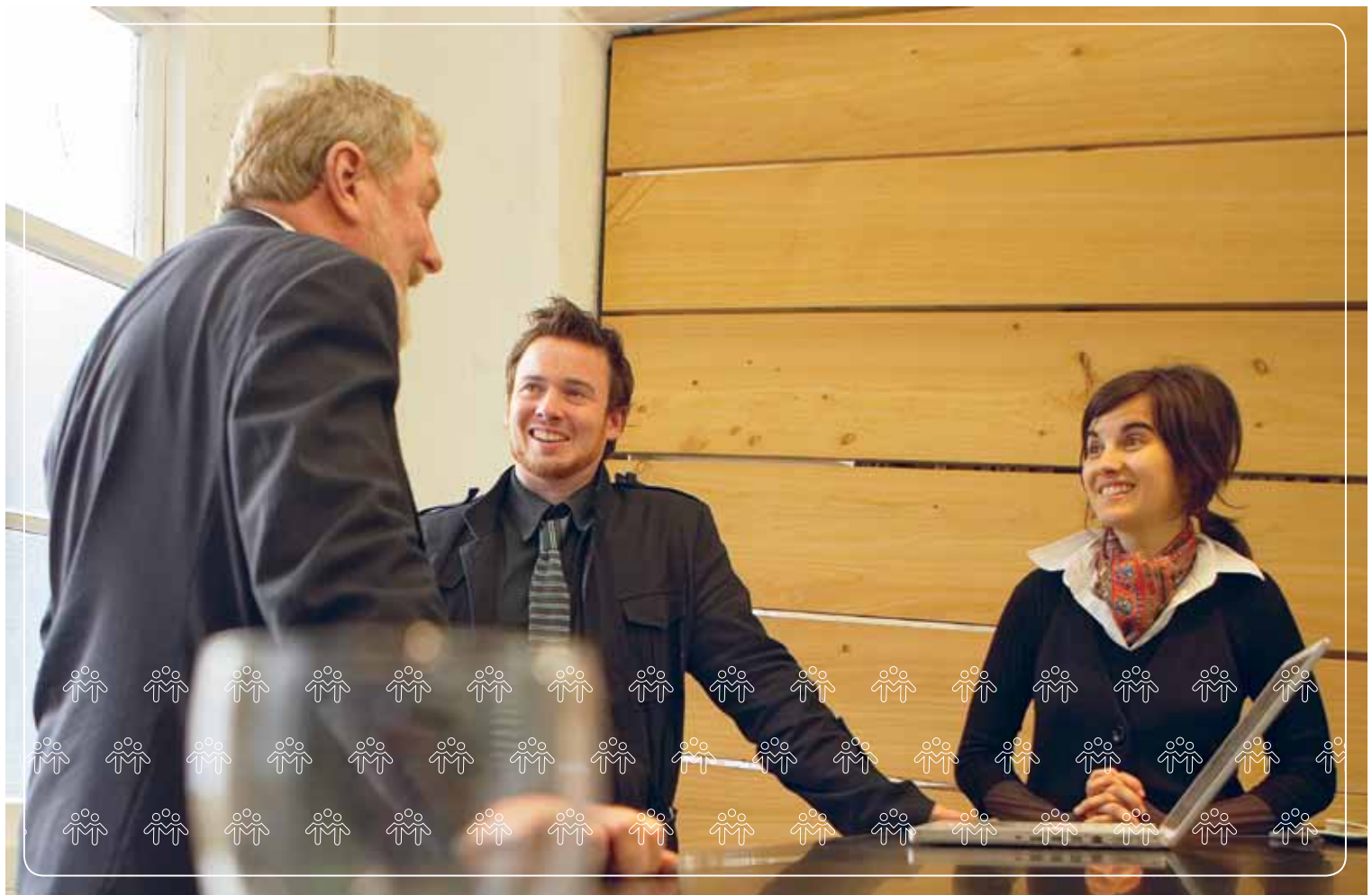




The effect of the Holidays Act 2003 on small and medium enterprises

A QUALITATIVE STUDY



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1 SUMMARY

Purpose & context of the research

The purpose of this research is to provide a qualitative picture of the impact of the Holidays Act 2003 on small and medium enterprises (SMEs); and in particular to explore criticisms of the Act relating to the complexity of calculating payments for relevant daily pay and annual leave. This research is intended to contribute to a wider review of the Holidays Act being supported by the Department of Labour in 2009.

Method

The research involved interviews with employers, payroll administrators and employees from 10 independent, private sector businesses with between 1 and 40 employees. An additional firm with 75 employees was included in the study to provide a point of comparison with a larger business. SMEs were the focus of the study because the compliance costs of regulation are widely considered to be relatively higher for this group. The firms selected were in the transport, manufacturing, retail or hospitality sectors because these sectors tend to employ at least some staff with varying daily or weekly working hours. Data was collected through semi-structured interviews, with some review of documents (pay roll data, pay slips and employment agreements).

Findings

Awareness & perceptions

Employers' knowledge of the Act followed typical patterns for employment rights legislation, that is, employers were most familiar with the provisions they encountered most often. Thus there was a high awareness of annual leave (or the percentage this would add to casual workers' pay) and public holiday entitlements, and less understanding of specific provisions of the Act around sick leave and bereavement leave because these provisions had a relatively low impact on the employers in sample.

Employees did not know their specific entitlements under the Act (nor in relation to other employment relations legislation). Although all employees could name sources of information about their entitlements only one had ever sought such information.

Employers' perceptions of the Act were focused on the direct costs of the fourth week of annual leave, and, to a lesser extent (because only one firm in the sample now regularly employed staff to work on public holidays) employees' entitlements for working on public holidays.

Calculating entitlements

Familiarity with the relevant daily pay concept varied amongst employers and payroll administrators. The most comprehensive knowledge of how leave entitlements were calculated was associated with employers who managed the payroll within the firm, and whose staff regularly worked varying daily or weekly hours.

Employers/payroll administrators did not consider the relevant daily pay calculations difficult to understand, and they were considered time consuming only for the largest employer because they had to be addressed on an individual staff member basis.

Respondents could not suggest an alternative calculation that would be less time-consuming for employers while retaining current entitlements.

Employers in the study were not resorting to the averaging formula for relevant daily pay in order to save time or minimise payments to employees but used it because it was not clear how many hours the employee would have worked on the day in question.

Although employees' 'gaming' was not in evidence in this study, this may be related to employees' lack of awareness of relevant daily pay and/or the informal nature of the employment relationships in small and medium firms.

Knowledge of annual leave calculations also varied amongst employers. However, annual leave calculations were not considered complex by employers regardless of the type of payroll administration they used, how many staff they had or the employment arrangements those employees had. There was no indication that employers used the averaging formula to calculate payment for annual leave except in cases where employees worked varying number of hours per week.

Accumulation of alternative holidays

Where a business regularly traded on public holidays, it was the cost of the alternative holidays rather than the management of these days that was an issue for employers. Where employees did get alternative holidays, they viewed the day as leave to be taken when it suited them rather than necessarily a day to be taken on the day of greatest financial advantage to them under relevant daily pay. This may be related – in this study – to employees' lack of awareness of the implications of relevant daily pay.

Accumulation of annual leave & sell back options

Accumulation of annual leave (subsequent to the introduction of the fourth week) was not an issue for employers either because it was managed through leave rosters and obliging employees to take annual leave within a 12 month period, or because employers did not object to it accumulating. Rather, the issue stemming from the fourth week of annual leave (aside from the direct cost) was one of covering for staff on leave.

Employers across all sectors and firm sizes were thus interested in employees' having the option to sell back a week's annual leave because this option may address difficulties with covering for staff on leave. Employees too were generally interested in having the option to sell back leave – as long as it was an option that employees rather than employers requested.

Use of casual staff

Firms in the study that sought to employ casual staff did so in a way that met the test of 'casual' defined in employment regulation. (There were, though, also examples of firms paying regularly employed workers as casuals.) The Act had increased demand for casuals to cover increased annual leave in firms,

particularly in those that did not have a close-down period. It was not, however, firms' preference to use casual staff over permanent employees regardless of firm size or sector. The key entitlement for casuals of an additional eight percent of pay rather than annual leave was well understood and adhered to.

Transferring observance of public holidays & treatment of public holidays

There was not sufficient clarity around how changes to the observation of public holidays under the Act might operate in practice to enable employers to assess whether it would be useful for business reasons, or for employees to gauge whether it would provide them with any advantage.

Respondents' views on the current anomalies in the treatment of public holidays were centered on fairness, that is, all businesses should be treated in the same way.

Overall impact of the Act

Those employers whose businesses postdated the increase in annual leave (April 2007) considered the Act a fact of business life, without a particular impact on their firms that other businesses did not also face. This suggests that some of the impact (including perceptions) of the Act relates to regulatory change rather than the regulation itself.

