



NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND

TE KAUNIHERA WAHINE O AOTEAROA

24 July 2013

S13.07

Submission to the Transport and Industrial Relations Select Committee on the Employment Relations Amendment Bill 2013 (105-1)

The National Council of Women of New Zealand (NCWNZ) is an umbrella organisation representing 47 organisations affiliated at national level and a further 41 organisations affiliated at branch level. It has 22 branches throughout the country attended by representatives of these organisations, as well as individual members. NCWNZ's function is to represent and promote the interests of New Zealand women through research, discussion and action. This submission has been prepared by the NCWNZ Employment Standing Committee and the Parliamentary Watch Committee after consultation with the membership of NCWNZ.

Policy

- 1 Thank you for the opportunity to submit our members' views on the Employment Relations Amendment Bill 2013 105-1 (the Bill). NCWNZ policy in relation to the employment of women dates back to 1896. That policy is continually reviewed through consultation with our members. We have always lobbied for the rights of women and their families and in particular for those in low paid jobs who are vulnerable.
- 2 In 1991, NCWNZ made two submissions on the Employment Contracts Bill expressing concern that hard-won measures designed to protect working people from exploitation were being swept away. We believed that there was a built-in imbalance of power between employers and employees and that women were particularly vulnerable to exploitation as so many of them were in weak bargaining positions. We subsequently welcomed the Employment Relations Bill 2000 as an attempt to redress the balance between bargaining groups. NCWNZ also supported the Employment Relations Amendment Bill 2006 as it was designed to protect specified categories of employees in the catering, rest home residential care and cleaning sectors. Our members agreed that such protections would help those groups with security in employment.

Executive Summary

- 3 The majority of our members are of the view that, overall, this Bill's amendments would significantly reduce the protections available to employees and result in a change of the balance of power between employer and employee, to the detriment of the latter. We believe that a number of the amendments in the Bill would be contrary to the object of the Employment Relations Act (the Act) which includes the building of productive employment relationships through the promotion of good faith by: acknowledging and addressing the inherent inequality of power in employment relationships; and promoting collective bargaining. It is our view that the Bill's amendments would result in a backward step to the harsher provisions of the Employment Contracts Act 1991.
- 4 NCWNZ believes that the amendments could contravene recognised international labour and human rights' conventions that New Zealand has ratified. In particular, the amendments would be contrary to New Zealand's obligations under International Labour Organisation (ILO) Conventions including Conventions 87 and 98¹. We are also of the view that the amendments could contravene Articles 22 and 23(3²) of the Universal Declaration of Human Rights which are seen as supporting collective bargaining.
- 5 NCWNZ encourages the Government to uphold the Convention for the Elimination of all Forms of Discrimination against Women (CEDAW). We note in particular, the relevance of CEDAW Article 11 to this Bill and New Zealand's obligations, as a State party to that Convention. In particular, we note the concluding observations of the Committee on the Elimination of Discrimination against Women (June 2012) following consideration of the New Zealand government's seventh periodic report to the Committee. The Committee expressed concern about *'...the proposed legislative changes to collective bargaining, allowing employers to hire new workers on lower individual terms even when a union-negotiated collective agreement exists.'*
- 6 Our submission addresses four areas in the Bill: collective bargaining; continuity of employment and the rights of employees to transfer to a new employer in the event of restructuring; rest and meal breaks; and flexible working hours.

Collective bargaining

Clause 4: Access to confidential information. Amends section 4 good faith requirements between the parties to an employment relationship.

¹ ILO Convention CO87 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) CO98 – Right to Organise and Collective Bargaining Convention, 1949 (No 98)

² Universal Declaration of Human Rights, Article 22 – Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Article 23 (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

- 7 NCWNZ supports the Employment Court's view that the employee has the right to information they need to present their case against dismissal, unless there is good reason for such information to be withheld. We note that full disclosure is required in other fields of law. Our members believe that the amendment would take away provisions relating to procedural fairness and natural justice. They note that information regarding the credentials of a person remaining in a position, or who has gained a particular position, could benefit an unsuccessful employee. It could, for example, provide information to assist the employee to set achievement goals to improve their performance, upskill and gain future positions. Importantly, it would enable an employee to ascertain whether they have been treated justly.
- 8 A small number of members support this amendment, provided that employers are still subject to the Official Information Act, the Privacy Act and instructions from the Employment Authority on mediation processes. That being the case, they believe that information should still be given to employees with blackouts. A number are of the view that an employer's retention of information about dismissal should only apply during the probationary period and be limited.

