Backgrounder

Planned changes to Employment Relations Act 2000

1. Amend the test of justification for any action by an employer (including dismissal) by replacing the word 'would' with the word 'could' in section 103A of the Employment Relations Act. That section will then read:

> *"the question as to whether a dismissal or an action was justified must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer* ***could*** *have done in all the circumstances at the time the dismissal or action occurred".*

REASON FOR CHANGE

The current law puts too much emphasis on the employer's process and not enough focus on the employer's action. There are a range of reasonable responses in any situation. Changing 'would' to 'could' reflects the principle that it is not for the Employment Court to substitute its judgment for that of the employer. Issues of fairness can be dealt with through minimum requirements of a fair process (see (2) below).

2. Amending the Act to set out the minimum requirements of a fair and reasonable process, including:

(a) That the employer's processes will not be subject to pedantic scrutiny;
(b) An employer's resources will be taken into consideration;
(c) The Employment Relations Authority and the Employment Court will consider whether a process has been fair and reasonable by taking account of the following:
(i) Whether the employer has properly investigated the allegations;
(ii) Whether the employer's concerns have been properly communicated to the employee;
(iii) Whether the employee has had a reasonable opportunity to respond to any concerns the employer raised;
(iv) Whether the employer has considered (with an open mind) the employee's explanation before making a decision;
(v) Whether, as a result of any deficiencies in the process undertaken by the employer, there was a probability that the employee was unjustly treated.

REASON FOR CHANGE

Case law has established the minimum requirements for a fair process. Specifying them in legislation will provide more certainty for employers and employees. Taking employers' resources into account will increase employer confidence that they will be treated fairly when defending a personal grievance. The removal of "pedantic scrutiny" means the focus will be on the merits of the employer's decision rather than on complete procedural correctness.

3. A Code of Employment Practice around disciplinary and dismissal procedures will be prepared. The Code will require the approval of the Minister of Labour.

REASON FOR CHANGE

Consultation undertaken by the Department of Labour revealed a low level of understanding about legal requirements surrounding disciplinary and dismissal processes. Developing a code will increase understanding and reduce the use of non-compliant processes.

4. Amend the Act to state that the Chief Executive of the Department of Labour will provide mediation services for early problem resolution without representation.

REASON FOR CHANGE

Many employers and employees see the need for a step before going into formal mediation in which they can obtain an assessment of the risk of proceeding with or defending a grievance. This proposal will assist with quicker and less costly resolution of employment relationship problems.

5. Promoting mediation by providing that the Employment Relations Authority will give priority to mediated cases.

REASON FOR CHANGE

Taking claims directly to the Employment Relations Authority can result in personal grievances being needlessly escalated. Giving priority to mediation will provide an incentive for parties to accept mediation before approaching the Authority.

6. Amending the Act to enable mediators and members of the Employment Relations Authority to make recommendations to parties at their request.

REASON FOR CHANGE

Mediators already have power under s150 of the Act to make a binding decision – provided both parties agree. This provision has been used infrequently, partly because

there is no appeal against the mediator's decision. The proposed provision would allow a mediator to make a recommendation. The parties would then have seven days to decide whether to accept it. If they do it becomes binding.

7. Amend the Act to allow Employment Relations Authority members to dismiss vexatious or frivolous claims.

REASON FOR CHANGE

There are claims submitted to the Authority that have no merit. Defending such claims can be costly and stressful and reduce productivity. While such claims are few (about 2% of total claims) their presence can have a disruptive effect. A mechanism is required to ensure they can be dealt with promptly. Any decision to dismiss a claim under this provision can be appealed to the Employment Court.

8. Amend the Act to allow Employment Relations Authority members to penalise parties who do not attend scheduled Employment Relations Authority investigation meetings or file a late claim without good reason.

REASON FOR CHANGE

Such tactics increase costs and delay the resolution of cases. Late claims are also difficult to defend. Penalties may improve the efficiency of the system by reducing the use of delaying tactics.

9. Extending the 90-day trial period to all employers. Previously only employers with fewer than 20 staff were eligible.

REASON FOR CHANGE

The 90-day trial period has helped job seekers gain a foothold in the job market. A Department of Labour evaluation of the first year of the trial period shows that three-quarters of job-seekers who found work under the trial period continued maintained their employment, while 40 percent of employers said they would not have taken on new staff had the trial period not existed. Currently the 90-day trial is only available to employers with fewer than 20 staff. Extending it to all employers will ensure its benefits are available to a wider range of employers and employees.

