



SUBMISSION

by

NEW ZEALAND PAYROLL PRACTITIONERS ASSOCIATION

Submission to

**Ministerial Advisory Group
Department of Labour**

**on the
Holidays Act 2003 Review**

Presented on 21st August 2009

1.BACKGROUND

This submission is made by the New Zealand Payroll Practitioners Association (NZPPA).

NZPPA is made up of some 500 individual, business and corporate member companies covering the whole of New Zealand and overseas members based in Australia. This membership is responsible for paying approximately 250,000 employees ranging from large companies to SME's based throughout in New Zealand.

Within our membership we have payroll practitioners that are sole-charge, or manage a payroll team, provide external payroll processing for businesses, are payroll application providers or are developers of those payroll applications.

The focus of NZPPA is to develop and support payroll professionals. How NZPPA is doing this is through the development of skills and knowledge in the payroll profession. Part of this development is in the area of promoting compliance with legislation and encouraging payroll practitioners to question and not follow with blind faith payroll calculations included with payroll systems currently used for paying employees in New Zealand.

All payroll practitioners want are calculations and rules that are written in a way that there is only one interpretation possible and that the calculation or rule actually fits with what a payroll system (manual or computerised) can actually do. This will then assist payroll professionals to effectively manage the largest cost any business has for the purpose of paying all employees on time and correctly.

As this review effects a major part of what payroll practitioners do, NZPPA wish to be actively involved in both the submission process and any development of regulatory proposals that may impact on our membership, such as those that may come out of the findings of the Ministerial Advisory Group.

2.CONTACT

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Oral Submission

NZPPA would be happy if asked to present an oral presentation to the Ministerial Advisory Group on the contents of this submission.

Further Information

NZPPA can also provide a range of further in-depth examples from NZPPA members, if required, on the problems members have experienced.

3.SUBMISSION

NZPPA is concerned that the current legislation is not clearly defined, with the result that employers and employees have been put at substantial risk by the various interpretations and applications of the act with regard to payroll practice, calculations and payroll applications. The Act has not been written with any understanding of how payroll will be conducted, its activities or how payroll calculations are computed manually or computerised.

Eighty-five percent of payroll conducted in New Zealand is manually completed. This fits with the very large SME sector that New Zealand has. For the other fifteen percent there are over eighty different payroll applications to select from on the marketplace. In Australia there are over two hundred and twenty payroll applications many with a New Zealand payroll module. NZPPA also knows of New Zealand employees being paid through payrolls in Philippines, India and the United Kingdom.

For SMEs running a manual payroll and for any other business that has invested in a payroll application the Act must be in plain language with no room for the current numerous interpretations. This would reduce the compliance cost to business and ensure employees are paid exactly what they should be paid. From what NZPPA has seen since forming in 2007 there are wide differences in the interpretation and application of the Act.

The NZPPA submission is based on examples and concerns from members on how the Act impacts on their work for businesses.

3.1 Specific Comment

3.1.1 Additional definitions needed to clarify the Act

Additional definitions need to be added to the Act for clarification. We believe that these should be added to the interpretation section of the Act along with being referenced from Section 14, 8 and 9.

3.1.2 Discretionary Payment

Under the Act this is defined as a payment that is or is not stated as such in the employment agreement **(See Appendix A)**.

This is misleading because there are a number of factors that payroll need to take into account in deciding if this discretionary payment should be included in the gross earning calculation. The factors are:

- The amount of the payment
- How often it has been made
- Whether it is written into the employment agreement or business policy
- What the history of the payment is

Presently there is a range of interpretations of what should and should not be included. For payroll there is a clear distinction and the Act should be updated to show this, the distinction should be that a:

1. **Discretionary payment** is in regard to the amount the employer has paid to the employee and that this can vary and therefore is discretionary in nature.
2. **Regular payment** is in regard to how often the payment has been made. This should be the guiding factor on whether a payment should be included in the gross earning calculation. The reason for this is that, even if an employer has not included this in an employment agreement, where payments have been made over a number of periods they will most likely become part of the employee's terms and conditions of employment, along with the employee's expectation that it will be paid. We believe any payment of the same type or purpose within a 12 month period that is repeated at least on an annual basis should be defined as a regular payment.