The main impact most employers experienced was the direct cost of employees' entitlement to an additional week of annual leave (including the difficulty and expense of covering for employees on leave). For businesses which traded on public holidays, the direct costs of employees' entitlements for working on public holidays added to this impact. Increased employee entitlements for working on a public holiday had caused or contributed to small employers in the retail and hospitality sectors either not trading on public holidays or the employer working the public holiday without any additional staff.

Overall, however, the Act was seen as a minor constraint by employers, particularly compared to product market and (to a lesser extent currently) labour market constraints.

Conclusion

The marginal compliance costs imposed by the Act were considered insignificant by employers in the study, therefore, amending the Act to alter the calculations required (whilst maintaining current employee entitlements) is likely to have no effect on these employers – or may even impose additional costs through change to current pay and leave systems. It was not evident from the study that the Act imposes higher compliance costs on SMEs compared to larger businesses. However amending the Act to give employees the option of selling back a proportion of annual leave may alleviate employers' difficulties with covering for staff leave - this was a suggestion generally welcomed by employers and employees in the study.

2 INTRODUCTION

2.1 Purpose and context of the research

The purpose of this research is to provide a qualitative picture of the impact of the Act on small and medium enterprises (SMEs); this includes exploring common criticisms of the Act, particularly those relating to the complexity of calculating payments for relevant daily pay and annual leave. The research focuses on SMEs because the compliance costs of regulation are widely considered to be relatively higher for this group.

This research was planned in the context of a wider review of the Holidays Act being supported by the Department of Labour in 2009, and is intended to be complementary to the review work. It has been assumed that the Advisory Group will seek the opinions of and further research from a range of employers and employee and employer representatives such as unions and employers' associations.

2.2 Scope of the research

The research involved 10 independent, private sector businesses with between 1 and 40 employees, located in rural and urban areas of New Zealand. An additional firm with 75 employees was included in the study to provide a point of comparison with a larger business.

2.3 Background to the research topic

2.3.1 The purpose of the Act

The purpose of the Holidays Act is to promote balance between work and other aspects of employees' lives and, to that end, to provide employees with minimum entitlements to annual holidays, public holidays, sick leave and bereavement leave.

2.3.2 Amendments to the Act

Since its inception, the Act has been amended twice to address unintended consequences for employers and employees.

2004 amendment

In 2004 the Act was amended to address some unintended consequences arising from the Act's implementation. Key changes included amending the time and a half rate for working on a public holiday to ensure this isn't added on top of an existing 'penal rate' in an employment agreement and clarifying payment for sickness or bereavement on a public holiday. The Act now provides that if an employee is sick or bereaved on a public holiday on which he or she was going to work, that day is to be treated as an unworked public holiday. That is, the employee is not entitled to time and a half for that day or to an alternative holiday.

2008 amendment

The Holidays (Transfer of Public Holidays) Amendment Act 2008 further amended the Holidays Act 2003 to allow for the transfer of public holidays in certain

circumstances. Employers and employees can now agree in writing to transfer a public holiday if an employee is required to start work on one day and finish on another; and one or both of those days are public holidays specified in section 44(1) of the Holidays Act.

2.3.3 Overview of the literature on the effects of employment regulation

There is little research specifically on the effect of holidays legislation on firms however over the last decade a number of studies both in New Zealand and internationally have explored the impact of regulation more generally. These studies have arisen in response to new employment rights legislation (particularly in the UK) and business representatives' view that government imposes significant compliance costs on firms. Attention has been given to both the impact of regulation (Edwards et al 2003, Alexander et al 2004, Dickens et al 2005, Carter et al 2006, Anyadike-Danes et al 2008) and to methods for studying the effect of regulation (Borland 2005, Massey 2003, Kitching 2006).

The methods used to study the effect of regulation profoundly influence data quality and the inferences and policy implications that can be drawn from the studies (Borland 2005, Dickens et al 2005, Kitching 2006). In reviews of research on the effects of regulation on SMEs in the UK, it has been noted that many studies focus on business owners, and regulation as a cost or constraint. Qualitative approaches are suggested to explore the inter-related mechanisms through which regulation causes changes in small business practices and performance (Dickens et al 2005, Kitching 2006).

Effects of employment regulation

In theory, employment regulations change the terms of employers' agreements with workers. They may consequently prompt some adjustment by firms. However the effects of a specific type of employment regulation will depend on other aspects of employment regulation or on labour market policy more generally (Borland 2005).

As noted, methodology deeply influences the findings of research, however, in practice; some general findings from mixed methods studies (Edwards et al 2003, Dickens et al 2005, Carter et al 2006) point to:

- a clear difference between the perceived potential effects of the regulatory regime and the actual experience of workplace legislation
- regulations interacting with sectoral conditions and may exacerbate competitive pressures
- regulation generating multiple influences which can be enabling and motivating as well as constraining
- market competition (and not employment legislation) as the overriding factor affecting business performance.

In relation to the size of firms:

- regulation does not have uniform consequences for small business owners. The effect of any regulation depends on how owners, and others whose actions causally affect them exercise their agency and adapt to regulatory change (Kitching 2006, Anyadike-Danes et al 2008)
- negative effects of workplace legislation tend to increase with firm size – smaller businesses have a degree of informality that can ease their response to workplace legislation. (Edwards et al 2004, Carter et al 2006).

Adding to this last point, case studies of the effects of employment regulation in New Zealand carried out by the Department of Labour in 2000, found that in small firms, employers were often relatively unaffected directly by regulation, while medium and large employers went to some lengths to follow many requirements. Actual compliance was variable, and sometimes employers avoided regulation through the structure of their employment relationships.

Knowledge & compliance

In relation to most of the above mentioned research, it is by no means certain that employers participating have an understanding of the regulation in question or are complying with it. Meager et al's (2002) UK survey of awareness of employment rights legislation found different levels of knowledge were associated with:

- the visibility of the law and the length of time it had been established
- publicity and controversy
- effort put into publicising different rights
- the existence of a visible enforcement body, and
- its relevance to particular groups.

Meager et al noted that active compliance requires employer awareness of duties and rights, and found variability here too, with smaller firms often not aware.

This is supported by other research in the United Kingdom. Only one-fifth of employers in firms with fewer than 50 employees in the large telephone survey for the Department of Trade & Industry by Blackburn and Hart (2002) felt confident or very confident of their knowledge of employment rights legislation, and that confidence waned when the depth of knowledge was investigated. Dickens et al (2005) also found that employer knowledge varied by size of enterprise and business sector and reflected perceived relevance and experience of particular rights rather than the length of time the legislation had been in existence.

Dickens et al further noted that the individualised, private law model characteristic of most of the individual rights legislation leaves individual workers to enforce their legal rights against employers. This places an importance upon awareness of rights and a capacity and willingness to enforce them.

2.3.4 Employers' response to the Holidays Act 2003

Employers' associations' submissions to government over the past six years have criticised both the increased direct costs placed by the Act on employers and the

complexity of the calculations required to administer the Act thus increasing compliance costs (see, for example, submissions from the Hospitality Association of New Zealand 2003, BusinessNZ 2004, Meat Industry Association 2004, Tourism Industry Association New Zealand 2004, the Small Business Advisory Group's 2006 report to government, and the Ministry of Economic Development's Quality Regulation Review Sector Studies Report 2007).

KPMG and BusinessNZ have surveyed firms annually on their perceptions of compliance costs. The Holidays Act 2003 has had the highest compliance cost trend score¹ in all but two of the annual surveys carried out between 2003 and 2008. The survey authors thus consider that the Act has the characteristics of poor quality regulation.

While we would expect an increase in compliance costs because of changes, regulatory changes that are of poor quality create a substantive shockwave in the years after the changes were made. [Our data] clearly shows that the perception of compliance costs for the Holidays Act has not come back down to anywhere near the level exhibited in 2003, before the changes took effect.

KPMG/Business NZ (2007)

The survey series also shows, however, how employers view the compliance costs of the Act compared to other employment regulation. In each of the six annual surveys (beginning in 2003) the Holidays Act has consistently been respondents' fifth placed priority after tax, ACC, the Health & Safety in Employment Act 1992, and the Employment Relations Act 2000.²

A different approach to the study of compliance costs was taken by Alexander et al (2004). Their study involved interviews and employers using log books to record time and money spent on regulatory compliance. This method enabled employers' perceptions to be explored more deeply than is possible in a survey. The study found that a 'striking feature of the results is that different firms have different attitudes to compliance costs. Some firms in the sample perceived compliance as a serious issue that was preventing them from expanding their business, others saw compliance as being only a minor issue, or in some cases no issue at all.'

