

Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill

Member's Bill

As reported from the Transport and Industrial Relations Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill, and recommends by majority that it be passed with the amendments shown.

Introduction

This is a Member's bill sponsored by Brett Hudson. It seeks to amend the Employment Relations Act 2000 to allow employers and potential employees who are negotiating individual employment agreements involving an annual gross salary of more than \$150,000 to contract out of the personal grievance provisions in the Act.

The purpose of the bill is to allow employers and high-earning employees to negotiate terms and conditions about not taking a personal grievance when exiting employment. It aims to create a smoother transition for high-earning employees leaving a business, and to reduce compliance costs and minimise prolonged and expensive employment disputes.

This commentary covers the main amendments that we recommend to the bill. It does not discuss minor, technical, or consequential amendments.

Contracting out of all personal grievance provisions

Clause 5 of the bill as introduced would insert new section 102A in the Employment Relations Act to allow higher earners to contract out of Part 9 of the Act (Personal grievances, disputes and enforcement). Section 103(1)(b) to (j) of the Act includes:

- the right to protection against unjustified disadvantage, discrimination, sexual or racial harassment, and adverse conduct for a prohibited health and safety reason
- the right to pursue a dispute about employment agreements
- requirements for employers to keep wage and time records.

We consider that including all of Part 9 in the contracting-out provisions is unnecessary given the bill's purpose of reducing compliance costs and minimising prolonged and expensive employment disputes. We believe that provisions such as those relating to discrimination, harassment, and health and safety are important for all employees, regardless of their earnings.

We propose narrowing the provisions which an employee can contract out of so that they apply only to section 103(1)(a) of the Act, which deals with unjustified dismissal. We therefore recommend amending clause 5 to replace proposed new section 102A with new section 67BA(1). This would specify that an employee who has contracted out of section 103(1)(a) of the Act could not bring a personal grievance under that section.

We consider that the bill as introduced is unclear about what mechanisms employees can use to challenge dismissals if they have contracted out of personal grievance provisions. We therefore recommend amending clause 5 to insert new section 67BA(1)(b).

This would make it clear that employees who have contracted out of personal grievance provisions relating to dismissal could not take other legal proceedings in respect of the dismissal.

We also recommend inserting new section 67BA(2)(b) to make it clear that an employee could still bring a personal grievance claim on any of the grounds specified in section 103(1)(b) to (j).

Protection for whistleblowing

We are concerned that the bill as introduced could deter an employee from whistleblowing—that is, reporting misconduct—because of the risk of being dismissed. We therefore recommend amending clause 5 to insert new section 67BA(2). This would provide that an employee could still bring a personal grievance for unjustified dismissal if section 17(1)(a) of the Protected Disclosures Act 2000 applies.

Calculating the remuneration threshold

Clause 5 of the bill as introduced, inserting new section 102(1), would apply the contracting-out provisions to an employee negotiating an individual employment agreement with an annual gross salary of more than \$150,000. The rationale is that higher earners are deemed to have sufficient bargaining power in the labour market and the necessary skills to negotiate employment terms that best suit their individual requirements.

We considered whether salary alone is the most appropriate measure because employees may receive other remuneration. We therefore recommend amending clause 5 to insert new section 67BB, to describe how the remuneration threshold would be calculated. This would limit remuneration to aspects that are annual, can be determined in advance, and are not discretionary.

Re-negotiating an employment agreement

Under clause 5, proposed new section 102A(1), only a person who is negotiating to make a new individual employment agreement could contract out of personal grievance provisions. We recommend deleting this section and inserting new section 67BA(3)(g) to allow employees who meet the remuneration threshold to re-negotiate their existing employment agreements to include this provision.

Provisions when an employee no longer meets the remuneration threshold

We recommend amending clause 5 to insert new section 67BA(3)(g). This would provide that the contracting-out provision would be void if an employee's earnings were below the remuneration threshold at the time of their dismissal.

Good faith employment relations

Section 4(1A)(c) of the Employment Relations Act requires employers who are proposing decisions that will affect an employee's employment to provide them with relevant information about the decision and an opportunity to comment on the information before a decision is made. Section 120 of the Act allows an employee who has been dismissed to request a written statement from their employer about the reasons for their dismissal.

We recommend inserting new section 67BA(5) to provide that an employer would not be required to comply with these two provisions in relation to a decision to dismiss an employee who has contracted out of personal grievance provisions relating to dismissal.

Contracting out of grievance provisions under a collective agreement

As introduced, the bill would only allow employees who are negotiating individual agreements to contract out of personal grievance provisions. We are unsure why collective agreements have been excluded, given that it is an employee's salary that is considered an indicator of their bargaining power, rather than whether a contract is individual or collective. We also consider that this distinction could cause confusion if an employee moved from an individual agreement to a collective agreement.

We therefore recommend deleting section 102A(1) of the bill as introduced (which restricted the application of the section to individual employment agreements) and inserting new section 67BA(7) to provide that employees covered by a collective agreement could contract out of personal grievance provisions relating to dismissal.

As a result of the change above, clause 4 would be unnecessary and we recommend that it be deleted.

New Zealand Labour Party minority view

Labour members of the committee oppose this bill because it is unnecessary, poorly targeted, and establishes a dangerous concept in New Zealand's workplace relations framework.

The bill is unnecessary because, as noted in the submission by Business NZ, it is rare for personal grievances to be taken by senior managers. Because of the personal and professional costs of going through a protracted and public process, people in senior management roles usually prefer to settle disputes and departures in the fashion envisaged by this legislation. That option is already available and widely used. All this bill does is take away the choice of pursuing a personal grievance. We find it surprising that a National MP is promoting a bill that diminishes choice.

