

The Chair
Cabinet Economic Growth and Infrastructure Committee

Addressing zero hour contracts and other practices in employment relationships

Proposal

- 1 This paper seeks Cabinet approval to a package of recommendations to address certain practices in employment relationships that lack sufficient mutuality between the parties.

Executive summary

- 2 While New Zealand has a well-functioning labour market in general, there are some practices that I believe are unnecessary in a modern and flexible labour market.
- 3 One of the core issues has been coined 'zero hour' contracts in the media. However, the specific practices which I think should be expressly prohibited in legislation are:
 - a) employers not guaranteeing employees any hours of work, while requiring them to be available (so-called zero hour contracts)
 - b) cancelling a shift without reasonable notice or compensation
 - c) putting unreasonable restrictions on secondary employment
 - d) making unreasonable deductions from employees' wages.
- 4 The common characteristic of these employment arrangements is that they lack sufficient reciprocity, providing the employer with more flexibility and less risk than the employee.
- 5 The interventions I propose to address the practices above are:
 - a) a requirement that where parties to an employment agreement commit to a set amount of hours, those hours are stated in the employment agreement
 - b) four specific prohibitions on certain practices
- 6 The two interventions above work together and mean that where the parties do not set agreed contracted hours the employee will be free to decline work. Also, when employees are offered work above their agreed contracted hours, employees will be free to decline work on a case-by-case basis or the employment agreement must specify compensation when the employee is required to be available.
- 7 If agreed to, I intend to progress these changes together with the changes in the omnibus *Employment Standards Bill* which I intend to introduce in mid-2015.

Background

- 8 In March of this year, Cabinet directed me, as the Minister for Workplace Relations and Safety, to report back by May 2015 with proposals relating to the following issues and whether any such proposals should be included in the *Employment Standards Bill* [CAB Min (15) 8/9]:
- a) casual employment, permanent employment with no guarantee of minimum hours and restrictions on secondary employment
 - b) deductions from wages that reimburse employers for loss or damage caused either by third parties or employees themselves, including deductions clauses in employment agreements.
- 9 My initial views were that these issues undermine the mutuality of obligations between employers and employees. I directed officials to undertake a review of these issues. Part of this review involved targeted consultation with key stakeholders. As a general theme, stakeholders were broadly supportive of taking some action to address issues with some of the employment practices identified.
- 10 The primary issue is zero hour contracts. New Zealand has no legislative definition of zero hour contracts. In the United Kingdom, the term has been used to refer to casual contracts that do not guarantee any hours of work and require the employee to be exclusively available to a certain business. However, in the New Zealand context, zero hour contracts have been used to describe any employment arrangement (including those in permanent employment arrangements) where employees are given no guarantee of hours from week to week, but are required to be available. This is predominantly occurring in permanent employment arrangements.
- 11 It is important that a zero hour contract is understood to be distinct from casual employment as this has been confused by the media. There is no legislative definition of what constitutes casual employment in New Zealand. However, casual employment is well recognised by the Courts as a form of employment which is on an “as and when required” basis. Casual employment agreements must meet the same minimum requirements as other employment agreements. Courts consider a number of characteristics when assessing whether a contract is casual. These include:
- a) engagement for short periods of time for a specific purpose (eg fluctuating demand)
 - b) a lack of a regular work pattern or expectation of ongoing employment
 - c) employment is dependent on the availability of work demands
 - d) no guarantee of work from one week to the next
 - e) lack of obligations on either party to offer or accept work
 - f) employees are only engaged for the term of each period of employment.
- 12 Zero hour contracts are being used widely in the fast food industry, though in recent weeks there seems to have been some movement towards providing more certainty of hours in this sector. However, the practices I am concerned with are used more broadly. They are also found in other businesses such as hospitality, service stations, convenience stores and some care and service providing businesses.