Clause 9: Replaces section 35 with new section 35. Duty of good faith

Clause 11: Inserts new sections 44A to 44C. Provides for employers to opt out of collective bargaining involving two or more employers.

Clause 16: Repeals section 63 which makes provision for the terms and conditions of employment for a new employee who is not a member of a union.

- 9 NCWNZ is of the view that these amendments undermine the whole concept of collective bargaining and the need to work towards better and safer workplaces, equality within the workplace and fairer wages. They are likely to result in a reduction in employees' terms and conditions of employment and create an imbalance in employment relations, in favour of employers.
- 10 We believe that collective employment agreements are good for women. They often promote the value of women's work, provide enhanced provisions (for example additional paid parental leave) and actively support equity in the workplace, including reducing the gender wage gap. Collective employment agreements provide a balance between the interests of employees and employers and have broader positive outcomes in the workplace including collaboration, stability and greater harmony, with benefits for productivity. Collective agreements provide a benchmark for terms and conditions of employment that may be obtained by the many individual employees who, for whatever reason, are not covered by a union. Many women, part-time, casual and contracted employees, are in that category.
- 11 NCWNZ believes that 30 days is a fair time frame for a new employee to opt into a collective agreement or negotiate individual terms and conditions, once there is a greater understanding of the work involved. The removal of the 30 day rule for new employees who are not union members could mean that they are offered starting pay and employment conditions that are less than the collective agreement. This would

particularly affect vulnerable employees including those with insufficient information regarding workplace practices, for example, women returning to work following breaks for childcare, refugees, those with limited English and those so desperate for a job that they will accept lower terms and conditions.

- 12 NCWNZ is concerned that the removal of the requirement to conclude bargaining would have a negative impact on employment relations generally, resulting in disharmony, instability and resentment. Such an environment is not conducive to productive, cooperative workplaces. The amendment is likely to have a significant impact, for example, on employees in the aged and disability care sector. Employees in that sector are mostly women. They are low paid, dispersed across a range of workplaces and work shifts to provide services that are required 24 hours a day, seven days a week. The nature of that work, therefore, means that the process of coordinating wage negotiations can be lengthy and complex. The ability of employers to opt out of bargaining could negatively affect such negotiations and impede improvements in wages and conditions so urgently needed in that sector.
- 13 A number of our members expressed the view that where there is common ownership of separate companies, employers should be required to attend multi-employer bargaining with no right to opt out. They cite the example of New Zealand Bus, a subsidiary of Infratil, which has three 100 per cent subsidiary companies operating public passenger bus services in the Wellington region. They believe that in such cases, and in the context of competitive tendering, multi-employer bargaining provides the basis for employees to establish fair industry rates of pay and provide best service for the public.
- 14 In our survey of members, one member expressed the view that an individual should be able to negotiate their own employment agreement whether or not it is a collective. If the person is not confident they believe that an advocate, either a union representative, family member or a lawyer should be able to assist them. That member, however, also expressed the view that the amendments appear to advantage the employer more than the employee.

Continuity of employment: rights of employees to transfer to a new employer in the event of restructuring; exempt employers (Part 6A)

Clause 28: Amends section 69A(a) and updates the objects of sub-part of Part 6A. Exempt employers.

Clause 30: Inserts new section 69CA. Defines exempt employer or associated person.

