

Employment Relations (Protection for Kiwisaver Members) Amendment Bill

Member's Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Employment Relations (Protection for Kiwisaver Members) Amendment Bill. We have recommended changes to the bill to improve its workability. We recommend these amendments unanimously. However, the majority of the committee ultimately do not agree that the bill should be passed.

Introduction

The bill seeks to amend the Employment Relations Act 2000 and the KiwiSaver Act 2006. It is a Member's bill in the name of Dr Tracey McLellan MP. For the sake of readability, references to "Kiwisaver" throughout this report include complying superannuation schemes.

Currently, under the Employment Relations Act, employers are not required to offer KiwiSaver members and non-KiwiSaver members the same terms of employment, salary or wages, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer.

The bill aims to ensure that workers cannot be discriminated against because they are members of a KiwiSaver scheme or a complying superannuation fund.

The bill's proposed amendments to the Employment Relations Act would allow employees to raise a personal grievance if their employment had been adversely affected by being a member of a KiwiSaver scheme. These amendments are similar to provisions that existed in the Employment Relations Act before late 2008. The amendments to the KiwiSaver Act would help ensure the effectiveness of the changes to the Employment Relations Act.

Background

Broadly, the KiwiSaver Act requires employers to pay the equivalent of 3 percent of an employee's gross salary into the employee's KiwiSaver scheme if the employee is a KiwiSaver member. This is called the compulsory employer contribution. However, section 101B allows employers and employees to agree that the gross salary includes the compulsory employer contribution. This is known as a total remuneration approach. In practice, this allows employers to deduct the compulsory employer contribution from the employee's salary, potentially paying a KiwiSaver member less than a comparable non-member.¹

Given that the purpose of KiwiSaver is to incentivise saving for retirement, the lower gross pay (that is, the pay left once the compulsory employer contribution is removed) associated with a total remuneration approach may disincentivise employees from enrolling in KiwiSaver. Conversely, not allowing this approach could inadvertently disadvantage non-KiwiSaver members who would prefer to invest the equivalent of a compulsory employer contribution into their own non-complying retirement plans, such as a personal investment portfolio.

Importantly, the bill would not prohibit parties from agreeing to a total remuneration approach, but it would limit the situations in which it would be possible to use the approach.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Title change to cover other superannuation funds

We recommend changing the title of the bill from "Employment Relations (Protection for Kiwisaver Members) Amendment Bill" to "Employment Relations (Protection for KiwiSaver and Other Superannuation Fund Members) Amendment Bill". This is because the provisions in the bill explicitly capture complying superannuation funds as well as KiwiSaver.

We recommend capitalising the "s" in "KiwiSaver" for consistency with the KiwiSaver Act.

¹ For example, a salaried worker earning \$100,000 per year would typically receive an additional \$3,000 compulsory employer contribution. Under a total remuneration approach, a \$100,000 salary would equate to \$97,087 plus 3 percent (\$2,913) compulsory employer contribution.

Adverse effect test for personal grievance

Clause 5 of the bill would insert new section 110C into the Employment Relations Act. This clause sets out the adverse effect test that would be used to determine whether a worker is eligible to raise a personal grievance claim. One ground for a personal grievance would be where the KiwiSaver member's salary is less than a comparable employee's because the employer has taken the compulsory employer contribution that they would be required to pay into account.

Clause 8 would amend section 101B of the KiwiSaver Act. The intent of this provision is to ensure that the personal grievance provisions in the Employment Relations Act would not be overridden by contractual terms and conditions under the KiwiSaver Act. However, we believe that the drafting in the bill as introduced was complex and unclear.

We therefore recommend amending clause 8 to clarify the interaction between these Acts when using a total remuneration approach. This would make it clear that, even though parties can agree to a total remuneration approach under the KiwiSaver Act, they cannot agree to one where the result is a member of a KiwiSaver scheme is paid less salary or wages than a comparable employee who is not a KiwiSaver member, if the difference is because the employer has taken into account the employer's compulsory contribution.

Employment agreement terms and effective dates

Clause 6 would insert a new Part into Schedule 1AA of the Employment Relations Act regarding employment agreements made before—as opposed to on or after—the date three months after the new personal grievance ground comes into force (the effective date). Existing employment agreements would not immediately be subject to the new ground but would become subject to it if they are varied after the effective date in a way that adversely affects a KiwiSaver member as described in the new ground. Therefore, many are likely to become subject to the new ground when the next adjustment to remuneration occurs.

As introduced, these transitional provisions would clearly apply to the dates of employment agreements of employees with a KiwiSaver membership. However, it is unclear whether the employment dates of a comparable employee would be taken into consideration when deciding whether an employee who is a KiwiSaver member may pursue a personal grievance. A comparable employee is a non-KiwiSaver member who is employed in the same or a similar role and has the same or similar qualifications, experience, skills as an employee who is a KiwiSaver member.

After consulting with the member in charge of the bill, we recommend replacing the transitional provision in the bill as introduced with new clause 24 to clarify that an employee who is a KiwiSaver member would be able to raise a personal grievance (if their employment agreement was entered into or varied after the effective date) regardless of the date a comparable employee entered into or amended their employment agreement if the comparable employee is receiving better employment terms because they are not a KiwiSaver member.

