Submission to:

Education and Workforce Select Committee

Subject:

Employment Relations Amendment Bill

Date: 29 March 2018

We wish to appear before the Committee to speak to our submission.

Contact Person:

Jayne McKendry
National Advisor Policy and Operations
Phone 04 471 2735

Background

Citizens Advice Bureau New Zealand (CABNZ) Ngā Pou Whakawhirinaki o Aotearoa welcomes the opportunity to comment on the Employment Relations Amendment Bill.

The purpose of our organisation is to:

- Ensure that individuals do not suffer through ignorance of their rights and responsibilities or of the services available; or through an inability to express their needs effectively — Me noho mataara kia kaua te tangata e mate i tōna kore mōhio ki ngā āhuatanga e āhei atu ana ia, ki ngā mahi rānei e tika ana kia mahia e ia, ki ngā ratonga rānei e āhei atu ana ia; i te kore rānei e āhei āna ki te whakaputa i ōna hiahia kia mārama mai ai te tangata.
- Exert a responsible influence on the development of social policies and services, both locally and nationally — Kia tino whai wāhi atu ki te auahatanga o ngā kaupapa ā-iwi me ngā ratonga ā-rohe, puta noa hoki i te motu.

We support the principle of partnership reflected in the Treaty of Waitangi - e tautoko ana Ngā Pou Whakawhirinaki o Aotearoa i te mātāpono o te pātuitanga e ai ki Te Tiriti o Waitangi.

Citizens Advice Bureau New Zealand
Ngā Pou Whakawhirinaki o Aotearoa
PO Box 24249 Level 4, 93 Boulcott St, Wellington 6011
Ph 04 471 2735 www.cab.org.nz policy@cab.org.nz

We work to empower individuals to resolve their problems and to strengthen communities. The person-to-person service provided by over 2,300 Citizens Advice Bureau (CAB) volunteers is unique in New Zealand. From 84 locations around New Zealand, the CAB provides individuals with a free, impartial and confidential service of information, advice, advocacy and referral. Ka mahi mātou ki te whakakaha i ngā tāngata takitahi ki te whakatika i ā rātou ake raruraru, ki te whakakaha hoki i ngā hapori. He mea ahurei i roto o Aotearoa te ratonga kanohi-ki-te-kanohi e whakaratohia e ngā kaitūao 2,300 o Citizens Advice Bureau (CAB). Mai i ngā takiwā e 84 puta noa i Aotearoa, e whakaratohia ana e te CAB ki ngā tāngata takitahi he ratonga koreutu, tōkeke, matatapu hoki e pā ana ki te mōhiohio, te tohutohu, te tautoko me te tukunga.

In the 2016/2017 financial year we had over 520,000 interactions with clients, including over 200,000 in-depth enquiries where we offered information, advice and support across the gamut of issues that affect people in their daily lives. This includes around 13,500 in-depth enquiries about employment rights.

We use our experience with clients to seek socially just policies and services in Aotearoa New Zealand.

Introduction

1 Citizens Advice Bureau New Zealand welcomes the measures proposed in this Bill to strengthen minimum employment standards and protections for employees, and in doing so, provide greater clarity for both employers and employees.

2 Our comment is limited to Part two of the Bill, specifically clauses 29 and 35 to 37.

3 Our submission is based on information from analysis of enquiries made to CABs. Client stories have been used to illustrate points made. Identifying details have been removed from the examples provided but the essence of the clients' circumstances and experiences remains.

Clause 29 - Amendments to Part 6 (individual employees' terms and conditions of employment) - limiting 90-day trial periods to employers with fewer than 20 employees

4 We see considerable problems with how the 90 day trial period is working across a whole range of clients. In our *Spotlight on CAB clients without employment agreements* (CABNZ September 2017), we cited several examples of unlawful application of this provision in the employment of people who did not have a written employment agreement. Review of client enquiries in preparation for this submission has revealed similar issues for people who *do* have a written (individual)

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employment agreement. The most common areas of concern for CAB clients in regard to 90 day trials are:

- Notice periods. Employment agreements are either unclear, or appear biased toward the employer in regard to notice required to end the agreement during the trial period.

