

A Commentary on Politics and Employment Relations in New Zealand: 2008-2011

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Introduction

As a policy issue, Employment Relations (ER) has appeared to have been, publicly at least, of relatively limited significance in the run up to, and after, the 2008 election. It has, on occasions, drawn serious public and media attention – a flurry around the 90-day measure or around the Hobbit Case, for example – but, compared to the impacts of the 2008 global crisis, or taxation or welfare policies or, of course, events in Christchurch, it has been small beer. However, as we run up to the 2011 general election, ER reform is back on the table as a key plank of National's strategy for economic performance and the Prime Minister has warned the unions that they will not like proposals that are in the making (Radio New Zealand 2011). After three years of relative unimportance, ER may become a major political and electoral issue.

Trade unionists might well take issue with the description just offered of ER in the post-2008 period. They see the period very differently. They have experienced what might be described as "the thousand cuts" approach in ER. They observe a gradual erosion of ER provision, punctuated by some very serious measures indeed. They would argue that public debate on ER has often misunderstood the scale and persistence of that erosion. They expect more adverse change if a National-led Government is returned in the 2011 General Election.

Employers, on the other hand, are broadly happy with ER changes since 2008. The changes could, perhaps, have been quicker and more profound but, in general, the direction is thought to be positive. Further changes consequent of the re-election of a National-led Government would be desirable and anticipated (for example, in non-union collective arrangements or, more generally, on questions like Youth Rates).

In this commentary, we provide an assessment of the developments in ER since 2008, focusing on the political environment and, in particular, on the positioning of the National-led Government on ER issues.

The Opportunity

ER issues were a relatively minor concern in the election campaigns of 2008. There were no pressing ER issues in the public's mind. Neither of the big parties went to the polls with a highly-charged ER statement and the Leaders' Debates barely mentioned them, if at all. Manifestoes said something, but not much about them. They were almost non-issues in the general public's view.

This was not true for the social partners. National went into the election with employment law changes clearly signalled but presented it, seemingly, as a "tweaking" of the framework rather than a root-and-branch reform (Rasmussen 2009: 166-7). In particular, it was stated explicitly that the Employment Relations Act (ERA) would stay as the overall legislative framework. However, it

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was not clear whether the array of issues in which it suggested an intention to move – holiday provision, non-union collective bargaining, the original 90-day provision, AC, Kiwisaver, for example – was high priority, or indeed a comprehensive statement of areas of policy interest. As in other areas, there was a feeling that National's policy directions were less developed than might have been expected in an Opposition, which had had nine years to develop positions.

The New Zealand Council of Trade Unions (NZCTU) responded adversely to these proposals. Whilst its electoral statement avoided a piecemeal engagement with National's ER platform for the election (see CTU, 2008), there was a concern in union circles about a return to an Employment Contracts Act (ECA) approach to ER (see, for example, Kelly, 2008).

Business New Zealand went into the election period arguing for a period of stability in ER provision, implicitly suggesting that the 1999-2008 period had been one of flux. It liked the idea of collective bargaining without union participation, of flexibility for the fourth week of holidays and the 90-day model as originally applied. It also developed a major focus on compliance costs, in which the impact of OSH and the Holidays Act played a significant part, as did the "ambush" of Kiwisaver and the costs of ACC. One might look at the changes that were supported and the compliance areas in which action would be appreciated and wonder what meaning Business New Zealand attributed to "restraint and consolidation" (Business New Zealand, 2008).

Thus, from a tripartite perspective, a National victory in the election might entail changes in the ER framework and in broader, related provisions, such as ACC and Kiwisaver. The parties were positioning themselves for the debate around such changes, yet even amongst the social partners, there was little sustained rhetoric about fear, conflict or major shifts in ER. Nearly a decade of tripartism and consensus seemed to have dulled the oppositional edge somewhat.

