



Employment and Holidays Act Update

NZPPA 9th Annual Payroll Leaders Summit

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| Specific advice should always be obtained before relying on any aspect of the content of this presentation or associated materials.

Overview



Redundancy law
and landscape



Tikanga and
compensation
bands



Employee status



Sexual harassment
limitation period



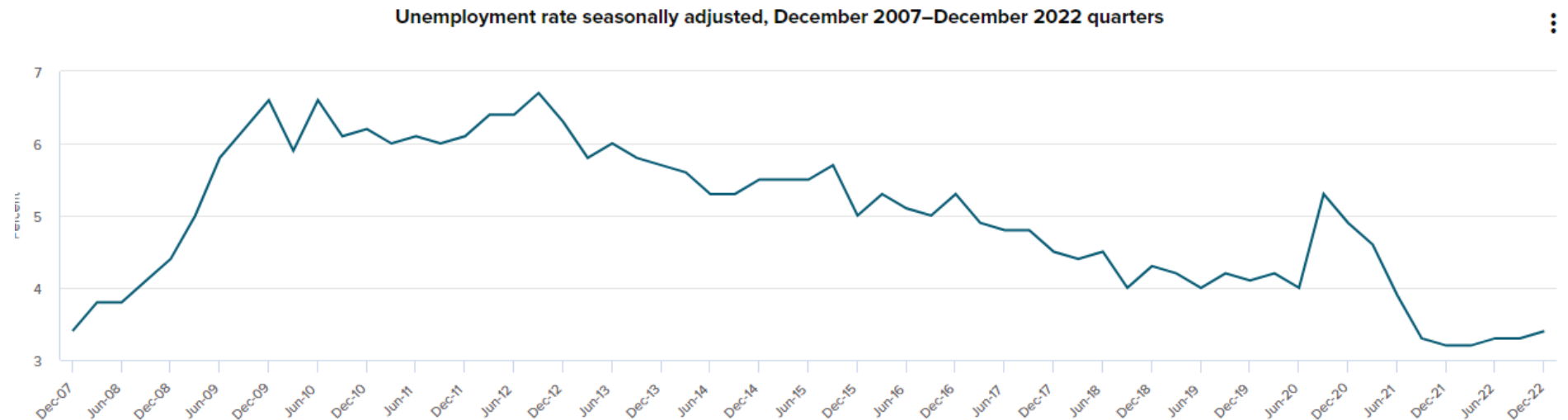
Fair pay
agreements



Holidays Act and
case update

Current economic climate

- Redundancies increasing
- Inflation (peaked?)
- Unemployment rate spiked during GFC 2008 - 2009
- Currently low unemployment
- Recession/“reset”





Redundancy law and landscape

- Robust business case required
- Court will look “under hood”
- Consultation includes sufficiently detailed information
- Redeployment separate and important duty
- Changing landscape and employer attitudes around redundancy





Tikanga and compensation bands

- Recent case – *GF v NZ Customs*
- Customs incorporated Tikanga values into its policies
- Where employer adopts Tikanga, it has to apply it
- More generally, Tikanga part of NZ’s common law (*Ellis* case)
- Tikanga values sit “entirely comfortably” with employment law which is relationship-centric
- Compensation “bands” to move with inflation
- Band 1 – up to \$12k, Band 2 - \$12k to \$50k, Band 3 - \$50k and upwards





Employee status

Gloriavale case – what is an employee?

- Six plaintiffs, left community between 2017 – 2020
- Carried out work from a young age, then joined “teams” after high school
- Work was “unrelenting, grinding, physically and psychologically demanding”
- Status turns on “real nature” of relationship
- Employee definition wide – includes any work for reward
- Volunteer exception didn’t apply
- Found to be employees
- “Tail cannot wag the dog”





Sexual harassment limitation period

Sexual harassment – extending time to raise PG

- New Act – Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023
- Time to raise a PG for sexual harassment extended from the normal 90 days to 12 months
- Time for all other PGs remains at 90 days
- 90 days considered insufficient in harassment cases because it can take people time to consider what occurred and feel safe to raise
- Updated plain language explanation required in new employment agreements
- Recommend advising existing employees of change and updating policies
- Good opportunity to reinforce policy and organisation values



Fair Pay Agreements

What does a FPA mean for my business?

