

## OFFICE OF THE MINISTER FOR WORKPLACE RELATIONS AND SAFETY

The Chair  
Cabinet Economic Growth and Infrastructure Committee

### **Employment Standards Legislation Bill – further policy decisions**

#### **Proposal**

- 1 This paper seeks Cabinet approval to a number of policy decisions on the Employment Standards Legislation Bill, following analysis of the submissions provided to the Transport and Industrial Relations Committee.

#### **Executive summary**

- 2 The Employment Standards Legislation Bill (the Bill) is currently before the Transport and Industrial Relations Committee. The Bill addresses issues relating to zero hours contracts and other unfair practices in employment relationships, modernises the parental leave scheme and strengthens the enforcement of employment standards.
- 3 As a result of issues that have arisen since the Bill's introduction, including those raised by submitters, I am recommending a number of changes to the Bill for which I seek Cabinet's approval.
- 4 I propose to clarify and strengthen the zero hours contracts provisions by:
  - a. providing that an employer must have a genuine reason based on reasonable grounds to include an availability provision in an employment agreement, along with factors to guide the courts' consideration of whether this threshold is met
  - b. providing that compensation for availability must be reasonable, along with factors to guide the courts' consideration of what is reasonable
  - c. providing that compensation for shift cancellation must be reasonable, along with factors to guide the courts' consideration of what is reasonable
  - d. extending the transition period within which employers have to meet the new requirements from six months to 12 months.
- 5 In relation to the parental leave provisions, I propose that:
  - a. the age threshold for children in respect of whom parental leave can be sought is clarified as being "under the age of six"
  - b. parents of preterm babies can receive an additional three 'Keeping in Touch' hours for each week prior to the 37 week gestation period the baby is born.

- 6 In relation to the employment standards provisions, I propose that:
  - a. the ability to seek compensation orders at the Employment Court for loss of damage resulting from a serious breach of minimum entitlements is extended to employees in addition to labour inspectors
  - b. the penalty provisions in the Holidays Act 2003 that relate to record keeping are clarified so that it is clear that it is breaches of the obligations to keep and provide access to records for which penalties can be sought.
- 7 I also intend to make some further amendments to the Bill that are consistent with the overall policy intent in line with the authorisations granted to me when the original policy decisions were sought.
- 8 I propose that these amendments to the Bill be incorporated into the Ministry of Business, Innovation and Employment's Departmental Report to the Transport and Industrial Relations Committee.

## **Background**

- 9 The Employment Standards Legislation Bill (the Bill) gives effect to three strands of policy previously considered by Cabinet:
  - a. modernising the parental leave scheme to better reflect current work and family arrangements, provide more flexibility in the scheme and extend the duration of parental leave payments to parents of preterm babies (SOC Min (15) 3/1, CAB-15-MIN-0047)
  - b. strengthening enforcement of employment standards, in particular through providing for a more comprehensive sanctions regime (CAB Min (15) 8/9)
  - c. addressing 'zero hours' contracts and other practices that undermine the mutuality of obligations in the employment relationship (CAB Min (15) 19/4).
- 10 The Bill was introduced to Parliament on 13 August 2015 and referred to the Transport and Industrial Relations Committee on 8 September 2015. It is due to be reported back to the House by 12 February 2016.

## **Summary of submissions**

- 11 Written submissions on the Bill closed on 6 October 2015. A total of 64 substantive submissions on the Bill were received by the Committee. In addition to these, around 10,500 form submissions were received opposing the zero hours provisions from the Labour Party, of which around 1800 were considered to be unique; and around 1600 form submissions were received from the Public Service Association.
- 12 Submissions were received from a range of submitters including unions, employers, employer associations, other organisations and individuals. They covered various aspects of the three policy areas in the Bill. Submitters were broadly supportive of the parental leave and employment standards provisions, but raised a number of concerns with the provisions to address zero hours contracts.

