Minimum Wage (Contractor Remuneration) Amendment Bill

31—1

Report of the Transport and Industrial Relations Committee

Contents

Recommendation 2

Introduction 2

Background 2

Main points favouring a minimum wage for contractors 2

Main points opposing a minimum wage for contractors 3

Reasons for the majority recommending that the bill not proceed 4

New Zealand Labour Party minority view 7

New Zealand First Party minority view 9

Appendix 10

Minimum Wage (Contractor Remuneration) Amendment Bill

Recommendation

The Transport and Industrial Relations Committee has examined the Minimum Wage (Contractor Remuneration) Amendment Bill and recommends by majority that it not be passed.

Introduction

The Minimum Wage (Contractor Remuneration) Amendment Bill, a member's bill in the name of Hon David Parker, seeks to amend the Minimum Wage Act 1983. The proposed amendments would extend the provisions of the Minimum Wage Act to apply to payments under a contract for service, where the service being provided is one that is specified in the bill.

Background

The overall purpose of the bill is to amend the principal Act to require that people working under certain contracts for services would not be paid less than the minimum wage. Schedule 2 of the bill lists the services that would be covered by this requirement.

The bill proposes several amendments to various parts of the Minimum Wage Act to align the Act with the overall purpose of the bill.

We received several submissions in support of, and against, a minimum wage for contractors. We discuss these below.

Main points favouring a minimum wage for contractors

Contracting is becoming more common

Submitters suggested that an increasing number of people seem to be employed as contractors rather than employees. Some submitters told us that firms can circumvent current legislation designed to prevent employees from being improperly categorised as contractors. Because there are limited legal protections for contractors (as opposed to employees), contractors then become vulnerable.

The bill would not change a person's employment status from contractor to employee. It would simply ensure that a contractor was not paid less than the minimum wage.

Some submitters considered that contracting arrangements are becoming increasingly common so businesses can reduce costs and avoid the duties and obligations that attach to employees, such as holiday pay, sick pay, and employer Accident Compensation Corporation (ACC) levies. There is an opinion that employees used to provide many of the services listed under Schedule 2 of the bill. We were told that many of those affected by this change do not understand the distinction, generally are not in any union, and do not have the resources to challenge this status.

Low rates of pay

We heard that some of those working under a contract for service are paid very low hourly rates, if their overall remuneration is broken down to an hourly rate. Some contractors working in industries such as freight and courier companies have overheads such as fuel and vehicle costs. After these overheads are taken into account a pre-tax wage can be about $7 per hour. We were advised that some people delivering pamphlets may receive between $1.67 and $6.25 per hour. Submitters suggested that this bill would allow those people to receive remuneration not less than the minimum wage.

Many of those working in lower paid contracting industries are over-represented in New Zealand's low-income statistics. Those over-represented include women, Māori, Pacific Island people, and disabled people. Submitters thought that introducing minimum remuneration requirements for these services may address some of these disparities.

Consistency with international obligations and trends

Some other jurisdictions (such as Canada, New South Wales, and the United Kingdom) have extended some employment protections to contractors in certain circumstances. For example in the United Kingdom all "workers" (a category that includes, but is not limited to, employees) have a variety of employment rights. Canada confers employment-like protections to dependent contractors. Submitters suggested that New Zealand may want to draw from these examples.

New Zealand is a signatory to several international conventions. Submitters suggested that agreeing to this bill would enable New Zealand to meet its obligations under these conventions. For example, Article 4(b) of the International Labour Organisation's Recommendation 198 on the Employment Relationship recommends that states ensure that their national policies include measures to "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status".

Main points opposing a minimum wage for contractors

We discuss some of the submissions we received in opposition to the bill below.

Change is not necessary

Some submitters considered that the current legislation is enough. They maintain that there is already legal protection in the Employment Relations Act 2000 to prevent the misuse of contractor status. The courts can deal with suggestions of exploitation.

The bill would have a negative effect in the workplace

Submitters raised concerns about the effect of the bill on several different sectors, including the farming sector and the printing and distribution sector. The main concerns are summarised below.

Representatives of the printing and distribution sector told us that competition from digital media is already affecting their industry. Imposing minimum remuneration requirements would put additional pressure on those who employ contractors to deliver newspapers and pamphlets. Such a change would also increase costs. A reduction in print volume would affect the wider printing industry, including courier companies, advertising agencies, and rural delivery contractors. A reduction in workforce opportunities would affect the entire community, including the elderly and disabled for whom pamphlet delivery represents a valuable source of income, exercise, and general community participation.