Applies
industry-wide

Covers union
and non-union
employees

Overrules
less favourable
terms

Does not apply
to contractors
(yet)

3 – 5 year term



Fair Pay Agreements

Current status

- Several FPA applications approved by MBIE
 - Hospitality
 - Grocery supermarket
 - Security officers and guards
 - Commercial cleaners
 - Early childhood education
 - Bus/coach drivers
 - Waterside workers (being assessed)
- National have indicated they will repeal





Holidays Act and update

Holidays Act and compliance

- New Act not expected until end of 2023
- The 2003 Act still receiving judicial attention around interpretation
- Basic duty to pay holiday pay and FBAPS *in full* remains. So, too, the duty to remediate
- Limitation period on money claims is 6 years. Interest and costs typically sought
- Underpayment may give rise to penalty claim for breach of relevant EA. Limitation period – 12 months
- Unpaid holiday pay can give rise to a personal grievance. A successful PG can result in an award of compensation for “hurt and humiliation”
- Limitation period for PGs: 90 days to raise PG and then 3 years to file any claim



Holidays Act and update

Key proposals – Taskforce

The Act (as it stands):

- 4 weeks' leave after 12 months
- Paid at the greater of
 - ordinary weekly pay; or
 - average weekly earnings over previous 12 months.

Taskforce proposal:

- 4 weeks' leave after 12 months BUT will be able to take leave in advance on pro-rata basis
- Calculated, taken, paid, and held in weeks or portions of weeks
- Paid at the greater of:
 - Ordinary Leave Pay; or
 - Average weekly earnings over last 13 weeks; or
 - Average weekly earnings over last 52 weeks.
- **Ordinary Leave Pay:** what the employee would have earned had they worked on the day(s) in question. Includes base rate for hours worked in relevant period, plus pay for scheduled overtime, allowances and incentive/commission payments that the employee would have received
- **Gross earnings:** change the definition so it reflects all cash-payments received, except direct reimbursement for costs. Distinction between discretionary and contractual payments to be removed



Holidays Act and update

Key proposals – Taskforce (continued)

- Current:
 - Often difficult to calculate accurately, particularly if employee works variable hours.
- Proposed:
 - Determine amount of leave being take in hours. Use roster or EA. If not available, average hours worked on corresponding day in last 13 weeks
 - Determine a week in hours, using roster or EA. If not available, use average weekly hours in last 13 weeks
 - Use this fraction (hours being taken divided by hours in a week) to determine portion of a week to be deducted from entitlement balance, held in weeks
- Useful flowchart contained in Taskforce Report



Holidays Act and update

Changes to leave entitlements

Sick leave

- *2021 amendments*
 - Sick leave entitlement increased to 10 days.
 - Employees carry over up to 10 days to maximum entitlement of 20 days in any year.
- *Taskforce proposals*
 - One day available from first day, additional day accrues each month until minimum entitlement reached
 - Leave can be taken in a unit of less than one day (minimum of a quarter day)

Bereavement leave

- *2021 amendments*
 - 3 days' leave for miscarriage or still-birth
- *Taskforce proposals*
 - 3 days' bereavement leave expanded to extended family to account for "*more modern understanding of family members*"
 - Entitlement available from first day of employment

Family violence leave

- *Current entitlement:*
 - After 6 months' service, 10 days for each 12-month period where employee affected by domestic violence
 - Not able to be carried over, but may be taken in advance with agreement of the employer
- *Taskforce recommendations:*
 - Entitlement available from first day of employment
 - Can be taken in units of less than one day



Holidays Act and update

Case law update



Can a bonus ever really be a discretionary payment?

