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The Employment Relations Act: A Statutory Framework for Balance in the Workplace

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The Employment Relations Act restored to employees basic rights which had been denied them for over a decade.

The two parties in the Labour Alliance coalition and the Green Party had promised to repeal the Employment Contracts Act as part of their election platforms. The new law was seen as delivering on that promise, not only in technical terms, but in the spirit which had motivated the thousands of New Zealanders who had fought against the old law.

In arguing for the new law, we said it would establish a balance between:

- The rights of employers to run their businesses as they see fit with the rights of employees to be treated fairly and
- The rights of individual employees with the rights of groups of collectively organised employees

The Employment Relations Act promotes collective bargaining and encourages democratic unionism. But there are significant restrictions on strikes and lockouts. An over-riding requirement on employees, unions, employers and managers is to act in good faith.

The law does not bring back elements of the so-called 'bad old days' such as compulsory unionism, compulsory arbitration or national awards.

It can therefore be seen as representing a middle course between the extreme Employment Contracts Act, and outdated systems of the past which no longer make sense in the modern labour market.

The Employment Contracts Act was the legal expression of an ideology that constructed the employment relationship as a purely economic contract. Labour was treated like any other commodity, whose price was best set through a free unconstrained labour market. Trade unions had no role in this new employment relationship because they were a constraint on the free operation of the labour market.

Although trade unions were not made illegal, all statutory supports were removed, including the support for collective bargaining. The constraints placed on unions were political as well as economic. The trade union movement was perceived as being the foundation upon which the Labour Party stood and therefore if their strength were diminished, so would be the political opposition to the National Government. This reading

of the politics of the left was inaccurate in so far as it assumed a greater organisational importance of the unions to the Labour Party than was the reality. As a former Party President, I understood this truth better than most people did.

The consequences that followed from the Employment Contracts Act were serious however. They included a reduction in the level of unionisation to about 20 percent of the workforce; increased flexibility in the use of labour through an increase in casualisation of work; stagnant productivity at around 0.5 percent a year; increasing levels of income inequality, especially in the middle income groups; increased compliance costs, especially in the area of personal grievances, where the advent of lawyers increased the costs of the process of dispute resolution; and a decline in the skill base through a combination of emigration and failure to resource skill training and retraining. While the effects of the Employment Contracts Act and the policies of structural adjustment that supported it impacted on sections of society differently, by the end of the 1990s there was a growing view that overall they were not working for the overall benefit of society. This realisation was a major factor in the change of Government at the last election.

During the election campaign, both the Labour Party and the Alliance had campaigned on the repeal of the Employment Contracts Act. This unambiguous position gave us the mandate when we won the election to get on and implement the policy commitment. It did not come as a surprise then when the Government proceeded immediately to start the process of repeal. This did not mean there was no opposition.

The New Zealand Employers' Federation led a high profile campaign in conjunction with the opposition parties in Parliament to destabilise the Government's relationship with the business community. The campaign was serious but misjudged because it failed to focus on the reality of the labour market and the problems facing New Zealand in positioning itself to be competitive in the attraction and retention of skilled labour. The campaign assumed the Government was taking an ideological position similar to the previous National Government and was just out to somehow punish employers for past wrongs. It therefore failed to understand the intent behind the legislation and the real attempt to reposition New Zealand by making it truly competitive in the global marketplace.

The principles and objectives that drove the Employment Relations Act are consistent with the principles and objectives of the Government's overall economic strategy. We are striving after years of neglect through failure of previous Governments to take responsibility for economic management because they had abdicated that responsibility to the invisible hand of the market. We are endeavouring to rebuild an economy that recognises the reality of the global economy for a small economy such as ours. We must trade. We must compete. We must develop our skills. We must create environments that support and encourage innovation and creativity. We are doing this through recognition of the need for an abandonment of the extremism of the National Party and a return to a more balanced approach to both economic and social policy.

An essential element of this balanced approach is the creation of partnerships between Government and the communities that comprise our society. The development of a partnership between Government and business was an essential element of that approach

as was the partnership between the Government and the trade union movement. While the quality and nature of those partnerships would be different because of historical and ideological factors, the need to establish a cooperative relationship was necessary for the rebuilding of New Zealand. How to give reality to the notion of partnership in the workplace through developing relationships, was the challenge I faced when conducting the negotiations surrounding the Employment Relations Act.

An understanding of the ERA can only be gained by looking at the political context in which it was enacted.

The MMP electoral system is designed to provide balance in political decision making. MMP was the electorate's answer to the tyranny of the executive under the previous first past the post electoral system. The election late last year produced a minority coalition Government. This means that the Government has no majority and is dependent on one of the opposition Parties, normally the Greens, but on occasions, New Zealand First, for a majority in Parliament. All decisions are therefore negotiated between the Labour and Alliance members of Government, then with one of the opposition Parties. From the outset I had established a process of consultation with the Green member responsible for employment relations. This relationship proved crucial when negotiating the Bill through Parliament.

