Employment Relations Amendment Bill

Note - the name of the Employment Relations Amendment Bill was changed to the Employment Relations Amendment Bill (No 2) prior to introduction.

10 August 2010

ATTORNEY-GENERAL

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: EMPLOYMENT RELATIONS AMENDMENT BILL

1. We have considered whether the Employment Relations Amendment Bill (PCO 14562/3.2) (‘the Bill’) is consistent with the New Zealand Bill of Rights Act 1990 (‘Bill of Rights Act’). We understand that the Bill will be considered by Cabinet on Monday, 16 August 2010.

2. The Bill amends the Employment Relations Act 2000 (‘the Act’) in regard to the personal grievance system (including extension of the 90-day trial period to all employees), employment institutions, labour inspector enforcement powers, union access to the workplace and communication with employees during collective bargaining. We consider that the Bill raises a possible issue of consistency with the right to freedom of association under s 17 of the Bill of Rights Act in relation to union access. As we discuss below, we consider that any limit on the right to freedom of association that might arise from the Bill is justified in a free and democratic society.

Freedom of association and union access

3. Clause 6 of the Bill (conditions relating to access to workplaces) requires that a union representative seeks consent for access to the employer’s workplace. Consent by the employer cannot be unreasonably withheld. Consent is deemed to have been given if the employer does not respond to the request within two working days. If the employer withholds consent, the employer must provide the reason for withholding consent.

4. The right to freedom of association is wide, and encompasses the right to form and participate in any kind of organisation. [1] The Court of Appeal has noted that an employer coming between employees and their representatives may impact on the right to freedom of association. [2]

5. The Bill, however, only creates the prospect of short temporal interference with the right of union representatives to associate with employees and only in the workplace. Any further interference must be reasonable. We, therefore, consider that any limit on the right to freedom of association that might exist is minimal.
Is any potential limit justified in a free and democratic society?

6. For completeness, we have considered whether, if the requirement to obtain consent to access the workplace did limit the right to freedom of association, this requirement is justified in terms of s 5 of the Bill of Rights.

7. The Department of Labour (‘the Department’) advises that the purpose of cl 6 is to allow employers to reasonably control access to the workplace. Employers have a duty and interest in controlling and being aware of who is in the workplace for reasons of health and safety, commercial sensitivity and security. We consider this purpose to be sufficiently important to justify any limit on the right to freedom of association that might arise from cl 6.

8. It is clear that there is a rational connection between requiring consent for union access to the workplace and employers controlling access to their workplaces.

9. We consider that, if engaged, the right to freedom of association is limited no more than is reasonably necessary to achieve the objective of cl 6. We note that there are provisions in the Bill and the Act to ensure union access to a workplace. An employer cannot unreasonably refuse consent to union access. If an employer does not respond within the specified time frame, consent is deemed to have been given. Any refusal must be in writing and can be the subject of mediation and/or brought to the attention of the Employment Relations Authority and/or the Employment Court under the Act. The Bill also provides an exemption from cl 6 where there are health and safety concerns. The Department advises that in the main, union representatives currently seek consent before entering the workplace and employers give consent. The Department further advises that the Bill’s intention is not to unreasonably limit access of workers to their union representatives, nor to unreasonably intrude into union business.

10. We consider that the transitory limit to the freedom of association (if any) is proportional to the objective to allow employers to reasonably control access to the workplace.

Conclusion

11. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. This advice has been prepared by the Public Law Group and the Office of Legal Counsel.

Jeff Orr
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Office of Legal Counsel

Footnotes:

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