NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi

to the

Transport and Industrial Relations Committee

on the

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

P O Box 6645
Wellington
May 2017

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1. Introduction

1.1. This submission is made on behalf of the 30 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. As the most representative workers' organisation in New Zealand, the CTU advocates for all working people. The proposals in the Bill may also directly affect many union members such as doctors, school principals, senior public servants, engineers and skilled technicians.

1.4. The rights of workers to be treated fairly and to seek justice at work is a core concern of the CTU. The guarantee of these rights in our employment law is the personal grievance protection.

1.5. These protections have existed in New Zealand since 1973 and have been available to all employees since 1991.[1] In part two of our submission we discuss the evolution of personal grievance provisions and unfair dismissal protections.

1.6. The Bill is poorly drafted. If enacted as introduced, it would create significant adverse consequences. We discuss the problems that the Bill, as introduced, creates in part three of our submission below.

[1] Excepting the changes in 2009 and 2011 permitting the removal of unfair dismissal protections during the first 90 days of employment.

1.7. Clumsy drafting renders the Bill's intent ambiguous. The most significant unanswered question is whether contracting out of personal grievance protections is intended to remove the right to challenge the dismissal or other action completely (as is the case for employees dismissed on 90-day trial periods) or to leave other avenues of redress under the general law available (as was the case for non-union members prior to 1991). Our submission considers both possibilities:

- Changes which would remove the right to challenge unjustifiable dismissals or other actions by the employer are considered at parts four and five of our submission; and
- The return to earlier common law remedies such as wrongful dismissal is considered at part six of our submission.

1.8. We recommend that this Bill does not pass. Any of the possible permutations deny employees' access to justice and unnecessarily complicate our employment laws.

2. The history of personal grievance coverage in New Zealand

2.1. Personal grievance provisions in their modern form covering unjustified dismissals were first introduced in the Industrial Relations Act 1973. The impetus for these reforms was primarily the high level of strikes attributed to disputes over dismissals during the 1960s and early 1970s. Workers resorted to strikes because the common law rules of unfair dismissal were ineffective. They were ineffective because they dealt only with process rather than justification.

2.2. The legislative reforms accorded with international trends of increasing legal protection of security of employment, a trend reflected in the International Labour Organisation (ILO) Recommendation on Termination of Employment (No 119) 1963 and in the later Convention (No 158) and Recommendation (No 166) on Termination of Employment 1982.

2.3. Convention 158 provides that a worker must not be dismissed for conduct or performance reasons without an opportunity to defend against the allegations made (art 7) and should have a right of appeal (within a reasonable time) to an impartial body in relation to that dismissal (art 8).

2.4. While New Zealand has not ratified Convention 158, it has been influential in our courts. In *New Zealand Food Processing Union v ICI (NZ) Ltd* (1989) ERNZ Sel Cas 395, 408 the Labour Court commented that:

> We understand that New Zealand has not ratified this Convention on the footing that safeguards already exist here which give effect to the Convention. This is understandable in view of the provisions of Article 1 of the Convention which does not require Member States to do anything if the provisions of the Convention are "otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice". The provisions which we have quoted from the Convention (which includes, also, the requirement that the burden of proving the existence of a valid reason for the termination shall rest on the employer) are already in force as part of the law of New Zealand. It is obviously the view of all civilised nations that that should be the universal law.

2.5. Personal grievance coverage expanded in the 1980s and 1990s. Under the Industrial Relations Act 1973, personal grievances were only available to union members bound by an award or registered agreement. The Labour Relations Act 1987 extended the personal grievance protections to all union members.

2.6. The Employment Contracts Act 1991 extended the right to take personal grievances to all employees. There is some irony that a National Party Member's Bill seeks to undo the work of a former National Government.

2.7. This extension was opposed by the libertarian Business Roundtable and Employer's Federation who argued throughout the 1990s and during the passage of the Employment Relations Act 2000 that dismissal should be wholly the employer's discretion.

