

# Holidays Act Review — What Next?, 29 March 2021

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The purpose of the Holidays Act 2003 (**Act**) is to promote balance between work and other aspects of employees' lives. The Act sets out minimum entitlements to holidays and leave, including how employees should be paid for leave and the obligations of employers in relation to those entitlements. However, the application of the Act can pose challenges for employers. There are well-known uncertainties surrounding entitlements, particularly for employees who do not work a "standard" Monday to Friday 40-hour working week.

In May 2018, the Government set up the Holidays Act Taskforce (**Taskforce**) to give recommendations on the Act with the hope of developing clear and transparent rules for providing entitlements to, and payment for, holidays and leave. The Taskforce was chaired by Professor Gordon Anderson from Victoria University, and included representatives from unions, government, and business.

The Taskforce established and tested options for change against a list of criteria, with a particular emphasis on 3 areas:

- Providing clarity and certainty for employers and employees
- Protecting overall entitlements for employees
- Ensuring that the recommendations would be readily applicable to the full range of working arrangements that exist.

Before completing its review, the Taskforce engaged a professional services firm with expertise in payroll matters to test the options it had developed. The Taskforce was then able to make unanimous recommendations to Workplace Relations and Safety Minister at the time, Hon Ian Lees-Galloway, (**Minister**) in October 2019.

On 21 February 2021, the Government released the Taskforce's recommendations alongside its own response, which accepted all 22 recommendations with some minor comments. It is expected that any changes will largely reflect the Taskforce's recommendations, however, new legislation has not yet been introduced.

This article summarises some key issues with different types of leave and the Taskforce's recommendations in relation to those issues.

## **Annual leave entitlements**

Employees are currently entitled to a minimum of 4 weeks' annual leave per year. This entitlement begins after 12 months of employment. There are potential issues with this model, particularly when trying to determine what constitutes a "week" for employees with varying work hours.

While there was feedback that a week-based system contributed to errors in accurately providing annual leave entitlements, the Taskforce rejected possible change to the provision of leave entitlements using an hours-based accrual system. Using an hours-based system would mean employees would accrue annual leave at a set percentage rate of every hour they worked, and the leave would be calculated in hours. Both the Taskforce's report and Government noted that an hours-based system could unfairly disadvantage employees including where hours of work increased over the course of a year.

Instead, the Taskforce recommended a new process to follow to determine how much of an employee's leave entitlement should be used for a period of time away from work:

1. Identify the days the employee may take annual leave. These days will be either where the employee has worked on the corresponding calendar day within the last 13 weeks, or the day in question is a day on which the employee could be contractually obliged to work or could offer work.
2. Determine the hours that would have been worked on each day of leave. Where an employee's days and hours of work are set out in an employment agreement, shift roster or other document and these are an accurate reflection of the employee's actual working pattern, these agreed days and hours should be used. If no hours are set out that accurately reflect the employee's working pattern, then an average working day should be determined by calculating the average daily hours the employee worked on all corresponding calendar days in the previous 13 weeks. This calculation should be carried out for each day of leave the employee wishes to take.
3. Determine what a week is for the employee. If the employee's hours of work are set out in an employment agreement, shift roster or other document then these hours would be used. If the hours are not set out, then a week would be determined by the average number of hours per calendar week within the previous 13 weeks.
4. Divide average working day in hours by average working week in hours to confirm the portion of a week to be taken as leave so it can be deducted from the annual leave entitlement.

### **Calculating annual leave payment**

Currently, under s 21 of the Act, payment for annual leave is whichever is the greater of an employee's "average weekly earnings" or "ordinary weekly pay". This means that both options must be calculated and compared by the employer.

The definition of "average weekly earnings" is 1/52 of gross earnings. The Act defines "ordinary weekly pay" as the amount employees receive under their employment agreements for an ordinary working week with exclusions of any overtime or commission payments that are not a regular part of the employees' pay. Where that calculation is not possible, the Act provides an alternative option in a formula which averages earnings over the 4 weeks immediately preceding the annual leave.

