In Confidence

Office of the Minister for Workplace Relations and Safety

Chair, Cabinet Business Committee

Employment Relations Amendment Bill: Outstanding Issues and Approval for Introduction

Proposal

1. This paper seeks approval to introduce the Bill to the House of Representatives in addition to approval for further policy proposals.

Executive Summary

2. The *Employment Relations Amendment Bill* (the Bill) implements Cabinet's December 2017 decisions to restore key minimum protections for employees and to strengthen collective bargaining and union rights in the workplace [CAB-17-Min-0552].

3. I seek Cabinet approval to introduce the *Employment Relations Amendment Bill* in February 2018 for referral to the Education and Workforce Committee.

4. To enable the Bill to be finalised for introduction, I seek Cabinet decisions on outstanding policy issues, including:

4.1. Amending the existing 90 day trials periods – I recommend amending the trial period policy to restrict it to only small to medium sized firms (19 employees or fewer). This better focuses the policy where it may make a difference to employment decisions and limits the insecurity that such employment agreements create;

4.2. Employees' choice of employment agreement – I recommend that the Employment Relations Authority is provided with an enforcement mechanism where an employer fails to pass on the form to an employee within the relevant timeframe or fails to provide an employee's completed form indicating their choice of employment agreement (or where they have not made a choice) to the relevant union;

4.3. Union representatives' access to the workplace – I recommend reverting to the pre-2011 position in the Act, so a union representative does not need advance consent from an employer to enter a workplace to conduct union activities where employees are members. Union access remains subject to the usual restrictions regarding safety, and access which does not unreasonably disrupt business operations;

4.4. Transitional arrangements – I recommend some principals for how to put in place transitional arrangements for the proposals in the Bill. These take account of the time needed for employers, employees and unions to adjust their processes to comply with the provisions and to account for active bargaining and matters before the Authority and Employment Court when the provisions commence.

Policy

5. On 18 December 2017, Cabinet agreed to policy decisions to implement the Government's 100 day commitments in employment relations. These policy decisions require amendments to the *Employment Relations Act 2000* and are designed to restore minimum standards and protections to workers, as well as strengthen and promote collective bargaining in the workplace.

6. Cabinet agreed to the following proposals:

6.1. reinstating the right to prescribed rest and meal breaks;

6.2. restoring key protections to Subpart 1 of Part 6A of the Act by:

6.2.1. repealing the exemption for Small to Medium Employers (SMEs) which will restore the right for vulnerable workers to elect to transfer to incoming employers; and

6.2.2. extending timeframes for employees to elect to transfer to incoming employers and requiring employers to notify employees of their right to review and ask for corrections of personal information (including disciplinary matters and personal grievances).

6.3. restoring reinstatement as the primary remedy available where an employee has been unjustifiably dismissed;

6.4. requiring employers to provide the applicable collective agreement, union contact details and the option to join the union at the same time they provide the intended individual employment agreement to the employee;

6.5. requiring unions to provide information about the role of unions to employers and that this information is provided when the intended employment agreement is given to employees;

6.6. reinstating the requirement for employees to make a choice at the end of the first 30 days of employment about whether they would like to join the relevant union and be covered by the collective agreement;

6.7. reinstating a union's opportunity in relation to initiating collective bargaining first;

6.8. reinstating the principle that the duty of good faith requires parties to conclude a collective agreement and repealing the provisions that enable the Employment Relations Authority (the Authority) to determine bargaining has concluded;

6.9. removing the ability for employers to opt out of multi-employer collective bargaining once bargaining has been initiated;

6.10. requiring that collective agreements must set rates of pay and that rates of pay must be agreed during collective bargaining;

6.11. extending the discrimination grounds so an employer does not discriminate against employees who are a member of, or who intend to join, a union;

6.12. requiring employers to allow union representatives reasonable paid time to perform their duties within working hours; and

6.13. removing an employer's ability to deduct pay as a response to partial strikes.

Outstanding policy issues

Amending trial periods so only small firms can use them

7. Currently, trial periods are valid where an employer includes a trial provision in the employment agreement, which is agreed to by the employee. If an employer dismisses the employee for any reason during the trial period the employee cannot bring a personal grievance claim in respect of the dismissal. The trial period policy sought to provide employers with the confidence to hire new employees by reducing the risks and costs of taking on new workers through giving employers an easy means to dismiss permanent employees. The goal was to increase employment opportunities, particularly for those who are marginal workers in the labour market, who may otherwise appear too great a risk.