2.8. Despite these arguments, the Employment Relations Act 2000 continued the personal grievance regime in essentially the same form with the only major coverage change being the introduction of ninety-day trial periods without a right to claim unjustified dismissal under s 67A-67B. These provisions were introduced in 2009 for Small to Medium Businesses and extended in 2011 to all employers. While these arrangements have proven popular with employers, evidence shows that, while creating suffering for many employees, they do nothing to incentivise job growth.[2]

2.9. National Governments have reviewed the personal grievance settings in 1998 and 2009/10. In both instances, the reviews found that the settings were fundamentally sound (despite employer perceptions of unfairness). The CTU has concerns with aspects of the personal grievance process but universalism not one of these concerns.

[2] See Chappell and Sin (2016) The Effect of Trial Periods in Employment on Firm Hiring Behaviour available at http://motu.nz/our-work/population-and-labour/individual-and-group-outcomes/the-effect-of-trial-periods-in-employment-on-firm-hiring-behaviour/

2.10. This Bill is the latest serving of the same old wine in new bottles. We hope that New Zealand has seen the folly of these arguments and moved past them.

3. Problems with the Bill as introduced

3.1. The general policy statement of the Bill states:

> The personal grievance provisions in the Employment Relations Act 2000 are intended to protect employees from unjustifiable dismissal or disadvantage. This overrides any existing contracts agreed to by the parties.
>
> This Bill amends the principal Act to allow employees with an annual gross salary over $150,000 to contract out of the personal grievance provisions. Under this Bill, if that option is taken, whatever the employee and the employer have agreed to in their employment contract stands. This removes the threat of personal grievance for the employer in exchange for agreed terms with the employee.

3.2. Proposed s 102A(2) holds that "[t]he employee and the employer may agree to include a term in the agreement excluding the application of this Part."

3.3. The effect of this would be to exclude the application of Part 9 of the Employment Relations Act- personal grievances, disputes and enforcement. Part 9 contains ss 101 to 142 of the Act. Along with the intended removal of access to personal grievance protections relating to unjustifiable dismissal or disadvantage, an exclusion of this Part would also remove:

- The ability of employees to pursue disputes about the interpretation of their employment agreement (s 129);
- Protections against sexual and racial harassment (ss 108-109);
- Protection from victimisation for raising health and safety issues (s 110A); and
- Requirements for employers to keep wage and time records (s 130).

3.4. Protections against discrimination in employment are preserved by being set out in parallel by the Human Rights Act 1993.

3.5. The absurdity of this proposal will be clear to the Committee and we will not belabour this point. Removing protections against sexual and racial harassment directly contravenes many of the most important international treaties that New Zealand is bound by including:

- The International Covenant on Civil and Political Rights;
- The International Convention on the Elimination of All Forms of Discrimination Against Women;

- The International Convention on the Elimination of All Forms of Racial Discrimination;
- ILO Convention No 111 on Discrimination (Employment and Occupation) 1958

3.6. Scott Simpson, the Member in Charge of this Bill, appears to recognise that his Bill needs significant surgery. In his first reading speech Mr Simpson stated that:[3]

> [T]here is an area that does need the attention of the select committee and it relates to adding in protection for employees, no matter how high their gross earnings are, from situations that might simply be regarded as those of a bad employer, such as discrimination, sexual or racial harassment, or where the employer fails to comply with their legal obligations. I believe those protections can and should be inserted at the select committee.

3.7. We agree and submit that these protections should be retained for all employees.

3.8. Part 9 of the Employment Relations Act 2000 includes s 124 which mandates the Authority to consider reducing remedies available to an employee if they have contributed towards the situation that gave rise to the personal grievance. Contracting out of this provision may lead to the unusual situation where the Authority or Court must award a higher earner more money because they have contracted out of Part 9. This is peculiar.

3.9. As we noted in the introduction, there are two ways that the exclusion of personal grievance protections relating to unjustifiable dismissal and action may occur: the extinguishing of these rights altogether, or the shifting of these rights into a related legal jurisdiction (such as general contract law).

3.10. In parts four and five of our submission, we consider the extinguishing of rights scenario and the problems this creates.

4. Contracting out of the right to challenge unjustifiable dismissal and action

4.1. It is possible to modify the Bill to provide that higher-paid employees may opt for something like a permanent version of the 90-day trial period provisions in s 67A-67B of the Employment Relations Act 2000. This is a bad idea.