3.1.3 Allowances

There are different types of allowances that employers pay employees: some are written into employment agreements, some are not, some are taxable and some are not. We are seeing a wide range of different interpretations of what allowances are being included or not included in the gross earnings calculation (section 14).

We believe that to assist users of the act a clear definition of what allowances should be included be included in the definition section of the Act. From a payroll perspective there are taxable and not taxable allowances. Clearly defining that taxable allowances are to be added to the gross earnings calculation should resolve the issue. Any further interpretation should be on how allowances are treated with regard to tax.

3.1.4 Exceptional payments

A clear definition on what an exceptional payment is would be another area that will assist payroll practitioners. There is a gray area between a discretionary and an exceptional payment. Discretionary has been described above but an exceptional payment is a one-off payment or extraordinary payment made to an employee.

3.2 The calculation of relevant daily pay (RDP)

The calculation for RDP is overly complex and is another calculation open to interpretation. The problem with the calculation is that a number of factors are included to the base rate (productivity and incentive payments (including commission), overtime, etc.). This makes it a complex calculation when it should not be because it is about what the employee would have got on the day concerned. NZPPA has been seeing a range of ways this calculation is being done. For instance, dividing an annual bonus to work out what the daily amount would be to go into RDP (**See Appendix E**).

The real problem with this section is that because it is hard to calculate what would have been received on the day concerned payroll developers use the alternative calculation in the act that does a gross earning calculated over the previous four weeks and divided by the number of days the employee actually worked. This means that this alternative calculation in general will inflate the RDP amount because it picks up everything in that four-week period defined in Section 9.

The result is that the RDP is inflated and distorted and does not really show the real value of a day. The only way to truly pay an employee on what they would have received would be to base the calculation on the day and past days, for instance the last four Mondays **(See Appendix D)**.

3.3 Sick leave entitlement

Under the current act an employee that works for 6 months in continuous employment receives 5 days of sick leave. This fits for an employee that works a five-day week over the six months but for an employer and a payroll system the five days applies to whatever number of days the employee works.

The problem with how the act provides sick leave to employees is that when employees work less than five days they are rewarded with more days than they typically work. For instance, a part-time employee working three days a week for six months will get five days of sick leave. This does not fit with the work the employee has already done over the previous six months.

NZPPA would like to see the maximum rate of sick leave entitlement kept at 5 days, except for anyone working less than a five day week where the amount of sick leave would be reduced to reflect the regular standard days they work. For instance, if they worked three days they would get three days of sick leave, not five, after six months.

3.4 Trading the fourth week of annual leave for cash at the employee's request

The trading of the fourth week of annual leave entitlement is not seen as a problem for payroll to undertake as long as clear rules are in place about how the fourth week will be cashed up. We would like to see the following being implemented:

- a) At least 14 days notice given to the employer by the employee for this request. This will allow for the additional pay to be processed and reduce
- b) The employer can refuse the cashing up of the fourth week as long as the leave is taken 12 months from the accrual becoming entitlement.
- c) The value of the cashed-up week is calculated from the last pay period using the Average weekly earnings calculation.

This should also be expanded to help employers with the real problem of leave liability in that if an employee has more than four weeks of entitlement, the employer can choose to either direct the employee to take this leave (section 19 covers this already) or implement the option to cash up extra entitlement over 4 weeks using the average weekly earnings calculation from the last pay period.

