Industrial Relations Amendment (Industrial Agents) Bill

Second Reading

Corrected Copy 15/11/2002

INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL AGENTS) BILL

Page: 6891

Bill introduced and read a first time.

Second Reading

Mr WHELAN (Strathfield—Parliamentary Secretary), on behalf of Mr Amery [1.34 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech in *Hansard.*

Leave granted.

Termination of employment can be one of the most traumatic events in anybody's working life. Loss of a job and the security it brings are heavy burdens to bear, particularly for lower paid or less skilled workers.

For many years now, this State has had laws, which recognise that the loss of a job is a burden that should not fall on a person without good reason, dependent on impulsive decisions of an employer. Where a dismissal was unfair, whether in substance, in process or in effect, the dismissed employee has the right to challenge it in the Industrial Relations Commission of New South Wales. Where the Commission finds there has been unfairness, it has power to order a remedy. The remedies, in descending order of priority, are reinstatement, re-employment or compensation.

However, this Government acknowledges the time, effort and money that it takes both to prosecute and to defend a claim of unfair dismissal. The burden of defending a claim may fall particularly heavily on smaller businesses, with less capacity to absorb such unexpected costs. Because it believes in the integrity of the unfair dismissal system, the Government is also concerned about the unfair burden on business of defending vexatious or unreasonable claims.

The fact is that unfair dismissal is becoming, for some, a money game. And a money game attracts those prepared to take a gamble on getting a big payout. It is undeniable that some claims are a 'try on'. Some employers may find it cheaper and quicker to 'pay off' a claimant than to expend time and energy on attending conciliation hearings and then preparing for the formal procedures of an arbitral hearing of the merits.

The Government has committed to take a complete overview of the unfair dismissal legislation as it operates in New South Wales. This has already commenced through the five-year review of the Industrial Relations Act. Restoring the primary remedy of reinstatement and examining the historical context of the dispute-based role of unfair dismissals will be included in this review. The first phase of this review will focus on the conduct of unscrupulous agents, who are not legal practitioners nor union or employer representatives.

Large numbers of industrial agents are a recent phenomenon in the commission. They are not bound by the requirements that apply to either legal practitioners or industrial organisations. Some of them feed off the system, encouraging weak or baseless claims and holding out for the biggest monetary settlement possible. Such agents not only rip off the system—some of them rip off their clients as well. They promise 'no win, no pay', but then charge like wounded bulls for a win. A system that permits such unethical behaviour and inappropriate outcomes is not doing anybody a favour. It is not in the best interests of the sacked employee or their former employer.

A survey by the Department of Industrial Relations has revealed a significant increase in the number of applications in which the applicant was represented by an agent. In a survey undertaken in 1998, only 4 per cent of applicants were represented by agents. In 2001, 18 per cent of applicants were represented by an agent. This is a significant increase and is not a issue which is going to go away.

I should point out that not all agents are simply money hungry. Of course, some of them are decent advocates, working for their clients best interests. The Government does not want to prevent these good people from doing their work. We simply want to put a stop to money hungry agents clogging the system and taking employers for a ride. The proposed amendments will regulate the activities and conduct of industrial agents and deal with the difficulties that I have identified.

I now turn to the specific amendments. A new definition in the Dictionary of the Act will define 'industrial agent' to mean a person, other than a legal practitioner or an employee or officer of an industrial organisation, who represents a party in proceedings before the Commission for fee or other award. Services performed by an industrial agent will be defined as 'industrial agent service'. It is very important to note that the issue here is fee-charging agents. We are not seeking to prevent friends or family from assisting the applicant or employer in running a claim or response in relation to an unfair dismissal allegation. Also, for the most part, these amendments do not deal with the conduct of industrial organisations in representing their members in unfair dismissal proceedings.