Client is on a 90 day trial period with employer. Her agreement states that during this period, the employer can dismiss with one week's notice but is silent on notice period for an employee leaving within the 90 days. The notice period stated elsewhere in the agreement is 3 months.

- Termination. The provision that employers may terminate during a trial period without giving reason often feels unfair to employees, and is often the subject of enquiries to the CAB.

Client has just been given his notice to leave at the end of a 90 trial period. He is upset and wanting to discuss this.

- The prospect of their employment being terminated without cause during a trial period leaves employees worried about the loss of, or abuse of, other employment rights.

Client is on a 90 day trial but intends to resign before the trial period is over. Client is worried the employer may not want him to work out the notice period and that she will use the provisions of the trial period to dismiss him so she doesn't have to pay him for the duration of the notice period.

- Trial period provisions continue to be applied by employers unlawfully.

Client has been working as a chef for just short of 90 days. He has been given a week's notice that his employment is terminated under the 90 day trial legislation. He is questioning this because he signed his employment contract after he started work and it does not mention a trial.

5 The CAB does not generally collect information about the size of the business with whom our clients are employed. Our sense is that 90 day trial periods are an issue regardless of the size of the employer. .We are very concerned about the significant issues that impact negatively on employees as a result of 90 day trials and therefore support the removal of this option for employers with 20 or more employees.

6 However, we acknowledge there may be both employment and business advantages to allowing trial periods for new staff. Maintaining this provision for small and medium sized enterprises may be advantageous from that perspective; it is unclear whether or not it is generally advantageous for employees however. We therefore concur with the need for research on the impact of 90-day trial periods,

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from both the perspective of employees and employers - *"What is clear is the need for more research on the impact, both positive and negative, of 90-day trial periods…"* (Hon. Iain Lees-Galloway, Minister for Workplace Relations and Safety, Hansard debate 1 February 2018).

7 If trial periods are going to persist for small and medium employers we think there needs to be careful consideration of ways to mitigate the sorts of issues that our clients are experiencing.

Part 2, clauses 35 to 37 - Amendments to Part 6D (rest breaks and meal breaks)

8 The proposed amendments clarify entitlements from both the employers and employees perspectives. We support improved clarity because it reduces the opportunity for misunderstanding and for abuse of rights.

9 Amended clause 69ZD increases clarity about the frequency and duration of breaks. Amended clause 69ZE increases clarity about the timing of breaks. CABs frequently receive enquiries from people wanting to know their rights in regard to the number, frequency and duration of breaks. Concern is often raised when employers change their practice in relation to employee breaks. Enactment of both these proposed amendments will greatly assist employees

Client works 12 hour shifts with only 2 x 10 minute breaks and a 1/2 hour break for lunch. Client wants to know if they [employees in this company] are entitled to another break?

Client's employment agreement includes entitlement to two ten minute paid breaks and one unpaid half hour break. The company has advised her that they are no longer going to pay for those breaks.

10 CABs also get enquiries from people who are independent contractors, filling in the information gap about rights and responsibilities that exists for this group given they are not generally included in employment related legislation. We think increased clarity about break and meal times will also assist this group who often look to employment legislation as a guide for their own practices.

Client is a contractor. If she spends 8.5 hours working for the same customer, she includes a 30 minute lunch break in her calculation for payment. Is she entitled to charge her customers for morning and afternoon tea breaks as well?

Clients are contractors. They charge their clients on an hourly basis. They deduct 1/2 hour from the hourly charges for lunch but they charge the client the 2 x 15 minute breaks for morning/afternoon tea. They wanted to know if they are entitled to do this?

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11 Proposed amendments to clauses 69ZEA and 69ZEB narrows the exemption from the requirement to provide meal and rest breaks to businesses that:

a. provide an essential service, and
b. where the continuity of the service is critical to the public interest, and
c. the cost of replacing the employee with a person sufficient to cover the break is unreasonable.

12 We are concerned about the practical compliance issues this proposed exemption will raise, particularly in, but not limited to, the retail and hospitality sectors (which we assume do not meet the criteria for exemption).

Client works full-time in sole charge of a shop, with no allowance for breaks. As the shop is in a mall, it has to remain open at all times. Client is expected to stay or else ask someone from another store to cover her break and toilet times.