The nature and extent of the problem of employment practices which undermine the mutuality of obligations

- 13 New Zealand's employment relations framework aims to promote good faith and productive employment relationships.
- 14 Certain practices that some employers are engaging in appear to be creating poor outcomes for workers. For example, some of these practices have led to employees finding it difficult to plan their financial and personal lives, and access state-provided benefits and subsidies. They also tilt the playing field away from good employers and generally undermine productivity in the labour market. These practices were not envisaged when the employment relations framework was developed, so the legislation does not specifically address them. I propose to make it clear in legislation that these practices are unacceptable.
- 15 New Zealand's labour market settings also aim to strike the right balance between flexibility and certainty. This means, on the one hand, businesses are able to adapt to changing demands and employees have sufficient flexibility to meet their personal needs. On the other hand, there needs to be enough certainty that businesses can plan for their commercial needs, and employees can plan financially and in their personal lives.
- 16 This balance is not struck in employment practices in which there is no reciprocity in the obligations between employers and employees. Mutuality of obligations is a key feature of modern employment relationships. Where flexibility is desired by both parties, agreements should ensure that this is achieved in a manner consistent with the principles of mutuality. This means that the risks associated with employment are borne by the appropriate parties.
- 17 An example of risk being appropriately borne by the parties who are best placed to manage it is casual employment arrangements. Casual workers do not have certainty of hours, but they can decline work, and the employer is under no obligation to offer work, but may not have someone available when needed.
- 18 Practices where there is not an appropriate balance of risk in the employment relationship may result in employees being less secure in their work and hours, and have the potential to increase staff turnover and lower employee engagement and productivity.
- 19 While comprehensive data on the nature and extent of the problem is not readily available, a picture of poor practice creeping into mainstream employment arrangements has become apparent. These include the following practices.
- 20 Employees are being required to be available for work without necessarily being given the opportunity to receive work or payment for that availability. While these practices mean employers can readily access labour, allowing them to be responsive, the risk and cost of this flexibility is being pushed to employees who are less able to bear that risk.
- 21 Another issue is the short notice cancellation of shifts in which employees are told they are no longer required to work a shift close to the time the shift is to commence, or are sent home midway through a shift, without being compensated for this. While this may allow employers to have flexibility and reduce costs, the risk and cost of this flexibility are similarly shifted onto the employees.

- 22 A third issue is the restriction on secondary employment in which employers prevent employees from seeking alternative employment. This may be appropriate in a narrow set of circumstances to protect commercially sensitive information, where there is reputational risk to the employer or where there is a conflict of interest that could affect the employer. However, such restrictions are being used across a range of employment relationships without such characteristics.
- 23 Finally, there have been instances of employers making deductions from employees' wages to cover business losses. An example of this is service station attendants having their pay docked to cover the cost of customer theft. The *Wages Protection Act 1983* generally prohibits employers from making deductions, with limited exceptions that allow for deductions that an employee has consented to, or requested, in writing. However, in some employment relationships, established expectations around wage deductions are such that employees are unlikely to be able to exercise that discretion effectively. This is especially the case when a general "consent to deductions" clause, pre-authorising various types of deductions, is contained in the employment agreement.
- 24 I am clear that there is a space for a range of legitimate working practices in our labour market, whether casual, permanent part-time or permanent full-time. However, I want to send a strong signal that exploitative practices where mutual obligations are unbalanced have no place in New Zealand's labour market.
- 25 The current employment relations system does not provide sufficient incentives to ensure mutuality of obligations in the employment relationship. Therefore, I propose to amend the legislation to prevent exploitative practices being undertaken in the New Zealand labour market.

Proposals to ensure mutuality of obligations in employment relationships

- 26 I recommend that a requirement is introduced into the *Employment Relations Act 2000* that where the parties to an employment agreement commit to a set amount of hours, those agreed contracted hours are stated in the employment agreement.
- 27 The purpose of this requirement is to ensure that employers and employees are clear about their commitments to each other to provide or undertake work, respectively.
- 28 I have proposed a specific prohibition below that will mean where the parties do not set agreed contracted hours, or when employees are offered work above their agreed contracted hours, employees will be free to decline work on a case-by-case basis or the employment agreement must specify compensation when the employee is required to be available.
- 29 This will retain flexibility, but also increase certainty by ensuring that both parties are aware at the beginning of the working relationship of the mutual commitment that they have made. This encourages employers either to give more certainty as to the amount of hours or to compensate for their availability.

Prohibition of specific practices

- 30 I propose that, in addition to greater certainty being provided in the employment agreement, the specific practices discussed above should be expressly prohibited in the legislation. Specifically, I propose that the legislation prohibit employers from:
- a) **requiring in an employment agreement that an employee must be available for work over their contracted hours unless:**

- i. the agreement retains a genuine right for the employee to refuse such work on a case-by-case basis without penalty; or
- ii. the agreement provides compensation where an employer requires the employee to be available, and this is paid where the employee is required to be available.