3.5 Changes needed to entitlement calculations for annual leave

There are two entitlement calculations undertaken to decide what to pay an employee when they request annual leave:

- Average weekly earnings (12 months average)
- Ordinary weekly pay (4 week average)

The average weekly earnings calculation is based over a 12-month period from the last pay period. This is a good calculation because it is based on a period that is known (from the last pay period). The average weekly calculation includes everything that the gross earnings calculation defines (s14). We have already talked about additional definitions that are needed to be added to the Act to make the concept of gross earnings clearer and more precise than it is currently. We believe that, if the gross earnings definition under s(14) is refined, the average weekly earning calculation should be retained as the single annual leave entitlement calculation **(See Appendix B)**.

The second calculation used to calculate ordinary weekly pay is a cumbersome calculation that has opened the doors to differing interpretations of what should and what should not be included in this four-week calculation. There are also issues with the timing of this calculation. The Act states that if employers cannot ascertain the ordinary weekly pay for an employee they are to use the calculation specified in (s8). Nearly all payroll systems use the alternative calculation as the standard calculation for ordinary weekly pay. The problem with this calculation is that what goes into it is based on a 4 week period.

Usually the two calculations AWE and OWP will provide the same result except when either of the following occurs making OWP the higher of the two. The events that make OWP higher are:

- High overtime hours just before going on annual holidays
- Salary increase just before going on annual leave

If an employee does a good amount of overtime over a period of 4 or 5 weeks before going on annual holidays the overtime will inflate the annual leave rate. This is an additional cost to the employer that has already paid overtime for that period. If an employee receives a wage or salary increase in the period before going on annual leave this can inflate the annual leave calculation if the rest of the year has been only normal hours. This is unfair to the employer in terms of cost and is not valid as a calculation because it only covers 4 weeks when annual leave entitlement is based on 12 months of continuous employment.

Another problem for many businesses is having staff that have multiple positions within the one organisation and have different terms and conditions on each agreement. Presently many payroll practitioners have to separate earnings manually so when leave is taken the system is looking at the right earnings for each role and paying the correct amount.

In some cases the present Act does not handle permanent employees who have varying hours each week in terms of Annual Leave entitlement. These types of employees are currently entitled to four weeks but if they work varying days or hours each week then it is difficult to establish the number of days/hours in four weeks. Currently some payroll applications handle this by calculating 8% of ordinary hours (including leave) worked over the year. This could be an option to help in this area and would be useful if formalised and added to the Act.

The difference with timing between the two calculations is that the AWE calculation is taken from the last pay period back 12 months. The OWE calculation is taken from the day the person is to go on leave back 4 weeks. The second calculation does not fit with how a payroll system works. For instance if an employee is paid monthly and on the second week of the month before the next pay they go on annual leave the payroll practitioner would not even know they were on leave until processing the pay for the month in the fourth week of the month. Payroll is not done in real time and for that reason calculations for annual leave should be based on the last pay period. Most payroll systems do the AWE and OWP from the last pay period.

In summary, we would say that we believe only one calculation is required for annual leave entitlement: the average weekly earning calculation. It does not reflect just a 4 week period that ordinary weekly pay covers. It reflects the 12 months in which the employee accrued the leave they are now taking as entitlement.

3.6 Holiday pay on holiday pay (section 26)

One of the sections of the Act that provides the calculation for employees who terminate their employment allows for the payment of holiday pay on holiday pay. This calculation is complex for a person who is not a payroll practitioner and costly to the employer. To explain this problem an example has been provided (**See Appendix C**).

We suggest that just the calculation under section 24 and 25 of the Act should be used and not section 26 with the value of entitlement being out into the 8% gross earnings calculation. This will make the calculation easy to calculate and fairer on the employer in terms of cost.

3.7 Allowing all employers and employees to agree to transfer the observance of a public holiday listed in the Act to another day

NZPPA regards the transferring of public holidays as a problematic area because it will undermine the operational requirement of a business and will mean that a payroll system will have to have a degree of customisation included to be able to set different days for different employees.

