

Employment Relations (Triangular Employment) Amendment Bill

Member's Bill

As reported from the Education and Workforce Committee

Commentary

Recommendation

The Education and Workforce Committee has examined the Employment Relations (Triangular Employment) Amendment Bill and recommends by majority that it be passed with the amendments shown.

Introduction

This member's bill in the name of Kieran McNulty seeks to amend the Employment Relations Act 2000 to protect the rights of people who are in a triangular employment arrangement. Triangular employment involves a person being employed by one employer, but working under the control and direction of another business or organisation.

We heard in the first reading speech for this bill that a growing number of New Zealanders work under triangular employment arrangements. They represent an important part of the workforce, particularly for businesses subject to seasonal fluctuations or needing labour at short notice.

The bill as introduced would make two main changes:

- It would give employees the right to coverage by a collective agreement.
- It would provide a framework for employees to raise a personal grievance with their employer and for the controlling third party to be joined to the proceedings.

Proposed amendments

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

Commencement timing for the bill

As introduced, the bill would come into effect the day after the date of Royal assent. We recommend amending clause 2 so that the legislation would come into force either on a date appointed by the Governor-General by Order in Council, or 12 months after the date of Royal assent, whichever is earlier. This would allow time for officials to analyse the Employment Relations Authority Regulations 2000 and the Employment Court Regulations 2000 and determine whether any amendments are necessary.

Definition of “controlling third party”

The bill as introduced would amend section 5 of the Act to provide definitions of “primary employer” and “secondary employer”. We recommend deleting these definitions from clause 4. Instead of “primary employer”, we recommend using “employer” to describe the party that a person is the employee of, under a contract of service.

We also recommend adding a definition for a “controlling third party” instead of “secondary employer”, to denote the business or organisation that exercises control or direction over the employee equivalent to what would normally be expected of an employer. This would clearly define the three parties in the triangular employment arrangement: the employee, the employer, and the controlling third party.

Collective agreements

Clause 5 would amend the Act to require workers to be bound by the same collective agreement as the employees of the controlling third party.

As introduced, these provisions would introduce considerable complexity to the labour hire model. For example, if a labour hire firm had an employee who worked for multiple controlling third parties, it could be required to manage multiple collective agreements.

We recommend removing these collective agreement provisions from the bill as introduced by deleting clause 5 and the applicable part of clause 4.

Personal grievances

Clause 6 of the bill as introduced would provide a framework for people in triangular employment agreements to raise a personal grievance with their employer. We recommend amending this clause to make it easier for the employee, the employer, and the Authority or court to join the controlling third party to personal grievance proceedings. (As a consequential amendment, we also recommend inserting clause 10.)

Our amendment would insert new section 103B in the Act to provide the following process. The controlling third party would be notified if the grievance related to their actions or policies, or if the employer considered that to be the case. The employee or the employer could apply to have the controlling third party joined to the proceedings. The Employment Relations Authority or court would then apportion responsibility, liability, and awards as it considered appropriate.

Notification provisions

We recommend inserting clause 7 to set out the process for notifying the controlling third party of a personal grievance. Under our proposal, either the employee or the employer could make a notification within 90 days of the date on which the employee raised the personal grievance. After the 90-day period, notification could still be made with the consent of the controlling third party. If the controlling third party did not consent to being notified, the employee or employer could apply for leave to notify outside the 90-day period.

Remedies and mediation service provisions

We recommend inserting clause 8 to set out the process the Authority or the court must use when it determines that an employee has a personal grievance and the controlling third party has been joined to the proceedings. The court could then order the controlling third party to provide either or both of the following remedies:

- to reimburse the employee for wages lost as a result of the grievance
- to compensate them for the effects of the personal grievance, such as loss of dignity or loss of any benefit.

The Authority or the court would need to award remedies in a way that reflected the extent of the controlling third party's actions resulting in the personal grievance. If the financial position of the controlling third party required it, the Authority or the court could order payment to the employee by instalments.

We also recommend inserting clause 9 to clarify that, in the provisions relating to mediation services, "employment relationships" include those between an employer and an employee who are in a triangular arrangement.

Minority view

National members opposed this bill at first reading, and although the bill will be reported back from this committee in a format that has been amended in all but two places, National members remain opposed to it.

Appendix

Committee process

The Employment Relations (Triangular Employment) Amendment Bill was referred to the committee on 21 March 2018. The closing date for submissions was 11 May 2018. We received and considered 174 submissions from interested groups and individuals. We heard oral evidence from 27 submitters at hearings in Wellington and Auckland.

We received advice from the Ministry of Business, Innovation and Employment.

