

# New Zealand Law Society

## SUBMISSION ON THE EMPLOYMENT RELATIONS AMENDMENT BILL (NO. 2)

### Introduction

- 1 The New Zealand Law Society (Society) welcomes the opportunity to comment on this Bill. The Society does not express any view on the underlying policy issues which the Bill is designed to address but raises some matters which it believes will improve the certainty, effectiveness and workability of the Bill. The Society wishes to be heard.

### Proposed change 2 - ERA Bill clause 14 which amends ERA Act s103A

- 2 The proposed change would set out certain minimum requirements of a fair and reasonable process (to be followed by an employer in relation to any matter resulting in any dismissal or action against an employee). The stated purpose of the proposed change is to remove “pedantic scrutiny” from analysis of an employer’s actions in issues involving procedural fairness. The following comments are made in relation to this proposed change:
  - i. At the outset, it is noted that proposed s103A(3) presupposes that procedural fairness issues will relate to cases that involve complaints about an employee’s actions or performance. But the matters falling within s103 may extend beyond disciplinary or performance complaints. For example, an employer may alter the eligibility criteria for an employment-related benefit (such as insurance or superannuation) in a way that affects an employee’s interests. As presently drafted, s103A(3) would have no meaningful application to such a situation.
  - ii. Section 103A(3)(a) is the only provision that contains reference to the employer’s resources as a mitigating factor in assessing procedural fairness. That provision relates solely to the employer’s investigation of an allegation. The following provisions (at paragraphs (b), (c) and (d)) are, in effect, components of an investigative process which – on a reading of the provision – must be performed irrespective of resource). A practical question may arise as to what activities, if any, are said to comprise a fair investigation beyond those stipulated in paragraphs (b), (c) and (d) – and, therefore, the limitation intended to be achieved by paragraph (a) may, in practice, be limited.
  - iii. The proposed s103A(5) otherwise achieves the desired effect of introducing a broad, overall analysis of an employer’s actions – eliminating the prospect of “pedantic scrutiny” in every case.

### **Recommendation**

- iv. Consider whether clause 14 needs amendment in light of the comments above.

### *Procedure in relation to Mediation Services*

#### **Proposed change 4 - ERA Bill clause 20 which would amend ERA s147(2) to add s147(2)(ac)**

- 3 The proposed change is to amend the Act to provide that the Chief Executive of the Department of Labour may provide mediation services for early problem resolution without a party having representation.
  - i. Clause 28 would add a new clause, s147(2)(ac) which would allow mediators to assist the parties to resolve a problem at an early stage, including discussing the problem with a party without any representative of that party being present.
  - ii. Although this is not presently expressly provided for, there seems no reason why mediators could not do this at present. Thus, the amendment highlights and clarifies that early mediation is available, including without representation.
  - iii. However there is a concern that this may be interpreted as encouraging resolution without the right of representation and/or discouraging mediators from advising parties of their rights to seek representation.

### **Recommendation**

- iv. Include clause 20 amending s147(2) and adding s147(2)(ac) on the basis it would achieve the stated aim, but amend the clause to provide that prior to signing off any such settlement, the mediator must advise the parties of their right to seek legal advice and allow time to seek that advice if desired. This would provide protection for mediators in the face of a subsequent challenge or criticism.

### *Prioritising previously Mediated Matters*

#### **Proposed change 5 – ERA Bill clause 27 which would add ERA s159A**

- 4 The proposed change is to amend the Act to promote mediation by providing that the Employment Relations Authority will give priority to mediated cases.
  - i. Clause 27 would add a new s159A, which would require the Authority to prioritise matters that have been to mediation over any other matters in which mediation has not been used

unless the Authority considers that mediation would be inappropriate under s 159(1) or (proposed) (1A).

- ii. Section 159(1) and (1A) provide reasons for not directing mediation, i.e. will not contribute constructively to resolving matters; not in the public interest; urgency; otherwise impracticable or inappropriate; or minimum entitlements involved.
- iii. The Authority is already required to direct mediation unless s 159(1) applies, so this proposed section would add a consequence for not going to mediation.
- iv. The Society supports the aim of not disadvantaging parties (in terms of timing) who have attempted to resolve their differences. However, it is unclear how the new section would work in practice in order to achieve the stated aim. For example, it seems unfair to prioritise cases that have been mediated over those where the reason for not going to mediation is urgency.

