PSA Submission on the Employment Relations Amendment Bill 2016

PSA

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New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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Submission to the Employment and Workforce Select Committee on the Employment Relations Amendment Bill 2018 by the New Zealand Public Service Association: Te Pūkenga Here Tikanga Mahi

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) strongly supports the purpose of the Bill in rebalancing working people's rights in the workplace. We see it as an important first step to achieving fairness at work. As a union we support a high engagement, high involvement approach to workplace relations. This means strategic tripartite engagement at an industry or sector level, and strong union-management forums within workplaces. We also encourage a framework that empowers our members to engage directly and safely with managers provide for decent jobs and to drive improvements in the quality and effectiveness of services.

The PSA supports the restoration of key minimum standards and protections for employees and the other changes to promote and strengthen collective bargaining and union rights in the workplace.

The PSA supports the intention of the changes to introduce greater fairness in the workplace, in order to promote productive employment relationships.

As a PSA member put it:

I feel these changes will overall give the union more mana and legitimacy in my workplace. The erosions that have occurred in the last decade have made it increasingly difficult to organise union activity and (I believe) have given employers a sense of impunity – this needs to change, and I think these legislative changes will go some way towards improving things.

In particular the PSA supports the following:

- **Measures that strengthen collective bargaining**– the requirement to include pay rates in collective agreements and for such rates to be agreed in writing during collective bargaining, restoration of the duty to conclude bargaining, restoration of the earlier initiation of bargaining timeframe for unions, removal of MECA opt-out for employers, restoration of the "30 day rule", repeal of partial strike pay deductions.

- **Measures that strengthen union rights** - restoration of union access without prior employer consent, the provision of reasonable paid time for union delegates, making it

easier for workers to connect with and join the union, greater protection against discrimination for union members.

- **Measures that strengthen workers' rights -** Restoration of the right to rest and meal breaks, restoration of reinstatement as the primary remedy for unjustified dismissal, protections for workers in "vulnerable industries".

The PSA does not support the retention of the 90 day trial period for businesses with less than 20 staff as we consider that these **trial periods are unfair** and should be removed altogether.

The PSA would like to make an oral submission to the select committee

About the PSA

The PSA is the largest trade union in New Zealand with over 64,000 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.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they are delivered.

PSA member networks, Te Runanga and sector committees have been invited to comment on the Amendment Bill and many of their comments are included.

The PSA is an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU) and supports the submission of the CTU on this bill. As an affiliate of the CTU the PSA was actively involved in the development of the CTU's agenda for employment relations reform and fully supports its recommendations for change.

Measures that strengthen collective bargaining

Pay in collective agreements

Remuneration should be transparent, properly bargained and agreed in writing in collective agreements. PSA members welcome the proposed amendments to the Employment Relations Act 2000 (ERA) that clarify the recent decisions of the Employment Relations Authority and the Employment Court which require employers to bargain pay in collective bargaining.

As former Chief Judge Colgan said:

> *Remuneration is a fundamental element of an employment relationship. Individual employment agreements must contain, statutorily, information about the remuneration to be paid to the employee. There is, however, no such statutory requirement of a collective agreement. That is perhaps because it is* ***so obvious that collective agreements will deal with remuneration, or at least minimum remuneration, that it has always been assumed that a collective agreement will contain such a term or condition****. So, too, is it a fundamental underlying* ***assumption of employment relations that remuneration will be the subject of agreement between the parties and not by unilateral imposition*** *by the employer based on its own assessment of the employee's performance of his or her job…"*[1]

In our experience a number of employers have declined to bargain pay or declined to include pay rates and pay systems in collective agreements. For example we estimate that in the state sector only half of pay outcomes have been properly negotiated within collective agreements.

Remuneration should not be a matter of a "unilateral imposition by the employer" to repeat Judge Colgan.

The PSA therefore supports the intent of the requirement that collective agreements must contain rates of pay and that rates of pay must be agreed during collective bargaining. We do however have some suggested improvements to the proposed changes.