We might wonder why an issue, which, in previous decades, had been a touchstone political matter, had lost much of its political importance in the public sphere (as opposed to amongst the social partners). The answer probably lies in ER changes in the two decades prior to 2008. The ECA had devastated union density whilst simultaneously giving most employers a major shock as they geared up to understand and implement enterprise-level bargaining. The 1990s was a very difficult period for the social partners, if more so for one than the other. The unions were under major attack from an explicitly anti-union legal framework that sought to replace union-based collective bargaining with a unitarist, HR-driven, enterprise-based approach to wages and conditions. Employers (though not all) supported this attack on the unions but were not grounded in enterprise-based arrangements and floundered in the early years of the ECA. The outcome was a halving of union density and, in many companies, a take-it-or-leave-it approach to wages and conditions. The balance of power swung dramatically towards employers, and they took advantage of their new powers.¹

The ERA sought to counterbalance the impact of the ECA. The ERA did not dispense with the ECA; it took key elements of the 1990 legislation and included them in a new framework. The framework was designed to promote improved economic performance by building better workplace relationships (as opposed to the ECA's focus on contract arrangements). The building block was still the enterprise and although unions put pressure on Government, there was no serious move to promote industry or sectoral arrangements. Labour's model adopted "soft regulation", that is, an approach encouraging, rather than attempting to legislate for, changed behaviours (Macneil, Rasmussen and Haworth, 2011). This was also true across the 1999-2008 Governments in general. Tripartism was introduced extensively. Initiatives on productivity and partnership were introduced, also on a tripartite basis. However, in the ER area, the three Governments in the period preferred to encourage and support rather than direct.² They did so for many reasons, two of which are particularly important. The first was the clash between business and the Labour-led Government in the first term, which, arguably, had a dampening effect on Labour's reforming zeal. Second, Social

Democracy, in general, has adopted a soft regulatory approach in the face of neo-liberal certainty. Social Democratic Governments have since the 1970s often faced the constraints imposed by neo-liberal macro-economic settings and the wider ideological impact of free market philosophies. One effect of this is to temper “hard law” interventions in policy areas, such as ER and Governments preferring instead to use “soft regulation”, that is, measures designed to encourage and support rather than to direct.

The combined impact of the passage of time, the ERA and soft regulation created what seemed to be an agreement around the wider ER model. The social partners both had their problems with the framework, yet, in general, it and its agencies (the Employment Relations Authority and the Mediation Service, in particular) became relatively non-controversial. Trigger issues (for example, industrial disputes) did not arise to disrupt the consensus. There were issues on which a positive joint purpose existed between the social partners, as in the case of better-performing workplaces or training provision. As the 2008 election approached, there were, at least publicly, few if any ER issues that had that element of conflict, which would make ER a political football in the election campaign. It seemed to be an issue around which a practical and political accommodation reigned.

Therefore, when a National-led Government came to power in 2008, it had a tremendous opportunity. ER was, it appeared, politically non-controversial. Its legislative framework worked and seemed to achieve something of a consensus. On the face of things, the social partners were engaged positively around important issues, such as growth, productivity and performance. Issues signalled as concerns around the election were, potentially, open to resolution in a tripartite approach. There was a platform on which to build greater focus and success in the productivity area. This was an area in which continuity and confirmed consensus could deliver serious benefits, particularly as the 2008 global crisis exploded. What was required for this potential to be realised was, of course, that the three parties – Government, employers and unions – actively and jointly took advantage of that potential. This was not to be.

First Days

The National-led Government came into power in adverse circumstances. The worst global downturn since the inter-war Great Depression was in train, and New Zealand had already entered the downturn as a result of drought and other factors. These were circumstances in which ER issues were not likely to gain immediate priority. Indeed, apart from the signalled 90-day measure, it was not obvious if the new Government was going to do anything much about ER, and if it was, what it would be was not clear. On the contrary, the new Government seemed willing to continue the tripartite tradition of its predecessors.

The Jobs Summit captured that early sense of continuity. It was a tripartite process in which the NZCTU played a strong role, alongside both business and Government sectors. Personal relationships, so important in New Zealand, between the NZCTU and, in particular the Prime Minister, seemed to be open and mutually respectful. Some of the measures that were implemented from the summit, especially the jobs subsidy approach, were welcomed by all, if sometimes argued to be too little, too narrowly focused. (see, for example, NZCTU, 2009a; b). Subsequently, the Prime Minister took part in productivity-related public events held by the NZCTU, reinforcing a perception that continuity through the change in Government was possible. The responsible Minister appeared, on the face of things, to be, at best, moderately grounded in either the work of the Ministry or the strengths and weaknesses of the extant ER model.

