

2017-01-23

OBJECTS AND REASONS

This Bill would repeal and replace the *Holidays with Pay Act, Cap. 348* in order to

- (a) make better provision for the granting of the annual holiday due to an employee;
- (b) make better provision for the calculation of the sum to be paid to an employee who has taken his annual holiday;
- (c) increase the penalties for offences under the Act;
- (d) make better provision for the Chief Labour Officer to initiate proceedings for offences under the Act; and
- (e) provide for related matters.

Arrangement of Sections

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2. Interpretation

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THE ANNUAL HOLIDAY OF AN EMPLOYEE

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Enactment to be Amended

BARBADOS

A Bill entitled

An Act to repeal and replace the *Holidays with Pay Act* to make better provision for the granting of an annual holiday with pay to employees.

ENACTED by the Parliament of Barbados as follows:

PART I

PRELIMINARY

Short title

1. This Act may be cited as the *Holidays with Pay Act, 2017*.

Interpretation

2. In this Act,

“average pay” means the sum that

- (a) an employer pays an employee for the annual holiday of the employee or a part thereof; and
- (b) is calculated in accordance with section 5(1);

“basic wage” means the sum of money paid to an employee for the standard work period provided for in a contract of employment, whether the employee is paid monthly, weekly, fortnightly, daily, on an hourly basis, or by work done, as the case may be, but does not include any additional payment made to the employee as a bonus, commission or overtime;

“contract of employment” has the meaning assigned to it by section 3 of the *Employment Rights Act (Act 2012 - 9)*;

“commission” means a sum of money paid under the terms of a contract of employment which is based on the performance of the employee and is paid per unit of sale or per completed task, and where the payment of commission

- (a) forms a part of the salary, remuneration, or wage of the employee it shall be paid together with the basic wage; or

- (b) constitutes the basic wage of the employee it shall be paid in the manner in which the employee is to be paid whether on a monthly, weekly, fortnightly, daily, on an hourly basis or by work done;

“employee” has the meaning assigned to it by section 2 of the *Employment Rights Act* (Act 2012-9);

“employer” means a person who employs one or more employees and includes any agent or representative of that person where the agent or representative is directly or indirectly responsible for the payment, whether in whole or in part, of the total remuneration to an employee;

“incentive payment” means a sum of money paid under the terms of a contract of employment which is

- (a) based on the performance of the employee or the performance or production of a group of employees; and
- (b) paid with the basic wage of the employee or paid separately in similar manner as the basic wage or at the same time;

“public holiday” means a day designated as such in the *First Schedule* to the *Public Holidays Act*, Cap. 352;

“standard work period” means the time period or fixed hours stipulated in the contract of employment and includes the required hours of work which comprises a work day, as well as the required work days;

“terminated” means the end of a contract of employment by

- (a) an employer dismissing the employee;
- (b) an employer making the employee redundant; or
- (c) the employee tendering his resignation and resigning from his employment;

“total remuneration” means the total sum paid to an employee in respect of the labour or services performed for his employer under a contract of employment, being the sum of his basic wage

- (a) together with any sum paid
 - (i) for services done or labour performed on a Sunday or Public Holiday where the contract of employment stipulates these days as a part of the standard work period; and
 - (ii) as a commission, or incentive payment, or any other sum paid based on the productivity of the employee where that sum is paid together with the basic wage, or paid in a similar manner as the salary or wage of the employee; and
- (b) together with the cash value of any
 - (i) boarding or lodging provided by the employer which shall be paid at the rate specified in the *First Schedule*, unless the terms of the contract of employment between the employer and employee, or any other agreement or implied term states otherwise and provides for a rate that is higher than the rate specified in the *First Schedule*; and
 - (ii) meals provided by the employer which shall be paid at the rate specified in the *First Schedule* unless the terms of the contract of employment between the employer and employee, or any other agreement or implied term states otherwise and provides for a rate that is higher than the rate specified in the *First Schedule*; but
- (c) shall not include a discretionary payment of any kind, paid by an employer to an employee;

“year of employment” means any period of 12 months during which an employee has performed labour or rendered services for the same employer, and where the employee is employed

- (a) on a weekly, fortnightly or monthly basis, the year of employment shall be a minimum aggregate of 208 days; and
- (b) other than on a weekly, fortnightly or monthly basis, the year of employment shall be a minimum aggregate of 150 days.

PART II

THE ANNUAL HOLIDAY OF AN EMPLOYEE

Administration

3.(1) The Chief Labour Officer shall be responsible for the application, administration and enforcement of this Act, and for such other matters as the Minister may direct.

