

Review of Developments in Employment Law

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I INTRODUCTION

May I thank you for the invitation to participate in this Symposium. I take the opportunity at the outset to acknowledge how fortunate I was to be a law student at Auckland Law School in the 1960s. It was a time when the staff recognised the need to teach students not only Privy Council and House of Lords cases, but also the emerging areas of the law that reflected the changing legal needs of the community. I was introduced to industrial law through two Honours seminars, the first taught by Ed Flitten for whom I wrote a paper on the Arbitration Court and the second by James Farmer QC from which emerged my first article in the 1967–1971 Auckland University Law Review.¹ I then went on to write my MJur thesis on workers' participation in management in New Zealand.²

When I received the invitation and request for a topic, I suggested it might be appropriate to review the developments in employment law since I published that article. I realise now this was rather optimistic. I should have read the opening sentences of my article. I wrote:³

A satisfactory system of governing industrial relations cannot be created overnight. It is a process of trial and error, reflecting the political systems and the development of the economic and political forces within the country concerned. It is also a process of evolution with new methods being introduced to meet changing conditions in industry.

In the words available I cannot capture the complexity of the development in industrial relations (or as it is called today, employment relations) over the past 40 years. Since 1968 New Zealand has experienced the evolution of a regulatory framework that reflects the increasing influence of globalisation on public policy. The year 1968 was a pivotal year in the history of industrial relations. The nil-wage order of the Arbitration Court marked the beginning of the end of the industrial conciliation and arbitration system that had prevailed since 1894. The changing economic environment, in particular the entry of the United Kingdom into the European Economic Community, opened New Zealand to the harsh reality of unprotected international trade. Changing technology was also exercising considerable influence over the

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1 Margaret Wilson "Collective Bargaining in New Zealand Outside the Industrial Conciliation and Arbitration Act" (1970) 1(3) Auckland U L Rev 37.

2 Margaret Wilson "Workers' participation in management in New Zealand" (MJur Thesis, University of Auckland, 1974).

3 At 37.

performance of work. In the 1960s containerisation transformed work on the waterfront, as did the introduction of technology in the office in the 1970s.

As the nature of work and the workplace changed, so did the regulatory framework. The Arbitration Court, with its regulatory function of determining wages and conditions across industries, gave way to the hybrid Industrial Court and then the current Employment Court with its function being entirely legal. Dispute settlement procedures to complement the role of the Court have included conciliation, arbitration, mediation and adjudication. The emphasis has always been on keeping the dispute out of the courts and settling at the lowest level to avoid the costs of litigation. During the 1990s there was an attempt to incorporate employment matters into the jurisdiction of the ordinary courts, but this was resisted essentially on the ground that employment matters require a less adversarial approach to dispute resolution.

It is important to note that the employment relationship has always been constructed as a special relationship. Blackstone in his *Commentaries on the Laws of England* characterised the relationship between masters and servants as a personal private relationship that defined the legal status of the parties.⁴ This legal status evolved into one of contract under the influence of industrialisation. The advent of trade unions and collective action created a new challenge for the common law and its emphasis on the individual and the protection of free trade.⁵ Trade unions were collective entities and their primary function of protecting and furthering the interests of workers was seen in legal terms as a restraint of trade. It required political intervention to enable individuals to combine to further and protect their employment interests and in New Zealand this took the form of the Industrial Conciliation and Arbitration Act 1894. It created a separate regulatory system to regulate the industrial relations with a role for governments, employers and unions. It can be argued that this system served New Zealand well and complemented the economic and social conditions of the time.

When those conditions changed in the 1960s, however, so did the need for a new regulatory framework. Change is never easy for those most affected by it and the birth pains of change were seen in the increasing industrial strife during the 1970s and 1980s. Amendments to the legal industrial framework came thick and fast during this period and ultimately resulted in the Labour Relations Act 1987. This Act was an unsatisfactory compromise and soon gave way to the Employment Contracts Act 1991 (ECA). The ECA represented an ideological break with the past as it attempted to remove collective negotiations and to individualise the employment relationship. For lawyers this change was like a bonus because lawyers became the new representatives of employers and employees in their employment disputes. The attempt to marginalise the unions from the process created a political backlash that eventually resulted in the Employment Relations Act 2000 (ERA). This Act attempted to find

4 William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765) vol 1 at ch 14.

5 Paul Davies and Mark Freedland (eds) *Kahn-Freund's Labour and the Law* (3rd ed, Stevens & Sons, London, 1983) at ch 1.

a balance and a real choice between individual and collective negotiation of employment conditions. Further amendments were made to the holiday, and health and safety legislation to create, in effect, a statutory framework of minimum standards.⁶ The change of government in 2008 has seen the steady stream of amendments to reverse the previous amendments and more are foreshadowed from both parties. I fear the search for a stable employment regulatory framework is some way off.

