Employment Relations Amendment Bill (No 2)

Government Bill

As reported from the Transport and Industrial Relations Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Employment Relations Amendment Bill (No 2) and recommends by majority that it be passed with the amendments shown.

Introduction

This bill seeks to amend the Employment Relations Act 2000 (the principal Act) by providing for changes in the following areas:

- requiring employer consent for union access to the workplace
- clarifying communications with employees during collective bargaining
- extending trial periods to all employers
- improving the personal grievance system
- improving the ability of employment institutions to resolve employment relationship problems
- specifying the role and enforcement powers of Labour Inspectors.

This commentary discusses the main issues we considered and explains the significant amendments we recommend to the bill.

Representative of union must obtain consent to enter workplace

We recommend amending new sections 20A(2)(b) and 20A(3) (clause 6) to require that the employer's response to a union request for access to a workplace be provided no later than the working day after the request is received, and that if the employer withholds consent, reasons for doing so be given no later than the working day after the date of the decision. Therefore the longest permissible time between the employer's considering the request for access and providing written reasons for the decision would be two working days after the request was received.

Employer must retain copy of individual employment agreement

We recommend inserting new section 64(2A) (clause 10) to make it clear that the employee may have access to a copy of the employment agreement retained by the employer.

We further recommend inserting new section 64(5) to clarify the status of unsigned employment agreements where the parties have clearly not agreed on one or more of the terms and conditions of employment. The intention of the bill is to ensure that an employee's employment agreement is maintained for enforcement purposes. However, it is not intended that where an employee has clearly informed the employer that the terms of the agreement are not agreed the unsigned agreement should be treated as the parties' employment agreement.

Test of justification

We recommend removing the words "or technical" from new section 103A(5)(a) (clause 14). The use of both "minor" and "technical" in new section 103(5)(a) might cause interpretive difficulties for the courts, as "technical" is not a term with an established meaning in employment law.

We further recommend that new section 103A(5)(b) be amended to remove the reference to a probability of the employee being unfairly treated, to make the provision easier to interpret.

Procedure in relation to mediation services

We recommend amending clause 20 to make it clear that mediation could occur in the absence of representatives of the parties, at their request. Clause 20 in the bill as introduced is a clarifying clause, drawing attention to an existing mediation service which allows mediation at an early stage without representation (if this is requested) to allow quick resolution of disputes at a lower cost. Amending clause 20 would make it clear that access to representation was not being removed.

Duty of Authority to consider mediation

The intent of clause 26 in the bill as introduced is to ensure that where a Labour Inspector has determined that a breach of minimum entitlements has occurred, the Employment Relations Authority would consider whether mediation was appropriate, in order to ensure that any settlement of the matter would not involve a reduction of minimum entitlements. To ensure that clause 26 fully addresses minimum entitlements we recommend amending new section 159(1A) (clause 26) to require the Authority to consider whether it is appropriate to refer to mediation any matter brought to the Authority by a Labour Inspector that relates to an employee's minimum entitlements, not only those where a demand notice is involved.

Powers of Authority

We recommend the insertion of new section 160(2A), to make it clear that the Authority would have to allow cross-examination of a party or a person to the extent that is consistent with section 160(2) (clause 28).

We further recommend amending new section 160 (clause 28) and new section 173(5) (clause 32) to specify that the Authority would not have the power to make a freezing order or search order as provided for in the High Court Rules. The bill as introduced might be taken to imply that the Authority could make search orders or freez-

ing orders if it were not ex parte (that is, without notice). The intention of the bill is that the Authority should not have the power to make a freezing order or search order on an ex parte basis or otherwise.

Recommendation to parties

We recommend inserting new section 173A(6) (clause 32) to make it clear that a recommendation under new section 173A would not be required to comply with the requirements of section 174(a) of the principal Act, which relates to the content of a determination. The policy intention of section 173A is that a recommendation by the Authority should have the same status in law as a determination by the Authority. However, it is not intended that the content of a recommendation should be the same as that of a determination as set out in section 174 of the principal Act.

Challenge in respect of dismissal of frivolous or vexations proceedings

We recommend amending new sections 178(1) and (2) (clause 34) by substituting the word "challenge" for "appeal". A determination of the Authority is "challenged" in the Court rather than "appealed".

Functions of Labour Inspectors

We recommend that new section 223D in clause 36 be amended to provide that an improvement notice may not be served in the period commencing on 17 December and ending with the close of 8 January in the following year. This would align improvement notices with the period in which demand notices may not be served under section 224(3) of the principal Act. During this period employers would not be present to receive the improvement notice. The proposed amendment would also be consistent with the period in which improvement notices cannot be issued by Health and Safety Inspectors.

