



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill

08/05/2017

Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill

1 Introduction

- 1.1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill (the Bill). This submission draws attention to a number of practical issues that the Bill raises and makes recommendations to ensure that the Bill achieves its stated objectives.

2 Scope of ability to contract out of Part 9, and relationship with section 113 of the Employment Relations Act 2000

Contracting out of “this Part”

- 2.1 Clauses 4 and 5 of the Bill propose to amend the Employment Relations Act 2000 (the principal Act) to:
- (a) insert new subsection 102(2), removing from an employee the right to pursue a personal grievance claim where they have entered into an employment agreement which contains a contracting out clause, and
 - (b) insert new section 102A (‘Higher earners may contract out of this Part’).
- 2.2 As currently drafted, the effect of proposed section 102A(2) is to enable the employee and employer to agree to include a term in an employment agreement excluding the application of “this Part” – namely the whole of Part 9 of the principal Act, rather than just the personal grievance provisions in Part 9.
- 2.3 This would mean that such an employee could not pursue personal grievances for discrimination, harassment or other human rights-based claims (as set out in section 103 of the principal Act). It would also exclude the operation of provisions in Part 9 not associated with personal grievances, such as obligations to keep records of time and wages (sections 130 and 132), the limitation period in section 142, and actions for the recovery of wages and other enforcement provisions. It is noted that the proponent of the Bill during the first reading debate acknowledged the need for significant change to be made in at least some of these respects:¹

“... there is an area that does need the attention of the select committee and it relates to adding in protection for employees, no matter how high their gross earnings are, from situations that might simply be regarded as those of a bad employer, such as discrimination, sexual or racial harassment, or where the employer fails to comply with their legal obligations. I believe those protections can and should be inserted at the select committee.”

Section 113, Personal grievance provisions only way to challenge dismissal

- 2.4 Section 113 of the principal Act states that personal grievances are the only way in which to challenge a dismissal. When the Employment Contracts Act 1991 was introduced, the right to pursue

¹ 1st reading debate 22.3.17, Scott Simpson, https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb_20170322_20170322_24 (accessed 4.5.17).

a wrongful dismissal claim was removed, on the basis that all employees could have access to the personal grievance rights to challenge a dismissal.

- 2.5 Under the Bill as currently drafted, an employee earning an annual gross salary of more than \$150,000 who contracts out of the personal grievance rights, and who is subsequently dismissed, is excluded from challenging the dismissal – including (as noted above) on the basis of alleged discrimination, harassment or other human rights-based claims.
- 2.6 It also seems unclear whether an employee who has contracted out could bring a disadvantage grievance² during the course of their employment, in anticipation of their dismissal. This should be clarified.

Recommendation

- 2.7 The Law Society recommends the wording of proposed section 102A(2) be reviewed, to clarify whether the proposed ability to contract out applies to:
- (a) all or part of Part 9; **or**
 - (b) all rights to bring personal grievances; **or**
 - (c) rights to bring personal grievances on some grounds.

3 Alternate Remedies

- 3.1 One potential effect of the Bill is that persons earning a gross salary over \$150,000 may choose to pursue claims under the Privacy Act 1993 and the Human Rights Act 1993 that otherwise might have been pursued as personal grievances. The Law Society understands that this has been the experience in Australia – namely, that when such provisions are introduced there is an increase in other types of claim, such as adverse action claims, that in many ways simply replace the personal grievance claims that the Bill proposes to extinguish for higher earners.

4 Threshold – Annual Gross Salary greater than \$150,000

- 4.1 Under the Bill as currently drafted the threshold (annual gross salary greater than \$150,000) is assessed at the time the employment agreement is entered into (proposed section 102A(1)), and does not take into account any other benefits that have a monetary worth such as incentive payments, bonuses, allowances, other benefits and share options. It also does not take account of foreign currencies and currency fluctuations. It is understood that there was a recent case in Australia where this was relevant, albeit that the time period for assessing the conversion was at the time of dismissal rather than the time the contract was entered into. The same considerations however would apply with respect to the Bill.