Clause 16 of the Bill amends section 54 to provide for the addition of "the rates of wages or salary payable to employees" to the list of requirements in the form and content of any collective agreement. It then goes on to state that this will be satisfied if the agreement provides for "ranges

[1] *FIRST Union Inc v Jacks Hardware and Timber Ltd* [2015] NZEmpC; at [147]

of wages or salary payable for certain work or types of work or certain employees or types of employees; or 1 or more methods of calculating pay rates of wages or salary payable for certain work or types of work or certain employees or types of employees". There is a further proviso that it will not be sufficient if the collective agreement purports to give the employer sole discretion to determine the wages or salary payable for certain work or types of work or certain employees or types of employees.

We consider that the provision should be tightened to truly ensure collectively bargained and transparent pay. We know from our experience with employers that they commonly seek to include opaque remuneration systems in which they can determine pay . This can include methods of calculating rates of pay which lack transparency and do not amount to the actual bargaining of pay with the union. Where pay is included in collective agreements, we have experienced a tendency for employers to prefer to describe it in terms of pay ranges, which are again not transparent and can be unilaterally manipulated by an employer.

We understand that privacy concerns have been raised about transparent pay systems. In our view, any privacy issues are greatly outweighed by the importance of ensuring fair pay. In our experience, hidden remuneration systems lead to unfair practices, and have contributed greatly to the gender pay gap that currently exists, allowing the masking of inconsistent and unjustified starting salaries and salary progression between male and female employees, and between ethnicities.

We therefore support the CTU's suggested amendments to clause 16, which we believe will address the issues we have experienced when trying to bargain and record pay.

PSA members said:

"Pay is an essential component of the employee/employer relationship and the inclusion of these rights balances the power in this relationship"

"Bargained pay reduces the opportunity for discrimination in pay rates and ensures transparency and honesty in the way work is rewarded. Our workplace's current 'performance-based' pay system can encourage secrecy and distrust between co-workers and makes it hard to see where patterns of difference in remuneration are due to discrimination. By bargaining pay, we can ensure all workers have a fair wage that reflects their skills, experience and commitment."

"This would make a huge positive difference. In our organisation pay rates are currently determined through a Remuneration Forum which is separated from negotiations on our Collective Employment

Agreement (CEA) What that means in practice is that when we negotiate our CEA we have no power to influence pay, and although we get to participate in the Remuneration Forum all we can do is make recommendations which are ignored every year.

Restoration of the duty to conclude bargaining

Removing the good faith obligation to conclude a collective agreement unless there are reasonable grounds not to undermine collective bargaining. It was also inconsistent with the object of the ERA by enhancing rather than addressing the inherent inequality of power in the employment relationship.

We support the restoration of this duty, which is an important protection for collective bargaining.

Restoration of the earlier initiation of bargaining timeframe for unions and removal of MECA opt-out for employers

We support the reversal of the previous government's amendments to the ERA in this regard and see these changes as consistent with the Bill's purpose of promoting and strengthening collective bargaining.

We see MECA bargaining as effective and efficient. The PSA is party to a number of occupationally based MECAs with District Health Boards, which have been of great benefit to both employers and employees. They have significantly reduced costs for all parties and have brought much needed coordination and consistency to health sector employment. They have, in our experience, also lead to greater cooperation and discussion in a wider sense, both between DHBs, and between unions and DHBs.

Restoration of the "30 day rule"

The PSA supports the restoration of the "30 day rule" but proposes that it be accompanied by the payment of a bargaining fee. Pass on of terms and conditions that have been bargained to workers who have not been a party to the bargaining (i.e. non-members) should be by the agreement of the union or by the inclusion of the payment of bargaining fees by those who benefit from bargaining without contributing to it. The intention of the 30 day rule is to protect new workers from being

employed on worse conditions than the collective agreement, which we support. However we are concerned that without improvement to "pass on" provisions including bargaining fees there could be unintended consequences of restoration of the 30 day rule, namely undermining bargaining and reducing overall terms and conditions.

Repeal of partial strike pay deductions

We support the repeal of partial strike pay deductions.

It was not uncommon during bargaining for our members to take low-level action, such as wearing union badges, or refusing to participate in performance assessments. The recent changes provided an ability for employers to heavily and often disproportionately penalise such "low level" industrial action, and in our view had the effect of encouraging workers to vote to fully withdraw their labour, causing disputes to escalate.