Amendments to Schedules 2 and 3 of principal Act

We recommend amending clauses 12A and 15 of Schedule 1 of the bill to provide that the Authority's order may include an order for costs and expenses. The sense of "may be limited to" in clauses 12A

and 15 of Schedule 1 in the bill as introduced would be more clearly and plainly expressed by the words "may include".

We recommend amending clause 14 of Schedule 1 of the bill to remove reference to "the appellant" and to substitute "a party", as there are no appellants before the Authority.

We further recommend amending clause 13(1) of Schedule 1 of the bill to clarify that an order of discovery could be made only in relation to proceedings intended to be brought before the Authority. The wording of clause 13(1) of Schedule 1 in the bill as introduced might create operational problems because it could allow discovery applications in the court after the commencement of proceedings before the Authority.

New Zealand Labour and Green Parties minority view

The Labour and Green Parties recommend that the Employment Relations Amendment Bill (No 2) not proceed because it is unfair and unjustified. We believe the balance in the legislation shifts significantly towards the interest of employers at the expense of employees.

We are concerned that the changes risk significantly damaging employment relations and potentially increasing industrial disputation.

The Labour and Green members believe that the case for supporting the changes proposed is not made out; in fact a number of provisions are supposed solutions to problems that do not exist. The Regulatory Impact Statement explicitly states that areas like union access provisions and the personal grievance system are generally working. Even agencies such as Treasury and the Ministry of Economic Development complained of "the lack of robust evidence on the impact of the proposed amendments." We believe it erodes the protection of New Zealanders and will disproportionately impact on those already disadvantaged in the labour market—the un-unionised, the low-paid, women, and Māori, Pacific, and younger and older workers.

The Labour and Green members consider that a number of the provisions of the bill are at odds with the objects of the Employment Relations Act in part 3(a) including the building of productive employment relationships by acknowledging the inherent inequality of power in employment relationships and by promoting collective bargaining.

The Labour and Green Parties have particular concern with the bill as follows:

Union access to workplaces

The Labour and Green members believe that the change proposed is unnecessary or not a high priority; this was the view of officials, the union movement, and Business NZ. The current Act provides for a range of limitations on the right of access and for the right to be exercised in a reasonable manner at a reasonable time. There have been few legal cases taken on access issues under the present law.

We believe the current system works and enables union representatives to respond to the needs of individuals and groups of employees who have employment relations, health and safety, and other workplace issues. We received many examples of the sensible arrangements that currently operate between unions and employers.

Union representatives also need to access workplaces to provide employees with the opportunity to organise themselves to collectively bargain to improve their wages and conditions of employment. There are many situations where urgent or timely access is important, for example around a health and safety matter, or during collective bargaining. These rights are fundamental rights guaranteed by international law.

Many submitters reflected on the situation under the Employment Contracts Act when union access was last restricted. It is clear that this provision will be used by the worst employers to try to limit the rights of their employees. This includes the potential for litigation to be used as a mechanism to delay access for a significant period of time. We were presented with evidence to show that the legal environment is highly influential in determining the behaviour of companies in relation to union access.

Communications with employees during collective bargaining

We believe the change here appears to be driven by a misunderstanding of the current legal provisions. While it is impossible to predict the consequences of the proposed change, there is genuine concern that it will encourage employers to try to persuade their employees to ignore the advice of their union representatives or to try to undermine their credibility. We believe this will undermine good faith, respect-

ful bargaining between employers and unions. It is likely this is an area where much wasteful and expensive litigation will result.

Extending the 90-day trial period to all workplaces

The Labour and Green Parties oppose this provision because it is unfair and a removal of rights. The policy underpinning it, that is, that it will give those disadvantaged in the workplace a chance for employment, is contrary to the experience with the 90-day trial period in workplaces of less than twenty employees. We believe this provision effectively means that workers can be dismissed without reason or recourse. We believe it will encourage poor management practices and hamper the development of quality appointment, induction, supervision, and training practices. The proposition that the 90-day trial is subject to employee choice and agreement fails to recognise the inherent inequality of power and is particularly cynical in times of high unemployment. There are a range of potential outcomes of this provision including implications for wage and salary earners' future job prospects when they are unable to advise a potential employer why they were dismissed, and implications for worker confidence and trust in their employer. The implications in relation to the benefit system are also significant—those on benefits will be required to take jobs with 90-day trial periods, and those dismissed may have to face extended stand-down periods as they will not be able to show why they were dismissed and the ex-employer will be asked by WINZ for their explanation of the reason for dismissal so that the employees' culpability for the dismissal can be assessed by WINZ; and we understand the employee's reason will be accepted by WINZ in the absence or generally accepted if there is any conflict with the reason from the employer.

