New Zealand Journal of Industrial Relations, **26(3):** 287-306

The Employment Contracts Act 1991-2000: A Decade of Change

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Introduction

As discussed below, when the Employment Contracts Act 1991 (EC Act), was first introduced it was considered an "Employers' Charter" (Anderson, 1993) as it did away with union support by the state, outlawed compulsory unionism and allowed for individual bargaining. In contrast the Employment Relations Act 2000 (ER Act) has been seen by some commentators as a radical change in the opposite direction emphasising "relationships", the concept of "good faith", and indeed reverts to giving unions some support.

If the two statutes are considered in isolation, they are indeed very different, if not exactly chalk and cheese. However, as is very well known statute law is but part of the story and common law, the decisions of Courts, is as significant in determining what is in fact contained in the law. Now, as stated by the Chief Judge of the Employment Court in a recent case (*Service Workers*: 529) the commonly accepted role of the Court is simply "to interpret and apply the law made by Parliament." However during the decade the Employment Contracts Act 1991 (EC Act) was in force, a strong lobby group in the country, spearheaded by the two primary employer bodies: the New Zealand Employers' Federation (NZEF),[1] the official representative association of employers, and the New Zealand Business Roundtable (NZBR), an unofficial but powerful group of the senior executives of most of the major New Zealand organizations, suggested that the Employment Court in particular, but also the Court of Appeal, went beyond this accepted role of interpreting and applying the law and were, in effect, legislating and redrafting. The two employer bodies orchestrated concerted attacks on the Employment Court, and together they commissioned critical analyses, such as that by Howard (1995), and published articles with titles such as "Why we don't need the Employment Court" (Robertson, 1996). Their leaders including Douglas Myers, then Chairman of the NZBR, made frequent attacks on the Courts, both in speeches and in articles.

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[1] The NZEF has recently merged with the NZ Manufacturers Association to become "Business New Zealand".

Myers (1996: 11) claimed:

> The most harmful feature of all our present labor market arrangements is, of course, the Employment Court and its jurisdiction . . . The problems do not end with the Employment Court, however. They are also apparent in some decisions of the Court of Appeal . . .

This paper examines the extent to which decisions of the Employment Court in particular, but also the Court of Appeal, have changed the tenor and real influence of the EC Act, and discusses the effect this has had on industrial relations. Whether or not the rulings by the Courts during their past decade have simply been interpretation and application, or indeed have tended towards redrafting, the end result, it is submitted, is that the EC Act in the year 2000 was very different to the EC Act 1991 and as a consequence the ER Act 2000 has not resulted in anything like the significant change suggested by commentators, or Business New Zealand.

The paper will provide a brief background description of industrial relations legislation in New Zealand and a summary of the EC Act. It then examines the changes to the EC Act brought about by Court decisions through the 1990s, focussing in particular on the law applying to the conduct of collective bargaining. While some of the more extreme decisions made by the Employment Court were overturned, at least in part by the Court of Appeal, this paper suggests that as a result of Court decisions, the EC Act in 2000 was very different to the EC Act 1991.

Background

In the last fifteen years New Zealand's industrial relations legislation has undergone two radical changes. The period from 1894 to 1987 was the "Arbitration Era" in New Zealand. Industrial relations was typified by two systems, one for the private sector and one for the public. In the private sector unions were supported and protected by legislation and given monopoly bargaining rights. For much of this period union membership was compulsory. From 1936-1961 membership was compulsory by law. From 1961 membership would be compulsory only "by agreement" – but employers always agreed. Strikes and lockouts were outlawed and disputes, which could not be settled by negotiation, were supposed to be referred to the Court of Arbitration (or its replacements), for settlement by arbitration. This included interest disputes as well as rights disputes. In practice, strikes occurred quite frequently and "interest arbitration" was not common. Of 7,602 union management documents registered between 1975 and 1987, only 143 (1.88 percent) involved some arbitration (Geare, 1995: 496). However, the very existence of the Court, and knowledge of its probable decision-making, would, in all probability, have significantly influenced negotiation behavior and outcomes.

After a long period in opposition, a Labour Government was elected in 1984. Kelly (1995: 334-5) dramatically points out that while the new administration initially had no major agenda for reform:

> Very quickly, however, Treasury thinking and corporate influence (in particular from the New Zealand Business Roundtable) converted core personalities in the Cabinet to the view that there was no alternative to a programme – an ideology – of fundamental change . . . The objective was to transform the architecture of the State on the foundation of economic rationalism . . . In a blitzkrieg of change, financial and foreign exchange markets were liberalized, factor and product markets were largely deregulated, incentives and supports were removed, public entities were corporatized and often privatized, and substantial revamping of provision for health and education and welfare took place.