We consider that further changes should be made to remove the notice requirement for strikes in non-essential services.

Measures that strengthen union rights

Restoration of union access without prior employer consent

Union access to the workplace is fundamental to freedom of association. Although the ERA provides very limited grounds upon which union access to the workplace may be denied (for example where access may prejudice the security or defence of New Zealand, or the investigation or detection of offences), our experience has been that the requirement for employer consent has encouraged some employers to try to delay and discourage access to the workplace.

Examples of the grounds that have been advanced to our union organisers when denying or trying to limit access include "concern about disrupting staff at an incredibly busy time", "so soon after the previous visit", and "we would only consent to meeting employees in the café", none of which appear in the ERA.

The PSA therefore welcomes this change.

Provision of reasonable paid time for union delegates

The PSA supports the intent of the amendment entitling union delegates to reasonable time off to undertake union activities, but make some suggested improvements to the changes.

In our experience, active delegates add value to a workplace. They are workplace leaders, and have a valuable role in maintaining a healthy workplace, often "troubleshooting" issues at a low level, before they escalate. This is a win/win for employers and workers.

New section 18A would provide for union delegates to have reasonable paid time off to undertake "union activities". This is conditional upon the activities relating to representation of employees of the employer.

This is significantly narrower than the activity the PSA requires from delegates, and for example does not include matters relating to recruitment or providing information about the union or its campaigns. It is also inconsistent with the scope of purposes for accessing a workplace under section 20. We therefore suggest that "union activities" be aligned with the purposes for union access in section 20(2) and (3) of the ERA.

PSA members reflected on their experience:

"We recently conducted a survey of employees and managers to test what their experience has been getting leave for union work. Particularly for roles at the coalface, delegates feel like it's almost impossible to get time off to fulfil their delegate obligations. Delegates are the backbone of the union and are the first point of contact into the PSA when there is a workplace incident. Also they are usually the people appointed to working groups when PSA representation is required. The better trained a delegate is, the more they can effectively perform their role."

"I am particularly excited about this change. Even in a workplace like mine where the collective agreement generally provides good protection, I frequently observe union delegates struggling to manage their advocacy work on behalf of colleagues at the same time as continuing to juggle often already overloaded work schedules. Part of the problem appears to be that these volunteers are really committed and caring people and so are often contributing to worker wellbeing across a bunch of different capacities – eg. Health and Safety Rep, Union Rep, mentor to new colleague, etc etc."

"Delegates play an important role in supporting the staff in an organisation and need time to undertake their duties. People who feel supported in their role will be more motivated and productive"

Making it easier for workers to connect with and join the union

The changes proposed here include the employer providing information about the union to new employees, advising the union that a new employee has started and, with the new employee's permission, provide contact details to the union. The PSA agrees that making it easier to join the union through open exchange of information at the start of the employment relationship will strengthen the role and mana of unions as social partners.

Greater protection against discrimination for union members

The PSA supports the amendments to Part 9 of the Act intended to protect union members from unfair treatment by an employer because of their involvement in a union. Delegates in particular describe their vulnerability to subtle forms of discrimination as "micro-agressions", "undercurrents of anti-union sentiment', "quiet bullying", "passive aggressive" behaviour and general hostility.

Members said:

"When I first joined [organisation] I was told not to join the PSA or I would be considered a trouble-maker. When I joined, I was told that I would have to let my manager know in advance and get approval to attend union meetings and events, even if it was during my break times. When I became a delegate, I was told that I wasn't able to use [organisation] resources such as email, and meetings such as the morning huddle to provide information to my members. When I checked with the union and heard it was OK and started doing it, I was reprimanded. I've also been told I couldn't do separate events, such as supporting language weeks, because I'd already done my "union time" for the week."

"I have never experienced explicit discrimination for union activity, but I suspect that my role as a delegate has influenced me being inappropriately excluded from consideration for a job I applied for."

"In some teams and role there is a social stigmatisation against being active in the union. For example, members in the human resources or communication function or a managerial role feel social pressure to distance themselves from union work."