Changes to the personal grievance system e.g. removal of reinstatement as the primary remedy and the test of justification

The removal of reinstatement as the primary remedy is significant. While it is used infrequently, reinstatement is the one remedy that restores the employee to the situation they were in prior to an unfair dismissal. The Labour and Green members are concerned that the removal of reinstatement as the primary remedy will put the jobs of union delegates and activists at risk. In relation to the test of justifi-

cation the change of the word "would" to "could" makes acceptable the worst behaviour that could be reasonably conceived of within the law. We believe this represents a reduction in employees' rights and protections, and will potentially lead to a protracted period of litigation in what is currently a well settled area of the law.

The Labour and Green Parties believe that this bill will make New Zealand's employment relations less fair and will undermine fundamental rights at work. We believe it is backward-looking, and will not assist in developing the high-wage and highly productive workplaces New Zealand needs.

Appendix

Committee process

The Employment Relations Amendment Bill (No 2) was referred to us on 19 August 2010. The closing date for submissions was 13 September 2010. We received and considered 295 submissions, and 7554 form submissions from interested groups and individuals some of which included individual comments. We heard 95 submissions, which included holding hearings in Auckland.

We received advice from the Department of Labour.

A subcommittee was appointed to hear evidence on the bill.

Committee membership

David Bennett (Chairperson)
Dr Jackie Blue
Carol Beaumont
Darien Fenton
Hon Tau Henare
Gareth Hughes
Moana Mackey
Allan Peachey
Michael Woodhouse
Keith Locke replaced Gareth Hughes for this item of business

Key to symbols used in reprinted bill

As reported from a select committee

text inserted by a majority

~~text deleted by a majority~~

Hon Kate Wilkinson

Employment Relations Amendment Bill (No 2)

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Employment Relations Amendment Act (No 2) **2010**.

2 Commencement

(1) **Section 10** comes into force on **1 July 2011**.

(2) The rest of this Act comes into force on **1 April 2011**.

3 Principal Act amended

This Act amends the Employment Relations Act 2000.

Part 1
Amendments to principal Act

4 Interpretation

Section 5 is amended by inserting the following definitions in their appropriate alphabetical order:

"**intended agreement** includes part of an intended agreement

"**minimum entitlements** means wages or holiday pay or other money payable by the employer to the employee under the Minimum Wage Act 1983 or the Holidays Act 2003

"**relevant Acts**—

"(a) in **sections 223A and 223B**, means the Acts specified in section 223(1):

"(b) in **sections 223D to 223F**, means the Acts specified in section 223(1), except Part 5 of this Act".

5 Access to workplaces

Section 20 is amended by omitting "section 21" in each place where it appears and substituting in each case "**sections 20A** and 21".

6 New section 20A inserted

The following section is inserted after section 20:

"**20A Representative of union must obtain consent to enter workplace**

"(1) Before entering a workplace under section 21, a representative of a union must request and obtain the consent of the employer or a representative of the employer.

"(2) If a representative of a union makes a request under **subsection (1)**,—

"(a) the employer or representative of the employer must not unreasonably withhold consent; and

"(b) the employer or representative of the employer must advise the representative of the union of the employer's or representative of the employer's decision as soon as is reasonably practicable but no later than ~~2 working days~~ the working day after the date on which the request was received; and

"(c) the consent of the employer or representative of the employer (as the case may be) must be treated as having been obtained if the employer or representative of the employer does not respond to the request within 2 working days after the date on which the request was received.

"(3) If an employer or a representative of an employer withholds consent under **subsection (2)**, the employer or representative of the employer must, ~~within 2 working days after the decision,~~ as soon as is reasonably practicable but no later than the working day after the date of the decision, give reasons in writing for that decision to the representative of the union who made the request.

"(4) This section is subject to sections 22 and 23 (which specify when access to workplaces may be denied)."

7 Conditions relating to access to workplaces

Section 21(5) is repealed.

