PSA

Employment Standards Legislation Bill

Submission to the Transport and Industrial Relations Select Committee by the New Zealand Public Service Association: Te Pūkenga Here Tikanga Mahi

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New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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INTRODUCTION

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 60,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities, state owned enterprises), local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

This submission represents the view of the PSA as a whole. PSA members have had a strong response to the Bill and many individuals have made submissions to the Select Committee. In addition to this, many have provided us with their thoughts about the Bill, and we include their words in this submission.

This is an omnibus Bill, and impacts several aspects of employment legislation. The PSA generally supports the extensions to parental leave and most of the enforcement of employment standards proposals, but does not support the changes relating to availability, shift cancellation and secondary employment, which in our view, do not achieve in any way their stated purpose of prohibiting the unfair and exploitative practices which have come under scrutiny recently in the form of "zero hours" contracts, short notice shift cancellation and unreasonable wage deductions.

We have read the submissions of the New Zealand Council of Trade Unions Te Kauae Kaimahi, and we support that submission.

Our submission is structured in three parts, to correspond to the three broad policy areas of the Bill:

- **PART A** considers the proposed amendments to the Parental Leave and Employment Protection Act 1987;

- **PART B** considers the proposed amendments to the Employment Relations Act 2000 and the Wages Protection Act 1983 relating to availability for work outside contracted hours, shift cancellation, secondary employment and deductions from wages;

- **PART C** considers the proposed amendments relating to the enforcement of employment standards.

PART A – AMENDMENTS TO THE PARENTAL LEAVE AND EMPLOYMENT PROTECTION ACT 1987

General statement

The PSA represents over 40,000 women, and an overwhelming majority of PSA members, both men and women, are parents or grandparents. At any one time, approximately 530 PSA members are on parental leave. PSA members have long shown a strong interest in issues relating to parental leave.

The PSA is supportive of the extension of parental leave and payments to more workers and supports the increased flexibility outlined in the Bill.

There are further changes to parental leave legislation that we would like to see addressed which are not currently contained in the Bill. The PSA is a member of the 26 for Babies Coalition and supports the extension of paid parental leave to 26 weeks. We support Sue Moroney's member's bill – the Parental Leave and Employment Protection (Six Months Paid Leave and Work Contact) Amendment Bill. We consider that a longer period of paid leave would support WHO objectives in respect of breastfeeding and mother/infant wellbeing, and would bring us more into line with other OECD countries.

We are also concerned about the low level of paid parental leave payments which are currently $516.85 per week. This is below the minimum wage and does not adequately cover the many increased expenses that families face when children are born.

Further, the current calculation of payment for annual holidays after return from parental leave needs addressing. At present, a worker's payment for annual holidays is impacted by parental leave. This is because under the Parental Leave and Employment Protection Act 1987, if an employee becomes entitled to annual holidays while they are on parental leave or in the 12 months following any parental leave, the calculation is required to differ to that under the Holidays Act 2003. The payment amount is to be determined by calculating only the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holidays are taken. This means that if the employee takes their annual holidays soon after coming back from parental leave there is a high likelihood that the payment for annual leave will be a smaller amount than if they took their annual leave at another time. Clearly this results in an unfair situation for parents re-entering the workforce, often at a time when they are seeking to use annual holidays to help settle their child into care and manage the transition back to work.

We request that the government address this unfair anomaly in this legislation as well, and repeal subsection 42(2) of the Parental Leave and Employment Protection Act 1987.

Comments on proposed amendments

Extending paid parental leave to non-standard workers and those who have recently changed jobs

We support the extension of paid parental leave to casual, fixed-term, temporary and seasonal workers and to workers with more than one employer. This addresses a significant problem for affected workers, many of whom are low paid and struggle with time out of the paid workforce when having and caring for babies.

We are concerned that many of these workers, despite being entitled to paid parental leave will not access this entitlement because they are not aware of it or because the process to access it is complicated and requires evidence about previous hours worked which they may not have. We agree with the acknowledgement in the Regulatory Impact Statement about the need to improve information for pregnant employees and with employers.

We suggest that clear information is provided to workers about accessing paid parental leave, and that a simple regime for providing information about hours worked is established.