We were told that the proposed bill may affect the farming sector. Farmers may not be able to engage contractors on a "fee for service" basis for building, forestry, and freight services. Farmers may have no real idea of the hours involved in forestry work because quotes are usually given in a different way.

We were told that independent contractors and productivity-based remuneration have been the norm in courier services for more than 50 years. The suggested changes would cause large scale disruption to the way this service operates.

Clouding the distinction between employees and contractors

Some submitters suggested that the bill clouds the distinction between employees and contractors. Submitters said that independent contractors do not require protection and are not vulnerable. In contractor relationships the principal's focus is on the delivery of the service and the total cost involved. The principal may have no interest in the hours a contractor works and may not want to control those hours in any way.

Some submitters suggested that the proposed bill is inconsistent with the International Labour Organisation's Recommendation on the Employment Relationship 2006, which recognises the legitimacy of self-employment. This recommendation states that national policy should not interfere with true commercial and civil relationships.

Unnecessary complexity

We were told that the proposed bill would, in some circumstances, be complex and unworkable. For example, it would be complex to determine, in advance, a reasonable delivery time for a given quantity of pamphlets. There may be gaming or manipulation by contractors. Delays in performance would result in inevitable minimum remuneration claims.

We were told that it would be highly complex to convert the current courier industry model to a time-based system. Currently, multiple contractors are involved in the delivery system, but the customer is simply charged a single fee. There will be likely cost increases if a time-based approach is adopted.

Some submitters said that there would be compliance costs for firms to comply with record-keeping requirements. This investment may be beyond the reach of small businesses and individuals who engage contractors from time to time.

Some submitters said that enforcing the bill's requirements would require increased regulatory capacity. If resources were not put in place the proposed approach to minimum remuneration would be largely ignored. The Labour Inspectorate would need to upskill to regulate contractor/principal relationships.

Some submitters said that the bill would amount to an unjustified interference in the freedom to contract and, as such, would undermine the integrity of contracts.

Reasons for the majority recommending that the bill not proceed

We have been unable to ascertain how widespread the problem is, and do not support the essential proposition of the bill to change New Zealand's existing contracting law to remedy such a problem. We believe there are existing provisions within the Employment Relations Act to address the problem that the bill seeks to remedy.

The problem the bill seeks to remedy is workers placed in "employee" like situations as contractors, but without the benefit of employee protections, such as minimum wage entitlements, ACC employer levies, holiday pay, and annual leave. The bill suggests that these contractors receive less than the minimum wage, or that after costs of business are taken out, they receive substantially less than the minimum wage.

The remedy proposed in the bill is to require principals engaging contractors (providing Schedule 2 services) to record the time a contractor takes to undertake the work and the remuneration paid, then to maintain such records for not less than six years as evidence that they have been paid the minimum wage or above.

This confuses the nature of contract work where a principal engages a contractor for a set rate for a set outcome (often referenced to as quotes); or pays a set rate for a set volume of product made or handled.

The majority of us believe that the administrative compliance costs would be substantial in overlaying a time recording and remuneration component on top of the traditional form and practice of a contract. This would negatively impact firms who operate effectively and efficiently within their current contracting practice. Increased compliance costs may affect the profitability of a business, which in turn could affect remuneration levels paid to contractors.

Added to that, ensuring a contractor's remuneration is no less than the minimum wage does not meet the bill's intended outcomes, as a contractor still has ACC levies, sick pay, and holiday pay deductions to be made; after which the balance a contractor may receive could still be less than the minimum wage.

The majority of us believe that there are existing provisions within the Employment Relations Act to address the problem that the bill seeks to remedy.

Employees who are incorrectly classified as contractors are unlikely to be receiving their minimum entitlements such as payment for public holidays, sick leave, or annual leave. Therefore, where a Labour Inspector has reasonable cause to believe that an employee has been incorrectly classed as a contractor (and so is in reality an employee), the powers provided in section 229 of the Employment Relations Act can be applied by Inspectors.

Section 6 (5) of the Employment Relations Act ("Meaning of employee") also allows for a Labour Inspector (or other parties) to apply directly to the Employment Court to seek a declaratory ruling on an individual's employment status.

Where Labour Inspectors have information to suggest "sham" contracts are being used in workplaces to class employees as contractors, resulting in serious breaches of employment standards, this is something that is also investigated by Inspectors. If an investigation establishes that there has, in the Labour Inspectorate's view, been a breach of employment standards, payment arrears and/or penalties can then be pursued through the employment institutions.

While most employers are law-abiding we are seeing growing evidence of serious and systemic breaches of employment standards, such as the exploitation of migrants and other vulnerable groups.

This is unfair on employees who work hard to support their families, and damages the reputation of industry sectors here and offshore. It also means employers who are playing by the rules are undercut by employers who are breaching employment law.