8 Penalty for certain acts in relation to entering workplace

Section 25 is amended by repealing paragraph (a) and substituting the following paragraphs:

"(a) contravenes **section 20A(2)(a)** by unreasonably withholding consent in relation to a request by a representative of a union under **section 20A(1)** to enter a workplace; or

"(ab) fails to give reasons in writing for withholding consent to access to a workplace in accordance with **section 20A(3)**; or".

9 Good faith in bargaining for collective agreement

Section 32 is amended by adding the following subsection:

"(6) To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (including, without limitation, the employer's proposals for the collective agreement) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4."

9A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(1) Section 63A(2)(a) is amended by omitting ", or the part of the intended agreement,".

(2) Section 63(2)(b) is amended by omitting "or any part of the intended agreement".

10 New section 64 inserted

The following section is inserted after section 63A:

"**64 Employer must retain copy of individual employment agreement or individual terms and conditions of employment**

"(1) When section 63A applies, the employer must retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of the employment (as the case may be).

"(2) If an employer has provided an employee with an intended agreement ~~or part of an intended agreement~~ under section 63A(2)(a), the employer must retain a copy of that intended agreement even if the employee has not—

"(a) signed the intended agreement; or

"(b) agreed to any of the terms and conditions specified in the intended agreement.

"(2A) If requested by the employee, the employer must, as soon as is reasonably practicable, provide the employee with a copy of the employee's—

"(a) individual employment agreement or current terms and conditions of employment retained under **subsection (1)**; or

"(b) intended agreement retained under **subsection (2)**.

"(3) An employer who fails to comply with ~~**subsection (1) or (2)**~~ **subsection (1), (2), or (2A)** is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.

"(4) Before bringing an action under **subsection (3)**, the Labour Inspector must—

"(a) give the employer written notice of the breach of this section; and

"(b) give the employer 7 working days to remedy the breach.

"(5) To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—

"(a) signed the intended agreement; or

"(b) agreed to any of the terms and conditions specified in the intended agreement."

11 Terms and conditions of employment where no collective agreement applies

Section 65 is amended by adding the following subsection:

"(4) An employer who fails to comply with this section is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority."

12 When employment agreement may contain provision for trial period for 90 days or less

(1) Section 67A(1) is amended by omitting "as defined in subsection (4)".

(2) Section 67A(4) is repealed.

13 Object of this Part

Section 101(c) is repealed.

14 New section 103A substituted

Section 103A is repealed and the following section substituted:

"**103A Test of justification**

"(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in **subsection (2)**.

"(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

"(3) In applying the test in **subsection (2)**, the Authority or the court must consider—

"(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

"(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

"(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

"(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

"(4) In addition to the factors described in **subsection (3)**, the Authority or the court may consider any other factors it thinks appropriate.

"(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

"(a) minor ~~or technical~~; and

"(b) did not result in ~~the probability that~~ the employee ~~was~~ being treated unfairly."

15 New section 125 substituted

Section 125 is repealed and the following section substituted:

"**125 Remedy of reinstatement**

"(1) This section applies if—

"(a) it is determined that the employee has a personal grievance; and

"(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).

"(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so."

16 New section 134A inserted

The following section is inserted after section 134:

"**134A Penalty for obstructing or delaying Authority investigation**

"(1) Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation (if required).

"(2) The power to award a penalty under **subsection (1)** may be exercised by the Authority—

"(a) of its own motion; or

"(b) on the application of any party to the investigation."

17 Recovery of penalties

(1) Section 135(2)(a) is amended by omitting "$5,000" and substituting "$10,000".

(2) Section 135(2)(b) is amended by omitting "$10,000" and substituting "$20,000".

(3) Section 135 is amended by inserting the following subsection after subsection (4A):

"(4B) 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 **section 223D**."

18 Power of Authority to order compliance

Section 137(1)(a) is amended by inserting the following subparagraphs after subparagraph (iii):

"(iiia) an enforceable undertaking that **section 223C(1)** provides may be enforced by compliance order; or

"(iiib) an improvement notice that **section 223D(5)** provides may be enforced by compliance order; or".

19 Further provisions relating to compliance order by Authority

Section 138(1)(b) is amended by adding "; or" and also by adding the following subparagraph:

"(iii) in the case of **sections 223C, 223D(5)**, and 225(4)(c), a Labour Inspector."

20 Procedure in relation to mediation services

Section 147(2) is amended by inserting the following paragraph after paragraph (ab):

"(ac) may assist the parties to resolve a problem at an early stage, including, at the request of a party, discussing the problem with ~~a~~ that party without any representative of that party being present; and".

