VICTORIA
UNIVERSITY OF WELLINGTON
TE WHARE WĀNANGA
O TE ŪPOKO O TE IKA A MĀUI

Centre for Labour, Employment and Work

Government begins employment law overhaul

Sue Ryall and Stephen Blumenfeld, CLEW

Former Prime Minister Bill English described the Government's recently proposed changes to New Zealand's labour law as a 'union shopping list' and argued that the reforms are 'cutting across what has been a very impressively performing labour market'. How well-founded are these claims, though? To answer this, we look to data in CLEW's Collective Agreements database for the year ending 31 May 2017 and evaluate those proposed changes against what is currently provided by way of CAs.

Union access to workplaces

Since 2011, Union access to workplaces has required by statute the union to obtain the employer's consent in advance. The employer must respond to the request within one working day and cannot 'unreasonably' withhold access. The exception to this statutory requirement is where there is provision in the collective agreement for the union to have unfettered access to the workplace to meet with its members or to conduct union business (including recruitment).

This restriction on union access to workplaces in the ERA has rendered it particularly difficult for unions to organise on greenfield sites, where a collective agreement is not in place. The changes in the Government's new legislation returns to the status quo that existed prior to 2011, implying unions will now be able to access workplaces without gaining prior consent from the employer, although they will still be required to enter workplaces only at reasonable times and not unduly interrupt business continuity.

Notwithstanding this change, it has been the case for many years that most employees covered by collective agreements have had provision in those agreements allowing union representatives ready access to their workplace. Two-thirds of employees across just under half of all private sector collective agreements in effect in the year to June 2017 included provision for their union to enter the workplace in order to meet with employees, both union and non-union, without requiring their employers' permission to do so. This provision is found in the agreements of a majority of employees on CEAs in most industries.

Union delegate leave

Union delegate leave is paid time for union delegates to complete their duties, such as talking with new employees about the collective agreement, representing their workmates when issues arise, and consulting with the employer when changes are proposed. Under the

proposed changes to the Act, employers will be required to pay union delegates for reasonable time to undertake their role. Regardless of this change to the legislation, provisions allowing for paid union delegate leave are common in collective agreements.

More than four-fifths of private sector employees on collectives are covered by an employment agreement under which union delegates in their workplace are provided with paid leave to conduct union business. Nevertheless, such provision is found in only two-thirds of all collective agreements, suggesting that union delegate leave applies most to larger coverage agreements. Provision of union delegate leave is particularly common in collectives covering workers in food retailing and other retailing and warehouse trade, as well as those in financial services. In the latter, more than 90 percent of covered employees have such provision specified in their employment agreement. Union delegates working in most areas of manufacturing, information, media and telecommunications and transport, postal and warehousing are also likely to have access to paid leave for that work.

Pay rates in collective agreements

Under the proposed changes, collective agreements will be required to include pay rates or ranges for various levels of staff**.** In our collective agreement data, we code agreements for 'discrete' wage rates (those that have wage rates expressed for particular occupations, skills and competencies and/or length of service); ranges of rates either for particular occupations/roles or across an organisations such that the employee's rate is at the discretion of the employer or subject to performance; only a minimum rate of pay for the organisation is included and there is no link to occupations or roles.

With the possible exception of the local government sector, our data for the year ending June 2017 suggests that the proposed legislative changes will have little impact in this regard. To this end, whereas only 6 percent of collective agreements in private sector organisations do not include pay rates, 11 percent of private sector collective agreements include only the minimum rate paid rather than stipulating pay rates or specifying wage ranges for different occupations or across groups of employees. It is more likely (50 percent of employees) that a private sector employee's wage or salary will be expressed as 'discrete' rates for particular jobs, occupations or skills. It is, nonetheless, becoming more common for wages to be specified as a range of rates (currently 39 percent of private sector employees) and this is the most common way that wages are specified in public sector collective agreements.

