NZCTU
Te Kauae Kaimahi

Submission to the EDUCATION AND WORKFORCE SELECT COMMITTEE on the:

Employment Relations Amendment Bill

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

13 August 2025

This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 340,000 union members, the CTU is one of the largest democratic organisations in New Zealand.

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.

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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 (NZCTU). With over 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The NZCTU 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 (NZCTU) which represents approximately 60,000 Māori workers.

1.3. The NZCTU opposes the Employment Relations Amendment Bill 2025 (the Bill) in the strongest possible terms.

1.4. The Bill is nothing more than a 'multi-pronged' attack on the rights and dignity of working people.

1.5. Taken together, these amendments follow a plain legislative agenda, designed to strip working people bare of their rights, while giving a broad license to employers to abuse imbalances of power and fire at will.

1.6. These attacks are couched in the confusing rhetoric of 'balance' and 'certainty'. Yet this is a Bill that abandons any sense of balance by completely trashing the interests of working people.

1.7. In terms of 'certainty', one thing is clear. If passed into law, this Bill will leave abusive employers certain of the fact that they may avoid accountability in most situations when they trample the dignity of workers, deprive them of justice, and sack them without reasonable cause.

2. The 'weak' case for change

2.1. This Bill slashes rights and protections that New Zealand workers have taken for granted for decades.

2.2. The Bill also makes a strident policy justification, namely that:

Together, these changes will enhance labour market flexibility, reduce compliance costs, and re-tilt the personal grievance system to better balance employer and employee interests and discourage poor behaviour.[1]

2.3. These claims are not backed up by empirical data and facts.

2.4. The cabinet paper relating to this Bill was released on 31 January 2025[2]. Since then, the Minister Brooke van Velden has released several press releases and publications speaking to the Bill.

2.5. Accordingly, there have many opportunities to for the Minister to back up her claims with sound analysis.

2.6. As at the date of this submission, those opportunities have not been taken up.

2.7. The lack of substance behind the Ministers policy justifications are particularly concerning where she alleges failings in the processes carried out by the Authority and the court.

2.8. In certain instances, the Minister freely suggests that Authority Members and Judges have rewarded serious misconduct, going as far as to say this has happened in at least 7 cases.

2.9. Many accusations are made about working people as well, to justify a view that workers do not deserve the protections and rights they currently have. Again, these are based on hearsay at best[3] and are not evidenced.

2.10. The NZCTU notes with concern the Minister's standards for justifying the sweeping changes contained in the Bill. It is not sufficient to strip away workers' rights on vague and unsubstantial grounds.

2.11. The cabinet paper connected to this Bill does show two graphs.[4]

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[1] Employment Relations Amendment Bill 2025 (175-1), **Explanatory note**

[2] Cabinet Paper "Introducing an Income Threshold for Unjustified Dismissal Strengthening consideration and accountability for the employee's behaviour in the personal grievance process" (31 January 2025).

[3] Ibid:

Instead of making clear references to verifiable facts, the Cabinet Paper frequently uses the phrase *'I have heard'*. For example, at paragraph 15 of her Cabinet Paper, the Minister complains of '*at least seven cases in the three years to February 2024'* where she alleges that personal grievances were improperly established. However she provides no case references to verify this allegation, saying only that she has '*heard*' about these instances.

[4] Ibid, both graphs displayed at pg. 4.

2.12. The raw data informing these graphs is not available, nevertheless, these graphs are the closest thing we have empirical evidence to justify the changes proposed in this Bill.

2.13. One graph shows that since 2014, and especially after 2017, the average size of compensation for hurt and humiliation awarded for successful personal grievances has been increased until 2023 (with more recent data being excluded).

2.14. The other graph shows that since 2007, the average reduction in remedy for contribution has been declining as a trend, notwithstanding significant fluctuations and with the data stopping at 2023.

2.15. Aside from the interpretation put forward by the Minister and the drafters of this Bill, there are several, more coherent ways, of understanding these trends.

2.16. With respect to increases in average compensation for hurt and humiliation, the clear trend of increase since 2017 can reasonably be linked to the Employment Court decision of *Archibald v Waikato DHB*.[5]

2.17. In that case, the Employment Court established bands for determining compensation. With the degree of compensation being tied to the seriousness of the grievance.

2.18. Prior to these bands, compensation was incredibly low, leading many to view personal grievances as a 'poverty jurisdiction'.

2.19. The Minister's own graph shows that the average compensation for a worker in 2014 was under $6000. These sums were often dwarfed by legal costs and did not adequately reflect the harm caused to a worker by unjustifiable treatment at the hands of an employer[6].

