



Remediation for former employees – how calculations were done

21.09.22

The issues identified during the Holidays Act remediation project required us to make data corrections in several areas before we could use the remediation calculator to recalculate and compare payments. Outlined below are the key processes, recalculations and data corrections that have taken place for the remediation period 1 March 2010 to when your employment with the Ministry ended.

PROCESS	DESCRIPTION
Main recalculation of leave payments	<p>We've recalculated the payment for every instance of leave across the remediation period to ensure that at least minimum entitlements under the Holidays Act 2003 have been received by employees.</p> <p>We've recalculated Annual Holidays to ensure that at least the higher of Ordinary Weekly Pay and Average Weekly Earnings has been paid.</p> <p>We've recalculated other leave types – bereavement, family violence, alternative holidays, public holidays, sick leave – to ensure that Relevant Daily Pay has been paid. Where it has not been possible or practicable to determine Relevant Daily Pay, we have used Average Daily Pay.</p>
Cash up of annual holidays	We completed a review of Annual Holiday cash ups across the remediation period to check that the payment for annual holiday cash ups aligns with an employee's entitlement year, as specified in the Holidays Act.
Casual employees holiday pay	We have reviewed casual employee entitlements to leave payments, leave entitlements and entitlements to payments on public holidays as defined by the Holidays Act.
Data checking	<p>We identified instances where retrospective changes to pay had not processed correctly (e.g., if an allowance had been added or removed and were not calculated accurately).</p> <p>We completed a review of these records so that all remediation checks and calculations could proceed based on the correct payment data.</p>
Public holidays	<p>We have completed a detailed review of all instances where an employee has worked on a Public Holiday to:</p> <ol style="list-style-type: none"> 1. identify and adjust where other paid leave types have been recorded (e.g., Annual Holidays and Sick Leave) 2. pay for working on public holidays has been paid correctly. <p>We have also ensured that a full day's Alternative Holiday is provided, when the Public Holiday is determined to be an otherwise working day.</p>
Salary increase post-termination	We identified instances where a salary increase after termination needs to be applied. We completed a review of salary so that remediation checks and calculations for leave and termination pay could be based on the correct payment data.
Termination pays	We have reviewed all termination pays to ensure all requirements of the Holidays Act 2003 have been met for terminating employees.
Worked hours	We have validated worked hours and leave taken for each employee against their work pattern to ensure that when leave is taken, the leave payments are correct.
Data cleansing	<p>We have also identified historic practices which have not been compliant with the Act, for example:</p> <ul style="list-style-type: none"> • paying overtime and allowances on a single day per week (not the actual workday they related to)

- gross earnings inclusions/exclusions that were not compliant with the Act
 - non-compliant pay rates for some types of leave.
- We have corrected these records so that all remediation checks and calculations could proceed based on compliant payment data.

Glossary of Holidays Act terms

Sources: Holidays Act 2003 (the Act); MBIE Holidays Act 2003 Guidance, published April 2019

TERM	DEFINITION
Leave types	
Annual holidays	Annual Holidays are to provide employees with paid time off work for rest and recreation.
FBAPS leave	A collective term for Bereavement Leave, Alternative Holidays, Family Violence Leave, Public Holidays and Sick Leave.
Bereavement leave	Bereavement leave is paid leave that all employees who meet the certain criteria can use if someone close to them dies.
Alternative holidays	An employee receives an alternative holiday for working on a public holiday that is an otherwise working day.
Public holidays	There are 12 public holidays provided under the Holidays Act 2003 and are in addition to annual holidays. An employee is entitled to a public holiday if the holiday falls on a day that the employee would otherwise have worked.
Sick leave	Sick leave is paid time off work if an employee, their spouse, partner, dependent child or other person who depends on them is sick or injured.
Family violence leave	Family violence leave is paid leave that all employees who the meet certain criteria can use.
Pay rates	
Gross earnings	In relation to an employee for the period where the earnings are being assessed and means all payments an employer is required to pay under an employee's employment agreement. The Act and Annex 1 of the MBIE Guidance (April 2019) provide a list of inclusions and exclusions. References: Holidays Act 2003 s14, MBIE Guidance Annex 1 (April 2019)
Ordinary Weekly Pay (OWP)	Ordinary weekly pay is used in the calculation of payment for annual holidays and is the amount an employee is normally paid each week. Holidays Act reference: s8(1)
Ordinary Weekly Pay – 4 weeks	Where it is not possible to calculate ordinary weekly pay due to the variability of pay each week, a formula using the previous four weeks gross earnings should be used. Holidays Act reference: s8(2)
Average Weekly Earnings (AWE)	Average weekly earnings are worked out by calculating the employee's gross earnings over the 12 months before the end of the last pay period before the annual holiday is taken and dividing that figure by 52. Holidays Act references: s5(1), s16(3), s21, s22
Relevant Daily Pay (RDP)	Bereavement, family violence leave, sick leave, public holidays and alternative holiday payments are calculated using relevant daily pay or average daily pay. Relevant daily pay is what an employee would have earned if they would normally have worked on that day. Holidays Act reference: s9
Average Daily Pay (ADP)	If it is not possible or practicable to work out relevant daily pay or an employee's daily pay varies in the pay period in question, average daily pay may be used. Average daily pay is the daily average of the employee's gross earnings over the past 52 weeks. Holidays Act reference: s9A
Other terms	
Otherwise working day	A day an employee would have worked, had they not taken holidays or leave on the day in question. Holidays Act reference: s12
Worked hours	The actual number of hours worked by an employee for a given period of time.