#### **Recommendation**

- v. Redraft clause 27 to make it clear that cases which are genuinely not appropriate for mediation are not disadvantaged and add in some procedural criteria which clarify how the process will work in practice.

#### ***Recommendations to Parties***

##### **Proposed change 6 – ERA Bill clauses 23 and 32 which would add ERA s149A and s173A**

- 5 The proposed changes are to amend the Act to enable mediators and members of the Employment Relations Authority to make recommendations to parties at their request.
- i. There is an error in the drafting in new s173A(1)(b) with an unnecessary “to”,
  - ii. The section is ambiguous and we are uncertain as to the intended meaning of “final” in s173A(1)(b) and s173A(5). Is the intended to mean “unchallengeable”? The Explanatory note makes reference to “final and binding in the usual way” but s173(1)(5) refers to recommendations being “treated like a determination” – which would imply it is open to challenge in the same way as other determinations of the Authority.
  - iii. Clause 23 would add a new s149A which would allow parties to agree in writing to a mediator making a recommendation that would become final unless a party does not accept the recommendation. Clause 32 would add a new s173A that would similarly provide for

parties to agree to let an Authority member make a recommendation that would become final unless a party does not accept the recommendation. In the event a recommendation was rejected, the parties could return to mediation or to complete the investigation as the case may be.

- iv. Parties can “request” a different mediator or Authority member but it is unclear whether such a request must be granted.

### **Recommendations**

- v. If the clause is included it is recommended that proposed s 149A(4)(b) be amended to read:

*“on request from either party to the problem those services will be provided by a person other than the person who made the recommendation.”*

and that proposed s173A(4)(b) read:

*“on request from either party to the problem those services will be provided by a member other than the person who made the recommendation.”*

- vi. It is also recommended this section should be changed to create an “opt-in” situation, rather than an “opt-out” process. Binding parties by default could lead to serious disadvantage and unfairness (for example, if communication problems preclude a timely response).
- vii. However, overall, the proposed new clauses add another “tool” to the tool box of mediators and Authority members and follow a practice already used in some private mediations.
- viii. Therefore the Society recommends the adoption of the amendment subject to the changes proposed.

### ***Vexatious and frivolous claims***

#### **Proposed change 7 – ERA Bill clause 38(1) which would add ERA Schedule 2, clause 12A; and clause 34 adds new s178A**

- 6 This proposed change would amend the Act to allow Employment Relations Authority members to dismiss vexatious or frivolous claims.
  - i. Proposed Schedule 2, clause 12A would allow Authority members to dismiss a matter or a defence that the Authority considers to be frivolous or vexatious.

- ii. Proposed s178A allows for an appeal against such a dismissal. We do not believe the word “appeal” is appropriate, but “challenge” is.

### **Recommendation**

- iii. Include clause 38(1) subject to the suggested change in proposed s178A.

### ***90 Day Trial Period***

#### **Proposed change 9 – ERA Bill clause 12 which would amend ERA s67A(1)**

- 7 The proposed change is to amend the Act to extend the availability of the 90-day trial period to all employers. Currently, only employers with fewer than 20 employees are able to apply the trial period.
- i. The proposed amendment achieves the stated aim of extending trial periods to all employers.
  - ii. The Select Committee’s attention is drawn to the recent Employment Court decision, *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpc 111. This is the first case to be heard by the Employment Court concerning trial periods. The Court had considerable difficulty interpreting the words “*the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal*” in s67A(2)(c) and expressly left that issue for determination for a future case.

### **Recommendation**

- iii. Include clause 12 but subject to addressing the ambiguity in s67A(2)(c) of the Act, as identified by the Employment Court in *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] NZEmpc 111. It is recommended that the words “*the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal*” be amended as necessary to accord with what actions Parliament intends to exclude, e.g., procedural claims for an unjustified disadvantage grievance and/or discrimination or harassment claims as well as amplifying what it intended by the phrase “or legal proceedings in respect of the dismissal.” Refer paragraphs 63-66 of the Court’s judgment.