The policies of both the Labour Party and the Alliance had been clear that the repeal of the Employment Contracts Act was to be replaced by a return to collective bargaining and a recognition of the right of unions to bargain collectively on behalf of their members. The policies also relied on the notion of good faith as an essential element of collective bargaining. I sought the views of both the NZ Council of Trade Unions and the NZ Employers' Federation, as well as the Employment Law Committee of the NZ Law Society at the outset of the policy work on the new law. I included the lawyers because they had become major players under the Employment Contracts Act. The employer community had become dependent on legal advice and I assumed this would not be easily discarded. The subsequent campaign against the Bill proved me correct as the legal community supported and on occasions led the criticism of the legislation.

The policy process indicated that fragmentation of the labour market was well advanced. New Zealand had always been a country of small employers but the programme of structural adjustment had not only casualised the workforce but the traditional employer-employee relationship was being replaced by the employer independent contractor relationship. Collective contracts had also been substantially replaced by individual contracts. The parties were also relying more on the pursuit of their legal rights upon the breakdown of their employment relationship. This had increased costs for employers and employees, and the practice of contingency fees had become prevalent. The courts had also interpreted the Employment Contracts Act inconsistently so there was a general feeling of uncertainty amongst the parties.

It was also apparent that the Act had contributed to a lack of labour market strategy, a deskilling of the workforce and low productivity. It would be unfair to assume the Employment Contracts Act was solely responsible for these outcomes because it was merely

part of a larger economic strategy of structural adjustment. It was fundamental, however, in constructing a low waged, low skilled labour market, with small groups of high paid and high skilled employees.[1]

It was obvious that a new direction was required and the new Act would need to clearly signal that direction. The title was therefore used to signal that the notion of contract was to be replaced with that of a relationship. The objects section also clearly set out the expectations for the new Act. The objects stated in the Act are as follows:

> to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship –
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> - by recognising that employment relationships must be built on good faith behaviour; and
> - by acknowledging and addressing the inherent inequality of bargaining power in the employment relationships; and
> - by promoting collective bargaining; and
> - by protecting the integrity of individual choice; and
> - by promoting mediation as the primary problem-solving mechanism; and
> - by reducing the need for judicial intervention; and
>
> to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

The first point to note about the objects of the Employment Relations Act is that they cannot be achieved by a return to the traditional instruments of compulsory unionism, national awards, monopoly unionism, and compulsory arbitration. It is equally clear from the objects section that the legalism of the Employment Contracts Act era is no longer a useful construction of the employment relationship. The objects section endeavours to reinforce the human as well as the economic nature of the employment relationship, and to lay down the basic principles within which that relationship must be conducted. Those principles are those of good faith, and mutual trust and confidence, which are to prevail throughout all aspects of the employment relationship and not just during the collective bargaining phase. The principles therefore apply to individual agreements and to the relationship between unions and their members, and between employers where both are bargaining for the same collective agreement.

It is in the comprehensive nature of the application of good faith and mutual trust and confidence that the radicalism of the new regulatory framework lies. Naturally the critics

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[1] I have analysed the effects of structural adjustment and in particular the impact of the Employment Contracts Act in" New Contractualism and the Employment Relationship in New Zealand", *New Contractualism?* Eds Davis, Glynn, Sullivan, Barbara, Yeatman, Anna, Macmillan, Melbourne, 1997, pp.87 - 101; "The Role of the State in the Regulation of Employment Relations: The New Zealand Experience" (1997) Vol.2 Issue 2 *Flinders Law Review*, pp.131 - 146; "Policy, Law and the Courts: An Analysis of Recent Employment Law Cases", December, (1995) *Australian Labour Law Journal*, pp.203 - 225; "Contractualism and the Employment Contracts Act 1991: Can They Deliver Equality for Women?" (1994) *NZJIR*, Vol.19, No.3, pp.256 - 274.

have noted that it is impossible to legislate for good faith. Of course they are correct in that legislation cannot change individual values or beliefs. It can however influence and change behaviours. If it did not do this there would be no purpose to our legal system. Whether legislation successfully changes behaviours depends on whether it is sufficiently practical in its application to enable those affected to conduct their affairs in an orderly and mutually productive manner.

I believe the Employment Relations Act will meet that test, and early indications of its application support this belief. The reasoning behind this approach is simple. It is based on the practical principle of no surprises when conducting your employment relationship. This requires the parties to have access to as full information as is consistent with legitimate rights to confidentiality. It also requires assistance to be available to the parties through mediation to work constructively through points of difference in a win-win way, rather than always the win-loss approach of the adversarial system in the courts.

