NZCTU
Te Kauae Kaimahi

Submission to the JUSTICE SELECT COMMITTEE on the:

Employment Relations (Pay Deductions for Partial Strikes) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

30 January 2025

Table of Contents

1. Introduction

1.1. This submission is made on behalf of the unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi (Te Tiriti) as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. The NZCTU strongly opposes the Employment Relations (Pay Deductions for Partial Strikes) Amendment Bill (the Bill).

1.4. It is a clumsily drafted and punitive piece of legislation aimed at taking industrial power away from working people, undermining the right to strike and entrenching the inherent imbalance of power between workers and their employers.

1.5. If enacted as law, this Bill will give rise to injustice and confusion. It will further distance New Zealand from its commitments under international law and will contribute to an unstable industrial landscape.

2. Balancing Industrial Power

2.1. In industrial relations, workers are subject to an inherent and structural imbalance of power.[1] This fact is explicitly recognised in our industrial law.

2.2. This imbalance permeates all levels of the employment relationship and places working people in a subordinate relationship to employers.[2]

2.3. In this context, the "right to strike" has long been recognised as an indispensable tool for redressing that imbalance of power. The right to strike is a fundamentally collective one[3]

[1] Employment Relations Act 2000, s 3 (a)(ii).

[2] *Turner v Te Whatu Ora- Health New Zealand* [2023] NZEmpC 158-

An employee's common law duty to act in fidelity to their employer is a serious restriction on the right to freedom of expression. Speaking critically of an employer in a private capacity can justify dismissal.

and reflects the fact that workers can band together to amplify their power in situations where they would be relatively weak as individual actors.

2.4. The right to strike is inseparably linked to the right of workers to associate with their unions and participate in collective activity for the purpose of protecting and securing their interests. Indeed, the fundamental right to 'freedom of association' that is enshrined in our Bill of Rights Act 1990 is inextricably linked to the rights of workers to associate with each other through their unions.

2.5. The understanding that collective action through unionism is essential to addressing the imbalance of power is coded into framework of the primary industrial relations statute, the Employment Relations Act 2000 (the Act), which has as one of its statutory purposes the "promoting [of] collective bargaining"[4].

2.6. The right to strike is not unfettered and is subject to several restrictions. For example, the Act, restricts the grounds for a lawful strike to matters relating to collective bargaining, or the health and safety.

2.7. Even if the purpose of a strike is lawful, there are several statutory hurdles that must be overcome before workers can legally stake strike action.

2.8. There is a requirement for a secret ballot[5] to be held where a proposed strike relates to collective bargaining, as well as a general requirement to issue an employer with notice of strike action before the strike takes place[6]. Where a strike relates to health and safety there must be a reasonably held belief that a strike is justified on health and safety grounds[7].

2.9. The Act also extensively outlines situations where a strike may be unlawful[8] and effectively prohibits general and sympathy strike action.

---

[3] Simon Schofield "New Zealand Employment Law Guide" (CCH New ZealandLimited, Auckland, 2024) at 320:

The motive must involve **concerted action**, which means there must be a collective decision or action. One person cannot strike. However, one employee of each of several different employers covered by the same collective agreement, or one employee in each of several different workplaces of the same employer, can take action that falls within the definition of strike- so long as they

[4] Employment Relations Act, s 3(a)(iii)
[5] Ibid, s 82A
[6] Ibid, s 82A
[7] Ibid, s 86A
[8] Ibid, s 86

2.10. All these restrictions mean that the existing right to strike is narrowly construed and subject to limitations that greatly mollify the effectiveness and frequency of such action.

2.11. Notwithstanding these serious limitations, the law recognises that at its core, the ability of workers to take strike action is a basic safeguard of workers' rights:

> *The rights to strike and lockout, so long as they meet the requirements of the statutory provisions, are well enshrined in employment law and protected by the provisions of the Act. The rights to strike and lock out are part of ensuring a balance to the relative negotiating positions of the parties in industrial bargaining.* ***Any step to reduce their effectiveness is not to be taken unless there are sound principled reasons for doing so***[9]

2.12. Unfortunately, this Amendment Bill is not premised on "sound and principled reasons."

2.13. Instead, it aims to undermine a right that is a well-established cornerstone of industrial relations.

3. Punitive and unbalanced

3.1. The Act already allows employers to, at their discretion, completely suspend an employee who engages in industrial action that is short of a complete withdrawal of labour[10].

3.2. The existence of this power to suspend is already harsh and one-sided, especially since employees have no means of similarly undermining an employer who engages in a lawful lockout.

3.3. This Bill does not remove the right of employers to suspend employees who engage in industrial action. Instead, it adds a further discretion whereby an employer may require the worker to continue working, but on reduced pay.

3.4. This ability to deduct from an employee's wages is designed to render industrial action ineffective by shielding employers from the financial consequences of industrial action.