This perception was reinforced by informal conversation around the corridors of the Ministry, the employers’ and union organisations and also amongst media specialists (see, for example,

Armstrong, 2011). The general feeling was that ER was, in general, low in the Government's priorities. The exception to this was the public sector, in which it became clear early on that changes would be a priority for the new Government. However, in the public sector, the Partnership for Quality approach and positive developments in the health sector seemed to have established a modus operandi that new Ministers could adopt.

The general prescription for how New Zealand would escape the economic crisis also lent some support to a continuing tripartite framework with a focus on productivity. As was true for most economies, the route out of the crisis was reduced to two key elements – increased trade with the global economy and improved productivity (which would deal not just with price pressures, but would also emphasise a shift up the value curve into higher value, more sophisticated products). In such a model, enterprises could not be “black boxes” from which Government was excluded. Improved productivity required a joint effort across the Government, employers, unionised and non-unionised workforces to challenge each workplace to improve performance, from the simplest adoption of a 7 Wastes approach³ to the implementation of full-scale partnership models. Here again was a crisis-driven opportunity to make best use of the tripartite arrangements of the previous decade.

The 2008-2011 Period⁴

We can now turn to events subsequent to the Jobs Summit. Major Government ER interventions, judged in terms of impact and/or visibility, include:

- The introduction, under Urgency, of the initial 90-day measure (2008)
- The demise of the Partnership for Quality (2008) and a deterioration in the social dialogue in the Public sector
- The Hobbit Issue (2010)
- Changes to the ERA and the Holidays Act (including the extension of the 90-day measure) (2010)

Other interventions include:

- Ending of pay and employment equity studies (2008)
- Removal of the minimum wage protection for workers on the Recognised Seasonal Employer (RSE) scheme (2009)
- Disestablishment of the National Occupational Health and Safety Advisory Committee (NOHSAC) (2009)
- Changes in rest and meal breaks (2009)
- Closure of the Partnership Resource Centre (2011)
- Announcement of a new High Performance Work Initiative (2011)
- Fishing Inquiry (2011)
- New labour inspectorate provision for hazardous industries (2011)

The original 90-day measure was presented as an election promise met. The 90-day idea had currency for a considerable period before the election and was clearly signalled in National's election policy. It was fiercely opposed by the trade unions and supported by employer groups. Importantly, the debate around the measure divided between neo-liberal (market) and what might be described as “institutional” analyses of labour market dynamics. The measure represented a polarising tendency, not just between the social partners, but also intellectually around labour market performance. Thus, already in 2008, the signals from the new Government were mixed. On the one hand, there was, it seemed, an openness to dialogue at the Jobs Summit, yet simultaneously a willingness to move against one social partner in the interests of another. There was no detailed

tripartite assessment of the 90-day measure. The measure was taken through Parliament under Urgency and, subsequently, the Department of Labour (DoL) admitted that

the department has no way of monitoring those who lose their jobs within 90 days, other than through the complaints procedure, nor has it the ability to report positive or negative impacts on the labour market (New Zealand House of Representatives, 2009. See also Cheng, 2011).

It was, therefore, a political move, carrying with it a known risk of polarising positions and threatening future tripartite engagement with scant regard to the monitoring of its effects.

In the public sector, the Partnership for Quality lost traction and faded from view. Mr. Key had spoken to the PSA conference, making it clear that his Government would not continue with the Partnership for Quality but would be open to engagement with the PSA. It was rather like the Jobs Summit versus the 90-day measure, a mixed signal. Subsequently, in early 2009, the PSA raised the question of a further agreement with the Government, which replied that it would consider the idea. Nothing came of that and then, as an effect of the 90-day measure and the Government's policies in the public sector, the idea of an agreement lapsed. It is clear that the Government was not strongly interested in sustaining strong social dialogue in the public sector and was comfortable in allowing it to lapse. Equally, the PSA, growing in a view that the new Government was marked by a polarising approach to ER, decided also to walk away from the Partnership for Quality model, whilst remaining open to constructive engagement where it might be in the interest of its members.