There is little research available to illuminate how firms worked with the previous Holidays Act. Case studies of three different industries carried out by the Department of Labour in 1999 found that, overall, the Holidays Act 1981 was applied with little difficulty by employers and employees. Exceptions to this

¹ The Business NZ-KPMG compliance cost survey seeks to measure the costs of complying with legislative and regulatory requirements as well as respondents' perceptions of changes in the compliance burden and the helpfulness or otherwise of central and local government agencies. The compliance cost trend score is a sum of the weighted average scores of each of the proportions of respondents selecting 'large rise,' 'modest rise,' 'no change,' 'modest fall,' and 'large fall.' The higher the score the more costs are perceived to have increased. The maximum possible score is 5 and the minimum possible score is 1. The cost trend score does not attempt to assign a monetary amount. The survey is based on business owners' recall at a point in time.

² Between 2003 and 2008 somewhere between 16 percent (2003) and 40 percent (2004) of respondents have ranked the Act as a compliance cost priority for their business.

related to the provision of a day in lieu for casual employees working on public holidays. There was some deliberate non-compliance reported by employers and employees in relation to this requirement. Finally there is no work on the marginal compliance costs of the Act, above and beyond that which employers would face preparing a payroll in the absence of the Act.

2.4 Research method

A qualitative approach to this research was used to explore the understanding of the Act by both employers and employees, and how this understanding affected the employers' response to the Act. Data was collected through semi-structured interviews, with some review of documents (pay roll data, pay slips and employment agreements).

Employers and one employee from each firm were interviewed face to face by a Department of Labour researcher. Where the employer did not administer the payroll and leave for the firm, the payroll administrator in the firm was also interviewed. The employee was selected by the employer or the researcher. Criteria for selection included one or more of the following: willingness to participate, having characteristics of interest to the research such as irregular working hours, and availability (on a break or after work).

SMEs were the focus of this research because there was no research available on how employers were applying the Act, and the literature suggested that in SMEs, employers' knowledge and compliance may be more variable than in larger firms (Blackburn & Hart 2002).

The sectors selected (transport, manufacturing, retail and hospitality) were the focus of the research because these sectors tend to employ at least some staff whose daily or weekly working hours varied. Submissions to government on the Act over the past six years suggested that these working arrangements made application of the Act more challenging for employers.

The purpose of this qualitative study is to provide an insight into how the Holidays Act 2003 affects small and medium businesses in particular contexts. The study does not use a representative sample and cannot be used to generalise statistical relationships to the broader small and medium business population.

This research adds to the work on the effects of employment regulation in New Zealand by asking employers to describe their understanding of the provisions of the Act and asking employees about their understanding of their entitlements. This was designed to enable a comparison of employers' perceptions of the complexity of the Act with what they actually do in applying the provisions.

2.5 Research questions

Participants were asked questions that fell broadly under the following categories:

- contextual information about the business and number and type of employees
- perceptions and awareness of the Act and information sources
- impact of the Act on the firm

- views on possible changes to the Act and to the treatment of public holidays.

2.6 Sample

Eleven firms were involved in the research between March and May 2009. The sample incorporated businesses with a range of size and sector characteristics (see Table 1 below). Sample businesses were identified with the assistance of employers' associations and the Department of Labour's regional labour market knowledge managers. All businesses satisfied the following criteria:

- independence – not part of, or owned by, large companies
- employment – employed 1-40 people (the study included one larger employer – of 75 staff – to provide a point of comparison)
- sector – businesses operated in the manufacturing, transport, retail or hospitality sectors.

The sample businesses were located within the Greater Auckland to Greater Wellington area, and the Canterbury region. This criterion was set to ensure diversity of rural/urban areas and to contain the costs of the research.

Table 1: Characteristics of sample firms

	Number of employees (excluding owner)	Length of time (years) current owner has had business
Retail (n=2)	3	10
	7	9
Hospitality (n=3)	4	1
	3	2
	75	8
Transport (n=3)	2	22
	14	2
	37	3
Manufacturing (n=3)	10	45
	3	6
	38	3

2.7 Limitations of the research

Potential participants in the research were approached through employers' associations and the Department of Labour's regional labour market knowledge managers. Respondents thus self-selected by agreeing to participate. It can be assumed that employers who were knowingly not complying with the Act would be unlikely to agree to participate. Researchers were unable to locate any firm (which met the size and sector criteria) in which employees were paid commission or productivity bonuses. This omits a sector of businesses that has expressed particular dissatisfaction with relevant daily pay under the Act.

3 FINDINGS

3.1 The business environment

This section provides a brief description of the business environment for the firms studied. Interviews were carried out over March-May 2009 – a time of economic recession.

In the retail sector, one firm sold clothes at the higher end of the market. The owner noted that turnover had become very unpredictable compared to earlier years in the business when clear patterns were visible. This retailer offered a made to measure service and the staff received a high level of training about fabric and fit. A second retailer sold and serviced computers. The business was busy and the owner was not expecting the recession to have a severe impact, as people would continue to have computers serviced even if sales diminished.

In the transport sector, the firms were local or regional operators. One of the cases had noticed a 10-15 percent drop in business and was not replacing the two staff who had left most recently. In a second case a recently won contract for the next two years had provided some future assurance to a business described as 'generally uncertain.' In the third case, business had declined over the past twelve months and the minimum number of hours guaranteed to drivers had recently been reduced from 40 to 32 per week.

Of the three firms in the study working in the hospitality sector one was newly established and working seven days a week in a competitive environment. A second firm received a significant part of its trade from the commercial building it was located in, and aligned its hours with the trade this building provided. The third case was a much larger business open seven days a week for lunch and dinner, catering to the local and tourist trade.

In the manufacturing sector, one clothing firm was facing extreme competitive pressure from offshore manufacturers, employees had been put on short working weeks (24 hours a week) and the owner described the business as covering costs only, and trying to remain viable until the owner retired. A second firm (manufacturing equipment for a primary industry) was, after some years of technical issues and investment in research and development, finally at a point they were satisfied with. In the third case, another clothing manufacturer had also developed a particular niche. The business had experienced both decline and growth and was now described as steady. Employers in the manufacturing sector spoke of the team approach that was now used in their work which had led to a move away from piece work and incentivising individuals' pay.

Overall, where business constraints were identified by employers (as they were by most), these related to the product market. Although a labour market more favourable to employers had been developing over the past 12 months, labour market constraints had been experienced by most employers. These constraints were not only about skills but also about reliability and attitude.

Employment relations were generally described by both employers and employees as flexible with 'give and take' from both parties. In the smaller firms where there was a close working relationship with the employer, employees were notably empathetic to the employers' circumstances. There were some union members

amongst the staff of two of the firms in the research; however, all employees interviewed were on individual employment agreements.

3.2 Awareness of the provisions of the Act

Employers & payroll administrators

All participants in the research were asked about their understanding of employees' entitlements under the Act. All employers knew at least that it provided minimum standards of annual leave (or 'pay as you go' holiday pay for casuals) and remuneration for employees on public holidays.

As shown in Table 2 below, two of the firms contracted out the pay and leave administration (to their accountant and a payroll company respectively). These employers stated they know little about the Act, were too busy to find out and couldn't see the point in doing so, as they paid someone else to do this work.

Other employers who had in-house pay and leave administrators had similar views. They had received information from (variously) employers' associations, employment lawyers, the Department of Labour or Inland Revenue but did not know or feel the need to know what the provisions of the Act were in detail. Payroll staff working in these firms generally used similar sources of information (the websites of Inland Revenue and the Department of Labour³ and updates from payroll software providers). One payroll administrator had attended training on the Act in a former role with a larger company.

Two of the employers administered the pay and leave themselves, manually using a spreadsheet (although one had recently bought payroll software.) These employers also used information from the Department of Labour's and/or Inland Revenue's website.

Table 2: Firms' administration of pay & leave

Type	Number
In-house manually	2
In-house with payroll software	6
Payroll company	1
Accountant	1
Mix of in-house & payroll company	1

Irrespective of whether the employer or a payroll administrator handled pay and leave, information about the Act was sought (most commonly from the Department of Labour website) on an 'as needed' basis. For example, information about the calculation of payment for annual leave would be sought only when someone took leave

With the exception of the payroll administrator who had received training in a previous role, only two of the employers or payroll staff had a comprehensive understanding of the provisions relating to annual leave, sick or bereavement

³ Although all employers knew of the Department of Labour website, none had used the online tool for calculating employees' entitlements.

leave or payment for public holidays (i.e. they knew what the entitlement was and how to calculate it).

When asked, several people who administered the pay and leave (either employers or payroll staff) mentioned an area of uncertainty, as shown in Table 3 below. There was not a common point of difficulty.

