Submission

By

BusinessNZ

To the

Transport and Industrial Relations Select Committee

On the

Employment Relations (Breaks and Infant Feeding) Amendment Bill

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1. Introduction

1.1. Business New Zealand opposes the introduction of the Employment Relations (Breaks and Infant Feeding) Amendment Bill ("the bill"). It wishes to appear before the select committee to speak to its submission.

1.2. Business New Zealand supports flexible approaches to workplace issues such as those covered in the bill. It makes sense that employers accommodate employee needs to care for children, take breaks and so on, as to do so is more likely to engender harmonious workplace relations and safe and productive workplaces. This bill, however, is unnecessary. It covers matters that practical reality suggests are either already adequately dealt with in employment agreements or are more effectively the subject of information and education.

1.3. The proposed changes, (particularly in relation to rest and meal breaks) are couched in prescriptive terms that take little or no account of the wide variety of work practices that exist in New Zealand workplaces.

1.4. As importantly, the way in which the proposed changes are expressed to work will mitigate against efforts to make New Zealand workplaces more productive and is likely to add significant extra costs to both the state and private sectors.

1.5. Finally, the penalties proposed in respect of breaches of the bill's provisions are inconsistent with those already applicable to changes in working arrangements.

1.6. Business New Zealand recommends that the bill not proceed.

1.7. Reasons for these views are set out below.

2. Infant Feeding

Justification is lacking

2.1. The explanatory note to the bill is long on reasons why breastfeeding is important for childrens' health but short on reasons why this should translate in the bill into what, in practical terms, is little more than recognition that breastfeeding is important.

2.2. There is no doubt about the benefits of breastfeeding for infants, just as there is no doubt that a flexible and supportive approach to employees with suckling children is ultimately beneficial to

workplace harmony and productivity. That said, it is hard to conceive how the proposed legislative interventions in this regard will introduce or add to these outcomes. Certainly the explanatory note to the bill does not spell this out.

Equity issues exist

2.3. There is an apparent assumption in the bill that only mothers who physically breastfeed their infants require physical access to their infant. This is because the bill as it stands supports the provision of breastfeeding facilities and breaks for breastfeeding mothers, but not mothers who are feeding their infant with expressed milk or who are using commercial formulae because for some reason they can't breastfeed. This is likely to be seen as a form of discrimination by those, otherwise equally valuable, employees for whom necessary (to them) infant feeding arrangements will not be protected. Such employees will need to fall back on arrangements negotiated with their employer, without any indication that this will be possible.

2.4. The bill exacerbates this inconsistency ostensibly by requiring provision of facilities for breast milk storage. Mothers who exclusively breast-feed seldom require additional storage. Many mothers, however, express surplus milk for later use. Working breastfeeding mothers therefore may incorporate bottled breast milk into feeding routines while at work, thus making them relatively indistinguishable from non-breastfeeding mothers who are bottle-feeding infants.

Must facilities and breaks be provided?

2.5. Notwithstanding the support expressed by the bill for breastfeeding mothers its provisions are unlikely to be effective in practice.

2.6. There is an apparent conflict between the purpose of this bill which is, in clause 4(a), to "***require facilities and breaks to be provided*** [emphasis added] *for employees who wish to breastfeed in the workplace or during work periods"* and proposed new section 69Y(1) (a) which requires an employer to *"ensure that, so far as is reasonable and practicable in the circumstances... appropriate facilities are provided..."*.Circumstances are defined in section 69Y(3) of circumstances as including the employer's operational environment and resources.

2.7. Since clause 4 of the bill as it stands will not be repeated in the principal Act, it is reasonable to assume that section 69Y will enjoy an interpretative ascendency over clause 4. If true, it would be clearer to say that employers can refuse a request for breastfeeding facilities and breaks on the grounds that it is not reasonable or practicable to do so.

2.8. If it is the policy intent that breaks and facilities must be provided when requested, then the bill is ineffective. Under the heading "Preferred Options" the explanatory note states the objective of placing *"a statutory obligation on employers to facilitate breastfeeding in the workplace through the provision of facilities and breaks, supported by a code of practice"*. However, achieving this is not supported by the provisions of the bill, since an employer must comply only when it is reasonable and practicable in the circumstances to do so.

2.9. If it is the policy intent that the provision of facilities and breaks for breastfeeding is dependent on the decision of an employer that a request for such is reasonable and practicable, then Business New Zealand's view is that the bill is a legal nonsense. For all practical purposes this is tantamount to saying "the employee can ask, and the employer is entitled to say yes or no". Enshrining commonsense voluntary conversations such as this in legislation is unnecessary.

2.10. Introducing the proposed code of practice will not assist in this regard since the ascendency of the proposed permissive provisions of the Act will obviate purported obligations under a code.

