NEW ZEALAND LAW SOCIETY

NZLS EST 1869

EMPLOYMENT STANDARDS LEGISLATION BILL

06/10/2015

SUBMISSION ON THE EMPLOYMENT STANDARDS LEGISLATION BILL

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Employment Standards Legislation Bill (Bill). This submission sets out the Law Society's recommendations on a range of technical issues, to ensure the proposed amendments are clear and workable in practice and achieve the Bill's stated objectives. The most significant substantive recommendation is to amend the Bill to provide for minimum criminal procedure standards, rather than the civil standard, to apply to the pecuniary penalty and banning order provisions in the Bill.

2. The Law Society's comments are grouped under the following headings:

   (a) Mediation;

   (b) Zero hours contracts;

   (c) Wage and time records;

   (d) Banning orders;

   (e) The standard of proof in relation to pecuniary penalties and banning orders;

   (f) Wages Protection Act 1983 amendments; and

   (g) Minor technical corrections.

Mediation

3. Clause 83 amends section 3(a)(v) of the Employment Relations Act 2000 (ERA) to provide that an object of the Employment Relations Authority (Authority) is to promote "mediation as the primary problem-solving mechanism *other than for enforcing employment standards*" (emphasis added). The italicised phrase has a different effect than that apparently intended according to the Explanatory Note, which suggests that this amendment is designed to "expressly exclude the enforcement of employment standards" from having mediation as a problem-solving mechanism.

4. The clause dealing with mediation and enforcement of employment standards, proposed clause 159AA (to be inserted by clause 98 of the Bill), does not expressly exclude mediation as a problem-solving mechanism. In fact it specifies various circumstances in which mediation remains appropriate. A more accurate explanation is that mediation is the primary problem-solving mechanism but that, where a matter before the Authority relates substantially to an alleged breach of employment standards relating to an employee, then the Authority must be satisfied that one of the circumstances specified in proposed clause 159AA applies before directing mediation.

Recommendations:

- Clarify that the Bill does not intend to "expressly exclude" mediation as an available problem-solving mechanism for enforcement of employment standards; and
- Delete the wording in section 3 "*other than for enforcing employment standards"* and substitute the words "*except as otherwise provided in section 159AA*".

5. Further, the criteria that the Authority must consider when directing mediation may be too limiting, especially in requiring there to be a dispute. There may be circumstances where the breach of

employment standards is not in dispute but mediation may still assist the parties, for example in terms of agreeing a payment regime for arrears of wages or where the issue of penalties is still live. There may in such circumstances be some value in the parties meeting in a mediated process whereby the person in breach can usefully use confidential discussions with the Labour Inspectorate, facilitated by a mediator, for resolution.

Recommendation:

- Delete the wording in proposed section 159AA(a) – "the facts of the alleged breach are in dispute and". [Clause 101 inserts similar provisions to clause 98 with regard to criteria the court must consider when directing mediation and should be amended accordingly.]

Zero hours contracts

Agreed hours of work

6. The Explanatory Note (and the Minister's public statements) suggests that so-called "zero hours" contracts are to be prohibited: "the Bill prohibits certain practices in employment relationships that lack sufficient mutuality between the parties (particularly in relation to 'zero hours' contracts)" (p 1), and "The Bill also prohibits specific practices that undermine the mutuality of obligations in the employment relationship. These issues were recently highlighted in relation to "zero hours" contracts (in which employees are required to be available for work, but the employer is not required to offer guaranteed hours)" (p 2).

7. The Law Society considers that the clauses intended to effect this prohibition are unclear. Indeed, they appear in fact to *enable* zero hours contracts, subject to a requirement to pay compensation to the employee.

8. The starting point for agreed hours of work is section 65(2)(a)(iv), which provides that every individual employment agreement must include "an indication of the arrangements relating to the times the employee is to work". An "indication of the arrangements" does not require the fixing of hours of work, although it could include it.

9. Proposed section 67C defines "agreed hours of work". Sections 67C(a)(ii) and (b) refer respectively to "*any* agreed hours of work" and "*any* hours of work agreed under section 65(2)(a)(iv)". The language indicates that the agreement to hours of work is optional, that there may well be no agreed hours of work, or agreed minimum hours of work at all.