- (2) The functions of the Chief Labour Officer are to
 - (a) receive and investigate any representations made to him or any instrument in writing sent to him concerning the Act or matters arising thereunder;
 - (b) provide information and advice to employers and employees on the application of this Act; and
 - (c) enforce the provisions of the *Labour Department Act*, Cap. 23, and the *Employment Rights Act* (Act 2012 - 9) in so far as they are applicable to the provisions of this Act.

Grant of annual holiday

- 4.(1) An employee who
- (a) completes a year of employment with the same employer shall be entitled to an annual holiday for a minimum period of 3 weeks; or
 - (b) has been in the employment of the same employer for more than one year of employment but less than 5 years of employment shall be entitled to an annual holiday for a minimum period of 3 weeks.
- (2) An employee who has been in the employment of the same employer for 5 or more years of employment shall be entitled to an annual holiday for a minimum period of 4 weeks.
- (3) Notwithstanding subsections (1) and (2), an employee may be granted an annual holiday which is greater than any period specified in those subsections where the duration of the annual holiday is
- (a) a part of the contract of employment of that employee;
 - (b) a part of a collective agreement which has been incorporated into the contract of employment or which is to be implied as a term of the contract of employment of that employee; or
 - (c) granted by way of custom or practice at his place of work for his years of service as an employee.
- (4) An annual holiday shall be given and taken in a single continuous period unless the employer and the employee agree otherwise, and where they so agree, the annual holiday may be taken in two separate periods or in such periods as may be agreed.
- (5) An employer shall determine the date on which the annual holiday of an employee is due to commence and shall give the employee no less than 14 days notice of the date on which that annual holiday is due to commence.

(6) An employee may, where the notice required by subsection (5) has not been given, notify the Chief Labour Officer of that fact by an instrument in writing and the Chief Labour Officer may, where he considers it necessary in the circumstances, make a complaint in respect of the matter to the Employment Rights Tribunal.

(7) An employee who is entitled to an annual holiday shall be granted that annual holiday by his employer within a 6 month period from the date on which the annual holiday is due to commence unless

- (a) the employer and the employee agree in writing to postpone the annual holiday until a specified date; and
- (b) the Chief Labour Officer is notified and submits his consent in writing in respect of the postponement of the annual holiday until that specified date.

(8) Where the employer and employee so agree, the annual holiday may be taken wholly or partly, in advance, that is before the employee becomes entitled to the annual holiday.

(9) Where an annual holiday or any part thereof has been taken before the entitlement to that annual holiday has accrued, the employee shall not be entitled to another annual holiday, though he may be granted any remainder where only a part has been taken in advance, until the expiration of the 12 month period in respect of that annual holiday has passed.

(10) An employer shall not give an employee a notice of termination prior to or during an annual holiday, and where any such notice is given it shall be void and of no effect.

(11) Where a notice of termination has been given to an employee prior to or during an annual holiday, the employee shall notify the Chief Labour Officer of that fact by an instrument in writing and the Chief Labour Officer may, where he considers it necessary in the circumstances, make a complaint in respect of the matter to the Employment Rights Tribunal.

Payment for annual holiday

5.(1) An employee who takes his annual holiday shall be paid his average pay for that annual holiday by his employer and in respect of an employee

- (a) who has one or more years of employment but less than 5 years of employment, with the same employer, the average pay shall be $\frac{3}{52}$ of total remuneration for that year of employment;
- (b) whose employment with the same employer is for a period of 5 or more years of employment, the average pay shall be $\frac{4}{52}$ of the total remuneration for that year of employment;
- (c) whose annual holiday is
 - (i) determined by his contract of employment, a term to be implied into his contract of employment or by custom; and
 - (ii) greater than the minimum period specified in section 4

the average pay shall be the number of weeks given for the annual holiday divided by 52 and multiplied by the total remuneration of the employee for that year of employment.

(2) An employee, whether employed on a weekly, fortnightly or monthly basis, who takes his annual holiday or part thereof, shall not be paid any less for the duration of that holiday than he would have been paid for a week, fortnight or month in the course of his usual employment.

(3) Where an employee takes his annual holiday as a single period his average pay shall be paid to him no later than the day immediately preceding the commencement of his annual holiday.

(4) Where an employee takes his annual holiday in separate periods, the proportionate part of his average pay shall be paid to him in respect of each period, and payment shall be made no later than the day immediately preceding the commencement of each period.

