SUBMISSION

By

NEW ZEALAND PAYROLL PRACTITIONERS ASSOCIATION

Submission to

Transport and Industrial Relations Select Committee

on the

Employment Standards Legislation Bill

8 October 2015

1. BACKGROUND

This submission is made by the New Zealand Payroll Practitioners Association (NZPPA).

NZPPA is made up of some 800+ individual, company, not for profit, corporate and overseas members (where ever New Zealand payroll is processed). This membership is responsible for paying approximately 425,000+ employees ranging from large companies to SME's based throughout in New Zealand.

Within our membership we have payroll practitioners that are sole-charge, or manage a payroll team, provide external payroll processing for employers, are payroll application suppliers or are developers of those payroll applications.

The focus of NZPPA is to develop and support payroll professionals. How NZPPA is doing this is through the development of skills and knowledge in the payroll profession. Part of this development is in the area of promoting compliance with legislation and encouraging payroll practitioners to question and not follow with blind faith, payroll calculations included with payroll systems currently used for paying employees in New Zealand.

NZPPA has no interest in what employees are paid we are only interested in legislation that is written in plain language and that can be easily applied to payroll and does not increase the compliance cost in running an effective payroll.

NZPPA wishes to be actively involved in both the submission process and any development of regulatory proposals that may impact on our membership, such as those that may come out of the findings of the select committee.

2. CONTACT

For further contact in relation to this submission:

David Jenkins
Chief Executive Officer
New Zealand Payroll Practitioners Association
Postal: PO Box 106-590, Auckland 1143
Physical: Level 2 & 5, 6-8 High Street, Auckland City
Phone: +64 9 480 6458
Fax: +64 9 480 6459
Mobile: +64 27 663 0620
Email: david@nzppa.co.nz
Web: www.nzppa.co.nz

Oral Submission
NZPPA would be happy if asked to present an oral presentation to the select committee on the contents of this submission.

Further Information
NZPPA is happy to provide any additional information if requested.

3. SUBMISSION

NZPPA is concerned that the current proposed bill is not defined clearly enough, with the result that it will add additional interpretations to a number of acts that are already not well understood and, in a lot of cases, are not being complied with.

3.1 Specific Comments

Amendments to the Employment Relations Act 2000

Record keeping is an essential component of the work payroll professionals do and the present act does not help in ensuring effective records are kept. It adds substantial compliance costs to the employer to keep the records required by the present acts and in producing records to the standard demanded by external parties (e.g. MBIE labour inspectors). Record keeping and the producing of records when requested, should be a seamless process which is not the case with the present legislation.

Records relating to minimum entitlement provisions

4B Employer's general obligation to keep records relating to minimum entitlements provisions

(1) An employer must keep records in sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions.

In section 4B(1) above the requirement to have records in "**sufficient detail to demonstrate that the employer has complied**" needs further description. Record keeping needs to be concisely defined and not open to interpretation as the word "**sufficient**" can have a range of meanings that may impact on record keeping for the employer, including:

- The employer's interpretation of what is "sufficient".
- What the payroll system contains and does not contain.

- Time and attendance systems and how they store time information.
- The employee's view of what the word "sufficient" means in regard to information.
- Human resources – if the employer has that present in the workplace.
- All external parties that may be involved or request information, (unions, employee representatives, labour inspectors).

What is needed is for the act to clearly list the bare minimum that is required to be kept, in what format it needs to be kept and where it needs to be held.

In regard to where it should be held, NZPPA believes that this information at present, is spread across a range of locations in the workplace and causes additional compliance costs in managing and then providing the information when requested. NZPPA believes that if the act were to define where this information is to be held and provided from, it would assist in quality records being maintained and produced when requested.

Presently records are stored and accessed in a range of locations including:

- the payroll system
- time and attendance systems or physical timesheets
- employees' personnel files and associated paperwork
- employees' employment agreements
- HR systems
- costing or finance systems.