One area of reform, which did receive careful consideration and lengthy consultation not only with all major interest groups but also with the general public, was industrial relations legislation. The Labour Government introduced both the Labour Relations Act 1987 (LR Act 1987), which made significant changes to private sector industrial relations (see Geare (1989)), and the State Sector Act 1988 which brought the public and the private sectors together. The LR Act 1987 introduced the "Collective Bargaining Era". Unions still received protection, having monopoly bargaining rights, but had to have a minimum size of 1000 members (compared to the original seven!) to remain registered. Union membership remained compulsory by agreement ("union shop" rather than "closed shop" in that workers had to join after commencing work). Wide coverage union management documents remained, providing basic minimum rates to all workers in an industry and area. Interest arbitration was no longer provided by the State, and with certain restrictions strikes and lockouts were legalized. Collective bargaining, free from an overarching arbitral body, was encouraged.

These reforms did not meet the approval of the proponents of the New Right namely the Treasury in the Government, and in the private sector the New Zealand Employers Federation (NZEF) and the New Zealand Business Roundtable (NZBR). In a series of publications the two latter organizations attacked unions and union officials (NZEF 1990, NZBR 1991), compulsory union-membership (NZEF 1986, NZBR 1989, 1991), and the system of wide coverage union-management documents (NZBR 1989, 1990). The over-riding call was for flexibility in the labour market in order to achieve efficiency.

The "blitzkrieg type" reforms mentioned earlier created an economic environment conducive to the changes proposed by the New Right. Public servants, who had traditionally enjoyed job security, saw their job numbers slashed from 90,000 to 50,000 between 1986 and 1990 (Kelly, 1995) and in the country as a whole unemployment rose dramatically from near zero in 1976 to 115,000 in 1987 and then up to 280,000 in 1992. Notwithstanding that union membership was compulsory, restructuring and redundancies caused a significant drop in union membership from 680,000 in 1985 down to 600,000 in 1992 (Harbridge and Hince, 1993).

Thus the stage was set for the introduction of the Employment Contracts Act 1991 (EC Act 1991) which heralded the "Laissez-faire Era" in New Zealand industrial relations. Unions were weak, the workforce was badly shaken and apprehensive and so opposition to the legislation was minimal and ineffective.

Major features of the EC Act 1991

Most neutral observers considered the EC Act clearly benefitted employers. Thus a visiting American scholar, Dannin, (1992: 3) stated that many of the provisions of the EC Act "match with great precision those advanced by (employer) associations", which she identified as the NZEF and NZBR. Even in a conservative newspaper, the *National Business Review*, its journalist (Macfie, 1990) observed that:

> Rarely has a lobby group wishlist been transformed so accurately into legislation. The Employment Contracts Bill is the Employers' Federation's agenda for change.

This view was echoed by Anderson (1993) who referred to the Act as "An Employers' Charter?" Not surprisingly the NZBR and NZEF were very supportive and almost aggressively protective of the Act. In a joint publication (NZBR and NZEF, 1992: 1) the two groups emphasized:

> The Employment Contracts Act has ushered in a new and highly beneficial era of employment relations by removing a great deal of statutory interference in employment relations and allowing employers and employees much greater freedom to decide on the terms of their contracts. In general, the results have been a pronounced shift to enterprise-based collective and individual contracts, greater trust, cooperation and information sharing between firms and their staff, and better incentives for performance including the removal of restrictive and uneconomic conditions. The Act is making an outstanding contribution to productivity growth and its contribution to employment growth is likely to become increasingly apparent in the period ahead.

Critics faced their wrath. Myers (1996:10) referred to four named academics who had analyzed the Act and been somewhat critical, and stated:

> These are people who still teach the graduates our firms employ; incompetence seems no barrier to lifetime employment in New Zealand universities . . . The reality is the ECA has brought immense economic benefits and a transformation in the culture in our enterprises. There is far more awareness of human resources issues generally. A climate of trust and cooperation has in most cases displaced former adversarial relationships . . .

However, the very fact that both the NZBR and more particularly the NZEF felt obliged to continue to heavily propagandize the "benefits" of the Act, makes it clear that they realized that those "benefits" were not apparent to many sections of society.

However, the Act itself was not overtly biased against unions. Except in a few areas it was, on the surface, "neutral". From a purist's perspective, Justice Hardie Boys (at the time on the Court of Appeal but later Governor General of New Zealand) had every right to argue "the Act is not anti-union; it may fairly be described as union-neutral" (*United Food Workers Union v Talley* [1993]: 370). However, from a union perspective, given that New Zealand legislation for virtually one hundred years had supported unions, encouraged union membership and collective bargaining, the total removal of any support certainly appeared anti-union and thus, by extension, anti-worker.

The Act has been analyzed in detail elsewhere (Anderson, 1993; Geare, 1995; Kelly, 1996) and this paper is concerned more with how common law has influenced the Act, than with the content of the Act itself. In brief summary, however, the Act was in six Parts:

Part 1: Freedom of association

This part purported to provide "freedom of association", but its greatest significance was in enforcing voluntary unionism, by law, making closed shops and union shops illegal, and reversing over half a century of compulsory union membership.