Termination and annual holiday

6.(1) An employee whose employment is terminated before he has taken the annual holiday to which he is entitled shall be deemed to have been given his annual holiday from the date of his termination and the employer shall forthwith pay to the employee, in addition to any other sum due to him, his average pay in respect of his annual holiday.

(2) An employee who has taken a part of his annual holiday and whose employment is terminated before he has taken the remainder of his annual holiday shall be deemed to be given the remainder of his annual holiday from the date of the termination, and the employer shall forthwith pay to the employee, in addition to any other sum due to him, his average pay in respect of the remainder of his annual holiday.

(3) Where the annual holiday or any part thereof has been taken in advance by an employee and

- (a) the employment of the employee is terminated before he has completed his year of employment in respect of which the annual holiday or part thereof was taken; and
- (b) the sum paid by the employer to the employee in respect of the annual holiday or part thereof exceeds the sum which the employer is required to pay to the employee under subsection (1) or (2),

the employer shall not be liable to make any further payment to the employee and shall be entitled to deduct the amount of any such excess from any remuneration payable to the employee upon the termination of his employment.

Termination after 3 months employment

7.(1) Notwithstanding section 4, an employee who

- (a) has been employed by the same employer for a period of at least 3 months; and

(b) has his employment terminated

shall, in addition to all other sums due to him, be entitled to payment for the portion of the annual holiday which has accrued during the tenure of his employment, and his employer shall forthwith pay that sum and all other sums due to the employee.

(2) Where subsection (1) applies to an employee, the sum to be paid shall be determined by multiplying the total remuneration paid to the employee during his employment by $\frac{3}{52}$.

(3) For the purposes of this section,

“3 months” means an aggregate of no less than 48 days in three consecutive months during which the employee was employed by the same employer.

Public holidays and annual holidays

8.(1) Notwithstanding sections 4, 5, 6 and 7, where a public holiday granted under the *Public Holidays Act*, Cap. 352 occurs within any period taken by an employee as annual holiday or as a part thereof, that day shall be deemed to be granted in accordance with the *Public Holidays Act*, Cap. 352, and accordingly shall not be computed as a part of the annual holiday of the employee.

(2) Where subsection (1) applies,

(a) the period of the annual holiday shall be increased by one day in respect of that public holiday; and

(b) the employee shall be paid his average pay in respect of that additional day.

(3) Notwithstanding subsection (2)(b), the terms of the contract of employment of an employee as it relates to payment for a public holiday shall apply in respect of payment for that public holiday.

PART III

MISCELLANEOUS

Records to be kept

- 9.(1) An employer shall keep a record of
- (a) the date on which an employee begins his employment, that is the first day that the employee reports for work unless the contract of employment or agreement provides for an earlier date;
 - (b) the basic wage of an employee or, where relevant, the amount paid as earnings to that employee as well as the manner in which the basic wage or the earnings is paid, that is whether the employee is paid monthly, weekly, fortnightly, daily, on an hourly basis, or by work done;
 - (c) the annual holiday or part thereof taken by an employee specifying the date on which the annual holiday or part thereof began and the date on which it ended, and state the duration thereof, in days or weeks as the case may be, as well as the total remuneration paid for that annual holiday; and
 - (d) any other amounts paid to an employee for his annual holiday or part thereof.
- (2) The records shall be kept by the employer in such form as may be prescribed by the Chief Labour Officer.
- (3) The Chief Labour Officer, or any person duly authorised by him, may at any reasonable time enter any premises or place where an employee to whom this Act applies is employed and inspect the records which are required to be kept pursuant to subsection (1).

Void contract or contract terms

10. A contract of employment or an agreement, or any term thereof between an employer and an employee which purports to exclude the operation of any of the provisions of this Act shall be null and void, and where the Chief Labour Officer is notified by an instrument in writing of any such term, he may where he considers that the circumstances require it, make a complaint in respect of the matter to the Employment Rights Tribunal.

Offences

11.(1) Any employer who

- (a) refuses to allow an employee to take an annual holiday to which he is entitled under this Act;
- (b) gives an employee less annual holiday than the annual holiday to which that employee is entitled;
- (c) fails to pay an employee the average pay or part thereof, to which he is entitled in respect of his annual holiday or part thereof, in accordance with the provisions of this Act;
- (d) contravenes section 4(5);
- (e) contravenes section 4(10);
- (f) fails to keep records in accordance with section 9;
- (g) knowingly enters or causes to be entered in the records required under section 9 any false particular; or
- (h) wilfully delays or obstructs the Chief Labour Officer or any person duly authorised by him in the exercise of any power under section 9(3),

is guilty of an offence and is liable on summary conviction to a fine of \$10 000, or to imprisonment for a term of one year, or to both.