***The larger the organisation the more the likelihood is that all of the above systems are present in the workplace.**

The management of all of these record sources can become a large compliance cost to employers. Most suppliers of systems currently used will not provide the record-keeping ability to hold the required records centrally in their system, because it is a development cost and legislation does not state it has to be held in an electronic system. For the employer to get this presently, they would have to spend a large amount of money to have their system customised.

NZPPA believes that the logical place for all records in relation to minimum entitlements should be the payroll system (if used by the employer). As long as legislation clearly states what information and in what format, a payroll system can hold this information and with the standard reporting features of payroll systems, the information can be supplied to any authorised party requesting it in a timely manner and cost effectively for the employer.

Section 130 amended (wages and time record)

NZPPA believes the additional information prescribed to be included in section 130 of the Employment Relations Act 2000 will erode the effectiveness of providing a salary to an employee.

At present section 130(g) states:

> (g) where necessary for the purpose of calculating the employee's pay, the hours between which the employee is employed on each day, and the days of the employee's employment during each pay period:

The wording in the present section can mean that only an employee's waged hours need to be recorded as that is required to calculate the employee's hours worked on a day. For salaried employees, the above section does not need to be used as the employee is paid the same each day because their rate is part of a standard salary agreed between the parties.

The proposed amended section below, changes the wording so hours worked each day must be recorded for both wage and salary paid employees as the term "where necessary" has been removed.

> (1) Replace section 130(1), insert:
>
> (g) the number of hours worked each day in a pay period and the pay for those hours:

A salary paid to an employee includes an all-inclusive rate. What it can mean is that the actual working hours are the base value paid with an additional payment included to cover extra hours worked.

For example:

Employee B works a standard 37.5 hours each week but their salary is based on 42 hours to cover any additional hours worked. This can mean that some weeks the employee may work additional hours and some weeks not, but across the year it balances out. The benefit to the employee is they get the same salary payment and for the employer, the benefit is a known fixed salary payment.

If the amended section 130(g) is implemented, what it could mean is an employee or external agency (e.g. a labour inspector) could make a claim against an employer for payments such as sick leave that use the calculation of Relevant Daily Pay where the salary payment related to a particular day is less than the hours actually worked on the day. This could mean the employer has underpaid the employee. This undermines the whole purpose of having a salary and puts additional compliance costs on the employer along with the actual cost of the day that would need to be paid. There should be a balance between what the employee has agreed and what the employee is paid. The employee cannot get the option to have the benefit of a salary and also the ability to use actual hours to claim additional hours for one day, when they have received additional hours elsewhere by having a salary applied.

Section (g) needs to acknowledge for agreed salaried positions that actual hours worked are not needed to be included in the record. If the employee is doing exceptional hours that decrease the salary rate, then the employee can approach their employer with their concerns, or a Labour Inspector or they can seek mediation.

The following section is another addition to section 130.

> (2) After section 130(1), insert:
>
> (1A) The wages and time record must be kept-
>
> (a) In written form, or
> (b) In a form or in a manner that allows the information in the record to be easily accessed and converted into written form

In this section, because it is not clearly stated that this information does not need to be included in a payroll system, a payroll supplier would not normally include this in their system. NZPPA suggests that the following additional clause be added.

- If the employer uses a computerised payroll system, the wage and time record should be fully accessed from that system and meet all of the requirements stated under (b).

Frivolous wage arrears complaint by employee

The amendment allows the employee to seek their own remedy in regard to penalties against the employer but states no minimum or maximum penalties. The act needs to have at least a minimum rate that can be claimed, and a set of criteria the employee must meet to bring this type of claim. If this is not added to the act, an employee could bring a range of frivolous claims that the employer would be forced to defend at a far greater cost to the employer, even when the claim itself is not valid.

A test needs to be created that sees an employee having to meet a threshold for this type of claim so only valid and substantive claims are progressed and, if needed, escalated to an external party.

