Submission

by

Business|NZ

to the

Transport and Industrial Relations Select Committee

on the

Employment Relations (Flexible Working Hours) Amendment Bill

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Employment Relations (Flexible Working Hours) Amendment Bill

1. Recommendation

That the bill not proceed.

2. Why what the bill proposes should be rejected

2.1 The amendment bill is a reflection of current demands for work/life balance but, in practice, may well defeat its own purpose.

2.2 Employers are generally prepared to accommodate individual needs where accommodation does not unduly disrupt the business, including the interests of other employees. This voluntary approach is consistent with an employment relationship based on good faith and helps with staff recruitment and retention.

2.3 However, there is a considerable difference between a voluntary consideration of employee requests and enforced legislative provision giving the Employment Relations Authority the right to substitute its own decision for that of the employer, awarding compensation to the applicant employee in the process..

2.4 Employers' willingness to take on employees is already affected by a natural concern that they may be faced with personal grievance proceedings if the employment does not work out. This is a state of affairs that the proposed legislation will only exacerbate

25 Given the potential for Employment Relations Authority intrusions, employers may well respond by offering fewer job opportunities to women with young children believing that their businesses cannot operate effectively in the atmosphere of uncertainty that the legislation would create.

2.6 Workplace flexibility is good practice, not something to be imposed. If there is a difference of opinion between employer and employee as to how work can be managed (and the bill allows employees to indicate their views on the matter) the end result may well be an exercise in frustration for both as a third party (the Employment Relations Authority) is brought into the decision-making process.

2.7 Contrary to best workplace practice, the bill encourages a ‘me’ not a ‘we’ attitude to the issue of flexibility - a one-sided rights-based approach rather than an approach that encourages co-operation and a proper balancing of the interests of both parties.

2.8 The bill itself is supported by highly generalised and unproven statements. It is focused entirely on “making parents’ lives easier” and fails to take any real account of how a workable balance of interests (employer and employee) might be achieved.

2.9 To focus on only one party to the employment relationship – as the bill does – is to ignore workplace realities. The capacity for businesses and other enterprises to run effectively may be much reduced if the provision of flexible working hours is placed in a compulsory setting.

3. Background to the bill

3.1 The issue of flexible working hours has recently gained a degree of significance, leading, in 2003, to the introduction of United Kingdom legislation allowing some parents to ask their employers for work hours adapted to family circumstances.

3.2 A press release issued by the Green Party when the present bill was introduced noted that it “is based on UK legislation” and this “had been extremely successful in changing workplace culture”[1].

3.3 The above is a strong statement but one that must be viewed with caution. Not only are there notable differences between the two pieces of legislation but as well, anecdotal evidence indicates that, in any event, the UK “model” may not be the out and out success its proponents claim.

3.4 The discussion below sets out Business New Zealand’s reasons for its view that this private member’s bill should be rejected.

4. What the bill provides

4.1 An immediate difference between this bill and the UK’s statutory right to request flexible working (RTR) is that the UK model puts the needs of business first. In the UK the right to request is just that, a right to *ask* for flexible hours, not a right to flexible working.

4.2 By contrast, the bill’s purpose statement (clause 3) states the purpose of the Act as being “to grant qualifying employees the *right to change* their working hours …”.

[1] “Bill will give more flexible working hours to parents”, press release, Sue Kedgley MP, 17 March 2005

4.3 The above statement contrasts also with the bill's explanatory note where it is said that the bill provides a right to *request* part-time and flexible hours – a limitation, as indicated, not borne out by the bill itself.

4.4 The bill's message is clear. Proposed new s61B(1) states: "An employer must acknowledge that a qualifying employee has the right to work whenever possible". This statement is confirmed by the s61C(1) provision that enables an employee to challenge an employer's decision via an application to the Employment Relations Authority even if the employer has legitimately refused a request on one or other of the grounds set out in 61B (2)(b). In the UK an employee whose request is refused can appeal to an employment tribunal in specific circumstances only. The employer must then demonstrate that a correct process was followed but crucially, the tribunal cannot compel the employer to decide in a certain way.

4.5 While the current bill, like the UK legislation, requires an employee making a request to consider any effects it will have on the employer's business, the onus on the employer is much heavier. Section 61B(2)(b) allows an employer to refuse an application only "when it cannot reasonably be accommodated", suggesting that the basis for refusal must be objectively justified. This significantly raises the refusal threshold, greatly increasing the likelihood of successfully challenging the employer's decision.

4.6 The much lower onus on the employer is one reason why to date the UK legislation has not caused severe disruption. A further reason is found in the fact that once a request has been granted there is a permanent change to the employee's terms and conditions; an employee cannot subsequently revert to his or her earlier contract unless the employer agrees. Consequently, before making a request the employee must think carefully about what he or she is seeking - including the financial implications. No such qualification appears in the current bill.

4.7 The bill also creates a rather curious anomaly since it purports to amend s61 of the current Act, a section concerned with agreeing additional individual terms and conditions of employment where an employee is covered by a collective agreement. This implies that the ability to use the legislation, were it to become law, would be confined to employees who work under collective agreements. The right to change working hours would not be available to employees on individual agreements.

