

Employment Relations Law Reform Bill 2003

19 December

Attorney-General

LEGAL ADVICE CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Employment Relations Law Reform Bill

1. We have considered the Employment Relations Law Reform Bill (PCO 5316/10) for consistency with the New Zealand Bill of Rights Act 1990. We understand that this Bill is due to be introduced on Thursday 4th of December.
2. We have concluded that this Bill appears to achieve overall consistency with the Bill of Rights Act. However, two prima facie issues of inconsistency with sections 14 and 27(2) of the Bill of Rights Act arose on the face of the Bill. These issues were justified in each case and achieved overall consistency. A further two potential issues were also considered . These are also set out in this opinion.

Purpose

3. This Bill proposes a number of amendments to the Employment Relations Act 2000. The purpose of the amendments is to promote and encourage behaviour that meets the object of the principal Act, of building productive employment relationships.
4. The Bill also repeals and replaces the Government Service Equal Pay Act 1960 and the Equal Pay Act 1972 and makes related changes to the Human Rights Act 1993 and the Health and Safety in Employment Act 1992.

Section 14 of the Bill of Rights - Freedom of expression

5. A number of parts of the Bill require the employer to continue to bargain with a union despite having reached a deadlock or standstill, or to respond to any issues raised by employees (Clauses 1.32 and 1.63(3)(2)(d) refer). These clauses may give rise to prima facie issues of inconsistency with the right to freedom of expression (section 14 of the Bill of Rights). However, as the objective of the Bill is to promote fair, productive and effective employment relationships between workers, employers and unions, we consider that these measures are rationally and proportionately linked to the objective in question. In our view such provisions are clearly justifiable.

Section 17 of the Bill of Rights - Freedom of Association

6. Clause 1.9 adds a new subsection to the existing section 9 of the principal Act. This amendment provides that this Act does not prevent a collective

agreement containing a term of condition that is intended to recognise the benefits-

(a) of a collective agreement:

(b) arising out of the relationship on which a collective agreement is based.

7. We note that a benefit so great as to practically compel or induce an individual to become part of an association^[1] may give rise to an issue of inconsistency with the right to freedom of association.
8. We have clarified the purpose of this provision and have been informed by officials at the Department of Labour that the types of benefits envisaged in this provision include only nominal amounts that are often awarded as payments for settlement. On the basis of this advice we do not consider a prima facie issue of inconsistency with section 17 exists.

Section 27(1) of the Bill of Rights - Principles of Natural Justice

9. Clause 1.173 of the Bill enables the Employment Relations Authority to exercise its "functions and powers" on an ex parte basis. Any provision that enables functions or powers to be carried out in the absence of the other party to the proceedings may give rise to issues of inconsistency with the right to the observance of the principles of natural justice (section 27(1)).
10. Officials from the Department of Labour have confirmed our understanding that the Authority's ability to exercise powers ex parte will need to be exercised in a manner that is consistent with the principles of natural justice, as expressly required by section 173(1)(a) of the principal Act which requires the Authority to comply with the principles of natural justice. Accordingly, we consider that clause 1.173 must be read consistently with the Bill of Rights Act.

Section 27(2) - Judicial Review

11. Clause 1.194A inserts a new section 194A into the Employment Relations Act that prohibits a state sector employee from bringing an application for review in relation to an employment relationship problem in either the Employment Court or the High Court. This appears to give rise to a prima facie issue of inconsistency with the right to judicial review (section 27(2) of the Bill of Rights Act).
12. Department of Labour officials have confirmed that this limit on judicial review only applies to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power of decision by an employer in relation to employment matters.
13. Department of Labour officials have confirmed that clause 1.194A is designed to encourage the use of low-level problem-solving mechanisms, rather than technical judicial intervention sought about by judicial review. Such a measure

further the key objective of the Act - building productive employment relationship, which includes reducing the need for judicial intervention (section 3(a)(vi)). We consider that this objective is significant and important.

14. There is a direct rational and proportionate connection between a limit on the right to judicial review and the promotion of low-level dispute resolution designed to build productive relationships. While clause 1.194A does limit the ability to bring judicial review, it does not deprive state sector employees of the means of addressing their underlying employment relationship problem. The problem-solving mechanisms available under the principal Act allow the substance of an employment relationship problem to be directly addressed and can provide an aggrieved state sector employee with superior remedies to those available under judicial review.
15. Further this limit is proportionate to the objective as the incidence of employment cases based solely on judicial review of state sector employees is very low - there have only been six cases concerning judicial review cases heard in the Employment Court since 2000.
16. On the basis of this material, we consider that the limit on the right to judicial review is justifiable.

CONCLUSION

17. We have concluded that the Bill does not appear to be inconsistent with the Bill of Rights Act. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice.

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Footnotes

1. Air New Zealand Ltd v Trustees of the New Zealand Airline Pilots Mutual Benefit Fund [2000]1NZLR 418. See also Canadian Supreme Court decision Lavigne v Ontario Public Service Employees Union [1991] 2 S.C.R 211