II IDEOLOGY

The swings and roundabouts of employment legislation are driven by changes in policy that are driven frequently by ideologies, which in turn are driven by principles, ideas and values. My observation is that until there is a consensus on the ideological foundations of the employment relationship there will be no regulatory stability. Ideology in New Zealand is like the proverbial elephant in the room. It contradicts our image of ourselves as a pragmatic egalitarian consensus-seeking society. Understanding the central role of ideology in policy making however is essential to any analysis of employment policy and law.

Ideology has been recognised as an essential element of any industrial relations framework, as is seen in the works of theorists such as Dunlop's *Industrial Relations Systems* and Fox's *Industrial Sociology and Industrial Relations*.⁷ In the New Zealand context, Deeks has observed:⁸

It is a truism that there is in New Zealand culture a widespread if inarticulate suspicion of ideas, of theory, of ideology and a general preference for the practically useful, for the matter-of-fact treatment of things, for the pragmatic.

About the same time, Woods also observed the New Zealand aversion to theory:⁹

Despite New Zealand's long-standing claim to initiative and uniqueness in the systemising of industrial relations, we are not renowned for our production of theory in this field.

Deeks noted further that this failure to acknowledge the importance of ideology had led perversely to an ideology of no ideology. He stated:¹⁰

6 Health and Safety in Employment Amendment Act 2002; and Holidays Act 2003.

7 John T Dunlop *Industrial Relations Systems* (Henry Holt, New York, 1958); and Alan Fox *Industrial Sociology and Industrial Relations* (HMSO, London, 1966).

8 John Deeks "Ideology and Industrial Relations in New Zealand" (1976) 1 *New Zealand Journal of Industrial Relations* 26 at 26.

9 Noel S Woods "Industrial Relations in New Zealand: A Look at the Groundwork" (address to the Annual General Meeting of the New Zealand Institute of Economic Research, 30 October 1975) at 1.

10 Deeks, above n 8, at 30.

What is perhaps unusual about New Zealand is the way in which these contradictions are masked or blurred by the rejection of ideological consciousness and the consequent reluctance to analyse industrial relations situations in terms of conflicts of interest and ideology.

He then notes that the espousal of an ideological position is akin to exposing oneself and therefore while people do hold ideological positions, they keep them covered in public. He cites the example of the concept of class being banished from public debate in New Zealand for fear of disturbing the myth of New Zealand being a classless society.¹¹

Both Deeks and Woods were writing at a time of considerable industrial conflict that was accompanying the weakening of the industrial conciliation and arbitration system that had provided the foundation for industrial relations since the 1890s. They both identified the tension between a unitary policy approach to industrial relations by employers and the government of the day and the reality in the workplace, where a pluralist approach was practised because of the need to engage with unions representing workers. Since the introduction in 1984 of neo-liberalism into New Zealand public policy making, ideological differences and a willingness to discuss them has become greater, at least amongst academics.

The ideological perspective of employers, employees and their respective organisations has an influence on political parties' policies. It is this strong political ideological difference that creates the difficulty in constructing a consensus around a stable statutory employment relations framework. Over the past 40 years, there have been dramatic ideological swings in employment relations public policy. For example, in the 1970s, the governments of the day pursued two parallel strategies. One strategy was to attempt to control wage-fixing in the short-term through a series of various wage stabilisation/control regulations.¹² The other was to enact a new statutory framework through the Industrial Relations Act 1973 that was better suited to the economic conditions of the time, which meant introducing more flexibility into labour market regulation. Although this Act maintained much of the philosophy underpinning the Industrial Conciliation and Arbitration Act, it marked a significant shift in policy.¹³ Furthermore, the political thinking was shifting even further and faster than the Act's underlying philosophy. While the old policy notions were being employed to address the immediate issues of increasing industrial conflict, increasing inflation and higher wage increases, a new policy environment founded on neo-liberal ideology was slowly developing. This would fully emerge in the 1980s.