### ***Removing Reinstatement as Primary Remedy***

#### **Proposed change 10 – ERA Bill clause 15 which would amend ERA s125**

- 8 The proposed change is to repeal s125 of the Act and replace it with another section, thereby removing reinstatement as the “primary remedy” when it is sought in unjustifiable dismissal cases.

- i. Currently, reinstatement is referred to in the heading to s125 as the “primary remedy”. Section 125 gives effect to this by providing that, if reinstatement is sought, it “must” be granted “*wherever practicable*”.
- ii. The new s125 would remove the reference in the heading to reinstatement being the primary remedy. Further, it will allow reinstatement to be ordered, at the Authority or Court’s discretion, “*if it is practicable and reasonable to do so*”.
- iii. This change would reverse the onus: reinstatement must be proven by the employee to be practicable and reasonable, rather than being mandatory unless proven by the employer to be impracticable. Further, the new s125 would add a new criterion. The onus will be on employees to demonstrate that reinstatement is not only practicable (i.e. possible in practice), but also “*reasonable*”. This changes the threshold.
- iv. The Society considers that the addition of the criterion “*reasonable*”, and the reversal of the onus, will further reduce the cases in which reinstatement will be granted.
- v. These changes therefore appear to go beyond the stated objective of removing reinstatement as the primary remedy. That could be effected simply by removing the reference to reinstatement being the primary remedy and providing that reinstatement may be granted, unless it is impracticable.
- vi. The Society notes that the proposed amendment goes beyond the stated objective of removing reinstatement as the primary remedy and may limit the remedy of reinstatement beyond what was intended.

### **Recommendation**

- vii. Include clause 15 which would amend s125 but redraft to make it clear that the amendment is not intended to limit the remedy of reinstatement.

### ***Withdrawn Actions – 3 years***

#### **Proposed change 11 – ERA Bill Schedule 1 clause 14 which would amend ERA Schedule 2 clause 14**

- 9 The proposed change is to amend the Act to provide that any matter before the Authority must be treated as having been withdrawn if no action on the matter has been taken by the applicant, the appellant or the Authority for at least 3 years.

- i. This would be a new clause, and is broadly consistent with the statutory object of resolving employment relationship problems quickly.
- ii. However, the Society has some recommendations as to drafting.

### **Recommendations**

- iii. In rare cases, proceedings may not actively be pursued for a number of years, such as where one party is incapable of pursuing the matter (e.g. due to mental illness) or intervening circumstances (e.g. a related criminal prosecution). Deeming a matter to be withdrawn in such circumstances, however rare, may result in injustices. The Society therefore recommends that the clause be amended to enable the Authority to permit proceedings to continue in exceptional circumstances.
- iv. Regarding the drafting, the Society recommends that the reference to “*the appellant*” be deleted as there are no appellants in the Authority.
- v. The Society therefore recommends that the proposed amendment be amended as follows:

*“(2) For the purposes of subclause (1), a matter before the Authority must, unless the Authority determines otherwise due to exceptional circumstances, be treated as having been withdrawn if no action on the matter has been taken by the applicant or the Authority for at least three years.”*
- vi. The Society notes further that this rule will apply only to proceedings in the Authority and not to proceedings in the Employment Court. The Society recommends that a similar clause be inserted in relation to Employment Court proceedings, for the same policy reasons. Specifically, the Society recommends that a new subclause (2) be added to ERA Schedule 3, clause 18 as follows:

*“(2) For the purposes of subclause (1), a matter before the Court must, unless the Court determines otherwise due to exceptional circumstances, be treated as having been withdrawn if no action on the matter has been taken by the applicant, the plaintiff or the Court for at least three years.”*
- vii. The issue of counterclaims also need to be addressed.