After consulting with the member in charge, we also recommend providing in clause 24 that a KiwiSaver member may raise a personal grievance if an employer offers better terms in a comparable employee's employment agreement after the effective date and the reason for the difference is due to them not being a KiwiSaver member. This would apply even if the KiwiSaver member's employment agreement has not been varied after the effective date. This provision is intended to mitigate a potential risk that discrimination could occur through employers giving higher salaries or wages to non-KiwiSaver members after the effective date while not varying KiwiSaver members' salaries or wages.

New Zealand National Party differing view

The National Party does not support the passage of the Employment Relations (Protection of Kiwisaver Members) Amendment Bill. While we support saving for retirement and the KiwiSaver scheme, the bill introduces uncertainty for employers by adding new grounds for personal grievances, potentially complicating existing employment relationships.

We do not believe that imposing additional hurdles for businesses under the Employment Relations Act benefits either employees or employers.

ACT New Zealand differing view

ACT does not recommend this bill be passed. We believe that this bill would negatively impact the relationship between employee and employer, as the majority of employers act responsibly when it comes to their employees' KiwiSaver membership. Flexibility should also be maintained in relation to the total remuneration approach.

The bill creates uncertainty for employers by creating a new circumstance in which a personal grievance could be made, including when they might alter existing employment relationships.

We do not believe that creating more hoops for businesses to jump through under the Employment Relations Act is productive for both employees and employers, and we believe that this bill needlessly adds more unnecessary state involvement into the private sector.

New Zealand First differing view

The New Zealand First party has reservations on the need for the legislative changes proposed in the Employment Relations (Protection for Kiwisaver Members) Amendment Bill. There was a lack of on-the-ground evidence from officials, and, in particular, evidence in submissions for the proposed changes. In our view, the proposed changes would impose additional hurdles for businesses without real benefits to employees. New Zealand First does not support the passage of this bill.

Appendix

Committee process

The Employment Relations (Protection for Kiwisaver Members) Amendment Bill was referred to the Finance and Expenditure Committee of the 53rd Parliament on 30 August 2023. The committee called for submissions on the bill with a closing date of 30 October 2023. Submissions were received from 14 interested groups and individuals.

The bill was reinstated with this committee in the 54th Parliament on 6 December 2023. We received an initial briefing on the bill on 6 March 2024, which the member in charge of the bill, Dr Tracey McLellan, attended. We heard oral evidence from two submitters by videoconference on 20 March 2024.

Advice on the bill was provided by the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Stuart Smith (Chairperson)

Jamie Arbuckle

Camilla Belich (from 20 to 27 March 2024)

Hon Barbara Edmonds

Ryan Hamilton (from 22 May 2024)

Nancy Lu (from 20 December 2023)

David MacLeod (until 22 May 2024)

Hon Grant Robertson (until 20 March 2024)

Hon Dr Deborah Russell

Hon Scott Simpson (until 20 December 2023)

Todd Stephenson

Chlöe Swarbrick

Rawiri Waititi

Catherine Wedd

Hon Dr Megan Woods (from 27 March 2024)

Dr Tracey McLellan attended committee meetings as the member in charge of the bill.

Related resources

The documents received as advice and evidence are available on the Parliament website.

**Employment Relations (Protection for Kiwisaver
Members) Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Dr Tracey McLellan

Employment Relations (Protection for Kiwisaver Members) Amendment Bill

Member's Bill

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	New-Part 4 Part 7 inserted into Schedule 1AA of Employment Relations Act 2000	

The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Employment Relations (Protection for ~~Kiwisaver~~ KiwiSaver and Other Superannuation Fund Members) Amendment Act **2021**.

2 Commencement

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This Act comes into force on the day after ~~the date on which this Act receives~~ the Royal assent.

Part 1**Amendments to Employment Relations Act 2000****3 Principal Act**

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This Part amends the Employment Relations Act 2000.

4 Section 103 amended (Personal grievance)

After section 103(1)(i), insert:

- (ia) ~~that the employee's employment has been adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund (as those terms are defined in section 4 of the KiwiSaver Act 2006); or~~ 15

After section 103(1)(k), insert:

- (l) that the employee's employment has been adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund. 20

5 New section ~~110AA~~ 110C inserted (Adverse ~~affect~~ effect test for membership of KiwiSaver scheme or complying superannuation fund)

After section ~~110~~ 110B, insert:

~~110AA~~110C Adverse ~~affect~~ effect test for membership of KiwiSaver scheme or complying superannuation fund

25

- (1) For the purposes of ~~section 103(1)(ia)~~ **section 103(1)(l)**, an employee's employment is ~~adversely affected~~ **adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund** if— 30

- (a) ~~the employee is a member of a KiwiSaver scheme or a complying superannuation fund; and~~
- (b) the employee's employer refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are 35

