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NZEI SUBMISSION

to the

**TRANSPORT AND INDUSTRIAL
RELATIONS SELECT COMMITTEE**

on the

**EMPLOYMENT RELATIONS
(PROBATIONARY EMPLOYMENT)
AMENDMENT BILL**

May 2006

EMPLOYMENT RELATIONS (PROBATIONARY EMPLOYMENT) AMENDMENT BILL

INTRODUCTION

- 1 NZEI Te Riu Roa (“NZEI”) is the professional organisation and industrial union that represents the industrial and professional interests of its 45,000 members. Our members are employed as teachers and principals in the early childhood and primary sectors (including Kura Kaupapa Maori, Wharekura, intermediate and area schools), support staff in the primary, intermediate, and secondary sectors, advisers employed by Colleges of Education and Universities, and special education staff employed by the Ministry of Education.
- 2 The main objective of NZEI is to advance the cause of education generally while upholding and maintaining the just claims of its members individually and collectively.
- 3 NZEI is one of the largest unions and professional bodies in the country and has a long history of playing a positive role in the education sector in particular, and on wider social issues that might affect our members.
- 4 NZEI is an affiliate of the New Zealand Council of Trade Unions (“NZCTU”). NZEI has been involved in the formulation of the NZCTU submission on this Bill to this select committee and supports that submission.
- 5 NZEI makes this submission as a “large employer” in its own right. It employs some 150 permanent employees, spread throughout New Zealand¹. Furthermore, NZEI represents over 2500 school principals, each of whom has daily “employer” responsibilities.

NZEI’s POSITION

- 6 NZEI opposes this Bill in its entirety and urges the Select Committee to reject it. There are many reasons why NZEI adopts this stance.
 - The Bill is dishonest.
 - The Bill is a crude interference in employment relationships, and seeks to deny every new employee that most basic of rights – the right to be treated fairly.
 - The Bill is abhorrent to the values of ordinary New Zealanders.
 - There is simply no need for the Bill.
 - The Bill seeks to impose arrangements that are bad for business and will cause stagnation rather than growth.
 - The Bill will be fundamentally damaging to the movement of staff that is critical for the success of New Zealand’s education system.
- 7 More detailed commentary follows.

¹ The average NZ employer still employs less than 15 employees.

NZEI's COMMENTARY

The Bill is Dishonest

- 8 NZEI notes that the language of this Bill and its *Explanatory Note* deceptively presents “probationary employment” arrangements as entirely voluntary matters. However, a closer analysis reveals that this is simply not so. The proposed section 69AE(2)(c)² makes it clear that every person offered employment will be compelled to have a probationary period.
- 9 NZEI finds this level of deception objectionable in itself.

The Bill is a Crude Interference in Employment Relationships

- 10 NZEI also objects to the notion that the legislative framework should so crudely interfere in the good faith relationships that must be established between employer and new employees. Parliament has no place foisting upon those relationships, the insecurities and doubts inherent in the “probationary employment” envisaged by this Bill.

The Bill is Abhorrent to NZ Values

- 11 Under this Bill, at the beginning of every new job, any new employee -
- (a) could be arbitrarily discriminated against, or harassed, or mistreated, with no recourse;
 - (b) could be summarily dismissed at will – a punishment that (until this Bill) has been reserved for the most serious forms of misconduct;
 - (c) could be abused, punished or dismissed, simply for joining the union of their choice, or raising a legitimate concern with their employer, or refusing to have sex with their manager;
 - (d) cannot ensure that they are paid the wages they are owed (section 69AD(2)(b) explicitly prohibits probationary employees from taking any proceeding under s 131 *Employment Relations Act 2000* – which enables the recovery of wage arrears³);
 - (e) would have nowhere to go in the rare⁴ event that there was a genuine disagreement about any part of their employment arrangements (proposed s 69AD(2)(b) also prohibits any proceedings under s 129, which governs “disputes” – the way for parties to resolve disagreements over the interpretation, application or operation of their employment agreement).

² The NZEI submission as lodged at Parliament incorrectly refers to section 69AD(2).