8. The trade-off is that it may increase the feeling of uncertainty for employees during the first 90 days that may lead to anxiety, mistrust, and stress. Where firms do dismiss, this may create significant mental harm, which may be exacerbated when workers are not provided reasons and where they believe the dismissal is unfair. The lack of any process for workers to challenge the dismissal may worsen their experience. In the future, they may have to account for that dismissal which may harm their future employment prospects. Employees may also become risk averse about moving jobs if they can be summarily dismissed. That may make the overall labour market less flexible. This may also harm employers who have less engaged and less productive workers.

9. MBIE has limited evidence as to the impact of the trial period policy on increasing employment or the frequency of dismissals. Motu (MOTU Economic and Public Policy Research) researched the effect on employment and found no evidence that the policy affected the number of hires by firms or duration of employment relationships on average. They found the main benefit of trial periods was a decrease in dismissal costs for firms but found employees reported feeling increased uncertainty about job security. Anecdotal evidence from that report also suggests divergent views between employees and employers. Employers argue trial periods allows them to take more risks in employment decisions. Employees, on the other hand, prefer not to be on trial periods because of the insecurity. The National Employer's Survey in 2014/15 shows 66 per cent of firms have employed on these terms in the previous 12 months with 24 per cent of those having dismissed at least one staff member using the trial period. Trial periods are most notable in construction and wholesale trades.

10. There also appears to be a divergence between large and small employers. Trial periods were originally introduced in 2009 for only small employers before their expansion to all employers in 2011. Small employers (with 6-19 employees) appear to use trial periods more frequently – 79 per cent. The economic case appears more powerful for SMEs since trial periods may well increase their risk taking. I hear anecdotally from employers' organisations and from Ministerial correspondence that many small firms are risk averse to take on employees because any performance problems can prove disproportionately detrimental to their business. Small employers already express discontent with the difficulty of using trial periods due to a strict interpretation over their correct use by the Courts. Removing trial periods for them could reduce their risk appetite and lead them to hire fewer workers. For larger employers, the arguments to retain the trial periods appear weaker. Trial periods are

less frequently used, they have formalised Human Resource operations to manage performance, and the impact of one poorly performing employee is less detrimental to the overall effectiveness of the business. So while the costs to employees are constant, the relative benefit to employers diverges significantly depending on their size.

11. I therefore propose to remove trial periods for larger employers but retain it for SMEs. This would retain the trial period policy for 97 per cent of New Zealand firms but, as only 29 per cent of employees work for such firms, most future employees would no longer be subject to trial periods. This will enable the policy to focus on where it may provide benefits, namely in encouraging employment opportunities and risk taking for small businesses. I propose defining SMEs as businesses which employ 19 or fewer employees to align with other definitions in legislation. I also propose to monitor the implementation of the changes to see how they operate in the New Zealand economy to see if they achieve the right balance.

Employees to be provided with a choice after first 30 days of employment

12. Cabinet agreed to reinstate the 30 day rule, which means new employees who are not a member of the union must be employed on terms and conditions that are not inconsistent with the collective employment agreement. In addition, Cabinet agreed that employees should be given a choice at this point to either remain on their individual employment agreement or join the union and be employed on the collective agreement. An employer would then communicate the employee's choice to the relevant union, unless the employee objects.

13. Employers must provide a form to employees at the outset of their employment. This form will be approved by the Chief Executive of MBIE, through the relevant section of the Act. The form would allow an employee to choose whether to be employed on either the individual employment agreement or the collective employment agreement (and join the union). The form will also include an opt-out question, where an employee can object to their choice being communicated to the applicable union.

14. In order to ensure compliance with this provision, I propose that if an employer fails to provide the form to the employee within the relevant timeframe the employer may be liable for a penalty imposed by the Employment Relations Authority. In addition to this, if the employer fails to provide the completed form to the applicable union, or where the employee does not complete the form and the employer fails to notify the union, the employer may be liable for a penalty imposed by the Employment Relations Authority.

Reinstating a union representative's access to the workplace without needing consent

15. Union representatives are entitled to enter a workplace for purposes related to the employment of its members or related to the union's business. This is an important part of the right to freedom of association. Following the 2011 changes to the Act, union representatives must gain consent from employers in order to access the workplace. Employers must not unreasonably withhold consent, but must advise the union representative of their decision no later than one working day following the request. Consent is treated as being obtained if the employer does not respond to the request within two working days.

