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ADVICE ON STATUTORY HOLIDAY PAY FOR CASUAL EMPLOYEES

1. You have asked for our advice on whether kiwifruit growers are required to pay casual employees for a statutory holiday, if they are offered work but are then they not required to work that day due to a change to the picking/packing schedule or rain.

Executive summary

2. We assume that the normal practice for growers is that if it rains or the picking/packing schedule changes, then the employee is not required to work. Thus, growers may be able to argue this same reasoning should apply in relation to a statutory holiday when an employee is not required to work and employees should not be paid for that public holiday.
3. We summarise growers' options below, in order of preference:
 - (a) The best option would be for growers to reach an agreement with the employees as to what "*would otherwise be a working day*" means. This could be done by having clear clauses in the employment agreement which set out:
 - (i) if an employee is offered work and it rains so the vines are wet and can not be picked, then they will not be required to work, and
 - (ii) the days of work offered are subject to packing/picking requirements.

This would then give the growers greater flexibility to argue that whether or not it is a public holiday, the employee is never going to be required to work if it is raining or the packing/picking requirements change. An example of such clauses is at 3(b) and (e) in the template casual employment we have provided to you.

- (b) Contact the Ministry of Business, Innovation and Employment and ask for a labour inspector to make a determination on what "*would otherwise be a working day*" means in this context;
- (c) Rely on employees' previous work records to argue that on a normal day if it rains or the picking/packing schedule changes they would no longer be required to work, so should not be paid on future occasions when this occurs; or
- (d) Pay employees for all public holidays regardless if they work or not.

Individual employment agreement for casual workers

4. You have provided us with a copy of NZKGI's standard individual employment agreement for a casual orchard worker.
5. As a general comment we note there is always a significant risk when employing casual workers. This is because if their hours/days of work become regular or they are put on a roster, they may be deemed to be permanent employees notwithstanding what any agreement says. This means they then have the rights of a permanent employee e.g. the right to ongoing employment.
6. A casual employee is an employee who is only offered work as and when he/she is required. The standard casual employment agreement you provided to us does not set out the mechanism for how a casual employee will be advised if there is work. Normally we would expect that a casual employee would be phoned the day or week prior to the work being available to see if they are willing and available to work. It is up to the worker whether they accept the offer of causal work each time they are contacted.
7. We note that clause 5 of the standard casual employment agreement you provided states "requested to work", rather than "offered work". This is corrected in the template casual employment we have provided to you.
8. We provide our advice in this letter on the basis that the employees at issue are casual employees, as legally defined.

Legal background

9. Section 46 of the Holidays Act 2003 (the "Act") sets out an employees' entitlement to public/statutory holidays:
 - (1) *An employee is entitled to public holidays, and payment for those holidays, in accordance with this subpart.*
 - (2) *Public holidays are in addition to annual holidays that an employee is entitled to under this Act or otherwise.*
10. The Act does not distinguish between types of employees such as casual or permanent, meaning all employees have an entitlement to public holidays.
11. Section 48 of the Act provides guidance on how to comply with section 46:
 - (1) *If a public holiday falls on a day that would not otherwise be a working day for an employee, section 46 is complied with if—*
 - (a) *the employee does not work on the day; or*
 - (b) *the employee works on any part of the day and the employer pays the employee in accordance with section 50.*
 - (2) *If a public holiday falls on a day that **would otherwise be a working day** for an employee, section 46 is complied with if—*
 - (a) *the employee—*
 - (i) *does not work on that day; and*
 - (ii) *the employer pays the employee in accordance with section 49; or*
 - (b) *the employee—*
 - (i) *works (in accordance with his or her employment agreement) on any part of that day; and*
 - (ii) *the employer pays the employee in accordance with section 50; and*

- (iii) *the employer provides the employee with an alternative holiday under section 56.*

12. Section 49 of the Act also states:

*If an employee does not work on a public holiday and the day **would otherwise be a working day** for the employee, the employer must pay the employee not less than the employee's relevant daily pay [or average daily pay] for that day.*

13. One of the difficulties with casual employees is because they are only asked to work 'as and when required', they do not (and indeed should not) have regular days of work. This often makes it hard to determine what "would otherwise be a working day" for the purposes of payment on a statutory holiday.

