New Zealand Journal of Industrial Relations, **24(2):** 167-171

ACT's Approach to Employment Law

Patricia Schnauer *

ACT's approach to employment law is based on the simple truth that there is a natural common interest between employer and employee. Because of this common interest it makes sense to allow workers and employers as much scope as possible to come to arrangements concerning wages and conditions that suit them best.

In contrast, the traditional approach to employment law has too often been based on the fallacy that employer and employee have opposing interests. It is assumed that, left to their own devices, workers will be "exploited" by employers, and that various laws and regulations aimed at "redressing the balance" are necessary. Yet almost invariably these regulations create more problems for workers than they ever solve. If they end up helping some workers, they only harm others far more seriously. Often those most harmed are unemployed people denied work altogether.

You cannot help borrowers by keeping interest rates artificially low. As New Zealanders discovered in the days of Sir Robert Muldoon, many would-be borrowers ended up denied credit altogether. Similarly you cannot help renters by imposing rent controls: housing shortages and homelessness are the only result.

Likewise you cannot help workers by legislating for a minimum wage, compulsory unionism, or a national award system. Such policies increase unemployment and reduce living standards because workers and employers are prevented from coming together to make deals that suit them best.

The superior performance of flexible labour markets is well established. For instance unemployment has been much lower (and growth stronger) in the US and Britain than in most of the countries of continental Europe, where unemployment has for years been at levels New Zealanders would regard as intolerable. Not surprisingly the US and British labour markets are relatively flexible, at least compared to the highly regulated labour markets found on the continent.

In New Zealand between 1984 and 1990 we saw a build-up in unemployment. A Labour Government was liberalising much of the economy but making our labour law - if anything - even more inflexible. By contrast the Employment Contracts Act 1991 brought in its wake a sharp fall in unemployment and a huge surge of job creation. Over 250,000 jobs have been created since the Act was passed.

* Member of Parliament, Justice Spokesman, ACT New Zealand

Despite the hysteria from the Labour Party at the time the legislation was introduced, the new Act has been successful on many fronts. With workplaces no longer tied hand-and-foot to wages and conditions set by third parties, the entire culture of many organisations changed. In 1993 an Institute of Economic Research survey showed that a high percentage of employers had used the Act to increase productivity, staff training, and the flexibility of their operations.

Moreover, surveys of employees strongly suggested that the move towards greater individual contracting, ushered in by the Employment Contracts Act, was not harming them. For instance, a 1993 survey by Fleet and Partners found that workers on individual contracts had higher levels of satisfaction with pay and conditions than those on collective contracts.

The predictions that the Act would increase industrial activity were as badly astray as all the other doom-mongering. This can be seen if we choose virtually any year from the period prior to the Act.

For instance in 1976 there were 487 stoppages involving 488,000 working days lost. In 1981 there were 291 stoppages involving 388,100 working days lost. In 1986 there were 215 stoppages involving a massive 1,329,054 days lost and $119 million in lost wages. Even over the five years between 1986 and 1990 there were around 178 strikes per year, involving an average of 520,000 working days lost and $48.7 million in lost wages annually.

Since the Act was passed, strike activity has fallen away spectacularly. Between 1992 and 1995 on average there were only around 60 stoppages per year, involving 57,300 lost working days and $8.4 million in lost wages annually. In 1997 there were only 42 stoppages, while last year there were only 35 - the lowest in 63 years. The whole atmosphere of our workplaces has become less confrontational. No wonder the Employers Federation has just stated that under the new legislation "a more direct constructive relationship between employer and employee is favoured, with better communication and a more positive focus in the workplace".

It is a sad measure of the degree to which Labour and the Alliance have failed to learn the lessons of history that they are still pledged to repeal the Act, and to replace it with more coercive, inflexible labour law which will seriously erode the freedom of New Zealanders to make employment contracts.

The industrial relations policies of Labour and the Alliance would lead to fewer jobs, increased industrial unrest, and reduced scope for productivity improvements in the workplace. Some of the ideas on offer from the Alliance and its union allies look particularly damaging: though couched in the language of "rights", they in fact take leave of all reality. Under a Labour/Alliance coalition, New Zealanders might face a requirement for employers to bargain in "good faith" (however that can possibly be legally defined); the

legalisation of political strikes, secondary picketing and the "blacking" of work-sites; the over-riding of rights not to belong to a union by simple majority vote; and other measures the trade union movement are pushing.

At the very least, Labour will promote and encourage collective bargaining, and then promptly make unions the sole negotiator of collective contracts.

If you take away from employees the right to negotiate a collective agreement with their employer and give that negotiating right only to unions, that is compulsory unionism in disguise because many employees at large work sites would feel compelled to join a union to have access to collective agreements.

For its part, ACT sees the Employment Contracts Act as such a key component of New Zealand's economic framework that it remains a non-negotiable plank for our joining or supporting any government.

But while New Zealand's labour law took a big step forward with the Employment Contracts Act, there still remain far too many legal barriers to job creation. For instance, mainstream economists have long recognised that a minimum wage costs jobs: no employer will hire a worker if the extra value produced by the worker is lower than the mandated minimum. For this reason, both the Ministry of Labour and the Treasury advised the National/New Zealand First coalition not to raise the minimum wage – advice that was promptly ignored.

Minimum wages impact particularly negatively on low-skilled workers, since it is these workers who are often denied a chance in the workplace as a result of the mandated minimum. The huge number of Maori in our dole queues is in large part due to this misguided policy.