Also NZPPA has no confidence that MBIE's Labour Inspectorate, Mediation Service or the Employment Relations Authority have the capacity to manage and assist in resolving these complaints and it will just add to the backlog, compliance costs and the delayed timeframes that are already seen with the services these institutions currently provide. There needs to be more focus on resolving this in the workplace rather than using these external parties.

Additional issues from a payroll vendor perspective

Clauses 89 and 120 look to replace wording in the wages and time record (in the Employment Relations Act) and the holiday and leave record (in the Holidays Act) to state the need to record "the number of hours worked each day in the pay period and the pay for those hours". A payroll vendor, would see little benefit or necessity for this change. Only half this information is useful – namely the number of hours worked each day. Knowing that an employee has worked on a particular day is useful to make a decision on the "otherwise be a working day" requirement needed for determining an employee's entitlement to public holidays, alternative holidays, sick and bereavement leave. The **payment** of hours on each day worked, on the other hand, does not have any value for any calculations that are needed in order to uphold minimum entitlement provisions. For example, Relevant Daily Pay calculations are based on what **should** have been paid on the day, should the employee have worked (not based on a day in the past) and Average Daily Pay calculations are based on days on which gross earnings have been earned including paid leave days – which would not be included in the above definition.

In contrast, the need to record the pay for each day in a pay period would require additional daily calculations that are not commonly performed either manually or through computerised tools. Payment calculations are typically aggregated for all hours of a payment type for the payment period – usually weekly, fortnightly or monthly. Requiring employers to record pay each day would necessitate daily calculations which are inefficient in a manual system and are not common practice for the majority of payroll vendors currently in the NZ marketplace. It can be argued that knowing what has been paid (historically) on every working day, provides no additional benefit, increases compliance costs for employers and introduces unnecessary changes and costs to the payroll software industry.

It is recommend from a payroll vendor perspective, that this clause be amended to "the number of hours worked each day in the pay period". It is believed that this information is required for an employer to fulfil their minimum entitlement provisions, and would be sufficient, along with the other records (as currently prescribed under the wages and time record and holiday and leave record) to assist a labour inspector in their investigations of any breaches of minimum entitlement provision.

Part 9A: Additional provisions relating to the enforcement of employment standards

One of the first things NZPPA saw in relation to the Employment Standards Bill was an example provided by MBIE in regard to making a senior payroll manager personally responsible for issues with the setup of the system not providing employees with their full holiday entitlements.

Strengthening enforcement of employment standards

Who will be covered by the proposal for persons other than the employer to be able to be held accountable for breaches of employment standards?

> "For example, a senior payroll manager, under direction from the company's director, who has set up the payroll system in such a way that employees do not receive their full holiday entitlements, could be caught by these provisions because they could meet the definition of an 'officer' of the company. However, a more junior payroll clerk would not be covered".

Reference: http://www.mbie.govt.nz/info-services/employment-skills/legislation-reviews/employment-standards-legislation-bill/strengthening-enforcement-of-employment-standards

NZPPA would like to state clearly that this example is excessive and clearly shows that MBIE does not understand how payroll functions within a business.

- There is no such common position as a senior payroll manager within payroll.
- Payroll is not a decision maker in regards to the terms and conditions provided to the employee. Payroll acts on what is signed off or directed by business management; it does not act without their authority.
- NZPPA has never come across a payroll professional trying to underpay an employee to save their business some money.

- Is MBIE and this amendment asking payroll practitioners to become whistleblowers or else to become personally responsible for decisions made by their business management?
- The decision maker for payroll is the manager above who is often a manager in human resources or finance, another senior manager or the small business owner.