### **Further policy decisions on the Bill**

- 13 A number of issues have arisen in relation to the Bill, both as a result of submissions and the need to clarify drafting in some areas, and I am seeking Cabinet's agreement to changes to the Bill that will address some of these.
- 14 Some other matters require changes consistent with the policy intent of the Bill and I will be recommending these changes under the authorisation granted to me by Cabinet when I sought the original policy decisions.

### **Zero hours contracts and other practices in employment relationships – further policy decisions**

- 15 I am seeking Cabinet's agreement to a number of recommendations concerning four issues regarding the zero hours contracts provisions in the Bill.

#### ***Availability: Genuine reason based on reasonable grounds for an availability agreement***

- 16 Some submitters were concerned that the provisions in the Bill to regulate availability provisions (ie a provision in an employment agreement that compels a person to be available for work) will mean that some employees will still be required to make themselves available for work for large periods of time where such availability is not really necessary. Having to be available or 'on standby' for work outside agreed hours makes it difficult for people to commit to other family and community obligations or employment opportunities.
- 17 I agree that such working arrangements should only be used where they are necessary. Many industries see ebbs and flow in work demand, however, good planning and astuteness can reduce unpredictability in work. Therefore, I recommend that the Bill be amended to require that employers have a genuine reason based on reasonable grounds to have an 'availability provision' in an employment agreement.
- 18 This same test already exists in the Employment Relations Act 2000 for employers to use fixed-term agreements and it works well. However, to assist the courts in determining when an employer has a genuine reason based on reasonable grounds for an availability provision, I intend to provide in the legislation some non-exhaustive factors for the courts to consider. Not only will these factors guide the courts but they will also serve to assist employers in understanding what they have to do to comply with the new provisions.
- 19 The factors signal my intention more clearly and, subject to final drafting, would include:
  - a. given the nature of the work, could a reasonable employer plan the demand of the work so that an availability provision was not required?
  - b. the proportion of hours the employee was required to be available, in relation to the agreed hours of work in the employment agreement (the guaranteed hours)

- c. the length of the availability period(s) given the particular restraints it puts on the employee
- d. the length of the availability period(s) given the notice period for undertaking work (eg the employee must be there within the hour, or must hold availability for work until the roster is confirmed for next week)
- e. the rate of compensation and whether it indicates a genuine need for an availability provision.

***Availability: reasonable compensation for availability***

- 20 Another issue raised by many submitters is that the Bill does not prescribe a minimum threshold for the size or form of compensation where availability is required. This may mean that employers could offer a very low level of compensation for availability. For example, employees may find they are on 'stand by' all week but only receive a few dollars for maintaining their availability for work. I agree and recommend the Bill be amended to provide that compensation for availability should always be 'reasonable' compensation.
- 21 However, what is reasonable in any given situation will depend on a variety of factors. Therefore, I intend to provide the courts with a non-exhaustive list of factors to consider when determining if compensation for required availability is reasonable in a particular case. Again, this will also assist employers. The factors, subject to final drafting, would include:
- a. the number of hours that the employee was required to remain available
  - b. the particular restraints the availability provision puts on the employee (including where agreed hours may be low, the ability to earn other income)
  - c. the proportion of hours the employee was required to be available, in relation to the agreed hours of work (the guaranteed hours in the employment agreement)
  - d. the notice period for undertaking work (eg within the hour or until the roster is posted for work next month)
  - e. the rate of payment for the work when it is undertaken
  - f. where remuneration is by salary, the amount of the salary.

***Shift cancellation compensation be 'reasonable'***

- 22 Many submitters were also concerned that the Bill does not prescribe a minimum threshold for the size or form of compensation where shift compensation is required (that is, where the agreed reasonable notice period for cancellation has not been met). Submitters have suggested that this could effectively allow minimal compensation to be paid for a shift cancellation in breach of the notice requirements.
- 23 I recommend that the Bill be amended to ensure compensation paid for shift cancellation in breach of the required notice, must be 'reasonable'.

- 24 To give more clarity for the courts when they are determining if compensation for a shift cancellation is reasonable, and to assist employers, I recommend the Bill include, subject to final drafting, the following set of non-exhaustive factors:
- a. the length of the shift that was cancelled
  - b. the period of notice given for the cancellation
  - c. what the remuneration would have been for the work
  - d. likely costs incurred by the employee in preparation for the work.