Although there is no time in this article to give a detailed analysis of the provisions of the Act, it may be useful if I briefly explained some of its key elements.

The Act applies to all employees and employers but directs the Court to look at the real nature of the employment relationship to ensure that the contract for services is not in reality a contract of employment;

All employment agreements, including individual agreements, must be in writing;

Individuals have a right to belong to or not to belong to a union, so the concept of voluntary unionism is preserved in the Act;

Any group of employees who are 15 in number may register as a union, provided the union is incorporated and the rules are democratic and not unreasonable, not unfairly discriminatory or unfairly prejudicial, and not contrary to the law. The union must also be independent and operate at arms length from any employer. This assessment is made by the Registrar of Unions on the production of a statutory declaration;

Only unions can negotiate collective agreements, so the trade off for this provision was the ability of any group of employees to form a union under the conditions set out above;

All employees have the right to chose between the collective or individual agreement, but where there is a collective agreement in existence a new employee must be given a copy of that agreement and be given a month to decide whether they wish to be covered by that collective or an individual agreement that may be offered by the employer. If the collective is chosen the employee must join the union;

Unions have access to the workplace under reasonable conditions to recruit members as well as service the interests of their members;

The right to bargaining collectively includes multi-employer as well as enterprise collective agreements. This right had been included in the Employment Contracts Act but the Employment Relations Act extends the right to strike or lockout to multi-employer agreements;

Codes of good faith setting out the protocols that will govern the good faith bargaining process may be negotiated between the parties. Currently the NZCTU and NZEF have agreed on an interim generic Code of Good Faith and will revisit that Code to finalise it in the new year.

The duty of good faith in the context of collective bargaining includes the union and employer using their best endeavours to reach an agreement; that they meet with each other; that they consider and respond to each others proposals; that they recognise the authority of any person appointed to be a representative or advocate and not undermine that authority; and they must provide each other with information that is reasonably necessary to support or substantiate claims relating to the bargaining - this information includes financial information but there is a process for the appointment of an independent reviewer to assess the information to ensure confidentiality is preserved;

There is a right to strike or lockout but only if the matter relates to collective bargaining.

There are also provisions relating to the settlement of personal grievances that are similar to those in the Employment Contracts Act but with the difference that reinstatement is now the preferred remedy unless there is good reason not to reinstate, and the parties have access to mediation to resolve their dispute before it goes to the Employment Relations Authority and on to the Employment Court if no agreement is reached;

While the Employment Court remains with a similar jurisdiction, the Employment Tribunal has been replaced with access to mediation through a service provided throughout the country by the Department of Labour. This service is free. If the dispute is not resolved at this level then the matter may be referred by the parties to the Employment Relations Authority that is required to investigate the matter in a non- adversarial manner, which basically means without lawyers having the right to cross examination, but with the intention of seeking a mutual agreement with the parties to resolve the dispute. If this process does not produce an agreed outcome then the matter may be referred to the Employment Court for a de novo hearing, at which the normal adversarial processes of cross-examination prevail. The institutions and processes of dispute resolution are the other radical innovation in the legislation. They attempt to provide a quick cost-efficient means to resolve disputes in a way that meets the interests of the parties. The provision of a combination of mediation, inquisitorial, and adversarial methods of dispute resolution is an attempt to meet the needs of the parties and not the demands of the legal profession.

The Act applies to both the public and private sectors so places some particular challenges for Government as an employer.

Conclusion

The Employment Relations Act is a new departure in industrial relations for those who have traditionally relied on adversarial conflictual models of dispute resolution in the workplace. For those of us who have always believed that cooperative inclusive models produce better outcomes for the most people, it is merely a new expression of an old tradition. The recognition of the fundamental right of employees to form and join trade unions must be an essential element of any workplace regulatory framework. To deny people this right not only produces inequitable and unsustainable outcomes in the workplace; it also weakens the fabric of democracy.

It is important for us never to forget that democratic principles and practices are relatively new in terms of the totality of human experience. They are also fragile and constantly under attack by those who do not find the sharing of power and the ability for all people to participate in decisions that affect them very congenial. For me, trade unions have always been one of the essential institutions in any democracy. This does not mean they are beyond criticism and do not need to change.

I sometimes think however that it is forgotten how important it is for people to be able to come together to support each other in pursuit of their interests. In a world where frequently decisions that affect the lives of many are made a great distance from their impact, it is doubly important that the voice of working people is heard clearly. I hope the Employment Relations Act not only provides them with this opportunity, but also will demonstrate that new approaches to old issues can operate to the benefit of all if we have the imagination and the willingness to try them.