

5 February 2020

**Re: Memorandum of Understanding (MoU)**

Please find attached the signed MoU with consolidated signatures.


The Labour Inspectorate is satisfied that the baseline document as offered and agreed by the representatives of the 20 District Health Boards, NZ Blood Service, the Council of Trade Unions, and other involved unions will ensure minimum entitlements for the employees of the DHBs and NZ Blood Service. The baseline document provides greater than the Holidays Act 2003 (the Act), which is generally beyond the Labour Inspectorates powers, by requiring DHBs to compare and pay the greater of:

- Relevant Daily Pay and Average Daily Pay for all instances of Bereavement Leave, Alternative Holidays, Public Holidays and Sick Leave; and
- Both calculations for Ordinary Weekly Pay and Average Weekly Earnings for all instances of annual holidays.

The Labour Inspectorate notes that the comparison method mentioned above is not required by the Act and will create payments owing to employees greater than the statutory minimum, the parties are aware and have agreed to this.

The Labour Inspectorate looks forward to continuing to work with the parties towards achieving compliance.

Regards



Tracy Torrance

Team Leader - Labour Inspectorate Payroll  
Labour Inspectorate, Market Services  
Ministry of Business, Innovation, and Employment  
*Hikina Whakatutuki - Lifting to Make Successful*







## Memorandum of Understanding

### 1. Introduction

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- 1.1. The Labour Inspectorate ("the Inspectorate") is conducting a programme of compliance audits in respect of the *Holidays Act 2003*, and other applicable employment legislation.
- 1.2. As part of this programme, the Inspectorate identified the 20 District Health Boards of New Zealand and the New Zealand Blood Service as potential auditees (collectively referred to as the DHB's).
- 1.3. The Labour Inspectorate carried out *Holidays Act* compliance audits of Auckland District Health Board, Counties Manukau District Health Board and Canterbury District Health Board. Non-compliance was found within all three DHB's.
- 1.4. Northland District Health Board, Capital & Coast District Health Board and Waitemata District Health Board advised the Inspectorate they were aware of their *Holidays Act* non-compliance and had commenced programmes of work to achieve compliance and remediate employees. All three DHBs were open with the Inspectorate regarding their non-compliance.
- 1.5. Representatives of the DHB's and the Council of Trade Unions (CTU) approached the Inspectorate regarding a national process for all DHB's to follow regarding identification, rectification and remediation of their *Holidays Act* non-compliance.
- 1.6. The DHB's, CTU, affiliate unions, other involved unions and the Labour Inspectorate have worked together to agree a baseline document (attached as appendix one) for the DHB's to be audited against and an overall framework for the DHB's to follow (attached as appendix two).
- 1.7. The DHBs will be audited in tranches (attached as appendix three).
- 1.8. Discussions between the parties have led to this Memorandum of Understanding ("MOU") being offered by the DHBs to Tracy Torrance, a Labour Inspector.
- 1.9. Given the scope of the *Employment Relations Act 2000* and the *Holidays Act*, there is a possibility employees randomly selected, in the audits mentioned in 1.3, may not be indicative of the entire workforce and that due to the small sample size, the payroll issues identified do not cover all issues in the end-to-end payroll system and with all employees.
- 1.10. This MOU outlines the actions the DHBs will undertake to assess compliance with the *Holidays Act*.

### 2. Breaches as identified in the sample audits

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- 2.1. The DHBs identified in 1.3 and 1.4 acknowledge that breaches of the *Holidays Act* have been performed. The other DHB's and New Zealand Blood Service agree that it is likely that they have breached the Act, and therefore there is a need for a full review of their end-to-end payroll systems against the agreed baseline using the framework document.

The following is a list of *Holidays Act* breaches that have been performed by one or more DHB named in 1.3 or 1.4:

**2.1.1. Section 8 Meaning of ordinary weekly pay**

- Not all allowances have been included in Ordinary Weekly Pay (OWP)
- OWP as per s8(2) not used when OWP as per s8(1) not possible to determine

**2.1.2. Section 16 Entitlement to annual holidays**

- "Accruing" annual holidays based on hours worked has resulted in some employees having not received their minimum entitlement to not less than four weeks' annual holidays per 12 months.

**2.1.3. Section 21 Calculation of annual holiday pay and Section 22 Calculation of annual holiday pay if holiday taken in advance**

- Incorrect exclusion of some allowances for Average Weekly Earnings (AWE) and OWP.
- AWE versus OWP calculation involved an incorrect interpretation of the meaning of OWP.

**2.1.4. Section 24 Calculation of annual holiday pay if employment ends and entitlement to holidays has arisen and section 25 Calculation of annual holiday pay if employment ends before further entitlement has arisen**

- Miscalculations of BAPS (bereavement leave, alternative leave, public holidays not worked and sick leave) and annual holidays will have a flow on effect in calculating termination pay.

**2.1.5. Section 28 When annual holiday pay may be paid with employee's pay**

- Employer paid annual holiday pay regularly with employee's pay when criteria of section 28 not met.

