

Barriers for Migrant Workers Participating in Resolving Employment Relationship Problems

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Overview

- UNEMIG and migration in New Zealand.
- Barriers to participation for migrant workers.
- 2015 Employment Relations Act amendments.
- What more can be done?

UNEMIG

- The Union Network of Migrants is a migrants' workers division within FIRST Union.
- established in 2012 in response to increasing concerns about exploitation of migrant workers.
- UNEMIG success due to strong community links within migrant communities.
- UNEMIG also recently involved in advocating for international students.

Who does UNEMIG work with?

- Vulnerable migrant workers (not all migrant workers are vulnerable).
- Many Filipino and Indian Workers.
- Often employed by a person from their country of origin.
- Come to NZ as students.
- Huge debt and family expectation.
- Jobs for cash arrangements
- Visa tied to employer.
- Legislative breaches (eg minimum wage).
- Abusive exploitative conditions, bullying, sexual harassment.

Why Migrate?

- Most migrant workers that UNEMIG deal with are economic migrants. Their main reason for migrating to New Zealand is the prospects of earning significantly more money than they would in their home country.
- Workers can be misled about the prospects for earnings in New Zealand, the costs of living, the opportunities to migrate to New Zealand permanently if one comes for educational purposes.
- Many migrant workers personally take on debt, sell ancestral lands or otherwise make huge financial sacrifices and take on risk to come to New Zealand. They are often backed by family who are betting on their success for their own economic wellbeing.

Why Does NZ have migrant workers?

- To meet skilled labour shortages. For example influx of migrant builders and other skilled blue collar workers in Christchurch rebuild.
- To meet labour shortages in lower skilled work, for example fruit picking.
- Students who come to study at Private Tertiary Education Services (PTES) but whose intention it is to migrate to New Zealand permanently.

PTES and the Migrant Experience

- Private Training Establishments (PTES) are a point of entry for many migrant workers.
- From 2010 a rapidly growing part of the economy. In 2012/2013 total contribution to GDP was \$1.3 Billion and by 2015/2016 it was over \$2 Billion. By contrast tourism generated International expenditure of \$11.8 billion in the year to March 2016.
- For most students we work with migration not education is the motivation. Post study visa for one year and then employer tied visa for up to 2 years.
- Many of the students are given unrealistic expectations of permanent migration to New Zealand.

Barriers to participation in Employment Relationship Problems

- Many workers are tied to a single employer visa.
- Employee requires the employer's assistance to renew the visa and is required to remain in employment with the employer to have a valid status in New Zealand.
- Lack of access to legal representation and advice including financial barriers to obtaining access.
- Not aware of rights.
- Lack of system knowledge.
- Section 67A trial provisions.
- Scepticism of judicial or government systems.
- Complicity (eg cash for job arrangements)

Barriers (cont.)

Community attitudes including:

- Normalisation of unlawful practices.
- Employers status in community.
- Migrant workers often cannot afford access to legal services and this sort of exploitation does not, for the main, occur in traditionally unionised areas.
- Many workers take huge financial risks in coming to New Zealand and do not want to jeopardise the investment.
- Lack of advancement beyond mediation. Migrant workers who come to mediation have generally been through a significant battle and stress to get there and have significant incentives to settle at mediation.
- Employers refuse mediation, do not respond to correspondence, phoenixing companies.
- May have returned to country of origin during dispute (or are intending to).

Conditions contributing to exploitation

- Employers are generally confident that migrant exploitation will go undetected and unpunished.
- A perception that even if one is caught the fiscal costs imposed will not outweigh monetary gains of breaching.
- Widespread use of phoenixing to avoid liabilities when legal action is taken.
- Low level of government enforcement.
- Businesses where migrants are the business. Marginal small business charge migrants for employment and pay under minimum wage. If you are running a small liquor store which is marginally profitable the fact you can charge a worker \$10,000- \$50,000 for a job and pay them \$8 an hour to work as a manager becomes the basis on which the business functions.
- Migrants talk about market rate of \$30,000-50,000 for residency and \$10,000- \$20,000 for a visa.

