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SENATE EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION LEGISLATION COMMITTEE

INQUIRY INTO WORKPLACE RELATIONS AMENDMENT (TERMINATION OF EMPLOYMENT) BILL 2002

SUBMISSION BY CPSU, THE COMMUNITY AND PUBLIC SECTOR UNION – STATE PUBLIC SERVICES FEDERATION GROUP

The State Public Services Federation (SPSF) Group of CPSU, the Community and Public Sector Union, represents the industrial interests of over 100,000 employees of State Governments in departments, agencies, statutory authorities, instrumentalities and State owned corporations, including universities. While most of these are within the jurisdiction of the various State industrial tribunals, two major groups of our members are within the Federal jurisdiction. These are:

- Employees of the Crown in right of the State of Victoria; and
- General staff in universities.

An obvious impact of the Bill on our members is that many of them, that is, those who are not employees of mainstream public service departments, are employed by statutory bodies which are "constitutional corporations". The Bill would deny them access to the State tribunals to which historically they have been able to go. It has to be said plainly that this prospect has not met with an overjoyed response from our members employed by State-owned statutory corporations.

But the Bill, in our submission, has a number of flaws that should lead to its being rejected, even without regard to the particular interests of our members. These may be summarised as follows:

- It seeks to expand the reach of the Commonwealth jurisdiction in unfair dismissal matters without being able to fully cover the field. It is, in this respect, a half-baked measure;

- It seeks to cut down the rights of workers who may be unfairly dismissed solely on the basis of the sort of employer for whom they work, ie, if they work for a small business, they have inferior rights. Some of the restrictions would amount to a denial of natural justice in particular cases;

- It seeks to introduce provisions which seem directed to non-existent problems.

The only proposal of the Bill that this union would support is giving primacy to reinstatement as the remedy for unfair dismissal, but this does not save it, in our submission.

Is This Bill a Step Towards a Unitary System?

This union does not support the concept of a unitary system of industrial relations regulation in this country. We strongly support the continued existence of the State jurisdictions, a number of which historically have been favourable to the interests of working people.

Nevertheless, we acknowledge that there is support from a number of quarters, not otherwise politically aligned, for a unitary system. It is therefore necessary to

make the point, should the present Bill be seen as at least a step in that direction, that a unitary system cannot be achieved without either constitutional amendment or the concurrence of all States. The history of constitutional amendments without cross-spectrum support is not encouraging. Even in the unlikely event that all States could be persuaded to concur, State concurrence is reversible, as can be seen from the moves by the present Victorian Government to restore at least a limited State jurisdiction there.

As the Australian Constitution at present stands, there is no constitutional head of power the Commonwealth could use to bring the State public services or, in the absence of an interstate dispute, sole traders or partnerships into the Federal industrial relations jurisdiction. Therefore, whether or not it is a desirable objective, the present Bill cannot be a real step towards a unitary system.

It cannot fully cover the field, even in relation to termination of employment, and is therefore a half-baked measure which can only add to confusion, not lessen it. Both for employees and employers, it will be difficult for their advisors to explain that, even though a State award applies, they must go or be taken, as the case may be, to the AIRC in relation to a claim of unfair dismissal.

Cutting Down the Rights of Employees of Small Businesses

The Bill seeks to confer lesser rights on employees of small businesses, solely on the basis of who the employer is, without regard to the employer's economic viability or the fairness or otherwise of the employer's conduct.

The only justification for this, in this union's view, would be if it could be demonstrated that industrial tribunals, both Federal and State, had a track record of awarding compensation in unfair dismissal cases that had seriously endangered the economic viability of a significant number of small businesses. We do not believe that there is any cogent evidence that this is the case. We certainly have not seen any.

Without such evidence, we submit that discretion should remain with the tribunal hearing a claim of unfair dismissal, if it finds that the dismissal in fact was unfair, to take into account the nature of the business concerned in assessing any compensation, if it finds that compensation is the appropriate remedy. We submit that the members of tribunals, the AIRC and the various State Commissions, are sufficiently worldly-wise to be able to exercise their discretion so as to ensure "a fair go all round", that is, both to employee and employer.