3.5. The entire point of industrial action is to impact upon the employer's business. It is the principle means by which workers can gain leverage over employers in collective

[9] Secretary for Justice, for and on behalf of the Ministry of Justice v New Zealand Public Service Association [2018] NZEMPC 129 AT [24].
[10] Employment Relations Act, s 87.

bargaining and without this tool, workers will be considerably hampered in their ability to negotiate the terms and conditions of their employment.

3.6. By adding to an already harsh system that allows employers to suspend an employee who engages in lawful industrial action, this Government seeks to sap workers from being able to exercise meaningful industrial power.

3.7. This will not lead to harmonious and equitable industrial relationships but will entrench inequality and establish a culture of resentment.

3.8. The ability to reduce a worker's pay for taking certain types of lawful industrial action, coupled with the discretion to suspend these workers, permits employers to take a punitive approach towards workers who take industrial action.

3.9. It allows employers to counter collective action by isolating and individualising the consequences of industrial action, thus weakening the ability workers to take such collective action.

3.10. Allowing employers to punish individual workers for exercising an important industrial right is not principled policy. It reveals a deep-rooted bias on the part of this Government against the collective interests of working people.

3.11. If the Government desires a stable legal framework within which industrial disputes can be resolved, it should ensure that interests of workers and employers are balanced.

3.12. This Bill will not deliver stability, if enacted it will undermine well established workers' rights and deepen already existing industrial inequalities.

4. Confusing

4.1. This Bill is not grounded in a thorough analysis of existing industrial relations. It is (for the most part) a simple copy of an amendment that had been inserted into the Act in 2014 and repealed in 2018. [11]

4.2. In taking this "cut-and-paste" approach to amending the Act, the Government has produced a Bill that is not relevant to the modern industrial context.

[11] Employment Relations Act, *s 95A: repealed, on 12 December 2018, by section 29 of the Employment Relations Amendment Act 2018 (2018 No 53).*

4.3. This lack of genuine analysis is illustrated by the clumsy drafting of proposed s 95A (c) & (d).

4.4. The two provisions are almost identical with the exception that (c) refers to partial strikes that "*only*" involve a refusal to work overtime or a refusal to perform call-out work that would otherwise entitle the worker to a special payment, while (d) refers to "*any period*" where same kind of industrial action is taken.

4.5. The functional difference between these two provisions is not clear and is not explained in any of the explanatory material that introduces the text of the Bill.

4.6. This provision is confusingly worded. However, it is an extremely important part of the Bill's machinery as it outlines circumstances where it is *not* lawful for an employer to make deductions for partial strike.

4.7. The lack of clarity in this part of the Bill will give rise to confusion on the part of both workers and employers and will likely lead to unhelpful litigation to clarify the meaning of the provision.

4.8. As it largely copies a provision that had been introduced in 2014 (and subsequently repealed), this Bill is imprecise, blunt and "out of touch" in relation the modern industrial context.

4.9. The imprecision and broadness of the proposed s 82AA especially reflects the bluntness of this Act with respect to modern industrial relations. At (b) of the proposed section, the Bill contains a "catchall" provision that will unreasonably intrude into the lives of working people. It says that in addition to any action carried out at work that impacts on productivity, a partial strike also means:

> *… an act of the employees who are a party to a strike in breaking their employment agreement, whether or not the act involves any reduction in the employees' normal duties, normal performance of work, normal output, or normal rate of work.*

4.10. This provision is broad enough to capture a range of activities that are associated with freedom of expression, including the displaying of signs, the wearing of badges, speaking with the media or making posts on social media.

4.11. In an industrial context that already struggles to balance employee obligations and the duty of fidelity against the rights of workers to have reasonable freedom of expression, this imprecise amendment is a grave step in the wrong direction[12].

4.12. Again, such imprecision and encroachment will result in confusion and most likely, litigation.

4.13. Another confusing aspect of the Bill is the mechanism by which the deduction for partial strike should be calculated in accordance with the proposed s 95C. This provision allows employers to choose one of two methods for deduction.

4.14. For the first route for deduction, the provisions at proposed s 95C(1)(a)-(d) provide a complex and vague set of requirements that an employer must meet in calculating a deduction that is expressed at a percentage of the time "lost" due to the action.

4.15. This calculation will always be an estimate, as acknowledged by the Bill itself at proposed s 95C(1)(c). Thus, the Bill encourages employers to engage in a subjective and imprecise analysis to justify deduction.

4.16. A worker's basic right to be paid at the agreed rate should not be subject to employer "estimations". This is poor employment policy that undermines the integrity of employment agreements and demeans an important workers' right.

4.17. It also leaves employers vulnerable to liability if their subjective estimates are unfounded, mistaken or otherwise misconceived. Thus, once again, the Bill is opening a field of industrial disharmony.

4.18. The second route for deduction allows for a blanket 10% reduction in wages with respect to the period of the strike.

4.19. Again, calculating the relevant "period" of the strike will require a great deal of guess work on the part of the employer and will result in contestable outcomes that will likely give rise to litigation.