21 New section 148A inserted

The following section is inserted after section 148:

"**148A Minimum entitlements**

"(1) Minimum entitlements may be the subject of—

"(a) mediation under this Part; and

"(b) agreed terms of settlement under section 149(1).

"(2) Despite **subsection (1)**, a person who is employed or engaged by the chief executive to provide mediation services and who holds a general authority to sign agreed terms of settlement under section 149(1) must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party's minimum entitlements."

22 Settlements

Section 149 is amended by inserting the following subsection after subsection (3):

"(3A) For the purposes of **subsection (3)**, a minor aged 16 years or over may be a party to agreed terms of settlement, and be bound by that settlement, as if the minor were a person of full age and capacity."

23 New section 149A inserted

The following section is inserted after section 149:

"**149A Recommendation to parties**

"(1) The parties to a problem may agree in writing—

"(a) to confer the power to make a written recommendation in relation to the matters in issue on a person employed or engaged by the chief executive to provide mediation services; and

"(b) on the date on which that person's recommendation will become final, unless the parties do not accept the recommendation.

"(2) The person on whom the power is conferred must, before making and signing a recommendation under that power,—

"(a) explain to the parties the effect of **subsections (4) and (5)**; and

"(b) be satisfied that, knowing the effect of those subsections, the parties affirm their agreement.

"(3) Where, following the affirmation referred to in **subsection (2)** of an agreement made under **subsection (1)**, a recommendation is made and signed by the person empowered to do so, a party has until the date agreed under **subsection (1)(b)** to give written notice to the person who made the recommendation that the party does not accept the recommendation.

"(4) If a party gives notice under **subsection (3)** that the party does not accept the recommendation,—

"(a) further mediation services may be provided in order to attempt to resolve the problem; and

"(b) either party to the problem may request those services be provided by a person other than the person who made the recommendation.

"(5) If a party does not give notice under **subsection (3)**,—

"(a) the recommendation becomes final and binding on, and enforceable by, the parties; and

"(b) a party may not seek to bring that recommendation before the Authority or the court, whether by action, appeal, application for review, or otherwise, except for enforcement purposes."

24 New section 151 substituted

Section 151 is repealed and the following section substituted:

"**151 Enforcement of terms of settlement agreed or authorised**

"(1) This section applies to—

"(a) any agreed terms of settlement that are enforceable by the parties under section 149(3):

"(b) any recommendation that is enforceable by the parties under **section 149A(5)**:

"(c) any decision that is enforceable by the parties under section 150(3).

"(2) A matter referred to in **subsection (1)** may be enforced—

"(a) by compliance order under section 137; or

"(b) in the case of a monetary settlement, in 1 of the following ways:

"(i) by compliance order under section 137:

"(ii) by using, as if the settlement, recommendation, or decision were an order enforceable under section 141, the procedure applicable under section 141."

25 Role of Authority

Section 157 is amended by repealing subsections (2A) and (3) and substituting the following subsection:

"(3) The Authority must act as it thinks fit in equity and good conscience, but may not do anything that is inconsistent with—

"(a) this Act; or

"(b) any regulations made under this Act; or

"(c) the relevant employment agreement."

26 Duty of Authority to consider mediation

(1) Section 159(1)(b) is amended by omitting "; and" and substituting "; or" and also by adding the following subparagraph:

"(iv) will be otherwise impractical or inappropriate in the circumstances; and".

(2) Section 159 is amended by inserting the following subsection after subsection (1):

"(1A) If the matter before the Authority ~~relates to a demand notice~~ was brought by a Labour Inspector and relates to an employee's minimum entitlements, the Authority must, before giving a direction under subsection (1)(b) or (c), consider

whether it is appropriate to direct that mediation or further mediation be used in order to prevent the matter being resolved in a manner that involves a reduction of those minimum entitlements."

27 New section 159A inserted

The following section is inserted after section 159:

"**159A Duty of Authority to prioritise previously mediated matters**

"(1) This section applies if a matter comes before the Authority for investigation and determination and an attempt has been made to resolve the matter by mediation.

"(2) The Authority must give priority to investigating and determining the matter referred to in **subsection (1)** over any other matters in which mediation has not been used unless the Authority considers that providing mediation services would be inappropriate having regard to section 159(1) **or (1A)**."