16. Although consent may only be declined in very limited circumstances, case law demonstrates that some employers may use the notification and consent process to delay access to the workplace. For example in N*ew Zealand Meatworkers Union Inc v South*

Pacific Meats Ltd[1] access was requested by the Union to the worksite so that there could be a union presence at two induction days. The induction day was regarded as the first day of the season and employees are provided with a copy of the applicable employment agreement and other information related to their employment like handouts and policies. The Union wanted to make sure that workers were aware of the collective agreement and the option to join the Union particularly if it was a new worker and not a returning worker. The employer said that this would unnecessarily disrupt the induction and therefore declined the request.

17. The union are currently required to take action to challenge the reasonableness of the refusal, a process that is likely to take considerable time and, in many cases, be prohibitively expensive. Moreover the cost of defending such an action and the size of a possible penalty is unlikely to be seen as a deterrent against non-compliance by employers.

18. Other case law shows that in some instances union representatives have been followed, trespassed and assaulted for attempting to exercise reasonable access rights[2]. This can be detrimental in circumstances where employees have reported concerns to union representatives and those union representatives cannot access the workplace to investigate those concerns or support members.

19. I propose to revert to the previous position in law, where union representatives were able to access the workplace without consent when their members are employees, and where they are accessing the workplace for union activities. The proposal would retain the conditions around access to a workplace, which were broadly unchanged by the 2011 amendments. This requires that union representatives access a workplace at reasonable times and in a reasonable way, taking into account normal business operations, comply with reasonable health and safety or security requirements in accessing the workplace and produce and hold identification when accessing a workplace. The proposal would also retain the provision that if a union representative cannot find an employer, they must leave information about their entry in a prominent place.

20. There is a concern that unfettered access may lead to unintended consequences and unduly limit the ability of employers to have adequate control over their work sites. However I consider that the requirements relating to access being at reasonable times and in a reasonable way mitigate this concern. I propose to retain the current restrictions on the right of access, which include situations where access would prejudice the security or defence of New Zealand, or the investigation or detection of offences and on certain limited religious grounds.

21. I consider that reverting to the previous position will improve the ability of union representatives to perform their roles effectively, while retaining a reasonable level of control and oversight of all personnel present at a workplace. I do not consider there will be significant impacts as a result of this change. A review of the union access provision undertaken in 2010 by the then Department of Labour suggest that most union representatives and employers worked together to find appropriate times and circumstances for visits.

22. I propose to monitor the changes and take account of whether stakeholder feedback suggests there has been any unintended consequences or confusion about the exact rights

1 [2012] NZERA Christchurch 21

2 See *New Zealand Meat Workers and Related Trades Union Incorporated v South Pacific Meats Limited* [2017] ERA Christchurch 121, or *The New Zealand Meat Workers Union v South Pacific Meats Limited and Michael Anthony Talley* [2016] NZERA Christchurch 13

of union officials. If such consequences arise, I will explore the option of providing further guidance in the form of a code of employment practice to help employers, unions and employees to better understand the provisions.

Commencement and transitional provisions

23. The Bill also includes provisions to commence the amendments at different times. This is to account for the fact that for some proposals, unions, employers and employees will need time to change procedures and systems in order to comply with the provisions. There is also a need to provide clarity around how active bargaining and employment disputes will be transitioned into the new provisions. In developing the transitional provisions I have taken care not to affect any existing rights or actions before the Employment Relations Authority or Courts.

24. Generally, I consider that the amendments should come into force at enactment of the Bill where possible. Where any transitional period is required these will be for four months following enactment. The only exception is for the extension of discrimination provisions from 12 to 18 months, which will have a six month transitional.

Impact analysis

25. The Regulatory Impact Analysis requirements apply to the proposals in this Cabinet Paper. A Regulatory Impact Assessment (RIA) is attached. A RIA was undertaken for the other proposals that formed part of the first Cabinet paper.

26. The Treasury Regulatory Impact Analysis Team (RIAT) has reviewed the RIA prepared by the Ministry of Business, Innovation and Employment and associated supporting material. RIAT comments are based on revised expectations for RIA covering 100 Day Plan priorities.

Treasury Comment

27. RIAT considers that the RIS clearly sets out the current legislative position, the available evidence of impact and the rationale for change, as regards union representatives' access to workplaces and the use of 90-day trial employment periods. However, as noted in the RIS, time constraints have meant that it has not been possible to consider other possible approaches and therefore it has not been demonstrated that the proposed approaches are the best way of addressing the issues identified.

28. In finalising the proposed new Bill, RIAT recommends that the cumulative impact of all the individual reforms on the balance of employment relations are also considered, in addition to the issue-specific Regulatory Impact Assessments that have been provided for individual elements of the package.