The Taskforce recommended a change to the calculation of annual leave to a "greater of 3" approach. Employees would be paid whichever is greater of "Ordinary Leave Pay", or, a short-run average weekly pay, or "average weekly pay" over 52 weeks.

### **Ordinary Leave Pay**

The Taskforce proposed replacing the existing "ordinary weekly pay" approach with a new "Ordinary Leave Pay". This would include the base rate for any hours worked in the relevant period, plus any scheduled overtime, allowances, incentive or commission payments that the employee would have received had they worked the relevant period.

The underlying principle for this payment for annual leave is that it should capture all payments the employee would have received if the employee had been at work for the period in question.

### **Short-run average weekly pay**

The short-run average weekly pay is the same notion as the existing alternative option of the 4-week averaging formula. The Taskforce considered whether it would be appropriate to instead use a 13-week averaging period to consider alongside the new "Ordinary Leave Pay" and "average weekly pay" (over 52 weeks) but did not come to a conclusion.

In the Government's response, the Minister proposed that the "short-run" reference period should be 13 weeks, indicating that this calculation will be an averaging of payment received for the 13 weeks immediately preceding the annual leave.

### **Average weekly pay**

Currently, the Act defines “average weekly earnings” as a simple calculation: 1/52 of gross earnings. The “average weekly pay” calculation under the Taskforce’s recommendations would use the same time period of 52 weeks.

Issues can arise with the Act’s complex definition of “gross earnings” with a lack of clarity as to what is included and excluded by that definition. The Taskforce recommended a simplification and proposed the new definition of gross earnings should be that:

*“an employee’s leave payment should reflect all cash payments received, except direct reimbursements for costs incurred”*

This definition would appear to include all commission payments, incentives and bonuses and remove the exception for discretionary payments.

The Minister added that where it is unclear what period of time the commission or incentive payments were “earned” over, they should only be included in the 52 week “average weekly pay” calculation.

## **Family violence leave, Bereavement leave, Alternative holidays, Public holidays and Sick leave (FBAPS)**

### ***FBAPS entitlements***

The Taskforce differentiated the entitlement to FBAPS from annual leave as they are intended to provide employees with paid leave for particular events or circumstances.

FBAPS leave can only be taken on a day that would otherwise be a working day for the employee. The Taskforce proposed a more prescriptive formula than the current Act to determine whether a day is an “Otherwise Working Day”. The Taskforce recommended that a day should be considered an Otherwise Working Day for an employee if:

- the employee was expected to work on the day in question according to a previously agreed work pattern; or
- the employee had worked on 50% or more of the corresponding days in either the previous 4 weeks or the previous 13 weeks.

The Taskforce recommended that FBAPS entitlements should continued to be held in days. For sick leave and family violence leave it was recommended that leave could be taken in units of less than a day, with a minimum of a quarter of a day.

The Taskforce noted that employees have little control over when they may need some forms of FBAPS and recommended that the employee become immediately entitled to bereavement leave and family violence leave, rather than after 6 months of employment. For sick leave, it was recommended that the employee receive an entitlement to one day of sick leave from their first day of employment, with an additional day per month of employment, until the full entitlement of 5 days is reached after 4 months.

The Government has recently introduced a Bill to increase sick leave from 5 to 10 days per year. There was no comment on the introduction of this Bill as the recommendations were made before the introduction of the Bill.

### ***Calculating FBAPS pay***

The Taskforce recommended that the FBAPS payment should be the greater of “Ordinary Leave Pay” (as defined above) or average daily pay over the last 13 weeks.

## **Conclusion**

While the recommendations do respond to some long-standing issues with the Act, the Taskforce was also focused on ensuring the recommendations could be readily implemented into payroll systems and minimising compliance costs for employers. Some employers may be disappointed that the Taskforce did not recommend accrual of annual leave using an hours-based system.

Further policy decisions will now be required during the drafting process to account for the complexity of some recommendations, how recommendations will line up with other areas of the Act and the application of real-world factors. The Government expects that new legislation will be introduced in 2022.