



## **Submission**

Of the

**New Zealand Retailers Association**

To the

**Transport and Industrial Select Committee**

In respect of the

**Employment Relations Amendment Bill  
(No. 2)**

September 2010

Louise Evans  
Government & Advisory Group Manager  
P O Box 12 086  
Wellington

Ph: 04 472 3733  
Fax: 04 472 1071  
[levans@retail.org.nz](mailto:levans@retail.org.nz)

## **Introduction**

These submissions are presented by the New Zealand Retailers Association

The Association is the largest Association representing the retail industry in New Zealand.

Our members include the major supermarket and general merchandise chains, specialised chains, traditional department stores and thousands of owner operators spread throughout the country.

Our membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.

Retail sales currently total some \$65b per annum and the industry employs approximately 325,000 people (20% of the workforce) in over 49,000 outlets spread throughout the country.

## **Background**

The New Zealand Retailers Association provides its members with a comprehensive range of Advisory services, the most utilised being Employment Relations Advice. This is a particularly vital service for our small to medium sized members who do not have expertise in these matters, and who have been made fearful of the potential costs of making a poor or legally incorrect decision. On average our advisors will receive some 13,000 calls a year from members, of which the majority are on employment related matters. It is from these real and everyday experiences of the frustrations surrounding practical application of well-intended yet fraught with process legislation, that we draw our responses for this submission.

We also wish to bring to the attention of the Committee that the Association submitted on the Department of Labour's consultation in regards to the Personal Grievance process. A copy of that submission is attached for further detailed reference of issues arising in the practical application of existing Grievance laws.

## **General Submissions**

The Association is supportive of the purpose of the Bill, being to provide more flexibility, greater choice, and ensure a balance of fairness for both employers and employees in the Employment Relations Act, while improving its overall operation and efficiency.

We note that the changes aim to allow for employment problems to be resolved more quickly, reduce costs, support more efficient, effective, and flexible processes around ending the employment relationship, and help restore the confidence of all parties in the personal grievance system and the employment institutions. Consequently we agree that by assisting employment relationship problems to be resolved more quickly, the negative impact of these problems on workplace productivity will be reduced.

Our specific responses on the main issues follow.

**Union right of entry** – *clauses 5, 6 & 7*

- The Bill provides that Union representatives must seek consent. This must not be unreasonably withheld and is taken as given if not provided after two days. It also provides for penalties for consent unreasonably withheld or for failure to advise reasons.

Currently consent is not required but access can be denied at a particular time (or place) for health or safety reasons or if it would unreasonably disrupt business operations. In practice, it is more common for access time to be discussed and agreed – so required consent is not so different to actual practice and will be easier to manage, for both parties.

**File copy of Individual Employment Agreements** – *clause 10*

- The Bill provides that employers must retain copies of individual employment agreements, whether signed or not, and of any separately agreed terms and conditions.

This is in line with best practice already recommended by us to all our members.

**90-day trial provision** – *clause 12*

- The Bill extends this provision to all employers, not just those with under 20 employees. Other conditions remain as is.

This will improve the confidence of employers and lead to jobs for those who might otherwise not get the chance.

It is worth noting here that the recent Employment Court decision relating to new employees and the timing of agreement to a trial period was no surprise to us. The Association routinely advises members that they cannot expect to rely on a trial period that was not agreed and fully documented prior to employment commencing.

In the interests of ensuring both parties understand the intended terms – and thereby reduce the incidence of dispute – anything to encourage signing of the Employment Agreement before an employee starts work is to be endorsed.

However, we are concerned that confusion remains (following the recent Court decision) regarding the obligations on the employer as to process on dismissal under the Act. The Act, at S67 B (5) (a) and (b), is clear that the employer is *not* required to comply with S4 (1A) (c) – which requires consultation and employee input or S120 – which requires a statement in writing of the reason for dismissal.

Contrary to this, the Court decision indicated that consultation, with the opportunity for employee input before a decision, is required.

The legislation needs to clarify what process is (or isn't) required.

### **Personal grievances** – *clauses 14 & 15*

- Under the Bill the test of justification for dismissal is returned to what a reasonable employer could (not would) have done.

This recognises that there is unlikely to be only one decision possible in any given situation and allows for a range of possibilities.

- The Bill provides that a dismissal or action will not be found unjustifiable solely because of minor or technical defects, provided these defects did not lead to unfair treatment of the employee. Further, the Bill describes the reasonable process to follow, considering the employer's resources.

We are entirely supportive of the move of focus from process to substance. Currently the system has high expectations on the expertise and ability of the employer. Large employers have access to resources and experts but small employers have a similar knowledge level to the employee. There is an unfair balance on the small employer at least and a proven repeated failure by the employee, or worse, dishonesty, is not negated by a small flaw in the employer's process.

Fairness applies to both parties.

- Reinstatement is no longer the primary remedy.

This is an excellent recognition of reality. Reinstatement is not always feasible, or even wanted by the employee.

Some time may have passed. Often there will not be a job to come back to and other relationships may also be damaged. – Ex colleagues' reactions will factor in too, potentially affecting the efficiency of the workplace.

**Employment relationship problem solving** – *clauses 20, 23, 27 & 34*

- The Bill provides for mediation assistance at an early stage, including discussions with a party without their representative present.

We strongly support this mechanism for achieving an early and inexpensive resolution. This will be an opportunity to resolve issues before they become convoluted and may save some situations from going beyond the point of reconciliation.

We do have concerns though relating to the resourcing for this additional mediation servicing. This early intervention assistance will be helpful only if access to skilled mediators is available. If waiting lists result, it would unfortunately do more harm than good.

- Provision is made for a new process whereby the parties can agree in writing to a mediator making a recommendation and a date when it will become final.

Again, this may lead to a faster and more cost effective – and possibly less caustic - solution for all and so is supported by the Association.

- Cases that have been to mediation are to be given priority by the Authority.

This too will mean parties communicate and will help to encourage early resolution.

- Authority and the Court can dismiss frivolous and vexatious proceedings.

This will deter time-wasters and 'bounty hunters'.

- Minors are able to be party to and bound by terms of settlement as if of full age and capacity.

This seems only logical given they are bound by Employment Agreements.

**Labour Inspectors** – *clause 36*

- Labour Inspector role and functions are defined. Inspectors are given powers to issue improvement notices (with a date for compliance) and to enter into enforceable undertakings with employers.

This will allow Labour Inspectors to better work to encourage sound, compliant employment practices. Currently their focus is much more on reacting to complaints from employees.

Finally, we have no objection to the proposed changes to:

- The Authority and the way it operates, and
- The provisions for and amounts of penalties.

***The Association supports the Employment Relations Amendment Bill (No. 2) and recommends that it proceeds.***

We wish to appear to speak to our submissions.

New Zealand Retailers Association  
September 2010