Table 3: Areas of uncertainty

Area of the Act	Question	Firm's solution
Public holidays	Who to pay and how much when a public holidays falls on a Saturday? The shop is closed on public holidays but would normally be open for several hours on a Saturday. Saturdays are worked on an irregular basis by whoever wants the extra hours – not the same employee every week.	Don't pay anyone for the Saturday hours.
Alternative holidays	How much in lieu time to give an employee who works less than a full day on a public holiday because the shop is open shorter than normal hours?	Round the in lieu time to the nearest half day or full day.
Sick leave	How many hours of sick leave per day to pay an employee who has recently had their daily hours reduced by the employer?	Pay sick leave 'on an individual (personal) basis,' taking into account how long they have been employed.

There were other examples of low awareness of entitlements amongst employers and payroll administrators, relating to other aspects of employment legislation such as when workers can be paid as casual employees, and the legislation around employment agreements. These had an effect on how the provisions of the Holidays Act were applied to individual employees. For example, employees erroneously defined as casual received no sick pay or pay for public holidays (when the business was closed) and were paid an additional eight percent of their pay every week rather than receiving annual leave.

The research also found a lack of advice from payroll companies and accountants to employers. There were two notable examples of this: in one case, employees who regularly worked a 40 hour week every alternate week with no end date to their employment were being paid by a payroll service as casual employees (with no pay for absence due to sickness, bereavement or a public holiday). In the second case, the payroll company accepted permanent staff in a seven day a week operation being rostered off by the employer on every public holiday and not being paid at all on such days.

Employees

All employees received a written record of earnings; for most this included a record of their accrued leave. Although all employees were familiar with the concept of an employment agreement, three had never seen one and a further person had seen but not signed one. Although there were some union members

in two of the firms in the research, the only employee on a collective agreement worked for a firm where none of the employees (including the employee in question) were in a union.

Employees were broadly aware that they had entitlements to leave under the Act. All of them were aware for example that there is an entitlement to annual leave, sick leave and bereavement leave and that their sick leave may be used for dependents. Employees were most familiar with the provisions which affected them most frequently. For example those working in hospitality and retail had a solid understanding of their entitlements for working and not working on public holidays. However none of the employees interviewed had an understanding of their specific entitlements across all provisions. A number of respondents were also unsure of whether the entitlements they received were statutory or unique to their place of employment.

Most but not all employees were aware that they got four weeks annual leave (none received any more than four weeks). However there were employees – in the retail and hospitality sectors – who were unsure of their annual leave entitlement. Not knowing what their entitlement was did not appear to be associated with the age of the employee, or their length of time in the workforce or in a particular job.

There is no holiday pay for the first three months, we get a percentage of our wage, after that normal holiday pay and public holiday rates apply. I don't know how much annual leave I will be entitled to after I have worked here a year.

Employee

Other examples of employees appearing unaware of their employment rights related to being erroneously treated as a casual employee, and being rostered off work – without pay – on every public holiday regardless of established work patterns.

All employees could name a source of information that they would use if they wanted more information about their entitlements (the Department of Labour website was commonly mentioned) but only one of them had ever looked for any information (when moving back to New Zealand rather than in relation to a specific job). All accepted what their employer offered, and several stated they would ask their employer first if unsure of an entitlement.

3.3 Perceptions of the Holidays Act 2003

In the research, employers were asked about their general attitudes to or perceptions of the Act. Note that at the time of the interviews only one employer was regularly employing staff to work on public holidays (a point which is discussed further on page 27).

Employers' responses can be categorised in several ways. In firms established after the fourth week of annual leave was introduced, employers did not hold particular views, having nothing to compare the Act with. The largest group of employers (all of whom had the payroll administered within the business) simply accepted the Act as part of being an employer, while noting that the fourth week of annual leave had been a cost which the business had to absorb. This attitude existed across sectors and amongst both small and medium employers.

Employers who contracted out payroll services to external providers did not have any particular view of the Act, stating that they knew very little about it. The most negative perceptions of the Act were expressed by: a larger employer in the hospitality sector who generally traded on public holidays, and a small manufacturer experiencing very difficult trading conditions. In both of these cases their views were related to the direct costs imposed by the Act rather than the calculations required.

3.4 The calculation of pay for leave

This section of the report looks first at how employers involved in the research understood and calculated pay for leave, and then discusses employers' views of the complexity of the calculations.

3.4.1 Relevant Daily Pay

Background

Relevant daily pay is a concept introduced by the Act. It applies to the calculation of an employee's pay when they take leave because of a public holiday, or because they take sick leave, bereavement leave or an alternative holiday. Relevant daily pay should reflect what an employee would have been paid if they had worked on the day in question. In cases where this amount is not clear the Act provides an averaging formula.

Relevant daily pay has been a focus for employer discontent with the Act due to the inclusion of productivity payments, shift allowances and other changeable elements of pay 'significantly inflating leave costs for many employers' (BusinessNZ 2005). BusinessNZ also considers relevant daily pay difficult to understand and apply – for both employers and employees. A survey of their members in 2005 found that somewhere between 22 percent and 33 percent of respondents agreed that they had difficulty calculating employees' entitlements using relevant daily pay.⁴ Relevant daily pay is also said to have created perverse incentives for employees to take sick leave (BusinessNZ 2005, Meat Industry Association 2005).

The implementation evaluation of the Act conducted on behalf of the Department of Labour in July 2005 (Capital Strategy) also found that one of the major issues with implementing the Act was the complexity of calculating employees' entitlements, particularly in relation to relevant daily pay. The complexity centered on the many variables involved in making the calculation and the need to manually adjust payrolls at the individual level. Both the Small Business Advisory Group (2006) and BusinessNZ (2005) have stated that a lot of the difficulties with the Act for employers would be resolved if the formula for calculating the pay rates for public holidays reverted to using ordinary pay⁵ as the basis of calculations.

⁴ 52 percent of the 1,656 respondents had fewer than 21 employees, 21 percent had fewer than six.

⁵ Ordinary daily pay excludes productivity or incentive-based payments (including commission), payments for overtime, bonuses and allowances etc.

How employers are calculating relevant daily pay

In the research, employers who managed their own payroll or firms' payroll administrators were asked if they were familiar with the relevant daily pay concept. Most of the firms in the research, across sectors, had at least some staff whose hours varied every day or every week. Note that the firms with staff currently working regular hours included a manufacturer whose employees were on short time but who in less straitened circumstances had worked overtime, and a transport operator whose staff currently worked regular hours locally but with previous contracts had worked irregular hours. (That is, employees with regular hours at the time of the research did not necessarily always work regular hours.)

The research found that respondents could be categorised in four ways. The two employers who contracted payroll and leave administration to external providers had not heard of relevant daily pay, but neither had they encountered a situation in which it might have to be applied. One of these firms employed its two regular staff as casual workers and did not pay them for sick leave, bereavement leave or public holidays. The other – a new business in the hospitality sector – rostered staff off on public holidays, did not pay them for those days, and had not yet encountered staff taking sick or bereavement leave.

A second group was not familiar with or only vaguely aware of the term relevant daily pay and it was not entirely clear whether staff were consistently paid according to the principles. Employees in these firms did not regularly work varying hours per day or week. This group included employers/payroll administrators who used manual systems and payroll software.

A third group both knew the term and followed the principles. These were employers/payroll administrators in firms where employees regularly worked differing number of hours per day and week. This group used the averaging formula when calculating relevant daily pay for employees with irregular hours because in their respective workplaces it was unknown – at the beginning of a working day – exactly how long an employee would work that day.

Finally, one employer who was familiar with the relevant daily pay concept found it simpler, using a manual pay system, not to observe the Act but to pay a flat daily rate if staff were absent. In this firm the employees did not work the same number of hours every day and thus may have been advantaged or disadvantaged by the employer's practice depending on which day they were away from work.

Table 4 below shows the range of approaches employers have taken in circumstances when the relevant day pay concept applied.