Penalties are unbalanced and hard to apply

2.11. If paragraph 2.8 above applies, every employer for whom the provision of breaks or facilities is an unreasonable or impracticable proposition will be in breach of section 69Y on each occasion they decline a request for such. This is likely to lead to widespread vulnerability to penalties under proposed section 69ZB.

2.12. If paragraph 2.9 above applies, penalties under proposed section 69ZB will be difficult to apply. If an employer is able to decline requests for breaks or facilities on the grounds that it is not reasonable and practicable in the circumstances to do so, it will be necessary for an employee to prove that their request was reasonable and practicable before penalties can be considered. This opens up a new vista for employment relations problems.

Penalties are inconsistent with existing ERA provisions

2.13. Under section 69ZB, penalties are imposed by the Employment Relations Authority, using the general penalty provisions of the Employment Relations Act.

2.14. However, breaks (and facilities) are working arrangements; requests for their provision arguably are little different to requests for changes to working hours. This being so, section 69ZB *Penalty* is inconsistent with the scheme of the recently enacted amendment

to the Employment Relations Act in respect of flexible working arrangements. Under that scheme, penalties are restricted to a financial penalty if an employer fails to follow the prescribed process for dealing with requests for changes to working arrangements. There is no appeal against that penalty or against an employer's substantive decision to refuse an employee's request. However, proposed section 69ZB opens employers to the full scale of penalties under the Act, and renders imposition of any penalty by the Authority open to appellate action.

Recommendation

2.15. That proposed Part 6C be deleted

3. Breaks

Justification is lacking

3.1. New Zealand has never legislated for meal breaks. Breaks are already almost universally provided for in collective agreements and are widely incorporated in individual agreements, company policy statements and, of course, custom and practice.

3.2. These are all descriptors of enterprise level solutions, which is where Business New Zealand believes the solution to when breaks should be taken should rest. Applying a nationally and mathematically prescribed formulation ignores the different realities of many enterprises

3.3. The explanatory note to the bill is devoid of any evidentially based explanation as to the need for these provisions. It observes primarily that there is "*little information*" about scheduling of breaks and "*little is known*" about non-collective provisions. .

3.4. Furthermore, the explanatory note, under the heading of Preferred Options, states

> "There is a risk that legislating for meal breaks will be seen as reducing workplace flexibility. A legislative approach also presents a risk in sectors and industries where rest and meal breaks of specified duration and frequency are incompatible with business operations. These amendments however are consistent with the majority of collective agreements and would be expected to support current practice and not require a significant change to current workplace practices in most instances"

3.5. This statement utterly and completely ignores the fact that collective arrangements are not representative of employment relationships generally. Current collective bargaining density in the state is of the order of 70%+ whereas in the private sector, coverage hovers at

only 10%. Collective bargaining density nationally is under 22%, making collective arrangements a poor basis for proceeding at other than enterprise level.

3.6. Add to this the fact that the state sector is comprised of relatively homogeneous working arrangements (eg Monday to Friday weeks), whereas the private sector is comprised of an array of widely varying operating approaches, frequently operating at all hours of the day, and on all days of the week. Thus, despite the stated risks in the explanatory note, using existing collective agreements as justification for legislative extension of collective arrangements to all employers may be seen, at least statistically, as the tail wagging the dog.

Regulatory guidelines already exist

3.7. The issue of breaks is inherent in obligations upon employers under the Health and Safety in Employment Act, and its attendant Regulations. The Health and Safety Regulations require employers to provide facilities for breaks and refreshment. The corollary and implied requirement is for there to be an opportunity to take such breaks. However the regulations sensibly stop short of specifying the form and frequency of breaks, leaving these to enterprises to determine in a manner that works best for them and their employees.

Inflexibility is enforced in some cases

3.8. The proposed changes specify both form and frequency of rest and meal breaks in terms that are like to have significant negative consequences for many businesses.

3.9. Proposed new section *69DZ Entitlement to rest breaks and meal breaks* is cast in absolute terms. In other words, depending on the hours worked, there is a calculation that determines what and how many breaks an employee is entitled to. There is no flexibility in this respect.

3.10. Proposed new section *69ZE When employer to provide rest and meal breaks*, while ostensibly providing flexibility in the timing of entitlements to breaks, in reality does not.

3.11. Subsections 69ZE (1) – (4) specify when during the work period breaks should be taken, when reasonable and practicable to do so. However subsection 69ZE (5) makes the determination of what is reasonable and practicable the subject of agreement between the employee and employer. The employer has no determinative say in the matter.

3.12. The impact of subsection 69ZE(5) is likely to have far-reaching potential effects in many enterprises; not least those in shift based continuous production environments. For instance any unwillingness on the part of shift employees to stagger their meal breaks to ensure continuity of operation would result in the employer having to allow the breaks at the time stipulated in section 69ZE. That would result in whole shifts having breaks at the same time, and equally likely require a slowdown if not temporary cessation of production several times daily. That is not a recipe for national productivity growth. To even permit its possibility makes no sense.

