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Fair Pay Agreements Bill

This Bill is presently before the Select Committee, which is awaiting submissions until 19 May 2022. As the Bill has serious consequences for employers, members are urged to make submissions as soon as possible, here.

Employer organisations consider the Bill a breach of International Labour Organisation principles and have filed a case with the ILO. At issue is the voluntary nature of bargaining and the fact that the Bill forces parties to conclude an agreement, or to have the Employment Relations Authority do so for them. The following is from the Explanatory note to the Bill.

"Policy objective

The Fair Pay Agreements Bill provides a framework for bargaining for fair pay agreements. The objective is to improve labour market outcomes in New Zealand by enabling employers and employees to collectively bargain industry-wide or occupation-wide minimum employment terms. The Bill builds on the analysis and recommendations of the Fair Pay Agreement Working Group in December 2018.

While New Zealand's labour market has some strengths, it also has systemic weaknesses. These include a significant prevalence of jobs with inadequate working conditions, low wages, and low labour productivity. For example, Māori, Pacific peoples, young people, and people with disabilities are over-represented in jobs where low pay, job security, health and safety, and upskilling are significant issues. Barriers to good labour market outcomes are particularly prevalent for people who fall within more than 1 of those groups. The Bill will help address these issues.

At present, New Zealand's employment relations and employment standards regulatory system only allows for collective bargaining at an enterprise level i.e. between individual employers and unions. There is no mechanism for parties to co-ordinate collective bargaining across entire occupations or industries.

The Bill creates a framework for bargaining for fair pay agreements by—

- setting out a general duty of good faith, and good faith obligations that apply to bargaining parties (within the same bargaining side and between bargaining sides); and
- prescribing processes for initiating bargaining (including when a default bargaining party may be required), carrying out bargaining, and finalising a fair pay agreement; and
- providing processes to resolve disputes that may arise during bargaining for a fair pay agreement; and
- establishing regulation-making powers to give full effect to fair pay agreements bargained under the Bill.

Fair pay agreement bargaining process

The Bill enables any eligible union to initiate bargaining for a fair pay agreement if it meets either a representation test of at least 1,000 employees or 10% of the employees in proposed coverage, or a public interest test based on specified criteria such as low pay, little bargaining power, or lack of pay progression. The chief executive of the Ministry of Business, Innovation, and Employment (**CE MBIE**) will

assess applications based on either test and may request further evidence and information from the initiating union if required.
The Bill requires an initiating union to describe the coverage of a proposed fair pay agreement (a **proposed FPA**) as either an industry-based agreement or an occupation-based agreement. All employers and employees within the proposed coverage will be covered by the fair pay agreement.

Under the Bill, bargaining will take place between bargaining parties representing employees and employers. Employee bargaining parties will be eligible unions. Employer bargaining parties will be eligible employer associations, and could also include certain specified public sector employers who are allowed to participate directly in bargaining. A bargaining party must meet certain requirements, such as having an employee (or an employer who has an employee) within the coverage of the proposed FPA as a member. If one side is unrepresented (or becomes unrepresented during bargaining), default parties will step into bargaining.

The Bill creates notification and communication obligations for eligible unions and affected employers. Employers must allow employees to attend two 2-hour paid meetings for fair pay agreement purposes (1 additional paid meeting must be allowed for a proposed FPA, a proposed renewal, or a proposed replacement if the (initial) 2 meetings have been used). Employee bargaining parties will also be able to access a workplace if there are employees within coverage at that workplace and the visit is for fair pay agreement purposes. The Bill provides safeguards relating to the notification and communication requirements, similar to those under the Employment Relations Act 2000.

The Bill sets out a general obligation of good faith that applies to certain relationships, which is based on similar obligations in the Employment Relations Act 2000. It also outlines specific good faith obligations between parties within the same bargaining side (for example, between 2 bargaining parties), and also between the employee bargaining side and the employer bargaining side. These obligations will support efficient, constructive bargaining that is focused on finalising a fair pay agreement in a timely manner. Each bargaining side will also have obligations to use its best endeavours to represent those within coverage, and to ensure that Māori employees and employers are represented effectively.

The Bill sets out what must, or may, be contained in a fair pay agreement. Each fair pay agreement must specify when it comes into force and when it expires, its coverage (with sufficient clarity), the normal hours of work, minimum base wage rates (including when and how they are adjusted), overtime, penalty rates, any superannuation, the governance arrangements that will apply to the bargaining sides, and the process for each bargaining side to engage with the other bargaining side, if they are bargaining to vary the agreement.