Part 2: Bargaining

This outlined the legislative intent (also expressed in the Title of the Act) to give all parties the "freedom to choose" the type of their employment contract, and to negotiate any provisions they were able. Since *all* parties were purportedly given the freedom to choose whether they, or their employees, are on individual or collective contracts, this is *suggestio falsi* and *suppresio veri*. If the employer "chose" to have the workforce on individual contracts while the workforce "chose" to be on a collective contract, clearly one or other party could *not* get their "choice". Parties would negotiate on their own behalf, or appoint a representative to negotiate for them. This paper concentrates on this part of the Act.

Part 3: Personal grievances

This Part gave protection against "unjustifiable" dismissal to any employee under a contract of service. Prior to the EC Act this protection was only available to union members. Extending the coverage to managers and non-union members clearly removed one of the main "selling points" previously held by unions, and was a subtle, but not ineffective, anti-union strategy.

Part 4: Enforcement of contracts

This established that employment contracts create legally enforceable rights and obligations and ensures all contracts have a procedure for settling disputes.

Part 5: Strikes and lockouts

This Part continued a long-standing situation in New Zealand legislation in which strikes and lockouts were defined very widely. Thus, not only the usual work stoppages, but also "go-slows", "work-to-rule" campaigns, and overtime bans, would all be classified as strikes.

Lawful strikes and lockouts are defined as only those relating to the *negotiation* of a collective employment contract (CEC), and which occur after any previous collective employment contract has expired. Further restrictions include the required provision of notice if the strike or lockout is to occur in named so-called "essential" industries, and the action must not relate to union membership, personal grievances, disputes over the interpretation or operation of an employment contract, or relate to efforts to persuade more than one employer to be party to a CEC.

Employers could lawfully suspend without pay any striking workers. They could also suspend without pay non-striking workers – if usual work is not available because of strike action by other workers. No wages were payable during a lawful lockout.

Part 6: Institutions

The major industrial relations institutions are the Employment Tribunal - which consists of individuals authorized to provide mediation services, adjudication (i.e. arbitration) services or both. At a higher level is the Employment Court presided over by Judges who rank alongside High Court Judges. Cases could be appealed only on points of law to the Court of Appeal, and actual decisions and questions of fact could not be appealed.

The EC Act : A need and opportunity for change?

Overall the change in philosophy from the pluralist pro-collective bargaining stance of the LR Act, to the anti-union philosophy of the EC Act may have provided a perceived *need* for liberal interpretation on the part of either liberal or pluralist judges. Indeed, the Chief Judge of the Employment Court concluded his judgment *(Ford v Capital Trusts* [1995]: 66*)* with the proclamation that: ". . . fortune may favour the strong, but justice must favour the weak." It is thus a possibility that he and others considered it an obligation to "interpret" the legislation in such a way that tended to favour the weak.

The EC Act also provided ample *opportunity* for varied interpretations, given the poor quality of its drafting. In marked contrast to the introduction of the Labour Relations Act 1987, when consultations took place over a lengthy period, the EC Bill was rushed through Parliament as soon as the National Party had won the General Election in November 1990. Submissions were able to be made – but only over the Christmas/New Year summer holiday period. An early commentator (Anderson, 1991: 129) observed that:

> The rushed procedure has resulted in an Act that is poorly thought through in legal terms and which contains glaring ambiguities and inconsistencies.

This is being somewhat generous. Regardless of what one thinks of the philosophy, or the overt or covert objectives of the Act, the standard of the legal drafting was, in many areas, abysmal. Some of the ambiguity and inconsistency mentioned by Anderson may have been deliberate on the part of the legislature, as part of a policy of *suggestio falsi* and *suppressio veri*, as discussed above when describing the features of the Act. In addition, many of the sections of the Act, including those that are the focus of this paper, were drafted very confusingly. This is not just the view of academic observers. Goddard, C.J. in *NZ Airline Pilots* (1995:43) stated:

> I feel bound to say that the framers of the Employment Contracts Act 1991 could not have intended to leave so much room for judicial doubt and the difference of opinion has obviously been left by s.12 . . . It is asking too much to expect the courts to read the legislators' minds to the extent that has been necessary in these cases . . .

Given the likelihood of perceived need for liberal interpretations, and given the opportunity presented by a poorly drafted piece of legislation, the probability of this occurring is further increased by an apparent licence to act in that way presented by s.104(3) which allowed the court to determine matters: ". . . as in equity and good conscience it thinks fit." However, the Court of Appeal (*Lowe Walker Paeroa* [1998]) countered that apparent licence by observing (at 567) that:

> There is no principle of equity that empowers the Court to ignore the true nature of a transaction and substitute some other concept. The appeal to "justice" is unstructured and unprincipled, and is unreliable.