Committee membership

Dr Parmjeet Parmar (Chairperson)

Simeon Brown

Hon Clare Curran (from 24 October 2018)

Hon Nikki Kaye

Denise Lee

Marja Lubeck

Jo Luxton

Mark Patterson

Jamie Strange (until 24 October 2018)

Chlöe Swarbrick

Jan Tinetti

Nicola Willis

**Employment Relations (Triangular Employment)
Amendment Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Kieran McAnulty

Employment Relations (Triangular Employment) Amendment Bill

Member's Bill

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Part 2
Further amendment to principal Act

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations (Triangular Employment) Amendment Act **2018**.

2 Commencement

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~~(1) This Act comes into force on the day after the date on which it receives the Royal assent.~~

(1) This Act comes into force on the earlier of the following dates:

(a) a date appointed by the Governor-General by Order in Council:

(b) the date immediately after the expiry of the 12-month period.

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(2) In this section, the **12-month period** is the period of 12 months that commences on the date on which this Act receives the Royal assent.

3 Principal Act

This Act amends the Employment Relations Act 2000 (the **principal Act**).

Part 1

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Amendments relating to triangular employment

4 Section 5 amended (Interpretation)

~~(1) In section 5, in the definition of **applicable collective agreement**, after “member of the union”, insert “and includes any collective agreement binding an employee and a primary employer under **section 56(1)(c)**”.~~

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~~(2) In section 5, insert, in their appropriate alphabetical order:~~

~~**primary employer**, for the purposes of **sections 56(1)(c) and 102A**, means any person who employs a person to do any work for hire or reward under a contract of service~~

~~**secondary employer**, for the purposes of **sections 56(1)(c) and 102A**, means any person who enters into any contract or other arrangement with a primary employer whereby the employee of that primary employer performs work for the benefit of that person and where that person exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer~~

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In section 5, insert in its appropriate alphabetical order:

controlling third party means a person—

- (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
- (b) who exercises, or is entitled to exercise, control or direction over the employee that is similar or substantially similar to the control or direction that an employer exercises, or is entitled to exercise, in relation to the employee

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5 ~~Section 56 amended (Application of collective agreement)~~

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~~In section 56(1), after paragraph (b), insert “and;” and also insert:~~

- (e) ~~the employees of any primary employer in respect of the primary employer where —~~
 - (i) ~~those employees are performing work for a secondary employer where that work is within the coverage clause of any collective agreement to which the secondary employer is a party; and~~
 - (ii) ~~those employees are a member of the union party to that collective agreement; and~~
 - (iii) ~~those employees are not bound by any other collective agreement to which the primary employer is a party.~~

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6 ~~New section 102A inserted (Joinder of parties to personal grievance)~~

~~After section 102, insert:~~

~~102A Joinder of parties to personal grievance~~

- (1) ~~Where an employee employed by a primary employer raises a personal grievance against that employer the employee may, if the grievance has also been raised with any secondary employer of that employee, apply to the Authority or court to join that secondary employer to the grievance.~~
- (2) ~~For the subsequent determination of a personal grievance the actions of any secondary employer are deemed to be the actions of the primary employer.~~
- (3) ~~Any secondary employer joined under this section is jointly liable with the primary employer for any remedies awarded to the employee unless the Authority or court makes an order determining the proportion of any award to be made by each party.~~
- (4) ~~The Authority or court must grant leave if —~~
 - (a) ~~the actions of the secondary employer have resulted in or contributed to the grounds of a personal grievance as defined in section 103; and~~
 - (b) ~~it considers it just to do so.~~

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5 Section 103 amended (Personal grievance)

After section 103(3), insert:

(4) For the purposes of sections 103B, 115A, and 123A, the provisions of this Act that describe, define terms relating to, and provide for the application of the grounds for a personal grievance under subsection (1) apply with all necessary modifications as if—

(a) references to the employer were references to the controlling third party; and

(b) references to the employee's employment included work the employee has performed under the control or direction of a controlling third party.

6 New section 103B inserted (Joining controlling third party to personal grievance)

After section 103A, insert:

103B Joining controlling third party to personal grievance

(1) This section applies if—

(a) an employee has—

(i) raised a personal grievance in accordance with section 114; and

(ii) applied to the Authority to resolve a personal grievance with the employee's employer; and

(b) the personal grievance relates to an action that is alleged to have occurred while the employee was working under the control or direction of a controlling third party.

(2) The employee or the employer, or both, may apply to the Authority or the court to join the controlling third party to the proceedings to resolve the personal grievance.