With respect to particular provisions, the proposed Section 170CEC, which enables the AIRC to dismiss applications from employees of small businesses without a hearing if it considers that the application is outside jurisdiction or is frivolous, vexatious or lacking in substance, could lead to denials of natural justice. Whether or not an application is within jurisdiction often depends on

contested facts, while it is hard to see how the Commission could properly test the frivolity, vexatiousness or lack of substance of an application without a hearing.

With respect to the proposed increase in the probationary period for small business employees from 3 to 6 months, there can be no justification for this. The purpose of a probationary period is to enable the employer to determine whether or not the employee is suited to the work and the employee to determine whether the work suits them. The only proper basis for a longer period is not the size of the employer's business but whether the nature of the work being performed is such that a longer period is needed to make a proper assessment.

The proposed subsection 170CG(3A) is, we submit, unnecessary. Subsection (3) gives the Commission adequate discretion now to take account of the size of an employer into account in determining whether or not a dismissal was unfair and, as noted above, we cannot discern any trend in Commission decisions to suggest that the discretion is not being exercised in a balanced and sensible manner.

Also, in making an order as to a remedy, the present subsection 170CH(2) requires the Commission, inter alia, to have regard to the effect of any order it might make on the viability of the employer's business. Therefore, those aspects of the Bill designed to reinforce that regard are superfluous.

This requirement in subsection 170CH(2) also renders inequitable the proposal to reduce the maximum amount of compensation that may be awarded to a small business employee under any circumstances from 6 months to 3 months. While it is can readily be conceded that small businesses, on the whole, operate on smaller cash flows and have less access to immediate reserves of money than larger enterprises, this, like all generalisations, is subject to exceptions. We submit that this change cannot be justified unless it can be demonstrated that the Commission, systematically, is not properly exercising its discretion as required by subsection 170CH(2), including paragraph (a) of that subsection.

Dealing with Non-Existent Problems

Apart from what has already been noted above, the Bill contains provisions that seem to be directed to problems which do not exist. This could result in unfairness.

One such provision is the proposed subsection 170CG(4), which, in effect, would empower the Commission to find termination on the basis of redundancy unfair in exceptional circumstances. Just what would constitute "exceptional circumstances" is unclear. Thus there is scope for inconsistent decisions of individual members of the Commission until matters reach Full Benches or, even,

the Federal Court or Full Benches of the Court. This could work unfairly to employees in some circumstances and employers in others.

While some decisions of members of the Commission concerning redundancy have been controversial, in the sense of unpopular with some employers, there have not been many of these and the present appeal mechanism is adequate to correct any decisions that are manifestly wrong (as distinct from merely unpopular with employers).

Another provision going to a non-existent problem is the requirement to take the employee's conduct into account in determining whether a dismissal was unfair or in assessing compensation for unfair dismissal. The Commission does take this into account. Indeed, it almost goes without saying that, when the Commission dismisses an application, it does so because it has found that the employee's conduct has justified the termination. Many applications, in fact, are dismissed. In a recent matter, Commissioner Cargill found a dismissal unfair, but determined that reinstatement was impractical and that the employee's conduct had been such as to disentitle him to any compensation at all [Van Leeuwen v Optus Administration Ltd, Print PR925130].

Another is the proposed requirement that the Commission, in ordering reinstatement or assessing compensation for unfair dismissal, must take into account any income earned by the employee since termination. One of the requirements of subsection 170CH(2), in the ordering of a remedy, is that the Commission must take into account any efforts by the employee to mitigate their loss. This gives ample discretion to take into account income earned, as well as the failure to attempt to earn income where it would have been reasonable to do so.

Again we submit that these proposals could only be justified if there was evidence of systematic or widespread miscarriage of the Commission's discretion under the legislation as it stands. There is no such evidence and the Parliament should not, in our submission, cure non-existent ills.

Conclusion

In our submission, the Bill is so flawed that it should be rejected in toto.