Introduction of "primary carer" and extension of entitlements

We support the extension of paid parental leave for other guardians, grandparents, home for life parents and whangai. The lack of access to entitlements for these workers has been a major problem and we are pleased to see this being addressed in the Bill.

Keeping in touch days

The PSA supports the introduction of "keeping in touch days". These days ensure that workers are able to remain connected with the employer and the workforce. These days could be very useful for accessing professional development, maintaining skills and for ensuring a smooth transition back into the workforce at the end of the parental leave.

Extending unpaid parental leave to workers who have been with their employer for more than six months

We support the ability for workers who have with been their employer for more than six months to take unpaid leave and consider this is important to support breastfeeding, bonding and the ability to transition back into the workforce with an older baby.

Introduction of negotiated carer leave

We support the intention behind and the development of a mechanism to accommodate workers who have been with an employer for less than six months. However, we are concerned that gaining the leave will be quite difficult and because it is not guaranteed in the legislation, it is a weak measure. If there is not a statutory right to maternity/primary carer leave, then the grounds in Part 3A for rejecting the request should be tightened.

PART B – AMENDMENTS TO THE EMPLOYMENT RELATIONS ACT 2000 AND THE WAGES PROTECTION ACT 1983

General statement

There has been a growing awareness, both in the media and within the union movement that employers seeking greater flexibility to deal with fluctuating demand are increasingly engaging in employment practices which are exploitative and unfair to workers. These practices include:

- Employers not guaranteeing employees any hours of work whilst requiring them to be available ("zero hours" contracts);
- Employment agreements unreasonably restricting workers from undertaking secondary employment;
- Rostering practices that include short notice cancellation of shifts; and
- Inappropriate pay deductions (for example "petrol station drive-offs").

These practices do not balance the mutual obligations of the employment relationship, instead allowing employers to maximise flexibility and profit while shifting the risks, costs and uncertainties to vulnerable employees. As a result, workers are experiencing uncertainty of hours and income, and their financial, personal and family lives are suffering. The PSA believes that workers should be entitled to certainty around their hours of work and income so that they can better plan their lives and support their families.

Young and low paid workers with little bargaining power are particularly at risk as they are less likely to be

able to negotiate fair terms of employment.

While a stated purpose of the Bill is to restrict or prohibit these unfair practices, it appears that the actual effect will be to legitimise them, providing a framework in which they be lawfully, although unfairly, utilised. The PSA believes that the following proposed amendments require serious revision if they are to give the protections that they were intended to provide.

Comments on proposed amendments

Agreed hours of work – proposed sections 67C and 67D

Under current section 65(2)(a)(v) of the Employment Relations Act 2000, individual employment agreements are only required to contain "an indication of the arrangements relating to the times an employee is to work". This broadly worded provision allows an employer to describe an employee's hours of work in general terms that may provide that employee with no guarantee as to how many hours they will be required to work, or when those hours of work will be.

Proposed sections 67C and 67D provide that where hours of work are agreed, they must be:

- Specified in proposed and actual individual employment agreements; and
- Proposed and actual terms and conditions of employment for workers on a collective agreement.

If the purpose of these amendments was to address the issue of lack of certainty of hours, they do not go far enough. The problem with these proposed amendments is that negotiation about hours of work remains dependent on bargaining power, and therefore it remains likely that the workers most in need of protection will be unlikely to achieve any greater certainty about their hours and times of work. In our view the balance remains tipped too far in favour of employers seeking flexibility.

We think that there needs to be a stronger requirement to set hours and days of work, and start and finish times. We think the problem of lack of certainty about hours and times of work would be better addressed if employers and employees were required, as far as possible, to agree hours and times of work, including, where practicable, start and finish times, and that those agreed hours and times of work be specified in employment agreements and additional terms and conditions.

"My daughter is a student and works part time at McDonalds to support her income. However, she is

constantly worrying from week to week about how much money she has to live on. Her hours are unknown from week to week and if she turns down a shift because of college hours this is viewed badly by the managers and other offers of hours/amount of hours offered are affected. She is exhausted and this is affecting her ability to study and to become a more productive member of society." Julie, Wellington

Availability and compensation – proposed sections 67E and 67F

Proposed subsection 67E(1) defines an availability provision as a provision in an employment agreement under which:

(a) The employee's performance of work is conditional on the employer making work available to the employee; and
(b) There is no obligation on the employer to make work available to the employee; but
(c) The employee is required to be available to accept any work that the employer makes available.

