NZCTU
Te Kauae Kaimahi

Submission to the EDUCATION AND WORKFORCE COMMITTEE on the:

Employment Relations (Termination of Employment by Agreement) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

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Table of Contents

1. Introduction

1.1. This submission is made on behalf of the unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi (Te Tiriti) 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. The NZCTU strongly opposes the Employment Relations (Termination of Employment by Agreement) Amendment Bill 2025 (the Bill).

1.4. The possibility of terminating employment in a mutually agreed manner already exists in our employment law system. This Bill adds absolutely nothing of merit to that right.

1.5. What this Bill does bring is a new ability for employers to put undue pressure on employees to leave employment without facing any accountability.

1.6. In an industrial context where workers are facing economic hardship and joblessness, this Bill offers to expose working people to further vulnerability. As such, this Bill is completely out of touch with the needs of working people and is unwelcome.

1.7. It also does not bring any rights or advantages that would be useful to principled employers.

2. No existing barriers to 'termination by agreement'

2.1. The Bill's title, along with its explanatory note, suggests that the law currently stands in the way of employers and employees agreeing to terminate an employment relationship.

2.2. This is incorrect.

2.3. Parties are completely free to agree on a *genuine* basis, to terminate employment at any time and for any reason.

2.4. The current framework for resolving employment relationship problems actively encourages termination of employment by agreement. It is for this reason that the *Employment Relations Act 2000* promotes mediation as the 'primary problem-solving mechanism'.[1]

2.5. The principal Act also promotes a robust concept of good faith that:

> *...requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.*[2]

2.6. This statutory conception of 'good faith', along with the active promotion of mediation to resolve employment relationship issues, creates a system that encourages difficult situations to be resolved through discussion and agreement, not litigation.

2.7. The law also provides numerous avenues for employers and employees to discuss matters on a 'confidential' and 'without prejudice' basis. In these contexts, parties can frankly discuss employment relationship problems and make any proposal for resolution.

2.8. These proposals can and frequently do involve an agreement for the termination of employment on a without admission of liability basis.

2.9. As these discussions and outcomes attract legal privilege, all details relating to negotiations and agreements, remain confidential to the parties (save for the purpose of enforcing an agreement).

2.10. There are safeguards in place to ensure that these discussions are genuinely consensual.

2.11. The Evidence Act 2006, requires that without prejudice discussions occur when there is a dispute between the parties, and that the discussions are pursuant to a resolution of that dispute[3].

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[1] *Employment Relations Act 2000*, s 3(a)(v)

[2] *Ibid*, s 4 (1A) (b)

[3] *Evidence Act 2006,* s 57:

Privilege for settlement negotiations, mediation, or plea discussions

(1) A person who is a party to, or a mediator in, a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of any communication between that person and any other person who is a party to the dispute if the communication—

a) was intended to be confidential; and
b) was made in connection with an attempt to settle or mediate the dispute between the persons.

2.12. The Employment Relations Act provides that all discussions in the context of mediation are confidential and subject to privilege. Similarly, any settlements that result from mediation are confidential and subject to privilege.[4]

2.13. The Act also provides safeguards to ensure that settlements resulting from mediation are genuinely understood and that all parties to the agreement are aware of their rights and obligations.[5]

2.14. In a system where mediation is the primary dispute resolution mechanism, 'termination of employment by agreement' is already an established feature. Accordingly, this Bill cannot be properly characterised as an attempt to introduce such agreed terminations.

2.15. The true purpose of this Bill is to enable employers to pressure workers into accepting termination agreements by removing the safeguards that would otherwise protect workers.

3. A shield for constructive dismissal

3.1. This Bill will make it easier for employers to constructively dismiss their employees.

3.2. Constructive dismissal is a reprehensible employment practise where an employer makes it impossible for a worker to remain in their role. It includes situations where an employer embarks on a course of conduct that is designed to induce a worker to resign[6].

3.3. In such situations, an employer seeks to cover up an unjustifiable termination by attributing it to a consensual resignation[7].

3.4. The current legal approach to termination by agreement is designed to ensure that employers do not improperly use an imbalance of power in their favour to push workers out of their employment under the veneer of consent. It is for this reason that 'without

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[4] *Employment Relations Act*, s 148

[5] Ibid, s 149 (2)(3)

[6] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372:

'The concept is certainly capable of including cases where an employer gives a worker an option of resigning or being dismissed; **or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign**...'

[7] *NZ Woollen Workers IUOW (Industrial Union of Workers) v Distinctive Knitwear Ltd* [1990] 2 NZILR 438:

'It is the wolf of dismissal in the sheep's clothing of resignation'

prejudice' discussions that may result in the termination of employment must be pursuant to resolving a real employment relationship problem.

3.5. This Bill takes away that basic protection. An employer does not need a good reason to approach a worker and ask them to leave their job. An employer who makes such approaches may ordinarily be liable for constructive dismissal.

3.6. This Bill limits the ability of a worker to rely on evidence of an employer intention to improperly terminate their employment. Consequently, it severely limits the ability of a worker to show that constructive dismissal has taken place, even where an employer has made their intention to constructively dismiss explicitly clear by engaging in the sort of conversation that is sanctioned by this Bill.

4. Summary of recommendations

4.1. Our recommendation is that the government completely abandon this, Bill.

4.2. We recommend that the Government stop these kinds of attacks against the rights of working people and put its energy and resources into fulfilling the purpose stated at s 3 (a)(ii) of the *Employment Relations Act*.

4.3. This will involve not only acknowledging but also **addressing** the inherent inequality of power that disadvantages workers in the employment relationship[8].

5. Conclusion

5.1. Despite its title, this Bill grants nothing new in terms of allowing employers and workers to agree to terminate an employment relationship.

5.2. The Bill does bring a new defense for unscrupulous employers who seek to constructively dismiss their employees.

5.3. If passed into law, the Bill will signal a shift away from the principle that workers should be protected against the improper use of employer power.

[8] Employment Relations Act, s 3 (a)(ii):

*by acknowledging and **addressing** the inherent inequality of power in employment relationships.*

5.4. It is not an onerous requirement for employers to comply with the current law relating to termination of employment. The law imposes basic standards of reasonableness and transparency that protect all parties to the employment relationship.

5.5. This Bill is another example of a legislative program that is designed to undermine the security and rights of working people in their employment. As such, it is completely 'out of touch' with the reality of working people who are facing significant economic hardship and prospects of joblessness.

5.6. The NZCTU does not welcome this Bill and asks that it is discarded immediately.

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