Issues that can impact on whether the employee is incorrectly paid in payroll include:

1. The complex nature of legislation such as the Holidays Act 2003 that has too many calculations and situations that the calculations are applied to. NZPPA is dealing with issues in relation to this act every day and it is reported in the media on a regular basis.
2. The lack of support provided by MBIE in relation to legislation such as the Holidays Act 2003 where it states that employers that fail to get it right may face prosecution. There is, however, no clear advice on what the employer has to do to be compliant. An NZPPA member approached MBIE for help and felt they were being bullied throughout their involvement with MBIE.
3. MBIE has created a climate of fear with employers and payroll where they no longer feel confident in approaching MBIE for assistance.
4. The poor quality of the advice given by the MBIE call centre. NZPPA has tested the call centre by ringing with the same question three times over the course of several days, receiving three different answers.
5. The lack of a technical specification document from MBIE to support payroll. IRD provides an annual updated payroll specification document to guide payroll developers in making their systems compliant with current legislation. MBIE refuses to do this after repeated requests and has provided a substandard reference titled *Assessing your Payroll System* that simply refers to the act and does not provide any level of detail that payroll developers or payroll professionals can use to ensure their systems are compliant.
6. Issues with where the payroll system was developed as many payrolls used in NZ are developed overseas and there are real issues with the understanding the developers of these systems have with NZ legislation.

7. Issues with a payroll that is outsourced to an external company to process on the employer's behalf (locally and overseas such as in the Philippines or India).
8. The payroll practitioner is instructed to action a payment in a way that would be considered non-compliant with legislation.

Additional points in relation to point 8 above

NZPPA is often advised that a payroll practitioner (including senior and junior staff members) is told to apply a manager's instruction to payroll that they know is wrong but because a manager has authorised it, it has to be actioned.

NZPPA always advises its members that find themselves in this situation, to document fully the situation and ensure they can show they highlighted to the manager that what they were instructing payroll to do was not compliant. Realistically, this is all that a payroll practitioner can do in their workplace, as they have no actual authority.

The amendment places too much responsibility and risk on the payroll individual. MBIE's example uses a senior payroll manager but even payroll managers are often overruled by other, more senior managers.

Section 142(V) (a)(c) and (d) is too widely defined because in-house payroll practitioners are in a unique position of having to run a payroll process without making decisions on how employees are paid. In a lot of cases, the manager of payroll staff has no actual understanding of what payroll staff do and this means they get little support and are left exposed and unprotected within the company. The result of section 142(V) is that payroll staff have the potential to become the scapegoat for the shortcomings of decision makers for the wider business. This is unfair and we hope that it is not the intention of the amendment.

Section 142(V) needs to have an additional clause to state any person that has been forced, bullied or instructed to do something unlawful under the threat of disciplinary action or termination of employment would not be held liable.

Additional issues to be raised from a payroll vendor perspective

Clause 95 introduces new provisions relating to the enforcement of employment standards. While in general a payroll vendor would be supportive of the intention to improve employment standards, it is believed that the scope of persons being brought into the breach conditions is too wide. Specifically, Section 142(V) proposes that a person may be involved in a breach of employment standards where that person:

> (a) has aided, abetted, counselled, or procured the breach; or
> (b) has induced, whether by threats or promises or otherwise, the breach; or
> (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the breach; or
> (d) has conspired with others to effect the breach.

Providers of payroll services act on instructions received by employers. If, under the instruction of that employer, the payroll vendor performs actions that may be considered a breach of minimum standards, even though it may have advised against such actions, but has had this advice ignored or overruled, points (a) and (c) imply that the company providing payroll services is still involved in a breach and is, therefore, open to penalties and arrears payments.

A payroll vendor would be concerned that while a defence can be provided for under 142(ZB), this does not absolve the person from being involved in the breach and given that 142(ZC) does not cancel an employee's entitlement (which a vendor would agree should not occur), this leaves any person involved in the breach still potentially liable. Where the person in breach is unable to provide remedies, it places those that are involved in the breach, as per the proposed legislation, open to legal proceedings.

A payroll vendor would propose that point (a) be modified to remove the word procured, and point (c) be removed completely to reduce the scope of those involved in the breach. Failing this, it would encourage including additional protection against liability for those involved in the breach in sections 142(W) and 142(X) included in the amendment.