2.20. The trend since 2017 clearly shows the courts and the Authority adjusting to this new system of banding.

2.21. Since the *Archibald* decision all parties in personal grievances have greater certainty that compensation for hurt and humiliation would be awarded on a proportional basis.

2.22. More serious actions will attract greater compensation; marginal disadvantages will draw much less compensation.

[5] *Waikato District Health Board v Archibald* (2017) 15 NZELR 821; [2017] NZEmpC 132; BC201762895
[6] Presumably the data is connected to dismissal cases, this is not clear

2.23. The Archibald case, and an understanding of the problem it addresses, provides a simple and logical explanation of the trend in the first graph that has caused concern to the Minister.

2.24. It is astonishing that the Minister complains about this trend, without any reference to the *Archibald* case and its significance.

2.25. The trend in the second graph, showing a decrease in the average size of deductions against personal grievance remedies for employee contribution should be encouraging to the Minister.

2.26. A purpose of such deductions (under s 124 of the Employment Relations Act[7]) must be to deter contributory behaviour.

2.27. A downward trend in such deductions likely shows the effectiveness of that deterrence over time, especially since the courts and the Authority have done nothing to dilute the notion of contribution.

2.28. The Minister confusingly refers to *Xtreme Dining Ltd t/a Think Steel v Dewar*[8] as a case that has made these deductions smaller.

2.29. If so, it is not clear why average deductions in the following year [2017] increased according to the Minister's own data (as presented).

2.30. What is more, there was nothing in the *Xtreme dining* case that can be taken as reducing or restricting the ability of the Authority or the courts to make s 124 deductions.

2.31. That case merely restates the law, that a remedy established by a successful personal grievance claim is not 'removed' by s 124, but that in cases where employee misconduct is '*so egregious that no remedy should be given*' [9], the Authority may reduce a remedy completely if doing so is consistent with 'equity and good conscience'.

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[7] Employment Relations Axct 2000, s 124

[8] Xtreme Dining Ltd t/a Think Steel v Dewar [2016] NZEmpC 136; BC201663684

[9] Ibid:

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been

2.32. The case also affirmed previously established law, that a deduction of 25% should be of 'particular significance'[10][11] and that deductions of 50% or more should be rarely made[12].

2.33. However, the Ministers view that these statements by the Employment Court in *Xtreme dining* reflect groundbreaking law is misconceived.

2.34. These comments reflect longstanding and well-established principles that are designed to ensure that deductions against established remedies must be fair and proportionate to the degree of employee contribution. [13]

2.35. What the caselaw does reveal is that deductions against the remedies of employees who successfully establish personal grievances are easily attainable.

2.36. Indeed, deductions can even be made against 'after-found' misconduct, where an employee's 'disgraceful conduct' is discovered after the dismissal.[14]

2.37. The current law already allows for deductions up to 100%, where employee contribution is egregious enough to warrant a complete reduction in remedy.

2.38. As recently as 12 June this year (2025), the Authority found that an employee who had established a successful grievance claim would not receive any remedies due to their contribution (*Stewart v Open Country Dairy Limited*).[15]

2.39. Accordingly, the NZCTU agrees with the 'Regulatory Impact Statement' (RIS) that is attached to this Bill, where it acknowledges that there is no deficiency in the legal

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outrageous or particularly egregious employee misconduct **[216].**

[10] Ibid [**218**]
[11] *Paykel Ltd v Morton* [1994] 1 ERNZ 875 (EmpC)
[12] *Xtreme Dining Ltd t/a Think Steel v Dewar [2016] NZEmpC 136*, at [219]
[13] *Donaldson & Youngman (t/a Law Courts Hotel) v* Dickson [1994] 1 ERNZ 920 (EmpC), where Chief Judge Goodard says:

I was told from the Bar that it is, while not common, yet not uncommon, for the Tribunal to find that an employee's contribution has been in the order of 50 percent or even greater. Such cases should be very rare. I do not mean to say that it is not possible for a situation to arise in which an applicant can be said to have contributed to the extent of as much as 75 percent to the situation that gave rise to the personal grievance, but in most cases of that degree of contribution, the difference between 75 percent and 100 percent which would disentitle the applicant from any recovery at all, is imperceptible to the naked eye, even to a trained and experienced one. A moment's thought will show that attributing 40 percent of the blame for his or her dismissal to an employee is already a strong criticism indeed. [**929**]

[14] *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno* Islands [2006] 3 ERNZ 449
[15] *Stewart v Open Country Dairy Limited* 2025 NZERA 330

mechanisms available to reduce a worker's entitlement to established personal grievance remedies[16].