***Transitional period: giving businesses sufficient time to comply with the legislation***

- 25 Submitters were also concerned that a transitional period of six months may be insufficient time for some businesses with large workforces to comply with the new provisions relating to zero hours contracts.
- 26 The provisions in the Bill will require some employers to update employment agreements to reflect agreement on hours of work, availability provisions and reasonable compensation for these provisions, as well as reasonable notice periods for shift cancellation and compensation where this notice is not met. With large workforces this may take some time (especially, for example, in the case of Individual Employment Agreements, where individual employees with different personal circumstances will need to be individually bargained with).
- 27 Therefore, I recommend the Bill extend the currently proposed six month transitional arrangement for all existing individual agreements to 12 months.

**Modernising parental leave – further policy decisions**

- 28 I am seeking Cabinet's agreement to two issues regarding the parental leave provisions in the Bill.

***Clarifying the child's age threshold for eligibility***

- 29 The Parental Leave and Employment Protection Act 1987 currently entitles adoptive parents to parental leave and payments if they assume the care of a child who is '*not more than 5 years of age*'. The Bill carries this cut-off point for a child's age over into the new definition of 'primary carer'.
- 30 The phrase '*not more than 5 years of age*' is open to interpretation as to whether the cut-off point is at the child's 5<sup>th</sup> or 6<sup>th</sup> birthday. Operational interpretation of this provision has long been that the child is considered to be '*not more than 5 years of age*' up until the 6<sup>th</sup> birthday, meaning that, for example, the care for a 5½ year old is covered by the parental leave scheme.
- 31 This is consistent with the current mandatory school starting age of 6 and ensures improved attachment and bonding outcomes for pre-schoolers who come into care of people other than their biological parents.

- 32 To remove the current ambiguity, I recommend replacing the phrase '*not more than 5 years of age*' in the Bill with the phrase '*under the age of 6*' or similar. The application of the provision will remain unchanged.

***Providing for additional 'Keeping in Touch' hours for employees with preterm babies***

- 33 Keeping in Touch (KIT) hours are provided for in the Bill for the 18 week payment period allowing employees, by agreement with their employer, to undertake up to 40 hours paid work for their employer without forfeiting their entitlement to parental leave payments. To ensure that a birth mother and baby's health outcomes are not compromised, the Bill stipulates that KIT hours may not be used where the child is under four weeks old (the 'stand down period'). The number of hours therefore covers a 14 week period and equates to an average of approximately three hours per week.
- 34 The rationale for KIT days applies equally, if not more so, to any preterm period. For some mothers, the imperative to do a handover or complete unfinished tasks may be greater, given the unexpected early arrival of their baby. For parents of babies in full time hospital care, there may also be more flexibility to enable a brief return to the workplace and they may prefer to complete a handover at this time, rather than when they are in sole charge of the baby and trying to settle the baby into the home environment.
- 35 I therefore consider there is merit in extending the KIT provisions for those eligible for preterm payments (in addition to the proposed 40 KIT hours during the standard 18 week payment period) on the basis that the total number of additional hours should not exceed an average of three hours per week for each week of the baby's life that the parents will be receiving additional preterm payments for.
- 36 I also consider that the stand down period for KIT hours need not apply for parents of preterm babies, for the reasons above relating to the unexpected early arrival of the baby and the likelihood of early hospital care.

**Strengthening enforcement of employment standards – further policy decisions**

- 37 I am seeking Cabinet's agreement to two issues in relation to the employment standards provisions in the Bill.

***Permitting employees to seek compensation orders***

- 38 The Bill introduced a new regime at the Employment Court to address serious breaches of employment standards. Following a successful application for a declaration of breach from the Court, a number of additional orders can be applied for, eg a pecuniary penalty order, a banning order and a compensation order. As currently drafted, these can only be sought by a labour inspector.