"I have not experienced blatant discrimination, nor specific incidents but there is definitely an undercurrent of anti-union sentiment from my manager and the wider office. These come as micro-aggressions in the form of calling union delegate 'rabble rousers', speaking about ratification meetings in tones that imply it is unsavoury, differences in treatment of union members to non-union members, shutting down discussions about the union, open distaste for 'industrial action' and staff organising, and mocking of unions as a whole."

"No direct discrimination but I have not felt confident to declare my union membership in my workplace because I do not feel like there is an overall supportive culture."

The PSA look forward to an employment relations environment of mutual respect and working together.

Measures that strengthen workers' rights

Restoring the right to rest and meal breaks

Members have varying experiences of workplace culture around rest and meal breaks. Some of those who responded to the PSA request for feedback told us that they already enjoy meal and rest breaks and support this being made available to everyone. A common theme was the importance of breaks during the working day for health and well-being as well as productivity. A number of respondents referred to staffing levels being a barrier to having rest breaks in the day.

Restoring the entitlement to meal and rest breaks ensures that both employers and employees understand that it is unreasonable to expect people to work without taking regular breaks and that it is important from a health and safety viewpoint to take breaks.

"This is enormously important to me! Having a break to look forward to, helps me to get through difficult work days and everyone has a physical need for some rest. It's also important that with a decent-length meal break you can eat without rushing, so your digestion is better, and are more *likely to get something nutritious to eat rather than convenience food with a lot of fat, salt and sugar in it. These things are essential for maintaining physical and mental health so we can carry on with our work and not burn out or break down."*

"Our staff are very dedicated and hard-working. When there is confusion or uncertainty about what breaks and rests are allowed, it's easy for that motivation to be exploited, leading to exhaustion,

burnout and injuries. Legislated break rules ensure everyone is encouraged to take care of their mental and physical health at work."

"Rest and meal breaks make all the difference when you're in a role which keeps you constantly engaged with customers and clients. Just having a short amount of time for a cuppa and a break makes a huge difference psychologically."

Reinstatement

The PSA strongly supports returning to reinstatement as the primary remedy for unjustified dismissal. Currently remedies do not provide adequate redress for those who have been unjustifiably dismissed.

The prioritising of reinstatement recognises the importance of a job to a worker, financially as well as emotionally. Removing reinstatement as the primary remedy meant that monetary compensation would most likely be awarded for wrongful dismissal. When compared to reinstatement to the job, a limited monetary remedy may be of little value emotionally, and practically, particularly in times of high unemployment, or in parts of New Zealand where work is difficult to find. Dismissal is a devastating sanction for a worker. Where it is unjust, reinstatement is the natural and fair primary remedy.

Further, compensation payments are insufficient to provide a deterrence to unfair and unjust practices.

The restoration of reinstatement as a primary remedy will also strengthen the concept of interim reinstatement. Interim reinstatement acts to minimise disruption to the employment relationship between an employer and a worker who may otherwise turn out to be wrongly ejected from that workplace. Interim reinstatement is vital in preserving the position of an employee complaining of unjustified dismissal while awaiting resolution of his or her personal grievance. It removes the ability of an employer to immediately employ someone else in the dismissed worker's place, which in turn enables that employer to argue that reinstatement would be impracticable and unreasonable.

90 day trials

The PSA does not support the right of employers to "fire at will" employees in the first three months of employment. We are disappointed that the amendments do not extend to workplaces with less

than twenty staff. A number of members talked of their experience of being hired in a busy period and then fired within the 90 days, which they viewed as exploitative. The insecurity of the first ninety days is stressful and unnecessary. The denial of due process is unfair and has a chilling effect on people who are new to a job.

"When I was under a 90-day trial period in my previous workplace, I was afraid to speak out about dangerous practices and unfair treatment. No worker should be afraid of speaking out because their employer can fire them at will. Replacing the 90 day rule with a right to due process will make sure that workers are able to stand up for their rights without fear of unjust reprisal, while still ensuring that workers with performance issues can have their issues addressed in a constructive way. Even employers with fewer than 20 staff ought not to be allowed the leeway to capriciously fire employees – perhaps their particular concerns could be better met through government support in implementing best-practice for managing performance problems, rather than by removing protections for workers' livelihoods"

"It has been too easy for bad employers to use this to benefit themselves – it is degrading and demoralising for an employee. There are already processes in place for employers to use for employees dismissal."