



HOLIDAYS ALERT! **A HIDDEN COST TO CHANGING YOUR PUBLIC HOLIDAYS...**

Introduction

While many employers do already simply observe public holidays on the day they fall, some may be caught out by a recent Supreme Court decision:

Until recently, if necessary employers have been able to fairly easily adjust Public Holidays to suit their business and their staff, by agreeing with their employees to observe them on another day. Why would anyone want to transfer a public holiday? This has been a way to give the employee certainty that they can still have the paid holiday off work, but doing this on a different day may fit in better with the business, or means an employee doesn't have to apply for annual leave to take time off. For example, an employer and employee could agree to transfer New Year's Day to be observed on 25th January instead of on 1st January because the employee wants to observe a religious festival that day, or to go to a wedding or other event on that day.

However, on 14th November 2007, the Supreme Court completely changed the way employers had been able to treat public holidays arrangements where employers and employees have agreed to observe these on days other than the date they fall. Specifically the Court addressed how one should interpret Section 44(2) of the Holidays Act ('the Act'), regarding observing a public holiday on another agreed day.

The Law

PREVIOUS INTERPRETATION:

In *Air NZ Ltd v NZ Airline Pilots' Association Industrial Workers Inc* the Court of Appeal affirmed that, under Section 44(2) of the Act, an employer and employee could agree to celebrate public holidays on different days, provided the arrangement maintained or enhanced the total number of paid public holidays the employee would otherwise be entitled to (at least 11). This type of arrangement transferred all the entitlements associated with a public holiday were transferred to an identified 'exchange day'.

NEW INTERPRETATION:

The Supreme Court decision effectively reversed the above stance on exchange days to the point that the concept now no longer legally exists. The Court reasoned that Section 44(2) serves as an "enabling provision" that expressly gives employers and employees the ability to agree that the employee will work the public holiday in exchange for another day's paid leave, i.e. an "*alternative holiday*". Section 50 also states that any employee who works a public holiday ought to be paid their relevant daily pay for that day, plus half that amount again (a.k.a. 'time and a half'). Ultimately the Court concluded that the practice of agreeing to transfer all an employee's entitlements regarding public holidays to an 'exchange day' undermined the Act and equated to "*unauthorised contracting out*".

EXAMPLE:

Previously each year Joe's Café has agreed with staff that their Easter Monday be exchanged and observed about two weeks later, and the staff have been working on that Monday. For next year's Easter holiday period, Joe had planned that Easter Monday (24 March 2008) would be observed on 7th April 2008, with the staff having that day off instead.

How is this arrangement affected by the new Supreme Court ruling? The key differences are outlined below:

- A public holiday cannot (with the exception of 25/26 December and 1/2 January) be transferred from the day it falls.
- Therefore, any agreement with staff to take another day off instead and work say Easter Monday, would actually be an agreement that the *alternative day* be taken later.
- If Joe was still to require the staff to work on the day that Easter Monday falls, they would have worked the public holiday, and therefore should be paid in accordance with the Holidays Act 2003 (i.e. paid 'time and a half' for any work done on that day, plus they become entitled to an alternative day).

Impacts for Employers

- The flexibility formerly available no longer exists: Public Holidays must be observed on the day they fall.
- Where staff are required to work on that day, they must be paid Time and a Half for that work, and get an Alternative Day to take at another time. As such, going forward you will need to factor in the extra '1/2' day of pay for each public holiday that is worked by an employee into your wage bill.
- If you have employment agreements where you have agreed that a public holiday will be transferred to another day, this is **no longer valid**. Now is a good time to **check your agreements** - they may need to be varied to avoid confusion.
- To minimize wage costs, Public Holidays should be taken on the day they fall, so that staff have the day off, and are paid only their Relevant Daily Pay.
- It should be noted that the possibility to transfer or 'roll-over' the Christmas and New Year's Public Holidays to the following Monday or Tuesday if they fall on a weekend day on which the employee doesn't normally work is not affected by this change in interpretation, as the ability to do this is specifically allowed in the Holidays Act.

SOUTHLAND & OTAGO ANNIVERSARIES **- NEED MORE INFORMATION?**

Our Consultants are happy to go over the basics with you regarding how to deal with Southland and Otago Anniversary Days at no cost by phone. However, to ensure you get a full understanding of your new obligations and can explain these changes to staff more easily, we can also provide written summaries to give you more detail about your responsibilities and the constraints now placed on these local Anniversary Days. These written summaries can be purchased for a standard fee of \$150 + GST.

- Most of Otago celebrate Anniversary Day on 23 March (or the closest Monday). But where did this date come from and must all of Otago celebrate that date? Our full summary explores the history and law surrounding **Otago Anniversary Day**, and can be purchased by ringing (03) 2181854 (Invercargill) or (03) 4413853 (Queenstown), or by emailing progressive@WeAreHR.co.nz.
- The recent legal changes above highlighted the importance of identifying the actual date for **Southland Anniversary Day**. Employers must be careful to ensure that they comply with their legal obligations concerning public holidays to avoid added costs and/or inadvertent breaches of legislation. But what can employers do when they are unable to identify the actual date of a public holiday? Our full summary outlines the law, the options and our recommendations in light of case law and local custom. This can be purchased by ringing (03) 2181854 (Invercargill) or (03) 4413853 (Queenstown), or by emailing progressive@WeAreHR.co.nz.

This information is prepared by Progressive Consulting and Janet Copeland Law. It is produced to provide a brief summary of issues and developments which may affect our clients in these fields. While we take care to ensure that the information is correct, details may be omitted which may be directly relevant to a particular entity. The information should therefore not be taken to be sufficient for making decisions. If you have any questions in relation to anything discussed here or just a general query, contact the team who will be happy to assist you.