

**Holidays Amendment Bill**  
**and the**  
**Employment Relations Law Reform Bill**

**AN ADDRESS BY**  
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**TO THE**  
**NELSON CHAMBER OF COMMERCE**

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## Members of Commerce Nelson

Thank you for the invitation to address you today. I appreciate the opportunity to exchange some ideas on aspects of New Zealand's future direction. I have been asked to speak on the Holidays Amendment Bill and the more controversial aspects of the Employment Relations Law Reform Bill (difficult because I consider them all controversial), but before doing so, a few words on both my and Business NZ's background.

Since April this year I have worked as the Principal Adviser of Business NZ (taking over from Anne Knowles who joined the ILO in February this year), previously having worked in my own employment law practice and as in-house Counsel for the Meat Industry Association. Prior to that I worked as a Corporate Solicitor for ACC. My real work was delayed a little: I attended the yearly ILO convention in Geneva, which takes three weeks. It was a real eye-opener in terms of New Zealand's international participation – New Zealand and its labour standards are held in high regard by many of the other ILO members. As a result though, I didn't really get started on domestic issues until I returned in July, and there were some fairly hefty items in the waiting – the Employment Relations Law Reform Bill, the Holidays Amendment Bill and the smoke-free legislation to name but a few.

As to Business NZ, it is an Incorporated Society owned by four shareholders: EMA (Northern), EMA (Central), the Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association. Business NZ emerged in 2001 arising out of two organisations: the Manufacturers' Federation and the Employers' Federation - not a merger but the beginning of a totally new lobby organisation to promote New Zealand business.

Business NZ's shareholders vary in location, size, and type: an Employer Association, two quite distinct Employers' and Manufacturers' Associations and an organisation similar to one such as your own – the Canterbury Employers' Chamber of Commerce, itself the result of a merger some years ago. I know the relationship here between EMA and Commerce Nelson is close both in a physical sense and in terms of business outlooks (which is not true of other centres), and that it makes sense to collaborate where possible and not to let undue or petty competitive influences undermine the message which needs to be sent.

Business New Zealand also runs the Affiliated Industry Group, a network of 54 trade associations and sectoral interest groups covering a wide geographical and sectoral interest base. All in all over 76,000 businesses are reached through this network. The AIG is a particularly valuable sounding board for employment related issues.

Business NZ is what is known as a social partner (not exactly what it sounds like) along with the Government, and the New Zealand Council of Trade Unions. Together the social partners consult on various issues affecting working New Zealand; recently, for instance, on the Employment Relations Law Reform Bill (but not the Holidays Act or its Amendment Bill which I'll come to). When the Government reports back to the International Labour Organisation on its respective obligations under ILO conventions and the like, it does so having consulted with the other social partners. The ILO itself runs on a tripartite structure (Government-

employers-unions) where all issues are debated with a view to arriving at a consensus approach to dealing with issues, if at all possible.

I turn now to the Holidays Act 2003. Business NZ considers this piece of legislation a prime example of how things can go wrong through lack of consultation. A working group consisting of major employers, Business NZ and the NZCTU was established to work out the best way of modernising the Act. A comprehensive report of the working group was published in September 2001, including an agreement to codify the Ports of Auckland case which had said ordinary pay satisfied s7A of the Act for public holidays. However, what was eventually passed by Parliament bore little resemblance to what had been agreed. The notional calculation of relevant daily pay had been inserted at the last minute and without consultation.

After the Act commenced in April this year there was an immediate outcry over its deficiencies which although dubbed "unintended consequences" by the Government, all were foreseeable had there been greater thought put into the Act. With a rising casualty list in terms of the adverse impact of this Act on employers, the Government decided that some changes needed to be made. A working group was hastily convened but we were told that any policy changes (ie minimum entitlements such as "relevant daily pay") were off limits.

The process has resulted in the Holidays Amendment Bill, which is due to be passed this week. The Bill addresses four areas seen as deficient in the principal Act:

1. Penal rates already included in an employee's wage for working a public holiday or a particular day will not be included in the relevant daily pay calculation.
2. Persons rostered on to work a public holiday and who fall sick are entitled to relevant daily pay only and the day counts as a public holiday not a sick day.
3. There will be extensions of time (until 1 April 2007) before parties might agree on whether a regular pay rate includes extra amount for working a public holiday, and
4. Employers may require a medical certificate within three days if a three stage test is met - reason to suspect sick leave is not genuine, notice of that to the employee as soon as possible, and reasonable expenses paid by the employer.