- 39 Some submitters suggested that employees should also be able to seek a compensation order from the Court in circumstances where a labour inspector has obtained a declaration of breach. The circumstances in which a labour inspector does not seek a compensation order in relation to an employee are likely to be rare, however it is possible, for example, that an aggrieved employee is absent at the time of proceedings. There is no downside to allowing this and I propose that the Bill is amended accordingly.

### ***Clarifying the penalty provisions relating to record keeping in the Holidays Act***

- 40 Sections 81-83 of the Holidays Act 2003 cover the following matters:
- a. Section 81 provides that employers must keep a holiday and leave record and sets out what the record must contain
  - b. Section 82 sets out the obligations on the employer in response to requests for access to the holiday and leave record
  - c. Section 83 provides that, if an employer fails in its obligations under sections 81 and 82 and this adversely affects the ability of the employee to bring a claim under the Act, then the Employment Relations Authority can take as proven, in the absence of evidence to the contrary, certain claims made by the employee.
- 41 The provisions of the Holidays Act that can attract a penalty are listed in s75. In relation to record keeping, the provision listed is section 83. However, section 83 is not directly concerned with an employer's record keeping obligations; these are found in sections 81 and 82. It is a breach of sections 81 and 82 that should attract a penalty.
- 42 Though my officials have not identified any instances of employers evading penalties for a failure of their obligations under sections 81 or 82 – the Authority generally reads these provisions into section 83 by inference – the possibility remains. I recommend that Cabinet take this opportunity to clarify this issue by amending section 75 so that it is clear that the penalty is sought for breaches of the record keeping obligations in sections 81 and 82.
- 43 This change would make the Holidays Act consistent with the wages and time record provisions in the Employment Relations Act in which it is section 130 (which is equivalent to sections 81 and 82 in the Holidays Act) that attracts the penalty, not section 132 (which is equivalent to section 83 in the Holidays Act).

### **Next steps**

- 44 I recommend that the policy decisions in this paper are given effect to through the recommendations of the Transport and Industrial Relations Committee.

### **Consultation**

- 45 The following government agencies have been consulted on this paper and, as far as possible, the Cabinet paper reflects their comments: Inland Revenue, The Treasury, State Services Commission, Ministry of Justice, Ministry of Social

Development, Ministry of Health, Ministry for Women and the Accident Compensation Corporation. The Department of Prime Minister and Cabinet has been informed.

### **Financial implications**

46 There are no financial implications arising from the policy proposals in this paper.

### **Human rights**

47 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.

### **Legislative implications**

48 The proposals in this paper will make amendments to the Employment Standards Legislation Bill which is currently before the Transport and Industrial Relations Committee.

### **Regulatory impact analysis**

49 Regulatory Impacts Statements (RISs) were prepared for each of the three policy strands in the Bill. The proposals in this paper do not significantly change the analysis of the impacts that were contained in those RISs.

### **Publicity**

50 I do not intend to make media releases to specifically announce the decisions arising from the recommendations in this paper. Rather, I will continue to make media releases at key points during the progression of the legislation.



## Recommendations

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

- 1 **Note** that further policy decisions are required to address issues that have arisen in relation to the drafting of the Employment Standards Legislation Bill (the Bill)

### Zero hours contracts and other practices in employment relationships

- 2 **Agree** the Bill be amended to require that employers have a genuine reason based on reasonable grounds to have an 'availability provision' in an employment agreement
- 3 **Agree** the following non-exhaustive list of factors be provided in the Bill to guide the courts in determining when an employer has a genuine reason based on reasonable grounds for an availability provision:
  - 3.1 given the nature of the work, could a reasonable employer plan the demand of the work so that an availability provision was not required?
  - 3.2 the proportion of hours the employee was required to be available, in relation to the agreed hours of work in the employment agreement (the guaranteed hours)
  - 3.3 the length of the availability period(s) given the particular restraints it puts on the employee
  - 3.4 the length of the availability period(s) given the notice period for undertaking work (eg employee must be there within the hour, or must hold availability for work until the roster is confirmed for next week)
  - 3.5 the rate of compensation and whether it indicates a genuine need for an availability provision
- 4 **Agree** the Bill be amended to provide that compensation for availability should always be 'reasonable' compensation
- 5 **Agree** the Bill be amended to provide the courts the following non-exhaustive list of factors to consider when determining if compensation for required availability is reasonable in a particular case:
  - 5.1 the number of hours that the employee was required to remain available
  - 5.2 the particular restraints the availability provision puts on the employee (including where agreed hours may be low, the ability to earn other income)
  - 5.3 the proportion of hours the employee was required to be available, in relation to the agreed hours of work (the guaranteed hours in the employment agreement)