2.40. In her cabinet paper, the Minister accuses workers of making personal grievance claims that are 'vague' and 'without merit'[17]. Characteristically for her, she makes these claims without any examples or evidence to support her contention.

2.41. What is in fact 'vague' is the Minister's justification for stripping away basic worker rights and protections.

2.42. For the reasons discussed above, we again agree with the RIS compiled by the Minister's own officials, where they say that the 'evidence base for the case for change is weak[18]'.

2.43. Trampling workers' rights is not a recipe for economic prosperity and social cohesion, it is the path to a low wage economy and an unequal society. What this Bill represents, is an anti-worker ideology. It is irrational, condescending to working people, and utterly disconnected from facts and reality.

2.44. We strongly urge Minister van Velden (and all members of this government) to make law based on an understanding of society and not be moved by purely ideological motivations.

3. Trashing personal grievances

3.1. This Bill will gut the effectiveness of New Zealand's personal grievance system.

3.2. Firstly, the Bill proposes to *remove* any remedies for employees who have established a personal grievance, but who have contributed to the situation giving rise to a personal grievance, if that contribution amounts to 'serious misconduct'.[19]

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[16] Regulatory Impact Statement: "Introducing an Income Threshold for Unjustified Dismissal Strengthening consideration and accountability for the employee's behaviour in the personal grievance process" (7 November 2024) [26]:

*This clause [Employment Relations Act, s 124] grants the Authority/Court **broad discretion** over determining what contributory employee behaviour is, the levels of contributory behaviour, how much to decrease the remedies by, and which remedies to decrease.*

[17] Cabinet Paper, at **[25][26]** and footnote 9

[18] Regulatory Impact Statement (7 November 2024) at pg.5:

*The panel notes the clear acknowledgement in the impact statement that the evidence base for **the case for change is weak,** and that officials' preference is to conduct a wider review of the dispute resolution system (including gathering further evidence) before implementing any policy changes.*

[19] Employment Relations Amendment Bill 2025, cl 7.

3.3. Secondly, the Bill proposes to *remove* remedies of re-instatement and compensation, where an employee has contributed in *any* way to the situation that gave rise their valid personal grievance. [20]

3.4. The wholesale removal of remedies is a drastic departure from how the law currently applies deductions. A remedy, for a valid legal claim, cannot be simply rooted out. [21]

3.5. A deduction, even one that amounts to 100% of the remedy, is not the same as removing an established remedy, it is an adjustment to the remedy that is made in proportion to a degree of contribution on the part of the successful claimant.

3.6. The idea that you can successfully prove unjustifiable treatment, or dismissal, at the hands of the employer, but have no remedies available to you from the onset, makes a mockery of the personal grievance system.

3.7. It reduces personal grievances to the status of a formality, where you can merely 'assert' a right to challenge unfair and unlawful treatment, but where that right is not backed up by any means of establishing accountability or redress.

3.8. The Bill also redefines the nature of 'contribution' by taking away any sense of proportionality from the concept, especially with the proposed s 123C, where any degree of contribution will remove the availability of remedies for reinstatement and compensation.

3.9. Contributing behaviour in the unamended Act was effectively defined at s 124. Under this provision, not all forms of contributing behaviour gave rise to deductions, as s 124 (b) stipulated that a deduction would only occur '*if those actions so require*'.[22]

3.10. These words meant that only contribution that was of a *blameworthy* nature would result in a reduction in remedy.

3.11. The new concept of contribution, expressed in the proposed s 123C of the Bill does not have this, or any qualification, and seeks to remove remedies for any degree of contribution, regardless of whether it is blameworthy.

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[20] Ibid.

[21] *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136, **[216]**

[22] Employment Relations Act 2000, s 124(b)

3.12. The fact that s 124 will no longer define the meaning of contribution in the Act, if the Bill is passed, is evidenced by the fact that s 124 deductions will only apply to 'available remedies'[23].

3.13. Thus, the new form of contribution contemplated in the preceding sections of the Act, that 'remove' remedies instead of reducing them is clearly new and much harsher than what law already provides.

3.14. This new concept of contribution will mean that virtually no personal grievance will result in the establishment of remedies (in compensation or reinstatement).

3.15. Employment relations are based on personal, human relationships. Accordingly, workers will contribute in various ways to the situations that give to personal grievances.

