‘Transfer of business’ policy will cost NZ

‘Transfer of business’ provisions in the Employment Relations Law Reform Bill are causing concern to many companies. They will result in restrictions on those wishing to sell their business or contract out services.

The idea has been borrowed from Europe where restrictions are imposed in an effort to stop job loss and the erosion of employee wages when companies are sold or services are outsourced.

While employment protection is a well-meaning policy, in practice it impacts negatively on firms, in many cases resulting in business closures and job losses – making the cure worse than the disease.

In Europe the policy is known as the EU Acquired Rights Directive. In the UK and Ireland it is called Transfer of Undertakings Protection of Employment or TUPE.

International expert Alan Wild is currently taking workshops in New Zealand on the policy.

Alan Wild has had many years’ experience with TUPE and the acquired rights directive as global employee relations director of the brewing giant Guinness and latterly managing partner of Aritake-Wild, a specialist consulting firm providing advice on employment issues to companies and employer organisations.

He says in Europe restricting the transfer of business has brought negative consequences in a number of areas:

- Labour inputs lose efficiency gains otherwise afforded by competition.
- Failing companies tend to close rather than restructure.
- New entrants into any market, including new companies coming from overseas, gain an unfair advantage over existing companies (as start up operations they have a clean sheet to design and implement the most efficient practices).

Another problem is excessive litigation, to address competing claims by employers and employees involved in transfer of business situations, and to close the many loopholes found in the regulations.

Employment Relations Law Reform Bill provisions relating to transfer of business require employers to develop a process for use if a business is sold or part of the work contracted out. All collective and individual employment agreements have to have an ’employee protection provision’ setting out a process to be followed in negotiating with a new employer about restructuring affecting staff, what will be negotiated with the new employer (including whether the employees will transfer on the same terms and conditions), and the process to be followed in determining what entitlements, if any, employees who do not transfer will receive. That is complicated in itself.

For employers with ‘specified categories of employees” (‘those providing cleaning or food services), the entitlement to transfer on existing terms and conditions is

automatic (any staff not wanting to transfer receive redundancy as provided in their employment agreement). Transferring employees must be paid redundancy compensation if their new employer makes them redundant and the Employment Relations Authority will decide what is to be paid if this cannot be agreed. The Minister of Labour can 'specify' further categories of employees after consultation with the employers, employees and their representatives.

These provisions, together with the Bill's requirement to consult with employees likely to be adversely affected by a business decision (and their unions), have serious implications for employers contemplating business restructuring.

Alan Wild says in Europe the policy was established before outsourcing became common, and has prevented employers from fully benefiting from contracting out.

"The irony is that fewer restrictions now apply to a company outsourcing a call centre to India than apply to a company contracting with a supplier just down the road.

"There are three great benefits from outsourcing – increased specialisation, economies of scale and lower labour costs.

"Increased specialisation – like outsourcing IT specialists - can provide higher-level services than keeping the function in house.

"Similarly, contracting out a function like, say, security, gives access to the economies of scale of a large security company so that guards are always on call, while in-house security would not be able to offer that consistency of service.

"And outsourcing makes it easier to manage labour costs - a company's strongest wage bargainers are usually those employees engaged in the company's core activities and the rate of pay struck by this core group usually has an impact on pay rates being struck for ancillary workers. If you contract out those ancillary functions, you can better manage labour costs. The unfortunate thing about the policy is that it effectively eliminates savings associated with sound labour costs management."

Alan Wild says the policy has survived in Europe for the last 25 years because the EU is a huge market and all its countries trade and compete among themselves – they all are bound by the same policy so they're all playing on a level playing field.

Unfortunately it will not be as benign for New Zealand, which must compete against Japan, Korea, China and South American nations, none of which have such provisions in their law – giving a very slanted playing field. By adopting the policy in its employment law, the New Zealand Government may well be imposing a significant handicap on New Zealand exporters.

Alan Wild is conducting workshops for employers in Auckland, Hamilton, Palmerston North, Wellington, Christchurch and Dunedin, on requirements imposed by the policy in Europe and on likely requirements under future New Zealand law.

To attend a workshop in your area, contact your regional business association EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce or Otago-Southland Employers' Association.

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