



August 2008

# Employment Update

## Loophole or legitimate remuneration strategy?

You may have seen in the media recently that the Government plans to “close a loophole” in the KiwiSaver scheme, namely involving the practice of including KiwiSaver employer contributions in an employee’s total remuneration. Many employers legitimately use a total remuneration approach to their employee’s salary, benefits and superannuation contributions.

So far, all that has been announced is that the Employment Relations Act 2000 (ERA) will be amended to make it unlawful to offer lesser terms and conditions to a KiwiSaver employee on the basis of their KiwiSaver membership. Under the proposal, it is suggested that doing so will give rise to a personal grievance. The example has been given of an employer giving a non-KiwiSaver member a 4% pay rise, while giving a KiwiSaver member a 3% pay rise (on the basis that the additional 1% is being paid into the KiwiSaver member’s scheme as the employer contribution). The Minister of Labour, Trevor Mallard, has said that the Government does not expect to see differences in take-home pay, or in the treatment of KiwiSaver members and non-KiwiSaver members.

The proposed amendment to the ERA is an about-face by the Government in respect of its policy relating to total remuneration and KiwiSaver. As recently as April 2008 the KiwiSaver Act was amended to clarify that compulsory employer contributions must be paid on top of gross salary or wages, except to the extent that parties otherwise agree after 13 December 2007. In other words, the Government changed the law to state that parties are free to negotiate total remuneration agreements.

The law change is planned to take effect from the date the amendments are introduced into Parliament, which Mr Mallard has been reported as saying will be late July or early August. It has also been reported that the law change would not affect employment agreements with total remuneration clauses already entered into before the amendments are introduced. The proposed amendments to the ERA will also not alter employer eligibility for employers’ tax credits.

Currently, section 101B of the KiwiSaver Act provides that a total remuneration approach is lawful if negotiated in good faith with the employee after 13 December 2007. It is unclear whether the Government plans to amend this part of the KiwiSaver Act to be in line with the proposed changes to the ERA. It is also unclear how the proposed amendments will impact on a situation where a KiwiSaver member receives more than a non-KiwiSaver member. At present, such differential treatment may be capable of being justified by the employer on

grounds that it has a statutory obligation to pay the employer contribution on top of the KiwiSaver employee's salary (unless otherwise agreed in accordance with section 101B of the Act).

However, we will have to wait and see whether the bill, once drafted and read in Parliament, will make it through to law before the forthcoming general election.

## National Party releases some policy

Meanwhile, the National Party is yet to release its policy on KiwiSaver. National Party leader John Key has indicated that compulsory employer contributions will most likely remain, and although there will be some changes they are unlikely to be considered "radical".

The National Party has however released its Employment and Workplace Relations policy. Contained to one page, this sets out areas of policy which National aims to introduce or change a 90 day trial period, unions and collective bargaining, dispute resolution, annual leave and holidays legislation.

The highlights of the policy are:

1. Introducing a 90 day trial period for new employees in small businesses with fewer than 20 staff, which would prohibit any unjustified dismissal claim by an employee of such a business who is dismissed in the 90 day period. Good faith provisions of the ERA would still apply during the 90 days, as would sick leave, holiday provisions, and health and safety law.
2. Allowing collective bargaining with groups of employees not connected to a union.
3. Requiring the Employment Relations Authority to act "judicially in accordance with principles of national justice" such as allowing cross examination before an impartial referee.
4. Allowing injunctions on important points of law to be heard in the Employment Court in the first instance.
5. Allowing employees to "cash up" their fourth week of annual leave.
6. Appointing a working party to review the Holidays Act, including "the issue of relevant daily pay".

The Employment Team at Minter Ellison Rudd Watts is keeping a close eye on these policy developments from both the National and Labour parties, and will provide further information in due course.

## Contacts

If you have any questions regarding this update and how it will impact on your organisation, please do not hesitate to contact us for assistance.

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