10. Proposed section 67D contains the employer's obligation to "ensure that the employee's agreed hours of work are specified in" their employment agreements. There is thus no obligation evident in these provisions that there must be agreed hours of work, or agreed minimum hours of work, merely the basic underlying obligation in section 65(2)(a)(iv) to include "an indication of the arrangements" relating to working times. If there are agreed hours of work, or agreed minimum hours of work, they are required to be specified in the employment agreement.

11. In none of these provisions is there a prohibition on "zero hours" contracts. In fact, such contracts are enabled because, as there may be no minimum hours of work agreed, the hours of work may be zero. Further, as proposed section 67E(2)(a) indicates, "all work performed under the employment agreement" may be performed under an "availability provision", including where there are no agreed minimum hours of work at all. It rests on a questionable interpretation of section 65(2)(a)(iv),

that "an indication of the arrangements relating to the times the employee is to work" can include the position where there are *no arrangements at all* relating to the times the employee is to work other than employer discretion.

12. Further, proposed section 67E purports to provide for a legal relationship *other than* a casual relationship, in that proposed section 67E(1)(c) envisions that under such a relationship the employee will be *required* to be available to accept any work that the employer makes available. In terms of the background papers to the Bill, there is an absence of mutuality and reciprocity in such a relationship.[1]

13. The provisions in clause 87 relating to agreed hours of work in proposed sections 67C and 67D of the ERA do not effect a prohibition and would benefit from clarification as to what precisely is intended. This lack of clarity affects the use of the concept "agreed hours of work" in the provisions about availability in proposed section 67E, as well as the nature of the legal relationship as contemplated in that provision.

14. An unintended consequence of the above framework may be that some employers who organise their work by rosters that are subject to change could be caught in some circumstances and be required to pay compensation.

15. Interpretation of this statutory framework would be greatly assisted, and compliance promoted, by including a preliminary purpose section so that the parties can easily comprehend what these provisions in combination are intended to achieve.

***Recommendation*:**

- Include a preliminary purpose section to explain the intention behind the "agreed hours of work" provisions and to clarify whether zero hours contracts are prohibited or enabled subject to minimum requirements to protect employees. If zero hours contracts are enabled, "an indication of the arrangements relating to the times the employee is to work" in section 65(2)(a)(iv) should be amended accordingly.

Availability provision

16. Clause 87 inserts section 67E to provide for the unenforceability of "availability provisions" without compensation. But, as described above, because "agreed hours of work" may in fact be zero as no minimum hours have been agreed, this has the effect of enabling zero hours contracts, so long as compensation is provided.

17. The term "compensation", a key concept for this provision, is not defined except to the extent of the requirement in section 67E(3) that it be provided for in the employment agreement. No minimum level of compensation is mandated, with the result that the agreed compensation could be very low indeed, depending on the parties' bargaining power. No doubt the provision would be interpreted as "reasonable compensation", but this introduces a significant uncertainty into the law as to what interests the compensation should be assessed against, if any. For example:

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1 Office of the Minister for Workplace Relations and Safety *Addressing zero hour contracts and other practices in employment relationships*; Ministry of Business Innovation and Employment *Regulatory Impact Statement: Addressing zero hour contracts and other practices in employment relationships*.

- Should the compensation be variable and calculated on the basis of the employee's lost opportunities for other work, recreation, being with family, the inconvenience of waiting and putting other activities on hold?
- Should it be equivalent to the minimum wage?
- Should it be a minimum percentage of ordinary salary, such as 50%?

***Recommendation*:**

- Given the stated purpose of prohibiting practices that lack sufficient mutuality between the parties, the Bill should provide for a minimum level of compensation. The amount of compensation should not be token or illusory, and it should be able to be determined with some certainty so as to avoid disputes.

Adverse treatment

18. Clause 87 inserts section 67F to prohibit the adverse treatment of an employee who refuses, and is entitled to refuse, to perform work.

19. The intention is to prevent employees being "punished" or "managed" for not performing work when they are entitled to refuse to work: that is, where there is an availability clause, but the employees are not being compensated for making themselves available, and so are entitled to refuse to work. However, subsection 67F(2) merely states that "The employee's employer must not treat the employee adversely because the employee refused to perform the work". While the employee is able to raise a personal grievance (proposed section 103(1)(g)), there is no test for determining what constitutes adverse treatment.

Recommendation:

- The provision should specify what constitutes "adverse treatment", or at least list factors that would indicate adverse treatment, such as:
    - no further offers of work since the refused offer, in comparison to the number and frequency of previous offers of work;
    - reduced hours in comparison to those worked prior to the refusal.

