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Submission of Fleming Singleton Law on Proposed New Zealand Income Insurance Scheme

Introductory comments

We are specialist employment lawyers and have assisted many employees and employers with situations involving termination of employment on both the grounds of medical incapacity (whether because of injury or illness) and restructuring and redundancy.

Both for employers and for employees, medical incapacity and redundancy are completely different situations. Amongst other things:

- Incapacity arises form factors relating to the employee, whereas redundancy arises from decisions of the employer; and
- In situations of medical incapacity, the employee is left unable to work, whereas redundancy results in the loss of the person's current job, but does not usually leave the employee unable to seek alternative employment.

Different policy responses are therefore called for in dealing with each of these situations.

Based on our experience:

- We support the proposal to provide income insurance for workers who lose their employment due to medical incapacity.
- We oppose the proposal to provide income insurance for workers who lose their employment due business restructuring.
- We propose that a statutory right to redundancy compensation be legislated for, as a better and simpler response to job loss arising from restructuring of businesses.

Incapacity

Income protection for people suffering from medical incapacity due to disease or disability

We support the proposed scheme as it relates to medical incapacity arising from disease or disability.

Universal income protection in the case of medical incapacity would alleviate hardship for individual workers affected by medical conditions, without imposing an undue burden on specific employers.

It would also reduce anomalies arising from the fact that currently a worker's access to entitlements such as earnings-related compensation depends not just on their needs, but on whether or not their

incapacity is the result of an external cause such as the application of force. This in turn would reduce the need for ACC reviews and litigation about whether a person's incapacity arises from an injury or from other factors such as natural degeneration.

Medical incapacity should be treated the same whether due to injury or illness

As far as practicable, entitlements for workers who are unable to work due to illness or disability should be consistent with entitlements available to workers who suffer from an injury.

Some differences may be necessary to reflect the fact that many injuries can be recovered from, whereas a worker who is unable to work due to a degenerative condition such as early-onset dementia may never work again.

However any unnecessary inconsistencies between the entitlements of workers who are ill and those who are injured:

- Will give rise to anomalies and therefore injustices; and
- Will give rise to unnecessary disputes, and potentially litigation, about which category the person falls under.

Expanded ACC appropriate agency to manage entitlements arising from medical incapacity

ACC would appear to be well placed to deal with situations of medical incapacity, and in many respects this would be a natural extension of the work they already do.

Displacement due to Redundancy or Restructuring

Redundancy or restructuring not comparable with incapacity

As referred to in our introductory comments, loss of employment due to redundancy or business restructuring is a completely different situation from loss of employment due to medical incapacity, and it calls for a different policy response.

In genuine incapacity cases, the loss of employment arises from factors that are innate to the worker themselves, and are beyond the control of the employer. Conversely a redundancy arises where an employer decides that the role performed by the worker is no longer required.

Many redundancy situations are not forced on the employer. Sometimes an employer is unable to carry on trading. However:

- Employers can, and often do, make people redundant for other reasons including a desire to increase profitability in a business that is already doing well; and

- It is common for employers to impose sham redundancies in an attempt to avoid following a proper process for dealing with other concerns such as performance issues or ongoing conflict in the workplace.

Not appropriate to impose cost of employers' decisions on other employers or on employees

The proposed scheme would have the effect of having other employers, and employees, pay the costs arising from an employer's decision to disestablish employees' roles.

This would effectively be a subsidy for businesses that choose to lay off their staff. In our view this is not appropriate.

Sham redundancies likely to increase

While it is proposed that an employer would pay redundant employees 80% of their salary for the first month, this would not be sufficient to address the problem of sham redundancies.

In our experience, where an employer and an employee agree on an exit package as an alternative way of bringing a problematic employment relationship to a close, it would be normal for the employer to pay the equivalent of the person's full salary for around 3 months.

Hence the scheme as currently proposed would incentivise sham redundancies, not disincentivise them.

ACC not appropriate body to decide if a redundancy genuine

Currently the Employment Relations Authority quite regularly determines cases on whether a redundancy was genuine. The scheme as currently imposed would, for practical purposes, make ACC responsible for determining this issue, as access to entitlements under the scheme would turn on it.

In our submission, ACC is not the appropriate body to determine this issue, and it is a matter that should be left for the employment institutions.

Mandatory redundancy compensation a simpler and better response

Employees often do face serious hardship as a result of their role being made redundant, and there is a need for a law change to address this.

However the proposed scheme is not the most appropriate mechanism.

A better response would be to create a right to redundancy compensation, as part of our framework of statutory minimum employment standards. This would have a number of advantages including:

- Simplicity; and
- Having the cost of decisions sit with the employer that makes those decisions.

Most employees in Australia have a right to redundancy compensation, under the award system. However in New Zealand redundancy compensation is generally only available to public sector employees, and employees in unionised workplaces.

The proposed fair pay agreement bargaining structure will allow for agreement to be reached on redundancy entitlements within sectors, but it does not require this, and it would not be universal in its application.

We therefore recommend legislative reform to make access to redundancy compensation a statutory entitlement.

Consequential Amendment to Companies Act

To complement this reform, we also recommend that the cap on employees' preferential claims in the event of liquidation (Contained in Clause 3 of Schedule 7 of the Companies Act 1993) be increased, so that workers who lose their job because their employer becomes insolvent are paid out more of their entitlements before surplus funds are distributed to other creditors.

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Privacy of natural persons

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