BUDDLE FINDLAY

# No personal grievances for higher earners?

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The Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill had its first reading in Parliament recently, and submissions to the Select Committee close on 5 May 2017. The Bill would give employers the right to agree with high earning employees to opt-out of the personal grievance provisions of the Employment Relations Act 2000 (Act). This opt-out would be available for employees earning over $150,000 gross annual salary (approximately 1% of New Zealand's workforce), but would not be mandatory and would only be available for those on individual employment agreements, following the receipt of independent legal advice.

The National Government contemplates this Bill would allow pre-negotiated, pre-agreed exit arrangements for employees who (it sees) are sufficiently skilled to command a salary of $150,000 or more. It considers well-paid senior executives are capable of agreeing and bargaining for themselves and are not so vulnerable that they need to be protected.

Currently, the Bill would not merely carve out unjustified dismissal, but would also prevent personal grievances based on discrimination, sexual or racial harassment, and situations where the employer fails to comply with their legal obligations. From a policy perspective, this has been argued to be "contracting out of fundamental human rights" and creating an unfair dual compensation system where high earners receive "golden handshakes" and lower income employees receive "capped" compensation under the Act. Criticisms have also been made of the salary threshold, which has been described as too low and unintentionally capturing middle-management employees.

Australia already has analogous legislation, with the threshold set at approximately AUD$140,000. But the exclusion of unfair dismissal in Australia does not include discrimination. Accordingly, to avoid this bar, claims are often made by high earners for discrimination or other causes of action.

In our experience, "no fault" termination provisions are already present in a reasonable proportion of senior executive employment agreements in New Zealand. Although such provisions are technically unenforceable (as they contract out of the Act), they are usually not challenged. In addition, senior managers often negotiate exits at the time a dismissal is contemplated, despite not having a contractual provision providing for this right. Whilst the implementation of this Bill would create certainty around such arrangements, we predict "creative claims" would increase as has occurred in Australia, and the quantum of severance would increase if this opt out became market standard. The purported secondary reason for the Bill - to free up the employment jurisdiction from dealing with high earner claims - does not appear to be a problem to us, as such claims are normally settled without the need for litigation.

Therefore, the Bill may create more issues than it addresses - assuming there is an issue at all to address.

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