**2.1.6. Section 49 Payment if employee does not work on public holiday**

- Where the employer has deemed an employee as "casual", the employer has not identified public holidays as otherwise working days and therefore has failed to pay public holidays not worked.

**2.1.7. Section 56 Alternative holiday must be provided if employee works on public holiday and section 60 Payment for alternative holiday**

- Where the employer has deemed an employee as "casual", the employer has not provided an alternative holiday to an employee who worked a public holiday that was an otherwise working day for them.

**2.1.8. Section 63 Entitlement to sick leave and bereavement leave**

- Where the employer has deemed an employee as "casual", the employer has not provided an entitlement to sick leave and bereavement leave.

**2.1.9. Section 71 Payment for sick leave and bereavement leave**

- Incorrect determination of Relevant Daily Pay (RDP) as stipulated by s9 or inappropriate use of RDP when RDP was not possible to determine.

### **3. Actions to Rectify Breaches**

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- 3.1. Each DHB will carry out a review and rectification process of their end-to-end payroll system and a subsequent remediation process.
- 3.2. Acceptable timeframes have been agreed in the framework document for the three processes in 3.1 (see appendix two). If a DHB is unable to meet the specified timeframe in that document then the DHB must follow the process outlined in that document to request an extension.

#### ***Review Process***

- 3.3. It has been agreed the tripartite HSRA-body will have overall responsibility for the joint-governance of the roll-out of the review processes at DHB level.
- 3.4. The DHB will follow the framework document and conduct their own end-to-end system review in line with the baseline document to validate and review key payroll issues relating to compliance with the *Holidays Act* that may impact on the employer and its employees.
- 3.5. After three months of commencing the review each employer will report back to the Labour Inspector and employee representatives on the following:
  - outcome of testing
  - recommendations arising from the outcomes

#### ***Rectification Process***

- 3.6. The employer will rectify the breaches identified in 2.1 and any further breaches identified during the process outline in 3.4 of this MOU.
- 3.7. Rectification may include manual process changes wrapped around the electronic payroll system to ensure employees receive their minimum entitlements moving forward.

#### ***Remediation***

- 3.8. The DHB is to calculate arrears owed to all current and past employees from 1 May 2010.
- 3.9. All entitlements and payments must be calculated sequentially by date as each entitlement affects the gross earnings of the next one calculated.
- 3.10. A list of affected employees (by name or employee number) and arrears owed to them is to be provided to the Labour Inspector.
- 3.11. Alternatively, depending on the outcome in 3.5, the unions and the DHB may agree to use the estimation approach as referenced in 4.6.

#### ***Completion Date***

- 3.12. For the avoidance of doubt the Labour Inspector may agree to a process of renegotiating a completion date should the DHB provide significant and reasonable grounds for failure to meet that date.

## 4. Acknowledgements

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- 4.1. The DHBs have actively engaged with the Labour Inspector and has been proactive in identifying areas of non-compliance and taking active steps to ensure employees receive their entitlements.
- 4.2. The Labour Inspector will continue to engage with the DHBs regarding achieving compliance with applicable employment legislation.
- 4.3. The tranche list in appendix three is subject to change, some DHB's may commence their end-to-end review on or around the date specified due to operational reasons, noting that all have committed to commencing their review by 1 April 2020.

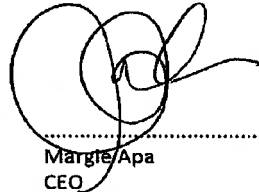
The DHBs acknowledge the following:

- 4.4. That this MOU is entered into willingly with the Labour Inspector, CTU and affiliate unions.
- 4.5. That they have been collectively advised by the Labour Inspector that they cannot offset overpayments against underpayments, and that any deductions to an employee's pay needs to comply with the Wages Protection Act 1983 as set out in the position statement "*Accounting for Overpayments through Holidays Act Re-calculations*" (attached as appendix four).
- 4.6. If the circumstances are met, individual DHBs or NZBS can consider an estimation approach and follow the principles set out in "*Estimating the Value of Holidays Act 2003 Underpayments*" (attached as appendix five). Noting that such an estimation approach will be agreed by the CTU affiliate unions and other involved unions on a good faith basis.
- 4.7. That the DHBs will continue to operate in a "good faith" manner advising employee representatives of the matter and involving them during the overall process.
- 4.8. That accurate record keeping is essential to ensuring employees receive their minimum entitlements and ensure accurate record keeping is a focus moving forward.
- 4.9. That this MOU is, to the extent possible, intended to operate in the same fashion as an Enforceable Undertaking (defined in s223B of the *Employment Relations Act*).
- 4.10. That this MOU does not affect a Labour Inspector's power to investigate future conduct of the employers, or to take any action or to exercise any power under the *Employment Relations Act* and any other legislation listed at s223(1)(a) of the *Employment Relations Act*.
- 4.11. That the information held by the Ministry of Business, Innovation and Employment pertaining to the DHBs may be subject to release under the *Official Information Act 1982*.
- 4.12. That this MOU does not prevent an affected employee or their representative from taking their own action if the Labour Inspectorate has chosen not to enforce or seek remedies to the extent that the legislation allows them to do so.

