
EMPLOYMENT

SEPTEMBER 2008

NO MORE “TOTAL REMUNERATION” ARRANGEMENTS FOR KIWISAVER



Clare Abaffy
SOLICITOR

When Dr Michael Cullen announced in the 2006 Budget the arrival of KiwiSaver, it heralded a renaissance for superannuation and savings in New Zealand.

KiwiSaver was established to address New Zealanders' lacklustre efforts at saving for their retirement, and generally to promote asset accumulation in New Zealand.

These general principles have created a savings framework that New Zealanders have taken up in droves – approximately 750,000 Kiwis are now KiwiSavers.

However, the mechanics of certain aspects of the operation of KiwiSaver have proved controversial, with debate most recently centred around the use of “Total Remuneration” arrangements.

Total Remuneration arrangements became controversial as a result of two amendments to the legislation.

First, the Government passed amendments to require employers to make compulsory employer contributions to their employees' KiwiSaver accounts. Essentially, the starting point is that if you are a member of KiwiSaver, from 1 April 2008 you get an extra 1% on top of your gross salary or wages, with this to become 4% from 1 April 2011. (We note that these subsections of the KiwiSaver Act have not been repealed. We imagine that this possible oversight may be

addressed and should not be safely viewed as an opportunity to ignore the recent changes.)

Secondly, the Government allowed agreements that “ignored the purpose” that “compulsory contributions are paid in addition to an employee's gross salary or wages” – Total Remuneration in shorthand.

The essential principle of a KiwiSaver Total Remuneration arrangement is that an employee's total salary package includes any contribution that an employer is required to make to KiwiSaver. The effect of this is that, if an employee is not contributing to KiwiSaver, his or her “in the hand” and pre-tax salary will be greater than an employee who is receiving employer contributions which are going into a KiwiSaver account.

There are two sides to this argument. On the one hand, some have argued that Total Remuneration arrangements provide financial certainty for employers, and fairness to employees by giving employees a choice about opting into KiwiSaver or taking what would otherwise be the employer contribution “in the hand”.

However, on the other hand, and the view that has been taken by Minister of Labour Trevor Mallard, is that a Total Remuneration arrangement has the effect

of an employee funding an employer's compulsory contribution and being paid less "in the hand" than those who opt out of KiwiSaver, which is stated to be unfair.

The Minister's argument is fuelled by the fact that employers currently get a tax credit for each employee in KiwiSaver, to help offset the compulsory employer contribution. Some employers have incorporated the tax credit into their Total Remuneration arrangements, for instance by forwarding the tax credit to KiwiSaver employees. Others have not. Some employers have raised the concern that they have no guarantee how long the tax credit will last before they are expected to absorb the increased costs of compulsory contributions.

This one is a really thorny issue – and has generated significant comment by each side in this debate.

However, the debate now appears to be over, with amendments to the Employment Relations Act 2000 and the KiwiSaver Act 2006 being passed under urgency in Parliament on 3 September 2008.

The changes

In essence, the amendments allow employees to bring a personal grievance where their employment is adversely affected because they are a member of KiwiSaver. This expressly includes where an employee's salary or wages are less than the salary or wages of other comparable employees employed by the same employer, and the reason for the adverse effect is that the employer has taken into account (wholly or partly) the compulsory employer contributions it is required to make for KiwiSaver.

The fact that the adverse effect need only be "partly" due to the employer having taken into account compulsory employer contributions will render it difficult to argue that other reasons for taking a KiwiSaver

Total Remuneration approach (for instance, equality in the work place or keeping New Zealand remuneration structures in line with a company's global remuneration structure) are in fact at play and no grievance arises.

Put simply, it is now unlawful in relation to employment agreements entered into or varied on or after 2 September 2008 to fund compulsory employer contributions by way of a Total Remuneration approach. Employees placed on a KiwiSaver Total Remuneration approach on or after 2 September 2008 will be able to bring a personal grievance. Existing employees who entered into a KiwiSaver Total Remuneration approach (prior to 2 September) will not be able to bring a personal grievance. This much is certain.

What is not certain, however, is the effect that these changes will have on matters relating to terms and conditions of employment - and, more importantly, in the operation of those terms and conditions - for employees in the future.

There is no great problem with the idea that employees in KiwiSaver must be given the same salary or wages as those "comparable employees" out of KiwiSaver and employed on or after 2 September. What is less clear is who the "comparable employees" are when referring to current employees on a KiwiSaver Total Remuneration approach. The changes will apply to existing employees on KiwiSaver Total Remuneration arrangements when their employment agreements are next varied (for instance their next salary review).

Issues to consider

Some of the issues that we think arise are:

Salary reviews

It appears that the legislation is designed to ensure that an employer performing salary



Matt McGoldrick
SOLICITOR

reviews may not make different decisions for salary increases for employees taking into account their employees' KiwiSaver status, as to do so would likely give rise to grounds for a personal grievance.

Therefore, where the tax credit does not apply and when and if the tax credit ceases, there will be a differential increase in the financial cost of providing salary increases to employees depending on whether the employee is in or out of KiwiSaver. But a more immediate consequence is the likelihood of lower salary increases across the board for all employees – as employers are likely to have to “assume” all employees will eventually become KiwiSavers.

Existing arrangements

There will almost certainly be difficulties in respect of employees who are already employed on a KiwiSaver Total Remuneration arrangement. While the legislation does not make illegal such pre-existing KiwiSaver Total Remuneration arrangements – 2 September 2008 being the relevant date at which such agreements may no longer be made – the effect of the legislation may be to require all employers to bring all of their Total Remuneration based employees out of Total Remuneration approaches when varying those employees agreements in the future.

This may mean from a practical perspective, and to avoid potential personal grievances, that employers should consider subsequent variations with existing employees on Total Remuneration approaches so their KiwiSaver contributions are straight additions to their base salary. Transitions back to traditional arrangements will, however, need to be carefully considered – and agreed in good faith between employers and employees.

As an aside, it should also be noted that the legislation does not make illegal other Total Remuneration arrangements in relation to,

for instance, health insurance or vehicles.

Super funds

We note that the legislation is expressly stated to apply to “complying superannuation funds”. Thus, the same principles in respect of KiwiSaver Total Remuneration approaches as outlined above will apply – such that Total Remuneration in respect of a complying superannuation fund will be off the table.

No go zone

In summary, Total Remuneration is now a “no go zone” for employers when it comes to KiwiSaver employer contributions.

But the consequence for ongoing obligations to employees, particularly those on a Total Remuneration arrangement, will need to be carefully managed – against the backdrop that KiwiSaver and non-KiwiSaver members may not be treated differently simply by virtue of their KiwiSaver status.

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For further information, please contact your usual Bell Gully adviser or:

AUCKLAND

Rob Towner

64 9 916 8902

rob.towner@bellgully.com

Anna Clark

64 9 916 8821

anna.clark@bellgully.com

Deborah Doak

64 9 916 8886

deborah.doak@bellgully.com

Clare Abaffy

64 9 916 8896

clare.abaffy@bellgully.com

WELLINGTON

Andrew Scott-Howman

64 4 915 6820

andrew.scott-howman@bellgully.com

Matt McGoldrick

64 4 915 6953

matt.mcgoldrick@bellgully.com

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