The bill is poorly targeted because many employees earning above the \$150,000 threshold are not in senior management positions. The committee discussed raising the threshold to better reflect the salaries of senior managers in most large organisations, however this was rejected by National Party members.

The concept of contracting out of employment rights is dangerous. Several pieces of workplace relations and health and safety legislation specifically prohibit contracting out in order to protect workers and maintain accountability for good employment practices. This legislation sets a dangerous precedent that could lead to further contracting out and dilution of employer accountability.

New Zealand First minority view

New Zealand First strongly opposes this bill as we believe it undermines and contradicts the basic human rights for workers. There is no evidence to suggest that employers are asking for, or are requiring this provision and this bill has been described as a solution looking for a problem.

New Zealand First also disagrees with the assumption and assertion of the bill which suggests that if you are a higher wage earner, you are better equipped to negotiate employment contracts.

New Zealand First believes that higher wage and salary earners can still have issues, such as workplace bullying. This bill could allow employees to be pressured into waiving their rights and their ability to take action against this type of exploitation inside and around workplaces.

To that end, we will oppose this bill and fight for the rights of all workers, no matter what their remuneration is.

Appendix

Committee process

The Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill was referred to the committee on 22 March 2017. The closing date for submissions was 5 May 2017. We received and considered 23 submissions from interested groups and individuals. We heard oral evidence from eight submitters.

We received advice from the Ministry of Business, Innovation and Employment.

Committee membership

Jonathan Young (Chairperson)

Hon David Bennett

Kris Faafoi

Iain Lees-Galloway

Clayton Mitchell

Sue Moroney

Dr Parmjeet Parmar

Denise Roche

Alastair Scott

Hon Maurice Williamson

Dr Jian Yang

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Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Brett Hudson

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Act **2016**.

2 Commencement

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This Act comes into force on the day after the date on which it receives the Royal assent.

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3 Principal Act

This Act amends the Employment Relations Act 2000 (the **principal Act**).

4 ~~Section 102 amended (Employee may pursue personal grievance under this Act)~~

~~In section 102, insert as subsection (2):~~

- ~~(2) Subsection (1) does not apply to an employee who is a party to an individual employment agreement containing a term included under **section 102A(2) and (3)**.~~

5 New ~~section 102A~~ sections 67BA and 67BB inserted (~~Higher earners may contract out of this Part~~)

After section ~~102~~67B, insert:

~~102A~~67BA ~~Higher earners may contract out of this Part~~ Employees earning at or above remuneration threshold may contract out of personal grievance provisions relating to dismissal

- ~~(1) This section applies when—~~
- ~~(a) a person (**employee**) is negotiating with another person (**employer**) to make an individual employment agreement; and~~
- ~~(b) the individual employment agreement provides for an annual gross salary greater than \$150,000.~~
- ~~(2) The employee and the employer may agree to include a term in the agreement excluding the application of this Part.~~
- (1) An employment agreement between an employer and an employee who earns at or above the remuneration threshold may include a provision in the agreement that states, or is to the effect, that—**
- (a) the employer may dismiss the employee; and**
- (b) if the employer does so, the employee is not entitled to bring a personal grievance under section 103(1)(a) or other legal proceedings in respect of the dismissal.**
- (2) The provision does not prevent an employee from bringing a personal grievance—**
- (a) under section 103(1)(a) if section 17(1)(a) of the Protected Disclosures Act 2000 applies (which relates to retaliatory action in respect of protected disclosures of information); or**
- (b) on any of the grounds specified in section 103(1)(b) to (j).**
- (3) The ~~term~~ provision is void unless—**
- (a) the agreement containing the ~~term~~ provision is in writing; and**
- (b) the employee and the employer have signed the agreement; and**

- (c) the employee had independent legal advice before signing the agreement; and
- (d) the lawyer who gave the advice explained the effect and implications of the ~~term-provision~~ before the employee signed the agreement; and
- (e) the lawyer witnessed the employee's signature; and 5
- (f) the lawyer certified that the lawyer complied with **paragraphs (d) and (e)**; and
- (g) the employee earned at or above the remuneration threshold—
- (i) at the time of signing the agreement; and
- (ii) at the time of dismissal. 10
- (4) **Subsection (3)** does not limit or affect any enactment or rule of law or of equity that makes an ~~individual~~-employment agreement void, voidable, or unenforceable on any other ground.
- (5) An employer is not required, in respect of an employee whose employment agreement contains the provision,— 15
- (a) to comply with section 4(1A)(c) in making a decision on whether to terminate the employment agreement; or
- (b) to comply with a request under section 120 that relates to terminating the employment agreement.
- (6) The employee is, in all other respects (including access to mediation services), to be treated no differently from an employee whose employment agreement does not contain the provision. 20
- (7) To avoid doubt, the provision may be included in an employment agreement under section 61(1)(a) but subject to section 61(1)(b).
- 67BB Calculating remuneration threshold for purposes of section 67BA** 25
- (1) An employee **earns at or above the remuneration threshold** for the purposes of **section 67BA** if the employee's specified remuneration is \$150,000 or more annually.
- (2) For the purposes of **subsection (1)**, specified remuneration—
- (a) includes— 30
- (i) gross salary or wages (or other payments to the employee) that are determined in advance and in writing under the employment agreement; and
- (ii) the agreed monetary value of any non-monetary benefit if the employee has an annual option under the employment agreement to exchange that benefit for a monetary payment; but 35
- (b) does not include—

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- (i)

any discretionary payments or other payments the amount of which cannot be determined in advance (such as bonus payments and commission payments); or

(ii)

any payments to reimburse the employee for costs incurred by the employee related to the employee’s employment; or

(iii)

any payment of an employer contribution to a superannuation scheme.
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Legislative history

8 December 2016

22 March 2017

Introduction (Bill 225–1)

First reading and referral to Transport and Industrial Relations Committee