The select committee heard all submissions on 16 September 2004. Business NZ was among six employer groups, the CTU and the Law Society who were also invited. Most employer groups submitted that the Amendment Bill did not go far enough to fixing the major flaws of the Holidays Act 2000 with its increased cost and complexity in establishing the relevant daily pay formula, the increase in Mondayisation, and the general inflexibility of the Act.

Business NZ received a relatively receptive committee hearing and suggested that the formula set out in the original Bill (ordinary pay) should instead be inserted into the Amendment Bill.

As the Bill has turned out though, there has been very little change to it as introduced. The excluded penal rates have been clarified a little – they do not include rates for working the sixth or seventh day; individual agreements have the same extension rights as collective agreements; an employer is liable only for reasonable expenses in an employee obtaining a medical certificate; the employer cannot dictate who the doctor is; and the employee will only lose sick pay if he or she fails to provide proof without reasonable excuse.

Although a majority of the select committee recommended against the Bill as reported back, it will most likely go through unamended despite attempts from the National opposition to refine it. In an MMP environment, select committee majority is not as important as it once was.

As such, it appears that the problems with the Holidays Act will continue until a major reform is undertaken yet again. To that end Business NZ has called for an urgent review of the whole Act.

Turning now to the Employment Relations Law Reform Bill. When the original Employment Relations Bill was being debated at the select committee stage prior to October 2000 there was substantial employer opposition to many parts of the Bill in large part, no doubt, due to its departure from the relative freedom of contract under the Employment Contracts Act 1990. Some elements of the ERA Bill were so inflammatory to employers they were taken out pending a later review. Chief among these elements were contracting out/sale of business and protection of employees jobs.

This review duly took place ending around July 2003. The result was the Employment Relations Law Reform Bill introduced just prior to Christmas 2003.

The explanatory note to the Bill reads:

*“This Bill furthers Government policy by amending the Employment Relations Act 2000 (the Act) to enable it to better meet its key objectives of promoting fair, productive, and effective employment relationships between employees, employers, and unions.*

*To achieve this, the Act acknowledges the inherent inequality of power in employment relationships, and seeks to balance the interests of employers and employees through the promotion of unions and collective bargaining, the obligation to act in good faith, and the provision of a continuum of services and bodies designed to support and enhance ongoing employment relationships wherever possible. The operation of the Act since 2000 has, however, revealed a number of areas where it can be strengthened so that it can better achieve Government’s employment relations policy objectives.*

This “furthering of government policy” in employment law is nothing new. Employment law has had major refits in 1973, 1987, 1990 (Employment Contracts Act), and 2000. Now in 2004 further major reforms will be enacted despite the reforms being sold as minor modifications.

The further imminent changes revolve around bolstering collective bargaining through changes to the requirements of good faith, introducing penalties for breaches of good faith and ERA determination of disputes of interests (compulsory arbitration), increasing union membership through better access and bargaining fees, and changing the law on unjustified dismissal. The Transport and Industrial Relations Select Committee received over 350 written submissions on the Bill and have now reported back its findings to Parliament recommending the Bill proceed with minor modifications.

Here are some of what I consider to be the more major changes the Reform Bill will effect on the New Zealand workplace:

1. It will no longer be good enough in the employment relationship to act with implied trust and confidence (the old test); something more, including responsiveness and communication, is required. Good faith is expressly extended to individual agreements.
2. All collective agreements must be agreed unless there is a genuine reason not to agree (note that disliking collectives is not a genuine reason). A single issue cannot create an impasse to considering other issues.
3. Bargaining fees must be included in a collective if a simple majority of employees vote for it (this was a late SOP inserted by the Minister late in the piece to clarify the Fonterra case – a further SOP is to be introduced on this complex matter).
4. It is a breach of good faith to automatically pass on terms and conditions to non-union employees if done during collective bargaining process and the effect is to undermine collective bargaining.
5. All collective agreements must now have transitional provisions where a business is sold or contracted out; vulnerable workers have even more protection.
6. The Authority will have increased powers to deal with a variety of new applications including breaches of good faith, facilitation, recommendations, and arbitration. Also there is no ability to judicially review during the process.
7. Change of the test for dismissals – now it is what a fair and reasonable employer would have done in the circumstances as existed at the time.