Accepted and signed by (or on behalf of) the District Health Boards and the New Zealand Blood Service



.....  
Nick Saville-Wood  
CEO  
Lakes District Health Board



..... 23/10/19  
Margie Apa  
CEO  
Counties-Manukau District Health Board



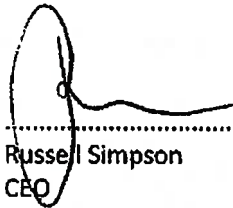
.....  
Dale Bramley  
CEO  
Waitemata District Health Board



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Kevin Snee  
CEO  
Waikato District Health Board



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Kathryn Cook  
CEO  
MidCentral District Health Board



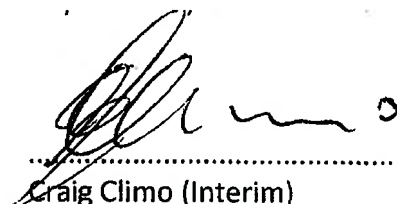
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Russell Simpson  
CEO  
Whanganui District Health Board



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Helen Mason  
CEO  
Bay of Plenty District Health Board



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Ailsa Claire  
CEO  
Auckland District Health Board



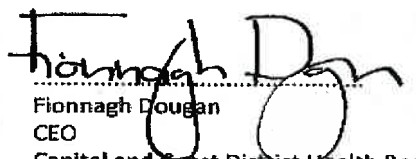
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Craig Climo (Interim)  
CEO  
Hawkes Bay District Health Board



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Peter Bramley  
CEO  
Nelson Marlborough District Health Board



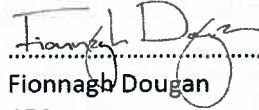
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Rosemary Clements  
CEO  
Taranaki District Health Board



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Fionnagh Dougan  
CEO  
Capital and Coast District Health Board



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Nick Chamberlain  
CEO  
Northland District Health Board



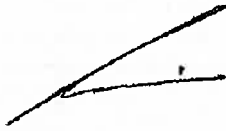
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Fionnagh Dougan  
CEO  
Hutt Valley District Health Board



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DALE OLIFF  
CEO  
Wairarapa District Health Board



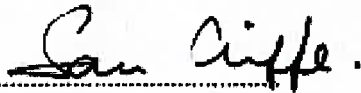
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Chris Fleming  
CEO  
Southern District Health Board



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Nigel Trainor  
CEO  
South Canterbury District Health Board



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Jim Green  
CEO  
Tairāwhiti District Health Board



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Sam Cliffe  
CEO  
New Zealand Blood Service



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David Meates  
CEO  
West Coast District Health Board

Accepted and signed by (or on behalf of) the Labour Inspectorate



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Tracy Torrance  
Team Leader – Labour Inspectorate Payroll  
Ministry of Business, Innovation and Employment

Accepted and signed by (or on behalf of) the following Unions




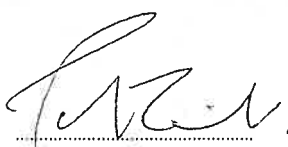
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Richard Wagstaff  
President  
CTU

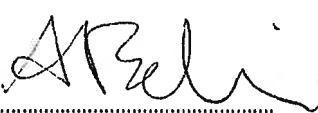


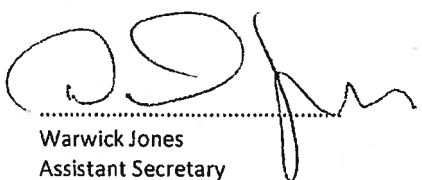
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Memo Musa  
CEO  
NZNO

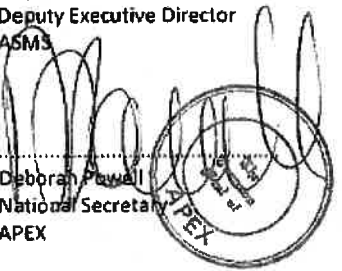


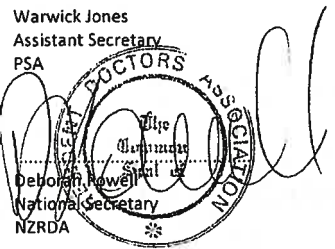
  
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Gerard Henik  
National Secretary  
Unite

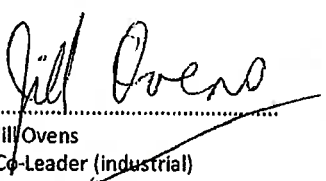
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Paul Tolich  
Senior National Industrial Officer  
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Angela Beitch  
Deputy Executive Director  
ASMS

  
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Warwick Jones  
Assistant Secretary  
PSA

  
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Deborah Powell  
National Secretary  
APEX

Warwick Jones  
Assistant Secretary  
PSA  
  
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Deborah Powell  
National Secretary  
NZRDA

  
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Jill Owens  
Co-Leader (Industrial)  
MERAS

  
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Sheryl Cadman  
Central Regional Secretary  
FIRST Union

  
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Heath Lash  
Chairperson  
STONZ