Submission

By

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations Amendment Bill (No 2) 2010

September 2010

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EMPLOYMENT RELATIONS AMENDMENT BILL (No 2) 2010

SUBMISSION BY BUSINESS NEW ZEALAND

INTRODUCTION

1. Business New Zealand welcomes the opportunity to make a submission on the Employment Relations Amendment Bill (No 2) ("the Bill"). It wishes to appear before the select committee to talk to its submission.

2. Business New Zealand generally endorses the Bill and recommends that it proceeds. Notwithstanding our general support, we have some recommendations that we believe could improve the Bill.

RECOMMENDATIONS

3. Business New Zealand <u>recommends</u> that the Bill proceeds but that:

Access to workplaces

4. Business New Zealand supports the proposed change to require unions to seek permission before accessing a workplace for any reason. However, the proposed process for seeking permission simply adds complexity, somewhat undermining the government's apparent intent of simplifying the Act.

5. Access to premises is an issue that is far wider than employment relations. This fact is recognised in other jurisdictions, notably in the United States, where property law governs access to workplaces in the same manner as for any other premises. Business New Zealand believes this is appropriate here too. It is noted that the penalty provisions expressed in the proposed change apply only to employers who fail to respond to a request for access.

6. It is recommended that:

    a. proposed section 20A (2) (b) onwards be deleted as well as proposed section 25(ab).

    b. for reasons of balance that the same penalty provision apply to unions who fail to seek permission to access a workplace.

Communications during collective bargaining

7. Business New Zealand understands that the government's intent is to clarify the meaning of existing sections 4 and 32. However, the proposed amendment is unlikely to have the desired effect.

8. By requiring consistency with existing subsection 32(1)(d), new subsection 32(6) effectively negates itself since it is subsection 32(1)(d) that is the source of most of the issues complained of, i.e. communication regarding bargaining

is directly or indirectly bargaining and therefore may undermine either or both the authority of one of the parties or the bargaining.

9. It is recommended that:

    a. proposed section 32(6) be amended to read:

    "Notwithstanding the provisions of subsection 32(1)(d), and for the avoidance of doubt, this section……. as long as the communication is consistent with the duty of good faith in section 4."

    b. existing section 32(1)(d)(ii) be amended by omitting the words in parenthesis,"(directly or indirectly)".

90 Day Trial Period

10. Business New Zealand supports the extension of the 90-day trial period to all employers.

11. However, we are concerned at the extent to which complexity is entering what should be a simple proposition, namely that new employees are not able to access personal grievance provisions in respect of a dismissal for the first 90 days of their employment.

12. The recent narrow interpretation, by the Employment Court, of the existing provisions essentially defeats what is an otherwise simple approach. In particular, it is now not clear what is meant by the term "at the commencement of employment", as the decision referred to differentiated between when the employee started work (impliedly on the understanding that a grievance fee period would apply) and when the contract containing the provision was signed. Furthermore, the addition of proposed section 64 makes it possible that the absence of an unsigned employment agreement may render an otherwise agreed probation period invalid.

13. Further, there are many instances where it is not the practice to have employees sign their employment agreements but to confirm acceptance of an agreement's terms and conditions by means of an accompanying letter. Under the recent ruling, this practice, too, would be likely to invalidate any 90-day trial period an agreement might include.

14. Attention is also drawn to a possible conflict between the 90 day period provisions and those of Part 6A of the Act.

15. It is not uncommon for an employer who has taken over an existing business and its employees to make some of the workforce redundant as part of rationalising existing operations with the newly acquired ones.

16. A vulnerable employee, whose work is transferred to another employer, is entitled to transfer to the new employer who must, if no provision exists, negotiate the terms of any redundancy with the transferred employee. This may cause confusion if the transferred employee, who is a new employee for

the purposes of the 90-day period provision, is subsequently dismissed by the new employer within the first 90 days of employment.