Shifts

20. Clause 87 inserts section 67G to require a period of notice for the cancellation of shifts. Subsection (6) defines "shift work", but the word "shift" is also used in the section with the same meaning.

Recommendation:

- Section 67G(6) should define both "shift work" and "shift".

Personal grievance

21. Clause 88 inserts section 103(1)(g) to extend the personal grievance jurisdiction to an employer's failure to comply with proposed sections 67C to 67H. However, since proposed section 67C is merely a definition section, it is difficult to see how an employer could comply or not comply with this section. Failure to specify a matter in an employment agreement under proposed section 67D also seems ill-suited to give rise to a personal grievance, and enforcement would be more appropriate by

way of a compliance order. None of the remedies for a personal grievance seem relevant to a breach of section 67D.

Recommendation:

- Amend clause 88 so that the subsection inserted is "(h) that the employee's employer has failed to comply with sections 67E to 67H".

Wage and time records

22. Clause 89 amends section 130(1)(g) to require that in a wage and time record, "the number of hours worked each day in a pay period and the pay for those hours" be shown.

23. While "*wages*" are not defined in the ERA, they are defined in the Wages Protection Act 1983 to mean "*salary or wages*". If this definition is to apply under the ERA, it would be problematic and administratively prohibitive in certain cases to show the number of hours worked each day in the pay period for salaried employees. That is because, by the very nature of a salaried role, these hours will vary on a regular basis. This will not be the case for employees on wages who work irregular hours, as the hours worked by those employees is required to calculate their pay entitlement.

24. The Law Society does not recommend defining wages as excluding salary in general terms. Instead, it is preferable to exclude the requirement to show the number of hours worked each day in the pay period in the case of salaried employees.

Recommendation:

- Exclude the requirement to show the number of hours worked each day in the pay period in the case of salaried employees.

Banning orders

New Zealand Bill of Rights analysis

25. Clause 95 inserts Part 9A, *Additional provisions relating to the enforcement of employment standards* (sections 142A – 142ZC). Proposed sections 142M – 142Q provide for banning orders for serious breaches of minimum entitlement provisions and section 351 of the Immigration Act 2009. While the Ministry of Justice has analysed banning orders under section 7 of the New Zealand Bill of Rights Act 1990 (NZBORA), it has not identified that proposed sections 142M – 142Q may engage the right of freedom of association in section 17 of NZBORA, which, by virtue of section 29 of NZBORA, applies to employers, whether natural or legal persons.

26. It may be that any limitation on this right may be demonstrably justifiable, but the Law Society recommends that the possible engagement of this right be considered. Even if any limitation is justifiable, the terms of any banning order imposed should be required to be proportionate to the breach of employment standards the order relates to, rather than the duration and terms being matters entirely at large for the court to determine.

Recommendations:

- that the proposal to introduce banning orders be considered for consistency with section 17 of NZBORA; and

- that there be a requirement that the imposition and terms of banning orders should be proportionate in the circumstances of the breach of employment standards to which the order relates.

Terms

27. Proposed section 142N(1) defines the terms of the banning order and prohibits a person from:

    - entering into an employment agreement as an employer;
    - being an officer of an employer;
    - being involved in the hiring or employment of employees.

28. As the Bill is currently drafted, the purpose of a banning order could be defeated by a banned person engaging independent contractors instead of hiring employees. However, if the Bill were to include a prohibition on contracting with both employees and independent contractors, this would effectively shut down a business if a banning order was made. Also, independent contractors may (although not always) have better bargaining power than employees and so may be better able to avoid abusive employment practices. The select committee may wish to consider whether a prohibition on contracting with independent contractors should be expressly included or excluded from the terms of banning orders.

Recommendation:

- That consideration be given to whether a prohibition on contracting with independent contractors should be expressly included or excluded from the terms of banning orders.

Standard of proof in relation to pecuniary penalties and banning orders

29. Proposed section 142R states that the standard of proof for a declaration of breach, pecuniary penalty order, compensation order, or banning order, is the standard of proof that applies in civil proceedings.

30. The Law Society is concerned that the application of the civil standard of proof in respect of pecuniary penalties and banning orders is inappropriate, especially because the regime may apply to a wide range of people, including those only indirectly connected to a breach. In principle, while it may be appropriate that declarations of breaches of employment standards and compensation orders may be made on the balance of probabilities standard, a civil penalty such as a pecuniary penalty or banning order should not be imposed on a balance of probabilities, and the protections available to criminal defendants ought to be available.