14. We note in the standard employment agreement you provided that there is no mechanism of how to determine what "would otherwise be a working day". Such a clause could reduce the ambiguity for the parties on this issue and we recommend that it is added to the agreement. An example of such a clause is at 12 in the template casual employment agreement we have provided to you.

15. Without this clause we have considered section 12 of the Holidays Act 2003 (the "Act") which states:

(2) *If it is not clear whether a day would otherwise be a working day for the employee, the employer and employee must take into account the factors listed in subsection (3), with a view to reaching agreement on the matter.*

(3) *The factors are—*

(a) *the employee's employment agreement:*

(b) *the employee's work patterns:*

(c) *any other relevant factors, including—*

(i) *whether the employee works for the employer only when work is available:*

(ii) *the employer's rosters or other similar systems:*

(iii) *the reasonable expectations of the employer and the employee that the employee would work on the day concerned.*

[(d) *whether, but for the day being a public holiday, an alternative holiday, or a day on which the employee was on sick leave or bereavement leave, the employee would have worked on the day concerned.]*

16. There are cases which have considered this issue however, none are directly on point.

17. *Personnel Solutions Limited v Mitchell (Labour Inspector)* Employment Court, Colgan J, AEC125/97, 29 October 1997, considered whether "temps" should be paid over the Christmas/New Year break. The employment agreement provided that "*when an employee was not on an assignment when a statutory holiday fell, or when an assignment was for staggered periods or was "on hold" (e.g. over Christmas)*", there was no entitlement to payment for statutory holidays. The Court considered whether the phrase "on hold" was an attempt to contract out of the Holidays Act 1981, which is prohibited. The Court was not persuaded that the phrase "on hold" was well known or established in the industry and the clause was found to be an unlawful contracting out of the Holidays Act. Therefore, statutory holidays would have been working days and the employees should have been paid for them.

18. *Progressive Meats Limited v Meat and Related Trade Workers Union of Aotearoa Incorporated* Employment Court 2008, considered whether irrespective of whether Monday, 4 June 2004 was a public holiday it was likely that the defendants plant would have been

processing and therefore the employees should have been paid. His Honour, Chief Judge Colgan, held

“Although these parties work arrangements are not precisely those contemplated by section 12(3)(c)(i) work availability does affect when employees work within the scope of the collective agreements maximum weekly hours and in practise the employer has considerable latitude in managing its work times around stock availability. That is likewise the position with notice of work allegation to employees: it is the client’s custom and practice that employers will know by the previous Friday the likely nature and duration of the work for the following week including any non production work that may be made available to make up the minimum weekly wage. I am satisfied that the employees would have had a reasonable expectation of there being no work on the Monday in question even if it had not been a public holiday.”

19. The Chief Judge considered that what happened in practice at the workplace was a matter of fact with prior reference to the custom and practice. He noted that what would otherwise have been a working day for the relevant employees was essentially a question of fact in each case.
20. *B.W.Murdoch Limited v Mark Anthony Thorn, Labour Inspector, Employment Court 2008 AC3/08*, considered whether a temporary employee should be paid for statutory holidays. The Court found that there was no basis for an argument that because of their status as casual employees they were not entitled to payment for public holidays. The starting point for all employees is the Act. The Court also did not accept that because the employee was not asked to work on the public holiday that he had no entitlement to payment. *“The question to be asked for all employees is whether pursuant to section 49, the public holiday would otherwise be a working day for the employee. This is a question of fact”*. Each public holiday also needs to be looked at separately in the light of the work patterns around it. The Court held that the employee worked regular and predictable hours each week, which meant that each public holiday *would otherwise have been a working day* and he was entitled to payment.
21. Thus any assessment is going to be a practical exercise on a case by case basis considering each employee’s circumstances.