This preserves flexibility where there is agreement and quid pro quo obligation between parties. It will incentivise employers to give employees certainty about the hours they are required to work, where this is possible.

Where it is likely that an employer may want an employee to be available above their contracted hours, this option creates a requirement on employers and employees to agree that employees can turn down the work or agree to compensation rates up front in the employment agreement. The incentive is for parties to agree in the employment agreement what is expected and how they are compensated for that.

Parties may also agree that the total remuneration package includes compensation for availability as might be the case for salaried employees who may be required to work additional hours from time to time to meet the requirements of the role. I considered limiting the scope of this proposal to contracts that have uncertain hours or for employees not paid a salary but believe it would be too easy to game (eg an employer could pay an employee a salary for one hour a week and then require availability without any compensation).

There is a risk that employers with a strong bargaining position may try to negotiate very low rates. However, the Act provides a mechanism for redress for unfair bargaining for terms and conditions.

- b) **cancelling a shift without reasonable notice unless compensation, as agreed in the employment agreement, is paid.**

Where it is likely that an employer may want to be able to cancel shifts, this option creates a requirement on employers and employees to agree to compensation rates up front in the employment agreement. This would not prohibit an employer providing no compensation where sufficient notice has been provided, but again notice periods must be agreed upfront in the employment agreement. The intention here is that notice periods and compensation rates will be settled in employment agreements.

Here too it is possible that employers may try to negotiate minimal notice periods and rates, and lower what has been established in case law. They may also delay rostering work to avoid penalties. It is not my intention that this proposal would allow parties to undermine case law.

- c) **putting any restrictions on secondary employment unless there is a genuine reason based on reasonable grounds.**

For example, it would not be reasonable to restrict a low-wage, low-responsibility employee who makes hamburgers part-time for one company from making hamburgers for another company due to the risk the employee may share information about promotions. It is an unbalanced response to the risk to restrict that employee earning other income. However, it may be reasonable to restrict a well remunerated professional, such as a doctor advocating for a cancer charity from also working as an advocate for a tobacco company.

I note that many employers want to know about employees' secondary employment to deal with health and safety risks in the workplace. Therefore, it is intended that employers are still able to request that employees disclose secondary employment so that employers are able to manage health and safety risks in the workplace. Employers can do this through the disciplinary or performance management processes where relevant.

d) **making unreasonable deductions from employees' wages.**

An example of where it is unreasonable to deduct the pay of an employee is to cover loss due to third party behaviour over which that employee had no reasonable control. However, it may be reasonable to make deductions in, for example, on-farm employment arrangements where it is common for employers and employees to agree that the cost of lodgings and provisions will be deducted from the employee's salary.

This prohibition will complement the existing protections of employees' wages that are set out in the *Wages Protection Act 1983*. In practical terms, it will provide an additional ground on which an employee may challenge a deduction in the Employment Relations Authority. Currently employees have a cause of action only if a deduction was made without their written consent, or where that consent was obtained under duress. The proposed change would allow courts to invalidate a deduction on the basis of unreasonableness even if the employee had consented to it, and regardless of how, or in what circumstances, the deduction was authorised.

I did consider whether to address this issue by tightening the process requirements for an employer to obtain an employee's valid consent to any deduction. I decided against this approach because it would not send a clear signal to employers that certain types of deductions are unreasonable. In addition, changing procedural requirements would be likely to make it difficult for good employers to make reasonable deductions, including deductions that may be necessary to recover employee debts at the end of an employment relationship.

31 All proposals discussed above cover all employers and employees. The legislation will not be limited to any particular demographic because such conduct is unacceptable at any level.

32 Under these proposed specific restrictions an employee, or their representative, can take a case to the Courts claiming that the employment agreement, or the law, has been breached. I propose to specify that any breach of the prohibitions be grounds for a personal grievance. I also intend that a penalty could be imposed by the Courts for non-compliance.

Transitional arrangements

33 Following the passage of the legislation, I propose a transitional period be provided before the changes are brought into effect. This will give employers time to make any changes needed to their employment agreements or systems before the amendments take effect.

