Submission

By

Submission

to the

Transport and Industrial Relations Select Committee

on the

Employment Standards Legislation Bill 2015

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EMPLOYMENT STANDARDS LEGISLATION BILL

INTRODUCTION

1. Business New Zealand supports the Bill and welcomes the opportunity to make a submission on it. It wishes to appear before the select committee to talk to its submission.

RECOMMENDATIONS

BusinessNZ recommends that the Bill proceed with the amendments suggested in this submission.

COMMENTARY

Part 1 Amendments to the Parental Leave and Employment Protection Act 1987

2. The intent behind the provisions of the Bill that relate to parental leave is relatively straightforward. The proposed changes basically extend the period a person may receive payment for being on parental leave, the scope of who is eligible for both the payment and leave and the nature of the leave that may be taken and the conditions that govern it.

3. However, the simplicity of the intent is not carried into the detailed provisions that govern it. Some 35 pages of detailed provisions set out the means by which the intent is to be realised. If it has proved complex to analyse and make recommendations on the Bill, it is likely to be similarly complex for the average employee seeking to take advantage of the entitlements provided by the Bill. Ideally, the benign intent of the Bill should not be undermined by the complexity of its provisions.

4. Aside from extending the period of paid leave, the main other changes include:

a. “Maternity leave” becomes “primary carer leave”. This will extend parental leave entitlements beyond those who give birth to, or adopt, a child to persons who become the primary caregiver for the day-to-day care of a child up to the age of five.

b. A new definition of 'eligible employee' will provide paid parental leave to those who do not have standard working arrangements. This will extend paid parental leave to now include non-standard workers (for example, seasonal workers) and employees who have recently changed jobs.

c. Employees not entitled to primary carer leave may now request (but are not guaranteed to receive) leave from their employer to allow them to receive parental leave payments.

d. Employers and employees may agree to "keeping in touch days" that will allow employees to work for up to 40 paid hours during their period of parental leave without being considered to have returned to work, allowing them to retain parental leave payments and other entitlements.

5. As mentioned above, while the intent of the changes seems clear enough, the Bill as drafted may not provide the same clarity. The suggestions in following paragraphs 7 – 22 following points made are therefore primarily for consideration by the drafters of the Bill as they are not suggestions to change the meaning of the Bill's provisions; rather they are considerations of drafting to achieve the intent of the Bill.

6. BusinessNZ also recommends that every effort be made to simplify the provisions of the parental leave provisions of the Bill more generally, as it is legislation that, more than most, is of direct and personal interest to ordinary New Zealand families.

Drafting comments

Clause 6

7. Extended leave definition: Where is the 'only' to be inserted in proposed section 2(2)? The meaning changes depending on whether it is placed after '7A' and before the comma or after the comma as it might currently be taken to be. Presumably the former is intended and this should be made clear (cf ESL Bill, 6(b)'s parental leave definition). (Part 6 protection of employment, Part 7 remedies available to employees, part 7A payment for parental leave.)

Clause 16

8. Meaning of primary carer: it is suggested that to make it entirely clear that it is the primary carer who is entitled to the parental leave payment, paragraph (a) of subsection (1)(a) should be amended along the following lines: "a female (the biological mother) who *being pregnant, or having given birth to a child for whom she intends to care, is entitled to the parental leave payment"*

Clause 26

9. Entitlement of spouse or partner of primary carer to partner's leave: under proposed section 17(2)(b), a child's biological mother may not take partner's leave if she transfers all the paid leave entitlement to her spouse/partner. However, if she transfers the paid leave entitlement to an eligible spouse/partner who has taken no partner's leave, it is suggested that for the bill to even-handed (as it appears to be trying to

be) the entitlement to unpaid partner's leave should pass to the mother. (Although it is acknowledged that current 19A(3) and 19B(2)(a) impose the same limitation in respect to the 6-month entitlement period, now extended by the bill to the 12-moth entitlement period.) If the mother had not transferred her paid parental leave entitlement but had taken all the paid leave period, her partner/spouse would then have been entitled to partner's leave. Why this distinction is made is not at all obvious.

Clause 33

10. Duration of extended leave: proposed section 26(5) states that extended leave is not reduced if an employee takes *'a period of partner's leave …. to which the employee and his or her spouse or partner are entitled in accordance with this Act'.* Compare this with removal of any partner's leave entitlement where the parental leave payment is transferred, referred to above. Again, why the different treatment? Isn't partner's leave distinct from extended leave if taken by the spouse/partner of the primary carer? Shouldn't the separate entitlement remain if the primary carer responsibility is transferred or is it then assumed that the transferee no longer has a role in caring for the child?