Criterion in section 12(3)(c) of the Act

22. If a grower asks a casual employee to work on a public holiday and they accept that offer of work, they have every intention to pay them, but it then rains or the picking/packing schedule changes so they are no longer required, does the grower still have to pay them for the public holiday.
23. We note that there is a clause in the standard employment agreement which says work is available when “weather is favourable”, but this does not go far enough in our view. We assume that the industry standard is that if it rains or the picking/packing schedule changes, then workers are not required no matter what the day is. If this is correct, then in our view growers could make the argument, that while a worker may have been required to work, whether it is a public holiday or not is irrelevant, because if it rains or the picking/packing requirements change, they will no longer be required to work. In other words it would not *“otherwise be a working day”*.
24. This argument is supported by the criterion under section 12(3)(c)(i) and (iii) of the Act. The employee is a casual so only works when work is available. If it rains or the schedule changes then work is no longer available. Also the grower and the employee would not

have a reasonable expectation of work being carried at on a public holiday if it rains or the schedule changes.

25. This argument can be distinguished from the *Personnel Solutions* case, if growers can show that the industry standard is that there is no work in rain or where there is a change to the schedule.
26. This is of course an untested argument and it is unknown whether a labour inspector or Employment Court would agree. A court may take the view that once an offer of casual work has been accepted by an employee, it cannot be withdrawn by the employer. We suggest that to strengthen the argument the standard employment agreement should be amended to include a clause which covers this. An example of such clauses 3(b) and clause (e) in the template casual employment agreement we have provided to you.
27. The key is to show that the grower is not structuring the work in such a way to avoid having to pay an employee for a statutory holiday. Growers need to be careful of allowing a pattern to develop where schedule changes coincide with statutory holidays.

Other options

28. Approaching a Labour Inspector is an option to get a definitive answer. Under the Act, inspectors are required to take into account the factors in section 12 of the Act and would have to consult with growers and employees about what factors they will take into account when making their decision. If a grower pursued this option, the grower would be bound to follow the Labour Inspectors' determination unless the grower filed proceedings in the Employment Relations Authority challenging the determination and asking for it to reconsider the issue.
29. Growers could rely on the argument that on a normal day if it rains or the packing/picking schedule changes, then the employee is no longer required so the same should apply on statutory holidays. However, growers would still need to consider what days an employee worked in the past to see if there is pattern. This is a risky approach as an employee could argue that but for it being a public holiday they would have worked, so the grower will need to be able to justify why work is not being offered, or if it is being offered and is then cancelled, why this is so.
30. From a strict legal point of view, the least risky option is that growers simply pay employees on statutory holidays. However, we doubt that that approach would make sense economically or practically for the growers.

Further point

31. While the focus of our advice is on if growers offer work, but it then rains or the picking/packing schedule changes so the offer to work is effectively withdrawn; there are other situations that that growers need to be aware of:
 - (a) Where there is no work available on a public holiday and a grower has not asked the employee to work, the grower would say that the casual employee would not be paid for the statutory holiday. However, it is not this straight forward. The grower would still need to give consideration to the employees' work patterns. For example, if the employee had worked the last three Fridays and would have worked on the Friday that is a public holiday but for it being a public holiday, then the presumption would be that they should be paid. The grower would need to be able justify that there was in fact no work that day and would not have been even if it was not a public holiday. The grower should bear in mind that casuals should not have a regular work pattern.

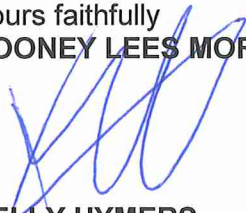
- (b) If a grower does not offer a casual employee work on a public holiday, when there is work available, the grower will have significant risk and this situation must be avoided.

Conclusion

32. There is never going to be a definitive or absolute answer regarding causal employee's entitlement on statutory holidays where work is cancelled due to rain or schedule changes. It is an intensely practical analysis of the circumstances.
33. Once you have had the opportunity to consider the above, please do not hesitate to contact us if you require anything further.

Yours faithfully

COONEY LEES MORGAN



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