Table 4: Relevant daily pay – examples of how employers are calculating pay for public holidays, sick leave and bereavement leave

Level of awareness of relevant daily pay	Approach taken
Unaware of relevant daily pay, uses external payroll service	Employer rosters (permanent) staff off on any public holiday and they are not paid at all for that day. Employer has no experience yet of staff being on sick or bereavement leave.
Unaware of relevant daily pay, uses accountant's payroll service	Employs two people to work alternate 5 day, 40 hour weeks. Pays employees as casual workers, with 8 percent added to their hourly rate and no pay when they do not work, i.e. for sick or bereavement leave or public holidays.
Unaware of relevant daily pay, employer manages pay and leave	Employer works on public holidays rather than have staff working then because of the requirement to pay time and a half and give staff a day in lieu. (The business trades shorter than normal hours on public holidays but the day in lieu is 'presumably' a whole day off.) Staff (who have regular hours) are paid what they would have earned on the day.
Unaware of relevant daily pay, has in-house payroll	Payroll software calculates entitlements, the actual calculation is unknown. The shop is closed on public holidays. Public holidays which fall on weekends present difficulties because there is no set weekend staff member. If a public holiday falls on a weekend, it is too difficult to work out who ought to be paid so no one is.
Unaware of relevant daily pay, has in-house payroll	Staff are on short hours, but have been paid for public holidays which fell on non working days.
Unaware of relevant daily pay, has in-house payroll	Employees paid at eight hours per day if on sick or bereavement leave or for a public holiday although they 'typically work longer than eight hours but not every day.'
Aware of relevant daily pay, has in-house payroll	Uses the averaging formula to calculate relevant daily pay. Employees' daily hours are irregular, and unknown at the beginning of any given day.
Aware of relevant daily pay, employer manages pay and leave	Pay for public holidays, sick and bereavement leave is calculated at eight hours (irrespective of whether the employee might have worked longer or shorter hours on that day) 'because it is simpler.'

Employees' understanding of relevant daily pay

As discussed previously, employees interviewed were aware of having entitlements to various types of leave but were not aware of the relevant daily pay concept, and did not know how specifically sick or bereavement leave, or pay for a public holiday would be calculated. When questioned, their expectation was that such days would be paid as for a normal working day (generally assumed to

be eight hours by those working full time) even in those cases where the employee rarely worked only eight hours a day.

The cost of miscalculations

The way in which non-compliant employers calculated pay in relation to public holidays, sick leave and bereavement leave tended to negatively affect employees (e.g. paying days off at a flat eight hours regardless of staff's actual working time, rostering staff off on public holidays and not paying them on those days, and incorrectly treating staff as casuals and not paying them at all for public holidays, sick or bereavement leave).

Sometimes the employers' approach was a cost to the firm (e.g. paying staff for a public holiday when it fell on a day of the week staff no longer worked). In addition, when considering the way in which the employer dealt with the entire remuneration package for an employee, some of these negative effects were evened out. For example, in the case where – 'in the interests of simplicity' – employees were always paid at eight hours for public holiday, sick leave and bereavement leave regardless of how many hours they would have worked on that day, employees were paid over lunchtime – also 'in the interests of simplicity.'

The actual amount of money in question ranged widely. The way in which employers were calculating entitlements when relevant daily pay should have been used may have cost employees a few hours or several days of pay (potentially more than 11) over a year.

Is there an alternative calculation?

Employers were asked whether there was an alternative calculation that would make it easier to calculate holiday pay, while maintaining current employee entitlements. Neither employers, payroll administrators nor employees considered that any alternative calculation would be preferable. The sole suggestion made by one employer was that relevant daily pay be calculated using a two week rather than four week averaging formula.

Are employees taking advantage of relevant daily pay?

Submissions to government from business associations have noted that the Act creates incentives for employees to maximise use of entitlements to sick leave because, with relevant daily pay, they cannot now be paid less for not working (due to sickness or bereavement) than they would be paid at work (Meat Industry Association 2004, Tourism Industry Association 2004, BusinessNZ 2005). However data on the actual extent of this is lacking.

The research did not find any examples of employees abusing sick leave related to relevant daily pay. Employers had not encountered employees taking sick leave on particular days in order to be paid at a higher rate – this may be related to the fact that none of the employees interviewed for the research were aware of what their specific entitlements were under the Act. One employee was surprised to discover he was paid for seven hours on a day he had taken sick leave, when he might have expected to work for four hours on that day.

In another case an employee stated they would endeavour never to be off work on the day they generally worked 10 hours as they would be paid for only eight

hours – the number they worked on all other days. The employer in this case also stated that days off due to sickness or bereavement leave were paid at eight hours a day regardless of the pattern of work hours on that day of the week.

Few employees in the research acquired alternative holidays through working on a public holiday. However those that had preferred to 'add them to annual leave,' that is, used them on planned longer breaks rather than taking it on a particular day of the week that would have maximized its advantage to them.

3.4.2 Payment for annual leave

Background

Under the Act, payment for annual holidays is at the greater of the ordinary weekly pay⁶ at the time the holiday is taken or the employee's average weekly earnings⁷ over the 12-month period before the annual holiday is taken.

How employers are calculating annual leave

All firms in the research were paying most of their staff an hourly rate (excluding some office staff). Across the sectors involved, some firms' employees' weekly hours were unvarying, others occasionally varied and some varied every week. Thus the employers/payroll administrators in most firms in the research were required to make some calculations for annual leave payments. The range of pay calculations made is shown in Table 5.

Table 5: Pay calculations made for annual leave

Employees' weekly hours	Range of pay calculations made for annual leave
Weekly hours vary (n=4)	Uses comparative averaging formula calculated by payroll software
Weekly hours occasionally vary (n=4)	Uses comparative averaging formula calculated manually Uses comparative averaging formula calculated by payroll software
Weekly hours standard (n=3)	Pay for annual leave at the standard weekly amount Pay as you go of an additional eight percent of pay

⁶ Ordinary weekly pay represents everything an employee is normally paid weekly, including: regular allowances, regular productivity or incentive-based payments, the cash value of board or lodgings, and regular overtime. Intermittent or one-off discretionary payments are not included in ordinary weekly pay; nor are any payments of any employer contribution to a superannuation scheme for the benefit of the employee. Where ordinary weekly pay is unclear for any reason, the Holidays Act 2003 provides an averaging formula for working it out.

⁷ Average weekly earnings are determined by calculating gross earnings over the 12 months prior to the end of last payroll period before the annual holiday is taken, and dividing that figure by 52.

The research found that employers or payroll administrators in firms where employees worked an irregular number of hours each week knew that an averaging calculation was required to determine payment for annual leave. While only some could specifically describe the comparison between ordinary weekly pay and average weekly earnings, others appeared to make the same calculation through using payroll software despite being unaware of the exact form the calculation took. Employers did not remark upon the complexity or time taken to make this calculation.

As with pay for sick, bereavement leave or public holidays, employees were unaware of the calculations that were used to work out pay for annual leave. They assumed that – if their pay was within the parameters they expected – their entitlement was worked out correctly by their employer/payroll administrator.

3.4.3 Perceptions of complexity

Employers or payroll administrators were asked specifically about how complex or time consuming they found it to make the required holiday and leave pay calculations. All of the firms in the research had some employees who currently or had at some time worked varying daily or weekly hours.

The employers who contracted the pay administration out to external providers had no view on the complexity of calculations the Act required. These firms included a long established business and one that post dated the Act.

Employers administering wages and leave themselves reported only preliminary difficulties with calculating leave when the Act first took effect. In this sense, the calculations have become easier over time. The Holidays (Transfer of Public Holidays) Amendment Act 2008 had also simplified calculations for those firms whose employees worked past midnight on a single shift.

In the cases studied, none of the employers/ payroll administrators considered pay calculations under the Act to be difficult to understand. This view was held by employers/payroll administrators irrespective of their level of understanding of how entitlements were calculated. There were clearly areas that some did not understand, as shown in Table 3 and Table 4. The most complex (and unresolved) situation encountered was who to pay on a public holiday when the public holiday fell on a day that was not regularly worked by any particular employee – that is, a weekend day on which various staff would offer to work.

All but one employer in the study considered that the relevant daily pay and annual leave calculations were not time consuming. Again, this view was held irrespective of the level of understanding of how entitlements were calculated. For example, one employer said that when he had 49 staff (last year), the payroll took two hours regardless of particular events that might have occurred in that pay period, and that one of those hours was spent checking timesheets (an activity not affected by the Act). Only the largest employer (with 75 staff) considered the pay calculations necessitated by public holidays to be time consuming (rather than complex), estimating that it added another day to the pay administration.

Preparing the timesheets for the payroll service takes twice as long as a normal pay period when there has been a public holiday because we have to go back and check the previous 4-5 weeks in order to work out the average amount earned on that day of the week. Since the Act we have not paid the accountant or the payroll firm more (related to the Act) but it takes the (internal) administrator more time – and on public holidays we run the pay a day later.

Employer

One payroll administrator with many years of experience considered that once the principles of the Act had been understood, it was not particularly difficult and that administering a payroll has been 'more complex (years ago) when unions had their own quirky bits tacked on to everyone's pay.' Two employers observed that larger employers would be more affected by the Act because of the need to calculate relevant daily pay for more individuals and the additional difficulty covering annual leave.

No employer with any comparative experience felt that accountants or payroll services had charged them more because of the Act.

3.5 The accumulation of leave

3.5.1 Annual leave

Respondents were asked whether the Act had changed the accumulation of annual leave by employees. The firms in the research managed annual leave differently but none of them had issues with the accumulation of annual leave – rather, it was covering for staff on leave that was problematic.

