PAY-AS-YOU-GO HOLIDAY PAY

WORDS BY LAWRENCE ANDERSON
ANDERSON EMPLOYMENT LAW ADVOCACY, NO WIN NO FEE KIWI, EMPLOYER HELP

I recently received an enquiry from a reader of the magazine, who runs a trucking business. The advice that this reader was looking for was how he should respond to a casual employee who had been working for his company on a weekly basis for at least a couple of years. The employee was being paid his holiday on an eight percent pay-as-you-go basis every week, and for the most part, working three days per week consistently. The employee had agreed in their employment agreement to be paid eight percent pay-as-you-go, and this has been an identifiable component in their pay. Despite being paid holiday pay as he goes, the employee has recently started to demand that they take paid holidays. The employee has claimed that he's now owed a large figure of accumulated annual leave despite being paid eight percent holiday pay with his regular pay.

While it's easy and seems logical for the business to take a position and to say to the employee: "You're casual. You are paid holiday pay at an eight percent pay as you go basis. You agreed to this from the outset of your employment. We are not going to entertain paying you for holidays you have already been paid for", the difficulty for the employer is that the Holidays Act 2003 allows employees to "double dip" on holiday pay already paid if the employee becomes entitled to holidays and the employer has not strictly complied with the legislation in paying eight percent holiday pay on top of wages.

For the purposes of this article, we're only discussing annual holiday leave entitlements that may arise in casual employment or fixed-term employment situations.

Entitlement to annual holidays

The purpose of the Holidays Act 2003 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 to provide the opportunity for rest and recreation.

Section 16 of the Act describes "Entitlement to annual holidays". Simply: After the end of each completed 12 months of continuous employment, an employee is entitled to not less than four weeks' paid annual holidays. The remainder of that section sets out what is considered to be a period of 12-month continuous employment and how an entitlement to annual holidays remains in force.

When annual holiday pay may be paid with employee's pay

The idea of substituting paid holidays with regular payments is therefore contrary to the purpose of the Holidays Act. Such a substitution is attractive to employers because it represents a saving in administration costs as well as avoiding the build-up of liabilities, which could prejudice the balance sheet solvency in the case of small businesses.

There are limited scenarios of when annual leave holiday pay may be paid with the employee's pay. Section 28 of the Act describes the scenarios that apply, these are:

1. That the employee:
   a. is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work for less than 12 months; or
   b. works for the employer on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks' annual holidays under section 16

And there are further conditions that must apply:

2. the employee agrees in his or her employment agreement; and
3. the annual holiday pay is paid as an identifiable component of the employee's pay; and
4. the annual holiday pay is paid at a rate not less than eight percent of the employee's gross earnings.

These are all conjunctive conditions, which mean that they all have to be met. If not, the consequence to the employer is subsection 4 of that section, which reads:

If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with section 16 and paid in accordance with this subpart.

Therefore, if an employee has worked for an employer for more than 12 months and has incorrectly been paid holiday pay on a pay-as-you-go basis, the employee will become entitled to holidays despite having already been paid the eight percent holiday pay.

For completeness, this section of the Act does provide (under subsections 2 and 3) the allowing an employer to pay eight percent pay-as-you-go for multiple fixed-term agreements that are less than 12 months each, or, where a fixed-term employment agreement results in becoming permanent employment when the entitlement arises it can then be reduced by the amount of pay-as-you-go holiday pay that has already been paid. Of course, the above conditions all need to be met and an employee's employment in any of these two situations must be genuinely a fixed-term agreement that complies with section 66 of the Employment Relations Act 2000.

Can holiday pay already paid be treated as overpayments and be recovered?

No, it cannot be recovered in a situation like this. An employer will be unable to recover holiday pay incorrectly paid at eight percent as an overpayment. In a case in the Employment Relations Authority, Cross v D Bell Distributors Limited [2017] NZERA Auckland 295, the Authority considered that holiday pay already paid in this circumstance cannot be recovered by an employer, the Authority summed it up nicely:

[38] The consequence for an errant employer, of effectively having to pay holiday pay twice, may seem harsh. DBD submitted the Holidays Act could not intend to entitle a worker to "a double dip". Section 28(4) is however, clearly, a deliberate instrument of parliamentary intention to provide regularly and continuously employed workers with annual holidays so they have real opportunities for rest and recreation. Subsection (4) intentionally creates a significant financial disincentive to the use of pay-as-you-go provisions outside the two strictly limited categories of employee allowed by s 28. An employer who does not strictly comply with the conditions for use of s 28 does so at its own, costly, peril.

What the employer should do

Coming back to the enquiry of the reader and the dilemma they have with their employee. If this casual employee's periods of work are not so irregular or intermittent that it's impractical for the employer to provide four weeks paid holidays, in other words the employee is not truly a casual employee, the company will become liable to meet the employee's entitlements under that would have otherwise arisen.

If pay or timesheet records show a regular pattern of work, for example, even if it's three days a week consistently for a significant period, the reality would be that the work would not meet any commonly understood legal definition of being intermittent or irregular work.

A company attempting to prove that it's impractical to provide holidays can find difficulty in such a situation particularly if circumstances would permit the company being able to arrange a replacement worker while the employee has time off during their employment, as it may be, unpaid time off, and, for an employment relationship that has lasted more than two years, I put my money on the fact that it's likely that the employee already has had unpaid time off work and another worker has covered for them in that time.

It sounds like there are a few years of entitlement, so this could amount to thousands of dollars of liability already, whether the employee remains employed and takes the paid holidays, or if employment is terminated by either party, then an appropriate calculation of the remaining holiday pay should be made. I'm sure that the payroll system would get this wrong given that it was set up incorrectly in the first place.

In this situation, my advice would be to calculate what the damage will be in terms of what quantity of holidays are owing to the employee under the Act, and to resolve this with the employee in a timely way rather than continue to pay holiday pay on an eight percent pay-as-you-go basis and risk a larger claim against the company later. Alternatively, the employer could deny that the employee is entitled to holidays and the parties may seek to have a decision made for them by the Employment Relations Authority, which is always an expensive exercise.

Ultimately, before making an offer of employment, an employer should be clear on exactly what the hours of work will likely be. If the employee is going to be working on a part-time and ongoing basis, it is advisable to set up the payroll package to allow for holidays to be taken in the usual way which may include accounting for an employee taking holidays in advance of their entitlement arising.

As I have described, if there's a genuine fixed-term employment agreement that becomes a permanent employment relationship, the paid eight percent can be later subtracted, but, the fixed-term employment agreement must comply with the law. Seldom do I see employers getting fixed-term employment agreements right for which will be a topic for another issue of the magazine.

What we can do for employers and employees

We are Employment Law Advocates that represent employers and employees. We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.

EMPLOYER HELP
0800 WIN KIWI
0800 WIN KIWI