³ The proposed new section 69AD(4)(b) would allow actions for “breach of contract” (incidentally an imprecise and confusing phrase in the context of the current Act), but whatever that would permit, subsection (2)(b) makes it absolutely explicit that it does not include the ability to secure wage arrears.

⁴ While NZEI does not have precise statistics, the small number of “disputes” dealt with each year by the Employment Relations Authority and the Employment Court clearly represent only a fraction of the employment relationships formed in New Zealand every year.

- 12 The Bill will mean that many fixed term employees will simply have no rights at all. NZEI accepts that fixed term employment is a legitimate form of employment in appropriate circumstances. As a comparatively large employer with a complex and diverse operation covering the whole of New Zealand⁵, NZEI occasionally has a need to employ fixed term employee: however it sees no legitimate reason to seek to deny such employees the basic rights held by the permanent employees they work alongside.
- 13 No matter how blandly it is presented, the essential object of this Bill is to impose on every new employee a period of 90 days, in which they are denied that most basic of rights – the right to be treated fairly and decently. That object is abhorrent to NZEI.
- 14 NZEI submits that this Bill is also abhorrent to ordinary New Zealanders: the notion of a “fair go” is deeply entrenched in our society. It is generally believed that everyone should be treated fairly, and that everyone should have some effective avenue of recourse if they are not treated fairly. This Bill runs absolutely counter to those notions.

There are No Reasons for the Bill

- 15 There Has Been No Trend Of Bad Cases
There is no discernable trend of employees raising grievances or disputes that lack substance within the first 90 days of their employment. While NZEI has not been able to locate any precise statistics, it is confident that any review of the facts in cases heard by either the Employment Relations Authority or the Employment Court would show that, if anything, cases tend to arise from longer-standing relationships. That impression certainly matches NZEI’s experience as a union involved in a wide range of workplace issues over many years.
- 16 Existing Law Already Permits Probationary Periods
Calls for probationary periods in which employers can do what they like without consequence are high on emotion but, without justification. The existing law is quite clear that probationary periods are already permitted. If there are genuine issues that cannot be resolved, it is open to an employer to dismiss a new employee. Termination of employment is straightforward as long as the employer has a substantive justification, and carries it out properly and fairly.
- 17 Having to provide good reasons for taking action against employees is not an abstruse concept: rather it is a basic tenet of Natural Justice.
- 18 Existing Laws Are No Disincentive to Employment
NZEI rejects the facile assertion that these current laws are a disincentive to employers taking on new employees. That is simply not borne out by NZEI’s experience as an employer.

⁵ With some 150 permanent employees – see paragraph 5, above.

- 19 Nor is borne out by the experiences of its 2,500 principal members, who for the last 17 years⁶ have effectively had daily “employer” responsibilities⁷. As a generalisation, principals are always keen to employ more staff because they are almost always under some kind of community pressure to reduce class sizes. There are however, many reasons why principals might, in any particular situation, be reluctant to take on extra staff, and all of those reasons have their parallels in the wider “commercial” environment⁸. However NZEI’s principal members have never reported employment laws as a reason for their reluctance to take on more staff.

The Bill Clashes With Sound Employment Practices

- 20 It is important to remember that this Bill imposes on every new employment relationship, a probationary period in which the new employee will have no employment rights. Only the details will vary. This ham-fisted approach is quite simply, bad business.
- 21 The *Employment Relations Act 2000* seeks to foster positive workplace environments, in which employers and employees talk to each other and genuinely attempt to resolve concerns. It is an acknowledgement of the reality of the 21st century that effective modern workplaces need innovation, teamwork and employees who are actively engaged in making the enterprise successful. The Bill seeks to replace that approach with a culture of repression, in which new workers will know that any comment, query or suggestion could result in arbitrary discipline or dismissal, regardless of merit or justification.
- 22 It flies in the face of what is now axiomatic as sound employer practice. Choosing the right employees and properly integrating them into the employer’s operation (no matter how large or small) is *the* key to employment relationships starting successfully. This Bill would give employers the message that it is fine to be careless in their employment processes.

