

Regulatory Systems (Workplace Relations) Amendment Bill

Government Bill

As reported from the Transport and Industrial Relations Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Regulatory Systems (Workplace Relations) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Regulatory Systems (Workplace Relations) Amendment Bill is one of three omnibus bills that would amend legislation administered by the Ministry of Business, Innovation and Employment. The bills seek to reduce the chance of regulatory failure by maintaining the efficiency and effectiveness of the regulatory systems established by the Acts they would amend.

This bill would amend the Employment Relations Act 2000 and the Parental Leave and Employment Protection Act 1987 to clarify certain provisions.

Under section 32 of the State Sector Act 1988, the chief executive of the Ministry of Business, Innovation and Employment is responsible to the relevant Ministers for the stewardship of the legislation that the ministry administers. The proposed amendments were identified as part of this responsibility.

This commentary covers the main amendments that we recommend to the bill. It does not cover minor, technical, or consequential amendments.

Amendments to the Employment Relations Act

We recommend the following amendments to take into account changes made in 2016 to the Employment Relations Act regarding the grounds on which an employee may take a personal grievance.

Grounds for which an employee may take a personal grievance

Section 67B(3) of the Employment Relations Act allows an employee on a trial period to make a personal grievance claim on the grounds specified in section 103(1)(b) to (h) of the Act. The Employment Relations Amendment Act 2016 extended the grounds to include subsections 103(1)(i) and (j), namely that:

- the employee has been treated adversely for refusing to perform certain work
- their employer has failed to pay them the compensation to which they are entitled when a shift has been cancelled
- their employer has treated them adversely for a prohibited health and safety reason or has contravened section 92 of the Health and Safety at Work Act 2015.

We recommend inserting new clause 3A, which would amend section 67B(3) by replacing the reference to “section 103(1)(b) to (h)” with “section 103(1)(b) to (j)”. This would allow employees to take a personal grievance on the grounds specified rather than having to rely on establishing an unjustified disadvantage.

We considered whether this amendment should be retrospective from the commencement date of the Employment Relations Amendment Act 2016. We were particularly concerned about the right to natural justice for those undertaking a 90-day trial period. However, we were advised that this was unnecessary. Under section 103 of the Act, employees could still have made a personal grievance claim on the grounds of unjustified disadvantage.

Adverse conduct for prohibited health and safety reasons

Section 110A(5) of the Act sets out an employer’s possible defence to a personal grievance claim for prohibited health and safety reasons. We recommend inserting new clause 3B to replace the cross-reference “section 103(1)(h)(i)” with “section 103(1)(j)(i)”. This would ensure that employers have the correct defence available if an employee makes a personal grievance claim on the grounds that they have been treated adversely for a prohibited health and safety reason.

Amendments to the Parental Leave and Employment Protection Act**Keeping-in-touch days**

Section 71CE(3) of the Parental Leave and Employment Protection Act provides that parental leave payments can be recovered as an overpayment when an employee performs work in certain circumstances while on parental leave. We recommend inserting new clause 5A to amend section 71CE(3)(b) of the Act by inserting the word “paid” before “parental leave”. This would make it clear that the ability to recover overpaid parental leave payments applies only in relation to work performed during a period of paid parental leave. There are no restrictions on the paid work that an employee can do while on unpaid parental leave.

Clarifying entitlements to preterm baby payment

Clause 6 of the bill as introduced would replace section 71K(2) of the Act to allow a person who is entitled to a preterm baby payment to return to work before recommencing their parental leave. Although they would forfeit their preterm baby payment, they would still be eligible for parental leave payments.

To eliminate potential confusion, we recommend inserting clause 5B to amend section 71DA. New section 71DA (5A) would clarify that the two groups the provision covers are:

- a person who has a preterm baby, returns to work and forfeits some or all of their preterm baby payment, then commences the parental leave payment period no later than the original expected due date
- a person who has already started their parental leave payment period early (for example, to take bed rest on a doctor's orders), has a preterm baby and has their parental leave payments suspended, returns to work forfeiting some or all of their preterm baby payments, then recommences their parental leave payment period no later than the original expected due date.

Enabling paid leave entitlements to be taken before parental leave

Section 71K of the Act was amended in 2016 and, as part of rationalising the provisions of the Act, the separate provisions for employees and self-employed were consolidated. It now provides that parental leave payments for employees and the self-employed begin on the earlier of the date the person begins parental leave or the expected due date. Before the amendment, parental leave payments for employees began on the date on which their parental leave commenced.

Since this amendment, it has become apparent that many employees prefer to take their paid leave entitlements, such as annual holidays or time off in lieu, before starting their parental leave payments. This allows them to start their parental leave payments at a later date.

Although employees have up to a year to apply for the parental leave payment if they have not returned to work, the actual parental leave payment is fixed as the 18 weeks from the date of the birth (at the latest). This means that employees who choose to take their annual holiday entitlement at the same time may have to pay secondary tax or receive the parental leave payments as backdated lump sum payments.

To address this, we recommend amending clause 6, section 71K(2), to provide that an employee may start their parental leave payment period after taking their paid leave entitlements, such as annual holidays.

Commencement date

We understand that allowing an employee to take their paid leave entitlements before commencing parental leave would require updates to the application forms, publications, and website information. Businesses may also need time to prepare for the changes and adjust any internal human resources and payroll policies. Therefore, we

recommend amending clause 2(1) (Commencement) to provide that Part 2 of the bill would come into force on 1 June 2017. This would allow time for Inland Revenue to make the necessary updates and for the Ministry of Business, Innovation and Employment and Inland Revenue to communicate the changes to employers and employees prior to implementation.