Collective bargaining under the EC Act

There are a number of areas of the EC Act which have provoked accusations of judicial activism. These include the area of redundancy (see Geare (1999)), the use of "partial lockouts",[2] the use of limited term contracts, as well as the actual process of collective bargaining. It is the latter area which is the focus of this paper.

The title of the EC Act emphasizes "freedom of choice" in negotiation, which suggests the legislator intended to create a situation in which "anything went". This was reinforced by s.18 of the Act which covered "Freedom to Negotiate":

> 18(1) Negotiations for an employment contract may, subject to this Act, include negotiations on any matter, including all or any of the following matters:
>
> (a) The question of whether employment contracts are to be individual or collective:
>
> (b) The number and mix of employment contracts to be entered into by any employer.

The only restriction is in s.18(2) which provided that:

> Nothing in this Act requires any employer to become involved in any negotiations for a collective employment contract to which it is proposed that any other employer be a party.

This provision is part of the policy to undermine the previous practice of regional or national documents covering many employers. Other than this, s.18 suggests any behaviour or strategy is acceptable. The following sections 19 and 20 appear to reinforce this by stressing that parties "may" (and hence, by inference, also may choose to "not") negotiate collective or individual contracts as they see fit.

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2 The legal definitions of strikes and lockouts are very wide. Strikes include go-slows, work-to-rule, and breaches of employment contracts, as well as work stoppages. Lockouts also include breaches of employment contracts as well as a full lockout of the workforce. *Paul v IHC* [1992] ruled that breaches of employment contracts (failing to pay penal rates) was thus a lawful lockout when used as a tactic to get agreement to a new collective employment contract. Goddard, C.J. disagreed, and ensured a Full Court of the Employment Court produced a total reversal in Witehira [1994].

On the other hand, other sections appear to restrict the freedom accorded by s.18. Thus sections 5 and 8 allow that most employees are free to associate for the purposes of collective bargaining, and that "undue" influence must not be applied with respect to collectivization. Under s.5:

> (a) Employees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees' collective employment interests:
>
> (b) No person may, in relation to employment issues, apply any undue influence, directly or indirectly, on any other person by reason of that other person's association, or lack of association, with employees.

While s.8(1) stipulates that:

> No person shall exert undue influence, directly or indirectly, on any other person with intent to induce that other person -
>
> (a) To become or remain a member of an employees organization or a particular employees organization; or
>
> (b) To cease to be a member of an employees organization or a particular employees organization; or
>
> (c) Not to become a member of an employees organization or a particular employees organization; or
>
> (d) In the case of an individual who is authorized to act on behalf of employees, not to act on their behalf or to cease to act on their behalf; or
>
> (e) On account of the fact that the other person is, or, as the case may be, is not a member of an employees organization or of a particular employees organization, to resign from or leave any employment.

Thus s.8 allows that a person can exert *influence* on others – so long as it does not become "undue" influence. Sections 5 and 8 have been described by the Chief Judge (*NZEI v State Services Commission* [1997] at 395) as "provisions that have caused very great difficulty in the past."

Coupled with the right to collectivize, the Act also provides under sections 9 and 10, the right for parties to negotiation to either negotiate in their own right or be represented by a person, group or organization. Under s.12(1):

> Any person, group, or organization who or which purports, in negotiations for an employment contract, to represent any employee or employer shall establish the authority of that person, group, or organization to represent that employee or employer in those negotiations.

It is s.12(2) which has proved most contentious. This stipulates that:

> Where any employee or employer has authorized a person, group, or organization to represent the employee or employer in negotiations for an employment contract, the employee or employer with who the negotiations are being undertaken shall . . . recognize

> the authority of that person, group, or organization to represent the employee or employer in those negotiations.

Finally, bargaining behavior, and outcomes, are limited by s.57(1) which stipulates that:

> Where any party to an employment contract alleges –
>
> (a) That the employment contract, or any part of it, was procured by harsh and oppressive behavior or by undue influence or by duress; or
>
> (b) That the employment contract, or any part of it, was harsh and oppressive when it was entered into, –
> that party may apply to the Court for an order under this section.

It should be noted that, under the EC Act there was no statutory requirement to "bargain in good faith", as is now the case. Thus on the one hand the EC Act presented a simple picture – parties were free to negotiate whatever they chose – while on the other there is a very confused and confusing set of conflicting and ambiguous clauses. This led the Chief Judge to observe (*NZ PSA* [1998]: 1320) that:

> It may be that the difficulty with the bargaining process . . . cannot readily be overcome by the legislation as it is. It may be that it is the policy of the legislation that collective bargaining should not be easy, only possible.