• *Metropolitan Glass & Glazing v Labour Inspector (July 2021)*



Holidays Act and update

Case law update (continued)

Metropolitan Glass & Glazing Ltd v Labour Inspector

Facts:

- Employee bonus scheme
- Payment conditional on attainment of performance targets, but also stipulated to be entirely “discretionary”
- Labour Inspector considered payments were “gross earnings” and should have been taken into account in holiday pay calculation

Issue: Were these payments ‘gross earnings’ for the purposes of calculating holiday pay?

Employment Court:

- Payments not “discretionary”
- Gross earnings capture “all remuneration for an employee’s job”
- Doesn’t matter how payments arise (EA, policy documents or otherwise)
- Even where payment amount uncertain and subject to conditions (i.e targets) – payment still not discretionary



Holidays Act and update

Case law update (continued)

Metropolitan Glass & Glazing Ltd v Labour Inspector

Court of Appeal

- Upheld appeal by Metro Glass – payments under the bonus scheme were discretionary
- Scheme contained an “express term” that the payments were discretionary even if conditions met
- Discretion not to pay had to be exercised reasonably, however

Key Takeaways

- Decision turned on wording of the bonus scheme
- Key issue whether the employer is “contractually bound” to make the payment
- The majority of bonus schemes tied to performance will still be contractual, unless specific/clear wording to the contrary
- Prudent to audit your current bonus schemes and to determine whether they are contractual or discretionary

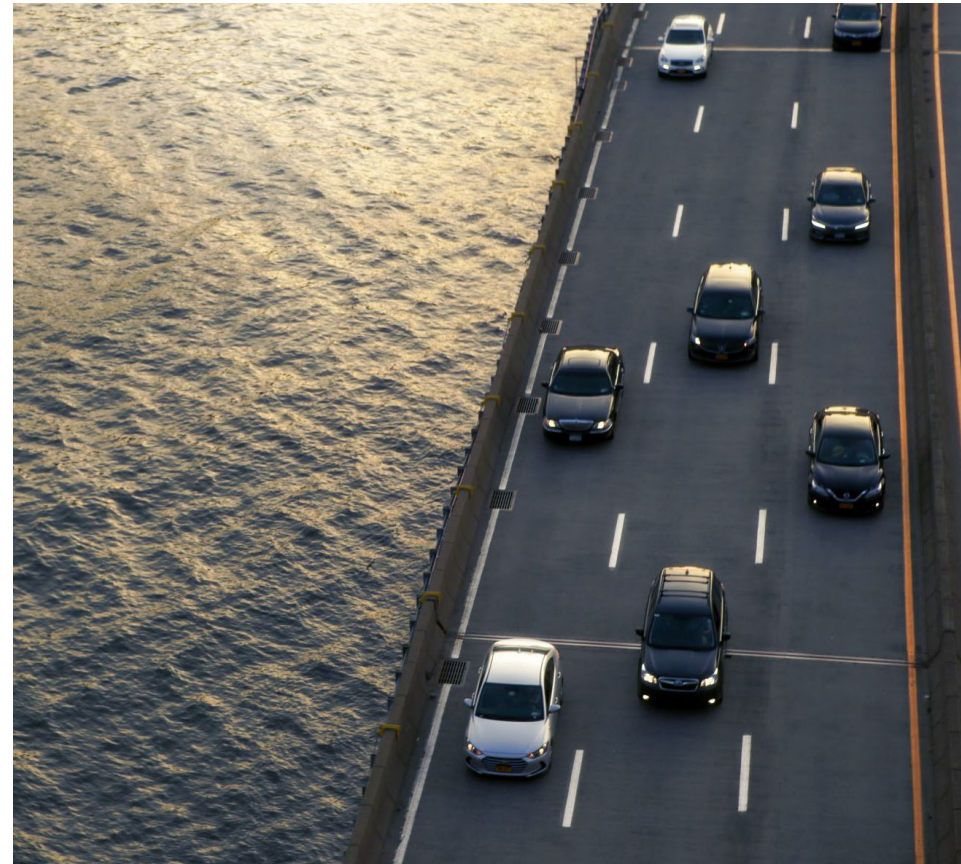


Holidays Act and update

Case law update (continued)

