



PSA Submission

Employment Relations (Triangular Employment) Amendment Bill

May 2018

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About the PSA

The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 64,000 members. We are a democratic organisation representing members in the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

The PSA has been advocating for strong, innovative and effective public and community services since our establishment in 1913. People join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

PSA member networks, Te Runanga and sector committees have been invited to comment on the Amendment Bill and their views are appended. The PSA has also repeated illustrative comments in the body of this submission.

The PSA is an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU) and supports the submission of the CTU on this bill.

The PSA's position

The PSA supports the two purposes of the bill:

1. Employees in a triangular employment relationship should have the right to coverage of a collective agreement covering the work being performed for the business or organisation which exercises control and direction over the performed work (the secondary employer).
2. Employees are enabled to allege a personal grievance against the business or organisation which exercises control and direction over the performed work (the secondary employer).

The PSA sees this bill as a first step towards ensuring protection and equality for all workers in a labour market which is characterised by increasing diversification of forms of work. To ensure the realisation of the purposes of the bill we recommend considering some changes.

Background

The diversification of forms of work – of which triangular employment is one – is not a natural nor unavoidable consequence in the changing world of work. We recognise that permanent, full-time employment with one employer is not the norm for a lot of workers any more. The employment relationship has substantially diversified: part-time work, fixed term work, casual work, seasonal work, labour hire or temporary agency work, and (dependent) self-employed work (or contracting) are a few of the new forms of work. From our experience a cap placed on public service staffing in New Zealand has contributed to the increased prevalence of different forms of work.

Workers who are employed by one employer but working under the control and direction of another business or organisation find themselves in a triangular employment relationship. These workers currently do not have automatic employment rights with the organisation which exercises control and direction over them. Their terms and conditions of employment are often determined by a (less favourable) individual employment agreement than the collective in place at their workplace. These workers should have a clear entitlement through the Employment Relations Act 2000 to allege a personal grievance against the employer who exercises control and direction over them.

The impacts of diversification of forms of work

The diversification of forms of work leads to a polarisation of and inequality between workers along the forms of work they are engaged in. The PSA is particularly concerned about the intersection of precarious and insecure work arrangements and low pay. While workers in this situation have employment, it is neither secure nor well paid and they do not have the choices available to others nor the ability to save and plan for the future. Often access to training is limited which challenges the worker's career development and enhanced organisational quality of outcomes. There is also the potential for increased health and safety risks for these workers. Women, Māori and Pasifika and people with disabilities are more likely to find themselves in this situation.

Not only can the use of triangular employment lead to an increasingly polarised workforce but also to an increasingly individualised or atomised workforce. Strengthening workers' employment rights and collective voice will slow the process of polarisation and atomisation of the workforce which is consistent with the purposes of the Employment Relations Act 2000. We recognise that it is a

challenge for labour law to accommodate changes to ensure security and protection of all workers in a variety of forms of work. If the government wants to ensure decent work for all and high-quality public services this challenge needs to be taken seriously.

Within our coverage - the public service, the wider state sector (the district health boards, crown research institutes and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors - labour hire has become an increasingly common practice. This challenges people's working conditions and the delivery of high-quality public services. The bill will contribute to more equal working rights and conditions to workers. To achieve the goal highlighted by Kieran McNulty in the bill's first reading which he summarises as

'job security, dignity, and an opportunity to progress in a working life, predictable hours of work and income, and the capacity to plan financially for themselves and their families'

political decisions need to be taken to (particularly) fund the public sector adequately to directly employ people on decent conditions. This will also contribute to high-quality services people rely on for a decent life.

Recommendations

Although the PSA welcomes this bill we like to recommend some changes.

PSA support for the CTU submission

We support the CTU's submission and would like to stress in particular the importance of using the terms employer and controlling third party. This is a preferential formula to that of primary and secondary employer because the formula needs to be broad enough to accommodate all the possible permutations of triangular employment and to be sufficiently flexible to adapt to continuing changes in employment trends.

We also support the CTU's submission that the test for controlling third party uses the phrase "substantially similar" which is preferable to "equivalent or substantially equivalent" as it is able to accommodate a wider variety of situations indicating elements of a triangular employment relationship.

The PSA would also like to highlight our concern that the bill only extends coverage of collective agreement, where there is one in place with the host employer, to labour hire employees, where those labour hire employees are union members. This means the bill does not address the circumstance of labour hire employees being engaged by the agency under individual employment agreements which are inferior to individual employment agreements of the permanently engaged employees of the controlling third party.

Inclusion of legal entitlement to permanent employment

The bill in its current form does not state a legal entitlement to permanent employment after a certain period. To limit continuous use of triangular employment (which is contrary to the purpose of providing temporary, short notice or seasonal employment) the bill could include a transition

clause similar to what the European Commission proposes to reform the Posting of Workers Directive which deals with rules and regulations related to recruiting and sending workers to a country other than the country where the business is located. It deals with temporary work agencies (or labour hire companies) as well¹. The reform suggests including

‘if the duration of posting exceeds 24 months, the labour law conditions of the host Member States will have to be applied, where this is favourable to the posted worker.’

This could be adapted to read

‘if the duration of hiring exceeds xx months, the employee has the right to be directly employed by the controlling third party, where this is favourable to the employee.’

Data and human rights protection for workers in a triangular employment relationship

The bill fails to address the data protection of workers. Anecdotes suggest that the controlling third party choose from a list of candidates employed with the primary employer which specifies workers’ sex, ethnicity, sick days, disability etc. This creates a risk of inequality in recruitment practices, unequal work opportunities and hence unequal labour market outcomes for certain groups of people who should be protected from discriminatory practises by the Human Rights Act 1993.

Persons employed using sham contracting arrangements should also be entitled to employment rights at work

Contractors are not deemed to be employed but deemed to be self-employed. They manage their own financial and contractual arrangements including payment of tax and the billing for the work they do. This is equally true for consultants. Certain contractors can be called dependent self-employed persons if they are dependent on mainly one employer undertaking the same work in the same space as employees should be entitled to the same rights at work as employees. Other terms used for these arrangements are solo self-employed, disguised or sham self-employed persons.

They are not covered by the definition of employee in the Employment Relations Act 2000 and therefore do not have access to collective bargaining, employment protections and dispute processes in the Act. This is where the similarity with workers in a triangular employment relationship lies. Like employees with a controlling third party, contractors cannot join the collective agreement or have access to employment rights at work and dispute processes.

Decent work deficits across all employment and work relationships need to be tackled. Therefore, we submit that dependent self-employed persons should also be entitled to enhanced employment rights at work. At the moment the protections of the Employment Relations Act 2000 are denied to this group of workers.

If contracting as a form of work is not dealt with at some point soon the risk exists that organisations and businesses will resort to contractors. The legislation needs to ensure that all workers enjoy the same employment rights. In addition, business and especially public sector organisations must be

¹ For an overview of the Directive and proposed reforms:
<http://ec.europa.eu/social/main.jsp?catId=471>

required to employ people under decent working conditions to ensure a good working life, high quality services and a sustainable world of work – now and in the future.

Thank you very much for the opportunity to be heard.
We would like to make an oral submission to the Select Committee.

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