Major problem areas

Specific questions left open to interpretation are:

> What sort of bargaining behaviours were required by the statute? and
> What sort of bargaining behaviours were prohibited by the statute?
> In particular, with regards (b) –
>
> b(i) What behaviours indicate a failure "to recognize" the bargaining representative of the other party?
>
> b(ii) What behaviours are deemed to indicate that "undue influence" or "duress" is being applied, and what are "harsh and oppressive" behaviours or contracts?

Through the 1990s the opinions of the Courts with respect to those questions changed frequently and markedly. This indicates either an inability to interpret that statute correctly, or a tendency to attempt, in effect, to redraft the legislation, rather than to interpret it.

In the view of the Chief Judge of the Employment Court *(NZ Airline Pilots Assn* [1995]: 31):

> The courts have responded to their duty to make the Act work in accordance with its spirit and intendment and have reaped criticism from different quarters in about equal measure for not confining themselves to black letter law and for doing so too much. That is only natural and cannot be helped.

The writer is not aware of any suggestions in the literature that the Employment Court has been overly concerned with "black letter law".

Bargaining behaviors required by statute

The EC Act, as outlined above, requires the recognition of the representative of the other party. Apart from that, there are no positive requirements at all. In *Adams v Alliance* [1992] the Chief Judge determined at 1023: "the employer must negotiate, if at all, with that representative . . . (but – my insert) the employer need not negotiate at all." This view was reinforced in the *obiter* observations of the then President of the Court of Appeal in *Eketone* at 787: "Certainly an employer is free not to negotiate with anyone . . ." Thus in the early years under the Act, there was certainly no claim that the *statute* required anyone to negotiate at all – let alone "in good faith". But, by 1997 the Chief Judge (as one of three in a sitting of the Full Court) had a very different "interpretation". In *NZEI v State Services Commissioner* [1997] it was stated at 391:

> There can be no doubting the existence of a duty to bargain in good faith as between parties to an existing continuous contract of employment.

In *Harrison v Tuckers* [1998] Goddard, C.J., sitting alone, went gone even further in creating negotiating obligations. While acknowledging (at 458) that these may not be justified "on a strict construction" of the EC Act, he goes on to create his own definition of what is meant by the phrase "to negotiate". Given the earlier ruling that there was an *obligation* to bargain (or negotiate) "in good faith" this new definition has significance. He noted that according to the Concise Oxford Dictionary:

> "to negotiate" is defined as "to confer with another with a view to compromise or agreement." "To confer" I take to mean to communicate on equal terms.

This definition is somewhat dubious. The implication is that the Concise Oxford Dictionary defines "conferring" as "communicating on 'equal terms'." That is just not so. The dictionary does not suggest that "to confer" has any connotations of equal terms. That is simply an illusion. The Chief Judge went on to claim that negotiation:

> involves the concept of deliberating together as contracting equals . . . for negotiation to take place in good faith, I take negotiation to mean each side regards the other as an equal contributor to the form, content and other qualities and aspects of the proposed contract.

The Court of Appeal (*Tuckers v Harrison* [1999]) has not specifically considered this point, but did conclude that the Employment Court made errors of law in *Harrison v Tuckers* [1998].

"Recognizing" the representative

The statutory requirement under s.12 was to "recognize" the bargaining representative of the other party. Again the seminal case was *Adams v Alliance* [1992]. An uncontroversial determination was made (at 1010) that:

> the obligation contained in s.12 to recognize the authority of the representative to represent the employees in the particular negotiations means that the employer must accept that the representative is able to conduct and conclude the negotiations on behalf of the employees whom that representative has established an authority to represent, subject only to any necessary ratification. The employer must accept without reference to the employees who have given authority that the authority exists and is valid and effectual. A requirement upon employers to recognize the authority of a representative of employees (and vice versa) means more than that they need not question the authority – it means that they may not do so.

The Chief Judge went further and ruled (at 1023):

1. the employer must negotiate, if at all, with that representative;
2. the employer may not insist upon negotiating with the employees direct or with some other representative;
3. the employer need not negotiate at all;
4. the employer may request or offer direct negotiation with employees;
5. the employer must not in doing so exert undue influence on the representative not to act or to cease acting;
6. the employer must not exert undue influence in relation to any employment issue on any person by reason of that person's association (or lack of it) with employees.

As already discussed, he later went on to apparently contradict point 3, ruling there was an obligation to negotiate (and moreover to negotiate in good faith). The crucial point with respect to recognition lies in point 4 – while the employer could not insist on negotiating with employees it was permissible to *offer* negotiation, should they wish. The Chief Judge elaborated on his views (at 1024):

> There remains the question whether it is proper for any employer, once negotiations are underway, to go behind the representative's back and endeavour to negotiate with the employees direct. The answer in my view must be that just as employees are at liberty to express a wish to be represented in negotiations, so they are entitled to stand firm in that resolve and refuse to negotiate with the employer direct when the employer approaches them to do so. But if they are persuaded by means falling short of undue influence of the kinds referred to in s.5(b) and in s.8 to agree to direct negotiations after having originally appointed a representative to act on their behalf, there is nothing to prevent them from doing so.