Some firms (in the manufacturing and transport sectors) had a close-down period for around 15 days. One of these firms had also – in response to the Act – introduced a roster for the remaining annual leave so that it could be managed throughout the year. Another firm had included a clause in its employment agreements with staff that each 12 month's allocation of annual leave would be taken within a certain time period. However, although employers in the larger SMEs actively managed annual leave, some were also open to staff accumulating leave for a particular purpose or made other provisions that enabled, for example, staff to be overseas for extended periods.

The businesses in the retail and hospitality sectors did not have a close-down period, but encouraged (rather than compelled) staff to take leave at quieter times. These employers too were open to staff accumulating leave for particular purposes, although it was not necessarily a simple matter for an employer in a very small business to manage the absence of an employee for several weeks or more.

It was noted by employees and employers in the transport sector in particular but also in manufacturing that a proportion of their employees had to 'apply themselves to use their leave.' For some employees in the research (in the transport sector) their interests and social life were at work and they were disinclined to take annual leave; others (in manufacturing) were interested in continuing to earn money during periods of annual leave by doing 'out work' at home.

3.5.2 Alternative holidays

Background

If an employee is required to work on a public holiday, and it would otherwise be a working day for the employee they are entitled to a whole day's alternative holiday (formally known as a day in lieu) at a later stage. This provision includes employees working shifts and some employees on call. All employees who have an alternative holiday owing to them get a full day off later, even if they only work for a small part of the public holiday.

An alternative holiday does not apply where an employee:

- works on a public holiday that is not otherwise a working day
- is on call on a public holiday and the restriction of being on call is not enough to deny the employee the enjoyment of the holiday
- is only employed to work on public holidays
- is scheduled to work on a public holiday but is unable to work because of sickness or a bereavement.

Are there issues with the accumulation of alternative holidays?

Employers were asked whether the Act had had any effect on the accumulation of alternative holidays. Amongst most of the employers across sectors there were no issues with alternative holidays because few or none of their employees (now) worked on public holidays – or, if they did, it would not be all of the public holidays but may only be one in a year.

Firms in the manufacturing and transport sectors were historically shut on public holidays. The transport operators in the research reported some ability to recoup costs if clients required them to operate on public holidays. In the retail sector one firm had chosen to shut because of the costs of operating on public holidays combined with the fact that many of their (commercial) customers were also not working on public holidays. In another case a retailer was obliged to open because of the shop's location in a mall, however the employer chose to work rather than employ staff because of the costs involved. Similarly in the hospitality sector, one firm was shut because most of their business came from a commercial building which was unoccupied on public holidays; another was shut because of the expense of employing staff and the opportunity the holiday provided the owners with to have a break from their seven day a week business. (Note that in this latter case the employer was not paying staff relevant daily pay as public holidays were considered to be rostered days off for staff.)

One of the issues for retailers in this research was that shop trading hours on public holidays were shorter than those on a normal working day but that staff working on a public holiday would be given a whole day in lieu. This increased the employers' disincentive to have staff work on public holidays.

For the largest employer in the study, the cost of providing staff with alternative holidays was noted but the employer had no issues with the accumulation of days or when they could be taken. If 'over a certain number' of alternative days accumulated the employer would buy them back – at the employee's request. It was noted by the employer that the alternative day would probably be taken by

the employee on the day of greatest financial advantage to that person. Employees with experience of having alternative days commonly said they added the in lieu days to their annual leave. In one firm where employees worked varying hours per week, one employee stated that 'In quieter times we might get down to 28 hours a weeks, I would take in lieu time then to make up the hours in pay.'

3.6 Treatment and entitlement of casual employees

3.6.1 Background

The Holidays Act 2003 contains no reference to casual work because the term is loosely applied to many types of employment arrangements. Instead, the Act refers to intermittent or irregular employment. An example of intermittent or irregular work for the purposes of the Holidays Act is a retired employee called back in emergencies to cover for sickness. Generally, these are employees whose employment is triggered by an event that cannot be accurately anticipated, or whose work pattern can be described as so irregular or intermittent that the concept of four weeks away from work is difficult to apply. In such cases, an arrangement can be agreed to add to their pay eight percent of the employee's gross earnings as annual holiday pay. For these employees, the arrangement must be by genuine agreement and be included in the employment agreement, and the eight percent annual holiday pay should appear as a separate and identifiable amount on the employee's pay slip. At the end of the employment relationship, no additional pay for annual holidays is due.

3.6.2 The effect of the Act on the employment of casual staff

Employers were asked if they employed casual staff in their business, and if so, to describe the circumstances and the nature of the employment arrangements with casual workers, and how their use of casual workers had changed over time.

The research found that there was not a high demand for casual staff in any of the firms involved in the research. Employers, regardless of size or sector, wanted to be able to manage their business with a regular workforce. Although half of the firms made use of casual staff, their use related to intermittent or irregular work (filling in for the absence of permanent staff or meeting unusual need). In many of these instances, the casual employee was a former employee. This overcame the main difficulty other firms had with using casuals – that of finding someone who could step straight into the role. Where firms could not find such a person, the employer and other employees covered the gap.

The main effect of the Act on the use of casual workers related to the increase in annual leave – firms now have to cover for employees having four weeks annual leave each year rather than three weeks. Firms in the manufacturing and transport sectors had a close-down period over Christmas and New Year which reduced this demand for casual staff but they were still used in these sectors to cover for absence or to meet particular customer demand. The research found no indication that the use of casual staff had increased since the Act in order to avoid dealing with some of its provisions.

Aside from the use of genuinely casual staff, in one case employees whose working hours were not intermittent or irregular were being defined as casuals.

These employees received an additional eight percent added to their pay but did not receive sick leave, bereavement leave or pay for public holidays. However this situation was not a consequence of the Act but was an established practice of the firm. The pay and leave in this firm was managed by an external service who had never questioned the practice. In another firm, an employee considered herself to be a casual worker (perhaps because she worked varying daily and weekly hours) although she was accruing annual leave and her employer considered her a permanent employee.

3.7 Canvassing changes to the Act

This section describes employers and employees' views on several possible changes to the Act.

3.7.1 Cashing in annual leave

The Advisory Group reviewing the Holidays Act will consider whether employees may choose to request trading some part of their minimum annual leave entitlement for cash. In the research, employers and employees were asked for their views of employees having this option.

Employers' views

Unsurprisingly, given the difficulties posed to most of the firms in the research with covering for staff on annual leave, employers across the four sectors were interested in employees having this option, even if they were not in a position currently to accede to employees' requests to sell back leave.

The real impact is replacing people who are on leave. The calculation of entitlements doesn't add extra work. I do more work and we lose work and we use casuals; extending annual leave has created 30 percent of a problem above and beyond the financial aspect.

Employer

Employers were however aware that some staff (noted particularly by employers in the hospitality sector) would sell back as much leave as they legally could and were concerned that staff had adequate breaks from work. Employers also raised the question of staff's ability to cope if after using their annual leave and cashing up some of it, they then wanted time off.

Employers held a common view that selling annual leave should be at the employees' request with the employer having the right to accept or decline the request, and further, that cashing up a week's leave year one year did not imply that this arrangement would necessarily happen again a following year.

Across all four sectors, employers commented on having bought back leave at some point and in various circumstances, for example, where an employee had accumulated considerable annual leave, or asked to come back to work early from a period of annual leave. Employers in both the transport and hospitality sectors noted that staff sometimes asked for – and received – advances on pay (for which accumulated annual leave was a form of security for the employer).

Employees' views

None of the employees interviewed had ever requested that their employer buy back leave but most – although not all – were interested in having this option. Several (all of whom were in manufacturing jobs) said that they personally would prefer to take their leave. An employee in a firm which closed down over Christmas pointed out that with the business closing down for three weeks, she had only one other week to use during the year and consequently never really accumulated any leave.

When asked if they could see any disadvantages with having the sell back option, a few felt it was possible that an employer may intimidate an employee into doing what was most convenient for the employer. One of these employees further mentioned that the peer pressure of their colleagues could also be brought to bear against someone unwilling to comply with a request to sell a week's leave (i.e. in situations where the person having a holiday would leave colleagues with additional work).

3.7.2 Transferring the observance of a public holiday to another day

The Holidays (Transfer of Public Holidays) Amendment Act 2008 amended the Holidays Act 2003 to allow employees working night shifts that start or end on a public holiday to transfer the public holiday, by agreement with their employer, so that the public holiday covers one whole shift. Research respondents were asked for their views on expanding this provision to allow for transfer in other circumstances such as for religious or business reasons.