Amendment to the Wages Protection Act 1983

In regard to the amendment to the Wages Protection Act 1983, NZPPA would like to highlight one area of concern to payroll.

> **5A Unreasonable deductions**
>
> An employer must not make a deduction under section 5 from wages payable to a worker if the deduction is unreasonable.

If this new term of "**unreasonable deductions**" is to be included in the act, then there needs to be a plain language definition of what an unreasonable deduction is. If this is not included, it will create an environment where employees and employers develop their own interpretation of this term.

Payroll is at the forefront of this, as it would be the part of the business to action a deduction from the employee's ongoing wage or salary or an employee's final termination pay.

The definition should provide a range of examples so employers and employees can use it to judge if a payment is unreasonable without having to seek external assistance that would cause delays and escalate the situation to an unnecessary level (e.g. a MBIE labour inspector or mediation). If it is clearly defined, this will ensure that a workplace issue can be resolved in the workplace.

If an unreasonable deduction cannot be resolved between the parties then of course, the option open to both parties is to seek assistance from a Labour Inspector or through mediation.

This approach is common sense and the focus is about providing clear legislation that can be acted on in the workplace **BEFORE** having to use external assistance.

The Wages Protection Act 1983 needs to be balanced!

The focus of the Wages Protection Act 1983 is on the employee. There really needs to be a balance that allows an employer to deduct valid monies owed to the employer without the employee using the act to delay or stop the agreed repayment to their employer.

There are some bad employers in New Zealand and NZPPA totally agrees there needs to be a mechanism to protect employees that are faced with this type of employer; BUT, our members are focused on ensuring employees are paid correctly and on time. This also includes the employee paying back any outstanding monies owed to the employer when the employee has agreed the repayment is valid and has consented to its deduction from their wage or salary.

What NZPPA often sees is the employer has gone through a whole process to consult with an employee in regard to an overpayment or other monies owed to the employer by the employee. The employee fully agrees that they need to repay this amount back to the employer but the employee then uses the act to redraw their consent and the employer cannot then make deductions.

This is the unbalanced part of the act, as a valid agreed deduction is being stopped only by an employee using the act in a way that is not in the spirit or purpose of the act. NZPPA does not believe this was the intention.

Example:

Employee A was overpaid by $1500 over a one-month period. When this was identified by the employer, the parties agreed on a repayment plan over four months (the employer provided flexibility on the payment to be made to aid the employee). The employee fully agreed that this was a valid overpayment and they understood it needed to be repaid. This was agreed in writing and the employer started making deductions from the employee's wages.

Two months later, Employee A puts in a letter of resignation and at the same time withdrew their consent for any outstanding deductions to be made to their wages and from their final pay.

No other additional deduction was planned to be made from the employee's wage, only what had already been agreed with them.

The employer went through a fair and reasonable process with the employee and the employee agreed that the overpayment was valid but they can now use the act to stop their employer from recovering monies that they are clearly not entitled to. The employer may use civil court action or debt collection after the employee leaves to try and recover the outstanding monies owed, but these are not time or cost effective for the employer.

What NZPPA would like to see is for some balance in the act, so that it protects not only the employee but also all of the good employers that are actively trying to work in the best interests of the employee. NZPPA suggests the following wording.

> If the employee has been involved in a process that identified they owed a sum of money to their employer and they have agreed (in writing) that repayment is needed and the following criteria are met:
>
> i. no other issue has been raised in relation to the original sum identified and agreed to be repaid by the employee; and
> ii. no new monies are included in the deduction the employer wants to make.
>
> The employee cannot withdraw their consent and the employer can deduct the money owed by the employee based on the original consent provided by the employee.

If any of the criteria above are not met then the employer cannot make deductions based on the employee's removal of their consent to deduct. Again, if any issue cannot be resolved, the employee can use the services of the Labour Inspector or mediation. In this way the employee is fully protected but fairness and balance are now present for both parties.