As an interpretation of s.12, both in terms of the words used and the intent of the legislature, the above seems uncontentious.

However, interpretation of s.12 changed markedly over the next few years, triggered by *Eketone v Alliance* [1993] – which was an appeal against the decision of *Adams v Alliance* [1992]. By the time the Court of Appeal heard the appeal, the case was no longer "live", and the observations made were rightly acknowledged by the President (at 786) and by Justice Hardie Boys (at 788) as being "necessarily *obiter*". The President (at 787) was not prepared to "express a final opinion" but sounded "a note of warning only" that:

> I am disposed to think that once a union has established its authority to represent certain employees . . . then the employer fails to recognize the authority of the union if the employer attempts to negotiate directly with those employees. To go behind the union's back does not seem consistent with recognizing its authority . . . Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt whether he can bypass an authorized representative.

Justice Hardie Boys expressed a similar view (at 788):

> Section 8 does not prevent an employer from using persuasion, provided the means are not unconscionable. But I think that the right to persuade is inhibited by s.12(2). Recognition of an authority given by employees is hollow indeed if the employer is able to undermine it by attempting direct negotiations with the employees while negotiations with their authorized representative are still in train.

In *Adams v Alliance* [1992] the Chief Judge had observed (at 1003) that some of the provisions of the EC Act are:

> the very antithesis of the legislation of the past . . . the overall objective is to promote an efficient labor market . . . In the concept of efficiency there is something more than the ideal of harmony enshrined in previous labor legislation . . .

It would appear that he was much more in sympathy with the previous legislation, and appeared almost to welcome the *obiter* criticisms by the Court of Appeal of his own judgment. This criticism encouraged him to go on to very different interpretations.

There were three major cases which appeared before the Employment Court, all of which were later appealed to the Court of Appeal. The first was *NZ Med. Lab v Capital Coast Health* [1994]. This was heard before the Full Court, with Goddard, C.J. and Travis, J. Notwithstanding the fact that *Eketone* [1993] was obviously obiter – the case was "dead" and both the President and another Justice stated their observations were *obiter*, the Employment Court decided (at 125-6) that:

> We do not agree that the observations in *Eketone* can properly be seen as obiter . . . In any event we agree with those views.

At 127-8 the Employment Court ruled that:

> a direct approach to employees may constitute a breach by undermining the authority of the authorized representative. All attempts at persuasion cannot constitute a breach of s.12 but attempts to disparage the representative in the eyes of the persons who have appointed it to represent them may well constitute conduct that breaches s.12. If the effect of the actions of the employer are to undermine the authority of the representative then s.12 may be

> breached regardless of the motives of the employer in taking such action. Thus bypassing the authorized representative and attempting to negotiate directly with the employee may well constitute a breach of s.12 regardless of the employer's reasons for so acting.

Further, (at 128) the Court foreshadowed further activism with regard to prohibiting communication by employers with their employees, indicating an intent to show that communicating with employees during negotiations, is failing to recognize their representative:

> It seems to us that there may be situations in which a lawful communication has the effect of causing employees to lose confidence in their representatives and of driving a wedge between them and their representative, whether a union or not. Whether, in a particular case, a communication is lawful or not may well depend on the motive of the utterer. Was the motive genuinely to impart information, opinion and other material? Or was it to disadvantage the employees in their ability to bargain with the employer? The former could qualify as a genuine exercise of its freedom of expression. The latter could amount to a breach of s.12.

The following year the Chief Judge also ruled on *Ivamy v NZ Fire Service* [1995]. Here he went further and (at 49) ruled that:

> once negotiations for an employment contract have begun and the employees' representative has established its authority to represent the relevant employees, no further communication on the subject of the negotiations should be addressed by the employer to those employees except such as may be authorized or required by the Employment Contracts Act 1991 to be personally addressed (notices of lockout or of suspension of striking workers are immediately obvious examples).

Later that year, the Court of Appeal then ruled on *Capital Coast Health* [1995] and dismissed the appeal, thereby apparently upholding the Chief Judge's viewpoint. However they were not uncritical, and Justice Hardie Boys (at 309-310) made the observation that:

> It very quickly became apparent that a quite minor and unnecessary, dispute had got out of hand . . . The manner in which the Employment Court's judgment was expressed could only have exacerbated the situation.

Later, (at 320) Justice Hardie Boys stated that in some regards the Employment Court "erred in law", and although the judgment attempted to clarify the meaning of s.12, it was itself confused and confusing:

> Section 12(2) is predicated on the basis that negotiations for an employment contract are under way between the employer and the employees' authorized representative . . . Once that process is under way with an authorized representative participating, the process may not be conducted directly with any party so represented. The provision of factual information does not impinge on that process. But anything that is intended or is calculated to persuade or to threaten the consequences of not yielding does . . . Attempts to undermine the authority of the agent may be in breach of s.8(1), but will also be in breach of s.12(2), because it is for the particular parties to choose their representative. It is their right to have that person act on their behalf without interference. But again the provision of factual information, relevant to the matter in hand, cannot be interference.