Subsection 67E(2) provides that the availability provision may relate to all work performed under the employment agreement, or to work performed additional to agreed hours of work.

Subsections 67E(3) and (4) provide that an availability provision will be unenforceable, and an employee will be able to refuse to perform work under it, unless it provides for the payment of compensation to the employee for making him or herself available to perform work under the provision.

Subsection 67E(4) allows the above compensation to be included in salary.

Section 67F provides that an employee who is entitled to refuse to perform work under section 67E will not be treated adversely if they do so.

We see a number of problems with these provisions.

As noted earlier, the proposed amendments in the form of proposed sections 67C and 67D mean that there still remains no requirement for any guarantee or minimum number of hours, and, because of subsection 67E(2)(a), there is nothing to stop an employer from offering an employee an "availability only" employment agreement. Proposed subsection 67(2)(a) should be deleted.

We are also concerned that the level of compensation payable has no fair lower threshold. Employers could compensate by way of meals or vouchers, and it appears possible that an employee could be paid next to nothing for remaining available. We again stress the point made earlier about the bargaining power of those most likely to be subject to these provisions, and consider that any compensation payable for availability must be "reasonable", to offer a level of protection to these workers. We suggest that "reasonableness" of compensation should take into account the scope of the restrictions placed on the employee.

"As a community support "assignment" worker I am paid the minimum wage for providing household management and shopping services to elderly, vulnerable clients. My employer will not guarantee my hours of work even though they insist I am available to work a nominated number of hours per week should they require me. Technically although they describe me as an assignment worker I am a "zero hours" employee. This is the normal work situation for 23,000 homebased community support workers nationwide. These people like myself live in the daily fear and stress that their wages on payday will be insufficient to cover the increasing cost of household expenses, power, food rent/mortgage, insurance, and fuel and car maintenance.

I believe the proposed amendments to this Bill - Sections 67C-67F "Zero Hours" will encourage employers to undermine workers' rights, and in the aged care sector will do absolutely nothing to attract more workers to an industry which is already suffering from chronic staff shortages." Jenny, Christchurch

Cancellation of shifts – proposed section 67G

Proposed section 67G allows an employer to include in an employment agreement a clause setting out a period of reasonable notice required for cancellation of the employee's shift and the compensation payable to the employee if the shift is cancelled without the stated notice.

The employee is to be entitled to what he or she would have earned for working the shift if the shift is cancelled without relying on a cancellation clause, the employee is not notified until the commencement of the shift that the shift is cancelled, or if the remainder of the employee's shift is cancelled once it has begun.

The PSA supports the general proposition that a worker who is ready and willing to work should be paid what they would have earned should their shift be cancelled, this being consistent with contract law.

However, we think that the proposed amendments do not sufficiently protect shift workers.

As with the proposed availability clause above, we are concerned that no fair lower threshold has been set for the compensation payable should a shift be cancelled without the required notice. We submit that

compensation should be expressed as "reasonable compensation" in proposed subsection 67G(2)(b).

We are also concerned by the concept of "reasonable notice". Cancellation of a shift will have a significant impact on a worker's expected income and consequent repercussions on the quality of life of themselves and those who depend on them. They may need time to try and arrange alternative work. A fair balance needs to be struck between these considerations and an employer's desire for flexibility and maximum profit. We concur with the CTU's submission that proposed subsection 67G(3) should require the period of notice to be "reasonable, and in any case, not less than 48 hours".

The PSA shares the CTU's concern that employers may be encouraged to break up shifts into smaller chunks to work around this provision, and agree that the definition of "shift work" proposed in subsection 67G(6) should be revised to mean "any period of continuous or effectively continuous work that an employer and employee have agreed that the employee will work."

Provisions prohibiting or restricting secondary employment – proposed section 67H

Proposed section 67H provides that a provision in an employee's employment agreement that prohibits or restricts secondary employment will be unenforceable unless there is a genuine reason stated, which must be based on reasonable grounds, for the prohibition or restriction.

The PSA considers that, while well intentioned, section 67H may do more harm than good.

At present, the enforceability of any restriction on secondary employment depends on the nature of the interest the employer is trying to protect, and whether the secondary employment unreasonably infringes on that interest.