In a surprising move, the equal pay provisions were deleted. The select committee agreed with submitters who said that:

“as [a] significant examination of equal pay equity is proceeding, it would be more appropriate to consider legislative amendments to address 'equal pay for the same of substantially similar work' at a later stage, in conjunction with the pay and employment equity initiatives ...”.

The note goes on ...

"the majority looks forward to the development of robust equal pay and pay equity provisions being introduced in the future ...".

With the nurses row not yet settled it takes little to imagine that pay equity may be the next big issue to worry sectors like nursing and home carers.

The Bill is soon to be law and although, as always, the proof will be in the pudding, bear in mind though that these changes were always coming about once the ERA proper was bedded in. It marks a real push by those in favour of the benefits of collective bargaining (last year New Zealand ratified ILO convention 97 on collective bargaining). Union membership is currently only about 11% of the private sector and substantial rises to date have only been seen in the public sector. It is clear what the next targets are though, and the tools to deal with promoting individual agreements or enterprise bargaining are diminishing.

As I mentioned, there is a new test for unjustified dismissal in the ERLRB. Currently we rely on common, or in other words judge-made law, as to the test for whether a dismissal is justified. What this means is that the Act is silent on the threshold and the Authority/Employment Court/Court of Appeal fill in the gaps over time.

The new test is now *"whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employers' actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"*.

This sounds quite harmless but I'd like to offer a few thoughts on why that might not be so. At the Bill stage both the CTU and Business NZ took exception to the proposed test, but for different reasons. Business NZ proposed that there was no need to alter the common law unjustified dismissal test, which had developed over time to a reasonable level everyone understood, but the CTU's concern was that the wording of the clause may not meet the Government's intentions.

The CTU's submission referred to an article by Professor Gordon Anderson from Victoria University in Wellington. It was his view that over the last decade the interpretative approach taken to unjustified dismissal had been dominated by the increasingly restrictive approach taken by the Court of Appeal.

Increasingly, he said *"it seems the test appears to be moving further to the standards of the particular employer making the decision"* rather than a more objective test.

The Transport and Industrial Relations Select Committee appears to agree with that sentiment by referring in the Explanatory Note to the Bill to the Oram case in the Court of Appeal.

Oram was a case that involved a senior journalist for the New Zealand Herald failing to check that the name under a photograph actually matched the person in the photo it identified. The Tribunal and the Court had held that the Herald should have taken a less serious view of Mr Oram's conduct because it contributed to the mistaken

publication but the Court of Appeal felt the Herald was entitled to apply its own high employment standards.

The committee felt the Court of Appeal had gone too far in Oram by deferring to the employer's high work standards and upholding a harsh but fair decision. The committee also implied that substitution of judgment was appropriate in the circumstances.

From Oram and the other cases the Court of Appeal has decided over the years, it has been established that the Authority or Court should not substitute their own judgment but, once establishing that deeply impairing conduct has occurred, it is for the employer to decide the sanction and dismissal is merely one such sanction available (this is called the "range of responses" test).

Introducing a test which disallows reference to a particular employer's standard of employment or house rules or attitude towards employment is a softening of the dismissal standard that New Zealand does not need and will create further uncertainty in industrial law.

If a particular employer has very high standards, as evidenced by the employment agreement, house rules, general practice and employee's attitude, then the ERA ought not be able to second guess the application of that standard. It might think that the result involved a tough call and as the employer they would have given the grievant a second chance, but he or she must respect the ability of the employer to make his or her own decision.

Sure the new test says that it's objective, but if there is no longer a range of responses available and only one correct result for each set of facts, that is an unreasonable constraint on the ability of anyone conducting a business.

A natural consequence of the new test may be that redundancy decisions are put under the substitution spotlight and the law concerning management prerogative amended to fit within the new regime. It remains to be seen to what degree the new test will impact on dismissal decisions in New Zealand but the mere fact that a new test has been introduced means that we are, in a sense, at year zero, as far as new law on unjustified dismissal is concerned.