~~**28 Application of law relating to contracts**~~

~~Section 162 is amended by adding the following subsection as subsection (2):~~

~~"(2) Despite subsection (1), the Authority may not make an *ex parte* freezing order or an *ex parte* search order as provided for in the High Court Rules."~~

28 Powers of Authority

(1) Section 160 is amended by inserting the following subsection after subsection (2):

"(2A) The Authority must allow cross-examination of a party or a person to the extent that is consistent with subsection (2)."

(2) Section 160 is amended by adding the following subsection:

"(4) The Authority may not make a freezing order or search order as provided for in the High Court Rules."

29 Membership of Authority

Section 166(3) is repealed.

30 New section 166A inserted

The following section is inserted after section 166:

"**166A Role of Chief of Authority**

"(1) In addition to deciding matters as a member of the Authority, the Chief of the Authority is responsible for—

"(a) making any arrangements that are practicable to ensure that the members of the Authority discharge their functions—

"(i) in an orderly and expeditious way; and

"(ii) in a way that meets the objects of this Act; and

"(b) directing the education, training, and professional development of members of the Authority.

"(2) Without limiting **subsection (1)**, the Chief of the Authority may—

"(a) issue instructions (not inconsistent with this Act or regulations made under it) that outline expectations in respect of the process, timeliness, or any other matter relating to the hearing and determination of matters before the Authority; and

"(b) require particular members of the Authority to investigate particular matters.

"(3) For the purposes of **section 169(3)**, the Chief of the Authority may provide a report to the Minister in respect of any member of the Authority in regard to the member's adherence to and compliance with any instructions issued under **subsection (2)(a)**."

31 Term of office

Section 169 is amended by adding the following subsection:

"(3) Before recommending the reappointment of a member of the Authority under section 167, the Minister must, if the Chief of the Authority has provided a report in respect of the member under **section 166A(3)**, consider that report."

32 New sections 173 and 173A substituted

Section 173 is repealed and the following sections are substituted:

"**173 Procedure**

"(1) The Authority, in exercising its powers and performing its functions, must—

"(a) comply with the principles of natural justice; and

"(b) act in a manner that is reasonable, having regard to its investigative role.

~~"(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 person were a witness in a proceeding to which the Evidence Act 2006 applies.~~

"(3) The Authority may exercise its powers under section 160~~(1)~~ in the absence of 1 or more of the parties.

"(4) However, if the Authority acts under **subsection (3)**, the Authority must provide an absent party with—

"(a) any material it receives that is relevant to the case of the absent party; and

"(b) an opportunity to comment on the material before the Authority takes it into account.

"(5) To avoid doubt, **subsections (3) and (4)** do not limit the powers of the Authority to make *ex parte* orders (except a freezing order or search order ~~under~~ as provided for in the High Court Rules).

"(6) The Authority may meet with the parties at the times and places fixed by a member of the Authority or an officer of the Authority.

"(7) Meetings of the Authority may be adjourned from time to time and from place to place by a member of the Authority or an officer of the Authority designated for the purpose by the chief executive, whether at any meeting or at any time before the time fixed for the meeting.

"**173A Recommendation to parties**

"(1) The parties to an employment relationship problem may agree in writing—

"(a) to confer the power to make a written recommendation in relation to the matters in issue on a member of the Authority; and

"(b) on the date on which the member's recommendation will become final, unless the parties ~~to~~ do not accept the recommendation.

"(2) The member must, before making and signing a recommendation under that power,—

"(a) explain to the parties the effect of **subsections (4) and (5)**; and

"(b) be satisfied that, knowing the effect of those subsections, the parties affirm their agreement.

"(3) Where, following the affirmation referred to in **subsection (2)** of an agreement made under **subsection (1)**, a recommendation is made and signed by the member empowered to do so, a party has until the date agreed under **subsection (1)(b)** to give written notice to the member who made the recommendation that the party does not accept the recommendation.

"(4) If a party gives notice under **subsection (3)** that the party does not accept the recommendation,—

"(a) the Authority must continue to investigate and determine the matter; and

"(b) either party to the problem may request that the matter be further investigated and determined by a member other than the member who made the recommendation.

"(5) If a party does not give notice under **subsection (3)**, the recommendation becomes final and must be treated as the Authority's determination of the matter.

"(6) However, a recommendation under **subsection (5)** need not comply with section 174(a) (which relates to the content of a determination made by the Authority)."

33 Removal to court

(1) Section 178 is amended by repealing subsection (1) and substituting the following subsection:

"(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it."

(2) Section 178(3) is amended by omitting "any matter" and substituting "any matter on application under **subsection (1)**".