The failure to develop a new consensus in the 1970s was attributed, amongst other factors, to a fundamental lack of trust amongst the key

11 At 30.

12 Jonathan Boston *Incomes Policy in New Zealand: 1968–1984* (Victoria University Press, Wellington, 1984) at 128–129.

13 FJL Young "New Zealand Industrial Relations: Retrospect and Prospect" (1976) 1 *New Zealand Journal of Industrial Relations* 3 at 3.

parties.¹⁴ It was this lack of political trust that was also to hamper the attempt of the Labour Government to construct an agreed new statutory framework in the 1980s. Immediately after the 1984 election, the Labour Government clearly signalled it intended to pursue a neo-liberal policy agenda, that was articulated in the Treasury briefing paper *Economic Management*.¹⁵ The classic neo-liberal strategy dictated fundamental change, but intense political negotiation eventually resulted in the Labour Relations Act 1987.¹⁶

This Act was an attempt to create a new bargaining environment that facilitated a move from national awards to industry or enterprise agreements. Employers had argued for greater flexibility in the conditions of employment to meet the conditions of the market in a timely fashion. Employers' desire for greater flexibility was further fuelled by the economic turmoil following the 1987 share market crash. However, the economic crisis also made the unions reluctant to pursue collective bargaining. The dilemma for the unions was that they did not wish to abandon the security of the national award system for the uncertainty of negotiating an industry or enterprise agreement without a commitment that the employers would conclude such an agreement.

The fact that the Labour Relations Act did not survive a change of government in 1990 was not a surprise. The National Party had clearly signalled it wanted to construct "an appropriate framework for New Zealand business".¹⁷ There was no place in this policy agenda for the traditional role of trade unions. The incoming National Government lost little time in implementing their agenda. There was no place for consultation or negotiation over the new framework. The policy advocated, for the first time, the abandonment of a pluralist statutory framework and opted for an explicitly unitary approach centred on the notion of contractualism. It moved quickly to honour its election commitment and enacted the ECA within the first year after the election.

In 1999, the new Labour Government followed a similar process and made the enactment of the ERA a priority. The highly contentious nature of employment relations policy was seen to justify quick action by both parties when in government. The polarisation of the politics of the issue had made any attempt at consensus impossible. The ECA and the ERA were both statutory frameworks imposed by governments and in different ways marked a genuine break with the industrial conciliation and arbitration bargaining framework.

14 See Rod Campbell and Alf Kirk *After the Freeze: New Zealand Unions in the Economy* (Port Nicholson Press, Wellington, 1983); and Boston, above n 12, at 301.

15 The Treasury *Economic Management* (14 July 1984).

16 See Margaret Wilson *Labour in Government 1984–1987* (Allen & Unwin, Wellington, 1989); and Pat Walsh "A Family Fight? Industrial Relations Reform under the Fourth Labour Government" in Brian Easton (ed) *The Making of Rogernomics* (Auckland University Press, Auckland, 1989) 149 at 153.

17 See Max Bradford "National's Labour Market Policy" (1999) 24 *New Zealand Journal of Industrial Relations* 155 at 155.

III EMPLOYMENT CONTRACTS ACT 1991 — A SHIFT FROM COLLECTIVISM TO INDIVIDUALISM

While the ECA was a genuine attempt to address real issues in the workplace that affected the economy as a whole, it also reflected the neo-liberal ideology that had been pursued by the Fourth Labour Government. The role of the state was to be regulation “lite”, and to enable the individual to take control of their lives by having the freedom to make decisions unconstrained by the law. However successful the ECA regime was from the perspective of employer organisations and the National Party, the fact is that this neo-liberal paradigm never lost its controversial political status.¹⁸ It did not survive the next change of government.

The wide difference between these two assessments made change inevitable if there was a change of government and that is what happened. By the 1999 election, there was a consciousness amongst the Labour Party for a more balanced, pragmatic approach to public policy. There was a greater acceptance of the need to recognise economic reality and not to try and reinvent the past in the guise of preparing for the future. At the same time, the Labour Party was expected to deliver to its constituencies that had experienced hardship through the policies of the 1980s and 1990s. It had also formed a coalition government with the Alliance Party and had to accommodate the policy of that party, which was further “left” than the Labour Party’s.