(3) The Authority or the court must grant the application to join a controlling third party if the Authority or the court is satisfied—

(a) that the requirement to notify the controlling third party in accordance with section 115A has been complied with; and

(b) that an arguable case has been made out—

(i) that the party to be joined to the proceedings is a controlling third party; and

(ii) that the party's actions caused or contributed to the personal grievance.

(4) The Authority or the court may, at any stage of the proceedings, of its own motion join a controlling third party to the proceedings by order.

(5) If the Authority or the court joins the controlling third party to the proceedings, the Authority or the court must consider whether to direct the employer, the

employee, and the controlling third party to use mediation services to seek to resolve the personal grievance.

7 New section 115A inserted (Notifying controlling third party of personal grievance)

After section 115, insert:

115A Notifying controlling third party of personal grievance

(1) For the purposes of **section 103B, this section is complied with—**

(a) when an employee—

(i) considers that the actions of a controlling third party caused or contributed to the personal grievance; and

(ii) notifies the controlling third party of that fact within the 90-day employee notification period; or

(b) when an employer—

(i) considers that the actions of a controlling third party caused or contributed to the personal grievance; and

(ii) notifies the controlling third party of that fact within the 90-day employer notification period; or

(c) if the controlling third party has consented to being notified under **subsection (2); or**

(d) if the Authority has granted leave to notify the controlling third party under **subsection (4).**

(2) **Subsection (1)(a) or (b) does not apply if the controlling third party consents to being notified after the expiration of the relevant 90-day notification period.**

(3) If the controlling third party does not consent to being notified after the relevant 90-day notification period, the employee or the employer may apply to the Authority for leave to notify the controlling third party after the expiration of that period.

(4) On an application under **subsection (3), the Authority, after giving the controlling third party an opportunity to be heard, may grant leave accordingly, subject to any conditions that it thinks fit, if the Authority considers it just to do so.**

(5) In any case where the Authority grants leave under **subsection (4), the Authority must direct the employee, the employer, and the controlling third party to use mediation to seek to resolve the personal grievance.**

(6) In this section,—

90-day employee notification period means the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later

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90-day employer notification period means the period of 90 days beginning with the date on which the employer's employee raised the personal grievance with the employer

relevant 90-day notification period means the 90-day employee notification period or the 90-day employer notification period.

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8 New section 123A inserted (Remedies where controlling third party caused or contributed to personal grievance)

After section 123, insert:

123A Remedies where controlling third party caused or contributed to personal grievance

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- (1) This section applies if the Authority or the court—
- (a) determines that an employee has a personal grievance; and
 - (b) has, under **section 103B**, joined a controlling third party to the proceedings to resolve the personal grievance; and
 - (c) determines that the actions of the controlling third party caused or contributed to the situation that gave rise to the personal grievance.
- (2) The Authority or the court may, if satisfied that it is just to do so, order the controlling third party to provide to the employee either or both of the remedies in section 123(1)(b) and (c).
- (3) The Authority or the court must consider the extent to which the actions of the controlling third party caused or contributed to the situation that gave rise to the personal grievance.
- (4) The Authority or the court must award any remedies against the employer under section 123 and against the controlling third party under **subsection (2)** in a way that reflects the extent to which the actions of each contributed to the situation that gave rise to the personal grievance.
- (5) The Authority or the court may, if making an order under **subsection (2)**, order payment to the employee by instalments, but only if the financial position of the controlling third party requires it.
- (6) **Subsection (2)** applies subject to **subsections (3) to (5)**.

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9 Section 144 amended (Mediation services)

After section 144(1), insert:

- (1A) For the purposes of this section, **employment relationships** include those between an employer and an employee employed by the employer where the work performed is under the control or direction of a controlling third party.

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10 Section 161 amended (Jurisdiction)

After section 161(1)(e), insert:

(ea) joining a controlling third party to a personal grievance under **section 103B**:

Part 2

Further amendment to principal Act

11 **Schedule 1AA amended**

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In Schedule 1AA, insert the **Part 3** set out in the **Schedule** of this Act in its appropriate numerical order according to the date of enactment of the provision of that schedule.

Schedule
Transitional, savings, and related provisions

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New Part 3 inserted into Schedule 1AA

Part 3
**Provision relating to Employment Relations (Triangular
Employment) Amendment Act 2018**

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16 Application of sections 103(4) and (5), 103B, 115A, and 123A

Sections 103(4) and (5), 103B, 115A, and 123A apply if the date on
which the action alleged to amount to a personal grievance occurred or came to
the notice of the employee, whichever is later, after the commencement of the
Employment Relations (Triangular Employment) Amendment Act 2018.

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Legislative history

1 February 2018
21 March 2018

Introduction (Bill 17-1)
First reading and referral to Education and Workforce
Committee