NEW ZEALAND
LAW SOCIETY

Employment Relations Amendment Bill

04/04/2018

Submission on the Employment Relations Amendment Bill

1 Introduction

1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Employment Relations Amendment Bill (Bill). This submission sets out the Law Society's recommendations on a range of practical issues, to ensure the proposed amendments to the Employment Relations Act 2000 (ERA) are clear and workable in practice and achieve the Bill's stated objectives.

1.2 The Law Society does not seek to be heard.

2 Clause 4: New section 18A – Union delegates entitled to reasonable paid time to represent employees

2.1 This new section provides that an employee who is appointed a "*union delegate*" is entitled to reasonable paid time during "*normal working hours*" to undertake union activities relating to the representation of other employees, if the activities do not unreasonably disrupt the employer's business or the employee's performance of employment duties.

2.2 The expression "*normal working hours*" may be problematic where the hours of work for the employee are variable.

2.3 The section should clarify who is a "*union delegate*", to avoid uncertainty as to the person appointed to the role. This would help to avoid potential for dispute between the parties as to recognition of a union delegate.

2.4 For further clarity and certainty, the section could include:

(a) a requirement for the employer to be notified of the name of the union delegate; and

(b) a requirement for reasonable written notice under section 18A(2)(b), to clarify expectations of notice.

2.5 ***Recommendations*:**

i. Either omit the word "*normal*" from "*normal working hours*" or cross-reference to the test in section 12(3) of the Holidays Act 2003 for determining "what would otherwise be a working day".

ii. The following amendment to new section 18A(1)(a): "The employee has been appointed *or elected as a union delegate, in accordance with the union rules or procedures*, to represent other employees of the employee's employer who are members of the union on matters relating to their employment".

iii. Insert additional sub-clause (b) "*the employee's union has notified the employer in writing that the employee is a union delegate*".

iv. Amend new section 18A(2)(b) to include "*provide reasonable notice in writing of*".

3 Clause 16: Amended section 54 – Form and content of collective agreement

3.1 Proposed section 54(3)(ii) refers to rates of "wages or salary" payable to employees to be included in the collective agreement.

3.2 The phrase "wages or salary" is narrow and the Committee may wish to give consideration as to whether it is intended that other forms of remuneration are to be included in the collective agreement including, for example, allowances or other monetary benefits.

3.3 Further, proposed section 54(4)(a) states that a collective agreement will contain the rates of wages or salary payable to employees if it provides for:

(a) the wages or salary payable for certain work or types of work or certain employees or types of employees; or

(b) the ranges of wages or salary payable for certain work or types of work or certain employees or types of employees; or

(c) one or more methods of calculating rates of wages or salary payable for certain work or types of work or certain employees or types of employees.

3.4 These definitions potentially constrain an employer from paying an employee above the rate or outside the upper limit of the range because to do so would provide a term that is inconsistent with the terms in the collective agreement as per section 61(1)(b) of the ERA. It is not clear if this is the intended effect.

3.5 ***Recommendations:***

i. In some cases, remuneration consists of more than wages and salary. If the Bill is intended to capture all remuneration payable to employees, it should be amended to reflect this.

ii. Amend proposed section 54(4)(a)(i) by including "the *minimum* wages or salary payable for certain types…."

iii. Consider whether it is appropriate to amend section 61 of the ERA to provide that *additional terms and conditions* may include higher wages or salary than that set out in the collective agreement under section 54(3)(ii).

4 Clause 17: New section 59AA – Union may provide employer with information about the role and functions of union to pass on to new employees

4.1 New section 59AA provides that a union may request that an employer provide information to a new employee who is not a member of a union. The section is to be inserted after section 59A of the ERA but appears misplaced. This part of the ERA is titled "*Undermining collective bargaining or collective agreement*", which is not a matter the new section 59AA deals with.

4.2 ***Recommendation:***

It would be more appropriate to place new section 59AA after existing section 62 in the ERA (section 62 requires an employer to provide a new employee who is not a member of a union with information about a collective agreement). The new section 63 contained in clause 17 of the Bill

also cross-references to the requirements in new section 59AA.

5 Clause 18: New section 63AA – Employer must share new employee information with union

5.1 New section 63AA(2)(a) makes provision for the employee to complete a form approved by the chief executive of the department, to notify the employer whether the employee "elects" to join a union.