11. Period during which extended leave may be taken: (s27(2)(b)). For an employee who has taken partner's leave, the applicable start date for extended leave is the date when partner's leave expires or earlier terminates. This provision makes it sound as if extended leave has to start when the partner's leave expires but that cannot be the case as the spouse or partner of a mother who has taken primary leave can, for example, take an extended leave period after the mother's leave ends (see section29(b). To make matters clearer, it might be better to describe the applicable start date for an employee who has taken partner's leave in respect of a child as "… *any date after the expiry or earlier termination of any partner's leave the employee has taken that has been notified to the employer'.*

12. A separate question arising from proposed section 27(2)(c) is: is this applicable extended leave start date – as from the date of confinement - intended to apply where no leave has been taken **before** the child's birth? If no primary carer leave is taken after the birth, presumably there will be no entitlement to the parental leave payment. It is difficult to see why the child's mother would take extended leave as from the date of confinement rather than primary carer leave, as this provision suggests she might. Extended leave could be taken only by whichever spouse/partner who was not the primary person caring for the child (although section 23(1)(a)(ii) requires that he or she assumes or intends to assume responsibility for the care of the child), not by the primary carer.

13. Primary carer leave therefore should be clearly tied to the paid parental leave entitlement, otherwise the two types of leave (primary carer and

extended) are likely to cause some confusion (see proposed amendment to section 7(clause 16)).

14. For the spouse or partner taking primary carer leave, extended leave, if taken, would follow on from the primary carer leave period. A spouse/partner could take extended leave concurrently with the primary carer leave taker or might take extended leave following the expiry of the primary carer leave, either together with or independently of the primary carer.

15. Sharing of extended leave**:** if, as provided in proposed sections 28(2)(a) and (b), one spouse or partner takes *'the full maximum combined period of extended leave'* and the other takes neither primary carer, nor extended, leave, is that spouse/partner entitled to the parental leave payment? Again, why would one or the other not take primary carer leave? What is '*the full maximum combined period of extended leave?* There appears to be nothing in the Bill to indicate that extended leave is not a discrete period in itself – i.e. to be taken alongside primary carer leave or after primary carer leave ends. Allowing one spouse/partner to take all extended leave and the other no leave (section 28 (2)(b)) seems to be a hangover from the original Act when no provision was made for paid leave. As it stands it seems that one partner taking all the leave as extended leave would preclude any parental leave payment.

16. Extended leave may be taken consecutively or concurrently with leave taken by partner: Another question arises with respect to proposed section 29(b) provision for extended leave to be taken consecutively or concurrently with *"any period for which the employee's spouse or partner receives a parental leave payment*"; viz, wouldn't a partner/spouse receiving a parental leave payment be taking a period of primary carer leave? As above, it is difficult to understand how someone could be receiving a parental leave payment if not on primary carer leave. As noted, primary carer leave and the leave payment should be tied together with, if necessary, grounds for exception specified – although it does not appear from the negotiated carer provisions (which require a leave application to the employer), that the payment is available to persons other than those currently in employment.

17. It is also the case that it would be difficult to take extended leave concurrently with a spouse/partner taking partner's leave. This is because at the latest, partner's leave must, in most instances, end by the 21st day following the child's delivery and at that stage, the primary carer would still be on primary carer leave (that is, if primary carer leave equates to the paid leave payment period).

18. Part 3A Primary carers not eligible for primary carer leave may request negotiated carer leave: the proposed section 30B(3)(a) requirement to make a request for the leave *at least 3 months before the expected date of delivery* presupposes that the employee will have been employed by that employer for at least 3 months. Is that the intention?

Clause 45

19. Labour Inspectors may make determinations in respect of employees: if, under proposed section 70A(3)(ab), the employee has to apply to the employer for leave at least 3 months before the expected date of delivery, he or she will have to have worked for that employer for at least 12 of the 26-week qualifying period.

Clause 59

20. Keeping-in touch days: presumably proposed section 71CC is intended to preserve the paid leave entitlement rather than the entitlement to the unpaid periods of leave. This would be entirely clear if new section 71CC(3) were to refer to performing more than *a total of 40 hours of paid work for his or her employer during a period of* ***paid*** *parental leave,* rather than, as currently, referring merely to *a period of parental leave.* The paid period must, after all, be taken in one continuous period (Section 71J).

Clause 64

21. Start of parental leave payment: in relation to proposed section 71K(a)(i)and (ii), and as previously recommended, the parental leave payment and primary carer leave should be linked with, in the case of a child born to the person or the person's spouse or partner, the payments commencing not, as currently, as *"at the date the person commences parental leave"* but: (in s*57K(a), "as at the date the person commences primary carer leave, whether before or on the date of confinement, whichever is the earlier"*.

Clause 65

22. End of parental leave payment: in proposed section 71(1)(a), the term *"primary carer leave"* should replace *"parental leave payments"* ie, *(a) 18 weeks after the date on which primary carer leave began in accordance with section 71K18*."

Part 2 – Amendments to the Employment Relations Act 2000

Records relating to minimum entitlement provisions

23. Business NZ supports the strengthening of requirements for the making and keeping of records that underpin minimum employment standards. While it may be argued that such requirements already exist, it is clear that these are not able to be adequately enforced in the current setting.

