

Employment Relations (Triangular Employment) Amendment Bill

Member's Bill

As reported from the Education and Workforce
Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Employment Relations (Triangular Employment) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This member's bill in the name of Kieran McAnulty seeks to amend the Employment Relations Act 2000 to protect the rights of people who are in a triangular employment arrangement. Triangular employment involves a person being employed by one employer, but working under the control and direction of another business or organisation.

We heard in the first reading speech for this bill that a growing number of New Zealanders work under triangular employment arrangements. They represent an important part of the workforce, particularly for businesses subject to seasonal fluctuations or needing labour at short notice.

The bill as introduced would make two main changes:

- It would give employees the right to coverage by a collective agreement.
- It would provide a framework for employees to raise a personal grievance with their employer and for the controlling third party to be joined to the proceedings.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement timing for the bill

As introduced, the bill would come into effect the day after the date of Royal assent. We recommend amending clause 2 so that the legislation would come into force either on a date appointed by the Governor-General by Order in Council, or 12 months after the date of Royal assent, whichever is earlier. This would allow time for officials to analyse the Employment Relations Authority Regulations 2000 and the Employment Court Regulations 2000 and determine whether any amendments are necessary.

Definition of “controlling third party”

The bill as introduced would amend section 5 of the Act to provide definitions of “primary employer” and “secondary employer”. We recommend deleting these definitions from clause 4. Instead of “primary employer”, we recommend using “employer” to describe the party that a person is the employee of, under a contract of service.

We also recommend adding a definition for a “controlling third party” instead of “secondary employer”, to denote the business or organisation that exercises control or direction over the employee

equivalent to what would normally be expected of an employer. This would clearly define the three parties in the triangular employment arrangement: the employee, the employer, and the controlling third party.

Collective agreements

Clause 5 would amend the Act to require workers to be bound by the same collective agreement as the employees of the controlling third party.

As introduced, these provisions would introduce considerable complexity to the labour hire model. For example, if a labour hire firm had an employee who worked for multiple controlling third parties, it could be required to manage multiple collective agreements.

We recommend removing these collective agreement provisions from the bill as introduced by deleting clause 5 and the applicable part of clause 4.

Personal grievances

Clause 6 of the bill as introduced would provide a framework for people in triangular employment agreements to raise a personal grievance with their employer. We recommend amending this clause to make it easier for the employee, the employer, and the Authority or court to join the controlling third party to personal grievance proceedings. (As a consequential amendment, we also recommend inserting clause 10.)

Our amendment would insert new section 103B in the Act to provide the following process. The controlling third party would be notified if the grievance related to their actions or policies, or if the employer considered that to be the case. The employee or the employer could apply to have the controlling third party joined to the proceedings.

The Employment Relations Authority or court would then apportion responsibility, liability, and awards as it considered appropriate.

Notification provisions

We recommend inserting clause 7 to set out the process for notifying the controlling third party of a personal grievance. Under our proposal, either the employee or the employer could make a notification within 90 days of the date on which the employee raised the personal grievance. After the 90-day period, notification could still be made with the consent of the controlling third party. If the controlling third party did not consent to being notified, the employee or employer could apply for leave to notify outside the 90-day period.

Remedies and mediation service provisions

We recommend inserting clause 8 to set out the process the Authority or the court must use when it determines that an employee has a personal grievance and the controlling third party has been joined to the proceedings. The court could then order the controlling third party to provide either or both of the following remedies:

- to reimburse the employee for wages lost as a result of the grievance
- to compensate them for the effects of the personal grievance, such as loss of dignity or loss of any benefit.

The Authority or the court would need to award remedies in a way that reflected the extent of the controlling third party's actions resulting in the personal grievance. If the financial position of the controlling third party required it, the Authority or the court could order payment to the employee by instalments.

We also recommend inserting clause 9 to clarify that, in the provisions relating to mediation services, "employment

relationships” include those between an employer and an employee who are in a triangular arrangement.

Minority view

National members opposed this bill at first reading, and although the bill will be reported back from this committee in a format that has been amended in all but two places, National members remain opposed to it.

Appendix

Committee process

The Employment Relations (Triangular Employment) Amendment Bill was referred to the committee on 21 March 2018. The closing date for submissions was 11 May 2018. We received and considered 174 submissions from interested groups and individuals. We heard oral evidence from 27 submitters at hearings in Wellington and Auckland.

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

Committee membership

Dr Parmjeet Parmar (Chairperson)

Simeon Brown

Hon Clare Curran (from 24 October 2018)

Hon Nikki Kaye

Denise Lee

Marja Lubeck

Jo Luxton

Mark Patterson

Jamie Strange (until 24 October 2018)

Chlöe Swarbrick

Jan Tinetti

Nicola Willis