If this was to be implemented that the following would need to be undertaken to help in the application of this option:

- a) DOL to consult and then publish a list of recognised holidays (religious, etc.) that public holidays can be transferred too.
- b) Limit the number of days to only two at the very least in total and only one to be taken at a time to limit the impact on the business.
- c) That the employer can direct that certain days cannot be transferred because of operational factors important to the business or because of a closedown already in place under the Holidays Act 2003.
- d) Add into an employment agreement the agreed days that will be transferred.

3.8 The accumulation of alternative holidays (days in lieu)

The present system for employees being rewarded with an alternative holiday for working on a public holiday has caused a substantial amount of additional cost to employers for the following reason:

- a) How to record an alternative holiday in a payroll system because the employee may have worked 4 hours on the day they received the alternative holiday but when the employee takes their alternative holiday it is based on the day they actually take, for instance it could be for 8 hours.

Since the time-and-half payment has already been made for working on a public holiday (section 50), NZPPA does not see the need to also provide an alternative holiday to employees. If the idea of "alternative holiday" is to be kept in the Act then we suggest the following should be included to make this area workable:

1. The alternative holiday, if the employee worked 4 hours, should be paid as a 4-hour day
2. The entitlement should be used within 12 months of getting it or cashed up by agreement or cashed up on termination or cashed up at the 12-month mark.

3.9 The treatment and entitlements of casual employees in relation to holidays and leave

Under the present Act there is very little reference to casual employees and that is a shortcoming of the Act because many employers take on the services of casual employees, as and when required to help run their business effectively. The only sections that reference casual employees are sections 16 (unpaid sick, bereavement and unpaid leave), section 28 (Pay as you go) and section 63 (Entitlement to sick and bereavement leave).

On a regular basis we get our members asking for support on trying to decide if an employee is a casual or not. They are also confused on how long or what pattern of employment will make them more than a casual. For instance, if a casual employee works the last four Mondays just because work was available employers may or may not pay them for the next Monday that is a public holiday. The Act does not provide enough direction in these areas that employers face throughout the year.

Including in the act an additional definition on what a casual is will ensure that employers cannot use their own interpretation of whether an employee is a casual or not. This will also allow payroll practitioners to manage this employee group more effectively. The other benefit will be that payroll developers will be able to create rules or criteria that a payroll system can default to in order to ensure casuals are treated fairly.

3.10 Treatment of public holidays

NZPPA has no additional points to put forward with regard to the eleven public holidays that are presently available under the Act.

3.11 Shop Trading on Easter Sunday and its interface with the Holidays Act 2003.

NZPPA does not see any problems with regard to changing Easter Sunday into a public holiday from a purely payroll calculation point of view, but this will become a major cost for businesses that are allowed to open on this day. The cost to business must be taken into account in this area.

We regard the suggestion that this day could be “Mondayised” is not warranted and that the day, if changed to a public holiday, can just be paid if worked or taken as a holiday if the day would have otherwise been a working day. The Act does not need to be any more complicated than it already is. Any changes to this part of the Act will impact on payroll systems.

3.12 Holiday and leave record (Section 81)

The Holiday and Leave record under section 81 should be expanded to state what method of calculation was used in each of the calculations of leave entitlements under the act. This will ensure that payroll providers provide information on how calculations are done under the act. This will also aid the DOL Labour Inspector in any investigation of Holiday Act entitlements.

NZPPA does not see this as an extra compliance issue because the calculations have to be done anyway and are just being provided as part of the record so that anyone using the system can see how the results were produced.

3.14 The treatment of annual leave entitlement while on parental leave

In this section NZPPA wants to raise the issue of how annual leave entitlement earned under the Holidays Act is changed because of an employee being on parental leave. NZPPA understands this now brings a separate Act into play whereas this review is on the Holidays Act 2003, but the question of how this is calculated is a common issue with our members.

The Parental Leave Employment Protection Act 1987 (Section 42) states that when an employee gets an entitlement to annual holidays while on parental leave, on their return to work they can only use the average weekly earnings calculation for a period of 12 months from their return date.