However, any new statutory framework had to reconcile fundamentally opposed ideological positions, while recognising the reality in the workplace and the need for business to prosper. The concept of good faith was an attempt to reconcile these objectives by providing a new norm or principle on which to try and construct a new statutory framework.¹⁹ It was an alternative to compulsory arbitration under the industrial conciliation and arbitration system and the contractualism of the ECA. The notion was grounded on the assumption that there should be a negotiated agreement on the issue of wages and conditions: that is, one party should not impose its will on the other, or have it imposed by a third party. Further, it assumed that if the parties approached the negotiations for an agreement in good faith, they would be more likely to achieve a settlement. It was a mechanism to get the parties into negotiations but not necessarily to conclude an agreement. In this respect, the shadow of the ECA lay heavily over the ERA.

The good faith concept clearly assumed an optimistic expectation of human behaviour, unlike that under either the industrial conciliation and arbitration or ECA systems, which assumed compulsion was necessary for an agreement. It was a new approach and a high-risk one. This approach also included the reintroduction of the notion of tripartism in decision-

¹⁸ John Deeks and Erling Rasmussen *Employment Relations in New Zealand* (3rd ed, Prentice Hall, Auckland, 2002) at 92–93.

¹⁹ Employment Relations Act 2000, ss 3 and 4.

making. Whereas in the past the government had played a more direct role in workplace decisions, the new notion of tripartism was confined to public policy making (with a consultative approach to the making of policy but a “hands off” approach to the implementation of that policy). Employers, employees and their bargaining representatives had the responsibility of implementing the policy in the workplace.

IV IS IDEOLOGICAL CONSENSUS POSSIBLE?

The different ideologies that underpin the ECA and ERA clearly reflect the political ideology of the government of the day. While the National and Labour parties reflect the ideological interests of business, and workers and their organisations respectively, they also have to accommodate a wider public interest that transcends sectoral interest to work in the national good. While sectoral interests tend to characterise their positions as being consistent with the public interest, it is governments who have the responsibility of judging whether in fact the policies have sufficient support to maintain political power. New Zealand governments have always strongly asserted their right to govern and in the past have pursued a policy above sectoral interests.²⁰ Hamer noted in his study of the Liberal Party that during the debate on the 1894 conciliation and arbitration legislation, the emphasis placed on the need for this intervention by the state was the benefit it would bring to the country as a whole.²¹ No one section of the community was to be privileged over another. Appeals to the public interest are still made today by governments, though the focus today is more on the economic benefits. The Hobbit legislation is a classic example of the current public interest policy approach to employment relations.²²

Since 1968, the ideological differences of the political parties have become more prominent under the demands for economic and social change. The 1975 election marked a new high (or low) in campaigning, with unionists depicted as dancing Cossacks with the implication that Labour was under the influence of communists. In 1984, Labour masked its intention to radically change economic policy and, after initial support, lost the confidence of the electorate — in particular its traditional supporters. The National Party won the 1990 election on an expectation it would reverse the policies of the Fourth Labour Government, but continued with the same policy framework and nearly lost the 1993 election.

As the ability for governments to assert that a policy rises above sectoral interests became less, the need to do so declined with the advent of MMP. It has enabled more explicit ideological positions to be presented

20 David Hamer *The New Zealand Liberals: The Years of Power, 1891–1912* (Auckland University Press, Auckland, 1988) at 40.

21 At 40.

22 Employment Relations (Film Production Work) Amendment Act 2010.

to the electorate, such as the ACT Party's neo-liberalism, the Green Party's environment policies and the Maori Party's sovereignty positions. In this more highly visible and contested political environment, the search for consensus becomes more difficult and often compromise is mistaken for consensus. It may have been thought that the current global economic crisis may provide the political conditions for accommodations to be made on new policy frameworks. This seems highly unlikely, as there has been little obvious pressure to rethink financial or economic policies in the current New Zealand context.

V CONCLUSION

In this paper, I have tried to outline briefly not only policy and statutory developments in employment relations, but also the important role of ideology as a major driver of legal change. The current neo-liberal public policy paradigm assumes the economy is the primary driver of public policy, with market mechanisms as the determining factor in the allocation of resources and decision-making. This ideology is constantly contested, however, and the recent financial and economic crises have opened the opportunity for the construction of a policy paradigm that strives for more stability through a more inclusive approach. Whether New Zealand can find a new consensus in public policy will be a challenge for all parties, but one that I would argue is necessary for the well-being of the community as a whole.

In the meantime, employment relations will continue to be conducted on a day-to-day basis in workplaces, while the representative organisations continue to engage with governments and governments continue to search for the holy grail of improved economic productivity through constant policy changes. One can only hope this policy search will be inclusive of all interests, otherwise the search for a new consensus will be a long one.

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