10. Retaining reinstatement as a remedy in dismissal cases but removing it as the primary remedy.

REASON FOR CHANGE

Reinstatement is rarely sought in dismissal cases and is often not practicable or reasonable because cases can leave a legacy of bitterness and mistrust. This change will legally recognise existing practice.

11. Amend the Act to provide that personal grievance claims filed in the last three years but not actively progressed or pursued be treated as withdrawn.

REASON FOR CHANGE

Many claims continue in the system for years even though it is clear that those who lodge them have no intention to pursue them. Eliminating such claims will reduce costs and avoid the stress and time of defending such claims.

12. The Department of Labour will work with the employment representatives industry to develop a code of professional ethics.

REASON FOR CHANGE

Concern has been expressed that some employment relationship advocates demonstrate a lack of professionalism. Many do not belong to professional bodies and are not therefore governed by codes of ethics and subject to disciplinary provisions. A code of ethics should encourage more professional behaviour, the disclosure of conflicts of interest, provide for professional development and ensure fair and reasonable fees.

13. Provide further powers to the Chief of the Employment Relations Authority so that he/she may:

(a) Issue a set of instructions, or individual instructions, for Authority members to ensure the Authority acts more judicially;
(b) Have the discretion to provide a report to the Minister of Labour on the appointment of an Authority member before a recommendation goes to the Governor-General.
(c) Direct the education, training and professional development of Authority members.

REASON FOR CHANGE

There have been perceptions that the Authority is sometimes inconsistent in its decision making. Giving the Authority Chief power to oversee its operations and to be involved in the

process of appointing members will improve the consistency of decisions in the Authority.

14. Amending the Act so that ex parte (issued without notifying one party) search and freeze orders are only issued by the Employment Court.

REASON FOR CHANGE

The proposal clarifies the Authority's powers and reduces uncertainty for parties. Search and freeze order can potentially involve a serious breach of a respondent's rights. It is appropriate that injunctions with such serious consequences should only be granted by the Employment Court.

15. Allowing the Employment Relations Authority to remove matters to the Employment Court on its own motion (using existing criteria), rather than only after an application from one of the parties.

REASON FOR CHANGE

The Employment Relations Authority currently has the power to remove proceedings to the Employment Court but only if one of the parties asks it to do so. Giving the Employment Relations Authority the power to initiate such a change will mean that cases are dealt with at the appropriate level. All parties would still have the chance to be heard before a decision is made, while current legal criteria would still apply.

16. Establish a right for parties to cross examine witnesses during Authority investigations.

REASON FOR CHANGE

This proposal was made in the National Party's 2008 election manifesto. It will strengthen the natural justice requirements of the Authority.

17. Clarify under what circumstances mediation is an impractical or inappropriate prerequisite to an Authority investigation.

REASON FOR CHANGE

Clarifying the circumstances where disputes should go directly to the Authority will mean these cases are handled more quickly and efficiently.

18. Review existing regulations to formalise the conduct of Authority investigations.

REASON FOR CHANGE

To establish a clear basis for all parties to understand the way in which Authority investigations are carried out and improve confidence in the system.

19. That before the Employment Relations Authority can refer a notice regarding minimum code issues (eg minimum wage and holiday entitlements) to mediation the Authority must consider whether it is appropriate to do so to prevent the negotiating away of minimum legal entitlements.

REASON FOR CHANGE

This is a technical change to ensure that parties cannot bargain away minimum lawful entitlements, such as minimum wages or holiday pay.

20. Allowing the Employment Court to deal with applications for pre-proceeding discovery regardless of whether the matter is or intended to be bought to the Employment Relations Authority or the Employment Court.

REASON FOR CHANGE

The Employment Court has identified that there is a problem obtaining information ("discovery") from a third party when it is unclear which of the Court or the Authority will hear the substantive matter. The change will clarify the powers of the Court and does not appear to affect the operations of the Authority.

21. Amending the Act so that minimum entitlements can still be considered in mediation but the lawful quantum of these entitlements cannot be the subject of negotiation and possible reduction.

REASON FOR CHANGE

This will ensure that lawful entitlements (eg minimum wage or annual leave) cannot be negotiated away.

22. Amending the Act so that the withdrawal of claims by one party in the Employment Court will not affect claims made by another party in the same proceeding.

REASON FOR CHANGE

This is a technical change that only affects the Employment Court. It will improve timeliness and reduce costs in the Court.

23. Amending the Act to allow young people between 16 and 18 to agree to terms of settlement that are full, final and binding.