The Court of Appeal thus confirmed the Employment Court's position that any attempt to negotiate with employees is a failure to recognize their representative, and that *some* communications will also be in breach of s.12. Factual information which is *not* "intended to persuade" is apparently permissible. Just why anyone would want to give information in the course of negotiations that was *not* calculated to persuade someone of something is left to our imagination.

The third case (*NZ Airline Pilot's Assn* [1995]) was heard by the Employment Court, just after the above ruling from the Court of Appeal was made public. The Chief Judge made what was later referred to by the Court of Appeal (*Airways Corp. of NZ* [1996]: 135) as an unwarranted "extensive shift", and the Court of Appeal went on to state he "erred in law". Notwithstanding the fact that the Court of Appeal found against the Chief Judge and allowed the appeal in *Airways Corp. of NZ* [1996], their decision does not mean this significant degree of interpretation will cease. Certainly they have overturned the general ban on employers communicating with their workforce, and allowed (at 136) some communications on the grounds:

> They do not in our view amount to negotiation or attempted negotiation but rather fall into the category of factual information relating to the negotiations. Nor do they strike us as so disparaging of ALPA as to call in question its authority to represent the controllers.

The above quotation refers to communications not being "so disparaging" as to call into question the authority of the representative. Hence, only communication deemed to be disparaging of the representative will be ruled to be in breach of s.12(a). However, the Court of Appeal has reinforced the ban on *attempting* to negotiate with employees, once they have a representative. "Offering to negotiate" will certainly be seen by the Employment Court as equivalent to "attempting to negotiate" and thus will be deemed illegal.

Undue influence and duress; harsh and oppressive behavior and contracts

What degree of influence amounts to "undue" influence and duress, and what level of behavior is harsh and oppressive is clearly a value judgment on the facts of each case. It is clear that the Court's approach has changed significantly over the ten year life of the EC Act.

Again *Adams v Alliance* [1992] was the seminal case, and also once again the original approach taken seemed reasonable. The Chief Judge declared (at 998) with regard undue influence that:

> it is necessary to be conscious of the need for the existence of a causative relationship between the behavior or undue influence or duress and the making of the contract . . . it is not to the point that harsh and oppressive behavior was exhibited towards workers if those workers were entirely unmoved by it and entered into the contract for reasons unconnected with it.

Later, (at 1014) he went on:

> The question whether a bargain is harsh and oppressive looks . . . at its effect on the party sustaining the detriment of the bargain. . . . It is not enough that the bargain should be an unfair or unconscionable one for the stronger party to obtain – it must also amount to harshness towards and oppression of the weaker party. . . . I venture to suggest, however, that there will be few cases in which the Court will grant relief by reason of harsh and oppressive behavior, undue influence or duress unless the contract procured by these methods involves some substantive injury or detriment to the party subjected to such treatment.

Goddard, C.J. was somewhat ambivalent as to whether a lawful strike or lockout could be deemed duress. He stated (at 1027) that "there exist highly persuasive authorities" for the proposition that a lawful strike or lockout could *not* be deemed duress - but also claimed "the contrary opinion has been advanced". Hence (at 1028):

> The Court will therefore necessarily approach with caution any suggestion that a strike or lockout which is lawful for most other purposes can amount to or constitute economic duress . . .

With regards "harsh and oppressive behavior", the Chief Judge (at 1027) considered:

> The behavior complained of must strike the Court as reprehensible, as morally blameworthy and as meting out intolerable treatment. It will normally have elements of deliberation and of unwarranted severity. Deceptive or misleading statements of the kind alleged and aggressive marketing by strong personalities do not strike me as amounting to the behavior described in the subsection. Abnormal behavior without abuse of power or position is not enough.

Within a very short space of time the Chief Judge had what appears to be a much lower threshold for behavior to be harsh and oppressive. In *United Food Workers v Talley* [1992] at 454 he claimed:

> What converts the defendant's conduct from oppressive to harsh and oppressive is the employees' misplaced dependence upon TFL and their trust in the first defendant enhanced by his offer of what is called his "LV Martin[3] guarantee". Add to that the natural feelings of subservience, dependence, impotence to influence their own destiny, and inferiority generally in the presence of a man who in their eyes had "arrived", and was important and powerful (and the source of their livelihood), the scene is set for great temptation to commit an abuse of power and position which, if not resisted, will lead to progressively more harsh and oppressive behavior. Unfortunately, blinded perhaps by his animosity towards the plaintiff union, the first defendant did not display the strength of character needed to resist the temptation to take advantage of employees who were unable and unaided to look after their own interests.