Availability provisions unenforceable unless agreed compensation payable

24. While the Bill makes it clear that compensation must be paid to an employee who does work under the terms of an availability provision, it

seems to be also possible to interpret the provision to mean that compensation must be paid to an employee who is available even if the work is not performed. Proposed section 67E(3) states that an availability provision is unenforceable if the employment agreement does not provide for compensation to the employee "for making himself or herself available to perform work under the availability provision".

25. However, the effect of requiring compensation for being available in accordance with an availability provision arguably is no different to that of traditional and common "standby" or callout" arrangements; i.e. that an employee receives an allowance for being available to work but not actually working. Using the same argument, these traditional provisions therefore overlap proposed section 67E(3). This being so, there will be significant consequences for employers who already pay standby or callout allowances.

26. One consequence relates to the fact that the amounts payable under proposed section 67E(3) are not fixed and therefore open to interpretation by the courts. Case law already exists to suggest that being available carries a minimum impost of the minimum wage rate[1]. While this has yet to be extended to situations covered by existing standby and callout provisions it remains possible. A court determination may therefore alter the basis on which existing and comparable standby and callout arrangements are paid even though these have not been challenged in the past. This will cause considerable uncertainty at the very least.

27. To avoid confusion, proposed section 67E(5) should be amended to include a provision that recognises that existing arrangements that compensate an employee for being available satisfy the requirements of proposed section 67E.

Cancellation of shifts

28. BusinessNZ supports the general requirement to require reasonable notice to be given of cancellation of shifts. It also supports the notion that compensation should be payable for failure to meet notice obligations. However it is concerned that these requirements will have unintended consequences for business and employees.

29. First, proposed section 67G requires the employer to identify the notice period that must be given to an employee if there is to be a change in shift duties. There is no indication of in what manner or form the notice must be given. Indeed the term "notice" is not defined anywhere within the ER Act 2000. This raises a concern that notice requirements could be gamed. For instance, modern cell phones enable an employee to identify who is sending the message or making the call and thence to decide to not answer a call then proceed to work and claim the entitlements proposed in section 76G. A requirement for acknowledgement of receipt of a request to work would seem to be

[1] *Idea Services v Dickson*, the so called "Sleepovers Case".

appropriate as a request to work made in good faith should be acknowledged in the same manner.

30. Second, it is clear that the employee is to be paid what they would have earned for the cancelled shift if the required notice was not given. However, it is not clear whether compensation requirements still apply in the case of a shift that is cancelled by the giving of the required notice. It could be argued that an employee whose shift has been cancelled in compliance with the required notice provisions is now back under the auspices of the availability provisions and still entitled to compensation. This should not be the case, especially in circumstances where the cancellation of the shift is due to factors not reasonably controllable by the employer.

31. To address these issues BusinessNZ recommends that:

    a. notice requirements are required to be included in the employment agreement together with a duty on the employee to acknowledge the notice.

    b. a shift that is cancelled by the giving of proper notice is not compensable under any other provision of the Bill.

Part 3 – Amendments to the Holidays Act 2003

32. BusinessNZ supports the amendments proposed in Part 3 of the Bill

Part 4 – Amendments to the Minimum Wage Act 1983

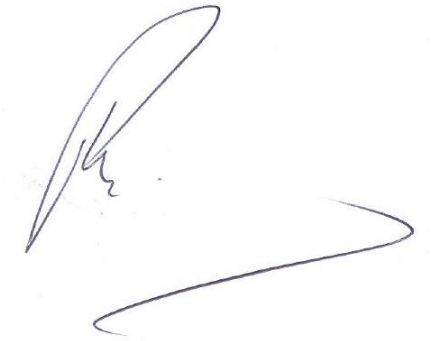
33. BusinessNZ supports the amendments proposed in Part 4 of the Bill

Part 5 – Amendments to the Wages Protection Act 1983

34. BusinessNZ supports the inclusion of a prohibition against the making of unreasonable deductions from an employee's wages. However, proposed new section 5A does not provide even guidance as to the meaning of "unreasonable", leaving it open to the courts to determine. This may not result in an interpretation that deals with the concerns giving rise to the provision in the first place.

35. The explanatory notes to the Bill characterise unreasonable deductions as including occasions "when deductions are made from an employee's wages to compensate the employer for loss or damage caused by a third party over which the employee could not reasonably be expected to have control." While not wide enough to cover all circumstances that might be unreasonable, this clarification would add considerably to interpretation of the Bill if it were included by way of example.

36. BusinessNZ therefore recommends proposed section 5A of the Wages Protection Act be amended by inserting, at the end of the section, "Without limiting the interpretation of this section, a deduction is unreasonable if its purpose is to compensate the employer for loss or damage caused by a third party over which the employee could not reasonably be expected to have control"



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BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its membership, comprising its four founding member organisations (Employers and Manufacturers Association, Business Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association), over 70 affiliated trade and industry associations and more than 100 of New Zealand's largest corporates, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the entire New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation (ILO), the International Organisation of Employers (IOE) and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development (OECD).