NEW ZEALAND LAW SOCIETY

NZLS EST 1869

Employment Relations (Triangular Employment) Amendment Bill

15/05/2018

EMPLOYMENT RELATIONS (TRIANGULAR EMPLOYMENT) AMENDMENT BILL

1. INTRODUCTION

1.1. The New Zealand Law Society welcomes the opportunity to comment on the Employment Relations (Triangular Employment) Amendment Bill (Bill).

1.2. This submission comments on:

(a) the best legislative vehicle for making the proposed changes to current employment structures;

(b) employees who will be covered by the Bill and an employer's obligations;

(c) drafting suggestions to improve the clarity and workability of the amendments introduced by the Bill; and

(d) the lack of a transitional provision in the Bill.

1.3. The Law Society does not seek to be heard.

2. GENERAL COMMENTS

Proposed changes to current employment structures

2.1. The explanatory note to the Bill sets out its two purposes, as follows:

(a) to ensure employees employed by one employer but working under the control and direction of another business are not deprived of the right to be covered by a collective agreement covering the work they perform; and

(a) to ensure such employees are not subjected to a detriment in their right to allege a personal grievance.

2.2. The Government has expressed an intention to ensure adequate protection for vulnerable contractors given the issues raised in the recent case of *Prasad & Anor v LSG Sky Chefs New Zealand Ltd* [2017] EmpCt 150 and concerns by the Court about the adequacy of tripartite employment relationships.[1] This member's bill proposes a solution to protecting vulnerable employees, by providing them with the ability to benefit from collectively agreed terms of employment that cover their work and by permitting them access to personal grievance rights against secondary employers who control or direct the employee in their work.

2.3. It would be preferable for the reforms in this member's bill to be incorporated into a government bill. That would enable the legislative response to the issue to be developed in a coherent and comprehensive way, informed by policy analysis from officials and supported by experienced parliamentary drafters.

[1] *Prasad & Anor v LSG Sky Chefs New Zealand Ltd* [2017] EmpCt 150 was referred to by the Member in charge of the Bill during its first reading.

2.4. If however the member's bill is to proceed, it will need close examination by the committee, assisted by officials. The Law Society's comments on the Bill are set out below.

Employees who will be covered by the Bill

2.5. The Bill provides that in order for an employee to benefit from collective agreement terms they must be:

(a) employed by a primary employer but providing services to a secondary employer, in circumstances where the control or direction exercised by the secondary employer is akin to that which would be exercised by an employer (clause 4(2));

(b) a union member of a union recognised by the secondary employer, but not covered by a collective agreement between the union and the primary employer (clause 5(c)(ii)); and

(c) included in the coverage clause of the secondary employer's collective agreement (clause 5(c)(i)).

2.6. This may result in employees who are genuine short term casual labour hire employees being able to access coverage to a collective agreement of a secondary employer. If the intent of the Bill is to only extend better protection to employees who have been in these arrangements for an extended period of time, such as in the *LSG Sky Chefs* case*,* then consideration could be given to having these provisions only apply after a set period of continuous employment.

Recommendation

2.7. Consider whether the Bill should only apply after a set period of continuous employment.

Employer's obligations

2.8. It is noted that section 62 of the Employment Relations Act 2000 (ERA) requires employers to provide new employees with information about unions and applicable collective agreements. Consideration could be given to whether a similar requirement should apply to secondary employers who are party to a collective agreement, in order to ensure consistency.

Recommendation

2.9. Include a provision that requires secondary employers to provide employees with information about unions and applicable collective agreements as in section 62 of the ERA.

3. CLAUSE 4: AMENDMENT TO SECTION 5 OF THE ERA

3.1. Clause 4 of the Bill amends section 5 of the ERA in two respects:

(a) by extending the definition of *applicable collective agreement* to include any collective agreement binding on an employee and a primary employer under new section 56(1)(c); and

(b) by inserting two new definitions of *primary employer* and *secondary employer*.

Definition of Primary and Secondary Employer

3.2. Clause 4(2) inserts two new definitions into section 5 of the ERA for a primary and secondary employer. A "primary employer" is simply an employer under the Act and the Bill does not seek to change that. For the sake of clarity and consistency of definitions, the Law Society recommends that the definition of primary employer in section 5(2) be amended by adding the words "to do any work for hire or reward under a contract of service *within the meaning of section 6, Employment Relations Act 2000*."