- made available for other employees of the same or substantially similar qualifications, experience, or skills (**comparable employees**) employed in the same or substantially similar circumstances; and
- (c) the reason (wholly or in part) for the employer doing any of those things is that the employee is a member of a KiwiSaver scheme or a complying superannuation fund. 5
- (2) Without limiting **subsection (1)**, an employee’s employment is adversely affected as described in that subsection if—
- (a) the employee’s salary or wages are less than the salary or wages of other comparable employees employed by the employee’s employer; and 10
- (b) the reason (wholly or in part) for the situation described in **paragraph (a)** is that the employer has taken into account the compulsory contributions the employer is required to make in relation to the employee.
- (3) To avoid doubt, for the purposes of **subsection (2)(a)**, an employee’s salary or wages— 15
- (a) do not include any amount that recognises (wholly or in part) compulsory contributions made by the employer in relation to the employee; but
- (b) do include deductions made by an employer on behalf of the employee, being the employee’s contributions to a KiwiSaver scheme or a complying superannuation fund. 20
- (4) In this section,—
- complying superannuation fund** has the meaning given in section 6(1) of the Financial Markets Conduct Act 2013
- compulsory contributions** has the meaning given in section 101B(6) of the KiwiSaver Act 2006 25
- ~~**complying superannuation fund** has the meaning given in section 4 of the KiwiSaver Act 2006~~
- ~~**KiwiSaver scheme** has the meaning given in section 4 of the KiwiSaver Act 2006~~ section 6(1) of the Financial Markets Conduct Act 2013.
- 6 **Schedule 1AA amended** 30
- In Schedule 1AA,—
- (a) insert the Part set out in the **Schedule** of this Act as the last Part; and
- (b) make all necessary consequential amendments.

Part 2

Amendments to KiwiSaver Act 2006 35

7 **Principal Act**

This Part amends the KiwiSaver Act 2006.

8 Section 101B amended (Compulsory contributions must be paid on top of gross salary or wages except to extent that parties otherwise agree after 13 December 2007)

- (1) In section 101B(5)(a), replace “matters.” with “matters; and”.
- (2) After section 101B(5)(a), insert: 5
- (b) ~~sections 103(1)(ia) and 110AA~~ of the Employment Relations Act 2000 apply in relation to the contractual terms and conditions of the parties to an employment relationship, subject to **Part 4** of Schedule 1AA of that Act.
- (b) subsection (4) does not entitle parties to an employment relationship to agree contractual terms and conditions under which, due (wholly or in part) to an employer taking into account the compulsory contributions that the employer is required to make in relation to an employee, the employee’s salary or wages are less than the salary or wages of comparable employees, as described in **section 110C** of the Employment Relations Act 2000. 10 15

Schedule
**New ~~Part 4~~ Part 7 inserted into Schedule 1AA of Employment
Relations Act 2000**

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	Part 4	5
	Provisions relating to Employment Relations (Protection for Kiwisaver Members) Amendment Act 2021	
17	Interpretation	
	In this Part,—	
	2021 Act means the Employment Relations (Protection for Kiwisaver Mem- bers) Amendment Act 2021	10
	effective date means the date that is 3 months after the date on which the 2021 Act commences.	
18	Application of provisions arising from 2021 Act	
(1)	The amendments made by sections 4 and 5 of the 2021 Act, to the extent that they relate to terms and conditions in employment agreements,—	15
	(a) apply to employment agreements entered into on or after the effective date; and	
	(b) do not apply to employment agreements entered into before the effective date; and	20
	(e) apply to variations of employment agreements entered into before the effective date, if the variations were made on or after the effective date.	
(2)	The amendments made by sections 4 and 5 of the 2021 Act, to the extent that they relate to other matters, apply—	
	(a) only to matters occurring on or after the effective date; and	25
	(b) whether or not an employee's employment agreement was entered into before the critical date.	
	Part 7	
	Provisions relating to Employment Relations (Protection for KiwiSaver and Other Superannuation Fund Members) Amendment Act 2021	30
23	Interpretation	
	<u>In this Part,—</u>	

	2021 amendment Act means the Employment Relations (Protection for Kiwi-Saver and Other Superannuation Fund Members) Amendment Act 2021	
	aggrieved employee means an employee whose employment may have been adversely affected because the employee is a member of a KiwiSaver scheme or a complying superannuation fund, as described in section 110C	5
	comparable employee has the meaning given in section 110C	
	effective date means the date that is 3 months after the date on which the 2021 amendment Act comes into force.	
24	Application of sections 103(1)(l) and 110C	
(1)	The amendments made by sections 4 and 5 of the 2021 amendment Act apply to a refusal or omission relating to the terms and conditions of an aggrieved employee's employment agreement (the agreement) only if—	10
	(a) the agreement, or a comparable employee's employment agreement, was entered into on or after the effective date; or	
	(b) the aggrieved employee's claim of adverse effect arises (wholly or in part) from, or otherwise relates directly or indirectly to, a variation of the agreement, or of a comparable employee's employment agreement, made on or after the effective date.	15
(2)	The amendments made by sections 4 and 5 of the 2021 amendment Act apply to any other refusal or omission only if the refusal or omission occurred on or after the effective date.	20

Legislative history

8 June 2023
30 August 2023

Introduction (Bill 260–1)
First reading and referral to Finance and Expenditure Committee