Subsequently, the public sector has become even more strongly polarised as an effect of Government policy and rhetoric. Under the rubric of 'shifting the back office to the front office', first capping and then cutting the size of the public sector, became Government policy. Between December 2008 and December 2010, 1886 jobs were lost in the core public sector and the PSA suggests that a further 600 plus jobs had either been lost or announced as cuts in January-August 2011 (Personal Communication, August 2011). The 2011 Budget provisions clearly envisaged further job losses, though implementation decisions were pushed down to decisions at departmental CEO-level to distance such outcomes from Ministers. Bargaining advice to Government departments emphasises modest, performance-related settlements, fiscal prudence and careful cost control, and it was made clear that the extended, 2010 90-day provision (see below) be applied in the public sector. The SSC expects to maintain a relationship with the PSA but it is clearly to be a relationship founded on Government expectations, and the existence of some departments is now challenged as the Government questions the structure of the core public sector.

Even more striking has been the "framing language" used by the Government about the public sector. This has moved a long way from the partnership language of the Partnership for Quality. Mr. English has launched a dismissive attack on public servants as purveyors of waffle and suggested that they lack integrity and creativity. Mr. Key has weighed in with comments about a bloated and inefficient public sector. Dr. Brash, leader of the Government support party, ACT, has spoken of public servants as Little Hitlers. Putting to one side the hyperbole found in statements of this type, it is clear that the post-2008 Government and its allies disrespect public servants.

The Hobbit Case in 2010 captures the shift from ambiguity towards, to explicit opposition to trade unions on the part of the post-2008 Government. The outcome of the dispute was, in ER terms, quite extraordinary. In a contingent move, uninformed by any detailed policy analysis, the Government chose to remove, from a group of New Zealand workers, the possibility to make full use of the national ER framework in place. Instead, that layer of workers was arbitrarily defined as contractors, except in the unlikely event the employer chooses to take a collective approach to ER. This was done to appease an alliance of powerful domestic and international forces in the global

film industry. It was a measure that, in its haste and content, carried through Parliament under Urgency, is difficult to associate with a modern and developed OECD nation. The NZCTU opposed this measure as firmly as employer groups supported it. However, the NZCTU opposition was clouded by the Government's dismissive approach to the NZCTU's attempts at problem-solving in the dispute. Instead, the Government chose to elide all union involvement in the matter into one camp, providing an explicit rationale for what can only be described as old-fashioned union bashing.

Also, in 2010, the Government brought through a range of amendments to the ERA and to the Holidays Act. A key rationale for the changes was to "rebalance" fairness in ER from employee to employer interests, in the interests of efficiency. It was, therefore, expressly a one-sided Government intervention into legislation, much as had been the intervention in the Hobbit Case.

The amendments of the ERA included:

- Reduced union access rights
- Extended communication rights for employers during bargaining
- Extension of the 90-day provision to all enterprises
- Shifts towards employer interests in the Personal grievance process

Amendments of the Holidays Act allow:

- The "cashing-up" of up to one week's holidays
- The transfer of observance of a public holiday
- Significantly tighter requirements relating to the provision of medical certificates

Many of these issues were the site of established, fierce employer-union opposition, often over an extended period. The "rebalancing" favoured the employer party in every important issue. It was the partial granting of an employer wish-list that had grown since 2000. Outside the parliamentary process, there was no attempt to construct a tripartite engagement on potential changes in the legislative framework. It was an explicit political decision to favour employer interests.

An Opportunity Lost?

When we look at the ER scene in New Zealand over the 2008-2011 period, we are struck by the cumulative, major change in both its operating principles and its substance. The tripartism that marked the 1999-2008 period has all but disappeared. The dialogue between employer organisations and unions has suffered in equal measure, for without a strong Government commitment to inclusive dialogue, collaborative problem-solving gave way to factional argument, and in a context in which Government favoured one faction over another. It is not simply that tripartism has fallen away but that Government has promoted positively a pro-business agenda in both the public and private sector ER contexts. From a degree of modest ambiguity in 2008, the Government has moved to adopt principles that are aligned more with the ECA than with the principles underpinning the ERA. Hence, when the Prime Minister announces that his re-election will see further ER measures that the unions will not like, he is confirming that shift in ER principle.

This is also true for matters of substance. From the pragmatic approach to job matters found in the Jobs Summit, the subsequent practical ER measures introduced by the post-2008 Government – from the initial 90 Day measure to the changes in the public sector, the Hobbit Case and on into the 2010 ERA and Holidays Act amendments – have been fundamentally one-sided. We note that the Government is unabashed by this view. It is proudly a Government that sees itself supporting

businesses, both domestic and international, and wishes to provide an ER system that emphasises that preference.