31. Proposed section 142V defines being "involved in a breach" very widely to include, among other types of behaviour, being indirectly knowingly concerned in breaches of employment standards. This raises the possibility that persons with weak connections to a breach of employment standards may be the subject of penalties or banning orders without the protection of minimum standards of criminal procedure, including the presumption of innocence. The criminal law has always required derivative or secondary liability for an offence to follow only on proof beyond reasonable doubt of knowing participation or encouragement of the principal offender.

32. Amending these provisions to provide for the criminal standard of proof for pecuniary penalties and banning orders may be difficult because these orders are presently predicated on a declaration of breach being made (see proposed sections 142E(1) and 142M(1)(a)). That means it would not be as simple as providing for the civil standard to apply in proceedings for declarations and compensation orders, and the criminal standard to apply in proceedings for pecuniary penalties and banning orders. There will need to be consequent amendments to proposed sections 142M(1) and 142E(1).

Recommendation:

- That pecuniary penalty orders and banning orders should only be available on proof beyond reasonable doubt of the breach of employment standards.

Officers involved in a breach

33. Proposed section 142V(3) specifies the persons to be treated as officers of a person in breach. This provision is similar to section 18 of the Health and Safety at Work Act 2015, in terms of the amendments introduced after the select committee's recommendations, as to persons exercising significant influence over the management or administration of the person in breach. The designation "*officer*" is intended to be confined to people in senior governance roles, such as directors and chief executives.

34. Proposed section 124V does not, however, go on to clarify (as does section 18(d) of the Health and Safety at Work Act 2015), that "*to avoid doubt, does not include a person who merely advises or makes recommendations to a person referred to in paragraph (a) or (b)*". This late addition to the Health and Safety at Work Act 2015 provides protection for certain employees in senior management.

Recommendation:

- To ensure clarity as to persons involved in a breach, proposed section 142V should be amended to include a new subsection (4) as follows:

  "To avoid doubt, does not include a person who merely advises or makes recommendations to a person referred to in ***subsection (3)****."*

  [Clauses 116(3), 119, 125, 126, 133 and 135 make amendments to the Holidays Act 2003, Minimum Wage Act 1983 and the Wages Protection Act 1983 respectively to provide for liability for persons involved in failures to comply with minimum standards. These provisions should be amended accordingly.]

Wages Protection Act 1983 amendments

Unreasonable deductions

35. Clause 131 inserts new section 5A into the Wages Protection Act 1983 (WPA). The provisions are problematic in several ways:

- The use of the term "unreasonable" is not specific and thus creates uncertainty.
- Proposed section 5A is arguably inconsistent with section 4, which spells out the general rule and specifies the limited exceptions to that rule.
- This provision is likely to have the unintended consequence of giving employers more scope to make deductions from employees' wages where a general written consent to make deductions

has been given, as opposed to the ostensible function of protecting employees. It sends the wrong message to employers: that they can make deductions as long as they are "reasonable".

Recommendations:

- preserve the current position under the Wages Protection Act and common law as it stands;
- clarify that consent to deduct from wages must be specifically given in writing by the employee for a particular deduction or a particular class of deduction; and
- instead of proposed section 5A, the legislation could usefully spell out in a new section 5(3) that deductions under section 5(1) may only be made (with consent) where the employee has a legal obligation to pay money to the employer or a third party, but in no circumstances may a deduction from wages be made where the reason for the deduction arises from a third party's independent actions.

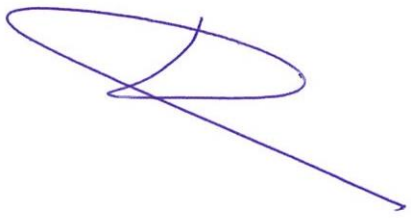
Minor technical corrections

Recommendations:

36. The Law Society recommends that minor errors in the following provisions be corrected:

- In proposed section 67E(2)(b), the "to" should be omitted, otherwise the provision as a whole reads as "To avoid doubt, an availability provision may relate to – (b) to work performed…".
- Clause 96 amends section 148A regarding minimum entitlements. Subclause 3 should refer to "*Subsections (1)* ***and (2) apply*** *to ….* ".
- Proposed section 142A(2)(b) should read "sections 223 ***to*** 235".

37. The Law Society does not wish to be heard, but is happy to meet with the officials advising on the Bill if the Committee considers that would be of assistance.



Mark Wilton
Vice President
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