We are concerned that, as a result of section 67H, employers will be encouraged to include in employment agreements clauses prohibiting or restricting secondary employment which, although potentially unreasonable and therefore unenforceable, will be unlikely to be challenged by employees. This is because employees may not have an understanding that the clause is potentially unlawful, or do not have the resources to mount a successful challenge.

Deductions from wages (cl 131)

Clause 131 of the Bill proposes to amend the Wages Protection Act 1983 so that an employer may not make "unreasonable deductions" from the wages payable to a worker.

The PSA supports the general intention here, but is in agreement with the position of the CTU that this provision would be improved with if "unreasonable deduction" explicitly included deductions from workers' wages for loss or damage beyond their control and deductions for loss or damage caused by the worker unless those deductions are subject to a fair and reasonable process in good faith and explicit subsequent written consent to the specific deduction.

PART C - AMENDMENTS RELATING TO THE ENFORCEMENT OF EMPLOYMENT STANDARDS

General statement

The PSA has a twofold interest in the enforcement of employment standards:

- Many of our members are protected by one or more minimum employment standards, and we represent those who believe they have not received their full entitlement; and
- Some of our members enforce or provide mediation services in respect of employment standards.

The PSA has a clear and firm commitment to the upholding of workers' rights, and we strongly support the introduction of stronger and wider measures to discourage breaches of minimum employment standards.

We support the introduction of new powers that would assist our Labour Inspectorate members who are involved in the enforcement of minimum employment standards to be more effective in their role, and in improving compliance. However, we do not support measures that would extend their role unless they are resourced to undertake these additional duties. We are concerned about the proposed greatly increased workload on an already under-resourced Inspectorate, and the impact that this workload will have on our members.

We consider that unions are well used to providing expert, accessible and timely advice to their members about their employment rights. We believe that the role of unions in supporting workers and strengthening employment standards should be supported rather than discouraged. We consider that workers should have the same rights as Labour Inspectors to seek penalties, compensation orders and other sanctions provided for in the Bill.

Comments on proposed amendments

Tougher and further reaching sanctions

The PSA strongly supports the increased and extended sanctions provided for in the Bill, including:

- increased penalties and compensation orders available for serious breaches,
- public naming of employers who have breached minimum standards,
- the possibility of being banned as a manager if an individual commits serious or persistent breaches of employment standards or exploitation of migrant workers, and
- extended accountability to persons other than the employer who are knowingly and intentionally involved in a breach of employment standards.

Clearer-record keeping requirements

The PSA supports the changes to record keeping requirements and the introduction of an infringement offence regime for breaches of minimum standards.

We support the CTU's submission that the cap of $1,000 for an infringement be removed.

Additional powers for Labour Inspectors

The PSA supports the enhanced powers for Labour Inspectors to request records and documents from employers.

While the PSA generally supports the enhanced powers of Labour Inspectors to share information with other regulatory agencies, we share the concerns of the CTU regarding the range of proposed agencies involved, and the need for adequate safeguards to protect the extremely sensitive personal information that will be shared, and support the CTU's recommendations in this regard.

We also support the CTU's submission that Labour Inspectors be provided with further powers to decide the employment status of workers.

Changes to the role of mediation in employment standards cases

Proposed section 159AA provides that if a matter before the Employment Relations Authority relates

substantially to an alleged breach of employment standards relating to an employee, the Authority must not give a direction that the parties use mediation or further mediation unless:

(a) the facts of the alleged breach are in dispute and the Authority is satisfied that mediation will be a cheaper and quicker way to clarify the facts; or
(b) the alleged breach appears to be minor and inadvertent; or
(c) both parties agree; or
(d) the Authority is satisfied that, in the circumstances and having regard to one of the purposes of the Act (being the effective enforcement of minimum employment standards) mediation is appropriate.

Proposed section 188A gives a similar direction to the Employment Court.

The PSA is concerned that this marks a significant departure from the intention in the Employment Relations Act 2000 to provide low cost, easily accessible options for the resolving of employment problems. As we have previously submitted on the Ministry of Business, Innovation and Employment's Discussion Document, "Playing by the Rules", we consider that access to justice issues must be taken into consideration when changes to practices at various points in the employment relationship problem resolution system are contemplated.

Please note that we wish to be heard by the Select Committee.

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