4.8 Even if the bill were not likely to lead to the problems identified, statistics show clearly that this kind of intervention is unnecessary in a New Zealand context. Statistics not only on the increased number of women working but on the number of women working part-time indicate that employers have already adapted to the needs of women employees. Statistics New Zealand records the following:

- Between 2000 and 2004 the number of female wage and salary earners increased by 16.1% with a 43.6% increase between 1986 and 2004

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- The Household Labour Force Survey for the December 2004 quarter gives the number of females in part-time work as 343.5 thousand as compared with 122.1 thousand males and the number of female wage and salary earners as 826.2 thousand as compared with 850.1 thousand males

- The Quarterly Employment Survey for the December 2004 quarter (which is business based) shows 835.4 thousand females in filled jobs as compared with 820.8 thousand males.

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4.9 Existing legislation prohibits discrimination (Employment Relations and Human Rights Acts) on the grounds of sex (including pregnancy) and family status, therefore requiring a degree of accommodation to specific needs (as the *Dryfhout* case (unreported AEC 58/96) established)[2]. Further, the duty of good faith means parties must be transparent about why their decisions are made,

4.10 Qualitative evidence suggests that employers are already accommodating the needs of individual women (particularly given the desire to retain the services of capable employees) through, apart from part-time hours, job sharing, term time working, flexi-time and the like.

5. Impact of the bill

5.1 It is true that in the UK surveys of the RTR legislation indicates a reasonably high take up rate but it has to be remembered that the legislation has been in place for a comparatively short period of time.

5.2 However, recent anecdotal evidence is beginning to indicate that the RTR legislation may not be operating as successfully as initially supposed. Experience of working with the legislation suggests that while individuals who made early requests were likely to have their requests approved, with later comers, the employer has had a much-reduced capacity to respond affirmatively.

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[2] This was a request by the employee for an interim injunction requiring the employer not to impede her return to work following parental leave. The employee, a Trust Manager at the New Zealand Guardian Trust, wanted to alter her hours to accommodate child care needs so that instead of working from 8am to 5 pm she would work from 8.45 am to 4.35 pm with a 20 minute lunch break. The injunction was granted on the basis that a trial period of two months (until the actual case was heard) would establish whether the employer's fears of a disruption to its business were or were not justified. The Employment Court saw this as a practical interim solution but in fact the case did not proceed to a substantive hearing.

5.3 The reason for the employer's inability to grant later requests is not hard to find. Many, if not most, employers need the majority of their employees present at times when the business is operational. The implications are particularly significant for 7-day a week businesses operating on a roster or shift basis. There would be considerable difficulty in accommodating numbers of requests to work other than on the established roster structure.

5.4 As well, a UK survey conducted by a group supportive of the RTR legislation[3] quotes one respondent who noted that the legislation had had a negative effect on her work relationships: "Colleagues were jealous of benefits for those qualifying under the legislation".

5.5 On this point, there is already some New Zealand evidence that too great an emphasis on official work-family practices is likely to result in a backlash from employees for whom these have little or no relevance. A recent study[4] failed to reach any real conclusion but noted, among other things, that "The significance of these findings is that it appears that among local government organisations offering multiple work-family practices, there is limited validation to the notion that a work-family backlash effect exists among non-users". And that without specific legislation obliging employers to consider employee proposals, adopt them, or face the consequences. In other words, it seems that workplace flexibility for some employees can cause resentment in others who have to compensate for their colleagues' reduced working hours.

[3] "Right to Request Flexible Working": Review of impact of first year of legislation, Report prepared for the UK Department of Trade and Industry by Christine Camp on behalf of "Working Families"
[4] Where is the Justice? Examining work-family backlash in New Zealand: the potential for employee resentment, Jarrold Haar and Chester S Spell, New Zealand Journal of Industrial Relations Vol 28 No. 1, February 2003)

5.6 Other comments from the UK survey suggest that the legislation was generally being ignored while the survey report itself notes that its sample "… probably include[d] parents who [were] more likely to be negative about their employers (since they [were] seeking advice) and employers who [were] more likely to already be 'family friendly'".

5.7 The problems that are beginning to be experienced with the UK legislation provide some indication of the difficulties the present bill would cause were it to become law. However, such difficulties would likely be appreciably magnified by the much greater onus placed on New Zealand employers than that carried by their UK counterparts.

5.8 As noted earlier, the bill is not a right to request but a right to *have* flexible hours, with employers not only required to justify a refusal but potentially liable to have their decision reversed by the Employment Relations Authority (and presumably by the Courts on appeal). There is, as well, no indication that altered working hours would, as in the UK, become permanent hours for the employee, with no ability to return to the former status quo other than with the employer's agreement. Evidence also indicates increasing problems with the UK legislation. It is in no-one's interest to abandon voluntary flexibility for a system bound to result in legislated inflexibility.

6. Recommendation

That the bill not proceed.

Business New Zealand

Business New Zealand is New Zealand's largest business advocacy body and encompasses four regional business organisations[5] as well as a 57-member Affiliated Industries Group (AIG). The AIG comprises most of the country's national industry associations and consequently enables Business New Zealand to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest, reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Government and tripartite working parties and to international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD, a high comparative OECD growth ranking being the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services. It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.

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[5](Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association).