Tourism Holdings Ltd v Labour Inspector (2021)

- Kiwi Experience
- Driver guides – drive, guide and sell activities
- Drivers paid:
 - Daily rate for tours - paid weekly in arrears
 - Commission on the sale of activities booked - paid in a lump sum after the tour and completed admin (paid monthly)





Holidays Act and update

Case law update (continued)

Tourism Holdings

Issue: Calculation of Annual Leave

Ordinary weekly pay **vs** Average weekly earnings

- Amount received for an ordinary week
 - Includes commission etc. if a **regular part of pay**
 - Excludes payments that are not regular
 - If not possible to determine OWP, then look to gross earnings over last 4 weeks
- 1/52 of **gross earnings** (previous 12 months)
 - Includes all contractual payments
 - Excludes truly discretionary bonuses



Holidays Act and update

Case law update (continued)

Tourism Holdings

Court of Appeal

- Payments are a “regular part of the employee’s pay” if they are either “substantively” regular (rule based) or “temporally” regular (time based)
- Drivers’ commission payments met both these tests, so were a regular part of their pay
- Commission should have been included in OWP calculations

Supreme Court

- The expression “regular part” implies a standard period against which regularity is to be assessed – in the context of section 8(2), the appropriate standard period is 4 weeks
- The SC amended the CA’s answer to what is “regular” to:

Payments are a regular part of the employee's pay if they are of a kind made regularly when assessed against the standard of a four-week period

- Commission payments, which were made monthly on average, were sufficiently regular so should be included in OWP



Holidays Act and update

Case law update (continued)

Fire and Emergency NZ v NZ Professional Firefighters Union (2023)

Payment for work on a public holiday

Issue: Were the overtime terms in the CEA compliant with s 50 and the requirement to pay time and a half?