3.16. These amendments will deny practically all workers from meaningful remedies.

3.17. The Bill's removal of any remedies for workers who contribute to the extent of 'serious misconduct' also raises several problems.

3.18. Firstly, the Bill does nothing to address 'employer contributions.' An employer may act 'egregiously', 'disgracefully' and in an entirely blameworthy way. However, it is only the worker's actions that will be scrutinised, and which can lead to a complete removal of remedies.

3.19. This approach serves to shield employers from accountability for unjustifiable and unlawful behaviour and sets up a system, where in most cases, employers can largely (if not wholly) avoid the consequences of their bad behaviour.

3.20. Another way in which this Bill trashes the personal grievance system is the proposed removal of the ability of workers under 90-day trial periods to raise personal grievances for unjustified action and disadvantage.[24]

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[23] Employment Relations Amendment Bill 2025, cl 8- proposed 124 (1):

In the heading to section 124, replace "Remedy" with "Available remedies".

[24] Ibid, cl 18

3.21. Currently, a valid 90-day trial period removes a worker's ability to challenge an unjustifiable dismissal in most cases[25]. However, a there is no bar against a personal grievance based on a disadvantage claim.

3.22. This Bill quashes the right to raise disadvantage claims, if the disadvantage somehow 'relates' to the dismissal. [26]

3.23. Not only will a worker under a 90-day trial period face the possibility of dismissal without any justification, they will now also have no means of challenging unfair and unreasonable employer behaviours if some (undefined) connection can be made between that bad behaviour and the dismissal under a 90-day trial.

3.24. However, it should be noted that the stripping of remedies brought about by other parts of this amendment Bill will most likely make any residual rights to raise personal grievances meaningless for all workers, regardless of whether they are under 90-day trial periods.

3.25. The Bill also undermines the principal Act's 'test of justification', especially in introducing a new concept of 'employee obstruction' to the statutory test.[27]

3.26. Employee obstruction is a confusing concept; it suggests that an employer's failure to act in a fair and reasonable manner can be justified if the employee 'obstructed' them from doing so. However, in practise this confusing concept is likely to be used by employers to stop employee's from challenging the genuineness of their actions and employment processes.

3.27. For example, an employer may use this vague concept of obstruction to claim that they were stopped from following a fair and reasonable process because the worker disagreed with or challenged various aspects of that process.

3.28. Accordingly, this provision will become a way of forcing unfair and bad-faith processes upon employees and silencing their ability to question the genuineness of these behaviours.

[25] Employment Relations Act 2000, 67B (2).
[26] Employment Relations Amendment Bill 2025, cl 18.
[27] Ibid, cl 19(1).

3.29. According to the 'explanatory note' that is attached to the Bill, the amendments therein will 're-tilt' the personal grievance system to achieve a 'better balance between employer and employee interests[28].'

3.30. The NZCTU strongly rejects that anything in the proposed changes to the personal grievance system is aimed at achieving a meaningful balance between the interests of workers and bosses.

3.31. These amendments will leave workers vulnerable to abuses of power at the hands of their employers. It hollows out the personal grievance system, which is the only mechanism available to workers for resolving and addressing employment relationship problems, while removing employer accountability for bad behaviour.

3.32. Gutting the personal grievance system in this way is plainly inconsistent with the purpose of the principal Act, that is to acknowledge and address inherent imbalances in power that favour employers at the expense of employees.

3.33. Thus, while the NZCTU rejects the rhetoric of balance that accompanies we Bill, we do agree with the explanatory note, where it evokes the idea of a new 'tilted' system.

3.34. Going forward under this Act, the personal grievance system will be 'tilted' against the interests of workers.

3.35. Instead of addressing real, and inherent, power imbalances that exist in employment relationships in the manner they were intended to, the new system will serve to deepen and entrench these power disparities.

3.36. The Bill's proposed changes to the existing personal grievance system are harsh, unjust, and absurd. The NZCTU submits that they should not be enacted into law.

4. Fire at will

4.1. The amendments discussed above will implicitly introduce a culture of employers being able to 'fire at will'[29] into New Zealand workplaces, for all working people.

[28] Ibid, **Explanatory note.**

[29] At-will employment, while totally alien to the New Zealand context, is deeply entrenched in the labour law of the United States and has been affirmed in the California Supreme Court:

4.2. By removing effective remedies, personal grievance challenges for all workers will be made toothless under the Bill, and the personal grievance system will not serve as any kind of deterrent against unjustifiable dismissal.