Respondents approached this question thinking about whether transfer was both feasible in their work circumstances and whether it was a socially desirable concept. They also thought about whether the possibility applied to single employees or all of the employees in a workplace requesting to transfer observance of a public holiday. In the situation where a single employee asked to transfer observance, there was some confusion over how this was different to an employee working on a public holiday and having an alternative holiday. One employer speculated about whether this would mean an employee would be paid at the normal rate (rather than time and a half) on the actual public holiday in question.

If an employee wished to transfer observance to a day of religious significance, respondents considered that this choice was available through taking annual leave. In workplaces that were normally shut on public holidays, employers generally considered it would be unfeasible to have one person working.

Two firms had experience of the effective transfer of public holidays, for recreational rather than religious or business reasons. It had happened – rarely – when a public holiday fell on a Tuesday or Thursday and employees agreed they would rather work that day and observe the holiday on the Monday or Friday, thus extending their weekend. However where all employees in a workplace were asking that observance be transferred, it was feasible only where a business could work – at least on that day – independently from other businesses being open.

Objections were raised to the concept of transferring observance by some employers and employees. These centred on the principles of observing the

holiday on the day it fell (particularly Anzac day), and people observing the day en mass – as a public holiday. It was also observed that schools were closed on public holidays, and that parents generally preferred to have the same public holidays as their children.

3.7.3 The treatment of public holidays including Easter Sunday

Respondents were asked for their views on the current treatment of public holidays in terms of whether they are taken when they fall and the restricted trading hours that affect some.

Employers in the study were resigned to the cost of public holidays whether they were affected by all of them or not. Employers that did not trade on weekends were most affected by whether Anzac Day or Waitangi Day fell on a weekend thus saving them paying staff on that day. Restricted trading hours affected only the retailers in the study, and they were indifferent to it as one retailer worked himself rather than have staff work on public holidays and the other shut on public holidays, thus it was an opportunity for time off work for him – albeit with the cost of not trading on that day.

In terms of restricted trading hours, respondents were concerned with the fairness of the situation rather than whether people were able to shop every day. Hence there was a common view that all businesses should be affected in the same way by public holidays. Some employers and employees felt this was best expressed through businesses having the choice to open or not. Others (employers and employees) considered that an absence of regulation would diminish what might be called the national identity reinforced by public holidays, and further that if a business had the choice some employees would be obliged by their employer to work whether they wanted to or not. Their solution therefore was for all businesses rather than some to be affected by current restrictions on trade.

In those sectors where businesses commonly trade on public holidays (in the retail and hospitality sector) employers were of the view that the current situation – anomalous as it was – should be left alone. When asked, employers were – obviously – not keen to see Easter Sunday be made a public holiday and employees in these sectors were just as clearly interested in having an additional public holiday.

3.8 Changes to employees' entitlements

Employers and employees were asked what impact the Act had had on employee's entitlements. The change from three to four weeks' leave was the major impact mentioned by both employers and employees. While the increased entitlements for those working on public holidays registered with all employers, they were cited in response to this question only by the two employers who regularly traded on public holidays.

Some employers considered that the Act – in raising minimum entitlements – had 'reduced the carrots available' for employees, that is, had removed the employer's financial ability to be able to provide additional benefits to employees. Certainly the raising of employee entitlements through the Act had some consequent negative effects for employees in either absolute or relative terms. In one manufacturing firm with employees earning the adult minimum wage, the

increase in entitlements through the Holidays Act in combination with a rise in the minimum wage on 1 April 2009, resulted in the employer removing the higher hourly pay rate for those employees with long service.

Amongst the firms involved in the research, employees in the retail and hospitality sectors were all on three weeks annual leave prior to the introduction of four weeks. However, in manufacturing and transport firms some employees with long service already had four weeks. In one case where approximately 10 employees out of about 30 had this entitlement they remained on four weeks after 1 April 2007; in the other case, only two of the firm's employees out of 30 had long service and these two moved to five weeks.

No employees commented on the introduction of the relevant daily pay concept having had an impact on their entitlements. This may be due to their lack of knowledge of the concept and/or the lack of employer compliance or because the provision had not (yet) been invoked in their employment situation.

3.9 Firms' responses to the Act

Employers were asked whether they had taken any action in response to the direct and compliance costs of the Act.

Firms in the hospitality sector trading on public holidays applied a surcharge on public holidays which partially covered the additional costs. Transport operators, who rarely worked on public holidays, could also in some circumstances charge a higher rate for work then. Retailers had to absorb the costs of public holiday pay entitlements but minimized them either by employers only working on public holidays or by closing on public holidays.

The cost of the fourth week of annual leave contributed to one employer's decision to reduce an existing discretionary entitlement, and to one other employer not maintaining the relative leave advantage of employees with long service.

The increased difficulty of covering for staff on leave was addressed by one larger SME by bringing in a leave roster. The smaller firms in the study did not take any specific action to manage annual leave in response to the Act.

Employers had not observed increased productivity arising from employees' additional leave. However two employers felt the Act may have contributed slightly to an increased focus on productivity. In another firm the need to cover leave had 'perhaps' contributed to a decision to use time in the current economic downturn to train employees in a broader range of skills.

Firms made no changes to the methods used for administering pay and leave attributed to the Act.

4 DISCUSSION

4.1 Awareness & perceptions

Employers were most familiar with the minimum standards of annual leave and entitlements related to public holidays. Other provisions of the Act were less well known specifically. Information on the Act was sought by employers or payroll administrators as required, and Department of Labour and Inland Revenue web based information generally answered employers' queries as the need arose. In some situations, information was not sought through a lack of awareness that it ought to be or because of the desire to do things more simply.

Employees did not know their specific entitlements under the Act, nor in relation to other employment relations legislation. Although all employees could name sources of information few had ever sought any. Rather, employees assumed employers were paying them the correct amount in relation to holidays and leave. This assumption appeared to some extent to be grounded in the informal employment relationships participants had, in which both employers and employees felt there was 'give and take' in the employment relationship.

The findings of the research in relation to employer knowledge are in line with the results of the implementation evaluation of the Holidays Act 2003 which found that employers wanted information on a need to know basis (Capital Strategy 2005) and with observations made by the Department of Labour's Small Business Information Unit (2008) when offering training to employers, that there was little understanding of the practical application of holidays and leave legislation amongst owners of SMEs. The findings are also supported by a number of UK studies showing that employers address individual employment rights and their detail on a need to know basis, and that their knowledge further varies depending on how much they are confronted by the Act and the extent to which it is enforced. (Blackburn & Hart 2002, Dickens et al 2005, Meager et al 2002). The influence of employer-employee relations on employers' awareness and compliance with employment rights seen in this research has also been shown in other qualitative (Ram et al 2001) and quantitative studies (Forth et al 2006).

Employers' immediate responses when asked about their perceptions of the Act were focused on the costs of the fourth week of annual leave and to a lesser extent (because only one firm now regularly employed staff to work on public holidays) the cost of paying staff to work on public holidays. Other provisions of the Act (sick leave, bereavement leave and payment for casual workers under the Act) were not raised by employers. In firms established after the introduction of the fourth week of annual leave, employers were less focused on the cost of employee entitlements.

The industry sector of firms in the research was not associated with particular attitudes or awareness of the Act. More salient was when firms had been established, whether firms managed the payroll within the business, how many of the provisions of the Act significantly affected the business, and the impact of these costs, particularly relative to other business conditions.

4.2 Calculating relevant daily pay

Amongst employers and payroll administrators, familiarity with the relevant daily pay concept varied. It appeared to be most closely associated with the extent to which employees worked irregular days or weeks in a firm. Where employers/payroll administrators were not familiar with relevant daily pay it was unclear whether (through using payroll software) they consistently paid staff according to its principles. Lack of awareness or non-compliance with the relevant daily pay concept was not associated with a particular sector and occurred in firms both where pay was administered in-house and externally. There was no pressure from employees in the firms studied to apply relevant daily pay calculations, and a notable lack of advice from external providers of pay and leave administration services. It was then up to the employer to comply with the Act.

Employers/payroll administrators did not consider it difficult to determine pay for staff on leave in circumstances when relevant daily pay applied. The calculations were considered time consuming only for the largest employer because they had to be addressed on an individual staff member basis. There was no obvious alternative calculation that would be much less time consuming for such employers that would retain current entitlements.

Employers in the study were not resorting to the averaging formula for relevant daily pay in order to save time or minimise payments to employees but used it because it was not clear how many hours the employee would have worked on the day in question.

Neither the compliance costs nor the direct costs of relevant daily pay were a significant issue for the firms in the research (even the largest firm in which the employer considered that it added considerably to payroll administration time). However, in other industries (for example, where commission or productivity bonuses are paid) relevant daily pay may pose more significant costs to a business.

