

Minimum Wage Exemptions

Legislative background

The Minimum Wage Amendment Act 2007 was enacted after the repeal of the Disabled Persons Employment Promotion Act (DPEP). The DPEP had been regarded by many disabled people as “utterly improper and an abuse of human rights”, according to a submission by the Disabled Person’s Assembly (DPA). At the time, it was argued that the changes in the legislation would see disabled people’s employment brought into line with New Zealand and international human rights norms.

The then Minister of Disability Issues, Ruth Dyson said: “The repeal will mean that all sheltered workshops will have to pay everyone they employ at least the minimum wage, unless an individual worker has an exemption. It will also mean that all people who work in sheltered workshops will have access to holiday and sick leave entitlements. To counter concerns about the continuing financial viability of sheltered workshops, the ministry has put in place a system of individual minimum wage exemption permits for workers who are ‘significantly and demonstrably limited’ in their work.”

DPA said that this means disabled workers can be subject to minimum wage payment provisions on the basis of productivity. “In this context, productivity is about comparing a disabled employee’s output with another employee doing the same job and, if it is considered that the disabled employee’s productivity is lower, paying them at a lower rate. It is not a concept used elsewhere in the employment sector.”

The DPEP Act along with the 1983 Minimum Wage Act had allowed for blanket minimum wage exemptions to be given to workplaces that employed disabled people. These workplaces were commonly known as ‘sheltered workshops.’ The law change meant that the individual employee, following an assessment, had to be issued with a permit from the Department of Labour that entitled their employer to pay them a particular amount less than the minimum wage.

The Minimum Wage Exemption Act enables a Labour Inspector to issue a minimum wage exemption permit to a worker if the Inspector is satisfied that -

- (a) the worker is significantly and demonstrably limited by a disability in carrying out the requirements of his or her work; and
- (b) any reasonable accommodations that could have been made to facilitate carrying out the requirements of the work have been considered by the employer and the worker; and
- (c) it is reasonable and appropriate to grant the permit.

Various wage assessment tools are accepted for the purpose of exemptions. Before accepting a Minimum Wage assessment tool, Labour Inspectors have to consider it against set criteria. For example a tool should be balanced and look at both productivity and individual competencies. The tool should be transparent and clearly show how the assessment is linked to wage rates and how the wage rate is calculated. Disability advocates have advised the Commission that the tools used do not appear to be consistent.

National Conversation about Work

The Commission visited ‘business enterprises’ in Invercargill, Dunedin and Christchurch which provide employment for disabled people who would be unable to compete for work in the open labour market. The Commission also heard from disability advocacy groups about the very low rate of pay received by some disabled workers (as low as 15c an hour). They believe that while business enterprises which operate like sheltered workshops remained an option, supported work opportunities in the open labour market were not being fully

implemented. Forms of assistance include supported employment (such as job coaches). Supported employment is usually provided on the assumption that the person will increase their skill levels and competence and that support can be gradually phased out.

Other employment options include micro-financing small business ventures, a mixture of education/training and work and narrowing job descriptions to a range of tasks that the disabled person can manage.

Business enterprises came into being after the repeal of the DPEP Act, which resulted in the closure of sheltered workshops. In reality, people receiving a wage below the minimum have their income supplemented by a social welfare benefit.

The employment of disabled people at rates below the minimum wage is controversial. The Commission heard all sides of the argument – from employers and employees, from business enterprises, from disability advocacy groups and from family members. Opponents of the exemption system say that it is discriminatory and alternate processes that support disabled people to work in the open labour market are necessary. Proponents argue that workers in business enterprises would not otherwise be employed and that working supports social inclusion and promotes well-being.

Facts and figures

Greater transparency around the process of determining minimum wage exemptions has been called for by the disability community. Disability advocates reported difficulty in accessing information from the Department of Labour. The Human Rights Commission wrote to the department asking for information about the number of people receiving exemption permits, rates of pay and about whether or not there was a standardised method of assessing payment rates.

Currently 1076 people receive a minimum wage exemption permit under s8 of the Minimum Wage Exemption Act⁶⁹. In 2001, under the DPEP Act, approximately 5400 people were employed in sheltered workshops. There are 136 employers across New Zealand who employ people who have a minimum wage exemption. Some but not all, are business enterprises.

Rates of pay vary from just under the minimum wage to less than a \$1.00 an hour.⁷⁰

Table 33: Pay rates minimum wage exemptions

Pay range	Number of permits
More than \$10.00	37
\$5 - \$9.99	260
\$3.00 - \$4.99	213
\$2.00 - \$2.99	179
\$1.00 - \$1.99	364
Less than \$1.00	53
Total	1106⁷¹

⁶⁹ Data provided by Department of Labour March 2010

⁷⁰ . ibid

⁷¹ Some people have more than one exemption

The majority (54%) of people with minimum wage exemption permits earn less than \$3.00 an hour.

Disclosure of mental health

From the National Conversation about Work

A particularly vexed issue is whether or not to disclose experience of mental illness. People with experience of mental health issues told the Commission that disclosure on application forms or unexplained gaps in CVs meant they were unlikely to be offered a job interview.

However, non-disclosure carried the risk that their needs will not be accommodated should they become unwell, and in extreme cases be dismissed for dishonesty.

Legal considerations include the appropriateness of questions in the application form and the steps taken to avoid discriminatory practices. One participant with experience of mental illness said, “The crux of the argument around disclosure is that there is still a lot of stigma around employability - there’s the myth that if you’ve got a mental illness you’re actually not employable. You can’t handle stress, you’re potentially dangerous to yourself and to others, you are a lot of extra work, you’re unreliable, you will take lots of time off.”

There were risks either way, disclose and risk not being considered for the job, not disclose and risk being unsupported or being dismissed should you become unwell.

A further meeting attempted to tease out what advice the Commission could usefully provide to prospective employers and employees.

The group suggested that the focus should come off disclosing experience of mental health and onto equality for any worker and their employer. Their advice was to not make it about mental health but ensuring the best person for the job by:

- Focussing on what an individual can do, not do but could learn, and what is outside their capability.
- Challenging discriminatory assumptions about ability based on diagnostic labels.
- Having conversations throughout any person’s employment about their needs and support required to do a job well, regardless of labels and assumptions.

Ensuring best fit requires detailed job descriptions and person specifications that are inclusionary.

The Employers’ Disability Network suggests that employers concentrate on what needs to be done rather than how the work should be done, for example it is better to ask, “this job involves working under pressure to tight deadlines. Tell us about situations where you’ve been under pressure and how you ensured you met deadlines” rather than “how will the pressure of tight deadlines affect your disability?”⁷²

Conversations about how to meet people’s needs or to support them to develop their performance at work is good practice for all employees. However, honest engagement requires a safe and supportive work environment. This conversation could include meeting out-of-work needs such as childcare and in-work needs like professional development needs

⁷² See *Manager’s guide A best practice approach to working with disabled employees* Employers Forum on Disability and Workbridge 2007 This guide has been adapted for New Zealand and is available from Workbridge or Employers’ Disability Network.