As has long been recognised, by High Court decisions as well as in the reality of the everyday functioning of the industrial relations system, industrial organisations of employees and employers are in themselves parties to that system, not mere delegates of their members. They have a unique place in the industrial relations system, and a commitment to maintaining the integrity and effective operation of that system. Such organisations have rules that regulate their relationship with their members. Certainly, I have had no complaints about industrial organisations failing to service their members appropriately in relation to unfair dismissal claims. However, I have heard numerous complaints about the conduct of certain fee charging agents and it is appropriate that their conduct be regulated to protect their clients and also the integrity of the Commission's processes.

Most of the proposed amendments go no further than imposing on industrial agents similar restrictions to those that are currently imposed on legal practitioners under the Legal Profession Act 1987. There is evidence that some of these industrial agents are in fact persons who have been admitted as legal practitioners, who have allowed their practising certificates to lapse so that the rules of conduct that apply to legal practitioners no longer apply to them. This is clearly unacceptable.

Industrial agents representing either an applicant or employer in a claim where compensation is sought will be required to file a certificate certifying that the agent has reasonable grounds for believing, on the basis of provable facts, that the claim or the response to the claim has reasonable prospects of success. This is similar to the requirement imposed on legal practitioners by section 197L of the Legal Profession Act. The Commission will be able to award costs against an industrial agent who lodges a certificate in circumstances where the Commission considers there was no reasonable

prospect of success.

Whilst legal practitioners are required to maintain trust funds in which to hold moneys on behalf of their clients, there is nothing that presently prevents an unethical agent from holding onto moneys received in relation to their clients' cases and not passing those moneys on to their clients. Under this bill, a payment made to an industrial agent will not be effective to extinguish the rights or liabilities of the parties. Where a party uses an industrial agent, the payment will have to be made directly to the party.

Section 166 (2) of the Act currently requires legal practitioners to obtain the leave of the Commission before appearing in conciliation proceedings. The bill proposes that this requirement be extended to industrial agents. Although it can be expected that the Commission will grant leave in most cases, this amendment will empower the Commission to refuse leave in the case of notorious industrial agents, or industrial agents who do not comply with any of the other requirements that the bill will impose on them.

There was one complaint about industrial agents that concerned me more than any other. This was that some agents charge their clients, not for the work they actually do, but on the basis of how much money they get from their former employer. And this is based on a sliding scale. That is to say, the greater monetary payment they can obtain for their client, the greater a proportion of the winnings the agent claims for themself. With such a payment system in place, it is easy to see the incentives for the agent in chasing outrageously high settlements from the employer, and for resisting offers of reinstatement.

Legal practitioners are not permitted to charge fees in this way. The bill proposes to impose the same prohibition as that set out in section 188 of the Legal Profession Act on all fee-charging agents (including industrial agents, and employees and officers of industrial organisations). Costs agreements will not be permitted to provide that costs are to be determined as a proportion of, or are to vary according to, the amount recovered in any proceedings to which the agreement relates. If a prohibited costs agreement is made, the client will not be bound to pay the costs and the agent will not be able to maintain proceedings for the recovery of those costs.

The costs of industrial agent services will have to be disclosed both to the client and to the Commission at or before the commencement of proceedings. If the industrial agent fails to make the required disclosure, the client will not be required to pay the costs of the representation and the agent will not be able to maintain proceedings for the recovery of those costs.

The proposals in this bill will protect participants in the unfair dismissal system from unscrupulous and unethical industrial agents. Agents will have to comply with the new requirements or get out of the unfair dismissal system. The amendments will ensure the smoother running of the system. This will be a benefit to all parties.

I commend the bill to the House.

Debate adjourned on motion by Mr Debnam.

Bill Name:	Industrial Relations Amendment (Industrial Agents) Bill
Stage:	Second Reading
Business Type:	Bill
Keywords:	1R, 2R
Speakers:	Whelan, Mr
Database:	LA Hansard Extracts - 52nd Parliament of NSW / 523pa061 / 18

Next Page
Previous Page