4.20. Both methods for calculating deductions severely undermine a worker's basic right to secure pay in accordance with their employment agreement.

[12] See footnote [2]

4.21. The Bill also undermines the Minimum Wage Act 1985 by providing that a deduction may be made even if it results in the worker being paid below the statutory minimum wage for the period of deduction[13].

4.22. This means that a worker engaging in so-called "partial strike" action may be *required* by their employer to keep working, without the lawful ability to decline that work on the basis that it violates the statutory minimum rate of pay.

4.23. The Bill defines "partial strikes" as including activities that do not reduce employee productivity and that have no material cost to the employer's business. Such partial strikes, where the employer incurs no cost, can still be subject to a discretionary deduction against the employee's pay.

4.24. In these circumstances, a worker may still be paid less than the minimum wage, even though they are fully productive.

4.25. Thus, this Bill permits employers to benefit from workers taking industrial action in scenarios that can only be described as exploitative.

4.26. The issues highlighted above go well beyond poor drafting. They will give rise to serious interpretative problems that will harm, not only workers and their unions, but employers as well.

5. Inconsistent with International Law

5.1. This Bill continues in a well-established pattern of this Government in disregarding New Zealand's obligations under international law.

5.2. As with many other actions taken by this Government, this undermining of the right to strike will be in breach of New Zealand's obligations as a member of the International Labour Organisation (the ILO).[14]

[13] Employment Relations (Pay Deductions for Partial Strikes) Amendment Bill (104-1)- cl 6 at proposed s 95D.
[14] New Zealand is a founding member of the ILO and bound by its constitution which reflects the principles contained in both Convention 87 and Covention 98- (ILO, Constitution Annex: "Declaration Concerning the Aims and Purposes of the International Labour Organisation" III(e)).

5.3. Namely, the Bill misaligns with *ILO Convention 98 (Right to Organise and Collective Bargaining Convention, 1949* in that it enables discriminatory treatment of workers engaging in lawful union activity (as prohibited under Article 1, paragraph 1)[15].

5.4. This breach will be particularly egregious with respect to provisions in the Bill that undermine the pay rates of union members or where union members engaging in lawful activities will no longer be protected by Minimum Wage legislation.

5.5. The Bill, if enacted, will also violate Article 4 of that Convention which requires signatory states to:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.[16]

5.6. Thus, the Convention establishes a clear obligation of signatory states to maintain effective systems for collective bargaining.

5.7. However, instead of encouraging and promoting the frameworks for effective collective bargaining, this Bill seeks to undermine those processes by depriving workers and their unions of industrial power.

5.8. The Bill is also inconsistent with *ILO Declaration on Fundamental Principles and Rights at Work (DFPRW)* – specifically, the obligation to uphold principle 1: "freedom of association and the effective recognition of the right to collective bargaining"[17].

5.9. Similarly, it is inconsistent with Article 22 of the *International Covenant on Civil and Political Rights* (the ICCPR), which provides strong protection against the undermining of 'freedom of association'[18].

5.10. The amendment will also breach s 17 of the New Zealand Bill of Rights Act 1990 by severely restricting the ability of workers to associate with their unions to engage in lawful and democratic industrial activities.[19]

---

[15] ILO Convention 98 - *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)* (Date of entry into force: 18 Jul 1951) art 1 paragraph 1.
[16] Ibid, art 4
[17] *ILO Declaration on Fundamental Principles and Rights at Work* (Adopted 1998, amended 2022)- principle 1.
[18] *International Covenant on Civil and Political Rights*, GA 2200A (XXI)(1966), art 22
[19] New Zealand Bill of Rights Act 1990, s 17.

6. Summary of recommendations

6.1. Our recommendation is that the government completely abandon this, Bill.

6.2. We recommend that the Government stop these attacks against the rights of working people and put its energy and resources into fulfilling the purpose stated at s 3 (a)(ii) of the Employment Relations Act.

6.3. This will involve not only acknowledging, but also **addressing** the inherent inequality of power that disadvantages workers in the employment relationship[20].

7. Conclusion

7.1. The Bill is an utterly unprincipled attack on workers' rights and an attempt to crush the ability of working people to engage in meaningful collective negotiation.

7.2. It reveals a deep-seated bias against workers and their unions and is an attempt by the government to deepen and entrench the imbalance of power that already exists in the industrial landscape.

7.3. The Bill will increasingly isolate New Zealand from international norms by adding to a growing list of breaches against international law.

For further information about this submission, please contact:

Gayaal Iddamalgoda

Legal Officer

New Zealand Council of Trade Unions- Te Kauae Kaimahi

PO Box 6645

Wellington 6141

Phone: 021 717 749

Email: gayaali.nzctu.org.nz

[20] Employment Relations Act, s 3 (a)(ii):

*by acknowledging and **addressing** the inherent inequality of power in employment relationships.*