The Bill also sets out several other topics that bargaining parties must discuss whether to include in a fair pay agreement, for example, health and safety requirements or leave entitlements. Those do not need to be included in the fair pay agreement. Bargaining sides will also be able to agree different terms that apply to different employees or classes of employees, for example, the terms of the fair pay agreement may differentiate on the basis of the territorial districts in which the employees work. Bargaining sides can also agree that the fair pay agreement (or certain terms of the fair pay agreement) will have delayed commencement for specified employers. Bargaining sides will be able, but not required, to discuss and include any other employment-related topics they consider to be relevant.

The Bill provides a dispute resolution process based on the Employment Relations Act 2000. Parties may access mediation and support services under the Bill. If parties cannot resolve their dispute using those services, a bargaining party may apply to the Employment Relations Authority (the **Authority**) for a determination. In addition, if parties cannot reach agreement during bargaining and specified criteria are met (for example, exhausting all other reasonable alternatives) or if ratification of a fair pay agreement has failed twice, a bargaining side may apply to the Authority to fix the terms of the fair pay agreement through a determination.

After bargaining, in order to finalise a fair pay agreement, it must be—

- assessed and approved by the Authority; and
- ratified by the employees and employers who would be covered by the proposed FPA; and
- verified by the CE MBIE; and
- brought into force by the CE MBIE through secondary legislation.

When a fair pay agreement has been finalised, all employers within coverage will be bound by it, regardless of whether they participated in the bargaining process. Likewise, all employees within coverage will receive the new minimum employment terms set by the fair pay agreement. This will improve outcomes for employees across the labour market.

Enforcement
The Bill includes a penalty regime for non-compliance consistent with other employment legislation."

Comment
Observers have commented that The Bill signals a return to the compulsory industry awards of 20 years ago, with its concomitant demarcation disputes and disruption, and destructive industrial action.

Compulsory redundancy courtesy of proposed NZIIS
MBIE has published details of a proposed income insurance scheme, the NZ Income Insurance Scheme, for consultation.

- Broad coverage for different working arrangements
- Coverage for job losses due to redundancy, layoffs and health conditions and disabilities
- A four-week notice period and four-week payment, at 80% of salary, from employers
- A further six months of financial support from the scheme, at 80% of wages or a salary
- Option to extend support for up to 12 months for training and rehabilitation
- A case management service to support people's return to work
- Administered by ACC
- Funded by levies on wages and salaries, with both workers and employers paying an estimated 1.39% each
- Workers eligible after six months of levy contributions in the previous 18 months.

The compulsory redundancy pay is explained as follows –
"Employers will give notice and four weeks' pay if they lay off workers or make them redundant.
All permanent employees will get four weeks' notice, and their employer will continue to pay wages for four weeks at 80% when the job ends, after which income insurance payments would begin. These payments are in addition to any other redundancy provisions in an employment agreement.

The payment encourages employers to consider if redundancy is necessary, or if alternatives can be found. It will also discourage fraudulent claims. Employers could seek a refund of some or all of the payment if they assist the worker to find work within the initial four-week period. This payment also reduces costs for all employers and employees, supports good employers, and makes sure that the costs of redundancy are more fairly shared.

In the event a business fails and the business can't pay, the scheme will cover this payment and seek to recover this from liquidators.

Employers will need to provide this notice period and payment if they end someone's employment because a health condition or disability means the employee can no longer do their work. This encourages employers to make reasonable attempts to accommodate the employee's health condition or disability, through things like new equipment or flexible working arrangements. These obligations don't apply if a worker quits for health reasons."

Comment
So, employers will pay –

- the notice set out in an employee's employment agreement or collective agreement
- plus four weeks wages at 80%
- plus any redundancy compensation set out in the employment agreement or collective agreement.

The scheme has been roundly criticised by employer organisations for being impractical and much work is clearly needed before it can be introduced into Parliament as a Bill. It will clearly change a lot before then and while it is not as urgent as the Fair Pay Agreements Bill, it is highly recommended that members read the full discussion document and provide feedback through either a short survey or a full submission here.

This article is brought to you by AdviceWise People, who provide WGANZ's free employment helpline 0800 692 384. If you have any questions or would like to discuss the article, please call Philip or Anthony.