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Expert predicts a raft of litigation likely to test the boundaries of our new employment relations law

EMPLOYMENT NEWS

December 16, 2025 Neil Sands

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The convenor of The Law Association's Employment Law Committee has welcomed moves to clarify a proposed "gateway" test for contractors in the controversial Employment Relations Amendment Bill, but expressed disappointment that plans to limit judicial discretion in some personal grievance cases remain unchanged.

Barrister Catherine Stewart says concerns remain, even with the proposed amendments put forward by the Education & Workforce Select Committee.

A select committee report released this week suggested a range of amendments to the bill which Workplace Relations Minister Brooke van Velden has indicated she will accept.

Brooke van Velden

The suggestions represent tweaks and clarifications, not the substantial amendments that TLANZ's Employment Law Committee called for in a submission to the select committee, which warned the bill "risks dismantling fundamental protections that underpin New Zealand's employment relations framework".

"It's a contentious piece of legislation. It's been strongly debated, and in many instances opposed, by many different groups. It will result in significant changes to the

Catherine Stewart

employment law landscape if it comes into effect," Stewart told *LawNews*.

In an online commentary, Simpson Grierson said the select committee had "tinkered" with aspects of bill, rather than making fundamental changes to a regime which "shift[s] the dial more in favour of employer rights".

Fire at will

One major element of the bill is a ban on high-earning employees lodging unfair dismissal claims, which van Velden has said is intended to make it easier to fire poorly performing managers who can have a huge impact on a company's operations.

The income threshold when the ban kicks in was previously $180,000 but the select committee recommended raising it to $200,000, a change Stewart welcomed, although the TLANZ committee had wanted it lifted to $250,000.

"That's a positive," Stewart said. "They've met us halfway – well not quite halfway – and increased the amount. They've also referred to remuneration, rather than wages or salary, which is also a point that we made in our submissions and avoids some anomalies that could otherwise arise."

She said the $180,000 threshold would have captured employees such as like doctors, airline pilots, senior police officers, lawyers and engineers, who were high earners but did not have governance or managerial responsibility.

"It seems unfair that they would be excluded from the protections of the personal grievance regime. That was our argument," she said.

Another change clarified that high-income earners can opt out of the ban on unfair dismissal claims, provided they do so in writing.

"That's something which there needs to be public education around, so that high income earners are aware of it," Stewart said.

"They'll hopefully take legal advice and can, if they wish, negotiate that exclusion from the prohibition into their contracts. It remains to be seen how willing employers will be to agree to the exclusions and how commonplace they will become."

Despite the changes, Stewart said the TLANZ committee remained concerned about the implications of excluding a group of employees from unfair dismissal protections.

“Employers could simply go out and fire employees at will, with no fair process and for no good reason. That’s the risk, and that could easily happen with these changes,” she said. “This will narrow access to justice for high-income employees who have been treated unfairly.”

‘Gateway’ clarified

The select committee also provided further clarification to the gateway test, which determines who is a contractor and restricts workers’ ability to challenge that status in court.

The select committee amendments mean that even businesses that do not categorise workers as “independent contractors”, such as Uber, can still access the gateway test if they specify that the worker is “not an employee”.

“The amendments make it easier to be regarded as a specified contractor. For example, they’ve added that the written agreement can specify either than a person is an independent contractor or that the person is not an employee,” Stewart said.

“That makes it simpler to fit the test because sometimes contracts might use wording like the worker is a freelancer or consultant, rather than stating they are an independent contractor. Before the amendments, those contracts would not have been captured. However, given that these types of contracts often will state that they are not an employee, they will now be captured.”

Another change says that if a business contracts someone to work the equivalent of full-time hours, it should not be interpreted as meaning they cannot work for another business, so they remain a contractor, not an employee.

“That’s quite a significant addition to the gateway test, given that historically there was usually an understanding that contractors might work for more than one business at the same time,” Stewart said.

“What this change is doing is ensuring that even if a person works full-time hours for one organisation, this is not interpreted by the courts as a *de facto* restriction on being a contractor.”

Stewart said it was important to note that the gateway test creates a carve-out from s 6 of the Employment Relations Act – which defines an employee – but it does not replace it.

“There are other exclusions, such as a home worker, a volunteer, a real estate agent,”

she said. “This is adding a new carve out to what the definition of an employee means.

“If you’re a specified contractor, it’s a carve-out. But if the specified contractor [status] doesn’t apply, because not all the elements of the test are satisfied, then you need to go right back to the rest of s 6 and apply the old test anyway.”

She said this meant the gateway test further complicated the task of determining who was an employee.

“When you get a question of, “is this person an independent contractor, or are they an employee?” you’ve got quite a few layers to work through in determining the answer to that question. The gateway test has just made those layers more complex.”

‘Very blunt instrument’

A major concern raised in the TLANZ Employment Committee submission involved restrictions on access to personal grievance remedies for employees.

Under the bill, employees whose behaviour amounts to serious misconduct are barred from all remedies, while those whose behaviour contributed to the issue are not eligible for reinstatement or compensation for hurt and humiliation.

The select committee has not recommended any changes to the proposed personal grievance regime.

“That is a disappointing outcome,” Stewart said. “We feel quite strongly that the removal of judicial discretion imposes a rigid rule which prevents the [Employment Relations] Authority or the [Employment] Court from assessing the overall justice of the situation and responding proportionately.

“There are always a number of factors to be weighed when working out where the fairness lies, but when you remove judicial discretion, that creates a very blunt instrument.

“The committee considers that these changes to remedies undermine procedural fairness, which has been built up over decades to ensure access to justice and fundamental protections that underpin New Zealand’s employment relations framework. The changes to remedies, in our view, significantly erode those principles of fairness, good faith and equality before the law.”

Stewart said there is likely to be a flurry of litigation examining definitions under the new regime.

“I predict there’ll be an expansion of case law around what “serious misconduct” means and what “contribution to the situation that gave rise to the personal grievance” means,” she said.

“I think that’s going to be one of the first things tested, because with these changes to remedies those definitions are going to become incredibly significant.”