Responses from employers and employees suggested that employees regarded any day away from work through sick leave, bereavement leave, a public holiday or an alternative holiday, as a standard or ordinary day (usually thought to be eight hours). Although employees' 'gaming' was not in evidence in this study, this may be related to employees' lack of awareness of relevant daily pay and/or the nature of the employment relationship in small and medium firms. The Meat Industry Association submission (2005), for example, would suggest that in other circumstances employees may have a greater awareness of relevant daily pay and may use these provisions to their maximum advantage.

4.3 Calculating annual leave payments

The terms used in the Act in relation to calculating pay for annual leave were not well known by most employers or payroll administrators, but there was an awareness amongst employers that some calculation was required if an employee did not always work the same number of hours every week. These calculations were not considered complex by employers regardless of the type of payroll administration they used (manual, payroll software or an external provider), how many staff they had or the employment arrangements those employees had.

There was no indication that employers used the averaging formula to calculate payment for annual leave except in cases where employees worked a varying number of hours per week.

Employees were unaware of how annual leave payments were calculated. They did not look for further information despite being able to name a source of information, assuming that their employer would pay the appropriate amount.

4.4 Accumulation of leave

The provisions of the Act in relation to staff working on public holidays were well known to employers and employees. Where a business regularly traded on public holidays, it was the cost of the alternative days rather than the management of these days that was an issue for employers. Alternative holidays did not have an impact on most employers in the study because they did not regularly employ staff on public holidays. This was due in some cases (in the retail and hospitality sectors) to the cost of paying time and a half and providing an alternative holiday to staff and in other cases to the established trading hours in the sector (in the manufacturing and transport sectors). Most employees in the study thus did not acquire alternative days as they did not work on public holidays. Where they did get alternative days, they viewed the day as leave to be taken when it suited them rather than necessarily a day to be taken on the day of greatest financial advantage to them under relevant daily pay. Again, in this study, this may be related to employees' lack of awareness of the implications of relevant daily pay.

Additional annual leave granted under the Act was not an issue for employers either because it was managed through leave rosters and obliging employees to take annual leave within a 12 month period, or because employers did not object to it accumulating. Rather the issue stemming from the fourth week of annual leave (aside from the direct cost) was one of covering for staff on leave. Employers across all sectors and firm sizes were thus interested in employees' having the option to sell back a week's annual leave. Employers considered that employees would welcome having this choice both because in their experience some employees would prefer having the money and because some employees struggled to use their annual leave. Potential risks centered on employees fully understanding the implications of selling back leave and the importance of staff having some time off work. Thus it was considered important that a maximum amount of sellable leave should be defined. Employees too were generally interested in having the option to sell back leave – as long as it was an option that employees rather than employers requested. Risks were perceived by a few employees relating to employer and collegial pressure to sell leave.

4.5 Use of casual staff

Firms in the study that used genuinely casual staff did so in a way that met the test of casual defined in employment regulation. The Act had increased demand for casuals to cover increased annual leave in firms, particularly those that did not have a close-down period but it was not firms' preference to use casual staff over permanent employees regardless of firm size or sector. The key entitlement for casuals of eight percent of pay as 'pay as you go' holiday pay was well understood and adhered to.

There were instances of workers being paid (either partially or wholly) as casual staff when they were not casual. These instances were, though, unrelated to the impact of the Holidays Act in the firms in question.

4.6 Treatment of public holidays

Although the transfer of observance of public holidays was not an unknown concept to some of the employers and employees in the research, respondents were lukewarm towards the idea of extending the transfer of public holiday provisions of the Act. There was not sufficient clarity around how this might operate in practice to enable employers to assess whether it would be useful for business reasons or for employees to gauge whether it would provide them with any advantage. Respondents considered that options already existed for people to have leave on days of religious significance. There were also employers and employees who objected to the principle of public holidays not being observed on the day they fell. Respondents views on the current anomalies in the treatment of public holidays were centered on fairness, i.e. all business should be treated in the same way.

4.7 Overall impact of the Act

Those employers whose businesses postdated the increase in annual leave (April 2007) considered the Act a fact of business life, without a particular impact on their firms that other businesses did not also face. This suggests that some of the impact of the Act relates to regulatory change rather than the regulation itself.

The main impact most other employers experienced was the direct cost of employees' entitlement to an additional week of annual leave (including the difficulty and expense of covering for employees on leave). For businesses which traded on public holidays, the direct costs of employees' entitlements for working on public holidays added to this impact.

Increased employee entitlements for working on a public holiday had caused or contributed to small employers in the retail and hospitality sectors either closing or the employer working the public holiday without any staff. This decision was determined by expected turnover, ability to apply a surcharge (not considered an option by retailers), and employers' attitude to simply closing on those days. Although the largest employer in the hospitality sector applied a surcharge on public holidays, this was considered only to partially cover the additional costs. Other responses from employers to the direct costs of the Act affected employees' previous entitlements in either absolute or relative terms.

Overall, however, the Act was seen as a minor constraint by employers, particularly compared to product and labour market constraints. This view is congruent with the UK research on the impact of employment regulation, which has shown that the product market is the overriding factor affecting business performance (Edwards et al 2003, Dickens et al 2005, Carter et al 2006).

4.8 The effect of the Act on SMEs

This study focused on SMEs because surveys on compliance costs and submissions to government on the Act suggested SMEs may face higher compliance costs than larger businesses (per full time equivalent staff member). This is in part attributed to the lack of specialist resources within small firms, and also to the higher marginal cost of, for example, payroll software for small firms. In this study, the method of administering pay and leave was not associated with differences in compliance costs. Further, the largest employer had the highest compliance costs because of the number of employees for whom relevant daily pay had to be calculated. This finding is congruent with other work which has shown that regulation does not have uniform consequences for small business owners and, looking more widely than compliance costs, that the negative effects of workplace legislation tend to increase with firm size (Ram et al 2001, Edwards et al 2003, Dickens et al 2005, Kitching 2006).

5 CONCLUSION

This study was initiated to further explore the findings of previous survey research and submissions to government stating that businesses find the Holidays Act 2003 complex and time consuming to apply. The sample of firms in this study was selected in order to explore how the Act was being applied in small and medium sized firms that do not have specialist human resources staff and whose employment arrangements would necessitate particular calculations under the Act. This research adds to the work on the compliance costs of employment regulation in New Zealand by looking at the extent to which employers (or payroll administrators) in SMEs understand and comply with the Holidays Act 2003.

The findings of the research show that employer knowledge of the Act follows typical patterns for employment rights legislation, that is, employers are most familiar with the provisions they encounter most often. Thus there was less understanding of specific provisions of the Act around sick leave and bereavement leave because these provisions have a relatively low impact on these employers, but high awareness of annual leave (or the percentage this would add to casual workers' pay) and public holiday entitlements.

Employees too were most familiar with annual leave and public holiday entitlements as they encountered these most often. Employees could name reliable sources of information about their entitlements under the Act but did not use them. Although this did not necessarily mean employees were paid less than they should be, enhancing employer and employee's knowledge of employment rights remains a challenge.

In line with this finding, knowledge of relevant daily pay and annual leave calculations was associated with employers whose staff regularly worked varying daily or weekly hours. It was unclear whether other employers/payroll administrators consistently made the appropriate calculations when required through the use of payroll software.

Employee 'gaming' of relevant daily pay provisions was not evident – this may be related to their lack of awareness of the relevant daily pay concept or to the employment relationships in the firms studied.

Although knowledge varied, employers in the study did not consider the provisions of the Act difficult to understand. Only the largest employer (of 75 staff) found any calculations required a significant amount of additional time. It was thus not evident from the study that the Act imposes higher compliance costs on SMEs compared to larger businesses. Rather, where relevant daily pay calculations are required, compliance costs may increase with larger numbers of employees.

The marginal compliance costs imposed by the Act were considered insignificant by employers in the study – even by the largest employer who was affected the most – compared to the direct costs of annual leave and public holiday entitlements. Therefore, amending the Act to alter the calculations required (whilst maintaining current employee entitlements) is likely to have no effect on these employers – or may even impose additional costs through change to pay and leave systems. However amending the Act to give employees the option of

selling back a proportion of annual leave may alleviate employers' difficulties with covering for staff leave where this is an issue, and was a suggestion welcomed by employers and employees in the study.

Other impacts of the Act on employers (shops not trading on public holidays, the use of surcharges, the reduction of existing employee entitlements and employers working longer hours) related to the direct costs of employee entitlements rather than the compliance costs. Overall, however, employers considered the Act was a very minor constraint on their businesses compared to the product market and – to a lesser extent currently – the labour market.

There was insufficient clarity around how possible changes to transferring public holidays and changing the treatment of some public holidays might operate in practice to enable employers to assess whether it would be useful for business reasons, or for employees to gauge whether it would provide them with any advantage.

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