Work pattern	<p>The usual and definable pattern of work or work roster for an employee, described by the days and/or the hours an employee is expected to work. The work pattern forms part of the employee's employment agreement.</p> <p>In the Ministry's case, most of the workforce works 8 or 7.6 hours per day, 5 days per week (Mon to Fri).</p> <p>Work patterns vary from the standard usually due to part-time work, flexible work arrangements, or for those who work on a shift or roster.</p> <p>In some instances, an employee may not have a usual and definable work pattern, typical of casuals.</p>
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Further details on how the calculations have been performed

For the purposes of remediation calculations, how is a 'week' defined?

The remediation calculations have been performed with a week being in line with the pay period, which is Thursday to Wednesday.

For the purposes of remediation calculations, how is a 'day' defined?

A day is defined as your work pattern hours for the particular instance of leave. For example, if you had a day of sick leave on Thursday and your work pattern for a Thursday is six hours, then that is what constitutes a day for the calculation of the Relevant Daily Pay or Average Daily Pay for that instance of sick leave.

Calculating annual holidays when the period of annual holidays cross pay periods

Section 21(2)(b) of the Holidays Act 2003 requires that annual holiday pay must be at the rate that is based on the greater of:

- The employee's ordinary weekly pay at the beginning of the annual holiday; or
- The employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

Where a block of annual holidays crosses pay periods, the remediation calculations check that the rate at the start of the block of leave is used for the entire block of the annual holiday. If the block of annual holidays is interrupted by other leave type/s, the rate at the start of the block is used for all annual holidays on either side of the other leave type.

Where a block of annual holidays is made up of more than one leave request, the rate at the start of the block continues across consecutive days of annual holidays.

Where an increase in pay starts within a block of annual holidays, the higher pay rate is used from the date it becomes effective.

Treatment of payments above entitlements and underpayments

The remediation calculations compare what was paid with what should have been paid for each instance of leave.

Both payments above entitlements and underpayments have been identified through the remediation process. The treatment of these in the remediation calculations are:

- Payments above entitlements – these are excluded from the 52 weeks gross earnings for subsequent annual holiday calculations. We won't be seeking recovery of overpayments.
- Underpayments – these are included in the 52 weeks gross earnings for subsequent annual holiday payment calculations. The underpayments will be paid to employees and ex-employees.
- Gross earnings – the gross earnings figures used for the remediation leave recalculations do not include amounts which are genuine or mistaken payments above contractual or statutory entitlements. By doing this, the Holidays Act 2003 remediation calculations are based on corrected gross figures that align with what the employee is due under the Employment Agreement.

Regular payments for annual holiday pay

The regularity of payments (e.g., overtime, allowances) is a consideration for determining the rate you get paid when you take annual leave¹.

- Fixed allowances, which are the same amount every time and paid every week, are automatically included in your Ordinary Weekly Pay (OWP).
- Some payments, like overtime, will be variable because the amount paid is not the same every time or paid every week. If you have received payments which could vary, we have used the 4-week average where you received that payment for three of the four weeks immediately before the pay period in which you took the annual leave.

Some examples:

1. Tony's usual work pattern is Monday-Friday, 10am-6pm. Tony has been working additional hours as the team has an extra workload.

Pay period	Week	Additional hours	Assessing payment for annual leave
Pay period 1	Week 1	Thursday + 2hrs Tuesday + 2hrs	Worked OT
	Week 2	Friday + 2hrs Tuesday + 2hrs	Worked OT
Pay period 2	Week 3	No extra hours	OT not worked
	Week 4	Wednesday + 3hrs	Worked OT
Pay period 3	Week 5	No extra hours	OT not worked
	Week 6	Tony took annual leave	

In assessing the pay rate for the leave Tony took in Week 6, the Ministry remediation will use the **4-week average** in place of OWP, including the OT payments for weeks 1, 2, and 4.

2. Sally works in the same team as Tony. Sally's additional hours worked are different.

Pay period	Week	Additional hours	Assessing payment for annual leave
Pay period 1	Week 1	No extra hours	OT not worked
	Week 2	Tuesday + 1hr	Worked OT
Pay period 2	Week 3	No extra hours	OT not worked
	Week 4	Friday + 1hr	Worked OT
Pay period 3	Week 5	No extra hours	OT not worked
	Week 6	Sally took annual leave	

In assessing the pay rate for the leave Sally took in Week 5, the Ministry remediation will use Sally's **standard OWP**, excluding the OT payments for weeks 2 and 4.

For both examples, the 4-week average or OWP rate used will be compared with Tony and Sally's Average Weekly Earnings (which include all OT payments) and the greater rate will be used.