BusinessNZ
The voice of business

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Hon Ruth Dyson
Minister of Labour
Parliament Buildings
Wellington

Dear Minister

Employment Relations (Flexible Working Hours) Amendment Bill

I am writing to you regarding our deep concern over the potential passing of the Employment Relations (Flexible Working Hours) Amendment Bill ("the Bill").

Not only is the Bill unnecessary in the first place, it also contains several provisions that make it potentially extremely onerous. That this should be so in legislation promoting flexibility is extraordinary.

As you know, we have consistently opposed the idea of introducing this Bill. Our view is that the vast majority of employers already are willing to, and do, accommodate requests for flexibility in working hours or place of work. Their reasons for agreeing, or refusing, are based on what is possible and reasonable given the needs of the business and the effect on other employees.

You also know that we have been actively engaged over many months in cooperative endeavours with the government and unions to promote the use of flexible approaches in the workplace on a voluntary basis. The Work Life Balance Project, Workplace Productivity Reference Group and Quality Productivity Leaders Group are some examples. The introduction of a compulsory overlay to such initiatives sends a somewhat confusing message. We continue to believe that the voluntary approach is the best way forward.

Any benefits of the Bill will likely be seen by very few in the typical New Zealand workplace. This, and the fact that the legislation is not necessary, leaves an overriding impression that government support for the recommended changes is more related to political commitments than it is to genuine support for flexible workplaces.

Use of the legislation

Given that employees are not required to request a change using this legislation it is entirely likely that many employers and employees will ignore it, seeking their solutions in the same simple commonsense ways that prevail today. Where agreement to a request is likely, no reasonable person would willingly make the process of agreement harder by submitting detailed explanations in formal documents then waiting for a formal response.

We therefore predict that the main reason for using the provisions will be to access the "grievance process" because refusal of a normal and informal request has aggrieved an employee. In other words, the Bill is simply another process for resolving grievances. This being so, refusal of requests is simply an extension of the existing ground of the employee being disadvantaged in their employment.

We continue to oppose the Bill. However, should the government feel committed to its passage, the Bill should be a simple mirror of the British legislation on which it is based, adjusted only for age and scope. If that is unacceptable, there are a couple of issues that should be addressed urgently if the law is not to become an embarrassment to its sponsors.

Use of Labour inspectors

The Bill inserts a further level of process into an already complex process of employment problem resolution. This arises because an employee whose request for flexible working agreements has been refused may refer the matter to a labour inspector in the first instance.

However, if discussion facilitated by an inspector fails, the matter enters the "normal" grievance process commencing with mediation, progressing through the Employment Relations Authority, Employment Court, Court of Appeal and ending, ultimately, in the Supreme Court. This progression is enabled by the fact that refusal of a request for flexible working arrangements is deemed by the Bill to be an "employment relationship problem." This definition exposes the issue of refusal of a request for flexible working arrangements to the full scope of the Act's provisions governing personal grievances and disputes.

Therefore, the process for a simple change to hours or place of work could prove to be at least as onerous and costly as the most serious employment issues, such as dismissal and discrimination.

We would suggest the Bill specify that refusals of requests under the bill are not an employment relationship problem as defined in the Employment Relations Act, and that the scope for "judicial" review of decisions be capped at the lowest sensible level, for example, the mediation service.

Furthermore, the proposed power of the Employment Relations Authority to order an employer to reconsider a request *and* to award compensation effectively predetermines the outcome. The ability to award compensation suggests that an employer's decision to refuse a request will be judged as "right" or "wrong" (depending on whether or not compensation was awarded). If the Employment Relations Authority is to be involved, the Bill should limit that involvement to the awarding of compensation.

Requirement to consult unions

The Bill provides that grounds for refusal of a request include undermining the terms of a collective agreement where the work done by the employee making the request comes within the coverage clause of the collective agreement. The Bill further provides that the employer must consult the relevant union if they propose to agree to a request made by an employee whose work is so covered.

These provisions insert further obligations into the otherwise simple and beneficial process of *agreeing* to a request. In fact, the Bill makes it harder to be flexible than ever before.

Other issues arise here too. Employers with a minority union presence (a common occurrence) will have to consult the union even when the employee involved is not a union member. Unions stand to be accused of using these provisions to exert industrial pressure on employers, particularly where employees are not unionised.

Unions that disagree with an employer's proposal to agree to an employee's request will have (as party to the collective agreement that covers that work) the ability to take the issue as an employment relationship problem through the Bill's proposed progression from labour inspector to the Supreme Court. This is hardly conducive to productive workplace relationships.

Recommendation

I would urge you to oppose the passage of the bill or, if you cannot, to address the specific concerns raised above.

Yours sincerely

Phil O'Reilly
Chief Executive
Business New Zealand

CC

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