As the 2011 election approaches, the Government is wedded to an ER model that favours employers and proposes to do more in that direction, if re-elected. It has replaced a tripartite model of engagement and joint problem-solving with a framework in which one social partner has privileged access and another is held at a considerable distance. It is interesting to adduce reasons for this positioning. First, it seems that there was no coherent “front line” ER policy at the time of the election. Rather, there was a piecemeal, contingent set of issues, derived mainly from contact with employer organisations.

Second, as its time in office progressed, older hands around the Cabinet with a stronger ideological commitment to neo-liberal thinking were comfortable with a dismantling of tripartism and a “rebalancing” of ER (and other) policy towards business interests.

Third, in response to the crisis and then the consequent debt issues, orthodox neo-liberal policy settings (as in the case of public expenditure, for example) became dominant and, with them, views about ER more akin to those found in the ECA.

Fourth, employer organisations abandoned tripartism without a fight, clearly expecting to gain privileged access to a pro-business Government. To an extent, this may have come true though we also appear to observe less leverage over Government for those organisations that they might have expected. One of the most striking features of the post-2008 period is the *volte face* of the employers as they sought contingent advantage.

Fifth, in the absence of Government or employer interest in tripartism, the unions were relatively isolated from the debates influencing the Government, and though regular meetings with the Government took place, union influence was generally limited.

Sixth, we note that the DoL has been on constant restructuring for much of the period since 2008. This may have undermined the extent that its “epistemic community” could, if so inclined, promote continuing tripartism in policy matters. This was not helped by the Government’s post-2008 downgrading of key areas of tripartite activity in the 1999-2008 period, such as the productivity agenda.

In sum, in the absence of a strong Government drive for sustained tripartism, a union movement supporting such arrangements was unable to promote them effectively, especially as employer organisations adopted other arrangements. There is much to ponder on the ease with which nearly a decade of tripartism can be abandoned so easily by two of the three parties.

Whether the replacement of tripartism and social dialogue by a one-sided focus on employer interests is an opportunity lost or a desirable return to an anti-union, unitarist ER framework is, therefore, a matter of principle. In many ways, it is reducible to the defining social democratic-neo-liberal clash that has driven the developed world and beyond since the 1970s. Social Democracy, operating at a macro level in terms of Keynesianism, welfare provision, active Government and social inclusion still emphasises tripartism, the importance of voice for both employers and unions in that tripartism and the legitimacy of pluralism in ER frameworks. The neo-liberal approach – centred on principles of individualism, market-driven competition and non-intervention by the Government – in practice, favours businesses (the “bearer” of market behaviour) and regards unions as a malign, collective affront to individual rights. Whilst such vocabulary is generally eschewed by the post-2008 Government (though not in the public sector, and not about the unions in the Hobbit Case, for example), the Government’s objective position is ever-more closely aligned with that neo-

liberal tradition. Protestations, to the contrary, are belied by the weight and tendency of legislative moves over the last three years.

If, therefore, one is of a neo-liberal tradition, then post-2008 ER shifts are broadly positive. It is a question of the Government doing better, both in the narrow ER context and in the wider labour market policy settings. If one is of social democratic bent, one sees the demise of tripartism and the general tendency towards ER settings that favour one social partner over another as damaging to both the ER environment and to New Zealand's economic performance. We might conclude reasonably that, notwithstanding a claim to pragmatism, the post-2008 Government's ER approach has charted a clear course in the former direction and intends, if elected, to continue with a full head of steam.

Notes

¹ Not all, as we said. Some, often larger, more sophisticated organisations, continued traditional constructive, pluralist bargaining arrangements, but they were in a minority (Ballard and McAndrew, 2006).

² There were, of course, exceptions to the soft regulation model – in health and safety, maternity leave and minimum wages, for example.

³ In Lean Production Systems, identifying areas of waste (the 7 Wastes) is a basic element of improved performance. The 7 areas are transportation, inventory, motion, waiting, over-processing, over-production and defects.

⁴ For the purposes of this article, wider issues, which have a bearing on tripartism, the relationship between the social partners and on government thinking on labour markets –for example, taxation policy, ACC, Kiwisaver, a productivity agenda, trade matters, privatisation, minimum and youth wages – are excluded.

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