REASON FOR CHANGE

While people under the age of 18 are able to enter employment relationships and are able to file personal grievances, any employment agreement is not enforceable against, or by, the minor unless it has been approved by a court. The Government considers that young people should have the same employment rights as older workers.

24. Amending the Act to define the role of a Labour Inspector as one of managing complaints and supporting businesses to achieve compliant practices and systems.

REASON FOR CHANGE

There is no current legal description of the role of a Labour Inspector. Their role is largely confined to the investigation of complaints from employees. They have a very limited range of tools to encourage compliant practices across workplaces and to undertake enforcement when required.

25. Amending the Act to introduce enforceable undertakings to enable written agreements between a labour inspector and an employer that sets out commitments in respect of compliance.

REASON FOR CHANGE

The current legislation does not support steps that enable willing employers to avert legal proceedings by changing non-compliant practices before disputes arise. An enforceable undertaking will be a signed agreement between the Labour Inspector and the employer that can be enforced in the Authority or the Court.

26. Amending the Act to allow Labour Inspectors to issue improvement notices.

REASON FOR CHANGE

The current law does not provide a mechanism by which Labour Inspectors are able to respond in a prompt and targeted way to motivate an unwilling employer to comply with the law. The proposed improvement notices are analogous to the notices inspectors can issue under the Health and Safety in Employment Act 1992. Issuing such notices under the Employment Relations Act 2000 is likely to prove valuable in encouraging compliance and reducing litigation.

27. Amending the Act to allow penalties to be awarded in relation to a demand notice, along with penalty interest for long-standing and repeated non-compliance.

REASON FOR CHANGE

While demand notices - which require an employer to comply with their obligations to pay wages and allowances - can be enforced by a compliance order from the Authority, there is no incentive to comply because there is no penalty for long-standing non-compliance. Issuing penalties along with penalty interest will improve compliance and ensure more speedy resolution of outstanding claims.

28. Amending the Act to require an employer to provide employees with a copy of a signed employment agreement or, where it has not been signed, an unsigned copy of that agreement.

REASON FOR CHANGE

Recent Authority decisions make it unclear whether the employer is required to provide a copy of the employment agreement after initial discussions over an intended agreement. However, an employment agreement is the foundation of an employment relationship and it is important that employees have ready access to the document that outlines the terms and conditions of their employment. Having written employment agreements reduces the likelihood of non-compliant behaviour and litigation.

29. Amending the Act to allow a Labour Inspector to seek a penalty action from the Employment Relations Authority in relation to providing employees with:

(a) A compliant individual employment agreement; and
(b) A copy of the intended and mutually-agreed terms and conditions of employment, except where an employer has made best efforts to provide an employee with a proposed agreement and resolve any questions asked and the employee has nevertheless refused to sign the agreement.

REASON FOR CHANGE

Labour Inspectors have the power to seek penalties for a range of provisions. But they do not include failing to provide an employee with a written employment agreement. Given the importance of written employment agreements, the absence of an enforcement tool is this area is an anomaly. However, the proposed penalty action will be preceded by a written notice of the breach to the employer, followed by a seven-day period to rectify it.

30. Amending the Act to increase existing penalties to a maximum of $10,000 for individuals and $20,000 for companies and individuals.

REASON FOR CHANGE

Current penalties (a maximum of $5000 for individuals and $10,000 for individuals and organisations are considered to be low and do not act as a deterrent to non-compliance. Increasing penalties will create incentives for compliance.

31. Amending the Act to provide that union access to workplaces is conditional on the consent of the employer (and that such consent should not be unreasonably withheld).

REASON FOR CHANGE

This proposal was made in the National Party's 2008 election manifesto. It recognises that employers have the right to confirm who comes into the workplace at any time. This right is important for a number of reasons, including health and safety and productivity. It ensures employers are better able to identify when a union representative is on their worksite and that business operations aren't unduly disrupted as a result of the visit. This proposal largely standardises current practice, as most union visits to workplaces are made with notice.

32. Amending the Act to allow employers to communicate directly with employees during collective bargaining (including details of any settlement offer), provided such communications are consistent with the duty of good faith..

REASON FOR CHANGE

Many employers believe the Employment Relations Act currently prohibits any communications with employees during bargaining. That includes details of any settlement offer. Often that leaves employers with the impression that settlement offers may not get appropriate consideration. While the Act does not prohibit such communication, there is a great deal of confusion. Amending the law will remove that confusion. Any communications will have to be consistent with the employer's good faith obligations under the Act.