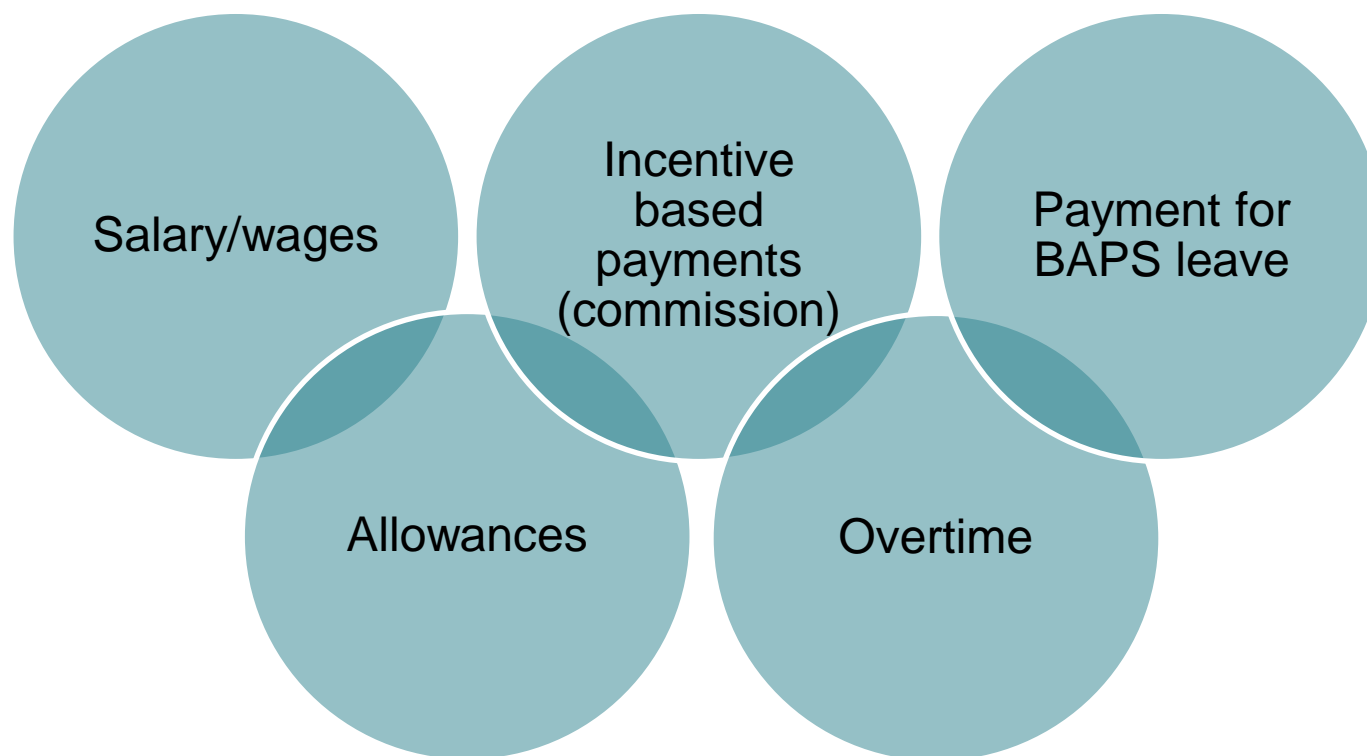
## *Tourism Holdings Ltd v Labour Inspector (2021)*

- Kiwi Experience
- Driver guides – drive, guide and sell activities
- Drivers paid:
  - Daily rate for tours - paid weekly in arrears
  - Commission on the sale of activities booked - paid in a lump sum after the tour and completed admin (paid monthly)



# Gross Earnings

All payments that the employer is **required** to pay under the employment agreement for the period the earnings are being assessed



## Tourism Holdings

Issue: Calculation of Annual Leave

### Ordinary weekly pay vs Average weekly earnings

- Amount received for an ordinary week
    - Includes commission etc. if a **regular part of pay**
    - Excludes payments that are not regular
  - If not possible to determine OWP, then look to gross earnings over last 4 weeks
- 1/52 of **gross earnings** (previous 12 months)
  - Includes all contractual payments
  - Excludes truly discretionary bonuses

# Case law update (continued)

## Tourism Holdings

### Court of Appeal

- Payments are a “regular part of the employee’s pay” if they are either “substantively” regular (rule based) or “temporally” regular (time based)
- Drivers’ commission payments met both these tests, so were a regular part of their pay
- Commission should have been included in OWP calculations

### Supreme Court

- The expression “regular part” implies a standard period against which regularity is to be assessed – in the context of section 8(2), the appropriate standard period is 4 weeks
- The SC amended the CA’s answer to what is “regular” to:

*Payments are a regular part of the employee's pay if they are of a kind made regularly when assessed against the standard of a four-week period*

- Commission payments, which were made monthly on average, were sufficiently regular so as not to be subtracted in the s 8(2) formula, with the result that the employee’s OWP figure would include them

## *Schollum v Corporate Consumables Ltd (2017)*

### *Underpayment and its consequences more broadly*

- Employer excluded commission from its holiday pay calculation
- Raised the “double-dipping” argument for not including commission
- Court held that the employer should not have excluded commission as it was contractual and formed part of gross earnings
- The Court noted that s 14 is explicit. Gross earnings means all payments and the exclusions are only those payments the employer is not bound to make
- The argument that the employees might be unduly financially advantaged by including the commission was said to be “erroneous and irrelevant”
- Outcome:
  - Declarations that employer breached the Act by failing to include commission payments
  - Employer to calculate and remediate

### **Key takeaways:**

- Courts have tended to dismiss double-dip arguments. As per *Schollum*, what employees are entitled to is “product of” their EA and the Act
- Make the important distinction between contractual and discretionary payments – until the new law comes in

# Questions



# About the presenter



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Mark provides strategic advice to employers, senior executives and human resource managers on complex and sometimes sensitive matters with regards to workplace issues. As an experienced employment law practitioner he has extensive experience as an advocate in personal grievance claims, conducting private negotiations on behalf of clients, and appearing before the Employment Relations Authority and Employment Court. Mark advises some of New Zealand's leading organisations and iconic brands on all aspects of their employment law needs. Mark has a particular interest in the Holidays Act and related issues.

## Facts about Duncan Cotterill

- National presence - 5 integrated full service offices
- 300+ employees
- 30+ ASX and NZX listed companies work with us
- Global connections through our relationships with INTA, and exclusive partnerships with GILC and TerraLex. TerraLex is a network across 100 countries connecting 19,000 high quality lawyers for appropriate jurisdictions.