5 Timing Issue

- 5.1 The proposed contracting-out provision (once enacted) would apply when *an employee is negotiating with an employer to make an individual employment agreement* (proposed section 102A(1)(a)). It would therefore appear to apply during bargaining and at the time the employment agreement is first entered into between the employee and the employer but not subsequently.

² Section 103(1)(b), that the employee's employment, or 1 or more conditions of the employee's employment ... [is/was] affected to the employee's disadvantage by some unjustifiable action by the employer.

- 5.2 The timing of the application of the proposed contracting-out provision could create uncertainty for both employers and employees, as it does not take account of changes in circumstances that often occur during an employment relationship. For example: changes (either up or down) to remuneration after the employment agreement has been entered into or changes to the work to be performed under that agreement.
- 5.3 As currently drafted, it does not appear that the proposed changes in the Bill could apply to variations to an existing individual employment agreement even if the proposed provisions of section 102A(3) were met.
- 5.4 Further, the Bill does not deal with what happens if a contracting-out term is agreed when an individual employment agreement is first entered into but the employee's annual gross salary then reduces to less than \$150,000 (or whatever the applicable threshold is at the time) during the employment relationship.
- 5.5 It may also be advisable to allow for 'future proofing' of the threshold, by providing for it to be set by regulations (e.g. CPI indexing).

Recommendations

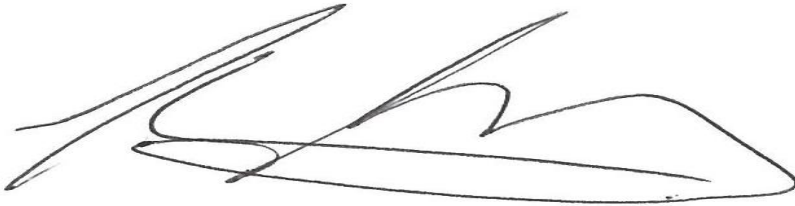
- 5.6 That further consideration be given to:
 - (a) the timing of the operation of the proposed contracting-out provision; and
 - (b) allowing for 'future proofing' of the threshold by providing for it to be set by regulations.

6 Execution complexities

- 6.1 Proposed section 102A(3) will add execution complexities for employment agreements that contain a contracting out provision for higher earners. Currently the requirement under the Act is for an employer to provide an employee with a copy of the intended agreement under discussion and to advise the employee that they are entitled to seek independent advice on the employment agreement. A reasonable opportunity must be given to the employee to seek that advice and the employer must consider any issues raised by the employee.
- 6.2 These requirements would be significantly altered in the case of an employment agreement that contains a contracting out provision which is required to be in writing, and prior to the employee signing the employment agreement, the prospective employee must have received legal advice (not just have an opportunity to do so).
- 6.3 This receipt of legal advice must be evidenced by the lawyer witnessing the employee's signature and the lawyer certifying that they had explained to the employee the effect and implications of the contracting out term before the employee signed the employment agreement (proposed section 102A(3)(c), (d), (e) and (f)).
- 6.4 These requirements in themselves, which are somewhat similar to the requirements for parties entering into pre-nuptial relationship property agreements, suggest that there is scope for abuse. Strict requirements of this type were introduced in relation to the provision of trial periods in employment relationships. Subsequent to the introduction of those provisions, the courts have strictly construed such provisions and at least initially there was significant litigation over the introduction of the trial period provision. These provisions are likely to lead to similar litigation as the legislation is interpreted and the boundaries tested.

7 Conclusion

- 7.1 The Law Society would welcome an opportunity to be heard.
- 7.2 In addition, specialists from the Law Society's Employment Law Committee are available to assist officials in drafting amendments to the Bill, if that would be of assistance to the select committee.

A handwritten signature in black ink, appearing to read 'K. Beck', with a large, sweeping flourish at the end.

Kathryn Beck
President
8 May 2017