17. Lastly, it is clear from the position of the union movement generally that employers who seek to utilise grievance free periods will be fiercely resisted.

18. The creation of grievance free periods was for the purposes of enhancing the chances of marginal workers getting a job. A blanket refusal to agree to a grievance free period is likely to disenfranchise many such marginal employees. It is also likely to create extreme friction during collective bargaining despite the bulk of issues to be resolved being of more mundane nature.

19. It is therefore recommended that:

    a. the existing provision be amended to make a 90-day grievance period the default position, but permitting employees and employers to contract out of it. This would also remove the issue created by the recent court decision in which the failure to sign an agreement before starting work rendered the 90 day period invalid.

    b. care be taken to avoid a conflict between the 90 day period provisions and those of Part 6A.

Test of justification for dismissal

20. Business New Zealand supports the proposed changes.

21. The proposed change to section 103A is essentially a reintroduction of the test for justification in personal grievance cases found in the decision of the Court of Appeal in *BP Oil* case [1989] NZILR, 278, where Cooke P stated: *'The question is essentially what it is open to a reasonable and fair employer to do in the particular circumstances. Thus it is necessarily a question of fact and degree.'*

22. We express some caution about the procedure set out in subsection (3) of new s103A. This essentially codifies the process of applying "natural justice", and requires the Authority or court to "consider" whether the described elements of natural justice were present in the employer's decision to dismiss an employee. It does not require that each step be managed in a particular manner or to a particular standard.

23. For the avoidance of doubt it is recommended that:

    a. the legislation make it clear that subsection (3) is for guidance purposes only and is not intended to be followed to the letter.

Institutions

24. Business New Zealand generally welcomes the intention of the government to simplify access to and the operation of the employment justice system.

However it is concerned that some of the changes make in fact add to the existing complexities.

25. Permitting mediation with and without representation, the Authority to make recommendations that can, by default, become decisions, and enhancing the powers of labour inspectors to levels analogous with the Authority are in themselves is helpful, but without care, may add to the steps employers must follow.

26. Similarly permitting the Authority to dismiss frivolous or vexations cases is helpful, but is unlikely to affect the common and much criticised practice of "no win no fee" utilised by some advocates and lawyers.

27. It is recommended that:

    a. it be made clear that mediation with or without representation is a matter of choice and is not a process where mediation escalates from one level to the next

    b. the practice of "no win no fee" in mediation be banned

    c. before implementing the proposed new powers of labour inspectors a review be undertaken as to whether there are sufficient numbers of Labour Inspectors and whether they possess the expertise that will allow them to carry out these functions adequately.

28. Business New Zealand <u>recommends</u> that the Bill proceeds but that taking into account the points made above,

    a. proposed section 20A (2) (b) onwards be deleted as well as proposed section 25(ab)

    b. for reasons of balance that the same penalty provision apply to unions who fail to seek permission to access a workplace.

    c. proposed section 32(6) be amended to read:

       "Notwithstanding the provisions of subsection 32(1)(d), and for the avoidance of doubt, this section……. as long as the communication is consistent with the duty of good faith in section 4."

    d. existing section 32(1)(d)(ii) be amended by omitting the words in parenthesis,"(directly or indirectly)"

    e. the existing provision be amended to make a 90-day grievance period the default position, but permitting employees and employers to contract out of it. This would also remove the issue created by the recent court decision in which the failure to sign an agreement before starting work rendered the 90 day period invalid

    f. care be taken to avoid a conflict between the 90 day period provisions and those of Part 6A

g. the legislation make it clear that subsection (3) is for guidance purposes only and is not intended to be followed to the letter

h. it be made clear that mediation with or without representation is a matter of choice and is not a process where mediation escalates from one level to the next

i. the practice of “no win no fee” in mediation be banned

j. before implementing the proposed new powers of labour inspectors, a review be undertaken as to whether there are sufficient numbers of labour inspectors and whether they possess the expertise that will allow them to carry out these functions adequately.

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 73 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.