We recommend amending clause 2(2) to provide that the rest of the Act would come into force on the day after the date of Royal assent.

Appendix

Committee process

The Regulatory Systems (Workplace Relations) Amendment Bill was referred to the committee on 18 October 2016. The closing date for submissions was 1 December 2016. We received and considered one submission.

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

Committee membership

Jonathan Young (Chairperson)

Andrew Bayly (until 8 February 2017)

Hon David Bennett (from 8 February 2017)

Iain Lees-Galloway

Peeni Henare

Clayton Mitchell

Sue Moroney

Dr Parmjeet Parmar

Denise Roche

Alastair Scott

Hon Maurice Williamson

Dr Jian Yang

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Bill**

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Simon Bridges

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Regulatory Systems (Workplace Relations) Amendment Act **2016**.

2 Commencement

- (1) **Part 2** of this Act comes into force on 1 June 2017. 5
- (2) ~~This~~The rest of this Act comes into force on the day after the date of Royal assent.

Part 1

Employment Relations Act 2000

3 Principal Act 10

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

3A Section 67B amended (Effect of trial provision under section 67A)

In section 67B(3), replace “section 103(1)(b) to (h)” with “section 103(1)(b) to (j)”.

3B Section 110A (Adverse conduct for prohibited health and safety reason) 15

In section 110A(5), replace “section 103(1)(h)(i)” with “section 103(1)(j)(i)”.

4 Section 142W amended (Involvement in breaches)

Replace section 142W(2) and (3) with:

- (2) However, if the breach is a breach by an entity such as a company, partnership, limited partnership, or sole trader, a person who ~~holds~~occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity. 20
- (3) For the purposes of **subsection (2)**, the following persons are to be treated as officers of an entity:
- (a) a person occupying the position of a director of a company if the entity is a company: 25
 - (b) a partner if the entity is a partnership:
 - (c) a general partner if the entity is a limited partnership:
 - (d) a person occupying a position comparable with that of a director of a company if the entity is not a company, partnership, or limited partnership: 30
 - (e) any other person occupying a position in ~~relation to~~ the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

Part 2
Parental Leave and Employment Protection Act 1987

5 Principal Act

This Part amends the Parental Leave and Employment Protection Act 1987 (the **principal Act**).

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5A Section 71CE amended (Keeping-in-touch days)

In section 71CE(3)(b), before “parental leave”, insert “paid”.

5B Section 71DA amended (Entitlement to preterm baby payment)

After section 71DA(5), insert:

(5A) A person may return to work as an employee or a self-employed person after becoming entitled to a preterm baby payment, in which case— 10

(a) either,—

(i) if the person receives a preterm baby payment, the preterm baby payment period ends on the date on which the person returns to work; or 15

(ii) if the person does not receive a preterm baby payment, the person’s parental leave payment period is suspended on the date on which the person returns to work; and

(b) the person’s parental leave payment period resumes on the date on which the person resumes parental leave (which must be no later than the original expected date of delivery, had the child not been born prematurely). 20

6 Section 71K amended (Start of parental leave payment)

Replace section 71K(2) with:

(2) Despite subsection (1),— 25

(a) an employee who takes a period of paid leave at the start of his or her parental leave period may elect to start his or her parental leave payment period on the day after the date on which that period of paid leave ends;

(b) if a person becomes entitled to a preterm baby payment under section 71DA(1) and that person’s parental leave payment period has not begun, **subsection (3)** applies instead of subsection (1). 30

(2) However, **subsection (3)** applies, instead of subsection (1), if—

(a) a person is entitled to a preterm baby payment under section 71DA(1); and

(b) the parental leave payment period in respect of the child has not already begun but been suspended under section 71DA(5). 35

- (3) If this subsection applies, the period in relation to which a parental leave payment is payable to the person in respect of the child does not begin until the earlier of—
- (a) the date the person commences parental leave; and
 - (b) the original expected date of delivery, had the child not been born prematurely. 5

7 Section 71L amended (End of parental leave payment)

In section 71L(2), replace “Subsections (1)(b) and (c) do not apply, and parental leave payments continue to be payable until the date specified in subsection (1)(a)” with “Subsection (1)(c) does not apply, and parental leave payments continue to be payable until the earlier of the dates specified in subsection (1)(a) and (b)”. 10

8 Section 71N amended (Annual adjustment of parental leave payment rates)

- (1) In section 71N(1), replace “must be adjusted as at 1 July each year by any percentage movement upward in average ordinary time weekly earnings using the method specified in subsection (2)” with “and persons who are eligible for a parental leave payment as an employee and as a self-employed person under section 71M(1B) are adjusted, by this section, by increasing the rate by the same percentage as any percentage movement upward in average ordinary time weekly earnings as calculated under subsection (2)”. 15 20

(2) In section 71N(2), replace “must be made” with “is calculated”.

(3) In section 71N(2)(a), replace “on which the adjustment is based must be” with “is”.

(4) In section 71N(2)(b)(ii), replace “must be based on” with “is”. 25

(5) In section 71N(4), replace “must be set as at 1 July each year as” with “is adjusted, by this section, as at 1 July each year, as”.

(6) Replace section 71N(5) with:

- (5) The Minister must, as soon as practicable after 1 July each year,—
- (a) publish the adjusted rates for employees and self-employed persons on an Internet site maintained by or on behalf of the department; and 30
 - (b) advise the Chief Parliamentary Counsel of those rates.

**Regulatory Systems (Workplace Relations) Amendment
Bill**

Legislative history

12 October 2016

18 October 2016

Introduction (Bill 187–1)

First reading and referral to Transport and Industrial Relations
Committee