***Powers to the Chief of the Employment Relations Authority***

**Proposed change 13 – ERA Bill clause 30 which would insert new s166A**

- 10 The proposed amendment would give further responsibilities and powers to the Chief of the Employment Relations Authority.
- i. The new s166A would place statutory responsibilities on the Chief of the Authority to ensure that Authority members discharge their functions in an orderly and expeditious way that meets the objects of the Act, and to direct education, training and professional development for Authority members.
  - ii. It would also enable the Chief of the Authority to issue instructions consistent with the above objects and to report to the Minister on adherence to any such instructions.
  - iii. These amendments would likely lead to improvements in the management of Authority investigations, and are therefore supported by the Society.
  - iv. Section 166A(2)(b) would enable the Chief of the Authority to direct that particular Authority members investigate particular matters. The rationale for this change is not clear. It does not appear to improve transparency and accountability, as the Explanatory Note suggests. Neither is it clear why it is seen as being necessary for this power to be incorporated into statute, being purely administrative.

**Recommendation**

- v. Include the amendment, subject to consideration of the Society's query as to the rationale and need for the proposed s166A(2)(b).

***Removal to the Court***

**Proposed change 15 – ERA Bill clause 33 which amends ERA Act sections 178**

- 11 The proposed change is to amend the Act to allow the Employment Relations Authority to remove matters to the Employment Court on its own motion (using existing criteria), rather than only after an application from one of the parties.
- i. The Society considers that this does not go far enough to ensure that appropriate cases are heard by the Court in the first instance.

## **Recommendation**

- ii. The Society suggests the following proposed amendment to s178:

### ***178 Removal to Court***

- (1) *Where a matter comes before the Authority, the Authority may, of its own motion or on an application by any party, remove the matter, or part of it, to the Court for the Court to hear and determine it without the Authority investigating the matter.*
- (2) *The Authority may order the removal of the matter, or any part of it, to the Court if—*
- (a) an important, novel or complex question of law is likely to arise in the matter other than incidentally, or where the outcome will primarily or substantially depend on the determination of a question of law;*
  - (b) the case is of such a nature and of such urgency that it is in the parties' or public interest that it be removed immediately to the Court;*
  - (c) a party reasonably requires the disclosure of certain information from another party, which that party is not willing to disclose, and which the Authority considers ought to be addressed by the Court due to the commercially sensitive, technical or complex nature of the information sought or the legal issues involved;*
  - (d) the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*
  - (e) the Authority is of the opinion that in all the circumstances the Court should determine the matter. Without limiting the generality of this subsection (e), the Authority may, in forming its opinion, have regard to the number of days the investigation meeting is expected to take, the nature, complexity and extent of the evidence to be given, and the prospects of the Authority's decision being challenged by way of a de novo hearing in the Court.*
- (3) *Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in any such case the Court must apply the criteria set out in paragraphs (a) to (e) of subsection (2).*
- (4) *Where all parties to a matter apply to the Authority jointly for it to be removed to the Court, the Authority must remove the matter to the Court. The application need not specify any grounds for removal, but the application must be in writing and must confirm:*
- (a) that each party has had a reasonable opportunity to seek independent advice prior to making the application for removal;*

- (b) *that each party understands that there is no appeal as of right from the Court;*  
*and*
- (c) *whether costs are sought by any of the parties in the Authority, and if so by which party or parties.*
- (5) *An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.*
- (6) *Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*
- (7) *This section does not apply—*
- (a) *to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*
- (b) *without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

### ***Cross-Examination of Witnesses***

#### **Proposed change 16 – ERA Bill clause 32 which amends ERA Act sections 173**

- 12 The proposed change is to establish a right for parties to cross-examine witnesses during Authority investigations.
- i. Clause 32 amends s173 by repealing the current s173 and substituting it with new sections 173 and 173A. New s173(2):
- “To avoid doubt, in complying with subsection (1)(a), the Authority must allow cross examination of a party or a person to the same extent as if the party or a person were a witness in a proceeding to which the Evidence Act 2006 applies.”*
- ii. This new section does create some uncertainty as the Evidence Act 2006 otherwise does not apply to the Authority or the Employment Court. However, the Employment Court has noted that the principles and content of the Evidence Act 2006 are an “important source of reference” – *Maritime Union of NZ Inc v TLNZ Ltd* [2007] ERNZ 593.
- iii. Where one party has a lawyer appearing and the other party appears for themselves, this right to cross examination may result in an injustice to the party appearing for themselves.