4.3. However, the Bill goes further and introduces an explicit concept of 'fire at will' for workers who earn at or above a 'specified income threshold'. That threshold is set at proposed s 113B of the Bill as being at (or above) an annual income of $180,000.[30]

4.4. For workers caught under the 'specified income threshold', the ability to challenge unjustifiable dismissal is stripped away in several ways.

4.5. Firstly, the new s 67I removes any obligation on employers to comply with **the good faith** obligations outlined at s 4(1A) (c) of the Act.[31]

4.6. Meaning that employers are no longer required to provide affected workers reasons, evidence, or information about a decision to terminate an employment relationship, before the decision is finalised.

4.7. Moreover, this new provision will release employers from any obligation to comply with a request from a dismissed employee, made under s 120 of the principal Act, that would require the employer to give the dismissed worker written reasons for their dismissal.[32]

4.8. Thus, a worker subject to the 'specified income threshold' will have no ability comment on an employer's reasoning for dismissal. Employers may predetermine a decision to dismiss a worker without hearing their side of the story. And after being sacked a worker will have no ability to get information about an employer's reasons for dismissing them.

4.9. Proposed sections 113A (2)(a) &(b) go further and completely remove the rights of employees under the '*specified income threshold*' to raise personal grievances for unjustifiable dismissal, or unjustifiable disadvantage connected with dismissal.[33]

Labor Code section 2922 establishes the presumption that an employer may terminate its employees at will, for any or no reason. A fortiori, the employer may act peremptorily, arbitrarily, or inconsistently, without providing specific protections such as prior warning, fair procedures, objective evaluation, or preferential reassignment... Thus, if the employer's termination decisions, however arbitrary, do not breach such a substantive contract provision, they are not precluded by the covenant (Guz v. Bechtel National, Inc., 24 Cal.4th 317, 100 Cal. Rptr.2d 352, 8 P.3d 1089 (Cal. 2000)).

[30] Employment Relations Amendment Bill, cl 11.
[31] Ibid, cl 10 (2).
[32] Ibid, cl 10 (3).
[33] Ibid, cl 11 (2).

4.10. The policy justification for introducing 'fire at will' for workers who meet the salary threshold is that they these workers are presumed to have greater individual bargaining power.[34]

4.11. Indeed, the Bill allows for employees and employers to agree that the provisions at new ss 67I and 113A do not apply.[35]

4.12. The assertion that workers who earn at, or above $180,000 a year have stronger bargaining power against their employers is not backed up by any evidence.

4.13. Moreover, the view that supposedly 'high-income' earning employees have greater individual bargaining power against their employers, or that their incomes and conditions stem individual bargaining power, is also unfounded.

4.14. Many high-income earners gain their pay and conditions through collective, not individual bargaining.

4.15. Unionised workplaces have higher than average incomes and better conditions than un-unionised sites[36]. Yet these high incomes do not reflect the strength of individual workers but are instead expressions of collective bargaining power.

4.16. The proposed income threshold makes no accommodation for workers who rely on collective strength to set their play and conditions.

4.17. MBIE has noted that Australia also has income threshold that limits the ability for certain employees to access statutory mechanisms for challenging unjust dismissal.[37]

4.18. Based on this, MBIE has expressed a view that the Bill proposes a law that is consistent with the Australian model.[38] However, this assumption is misconceived. The Australian

[34] Regulatory Impact Statement: "Personal grievances: Introducing an income threshold for unjustified dismissal" (12 November 2024) [**24**]:

[35] Employment Relations Amendment Bill, cl 10 (proposed s 67J)

[36] Goldie Feinberg-Danieli & Zsuzsanna Lonti "The Union and Non-Union Wage Differential in the New Zealand Public Service" (2006) 2 PQ 27 :

There is a large body of empirical research internationally on the union/non-union wage differential, using both micro- and macroeconomic models. Those studies almost uniformly conclude that union members receive higher wages then their non-union counterparts.

[37] Regulatory Impact Statement (12 November 2024) pg. 4
[38] Ibid, [**136**]

law does not apply to workers who have gained their terms and conditions through collective bargaining.

4.19. In stark contrast to the Australian law, the Bill provides no protection for workers who rely on collective bargaining power.

4.20. Instead, this proposed threshold will undermine the bargaining power of unionised workers, who under the constant threat of without reason, are likely to avoid engaging in union activities for fear that these may displease their employers.

4.21. Together with the proposed amendments to the personal grievance system, the introduction of a wage threshold that restricts the ability of certain workers to challenge unjustifiable dismissals introduce a concept of arbitrary dismissal that is truly repugnant to the principal Act and all established notions of justice.