Budget 2015 increased funding to employment relations services by $32 million over four years, to increase the number of Labour Inspectors and strengthen education and information services to help manage and address breaches of employment law.

This funding will support the recent package of measures to strengthen enforcement of minimum employment standards, including tougher sanctions.

This funding equates to an additional $8 million per year, which will be broken down as follows

- $4.3 million per year to maintain the system and ensure that services meet growing demand
- $1.7 million per year to fund more Labour Inspectors for Auckland, increasing the number from 9 to 15
- $2 million per year for information and education services and campaigns.

This funding complements and provides the extra resources needed to support the new measures to strengthen enforcement of minimum employment standards set out in the Employment Relations Amendment Act 2016[1], including tougher sanctions.

For the most serious breaches, such as exploitation, cases will now be heard in the Employment Court and carry maximum penalties of $50,000 for an individual and the greater of $100,000 or three times the financial gain for a company. Previously the maximum fine was $10,000 for an individual and $20,000 for a company.

Employers will be publicly named if the Employment Relations Authority or Employment Court finds they have breached minimum standards.

Individuals also face the possibility of being banned as managers if they commit serious or persistent breaches of employment standards, or are convicted of exploitation of migrant workers under the Immigration Act 2009.

Persons other than the employer, such as directors, senior managers, legal advisors, and other corporate entities, will now also be held accountable for breaches of employment standards if they are knowingly and intentionally involved when an employer breaks the law. These cases can be pursued even if the employer ceases to exist.

The extra funding ($8 million a year) will strengthen compliance with minimum employment standards and ensure levels of service keep pace with demand. The Government is committed to protecting the integrity of our labour market, and ensuring fair and productive workplaces.

Because of these provisions and increased resources for their enforcement, the majority do not support the bill proceeding. The majority of us believe that continual investigations and

[1] The Employment Relations Amendment Act 2016 is one of several amendment Acts created by the passage of the Employment Standards Legislation Bill. These Acts received Royal assent on 17 March 2016. The Acts are:

- Employment Relations Amendment Act 2016
- Holidays Amendment Act 2016
- Minimum Wage Amendment Act 2016
- Wages Protection Amendment Act 2016
- Parental Leave and Employment Protection Amendment Act 2016.

enforcement of these provisions are absolutely essential to ensuring fairness in the workplace and for the best solution to the problem the bill seeks to remedy.

New Zealand Labour Party minority view

It is currently legal in New Zealand for adult New Zealanders engaged as contractors to be paid at a rate which is less than the minimum wage. The New Zealand Labour Party believes it should not be.

As the committee's report describes above, there are two ways used overseas to address this problem:

- legislate protections for a subset of contractors called dependant contractors, including as to minimum remuneration
- legislate to apply minimum remuneration to contracted workers, not just employees.

The bill adopts the second approach, limited to the occupations listed in the schedule to the bill.

The committee requested amendments from the Parliamentary Counsel Office to deal with a number of issues raised by submitters, including:

- excluding contractors who get remuneration from more than one source at the same time (eg rural delivery contractors delivering mail for New Zealand Post and parcels for a variety of principals)
- making it clear that the obligation to keep a record of hours does not apply if there is a reasonable belief that the effective hourly rate will be above the minimum.

The bill would reduce the incentive to use disguised employment relationships. We accept that some (but not all) of those currently engaged as contractors would properly be classified as employees if they pursued the issue. Enforcement is patchy. Those taken advantage of as low paid contractors are not powerful, are not unionised, and sometimes have no effective recourse.

The New Zealand Labour Party believes the bill should proceed with the following amendments. We discuss major, but not minor amendments.

Interpretation: clarifying who the bill would apply to

Clause 6 would insert new definitions in section 2 of the principal Act. We would recommend some amendments to make the definitions clearer.

We would recommend amending the term "specified person" to "specified contractor" throughout the bill. We believe this would make it clearer who the bill applies to and would help the public in understanding this legislation.

The bill is intended to apply to companies only where the company consists of a single person as a shareholder and director who personally provides the specified service. For clarity, we would recommend amending the definition to specify that the bill would apply only where such a person provides the service exclusively—that is, not simply in a managerial capacity alongside employees. We believe this intention was not fully clear in the bill as introduced.

Changes to numbering and titles for clarity

We note that the numbering in the bill is not consistent with changes recently made to the principal Act. We would recommend changing the numbering to align with the principal Act.

The titles of some new sections proposed by the bill are also not clear. We would recommend some changes to avoid ambiguity.

Guidance on actual rate of remuneration not necessary

Clause 7 proposes to insert a new section 4B, containing guidance for the courts to use in establishing the actual rate at which a contractor has been paid.

