



YouthLaw

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Committee Secretariat

Education and Workforce Committee
Parliament Buildings
Wellington

BY EMAIL: ew@parliament.govt.nz

14 September 2023

Tēnā koe, Secretariat of the Education and Workforce Committee

RE: Employment Relations (Restraint of Trade) Amendment Bill

Thank you for giving us the opportunity to give feedback about the Employment Relations (Restraint of Trade) Amendment Bill. Our brief comments are set out below.

YouthLaw Aotearoa

YouthLaw Aotearoa is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout New Zealand. We are a national service providing free legal advice and advocacy for children and young people under 25 years of age. We also develop legal information resources and deliver legal education to children and young people, and those working with them.

Our legal team advises and assists in a wide range of legal matters, frequently including issues relating to restraint of trade clauses; it is one of the more common employment issues that clients bring to us and is presently a very relevant issue for young people. For example, we advised four clients about restraint of trade clauses between the months of May and July 2023.

Restraints of Trade in Our Work

Often, our clients (who are lower wage earners, and under 25-years-old) will have excessive restraint of trade clauses in their contracts, with the businesses having no proprietary interests to protect. We have seen a minimum-wage-earning assistant restrained from working for any employer in the same industry within 100km+, despite living in a several-kilometre-long city and not having been exposed to any important business information or special techniques during the employment. We have also seen a meat processing factory employee restrained from working for any other employer in the livestock or meat industry in the whole of New Zealand, for three months following the employment.

Restraints of trade covering such large areas usually exclude the employee from working in the same industry within the entire town or city that they live in, despite them not having any information or techniques unique to the business. Worse, we have seen employers attempt to enforce such restraints, through enforcement letters from law firms. These enforcement letters are very upsetting for young people, who don't have the work experience of older workers and think that their restraint of trade clauses will restrict them from going into new work.

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How We Advise Clients with Bad Restraint of Trade Clauses

Thankfully, because the courts have a series of factors which they consider before enforcing an employee's restraint of trade clause (such as whether it is reasonable for the stated activities to be restricted, whether the time period is reasonable, whether the geographical or population limits are reasonable, and the employee's position), our advice for clients with restraints of trade like this is usually: "this clause is unlikely to be upheld in the Employment Relations Authority or Employment Court". For instance, of the four restraint of trade issues that we advised clients on from May to July, we advised that three of them were unlikely to be enforceable. The fourth was a contractor — courts are more willing to uphold contractors' restraint of trade clauses than employees'. We sometimes write letters to clients' ex-employers (or their lawyers) asserting that the restraint of trade clauses in their contracts are unenforceable.

It is rare that we see a restraint of trade clause that is likely to be enforceable. This would probably only occur if a young person had a specialised job with access to sensitive or unique business information, and even then a restraint of trade clause might not be enforceable.

We also note that even when we are able to advise a client that their restraint of trade clause is unlikely to be upheld, they maintain a degree of worry about ending up in ongoing employment litigation, not to mention the time and energy expended in getting our legal advice and taking any steps required to ensure that they are able to work.

Support for the Intentions of this Bill

Our main concerns are for young people who face restraint of trade clauses without access to a lawyer or legal information, and for those who are adversely affected by these clauses despite having legal access. We are sure that many young people have contracted into restraint of trade clauses which would be legally unenforceable, but acquiesce to them because they do not know any better — or, even if they do know better, are intimidated by the potential legal ramifications of breaking such a clause.

Therefore, we commend the intentions of this Bill. It is unjust for employers to be legally able to insert restraint of trade clauses of any duration, covering any geographical area, and restricting any type(s) of activity, into the contracts of low-skilled, low-earning employees. ***We are particularly supportive of the restriction on restraint of trade clauses that do not protect any proprietary interests.***

We thank you for the opportunity to provide our comments. If you have any questions, please contact the writer.

Nāku noa, nā

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