RECONSTRUCTING NEW ZEALAND'S LABOUR LAW: CONSENSUS OR DIVERGENCE?

By Gordon Anderson
Wellington, Victoria University Press, 2011, 286 pages

Alan Geare*

Although written by a Professor of Law, the book's Introduction makes clear it is not "a detailed legal textbook" but rather is an historical overview of New Zealand's labour relations and law from the 1890's to the current Employment Relations Act (ERA).

The book is very readable and informative and I would strongly recommend it not only to students and practitioners of labour law but also to students and practitioners of employment relations and human resource management.

There is some tension in the book. Professor Anderson's sympathies appear to be for the working class and the Labour Party rather than the neo liberal / New Right. He does however acknowledge that it was the 1984 Labour Government which implemented "a neo liberal / New Right economic programme" and that the National Government's Employment Contracts Act 1991 (ECA) was "a logical completion" of the 1984 Labour agenda.

Tension is also apparent on a number of occasions when the book is virtually on two levels: a somewhat emotive level, where it seems that Anderson is writing about what he feels *should be,* and a more resigned level when he recounts what is or what did happen. This means the book should be read carefully, as a quick reading may focus on the more emotive moments. There are a number of instances.

The first includes the basic question as to what is labour law. We read that "The history of labour law is the history of a long and slow struggle of workers, those without sufficient property to support themselves independently, to gain a voice in and control over their economic security", and that "while capital does not need labour law, workers do". However the reality is that labour law is not simply about the glorious struggle of workers, but as Professor Anderson later discusses, labour law reflects the objectives of not only workers but also of the state "to provide for the state's own interests in the labour market" and of employers, with the ECA being "largely developed by employers for employers".

The second is concerned with the impact of the ERA. After the more overt neo liberal / New Right individuals from the 1984 Labour Government had left to form the ACT Party, the 1999 Labour-led Government had the

* Professor of Management, University of Otago

opportunity to replace the unitarist ECA with a pluralist ERA. Professor Anderson – and, indeed, many of a truly liberal bent, would have liked that to happen. Anderson suggests it did. Chapter 6 is headed:

> A Return to Pluralism:
> The Employment Relations Act 2000

Unlike other chapters, there is no question mark after "pluralism" – Anderson suggests the ERA *was* a return to pluralism. Later we read "the ERA reintroduced a much needed balance into labour law and industrial relations". An alternative view is that the ERA introduced cosmetic changes only – and it would appear that, deep down, Anderson agrees as he admits "the ERA did not alter the industrial relations and labour market outcomes achieved under the ECA".

A third example concerns the actions of the 2009 National-led Government and the 2010 amendments. At first glance, there appears to be a dramatic attack by the New Right. We read "National moved aggressively to enact a range of measures that will have a serious detrimental impact on employees, and later, that National launched a major assault on employee rights. Again, an alternative view is that the changes made so far by National are to appease the small business lobby and while the 90 day rule seems both unnecessary and discriminatory, in all probability it will not have much impact on other than a tiny minority of workers, who would probably have been treated poorly regardless. The replacement of "could" for "would" in the justification for a dismissal – whether a reasonable employer could/would have dismissed - will likewise have little significant impact on the level of job security against dismissal. As Anderson later states "it is unlikely that any government will seriously erode the full floor of minimum term and conditions although this is not to say that some rights, and personal grievance rights in particular, may not come under pressure".

Any book on employment relations *per se* will cover topics which have a variety of interpretations and consequently readers will agree with some and disagree with others. Many readers will agree with most of Professor Anderson's interpretations, but again with some caveats.

A minor issue is whether it is true that by 1983 "popular support for compulsory membership (of unions) had significantly eroded to the extent that … the Muldoon National Government felt politically safe in introducing voluntary membership".

One interpretation is that Muldoon introduced voluntary membership as a desperate political gambit, hoping to trigger industrial action which could swing voters to National. Certainly union leaders were recommending that their members take no action, and the Labour Party was promising it would reintroduce compulsory membership after it won the general election. They did – which hardly suggests compulsory membership had lost support.

Anderson reiterates the myth that the 1968 (1967 on p. 58) nil-wage order "symbolised the end of the arbitration era". If so, it was a very slow and lingering end and he ignores the fact that the parties went back to the Arbitration Court and, in possibly a unique occurrence, the employers representative and the union representative sided together against the Judge and gave a 5 per cent General Wage Order (GWO). Two years later, after the GWO Act 1969 was passed, the unions went back to gain a 3per cent GWO. After a period in the 1970's of wage restrictions, a new GWO Act 1977 was passed with further GWO's. The Arbitration era did not end until 1984, when arbitration was only available if both parties agreed. At that time employers were in a very strong position and refused to let disputes to go to arbitration.

A third area of disagreement is whether judicial activism was practised by the Employment Court under Chief Judge Goddard and the Court of Appeal under Cooke P – which Anderson disputes – or by the Court of Appeal later under Richardson P when Anderson considers the Court of Appeal "becomes increasingly conservative, if not reactionary, in its approval" and "was over responsive to what New Right would have preferred to see in the ECA rather than what was actually enacted".

The reverse interpretation is also possible. There is a good case that the Court of Appeal under Richardson's Presidency interpreted the law as written. Under Cooke's Presidency the Court of Appeal upheld what could be seen as blatant judicial activism by the Employment Court which ruled that, although workers had no statutory rights to redundancy pay, and no contractual rights unless there was a redundancy agreement, payment should be made in the case of dismissal for redundancy to make the dismissal "justifiable". Many may agree that redundant workers *should* receive redundancy pay, but surely Richardson is correct that those are "matters to be resolved by the legislature, not the judiciary" .

Readers should, of course, read the cases cited in the book concerning redundancy and make their own conclusions as to which courts, if any, were responsible for judicial activism.

To conclude, I reiterate my earlier comments – this is a very readable and informative book and I strongly recommend it to a wide audience. Gordon Anderson is to be warmly congratulated on his work.