The problem with this with regard to the employee is that if they take a short period of parental leave and they get their next entitlement to annual leave during that period they cannot get full value for the leave that was accrued when working. Also the Holidays Act 2003 includes any period of parental leave as continuous employment and annual leave is being accrued during that time. This means for the employee that it is in their best interest not to take leave until completing 12 months back in the workplace from parental leave. For the employer it potentially means they can be paying 8 weeks at their full value (4 from the last entitlement provided and 4 from the period of parental leave).

NZPPA has identified that there are very few payroll applications that actually automatically do the activities that have been stated above. Instead, manual processes are used, resulting in a wide range of interpretations and variations in the calculations used.

NZPPA fully supports that parental leave is considered part of continuous employment but the mixing of the two acts in regard to annual leave accrual and entitlement undermines the basic calculation. If there is to be an annual leave benefit to an employee when on any period of parental leave then that should be included in a clearly defined section added to the Holidays Act 2003. If this is considered part of the review NZPPA would be happy to provide what we believe should be in this type of clause.

Appendix A – Discretionary vs Regular Payments

Discretionary vs Regular Payments

The section on the gross earning calculation mentions “productivity or incentive-based payments (including commission)”. There is a lot of misunderstanding of these types of payment because if they are added into Holidays Act calculations the payment to an employee can be substantially increased.

Please note: For the following discussion a bonus payment will be used as the example.

Is a bonus a discretionary payment and how does that effect Gross earnings?

- The amount an employee is paid under a bonus is discretionary (0% to 100%).
- But this does not mean it is a discretionary payment if it is paid at regular intervals.

If a bonus is paid monthly, quarterly, six monthly, or annually that will become a regular payment if it is paid over time. An employer would also have no protection to call it a discretionary payment whether written or not written into an employee’s employment agreement. This is because the court would look at the actual nature of the payment. That information can be accessed through the Wage and Time record S130 ERA 2000.

Here is a guide to how bonuses would or would not be included:

		Example	Answer
Ordinary weekly pay	Is the bonus payment paid in a four week period, period after period?	Monthly bonus	Include in gross earnings (Four week rule)
	Is the bonus payment paid every quarter?	Quarterly bonus	No not included in gross earnings
Average weekly earnings	Is the bonus payment paid in the 12-month period?	Annual bonus	Include in gross earnings
	Is the bonus payment paid every quarter?	Quarterly bonus	Include in gross earnings
Relevant daily pay	Is the bonus paid on the same day, week after week?	Annual bonus	No not included in gross earnings
8% Gross earnings	Is the bonus paid on termination?	Paid on termination	Would be included in gross earnings

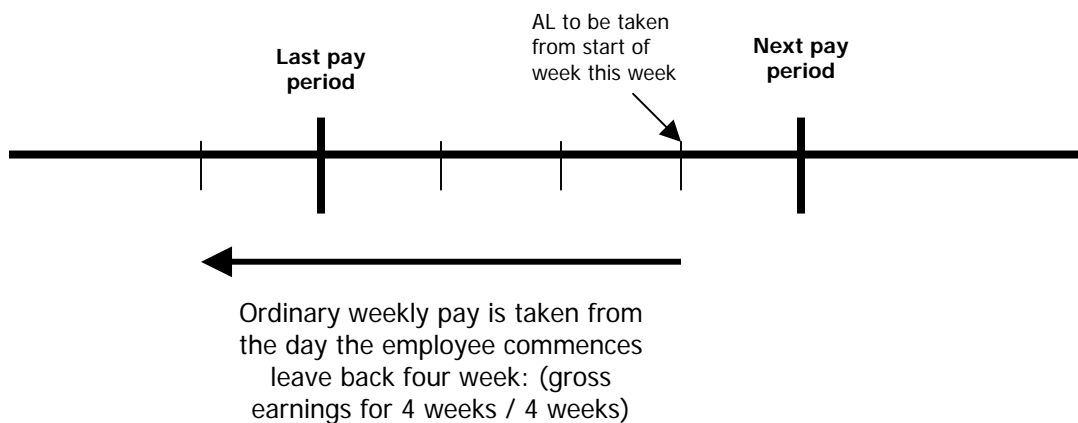
Appendix B – AWE & OWP Timings

Timing for when Average weekly earning and Ordinary weekly pay is taken from under the Holidays Act 2003

In this example the employee receives \$14.00 per hour and works five days a week (Mon to Fri). They get paid monthly and usually only work 40 hours per week with some overtime at different times of the year.