Income adequacy is far more effectively addressed through the tax-and-benefit system than through a minimum wage. Consequently ACT supports repealing the minimum wage, thus providing a major boost to job creation.

Another serious barrier to jobs are the mandatory personal grievance provisions in the Employment Contracts Act – provisions which include unjustifiable dismissal as a personal grievance. Here the Act actually achieved a step backward by imposing these terms in all employment contracts, especially in light of their later interpretation by the Employment Court, and even the Court of Appeal under Cooke P (as he then was).

For instance, it is absurd to have a statutory regime for a personal grievance for highly paid personnel. $100,000 plus salaries are paid in recognition of the responsible position that a person holds, and in the expectation of their producing results. If those results are not achieved, the person is removed. If there is any unfairness in the way they are sacked, then there should be a remedy through the High Court, not through a statutory regime.

Reinstatement as a remedy (which we have seen imposed by the Employment Court) is similarly inappropriate. Where a job is based on a relationship of trust and confidence, it is ridiculous to reinstate someone who has been sacked for a perceived breach of that trust. So when the Employment Court reinstated a school principal, it was not surprising that the entire school Board of Trustees resigned in consequence.

As almost any employer will tell you, it can be very difficult to get rid of an employee, even for perfectly genuine reasons, without facing a claim for compensation in the Employment Tribunal or Employment Court. This discourages the hiring of new staff and depresses wages. Moreover, those workers that employers are most discouraged from hiring are clearly those that employers view as most "risky" - owing to their youth, low skills or lack of a consistent work record. In other words, the biggest victims of the Employment Court are the very workers it was ostensibly set up to help.

The Employment Court has even decreed that procedure takes precedence over substance. This means that the dismissal of a thief will be unjustified if there is a procedural irregularity. The Court has openly said it is enforcing public law standards (more appropriate to organised, legally advised government departments) on small employers who cannot afford legal advice.

The whole business has become extortionate: employers fear that the Tribunal will find a procedural irregularity somewhere, and settle with former employees whose claims have no real merit.

In sum, the development of the law regarding personal grievances, the erratic nature of many other Employment Court decisions, the increase in the minimum wage, and its extension to cover youth workers, have combined to make our labour laws significantly more inflexible. In these circumstances, nobody should be surprised that unemployment has risen again, and stands at over seven percent of the workforce.

At the very least, ACT wants to see a six month period immediately following the hiring of an employee before any personal grievance procedure applies. It wants to see a limit in compensation payable equal to three months' salary, in the absence of prior agreement between the parties. It wants to end the nonsense whereby an otherwise justifiable dismissal is made unjustifiable merely on the basis of a procedural irregularity. And it wants a time limit on referring personal grievance claims to the Employment Tribunal, so that employers are not ambushed in the tribunal months after they were first notified of a grievance. During the life of this Parliament, ACT has been actively pressing for these minimal changes to the law.

Ultimately ACT sees no role for the Employment Court. Having a specialist tribunal has encouraged judges to see employment contracts as somehow different from other contracts, and to imagine that their job is to help workers counteract the supposedly excessive bargaining power of employers. Yet, as we have seen, judicial activism of this sort seriously affects job creation and therefore harms workers in the long run.

Most employment disputes are, and always will be, resolved through some relatively informal process such as the Employment Tribunal or private mediation/arbitration. A small proportion require formal legal resolution and ACT sees these being handled through the general court system, as the best means of ensuring that contractual principles are upheld. Under ACT, the Privy Council will be made the final appellate court for this area of the law. And ACT will amend the Employment Contracts Act so that it is more consistent with the principles of general contract law. At the same time, ACT will retain safeguards against unscrupulous employers taking advantage of unsophisticated employees.

It would be nonsense to suggest that ACT's policy is anti-worker. Those who take that line would expect that in laissez-faire Hong Kong, which has no minimum wage or compulsory unjustifiable dismissal provisions, workers would be horribly "exploited" and ground down. Yet there has been virtually no unemployment in Hong Kong, and workers' incomes are around 50 percent higher than here.

If this is "exploitation" clearly we need more of it. Ultimately it is economic growth which raises workers' incomes, as the people of Hong Kong have discovered.

ACT also supports more flexibility in the area of holidays. A recent report by the Northern Employers and Manufacturers Association indicated that the Holidays Act caused more uncertainty for employers than any other employment related issue. Employees should have the choice to trade off part of their holiday entitlement for higher wages, or for some other desired feature of their total job "package". Once we have jettisoned the idea that workers in general must be protected against "exploitation", it makes sense to give individual workers greater scope to make choices over what is most important to them.

Currently there are many other laws that adversely affect the capacity of workplaces to create jobs and to use their human resources productively. We are an over-regulated nation: business must cope with a growing mountain of compliance costs and regulatory burdens. ACT will review the Human Rights Act, the Privacy Act and the Occupational Safety and Health Act, insofar as those statutes impose significant compliance costs on employers when hiring staff.

ACT is particularly concerned about the Human Rights Act, which often seems to take leave of all common sense when dealing with labour market issues. A liberalised labour market, giving minorities more chances in the workplace, does far more for human rights than heavy-handed regulation.

ACT will also introduce a Regulatory Responsibility Act, to ensure that proposed new regulation receives the same degree of scrutiny as proposed new government spending, and to ensure the costs of regulation do not outweigh the expected benefits.