4.2. In a research paper prepared for the CTU in 2003, Professor Gordon Anderson sets out the main reasons for providing unfair dismissal protections to employees: [4]

[3] (22 March 2017) 721 NZPD Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill- first reading speech of Scott Simpson

> The economic security of most members of society depends either directly or indirectly on employment. The loss of employment is probably the most significant economic risk that that an employee (and their dependents) faces and the one that is likely to cause most disadvantage. Social justice therefore requires that termination of employment should only be permitted for a justified reason, carried out through a fair process and subject to third party review. Although the common law views employment as a purely contractual relationship this perspective seriously distorts the role and nature of employment in modern society. Given the central economic value of employment both to the employee and to their dependents it is reasonable to regard it as having quasi-property aspects which should be protected against arbitrary or unjustifiable deprivation.
>
> Related to this is the reality that many if not most employees have a considerable investment in their jobs and that the value of that investment increases significantly with time. This investment includes a direct financial investment (including long-term benefits) but also intangible benefits such as seniority, sense of self-worth, and personal identity. Again an employee should not be unjustifiably deprived of these benefits.
>
> The value of a particular job to an employee is much greater than the value of the incumbent to an employer. It follows that the loss of the job will fall proportionally more heavily on the employee. In dismissing an employee, an employer may also gain benefits such as setting an example to others or creating a sense of job insecurity among other employees. Obviously the more arbitrary the employer's decision the greater the heightened sense of insecurity generated for the employee.
>
> Finally, experience clearly indicates that, where employers can dismiss at will, they will abuse this right to dismiss employees or use the ability to do so to coerce employees to act in a particular way or into forgoing legal entitlements.

4.3. Some of these arguments apply with more force and others with less force to higher-paid employees. They may have greater financial reserves to cushion them from unemployment. However, higher-paid jobs may also require the maintenance of particular skills or professional status (with associated costs). For example, doctors must maintain their skills and professional registration to practice. For some, particularly when the work is very specialised, their jobs are harder to find than other work, or at any rate are available with a very limited number of employers. Being dismissed could severely affect their chances of finding another job in New Zealand or in their profession.

4.4. All employees face what s 3(a)(ii) of the Employment Relations Act 2000 identifies as "the inherent inequality of power in employment relationships." This is often misrepresented by employers as being about a mismatch of financial resources but this is not the most significant part. Rather, the inequality stems from the relationship of power and control by the employer stemming from their ability to direct the employee, the employee's duty of fidelity and the employer's ability to affect the

[4] Professor Gordon Anderson (2003) 'Personal Grievances: A Review of the Current Law and Proposals for Reform' (not publically available) at 7-8.

quality of working conditions, status and enjoyment of the job and, most importantly, to discontinue the employee's work.

4.5. The consequences of unemployment hang over the heads of these employees during their employment and may discourage them from taking important and difficult stands. Consider the following examples:

- A chief financial officer of a listed company discovers significant questionable use of expenses by the chief executive of the company; or
- A pathologist undertaking an audit discovers significant clinical errors in biopsies undertaken by their clinical director.

4.6. In both instances, there are very important reasons for the employee to disclose the possible wrongdoing. However, this law makes it less likely that they will do so.

4.7. It is possible in each of these scenarios that these issues may constitute sufficient wrongdoing to enable the provisions of the Protected Disclosures Act 2000. However, the Protected Disclosures Act is narrowly drafted and other scenarios can be created that clearly do not meet the test. In any case, 'whistle-blowing' by an employee can lead to further employment difficulties regardless of the formal protection of the Protected Disclosures Act. For example an expert in public integrity systems and whistleblowing law reform, Professor AJ Brown of Griffith University, reported in a lecture at Victoria University in May 2016 that an Australian survey showed that 25 to 30 percent of whistle-blowers reported mistreatment by management and/or co-workers. In launching a large research project into workplace whistleblowing, including both Australia and New Zealand, he said that "there is currently a 'mountain of negativity' especially around mistreatment of the whistle-blowers"[5].