4.22. Accordingly, the NZCTU calls for this income threshold to be discarded. It is unfair, irrational and harmful, and should not be implemented in any form.

5. Statutory misclassification of employees

5.1. Working people in New Zealand have a general right to seek a declaration from a court or the Authority as to their 'status' as workers[39].

5.2. The ability for workers to have certainty over their status is an important right. A worker under a contract is either an employee or an independent contractor. The difference between these two categories is an important and qualitative one.

5.3. A contractor is independent from the party that engages its services and carries out business on its own accord.

5.4. In contrast, an employee is controlled, integrated and subordinated to the business of the employer, they are subject imbalances of power that inhere in this type of relationship and are entitled to the protections, minimum entitlements and rights that are outlined in the principal Act.[40]

[39] Employment Relations Act 2000, s 6(2)&(3).

[40] *Raiser Operations BV v E tū Inc* [2024] NZCA 403:

The issues that remain to be determined are of great practical importance for Uber and for many thousands of Uber drivers in New Zealand. As the Chief Judge [of the Employment Court] observed, ***employment status is***

5.5. Under the Act, status declarations are made in accordance with the 'real nature' test. The name of this test is self-explanatory as it requires the court, or the Authority to consider all relevant factors and establish whether a worker is, in fact, either an employee or an independent contractor.

5.6. The current statutory test also provides that a mere label, or statement, made by parties about the relationship will not be determinative of whether a worker an employee or not.[41]

5.7. This is not to say that expressed intention of the parties relating to the type of relationship they intended to form is irrelevant. Only that statements and labels cannot be used to void the real nature of a work relationship.

5.8. The new s 6(7) describes a new category of worker in New Zealand, the 'specified contractor'.[42]

5.9. These specified contractors may have all the features of an employee under the 'real nature' test (being controlled, integrated and subordinated to the interests of an engaging party[43]). However, despite these 'employee like' characteristics, these workers will be deemed to be contractors and thus removed from the rights and protections accorded to employees under the law.

5.10. The new s 6(7) proposed by the Bill does not disturb the real nature test. Technically it is still available to workers seeking status determinations.

5.11. Instead, this new provision will add a 'gateway' test in front of the real nature test. Only workers who are not deemed to be 'specified contractors' under the new test can access the court or Authority ability to determine their status in accordance with the 'real nature' of their work.

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the gate through which a worker must pass before they can access a suite of statutory minimum employment entitlements, *such as the minimum wage, minimum hours of work, rest and meal breaks, holidays, parental leave, domestic violence leave, bereavement leave and the ability to pursue a personal grievance. Employment status is also the gateway to union membership and collective bargaining, and the gate through which a labour inspector must pass before taking action on behalf of a worker, or against a workplace.* **[18]**

[41] Employment Relations Act 2000, 6(3)(b).
[42] Employment Relations Amendment Bill 2025, cl 4.
[43] *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1:

These [common law tests] *are traditional tools of analysis which, despite the statute's overriding requirement to determine the "real" nature of the relationship, continue to be applied in cases such as this.*[**22**]

5.12. In practise, this 'gateway' test will in fact be a trapdoor that prevents the vulnerable and precarious employees in the country from being able to have themselves legally recognised as employees.

5.13. One of the criteria of the proposed 'specified contractor' test is that a contractual label or statement can be determine a worker's status.[44]

5.14. This criterion will give stronger parties greater power to impose a contractor status on a worker who would otherwise be an employee.

5.15. There are other criteria that form part of this test.

5.16. For example, a specified contractor must be able to subcontract (in accordance with s 6(7)(c)(i) or (ii).[45]

5.17. However, this requirement is another example of where a mere statement in a written agreement is taken as determinative, with no regard to whether sub-contracting is viable, practical, or in any way realistic.

5.18. The test for 'specified contractors' also requires that a worker must be free to work for other people (when they are not working for the engager)[46] and that the relationship between worker and engager is not terminated simply because the worker turns down a specific request for work[47].

5.19. Yet these are common features of ordinary employment. Workers already have a right to hold multiple jobs if this is not proscribed by their employment agreements[48] and any casual worker can turn down specific shifts.

5.20. In fact, the most vulnerable and precarious employees in the country will fit these requirements, as low-income earning casual employees frequently hold multiple jobs to make ends meet.