Next steps

34 I intend to include these changes in the omnibus Bill which covers the employment standards reforms, and the changes to parental leave announced as part of Budget 2014. The draft Bill will be with Cabinet in mid-2015 for introduction shortly thereafter.

Consultation

35 The following government agencies have been consulted: ACC, the State Services Commission, the Treasury, the Ministries of Social Development, Education, Health, Pacific Island Affairs, Justice, the Ministry for Women, Te Puni Kōkiri, Inland Revenue, the Department of Corrections, the Department of Internal Affairs and WorkSafe New Zealand. The Department of Prime Minister and Cabinet has been informed about the Cabinet paper.

Other consultation

36 My officials undertook three weeks of targeted consultation with a broad range of stakeholders which included employers, business and industry representative associations, unions, employee representatives and employment lawyers.

Financial implications

37 The proposals contained in this Cabinet paper do not have any financial implications.

Human rights

38 The proposals contained in this Cabinet paper appear to be consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*. A final view as to whether the proposals are consistent with the *Bill of Rights Act* will be possible once the proposed legislation has been drafted.

Legislative implications

39 The proposals in this paper will require amendments to the *Employment Relations Act*. These changes will form part of the omnibus *Employment Standards Bill* [REDACTED] s 9(2)(g)(i) of the Official Information Act 1982 [REDACTED]. The Bill is intended to be introduced by mid-2015.

Regulatory impact analysis

40 A regulatory impact statement (RIS) is required for these changes and is provided with the Cabinet paper.

Quality of impact analysis

41 The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and associated supporting material, and considers that the information and analysis summarised in the RIS partially meets the quality assurance criteria. They note, however, that the paper also contains a proposal (recommendation one), that will require employment agreements to specify the number of agreed contracted hours wherever practicable in their employment agreements; this is not backed by any regulatory impact analysis.

42 While there is limited evidence about the extent of the problem, the proposed specific prohibitions are aimed at addressing identified exploitative work practices that are occurring.

43 The RIS is aimed at also preventing residual problems which are not yet manifest, and therefore covers a broader range of options than those proposed in this paper. These options include a general prohibition on unconscionable conduct, to be enforced by the courts, for which a risk of unintended consequences has been identified. The option is not being recommended in this paper.

Publicity

- 44 I intend to make a media statement on the decisions about ensuring mutuality of obligations in the employment relationship at the appropriate time.

Recommendations

- 45 The Minister for Workplace Relations and Safety recommends that the Committee:
- 1 **Agree** to amend the *Employment Relations Act 2000* to require that where the parties to an employment agreement commit to a set amount of hours, those agreed contracted hours are stated in the employment agreement
 - 2 **Note** that when employees are offered work above their agreed contracted hours, employees will be free to decline work on a case-by-case basis or the employment agreement must specify compensation when the employee is required to be available
 - 3 **Note** that recommendation one does not affect casual employment agreements because the nature of casual employment is that the hours are as and when required
 - 4 **Agree** to amend the *Employment Relations Act 2000* to specifically prohibit parties agreeing in an employment agreement that an employee must be available for work over the contracted hours unless:
 - 4.1 the agreement retains a genuine right for the employee to refuse such work on a case-by-case basis without penalty; or
 - 4.2 the agreement provides compensation where an employer requires an employee to be available, and this is paid where the employee is required to be available
 - 5 **Note** that, for the purposes of the restriction on availability, parties may also agree that the total remuneration package for salaried employees includes compensation for that availability
 - 6 **Agree** to amend the legislation to specifically prohibit cancellations of a shift without reasonable notice, unless compensation, as agreed in the employment agreement, is paid
 - 7 **Agree** to amend the legislation to specifically prohibit restrictions on secondary employment unless there is a genuine reason based on reasonable grounds
 - 8 **Agree** to amend the legislation to specifically prohibit making unreasonable deductions from employees' wages
 - 9 **Note** that an employee affected by a breach of any of the prohibitions will be able to seek a remedy through the personal grievance process

Legislation

- 10 **Note** that these changes will be included in the omnibus *Employment Standards Bill* to be introduced in mid-2015

- 11 **Invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office to give effect to these recommendations
- 12 **Authorise** the Minister for Workplace Relations and Safety to make decisions consistent with the overall policy decisions in this paper on any issues which arise during the drafting process.

Hon Michael Woodhouse
Minister for Workplace Relations and Safety

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