We did not consider it necessary to give this level of guidance and would recommend that new section 4B be deleted.

Relationship with the minimum adult wage rate

In the bill as introduced, there is no mechanism for ensuring that a minimum rate of remuneration for contractors is consistent with the adult minimum wage. This was not the intention.

For clarity, it would be desirable to make an explicit link to the adult minimum wage set under the primary legislation. We would recommend amending clause 7 (new section 4C(2)) to make it explicit that, if a minimum rate of remuneration is set, it must not be less than the minimum adult wage rate.

We would also recommend technical changes to section 5 to ensure that a minimum rate of remuneration (if such a rate is set) be reviewed annually.

Contractors working for more than one principal at the same time

We would recommend an amendment to new section 6A in clause 10 to provide that contractors working for more than one principal at the same time (such as a truck driver delivering goods for more than one principal at the same time) would not be entitled to receive the minimum rate of remuneration from each principal.

Retention of remuneration records

As introduced, the requirements in the bill for keeping remuneration records were ambiguous. It was unclear whether the record must be retrospective and exact, or it might be made in advance and be approximate in some situations.

We would recommend clarifying the requirement to keep a record of hours worked in clause 11 (inserting new section 7A(2A–2B)). The amendments we considered are modelled on the new simplified record-keeping requirements in the Employment Relations Act (as amended by the Employment Relations Amendment Act 2016).

We would recommend an amendment to new section 7A to provide that a principal is not required to comply with the obligation to keep remuneration and time records if the principal and the contractor agree in advance to calculate the rate of remuneration in another way. The principal must reasonably believe that the remuneration will remunerate the contractor at a higher rate than the prescribed minimum rate of remuneration.

Penalties

We would recommend amending clause 12, which addresses penalties under this bill. The proposed amendment would clarify that the relevant section in the principal Act solely addresses penalties (as opposed to recovery of remuneration). Recovery of remuneration is dealt with separately, in proposed section 11AB (clause 13 of the bill).

Recovery of minimum remuneration

Clause 13 of the bill would insert new section 11AB, allowing for specified contractors to recover "minimum remuneration" through the employment institutions (in the same manner as employees recovering wages).

There is no explicit provision for those defined as a "specified person" or as a "principal" to appoint someone to represent them. We would recommend an amendment to explicitly allow people to choose someone to represent them in any legal action under the amendments in this bill.

Schedule 2

In clause 14, we would recommend amending Schedule 2, sub-clause (g). The purpose of this proposed change is to clarify that "personal home-care support to an individual" is covered by minimum remuneration requirements only when the principal is not, themselves, the person receiving the home care support. This is consistent with the definition of "principal" in clause 6 of the bill, which effectively excludes services purchased by the principal for their own "household use or consumption" from the minimum remuneration requirements.

We disagree that the obligations created by the bill, including to keep records, are too onerous.

New Zealand First Party minority view

New Zealand First supports the Minimum Wage (Contractors Remuneration) Amendment Bill as it gives protection to contractors who are engaged to fulfil either an hourly rate or piece rate contract and are not paid at least the minimum wage. Some contractors find themselves taking a contract that pays less than the minimum wage and do not qualify for holiday pay, sick pay, and/or bereavement leave.

It will also ensure that contractors engaged to perform a piece or delivery rate contract may not recover any minimum remuneration that relates to the actual time taken to provide the service that exceeds the reasonable amount of time agreed by the contractor and the principal. This will enable elderly people or people with a disability to work competitively in such industries as pamphlet deliveries.

The principal must keep a remuneration record of the contractor, details of the work performed, payments made, and other relevant information for a period of six years. A specified person or Labour Inspector may request that a principal provide access to information in the remuneration record relating to a specified person, to ensure that at least the minimum wage has been paid to the contractor. This provision is in line with the responsibility of an employer to an employee and should not be seen as an obstacle to this bill.

Appendix

Committee process

The Minimum Wage (Contactor Remuneration) Amendment Bill was referred to the committee on 12 August 2015. The closing date for submissions was 24 September 2015. We received and considered 32 submissions from interested groups and individuals. We heard oral evidence from 11 submitters in Wellington and two in Auckland.

We received advice from the Ministry of Business, Innovation and Employment.

Committee membership

Jonathan Young (Chairperson)
Andrew Bayly
Iain Lees-Galloway
Peeni Henare
Clayton Mitchell
Sue Moroney
Dr Parmjeet Parmar
Denise Roche
Alastair Scott
Hon Maurice Williamson
Dr Jian Yang

Hon David Parker replaced Iain Lees-Galloway for this item of business.