- 15 NCWNZ supported the general intent of the provisions of the Employment Relations Amendment Bill 2006 that dealt with continuity of employment for employees affected by restructuring. We believe that the continuity of employment protections for specified workers were included in the Act for good reason and after due consideration and consultation. There appears to be no evidence to justify the changes proposed in the current Bill.
- 16 We note the Ministry of Business Innovation and Employment Regulatory Impact Statement, April 2013, which states that: *'...on balance the Ministry considers that the benefits of having special continuity of employment protections for the specified workers are likely to outweigh these costs.'* We also note the former Department of Labour's review of Part 6A which concluded that: *'...despite its complexity, employers have found ways of making Part 6A of the Act work, but improvements could be made. The net costs and benefits of Part 6A are low in national economic terms.'*
- 17 Our members believe that these amendments would have a particularly negative impact on women, given that they make up the majority of employees in cleaning, caretaking, orderly, laundry and food services. We are concerned that the amendments would lead to increased franchising to small scale contractors. A number of our members note that the latter have been replacing some of the larger cleaning contracting companies, in schools for example. Protections that employees had in the larger companies, which are more likely to be unionised, are likely to be lost. Employees' increased insecurity and anxiety, resulting from these amendments, could also negatively affect the productivity and performance of businesses.
- 18 We recognise that there are good employers and small businesses that provide good working conditions. Changes of ownership, however, could mean that some employers (if exempt) could cut conditions and benefits given by a previous employer. We note that the majority of businesses in New Zealand would come within the 'exempt' category. This increases the potential for a widespread loss of employees' hard won terms and conditions, increasing societal inequities. A small number of our members, while believing that no employer should be 'exempt', suggest that if the amendment 'is insisted on by the Government', exempt employers should be those employing five or fewer employees.
- 19 Some members noted that the amendment could result in employers of medium sized business, for commercial reasons, shedding employees to reduce their workforce to 19 or fewer, thereby increasing unemployment.
- 20 A small number of members support the amendments, expressing the view that the change of ownership may result from previous poor performance. They suggest that a new employer may wish to take a different approach to the business, require people with different skills or employ family members. They also suggest a three month probationary period for employees in the changeover. Others believe that access to some form of mediation should be provided as the amendments seem 'rather punitive'. One member noted support for changes to the transfer process, believing that it should achieve a successful balance for both employers and employees.

Rest and meal breaks

Clause 43: Replaces section 69ZC. Compensatory measures for employer's failure to provide rest and meal breaks.

Clause 44: Replaces sections 69ZD and 69ZE. Breaks may be restricted if the restrictions are reasonable and necessary.

- 21 NCWNZ is of the view that current legislation prescribing rest and meal breaks is satisfactory for both employees and employers. We believe that all employees have the right to regular rest and meal breaks and that such breaks are conducive to productive and safe workplaces. We do not believe that proposed compensatory measures are an adequate replacement for legislated rest and meal breaks. For example, in a part-time/casual working environment, indeed in many busy workplaces, it can be difficult to take time off 'in lieu', even with goodwill on the part of both parties.
- 22 We believe that the amendments could result in the exploitation of vulnerable employees. Employees would be subject to an employer's discretion. This would particularly be the case for: migrants with limited English; those in small businesses where employer and employee work closely together; and those with limited information, confidence and experience in negotiating conditions of employment. This is more likely to be the case given the erosion of collective bargaining that we believe would result from the Bill's other amendments. A number of members recommend that a negotiated process and a written agreement be required in these amendments and that they be binding. Others recommend that a free mediation/arbitration process be made available in the event of disagreement between the parties.
- 23 Many of our members expressed concern that the amendments could erode health and safety standards. Employees may agree to less than adequate breaks for fear of not being hired, resulting in health and safety issues for the individual and for other employees. A tired, hungry employee is more likely to make mistakes or lack concentration, with potentially negative impacts on a business/workplace, including a higher risk of injury. There is also the potential for discrimination, with some employees doing the same job getting more or better breaks than others. Some members note that toilet breaks are essential for women and that negotiating breaks may be more difficult for part-time employees, most of whom are women.
- 24 A small number of members expressed the view that Clauses 43 and 44 seem more in keeping with both employee and employer interests than the rest of the Bill, noting that employees would be discouraged from taking too much time off. At the same time, they emphasised the need for a fair and balanced agreement and the potential for an 'overpowering, aggressive' employer to make demands that are unfair, particularly for those in precarious employment. Other members believe that the amendments provide adequate protection for employees, as long as there is a 'reasonable' employer. They also note that in the present employment situation, few employment conditions are not precarious. Others noted that consistently regular breaks were not possible in some businesses but that collaboration between the parties, where feasible, was important.

Flexible work arrangements

25 The NCWNZ supported the previous legislation on flexible work arrangements and recommended that they be extended to all employees. We are, therefore, supportive of that extension. We would, however, recommend that the right to flexible working hours be made more substantive. We believe that improvements to current arrangements should include: the right to appeal an employer's refusal to agree to flexible working hours; a requirement that any refusal be in writing; and the dissemination of information about the provision to ensure that all employees are aware of the opportunities for flexible working arrangements.

Conclusion:

26 NCWNZ supports any moves to enhance relationships between employers and employees. It is our view, however, that this Bill will change the balance of power between the parties, to the detriment of employees. We are particularly concerned that the proposed changes will affect the most vulnerable members of society.

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President

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Convener, Employment Standing Committee