4.8. Removing unjustifiable dismissal and disadvantage grievance rights while permitting discrimination or duress grievances may also incentivise employees to claim that the dominant motive for dismissal was discriminatory in order to avoid an artificially constructed hurdle to access justice.

4.9. A further issue arises with the scheme proposed by the Bill. It requires employees to negotiate the end of their new job while negotiating the terms of its beginning. A

[5] http://www.victoria.ac.nz/research/expertise/law-policy-government/new-rules-needed-to-support-workplace-whistleblowers.

prospective employee negotiating their employment agreement for the first time is at the most vulnerable time of their employment (before the deal has been struck). The employee also knows little about their new workplace and the problems which may arise.

4.10. We submit that there should be no right to contract out of unjustified dismissal protection.

5. Contracting out of the right to challenge unjustifiable action

5.1. The general policy statement of the Bill quoted at [3.1] suggest that contracting out of protections against unjustifiable action by the employer to the employee's disadvantage would be possible. This refers to the protection in s 103(1)(b) of the Employment Relations Act:

> [A personal grievance may include a claim that] "that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was… affected to the employee's disadvantage by some unjustifiable action by the employer.

5.2. 'Employment' and 'conditions of employment' encompass not only direct financial loss but also reduction in status (such as demotion), unfair imposition of warnings, loss of right to work, and suspension. It is possible for direct breach of contract to fall within the definition of unjustifiable action (although it may also be possible to simply seek compliance with the agreement).[6]

5.3. One of the most important questions for the Committee to answer is whether it is a good idea to permit employers to do these things to their employees without any right of challenge. If implemented, this change would permit a chief operating officer to be demoted to stapling the photocopies, or a school principal to be put on a final warning for wearing the wrong-coloured tie.

5.4. This is not the employment law of a civilised nation. The contracting out of unjustifiable disadvantage provisions is unwise and unwarranted. No compelling reason has been given for their excision.

5.5. We submit that it should not be possible to contract out of unjustifiable disadvantage rights.

[6] Disputes as the interpretation of an agreement are specifically excluded from the definition of unjustifiable action by s 103(3) and are subject to their own process under s 129 and outside of the personal grievance framework. Contracting out of Part 9 of the Act (as the Bill proposes) would remove the ability to pursue disputes under the Act's framework.

6. A shift back to the common law position

6.1. The alternative to the abrogation of rights to challenge unjustifiable disadvantage or dismissal is that these rights are maintained in a different form.

6.2. To give an historic example, prior to the extension of personal grievance provisions to all employees in 1991, it was possible for non-union members to take common law claims for wrongful dismissal.

6.3. In its current form, the Bill would appear to reinstate the cause of action of wrongful dismissal by allowing employees to contract out of s 119 (within Part 9 of the Employment Relations Act 2000):

> **113 Personal grievance provisions only way to challenge dismissal**
>
> (1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance. …

6.4. There is detailed jurisprudence around wrongful dismissal and it may be useful for the Committee to seek a briefing on the features of wrongful dismissal compared to unfair dismissal. In brief, wrongful dismissal is concerned primarily with whether correct notice has been given and paid. There is no requirement for wrongful dismissal claims to be raised within 90 days and an action may be commenced any time up to six years after the dismissal occurred. Employers would therefore swap a 90-day period of uncertainty for a six year one.

6.5. Also unaddressed by the Bill is the possibility that many of the claims currently framed as personal grievances may also constitute breaches of express or implied terms of the employment agreement.[7] These would be subject to the usual rules around breach of contract and remedies limited to financial loss but not subject to abatement for contribution. Again, these may be raised any time within a six year limitation period.

6.6. These odd consequences appear to thwart the intent and are symptomatic of the unhelpful nature of the changes.

[7] Certain terms are implied by the Courts into every employment agreement. These include mutual duties of trust and confidence, and fair dealing; employee's duties of fidelity and to perform work; and employer's duties to provide work; and a safe workplace and system of work.

7. Conclusion

7.1. This Bill is poorly thought out and badly drafted. It adds complexity, perverse incentives and odd outcomes into the system.

7.2. We strongly recommend that it should not pass into law.