(2) Where a person is convicted of an offence under this Act and a fine is imposed, and that person fails to comply with the order of the court in respect of that fine, that person is liable to a further fine of \$500 for each day during which the failure to comply continues.

Power to initiate proceedings

12.(1) The Chief Labour Officer may institute proceedings in his own name against an employer for any offence under this Act and may appear and conduct the proceedings.

(2) Where a magistrate finds an employer guilty of an offence under paragraphs (a),(b) or (c) of section 11(1), the magistrate may, in addition to the fine or sentence imposed, order the employer to pay to the employee concerned any payment due to him under the Act, and this payment shall be subject to such rate of interest as the magistrate considers appropriate in the circumstances.

Limitation period

13. No prosecution for an offence under this Act shall be instituted after the expiration of one year from the date of the commission of the offence.

Minister may amend First Schedule

14. The Minister may by Order amend the *First Schedule*.

Savings

15.(1) A person whose employment commenced after 1st day January, 1952 and before the commencement of the *Holidays with Pay Act, 2017* shall be treated as if his year of employment began on the date on which he commenced his employment, or, if that date is sooner, the date on which he signed his contract of employment.

(2) The provisions of the *Holidays with Pay Act, 2017* shall apply to all contracts of employment which are in force at the commencement of the this Act.

(3) Notwithstanding section 17, where an offence committed under the former Act,

(a) is being tried under the *Magistrate's Courts Act*, Cap. 116A; or

(b) was to be tried under the *Magistrate's Courts Act*, Cap. 116A

before the commencement of the *Holidays with Pay Act, 2017*, the trial in respect of that offence shall be continued to its final determination in accordance with the provisions of the former Act.

(4) For the purposes of subsection (3),

“former Act” means the *Holidays with Pay Act*, Cap. 348.

Amendment of the enactment in the Second Schedule

16. The enactment set out in Column 1 of the *Second Schedule* is amended in the manner specified opposite thereto in Column 2 of the *Second Schedule*.

Repeal

17. The *Holidays with Pay Act*, Cap. 348 is repealed.

FIRST SCHEDULE*(Sections 2 and 14)**Allowances*

| Nature of the Allowance | Minimum Monetary Value per Week |
|-------------------------------|---------------------------------|
| | \$ |
| Boarding or Lodging Allowance | 8.00 |
| Meal Allowance | 25.00 |

SECOND SCHEDULE

(Section 16)

Enactment to be Amended

Enactment

Employment Rights Act, 2012-9

Amendment

Section 2 is amended by deleting the definition of “ complaint” and substituting the following:

“complaint” means a complaint made to the Tribunal by an employee, by way of the Chief Labour Officer or by a trade union, as the case may be;”.

Section 7 is deleted and the following is substituted:

Function of Tribunal

7. (1) The function of the Tribunal is to enforce the rights conferred upon persons by this Act or under any other enactment that provides for enforcement by the Tribunal, and for that purpose to exercise the jurisdiction specified in subsection (2).

(2) The jurisdiction of the Tribunal is to determine complaints made to it under this Act or under any other enactment that provides for enforcement by the Tribunal, and subject to section 48, to make awards and other decisions in relation to those complaints in accordance with its powers under this Act.

(3) Subject to subsection (4), sections 11, 12, 13, 14, 15 and 21 of the *Commissions of Inquiry Act*, Cap. 112 apply in respect of the

determination of complaints by the Tribunal, with such modifications and adaptations as may be necessary, as those sections apply in relation to an investigation by a commission under that Act.

(4) Where there is a conflict between this Act and the *Commissions of Inquiry Act, Cap. 112*, this Act shall prevail.

(5) Where the Tribunal determines a complaint under this Act, the Tribunal may in addition to any other remedy, award or decision, require an employer or employee to

- (a) comply with the terms of the contract of employment; or
- (b) comply with the provisions of this Act or any other enactment that provides for enforcement by the Tribunal.

(6) A person who contravenes subsection (5) is guilty of an offence and is liable on summary conviction to a fine of \$20 000, to imprisonment for 6 months or to both.”.

Section 42 is deleted and the following is substituted:

Complaints to be referred to the Chief Labour Officer

“42. (1) Where an employee believes that there is a dispute or issue concerning an infringement of any right or benefit conferred on him by this Act, or under the provisions of any other enactment dealing with employment standards or other employment rights, he may make a complaint in writing to the Chief Labour Officer.