### **Recommendation**

- iv. That proposed s173(2) be included for the avoidance of doubt as to the right of cross examination, while noting that previously the Evidence Act 2006 did not strictly apply to the Authority or the Employment Court.

### ***Minimum Entitlements - Mediation***

#### **Proposed change 21 – ERA Bill clause 21, which inserts new s148A into the ERA Act**

- 13 The proposed change is to amend the Act to provide that minimum entitlements can be considered in mediation, except that there can be no negotiation/agreement to reduce the quantification of those entitlements.
- i. Clause 21 inserts a new s148A into the Act which expressly permits the parties to mediation to mediate on the subject of “*minimum entitlements*”, reach agreement on them, and enter into a s149 *final and binding* settlement of them<sup>1</sup>: s148A(1).
  - ii. The new s148A(2), however, prohibits a mediator employed/engaged and authorised by the Chief Executive of the Department of Labour from signing agreed terms of settlement under s149 of the Act if those terms of settlement would deprive a party of their minimum entitlements.
  - iii. The Society foresees the problem that mediators may not have the requisite expertise or knowledge of the Minimum Code, and issues relating to it in a particular dispute, to determine, reliably, when they may grant/withhold certification and signature. Mediators might also just “get it wrong”, in which case they may provide the certificate and sign the settlement, the stated objective of the amendment will not be achieved.

### **Recommendation**

- iv. To deal with this potential problem the Society recommends that s149 of the Act be amended so that s149(3) applies only to the extent that any settlement does not breach any parties’ “*minimum entitlements*”.

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<sup>1</sup> Section 149 ERA Act provides that where a mediator employed/engaged and authorised by the Chief Executive of the Department of Labour provides the necessary certificate and signs a settlement reached by the parties, that settlement is final and binding and unable to be cancelled, reviewed or overturned.

***Copy of Individual Agreement - Employers***

**Proposed change 28 – ERA Bill clause 10 which would add ERA s64**

- 14 The proposed changes are to amend the Act to require employers to have a copy of the employee’s individual employment agreement on file.
- i. While the clause requires that employers retain copies of the individual employment agreement or terms, signed or unsigned, it does not appear to require that employers provide the employee with a copy of the agreement, as is suggested by the backgrounder document. It may be implied that the employee shall have access to the agreement retained by the employer at any time, but this could benefit from clarification.
  - ii. It is desirable that employment agreements and or terms and conditions of the employment are accessible and provided to all parties to the agreement. The agreement contains the fundamental rights and obligations of each party. Knowledge of these is likely to reduce the risk of non-compliance and the risk of employment relationship problems.

**Recommendation**

- iii. Include clause 10 to add new s64 but subject to the clarification that employees shall have access to the agreement at any time.

***Increase Penalties***

**Proposed change 30 - ERA Bill clause 17, which amends ERA Act s135**

- 15 The proposed change is to amend the Act to increase existing penalties to a maximum of \$10,000 for individuals and \$20,000 for companies.
- i. The current level of penalties has been found to be insufficient to promote compliance, and it places employers who do meet their legal obligations at a competitive disadvantage.
  - ii. New s 135(4B), which requires the Authority or Court to consider whether an employer “has previously failed to comply with an improvement notice issued under s223D” in determining the amount of a penalty, however, raises two issues. Firstly, it seems somewhat selective to restrict this requirement only to repeated non-compliance with improvement notices. Secondly, it seems overly broad in its application to improvement notices generally, without some further limitation. As presently worded, the provision could potentially apply to the issuing of improvement notices in respect of *any* breaches, whereas the provision would be more logically targeted if it was aimed against any repeated breaches of the same or similar class of obligation.

**Recommendation**

- iii. Include clause 17 which amends s135 to increase the maximum amount of penalties in order to deter non-compliance with legal obligations. Proposed s 135(4B), however, should be amended along the following lines (changes in italics) in order to narrow its scope in accordance with the ostensible target:

In determining whether to give judgment for a penalty, and the amount of that penalty, the Authority or the court must consider whether the person against whom the penalty is sought has previously failed to comply with an improvement notice issued under **s223D** *in respect of the same or similar matter*.



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