The Bill Will Be Counter-Productive

- 23 The Bill would give employees substantial disincentives to shift jobs.
- 24 The Bill is expressly designed to enable employers to hire people who will have no rights for 90 days. No amount of words about what parties “can” agree to, is going to change the fundamental perception that a new job puts employees at risk, and at a severe disadvantage, compared with their current employment situations. Moving to a new job will be seen as a risky move,

⁶ The introduction of *Tomorrow’s Schools* devolved the employment relationship to individual school Boards of Trustees, who in turn delegate this responsibility to principals as CEO and professional leader.

⁷ Many have delegated authority to make employment decisions, and even if not, they are invariably closely involved in employment decisions. They run the gamut from the archetypical “small” New Zealand workplace with perhaps 3 or even fewer employees, to highly sophisticated operations with multi-million dollar annual turnovers and 100 employees or more.

⁸ For example, they may be reluctant because of uncertainties about future rolls, or a lack of funding, or something as simple as a lack of extra classroom space. In “business” terms, they are under pressure to hire more staff to provide better “service”, but can face uncertainties about market downturn, “fragile” cashflow, and problems of accommodation capacity. They may have problems securing staff with the requisite skills, qualifications and experience.

especially when the person is already “safely” employed, with legal recourse for any problems that might arise.

- 25 NZEI believes that employment opportunities will actually stagnate, with those in current, “secure” employment, becoming reluctant to trade that for the insecurity of a new job.

The Bill Will be Bad for New Zealand’s Education System

- 26 The Bill will discourage teachers, principals and support staff from moving between schools, especially those that find it difficult to attract staff.
- 27 It is common for teachers to begin their careers in rural communities, or low decile urban schools. If this Bill were to become law, teachers will be reluctant to take the chance of moving to a remote location. The pressure of student debt will force them away from such jobs, and towards jobs in larger centres, so that even if they are dismissed within those first 90 days, they have a better chance of quickly finding another position, without facing the expense and difficulties of relocating.
- 28 For almost 10 per cent of New Zealand’s primary and composite schools, the Bill would make the difficult task of finding staff almost insurmountable. The small size of these “remote” schools⁹, their geographic isolation and the difficulties of accessing the necessary professional development mean that it is often not appropriate for them to hire brand new graduate teachers. They need to attract experienced staff.
- 29 It is always difficult to attract experienced staff – even in the current legal environment, few experienced teachers are willing to uproot lives and families to re-establish themselves in a remote location. Such schools would find it all but impossible to persuade prospective staff to do so in the sort of environment that this legislation would inevitably bring about.
- 30 The teaching workforce has historically moved to gain promotion but the Bill would require teachers to sell a house and then, in a new location, attempt to negotiate a new mortgage when there is no certainty of employment for the first 90 days.
- 31 The Bill also does not address the fact that permanent jobs in the Education Service must be advertised.¹⁰ The question therefore arises in the education context “when is advertising required?” because it is arguable that a position is not permanent for the first 90 days. The Bill therefore strikes at constitutional principles that have been at the heart of state sector governance since 1912 when the twin requirements of advertising and appointment on merit were introduced to overcome the rampant nepotism that had hitherto been plaguing New Zealand public affairs.

⁹ Currently, 225 of approximately 2600 primary and composite schools are classified as “isolated”, according to the Ministry of Education’s *Isolation Index*. This index determines schools’ relative isolation through a weighted calculation based on census data and schools’ distance from different sized urban centres.

¹⁰ Section 77H *State Sector Act 1988*.

CONCLUSION

- 32 NZEI acknowledges that the majority of New Zealand's employers are decent, and will not abuse their employees, simply because an unfair law allows them to. However it is beggars logic to pretend that vulnerable people will not be exploited in an environment that makes it clear to everyone that there can be no legal recourse for exploitation.
- 33 This Bill is an invitation to unscrupulous employers, to exploit the most vulnerable members of New Zealand's workforce. Deliberately arranging our employment laws to allow that to happen, is morally wrong and makes no business sense. NZEI urges the Select Committee to ensure that this Bill does not proceed in any form.

Lynne Bruce
National Secretary
Te Korimako Tangi Ata

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