Extension of collective agreement for first 30 days

The Government's proposed changes also reinstate the requirement, removed in 2015, that new employees who are not union members be covered for first 30 days of employment by the terms and conditions of the collective agreement, if their work was covered by a collective agreement in that workplace. Unions have long seen this as an important entitlement that prevents the employer from offering terms and conditions that undermine the collective.

Despite this change, our data for the 2016/17 survey year indicate that more than half of employees under collective agreements in the private sector were covered by an agreement which either covered new employees in their first 30 days or covered all employees throughout their tenure with the employer, regardless of union membership status. Forty

percent of employees in the private sector on CEAs are on agreements with provision that new employees will be covered by the CEA in their first 30 days, and a further 11.5 percent are covered by a collective agreement, regardless of their joining the union. Nevertheless the '30-day' rule applies in agreements covering only 35 percent of collectivised employees.

Ninety-day trial periods

Ninety-day trial periods were brought into law by the former National-led Government in March 2009 with the stated purpose of encouraging small businesses (under 20 employees) to take on new employees deemed to be 'high-risk', without the danger of incurring a legal challenge in the event of dismissal. The government deemed it successful in its objectives and from 1 April 2011, this ability to employee on a 'trial period' was extended to all employers regardless of the size of the organisation. A study by Motu Economic and Public Policy Research Trust funded by the New Zealand Treasury and published in 2016, though, has shown that that policy had little effect on hiring or overall employment. Thus, the legislation simply made it easier for an employer to dismiss a recently hired employee. The current Government's proposed law change will once again make 90-day trial periods available only to businesses with under 20 employees.

Our analysis suggests 90-day trials are seldom addressed in collective agreements. Of the 136,931 employees covered by the 1652 private sector collective agreements in our database for 2016/2017, 5 percent enjoy protection of a clause specifically excluding them from employment on a grievance-free trial basis. Despite this, only 11 percent – across 13.5 percent of all CAs in the private sector – have specific provision in their agreement allowing their employer to use a trial period for new employees. In the absence of any trial period clause, the rule defaults to the Act. Hence, as things currently stand, the majority of employers who are party to a collective agreement, including those employing 20 or more workers, are unrestricted in this regard.

Where do trial period clauses exist? They are most likely to be found in agreements related to the agriculture, forestry and fishing sector and to a lesser extent in manufacturing. Such clauses are virtually non-existent in the public sector, the exception being collective agreements covering local government employees, where around 4 percent of those employees are covered by agreements allowing the use of trial periods and 1 percent are covered by agreements forbidding such practice.

On the other hand, close to one fifth of employees in the private sector agreements included in our database are covered by a probationary clause which allow employers to assess a new employee's skills before offering them permanent employment. Under such a clause, the employee must be informed of issues around their performance and given an opportunity to improve during the probationary period. The employer also must provide adequate training and support to help probationary employees improve to the required level of performance/competency. Unlike under trial periods, in the event of dismissal, the probationary employee is entitled to challenge the employer's actions through the personal grievance procedures.

Probationary clauses are commonly found in collective agreements covering workers in information and media industries, accommodation and food services, and mining, with more

than 50 percent of employees on CEAs in those industry groups being subject to such a clause in their agreement. It is also interesting that most probationary periods specified in those clauses extend for a similar period to the 'trial periods' - equal to or less than three months. Despite this most employees are covered by collective agreements with no probationary clause included.

Summary

Our analysis of CLEW's collective agreement data suggests the changes the Government is making to New Zealand's labour law will, for the most part, merely bring the Employment Relations Act into line with what is currently provided for a majority of employees covered by collective agreements and what has become the 'standard' across the private sector and most industries. The one exception to this is with regard to 90-day trial periods, where the proposed change will return the law to the previous status quo to make it available only to employers with fewer than 20 employees.

Finally, as Labour has not yet been able to get agreement from their coalition partner to introduce its promised sector-wide 'fair pay' agreements, which are intended to set a standard or 'bottom-line' provisions across an industry. Further work will be done on this in the next year to see how these agreements would be developed and how they would work. At this stage, though, the changes proposed by the new Government in its first 100 days do not seem to be the 'radical' change the Party touted during the election campaign.