Consultation

29. The Ministry of Business, Innovation and Employment has consulted with the following government departments on this paper: State Services Commission, Ministry of Education, Ministry of Health, the Treasury, Ministry of Social Development, Ministry for Women, Ministry of Justice, Te Puni Kōkiri and the Ministry for Pacific Peoples. The Department of the Prime Minister and Cabinet (PAG) has been informed about this paper.

Compliance

30. The Bill complies with each of the following:

30.1. the principles of the Treaty of Waitangi

30.2. the rights and freedoms contained in the New Zealand *Bill of Rights Act 1990* and the *Human Rights Act 1993*

30.3. the disclosure statement requirements (indicate that a disclosure statement has been prepared and is attached to the paper (if not, give a reason).

30.4. relevant international standards and obligations including the International Labour Convention 98

30.5. the Legislative Design and Advisory Committee Guidelines on the Process and Content of Legislation (2014 edition).

Legislative Implications

31. The *Employment Relations Act 2000* will need to be amended to give effect to the proposals outlined in this paper.

32. The amendment to the Act will bind the Crown to the same extent as the current Act which applies to most public sector agencies through sections 27 and 67 of the *State Sector Act 1988*. I propose that the Bill to amend the *Employment Relations Act 2000* is placed on the 2018 legislation programme with a priority of Category 2 – (must be passed in 2018).

Privacy Implications

33. The Privacy Commissioner has no comment to make on the new policy proposals in this paper. With respect to the Bill, the Privacy Commissioner does not support the proposal for an employee's name and choice of employment agreement to be communicated by the employer to unions unless they opt out (clause 19, new section 63B). The Commissioner considers that employees should provide their express consent prior to their choice of employment agreement being communicated to unions and will be making a submission to the Select Committee on this matter.

Disability Perspective

34. The proposals outlined in this paper raise no specific implications for people with disabilities.

Definition of Minister/department

35. The Bill does not contain a definition of Minister, department (or equivalent government agency) or chief executive of a department (or equivalent position).

Commencement of legislation

36. The Bill will come into force on the day after the date of Royal Assent.

Parliamentary Stages

37. I intend to introduce the Bill in February 2018. I expect the Bill will be passed in September 2018.

38. I will propose that the Bill be referred to the Education and Workforce Committee.

Publicity

39. I will make an announcement on these policy decisions in due course. The Ministry of Business, Innovation and Employment will publish a copy of this paper and associated policy advice papers on its website, subject to any necessary redactions.

40. The improvement in employee protections and the strengthening of collective bargaining and union rights within the workplace are likely to be received favourably by unions, employees and some employers. Some employers may be concerned that these proposals impact on the flexibility and efficiencies of their businesses.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

1. **Note** that the Employment Relations Amendment Bill holds a category 2 priority (must be passed within the year) in the 2018 legislation programme;

2. **Note** that the changes I am seeking will progress the Government's 100 day commitments to restore key protections to employees and to strengthen collective bargaining.

Proposals that improve employee security at work

Amending exemption from personal grievance employment rights under Section 67A

3. **Agree** to amend the Act so that only employers with 19 and fewer employees may employ new employees under a Trial Period.

Proposals that promote, protect and strengthen collective bargaining

Employee given choice after first 30 days of employment

4. **Agree** that an employer will be liable for a penalty imposed by the Employment Relations Authority where they either fail to provide the form to the employee within the relevant timeframe or fail to provide the completed form to the union or applicable unions or fail to notify the union or applicable unions if an employee does not complete the form.

Additional policy proposal: Reinstating a union representative's access to the workplace without needing consent

5. **Agree** that a union representative does not require consent to access the workplace if union employees work at the workplace or the collective agreement covers the work at the workplace.

Commencement and transitional arrangements

6. **Agree** to providing for commencement and transitional provisions for amendments in the Bill which require time for employers, employees and unions to adjust their processes and systems in order to comply with the new provisions, to account for active bargaining at the point of commencement and where existing rights and matters before the Employment Relations Authority or Employment Court apply.

Publicity

7. **Note** that I will release a media statement to announce the introduction of the *Employment Relations Amendment Bill.*

Approval to introduce the Employment Relations Amendment Bill

8. **Approve** the *Employment Relations Amendment Bill* for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;

9. **Authorise** the Minister for Workplace Relations and Safety to make minor and technical changes to the *Employment Relations Amendment Bill* in line with the policy framework in this paper, prior to introduction;

10. **Agree** that the Bill be introduced in February 2018;

11. **Agree** that the Government propose the Bill be referred to the Education and Workforce Committee for consideration.

Authorised for lodgement

Hon Iain Lees-Galloway

Minister for Workplace Relations and Safety