2015 Moving the dial

- In May 2014 on the back of growing concerns and media attention the Ministry of Business Innovation and Employment looked into what could be done to strengthen minimum employment standards. The result of the Ministry's concerns was a discussion paper titled *Playing by the Rules* which raised issues including:
 - Widespread breaches of minimum employment standards.
 - Lack of understanding about minimum employment standards.
 - Employers avoiding minimum employment standards by 'phoenixing' companies - whereby the legal company is wound up without paying workers' entitlements and a new company is established to, in effect, continue the business but avoiding debts owed, particularly to employees.
 - Resourcing constraints in the employment standards regulatory system.
 - Lack of appropriate mechanisms for dealing with serious and/or intentional breaches of employment standards.
 - That the most vulnerable parts of communities were the most susceptible to employment standards breaches.
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- Result was the Employment Standards Legislation Bill which was adopted as part of the 2015 amendments to the ERA.
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- The object of the amendments was to “promote the more effective enforcement of employment standards”. The core amendments are sections 142A – 142ZD of the Employment Relations Act 2000 (‘ERA’).
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- Immigration Act 2009 was amended in 2015 to address issues of migrant worker exploitation including providing for imprisonment. In 2017 the Auckland District Court applied this new power in sentencing two restaurateurs involved in high level migrant exploitation to a custodial sentence and a sentence of home detention. The judge described the conditions of employees as not far removed from modern day slavery.

New minimum standards provisions for Workers

- Labour inspectors to apply to the Employment Court for a new range of orders including: a declaration of a breach of minimum entitlement provisions, additional penalties and compensation provisions and orders banning non-compliant individuals from employing others.
- Higher penalties for serious breaches.
- Employees and labour inspectors can take proceedings against natural persons (not the legal employer) involved in breaches of if the default is due to a breach of employment standards and the person is a person involved in the breach as set out above. These proceedings limited to recovery for the minimum standards breach.

- The creation of these new remedies and rights incentivise greater participation in employment relationship problems by giving lawyers and advocates more tools and by shining public light on the issue.

What more can be done?

- Continued public advocacy and a discourse including media.
- A major barrier to many migrants pursuing employment relationship problems is the single employer visa. The government has announced changes in this area. From 26 November 2018 the employer assisted post-study visas will be . It is likely that with this removal we will see a growing confidence of these migrant workers in pursuing employment relationship problems.
- NB: Essential skill visas will still be tied to a specific employer. Need to find better way to apply labour market testing than restricting the employee to one employer.
- Immigration protection for 'whistle-blower' migrants. Protected Disclosures Act 2000 strengthened with an enforceable principle of no disadvantage.
- Regulation of foreign advisors.
- Education work can be done with migrant workers on arrival to New Zealand and also in migrant communities. These can be focused on encouraging and providing support for migrant workers but also to change the perception that these practices are acceptable.
- Appropriate language arrival briefing for new migrant workers.
- UNEMIG has developed a 'migrants' rights passport' for this purpose. It is intended to be given to migrant workers ideally prior to leaving their home country or, if not, upon arrival. It provides information on basic employment law, problem resolution mechanisms in New Zealand, health care information, a Q & A with common problems migrant workers face, basis 'kiwi' phrases and some te reo Māori.

- Need to increase the likelihood that employers will be caught and punished.
- Increased funding to labour inspectors to do more enforcement. This will both reduce exploitation but also install confidence in migrant workers that the problem resolution system will work in their favour.
- Consideration of greater criminal sanctions for egregious breaches. For example criminal sanction for jobs for cash arrangements and intentional 'wage theft' from workers.
- Review with a view to regulating the sorts of commercial arrangements and business that profit off migrant exploitation.
- Frame work agreements between unions and major employers.
- Liability for an employer involved in a breach of minimum standards could be reconsidered to expand it to include liability for non-minimum standards breaches including the ability to pursue personal grievances and contractual entitlements. There may be a need to consider a 'vulnerable worker' category.
- Revocation of 90 day trial periods for migrant workers.
- The power to seek the new orders in the Employment Court could be extended to allow workers to do it in their own name and not reliant on the labour inspector to make this application.