The employee has been there 12 months and now has 20 days of annual leave entitlement.

Example 1: Ordinary Weekly Pay (timing of the calculation):



Hours completed over last four weeks:

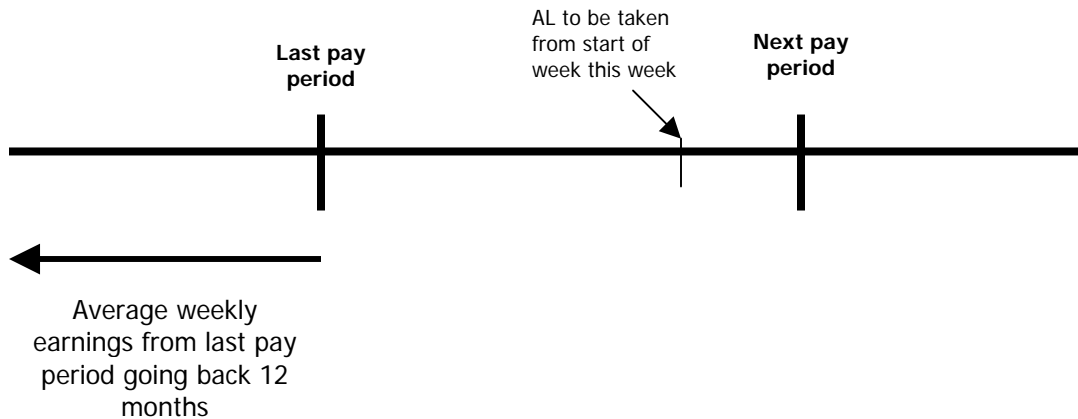
	Ordinary hours	Overtime	TOTAL
Week 1	40	10	50
Week 2	40	15	55
Week 3	40	10	50
Week 4	40	15	55
Total Hours	160	50	210

Ordinary weekly pay calculation Section 8 of the Holidays Act 2003:

Gross earnings over the last four calendar weeks from start of AL
4 (Represents last for weeks)

$$(210 \times \$14.00) = \frac{\$2940}{4} = \text{OWP } \$735.00$$

Example 2: Ordinary Weekly Pay (timing of the calculation):



Hours completed over last four weeks:

	Total hours	\$
Ordinary hours	2080	29120
Overtime	35	490
Total Hours	2115	29610

Average weekly earnings

Gross earning for last 12 months from last pay period
52 (Represent number of weeks in a year)

$$\frac{29610}{52} = \text{AWE } \$569.42$$

Difference between the two calculations:

$$\text{OWP} - \text{AWE} = (\$735.00 - \$569.42 = \mathbf{\$165.58})$$

OWP would be paid as the higher of the two.

Problems with incorrect timing of calculations

If both calculations are taken at the same it could mean that an employee is not getting the higher of the two calculations.

In this example all of the details stated in example 1 & 2 will be used but the same timing will be used. If both calculations for Ordinary weekly pay and Average weekly earnings is taken from the last period this is what could happen.

Example 3: Both OWP & AWE are calculated from same date

Hours completed over last four weeks from last pay period:

	Ordinary hours	Overtime	TOTAL
Week 1	40	15	55
Week 2	40	0	40
Week 3	40	0	40
Week 4	40	0	40
Total ours	160	15	175

$$(175 \times \$14.00) = \frac{\$2450}{4} = \text{OWP } \$612.50$$

Average weekly earning from example 2

$$\frac{29610}{52} = \text{AWE } \$569.42$$

Difference between the two calculations:

$$\text{OWP-AWE} = (\$612.50 - \$569.42 = \mathbf{\$43.08})$$

OWP would be paid as the higher of the two.