When the case went to the Court of Appeal, the Chief Judge's decision was upheld, albeit without much support. The Court of Appeal stressed (at 378) that the Chief Judge's finding:

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[3] LV Martin is a very well known (in New Zealand!) mail order firm, which provides personal assurances of satisfaction, from the CEO, over and beyond legal requirements.

> . . . is a finding of fact with which this Court cannot interfere on an appeal confined to questions of law, unless it can be shown that the conclusion is one which no reasonable Court could have come to.

The Court of Appeal went on:

> Simply on reading the judgment some of the language the Chief Judge employed in criticizing Talley's conduct may appear colorful if not rather extravagant, but the mere reader has not had the advantage of seeing and hearing the witnesses. The Chief Judge had that advantage and it clearly influenced his whole view of the matter. Recognizing that, we are not prepared to hold that he was not entitled to reach the conclusion that he did.

The Chief Judge made a number of determinations with regards the meaning of harsh and oppressive which are a long way removed from his earlier cited determination in *Adams v Alliance* [1992]. He now considers that a contract which does not have a premium for overtime worked is *by definition* harsh and oppressive. In *Harrison v Tuckers [1998]* he stated at 467:

> To require employees to agree in advance to do additional work for no additional return is harsh and oppressive, as the employee's ability to refuse the work is more theoretical than real in the case of low paid workers in potentially vulnerable employments.

It should be noted that this statement is somewhat confused. The clause in the employment contract did *not* require the employees to do "additional work for no additional return" – it required them to do additional work for a proportionately identical additional return. The Chief Judge decided that a *penal* rate of return is required, and that apparently anything less is harsh and oppressive. That may surprise salaried workers who do overtime for no additional return at all.

It seems clear that the level of bargaining behaviour, or the provisions in contracts of employment, which have been deemed "harsh and oppressive" by the Employment Court have changed markedly from the early to late 1990s.

Conclusion

This paper has shown how the EC Act in whole, that is the statute plus common law, changed markedly during its ten years of operation with regards the law with respect to the bargaining process. While the changes were primarily as a result of interpretations mainly by the Employment Court, but also the Court of Appeal (particularly under the presidency of Lord Cooke).

The influence of common law has occasionally been criticized, and the argument put that the elected legislature should create law and the Courts should simply interpret and apply the law. Indeed that is what the Chief Judge was quoted as asserting in the introduction to this paper. It would also seem particularly appropriate since we are here considering *recent* legislation. This was not a case when Courts were looking at ancient legislation which is either inappropriate, or only partly appropriate, to present day situations.

The counter argument is that if one believes legislation is philosophically wrong, then one should support more adventurous Court decisions if they create legislation which is philosophically more "correct". Other than the then NZEF and the NZBRT, many observers considered the EC Act was unfairly weighted against unions and collective bargaining. ("Union neutral" comments, discussed earlier, notwithstanding).

Hence those who support a Pluralist industrial relations ideology (Fox, 1974) would favour a very different piece of legislation to the EC Act itself. However, if common law is allowed to change statute law without comment or criticism simply because one supports the "altered" version of legislation is clearly a very risky strategy. Future Courts, may be extremely conservative, unitarist, and anti-liberal, and may move in the opposite direction.

A further argument *against* this liberal interpretation could be made on the basis that the possibility of legislative reform by the previous Government had almost certainly been significantly reduced because the Government could point to the Court decisions which appeared to favour employees and collective bargaining, and could then claim there was no problem with the EC Act itself.

The Council of Trade Unions laid a complaint against the Government of New Zealand in February 1993 with the International Labor Organization (ILO) alleging the Act violated ILO conventions 87 (on Freedom of Association and Right to Organize) and 98 (Right to Organize and Collective Bargaining). The Committee on Freedom of Association (CFA) of the ILO made an interim decision in March 1994 which was very critical and "a much revised and more muted" (Anderson (1996): 105) Final Decision in November 1994. As Anderson (1996:108) rightly suggests, the change in position was "heavily influenced by judicial decisions during the period".

It is of course possible that the previous Government would have totally ignored strong criticism from the ILO. It certainly demonstrated a willingness to ignore muted criticism. However, it is also possible that strong criticism would have led to some amendments to the EC Act in 1993-1994. Thus ironically, decisions made possibly in an effort to ameliorate the statute, could well be the reason why the statute was not amended until after a change of government.

The new Labour-Alliance Coalition elected in November 1999 introduced the Employment Relations Act 2000 (ER Act) which came into effect 2 October 2000.

On paper there is a vast difference between the EC Act and the ER Act. However, as this paper has demonstrated, Court decisions during the time of the EC Act meant that the "working" EC Act, that is the statute modified by decisions, was not nearly so different to the ER Act. It will be interesting to see how court decisions will, in turn, modify the ER Act. Already there has had to be amendments to the ER Act as a result of the Employment Court ruling in *David v ERA* [2000].

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