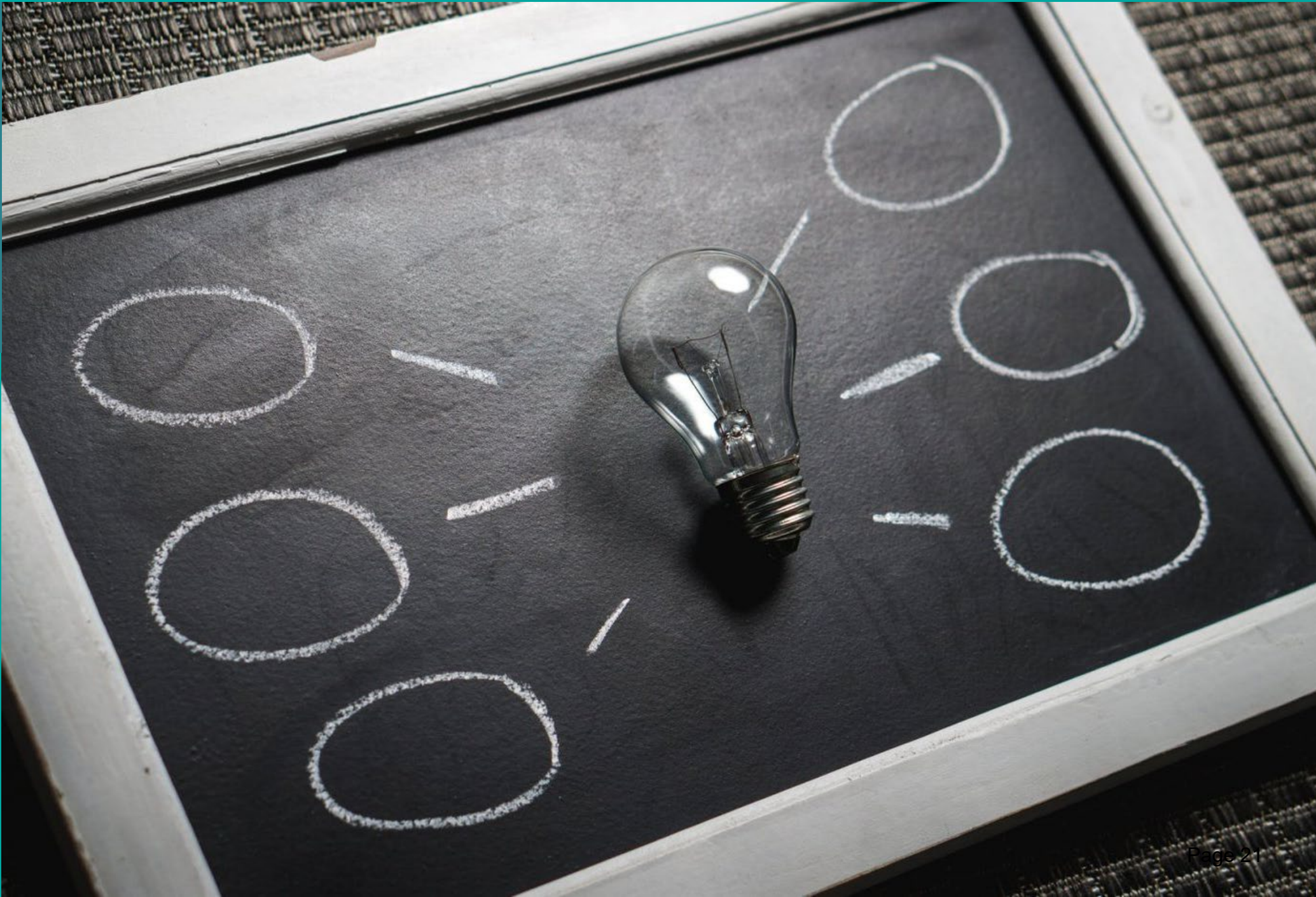
Facts:

- CEA provided for overtime rates. Example from 2013:
 - **Rate 1:** 1.1 times the standard hourly rate for first three hours of overtime on a weekday and before 12pm on a Saturday.
 - **Rate 2:** 1.33 times the standard hourly rate for all overtime worked in excess of the first three hours and all overtime after 12pm on a Saturday, or any time on a Sunday.
 - **Rate 3:** 1.5 times the standard hourly rate for all overtime worked on a public holiday.
 - Standard hourly rate = total weekly wage divided by 42 (being the average number of hours worked in a seven-day period).
- **By 2019, Rates 1 and 2 had increased to 1.5.**
- Employees were paid in accordance with Rate 3 for overtime on public holidays.

Decision

- *The assessment must be based on the amount the employee would have received had he or she worked on the day concerned, which includes payments for overtime if these would otherwise have been received. If overtime is worked on a public holiday, s 9 requires the starting point to be the applicable overtime rate [1.5 standard hourly rate]. Under s 50, a multiplier of 1.5 must then be applied.*

Questions



About the presenter



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Mark provides strategic advice to employers, senior executives and human resource managers on complex and sometimes sensitive matters with regards to workplace issues.

As an experienced employment law practitioner he has extensive experience as an advocate in personal grievance claims, conducting private negotiations on behalf of clients, and appearing before the Employment Relations Authority and Employment Court.

Mark advises some of New Zealand's leading organisations and iconic brands on all aspects of their employment law needs. Mark has a particular interest in the Holidays Act and related issues.

Facts about Duncan Cotterill

- National presence - 5 integrated full service offices
- 300+ employees
- 30+ ASX and NZX listed companies work with us
- Global connections through our relationships with INTA, and exclusive partnerships with GILC and TerraLex. TerraLex is a network across 100 countries connecting 19,000 high quality lawyers for appropriate jurisdictions.

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Partners

185+

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