3.3. The clause 4(2) definition of "secondary employer" refers to "*control* ***or*** *direction*" over the employee. This is not consistent with the description in the explanatory note to the Bill, which refers to employees working under the "*control* ***and*** *direction*" of another business. The committee should consider which of the two formulations is preferred and if necessary amend the clause 4(2) definition accordingly.

Recommendation

3.4. Amend the definition of "primary employer" in section 5(2) by adding the words "to do any work for hire or reward under a contract of service *within the meaning of section 6, Employment Relations Act 2000*."

3.5. Consider whether the definition of "secondary employer" should be amended, consistent with the wording set out in the explanatory note ("… *exercises or is entitled to exercise control and direction* …).

Declaration of primary or secondary employer status

3.6. Section 6(5) of the ERA provides that the Court may, upon application, make an order declaring whether a person is an employee under the ERA. There is no similar provision included in the Bill allowing a declaration to be made on application regarding whether a person is a primary or secondary employer for the purposes of the ERA.

Recommendation

3.7. Amend section 6(5) of the ERA to include an application for a declaration as to whether a person is a primary or secondary employer under the ERA.

Consistency with the HRA

3.8. An employee bringing a claim for discrimination or harassment has the choice to bring a proceeding under the ERA or Human Rights Act 1993 (HRA).

3.9. While it is likely that secondary employers will also come within the definition of "employer" in section 2(b) of the HRA, the position is not currently clear.

Recommendation

3.10. Amend the definition of "employer" in section 2 of the HRA to include a person who meets the definition of primary employer or secondary employer under section 5 of the ERA.

4. CLAUSE 5: AMENDMENT TO SECTION 56 OF THE ERA

4.1. Clause 5 amends section 56 of the ERA to extend the application of a collective agreement to cover:

> "(c) the employees of any primary employer in respect of the primary employer where –
>
> (i) Those employees are performing work for a secondary employer where that work is within the coverage clause of any collective agreement to which the secondary employer is a party; and
>
> (ii) Those employees are a member of the union party to that collective agreement; and
>
> (iii) Those employees are not bound by any other collective agreement to which the primary employer is a party."

4.1 Clause 4 expands the definition of "applicable collective agreement" in the ERA to include "any collective agreement binding an employee and a primary employer under section 56(1)(c)". However, proposed section 56(1)(c), as currently drafted, does not expressly require the primary employer to comply with those terms. It would be helpful if this is clarified.

4.2. Further, section 56(1)(c)(ii) should refer to "*member(s)*" not *"a member*".

Recommendations

4.3. Amend the proposed section 56(1)(c) to expressly require the primary employer to comply with the applicable collective agreement as it relates to that employee in those circumstances.

4.4. Amend, proposed section 56(1)(c)(ii) to read: "those employees *are members* of the union party to that collective agreement".

5. CLAUSE 6: PROPOSED NEW SECTION 102A – JOINDER OF PARTIES TO PERSONAL GRIEVANCE

5.1. An employee who raises a personal grievance against their primary employer, and who also raises the grievance with their secondary employer, may apply to the Authority or Employment Court to join the secondary employer to the grievance (proposed new section 102A(1)).

5.2. In these circumstances, it is assumed the Bill intends that the employee must raise their personal grievance with the primary employer and the secondary employer within the 90-day timeframe in section 114 of the ERA. (This would be the case even if the grievance concerns the conduct of the secondary employer.) It would be helpful for this to be clarified; that is, the Bill should specify that an employee who intends to join a secondary employer to a proceeding must also raise a personal grievance with the secondary employer within the 90-day timeframe in section 114 of the ERA.

5.3. It is also assumed that the grounds for granting leave under proposed section 102A(4) are to be threshold grounds only for a prima facie case and not require a substantive hearing to determine the secondary employer status, prior to hearing the substantive grievance. If this is the intention then this section should be clarified to ensure that it does not require a substantive determination of status prior to hearing the personal grievance.

5.4. Further, there is no ability for a primary employer to join a secondary employer to a personal grievance, for example for the purposes of a cross claim or a claim for indemnity. It may be desirable to provide for this to permit the dispute to be determined in one forum at one time.