3.13. Furthermore, as operators of heavy machinery know all too well, continuous starting and stopping of production machinery designed to be run continuously has marked effects on maintenance costs and economic life. When factored into larger industries with high capital and maintenance costs, this may end up in reinvestment decisions not involving New Zealand.

3.14. Continuous process enterprises are not the only victims. An enterprise employing sole charge employees will face real difficulties in making the proposed provisions work. While it is perhaps more likely that such employees will accommodate the employer's reasonable and practicable aspects of timing of breaks, there is no escaping the prescription of the nature and number of breaks. These may also be impracticable in the circumstances. This places "Hobson's Choice" on the employers of such people, i.e. do they ignore the requirements for breaks to be provided and face penalties under the Act, or forgo business on several occasions per day? Again this is not a recipe for national productivity growth.

3.15. Public transport operators are yet another example. Bus schedules, particularly urban ones, are the primary determinants of working days. Superimposing legislative requirements at odds with other legislative conditions will create significant difficulties for some. While the bill is not intended to affect those who are covered by better provisions under another law, the bill's provisions will cause considerable extra complexity for those for whom this is not the case.

3.16. These few examples are the tip of the iceberg. By admission, the drafters of the bill have insufficient information to know the full nature and scope of practice in relation to rest and meal breaks. To proceed on the trite basis that existing collective agreements are a sound basis for assumptions is logically unacceptable.

State and private sector employers face extra costs

3.17. The bill imposes extra costs on employers because it counts the period of work to be used in determining entitlements to breaks as being between starting and finishing times, not periods of paid work. In other words, work periods as defined in the bill include periods of unpaid time (i.e. lunch breaks) as being a factor in calculating the number of breaks to which an employee is entitled.

3.18. Proposed new section 69ZC defines "work period" as *"...beginning with the time when, in accordance with an employee's terms and conditions of employment, an employee starts work; and ...ending with the time when, in accordance with an employee's terms and conditions of employment, an employee finishes work"*

3.19. Section 69ZC (b) provides that the work period defined above includes breaks an employee is entitled to under the bill's provisions.

3.20. For example, this means that the common example of an employee whose terms and conditions of employment have them starting at 8am and finishing at 5pm will have a work period, defined in section 69ZC(a), of 9 hours (typically 8 hours paid work and a 1 hour unpaid lunch break). The traditional breaks for such workers are paid morning and afternoon "smoko" breaks and an unpaid lunch break, a total of **three breaks.**

3.21. An employee whose work period is 9 hours calculates their entitlement to breaks under section 69ZD(5) which provides *"If an employee's work period is more than 8 hours, the employee is entitled to- (a) the same breaks as specified in subsection (4); and (b) the breaks as specified in subsections (1) to (3) as if the employee's work period had started at the end of the eighth hour."*

3.22. Subsection 69DZ(4) provides for two 10-minute paid rest breaks and one 30-minute meal break. Subsection 69DZ(2) – periods of less than 4 hours - provides for one 10-minute paid rest break.

3.23. Therefore, the bill provides an 8 to 5 worker an entitlement to three paid 10-minute rest breaks and one 30-minute meal break, a total of **four breaks.**

3.24. Public servants and others who traditionally work 8am to 4.35 pm (a 7.5 hour working day) will also become entitled to the extra break. 8am to 4.35pm is a working period, as defined by section 69ZC (a), of approximately 8.5 hours, thus also triggering an entitlement to three 10-minute rest breaks and a meal break.

3.25. Even if it is intended that the interpretation in paragraphs 3.17 – 3.24 applies, it cannot work in practice. Under the scenario in paragraph 3.32, an 8 to 5 worker would be entitled to the first 10-minute break half way between starting time and the meal break,

and the second 10 minute break half way between the meal break and finishing time (in accordance with section 69ZE (3)). However, there is no time in which to take the third 10-minute break in accordance with section 69ZE(1) since the employee will already have finished work. Effectively this creates an entitlement to 10 minutes extra pay per day since there is no work period in which the third 10 minute break may be taken, even though the legal entitlement to take one exists.

3.26. As drafted, the bill clearly imposes extra costs, both directly and in terms of lost productive time, on employers and will impact significantly on employers generally.

Concerns for collective bargaining

3.27. The proposed provisions add complexity to existing collective arrangements, despite assurances in the explanatory note that these are a good basis on which to proceed. This is because existing arrangements, while providing for breaks, often also give the employer flexibility in determining when breaks should occur, frequently through clauses requiring that operational capacity and efficiencies not be lost as a result of employees taking their breaks. The proposed legislative changes may override such existing requirements making the issue of when breaks are taken a new bargaining issue in affected workplaces. As mentioned in paragraph 3.12, continuous process workplaces such as manufacturers are likely to be affected most in this regard.

Recommendations

3.28. That proposed Part 6D be deleted.