5.21. This amendment does absolutely nothing to address a real need for contractor law reform[49]. A need that stems from the fact that many vulnerable employees are

[44] Ibid, cl 4(7)(a).
[45] Ibid, cl4 (7)(c)(i) &(ii).
[46] Ibid, cl4(b).
[47] Ibid, cl 4(d).
[48] Employment Relations Act 2000, s 67H.
[49] Tripartite Working Group on Better Protections for Contractors: *Report to the Minister for Workplace Relations & Safety*, 22 December 2021.

misclassified as 'independent contractors' to prevent them from accessing their employment rights.

5.22. The proposed reform does nothing to address that real problem. In fact, it entrenches the problem and makes it easier for vulnerable workers, who are really employees, to be misclassified as contractors and deprived of their rights.

5.23. For these reasons, the NZCTU submits that this proposed amendment should be discarded and that genuine contractor law reform, aimed at protecting vulnerable workers, be implemented immediately.

6. Undermining access to unions

6.1. This Bill does not stop at taking away the personal rights of individual workers and normalising 'fire at will' employment.

6.2. It goes further and seeks to undermine collective workers' power by diminishing the role of unions in workplaces and restricting the ability of workers to engage in meaningful collective processes.

6.3. 'Promoting collective bargaining'[50] along with 'protecting the integrity of individual choice'[51] are two core purposes of the Employment Relations Act.

6.4. To that end, the Act has provisions aimed at putting new employees, in touch with their unions and exposing them to the benefits and protections that come with collective employment terms.

6.5. The '30-day rule' provides that all employees who start work in a job that is covered by a collective agreement will be covered by the terms of that agreement for the first 30-days of employment[52].

6.6. After this 30-day period, an employee is free to join a union and remain under collective coverage or leave the union and enter into an individual employment agreement with their employer.

[50] Employment Relations Act 2000, s3(a)(iii).
[51] Ibid, s3(a)(iv).
[52] Ibid, s62.

6.7. Employers are required to provide new workers with 'Active Choice' forms that a worker has the option of completing.[53]

6.8. Subject to the employee's right to object, an employer must notify the relevant union (or unions) of a new worker's name, any indication of their desire to join (or not join) a union, and whether they did not complete the Active Choice form[54].

6.9. Together these provisions support the core purposes of the principal Act by giving workers a real opportunity to connect with unions and to experience firsthand, the benefits that come with collective terms and conditions.

6.10. These provisions are repealed by the Bill.

6.11. Under the amendments, employers will only have the most basic obligations to inform the new employee that a collective agreement exists, provide a copy of that agreement, and state to the employee will not come under the collective terms unless they become a member of the union.

6.12. Employers can use these amendments to side-step unions and impose individual employment agreements on workers before workers have a chance to experience collective coverage.

6.13. Instead of requiring employers to pass on information about the new employees so that unions may connect with them, the new amendments will only require employers to inform unions 'as soon as practicable' that a worker has entered an individual employment agreement[55].

6.14. These amendments are designed diminish the visibility of unions and allow employers to control worker access to information about relevant unions.

6.15. Accordingly, these amendments (designed to undermine unions in the workplace), are inconsistent with and actively undermine the core purposes of the Act itself, which are to *promote* collective bargaining and protect the ability of workers to make genuine and informed decisions about union membership.

[53] Ibid, s 62A.
[54] Ibid.
[55] Employment Relations Amendment Act 2025, cl 13(3)(c).

6.16. The attacks on worker collectivism go hand in hand with the attacks on individual rights clearly expressed in other parts of this amendment Bill.

6.17. Overall, this is a Bill that is aimed at reducing both personal and collective power for working people in this country.

6.18. The NZCTU submits that these amendments against the role and visibility of unions in New Zealand be discarded immediately.

7. International obligations

7.1. The amendments in this Bill will breach basic international obligations, many of which New Zealand has championed in the past.

7.2. The dismantling of effective personal grievance mechanisms and the introduction of a 'fire at will' culture in our industrial relations is not consistent with ILO Recommendation 130 (the Examination of Grievances Recommendation 130-1967) where it provides that:

> ***Any worker*** *who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right—*
>
> *(a) to submit such grievance without suffering any prejudice whatsoever as a result; and*
>
> *(b) to have such grievance examined pursuant to an appropriate procedure.*[56]

7.3. Removing the longstanding right for employees to raise personal grievances for unjustifiable dismissal is plainly inconsistent with this Recommendation.

7.4. The stripping away of personal grievance rights is also inconsistent with ILO Convention 158, which protects employees from having their employment terminated by their employer:

> *…unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.*[57]

7.5. Convention 158 also requires that any dismissal of an employee must conform to a basic standard of procedural fairness, such as the requirement for a worker to have a

[56] R130 - Examination of Grievances Recommendation, 1967 (No. 130)- II. General Principles (2).
[57] C158 - Termination of Employment Convention, 1982 (No. 158).

reasonable opportunity to defend themselves against any allegations, before a decision to dismiss is made.