34 New section 178A inserted

The following section is inserted after section 178:

"**178A ~~Appeal to court~~ Challenge in respect of dismissal of frivolous or vexatious proceedings**

"(1) A party to a matter before the Authority that was dismissed because the Authority determined it was frivolous or vexatious under **clause 12A of Schedule 2** may ~~appeal to the court against~~ challenge that determination in the court.

"(2) ~~An appeal~~ A challenge under this section must be made in the prescribed manner within 28 days after the date that the matter is dismissed by the Authority.

"(3) The court must determine whether it considers the matter to be frivolous or vexatious.

"(4) If the court does not determine that the matter is frivolous or vexatious, it must order the Authority to investigate and determine the matter."

35 Application of other provisions

~~(1) Section 190(2) is amended by omitting "sections 162" and substituting "sections 162(1)".~~

Section 190 is amended by adding the following subsection:

~~"(3) To avoid doubt, the court has the power to make an *ex parte* freezing order and an *ex parte* search order as provided for in the High Court Rules.~~

"(3) In addition to the powers described in subsection (1), the court has the same powers of the High Court to make a freezing order and a search order as provided for in the High Court Rules."

36 New sections 223A to 223G inserted

The following sections are inserted after section 223:

"**223A Functions of Labour Inspector**

The functions of a Labour Inspector include—

"(a) determining whether the provisions of the relevant Acts have been complied with; and

"(b) taking all reasonable steps to ensure that the relevant Acts are complied with; and

"(c) supporting employers, employees, and other persons in complying with the relevant Acts by providing information and education; and

"(d) preventing non-compliance with the relevant Acts by assisting employers to implement systems and practices that comply with the provisions of the relevant Acts; and

"(e) providing any other services that assist employers and employees to resolve, promptly and effectively, employment relationship problems arising under the relevant Acts.

"*Enforceable undertakings*

"**223B Enforceable undertakings**

"(1) A Labour Inspector and an employer may agree in writing that the employer will undertake by a specified date (an **enforceable undertaking**) to—

"(a) rectify the breach of any provision of the relevant Acts; or

"(b) pay money owed to an employee under a provision of the relevant Acts; or

"(c) take any other action that the Labour Inspector determines is appropriate having regard to the nature of the breach of the provision of the relevant Act.

"(2) The employer may withdraw or vary an enforceable undertaking agreed under **subsection (1)** at any time, but only with the consent of the Labour Inspector.

"**223C Enforcement of undertakings**

"(1) An enforceable undertaking may be enforced by the Authority making a compliance order under section 137.

"(2) An employer who fails to comply with an enforceable undertaking that remains in force is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.

"(3) If the enforceable undertaking relates to a monetary settlement, the enforceable undertaking may be enforced by using, as if the undertaking were an order enforceable under section 141, the procedure applicable under section 141.

"*Improvement notices*

"**223D Labour Inspector may issue improvement notice**

"(1) A Labour Inspector who believes on reasonable grounds that any employer is failing, or has failed, to comply with any provision of the relevant Acts may issue the employer with an improvement notice that requires the employer to comply with the provision.

"(2) An improvement notice issued under **subsection (1)** must state—

"(a) the provision that the Labour Inspector reasonably believes that the employer is failing, or has failed, to comply with; and

"(b) the Labour Inspector's reasons for believing that the employer is failing, or has failed, to comply with the provision; and

"(c) the nature and extent of the employer's failure to comply with the provision; and

"(d) the steps that the employer could take to comply with the provision; and

"(e) the date before which the employer must comply with the provision.

"(3) An improvement notice may state the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

"(4) An improvement notice may be issued—

"(a) by giving it to the employer concerned; or

"(b) if the employer does not accept the improvement notice, by leaving it in the employer's presence and drawing the employer's attention to it.

"(4A) An improvement notice may not be issued in the period commencing on 17 December and ending with the close of 8 January in the following year.

"(5) An improvement notice may be enforced by the making by the Authority of a compliance order under section 137.

"**223E Objection to improvement notice**

"(1) An employer may, within 28 days after the improvement notice is issued to the employer, lodge with the Authority an objection to the notice.

"(2) The function of the Authority in respect of an objection is to determine—

"(a) whether the employer is failing, or has failed, to comply with the specified provision of the relevant Acts; and

"(b) the nature and extent of the employer's failure to comply with the provision; and

"(c) the nature and extent of any loss suffered by any employee as a result of the employer's failure to comply with the provision (if applicable).