5.2 The further provisions of new section 63AA then set out the procedure for the employer to follow, to share new information with the union if the employee elects to join a union.

5.3 The unions' rules provide for the manner in which persons may join the union. All unions are incorporated societies. Under section 6(1)(c) of the Incorporated Societies Act 1908, union rules must provide *"the modes in which persons become members of the society"*. Typically, this involves written notification to an officer of the union that the employee wishes to join the union. Some unions' rules may also require approval by an officer before a person can join or otherwise limit by demarcation the types of occupations or employees who are eligible to join.

5.4 The election to join a union via the proposed chief executive form will not amount to a valid method of joining a union.

5.5 ***Recommendations:***

i. New section 63AA should clarify that notification under section 63AA(2)(a) is of the "intention" to join a union or a particular union.

ii. The Law Society also recommends adding a new subsection (7):

(7) For the avoidance of doubt:

(a) The completion of the form approved by the chief executive referred to in this section and its provision to a union, does not have the effect of an employee joining or becoming a member of the union unless the employee has otherwise become a member of the union in accordance with its rules; and

(b) This section does not prevent an employee from joining a union other than by the process set out in this section.

6 Clause 25: Amended section 106 – Exception in relation to discrimination

6.1 This amendment clarifies that an employee is not discriminated against because the terms of their employment agreement differ from the terms of the employment agreement of another employee who is a member of a union.

6.2 Currently, clause 25 reads:

> *"Despite section 104, an employee is not discriminated against in that employee's employment simply because the employee's employment agreement or terms and conditions of employment are different from those of another employee employed by the same employer* ***as a consequence of*** *the employee being a member of a union."*

[emphasis added]

6.3 The discrimination provisions of the Employment Relations Act 2000 and the Human Rights Act 1993 refer to discrimination "by reason of" rather than "as a consequence of".[1] The Law Society recommends that the amendment uses wording consistent with the existing discrimination provisions.

6.4 ***Recommendation:***

Amend proposed section 106(4) by deleting the words "as a consequence of" and replacing them with "by reason directly or indirectly of".

7 Clause 29: Amended section 67A – 90-day trial period clauses

7.1 This proposed amendment provides for a definition of "employer" for the purposes of section 67A ERA trial period clauses:

> ***"Employe*r** *means an employer who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into."*

7.2 The proposed definition will limit the use of trial period clauses to employers who employ fewer than 20 employees at the beginning of the day the employment agreement is entered into. The definition raises the following issues:

(a) Currently "employees" will include a head count of casual, fixed term and permanent employees as qualifying within the "fewer than 20 employees" head count. It is unclear if this provision in the Bill is intended to capture casual employees within the head count. There are two competing considerations in this regard:

i. If casual employees are to be included, there may be daily or weekly changes in the head count making it difficult to anticipate head count when the employment agreement is "entered into", given that it is often offered to employees some days or weeks earlier; and

ii. If casual employees are not included in the headcount, it could inadvertently encourage casualisation of the workforce, as a means of circumventing the "fewer than 20" limit.

The Committee may also wish to consider the following situations which can arise:

- The employer who has up to 19 permanent employees but regularly engages casual employees from time to time from a dedicated pool of casual employees. Is this employer permitted to offer a 90-day trial period to a new permanent employment?

[1] Human Rights Act 1993, s 22; Employment Relations Act 2000, s 104 ("by reason directly or indirectly of").

- An employer has 19 employees and hires 4 new employees with trial period provisions on the same day. The first of the new employees to enter into the employment agreement will have a valid 90-day trial period, but the other 3 will not.
- The same employer has 2 employees leave that day.
- The same employer has 2 employees away who never return and claim they were constructively dismissed during the prior week.

(b) There is potential for uncertainty as to "*the day on which the employment agreement is entered into*". That date, for example, could be redrafted to the date on which the agreement is provided to the employee, the date on which it is signed, or the date on which the employee commences their employment.

(c) There may be uncertainty as to what constitutes the "*beginning*" of the relevant day.

7.3 ***Recommendations:***

i. Consider whether casual employees are intended to be counted as part of the "fewer than 20 employees" headcount.

ii. Consider whether the day of the headcount should be as currently drafted (being on the day the employment agreement is "entered into"), or an earlier date that permits the headcount to be fixed (i.e., the date of offer of the employment agreement).

iii. Provide clarity as to the "beginning of the day" being a specified hour of the day.

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