7.6. This Bill's legislative program of gutting both substantive and procedural protections against unjust dismissal puts New Zealand squarely at odds with the international legal principles relating to the termination of employment.

7.7. Convention 158 has not been ratified by New Zealand, however non-ratification of an ILO Convention does not prevent their legal principles informing the development of common law.[58]

7.8. This is especially true of Convention 158.

7.9. In considering the principles expressed in ILO Convention 158, the Court made the following decisive comments:

> *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.**[59]*

7.10. Thus, our common law firmly endorses and incorporates the substantive rights and procedural safeguards contained in Convention 158.

7.11. The reason why New Zealand has not had to ratify this convention is because, prior to its conception, we had already established a personal grievance system that fulfilled the relevant obligations.

7.12. The NZCTU wholeheartedly endorses the views of the court with respect to the significance of Convention 158.

[58] Hixon, Labour Inspector v Campbell [2014] NZEmpC 213.
[59] New Zealand Food Processing Union v ICI (NZ) Ltd (1989) ERNZ Sel Cas 395, 408.

7.13. Dismantling our personal grievance system in accordance with this Bill will not only move New Zealand from compliance with international law to non-compliance, it will be repugnant '*to the view of all civilised nations*' and go against our society's most basic presumptions of fairness and justice.

7.14. The attacks on the ability of unions to promote collective bargaining also breaches ILO Conventions 87 (on Freedom of Association)[60] and Convention 98 (on the Right to Organise and Bargain Collectively)[61].

7.15. Promoting New Zealand's observance of these core conventions is another core purpose of the Employment Relations Act[62].

7.16. Article 4[63] of Convention 98 requires New Zealand to encourage and promote the machinery of collective bargaining and the 'conditions of employment by means of collective agreements.'

7.17. Moreover, Article 8[64] in Convention 87 provides that in supporting rights to 'Freedom of Association' domestic laws cannot impair or be applied to impair the rights guaranteed by that Convention.

7.18. Removing access to collective terms while also dismantling provisions aimed at allowing workers the opportunity to make an 'active choice' to join a union, clearly impinge on the requirements placed by both Conventions 87 and 98 and undermine the conditions for the promotion of collective bargaining activities.

7.19. A particularly concerning feature of these breaches is the justification made the government that retracting rights for workers is a strategy for economic growth. Not only is this an incorrect and unsubstantiated view, but it also jeopardises New Zealand's Free Trade Agreement with the European Union, which expressly prohibits signatories from

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[60] C87-Freedom of Association, 1948 (No.87).

[61] C98-Right to Organise and Collective Bargaining Convention, 1948 (No.98).

[62] Employment Relations Act 2000, s 3(b).

[63] ILO Convention 98, Article 4:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

[64] ILO Convention 87, Article 8 (2):

The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

dismantling existing workers rights and protections under the pretext of pursuing economic growth [65].

7.20. The NZCTU is gravely concerned over this government's growing tendency to discard and ignore its international obligations.

7.21. Modern, developed democracies are seen as ones that do not sacrifice the wellbeing and dignity of working people in pursuit of false notions of economic growth.

7.22. This Bill, and other actions taken by the government, will tarnish New Zealand's international reputation and stand to undermine trade opportunities and relationships.

8. Conclusion

8.1. The NZCTU forcefully rejects the Minister Brooke van Velden's premise for putting forward this Bill, namely that the exercise of workers rights is 'without merit'.

8.2. We say, it is this Bill, and its single-pointed objective in stripping away workers power that is wholly without merit, and that should be stopped immediately.

8.3. This Bill is short-sighted, irrational and unjust.

8.4. Its view to introducing an employment system where workers can be sacked for no reason and can be poorly treated by their employers with no recourse to justice, is alien to our society's concepts of justice and ethics.

8.5. This Bill will not bring balance and certainty. It will embed inequity and cause industrial disharmony.

8.6. This Bill is poorly drafted and will give rise to challenges. If passed into law, the disruption and confusion that flows from these amendments will not be sustainable and will stand

[65] Free Trade Agreement between the European Union and New Zealand, OJ L 866, 25.3. 2024, Article 19.2(4):

'A Party shall not weaken or reduce the levels of protection afforded in its environmental or labour law in order to encourage trade or investment.'

as a testament to one of the worst, most poorly conceived legislative programs to be implemented by any government.

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