Client's partner is the head chef in a restaurant. The conditions of his work are very stressful working 10 days on 4 days off and 9am to 10pm daily with only a 20 minute break. Because of the nature of the work and reduced staff it is difficult to take any breaks.

13 The Ministry of Business, Innovation and Employment's (MBIE) Disclosure Statement notes that *"For those aspects of the Bill that relate to employment standards – including prescribed rest and meal breaks, and restoring the protections in Part 6A - the costs and benefits relate to the level of compliance with the provisions. Compliance may be impacted by the work of the labour inspectorate and the [Employment Relations] Authority in securing compliance."*

14 Reflecting on the experiences of CAB clients with and without written employment agreements, we have little confidence in the effectiveness of MBIE's labour inspectorate to impact non-compliance in this area within their current capacity levels and resourcing priorities.

15 In our *Spotlight on CAB clients without employment agreements* (CABNZ September 2017) we noted that the labour inspectorate has statutory powers for investigating breaches of minimum standards of employment and has the power to take action in response but that the capacity of the inspectorate is insufficient to deal with the widespread problems of employment rights being ignored and abused. We appreciate this government's plan to increase the inspectorate staffing from 60 to 110 people over the next three years. However we are concerned that the current practice of targeting the inspectorate's resource to specific sectors and industries has the effect of allowing many employers to blithely continue to operate outside the law. Employers need to know that if they don't comply with the law, there are consequences, regardless of which industry or sector the employer operates in, regardless of how large or small their business is, or how essential the services they provide are.

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16 It is apparent from our client's experiences that employees are vulnerable to abuses of their right to meal and rest breaks. We therefore welcome the proposed provisions to strengthen these rights but we question whether the proposed changes will have the desired effect of increasing protections for all employees. We agree that providing clarity about meal and rest break entitlements will give more power to employees with the ability to self-advocate, but do not believe it will improve the situation for all employees on individual employment agreements, or with no written employment agreement.

17 We do note, however, that if enacted, this Bill expands the jurisdiction and penalty provisions of the Employment Relations Authority (ERA) by allowing consideration of compliance with set rest and meal break provisions, and the validity of exemptions to the requirement. Unfortunately, an employee's access to the ERA is via the free mediation service offered by MBIE. Access to that service requires the ability to make a request online including using a RealMe login. We contend that this places unnecessary barriers to justice and recommend that access to the mediation service via free-phone application be reinstated.

18 Our experience is that given the significant imbalance of power between employees and employers, placing too much reliance on employees self-advocating for their rights will have limited success. There needs to be careful consideration about how to provide more support for helping ensure the rights of vulnerable employees.

19 Although the proposed amendments make no alteration to the interpretation of 'work period' for the purposes of calculating entitlement to rest and meal breaks, our research has revealed a lack of knowledge among some employees that one's work period includes all authorised breaks (whether paid or not).

Client is concerned about rest and meal breaks. She thinks she is entitled to payment for these breaks. She worked 30 hours over the past week but only got paid for 28.5 hours - the difference being the breaks she took.

Client worked through her lunch break, quickly eating her meal during her next 10 minute break. She expected to get paid for working through her lunch break but wasn't.

20 We therefore recommend that communications following enactment of any legislative change arising out of this Bill include information to employees, especially those in the retail and hospitality industries, and to new migrants. CABs are well placed to support such a plan.

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4.0 Summary of main recommendations:

We support:

1. The removal of 90 day trial periods as an option for employers with 20 or more employees.
2. The improved clarity proposed amendments will provide in relation to meal and rest breaks.
3. Expansion of the jurisdiction of the Employment Relations Authority to include non-compliance with meal and rest breaks.

We recommend:

4. That research on the impact of 90-day trial periods, from both the perspective of employees and employers, be undertaken to examine whether or not this option remains advantageous.
5. That communications following enactment of any legislative change arising out of this Bill include information to all employees about entitlement to meal and rest breaks and the interaction between these breaks and the hours of work for which the employee is entitlement to payment.
6. That access to the mediation service provided by the Ministry of Business, Innovation and Employment (the entry point to the Employment Relations Authority) include request by telephone.

Thank you for this opportunity to comment. Please use the contact details provided if you have any questions, or want any clarification about our submission.

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