5.5. The wording of proposed section 102A(1) could also cause confusion in referring to joining the secondary employer to a "personal grievance" rather than (as appears to be intended) "a proceeding". Proposed section 102A refers only to personal grievances (for example, unjustified dismissal, unjustified disadvantage, discrimination, sexual and racial harassment); there are however a number of other possible proceedings against employers under the ERA and also under the Holidays Act 2003. (These may include disputes as to interpretation of the employment agreement (section 129 ERA), recovery of wages/arrears of wages (sections 130 and 131 ERA) and proceedings to recover arrears of pay under the Holidays Act.)

5.6. It is proposed that if the secondary employer is joined to the grievance, the secondary employer is jointly liable with the primary employer for any remedies. However, the Bill does not set out what the situation is in relation to orders in the nature of injunctions, for example for reinstatement.

5.7. The context of proposed subsection (3) seems to indicate that joint liability will only apply to a monetary remedy. However, that is not expressly stated. If the intent is that the joint liability will only be as to monetary remedies, that should be expressly stated. If the intent is that there could be joint liability with respect to all remedies that can be awarded, that should be stated and provision made for how this will work in relation to reinstatement and other mandatory orders.

5.8. Finally, consideration should also be given as to whether enforcement action should be possible against the secondary employer. For example, even if a primary employer is responsible for payment of the employee's wages, a secondary employer may have acted in breach of the Holidays Act by incorrectly recording an employee's entitlement to paid leave.

Recommendations:

5.9. Amend section 114 of the ERA to clarify that, in the case of an employee employed by both primary and secondary employers, the personal grievance must be raised with both the primary and secondary employer within the statutory 90-day timeframe.

5.10. Amend proposed section 102A(1) to read:

> "*Where an employee employed by a primary employer raises a personal grievance against that employer, the employee may, if the grievance has also been raised with any secondary employer of that employee, apply to the Authority or Court to join that secondary employer to the* ***proceeding in the Authority or the Court in respect of that personal grievance***" (emphasis added).

5.11. Consider whether there should be an ability for a primary employer to join a secondary employer to proceedings filed by an employee.

5.12. Consider whether the ability to apply to join a secondary employer to a grievance proceeding should extend to disputes proceedings and arrears of wages/holiday pay proceedings under the Holidays Act 2003.

5.13. Amend proposed section 102A(4) to read:

"The Authority or Court must grant leave if _

(a) the employee establishes a prima facie case that the party is a secondary employer and its conduct is alleged to have resulted in or contributed to the grounds of the personal grievance as set out in the proceedings; ..."

5.14. Either expressly state that the joint liability of the secondary employer is only as to monetary remedies, or make specific provision for how mandatory orders such as reinstatement are to work.

6. TRANSITIONAL PROVISION

6.1. Clause 2 provides that the Bill comes into force on the day after the date on which it receives the Royal assent.

6.2. The Law Society recommends time be given to primary and secondary employers to:

(a) clarify their relationship to one another before the new provisions come into force;

(b) inform the union that one of the union's members is performing work for a secondary employer;

(c) inform the primary employer of the existence and terms of any collective agreement.

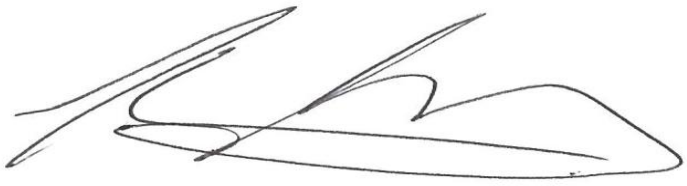
6.3. It is also unclear how any proceedings in the Authority or Court at the time of the Bill coming into force, and that would be covered by the new provisions, are to be dealt with.

6.4. A transitional provision would assist in clarifying what is to happen where a grievance has already been raised against the primary employer. Can (and if so, how) a secondary employer be joined to that grievance? Does the 90-day time limit apply?

Recommendation

6.5. A transitional provision should be included, providing a reasonable period between the day after the date of Royal assent and the Bill coming into force.

6.6. A transitional provision could also address whether the existing or new provisions are to apply to pending proceedings.



Kathryn Beck
President

15 May 2018