"(3) The Authority may confirm, vary, or rescind the improvement notice as the Authority thinks fit.

"**223F Penalty**

"(1) An employer who fails to comply with an improvement notice issued under **section 223D** is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.

"(2) If **subsection (1)** applies, a Labour Inspector may not also bring an action seeking a penalty in respect of the same matter under any of the relevant Acts.

"**223G Withdrawal of improvement notice**

An improvement notice may be withdrawn at any time by a Labour Inspector, but the withdrawal of an improvement notice does not prevent another improvement notice being served in relation to the same matter."

37 Actions by Labour Inspectors

Section 228 is amended by repealing subsection (2) and substituting the following subsection:

"(2) If a Labour Inspector commences an action under subsection (1), the Labour Inspector must not issue an improvement notice under **section 223D** or serve a demand notice under section 224 in respect of the same wages or holiday pay or other money."

38 Amendments to Schedules 2 and 3

(1) Schedule 2 (which contains provisions having effect in relation to the Employment Relations Authority) is amended in the manner set out in **Part 1 of Schedule 1** of this Act.

(2) Schedule 3 (which contains provisions having effect in relation to the Employment Court) is amended in the manner set out in **Part 2 of Schedule 1** of this Act.

Part 2
Consequential amendments and transitional provision

39 Consequential amendments to other enactments

The enactments specified in **Schedule 2** are amended in the manner indicated in that schedule.

40 Transitional provision

Section 64 of the principal Act (as inserted by **section 10** of this Act) applies whether the individual employment agreement or terms and conditions that make up the employee's individual terms and conditions of employment were provided to, or agreed with, the employee before or after the commencement of this Act.

Schedule 1

s 38

Amendments to Schedules 2 and 3 of principal Act

Part 1
Amendments to Schedule 2

Clause 11

Repeal and substitute:

"**11 Power to award interest**

"(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.

"(2) Without limiting the Authority's discretion under **subsection (1)**, in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.

"(3) **Subclause (1)** does not ~~authorises~~ authorise the giving of interest upon interest."

New clause 12A

Insert after clause 12:

"**12A Power to dismiss frivolous or vexatious proceedings**

"(1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.

"(2) In any such case, the order of the Authority may ~~be limited to~~ include an order for payment of costs and expenses against the party bringing the matter or defence."

Clause 14

Add as subclause (2):

"(2) For the purposes of subclause (1), a matter before the Authority must be treated as having been withdrawn if no action on

Part 1—*continued*

Clause 14—*continued*

the matter has been taken by ~~the applicant,~~ ~~the~~ ~~appellant,~~ a party or the Authority for at least 3 years."

Part 2
Amendments to Schedule 3

Clause 13(1)

Repeal and substitute:

"(1) The court may, in relation to discovery ~~in relation~~ that relates to proceedings brought or intended to be brought in the court, or intended to be brought in the Authority, make any order that a District Court may make under section 56A or 56B of the District Courts Act 1947; and those sections apply accordingly with all necessary modifications."

Clause 14(1)

Omit "such rate not exceeding the 90-day bill rate (as at the date of the order), plus 2%, as the court thinks fit" and substitute "the rate prescribed under section 87(3) of the Judicature Act 1908".

Clause 15

Repeal and substitute:

"**15 Power to dismiss frivolous or vexatious proceedings**

"(1) The court may, at any time in any proceedings before it, dismiss a matter or defence that the court considers to be frivolous or vexatious.

"(2) In any such case, the order of the court may ~~be limited to~~ include an order for payment of costs and expenses against the party bringing the matter or defence before the Authority."

Part 2—*continued*

Clause 18

Add as subclause (2):

"(2) To avoid doubt, if a matter is withdrawn under subclause (1), it does not affect any other matters before the court that form part of the same proceedings."

Schedule 2 s 39
Consequential amendments to other enactments

Holidays Act 2003 (2003 No 129)

Section 83(2): repeal and substitute:

"(2) To avoid doubt, for the purposes of subsection (1), an action before the Authority includes the determination of an objection to—

"(a) an improvement notice issued under **section 223D** of the Employment Relations Act 2000 that relates to holiday pay; or

"(b) a demand notice served under section 224 of the Employment Relations Act 2000 that relates to holiday pay."

Minors' Contracts Act 1969 (1969 No 41)

Section 12(8): add "; or" and:

"(d) **section 149(3A)** of the Employment Relations Act 2000".

Legislative history

16 August 2010	Introduction (Bill 196–1)
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