Problem

The problem with this calculation even though the employee is still paid OWP over AWE is that the employee is out of pocket by:

$$\$165.58 - \$43.08 = \$122.50$$

The other problem is the employer would not be meeting the requirements under the Act and could be challenged for not doing so by the employee.

Appendix C – Holiday pay on holiday pay

Section 26. Payments may be cumulative

To avoid doubt,—

- (a) gross earnings for the purposes of section [25\(2\)](#) includes any payments under section [24\(2\)](#); and
- (b) an employee may be entitled to payments for annual holidays under both section [24](#) and section [25](#).

Worked Example:

An employee works for 15 months and then resigns. At the 12-month mark they had taken one week of annual leave entitlement.

Annual leave payment on termination would be:

- Employee has 3 weeks of entitlement at a total of \$2400.00
- Employee has 3 months of accrual at a total of \$650.00

Calculation would be:

(Total for entitlement + Total for accrual) * 8%

- $\$2400.00 + \$650.00 = \$3050.00 * 8\% = \244.00

On the final pay slip it should be represented as the following:

- Annual leave entitlement (15 Days) \$2400.00
- Annual leave accrual \$244.00

Appendix D -

Relevant Daily Pay (Two ways to do the calculation)

In this example the employee receives \$14.00 per hour and only works four days a week (Mon, Tue, Wed, Fri).

Employee goes sick on a Monday what are they paid for relevant daily pay?

Example 1: Using Alternative Calculation from Holidays Act 2003:

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	TOTAL
Week 1	2	8	3		10	23
Week 2	3	8	4		10	25
Week 3	4	8	3		10	25
Week 4	2	8	3		10	23
Total Hours	11	32	13		40	96

Using the alternative calculation provided in section 9 of the Holidays act 2003 this is what the relevant daily pay would be based on the data above:

Gross earnings for the last four calendar weeks
Number of days the employee actually worked

$$(96 \times \$14.00) = \underline{\$1344.00} = \text{RDP } \$84.00$$

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Example 2: Using the last four weeks based on the actual day:

	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	TOTAL
Week 1	2	8	3		10	23
Week 2	3	8	4		10	25
Week 3	4	8	3		10	25
Week 4	2	8	3		10	23
Total Hours	11	32	13		40	96

Looking at the last four Mondays do an average over those four weeks to get the relevant daily pay:

$$= (2 + 3 + 4 + 2) = 11/4 = 2.75 \times \$14.00 = \text{RDP } \$38.50$$

Difference between two methods is: \$84.00 - \$38.50 = \$45.50!

Appendix E - Annual Bonus To Be Paid When Sick Leave Taken

If an employee was to be paid an annual bonus of \$20,000 on a Friday and the employee goes sick on the Friday, should the \$20,000 be included in the relevant daily pay calculation that would be paid to the employee on the Friday.

Some employee and unions will argue that the bonus was earned over the whole year so it should be included in the RDP calculation. On a number of occasions DOL staff have also stated this to be the case to NZPPA members. We do not believe this is correct, based on the following examples.

Example 1:

Employee earns \$1000 gross per week, over 4 weeks that would be \$4000.

Salary (4 weeks)	\$4000.00
Bonus (\$20,000)	\$20,000.00
Total (Gross Earnings)	\$24,000.00
RDP (Gross earnings/Days worked last four weeks)	$\$24,000.00/20$ =\$1200.00

Example 2:

Salary (4 weeks)	\$4000.00
Total (Gross Earnings)	\$4,000.00
RDP (Gross earnings/Days worked last four weeks)	$\$4,000.00/20$ =\$200.00