- 5.4 the notice period for undertaking work (eg within the hour or until the roster is posted for work next month)
- 5.5 the rate of payment for the work when it is undertaken
- 5.6 where remuneration is by salary, the amount of the salary
- 6 **Agree** that compensation paid for shift cancellation in breach of the required notice must be 'reasonable'
- 7 **Agree** to the following set of non-exhaustive factors for the courts when they are determining if compensation for a shift cancellation is reasonable:
  - 7.1 the length of the shift that was cancelled
  - 7.2 the period of notice given for the cancellation
  - 7.3 what the remuneration would have been for the work
  - 7.4 likely costs incurred by the employee in preparation for the work.
- 8 **Agree** that the Bill be amended to extend the currently proposed six month transitional arrangement for all existing individual agreements to 12 months

### **Modernising parental leave**

- 9 **Note** that the current provisions in the parental leave legislation are ambiguous as to whether the child must be under the age of 5 or 6 in order for the adoptive parents (and 'other primary carers' under the Bill) to be eligible for parental leave entitlements
- 10 **Agree** to amend the existing provisions in the parental leave legislation that refer to the child being '*not more than 5 years of age*' to read '*under the age of 6*' or similar, which is consistent with how the provisions are currently applied
- 11 **Note** that Cabinet has previously agreed to extend the duration of parental leave payments for eligible persons with preterm babies (CAB-15-MIN-0047 refers)
- 12 **Agree** to extend Keeping in Touch hours for the preterm period, not exceeding an average of 3 hours per week for each week of the baby's life that the parent will be receiving preterm payments for, in addition to the 40 hours provided for in the 18 week parental leave period
- 13 **Agree** that the four week stand down period for Keeping in Touch days does not apply to parents of preterm babies

## **Strengthening enforcement of employment standards**

- 14 **Note** that currently only labour inspectors can apply for a compensation order following a declaration of breach at the Employment Court to compensate an employee for loss or damage as a result of a serious breach of their minimum entitlements
- 15 **Agree** that employees can also rely on a declaration of breach to seek a compensation order at the Court
- 16 **Note** that the current penalty provisions relating to breaches of the record-keeping requirements in the Holidays Act 2003 are unclear and could permit an employer to evade a penalty
- 17 **Agree** that the penalty provisions in the Holidays Act are amended so that it is clear that it is the failure of an employer to meet their obligations under sections 81 and 82 that attracts a penalty under section 75

## **Financial implications**

- 18 **Note** that there are no financial implications from the proposals in this paper

## **Legislation**

- 19 **Agree** that Cabinet's decisions on the matters in recommendations 2 to 17 above be incorporated into the Ministry of Business, Innovation and Employment's Departmental Report to the Transport and Industrial Relations Committee on the Bill
- 20 **Note** that the Minister for Workplace Relations and Safety intends to make some further amendments to the Bill that are consistent with the overall policy intent in line with the authorisations granted when the original policy decisions were sought [SOC Min (15) 3/1; CAB Min (15) 8/9; CAB Min (15) 19/4; CAB-15-MIN-0047] and these will also be incorporated into the Ministry of Business, Innovation and Employment's Departmental Report on the Bill
- 21 **Authorise** the Minister for Workplace Relations and Safety to approve minor or technical changes consistent with the above Cabinet policy decisions
- 22 **Note** that the Ministry of Business, Innovation and Employment will recommend a range of other minor amendments to improve the working of the Bill within the scope of the existing Cabinet policy approvals, as part of the Departmental Report responding to submissions on the Bill.

**Minister for Workplace Relations and Safety**

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