(2) Notwithstanding subsection (1), a complaint may also be made under this section by a trade union or another representative group on behalf of the employee.

(3) Where a group of employees, having the same or substantially the same interests, has a complaint, one employee may make the complaint in a representative capacity or the complaint may be made by a trade union or another representative group on behalf of the group of employees.”.

Read three times and passed the House of Assembly this
day of _____, 2017.

Speaker

Read three times and passed the Senate this _____ day of
, 2017.

President

HOLIDAYS WITH PAY ACT, 2017

EXPLANATORY MEMORANDUM

The *Holidays with Pay Act, Cap. 348* came into operation on the 11th of January, 1952 and since that time this Act has provided paid vacations for private sector employees in Barbados. However, with the passage of time it became apparent that this Act needed reform. This Bill will reform the law with respect to the granting of annual holidays to employees and the calculation of the sums to be paid to employees for their annual holidays.

PART I : PRELIMINARY

- Clause 1:** states the short title by which the Bill may be cited, it may be cited as the *Holidays with Pay Act, 2017*.
- Clause 2:** defines the critical terms which are systematically used in the Bill. It provides clarity and certainty of application by defining employee and employer for the purposes of the Bill. It also clearly depicts the meaning of and the correlation between average pay, total remuneration, year of employment and the granting of an annual holiday.

PART II :THE ANNUAL HOLIDAY OF AN EMPLOYEE

- Clause 3:** makes it clear that the Chief Labour Officer has administrative responsibility for the *Holidays with Pay Act, 2017* and provides a clear connection between the *Holidays with Pay Act, 2017*, the *Employment Rights Act (Act 2012 - 9)*, and the *Labour Department Act, Cap. 23*.
- Clause 4:** makes provision for the amount of holiday which may be granted to an employee; this ranges from 3 weeks to 5 week

unless a longer period is provided for in the contract of employment. It also provides for the manner in which an employee can take his holiday and provides for necessary notice and dialogue an between employee and his employer with regard to holidays granted under the Bill. It also makes it unlawful for an employer to dismiss an employee while the employee is on vacation.

Clause 5: makes provision for the calculation of what an employee should be paid for his annual holiday. This amount will vary depending on the amount of vacation to which the employee is entitled, but it should not be less than the employee usually receives as his payment in the general course of his employment.

Clause 6: makes provision for a situation where an employee is terminated before he takes his annual holiday or part thereof, as it provides for the automatic granting of any holiday due to that employee, and it also provides for situations where an employee may have taken his annual holiday or a part thereof in advance by providing for any payments due as result of this to be made to the employer.

Clause 7: makes provision for the payment for any vacation time accrued by a person who has been employed for at least 3 months but less than one year.

Clause 8: makes provision for the occurrence of a public holiday during the annual holiday granted to an employee, and in light of this occurrence the annual holiday is to be extended by one day for each public holiday within the period, and payment would be in accordance with the Bill unless the contract of employment makes specific provision for the payment for public holidays.

PART III :MISCELLANEOUS

- Clause 9:** requires employers to perform certain duties in relation to record keeping with regard to matters under the Bill so that the Chief Labour Officer may properly monitor that vacations are being granted and paid in the manner required by Bill.
- Clause 10:** makes it clear that any clause in a contract of employment which seeks to exclude the *Holidays with Pay Act, 2017* would be void and the Bill would still apply to the employee and the contract of employment.
- Clause 11:** makes certain failings of an employer such as reporting, and the granting of and payment for an annual holiday, among other things, an offence under the Bill.
- Clause 12:** makes provision for the Chief Labour Officer to initiate proceedings in respect of matters under the Bill.
- Clause 13:** provides for offences under the Bill to be started within one year from the commission of the offence.
- Clause 14:** makes provision for amendment of the *First Schedule* by Order.
- Clause 15:** makes provision for all contracts of employment in existence at the time the Bill comes into force to be saved and to be covered by the new Bill and makes provision for offences that may be in the process of being tried at the time this Act takes effect.
- Clause 16:** amends the *Employment Rights Act* (Act 2012 - 9) to make it clear that Employment Rights Tribunal is empowered to deal matters under the *Holidays with Pay Act, 2017* as well as any

other enactment dealing with employment standards or employment rights.

Clause 17: Repeals the existing *Holidays with Pay Act*, Cap. 348.