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# Working under the Employment Relations Act 2000

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*The author, President of the New Zealand Council of Trade Unions, places the new legislation in a human and human rights context, and discusses it as part of a wider vision. Although many of the fundamental reforms introduced by the Employment Contracts Act are carried over into the new regime, the Employment Relations Act establishes a more fair framework for employment law.*

## Introduction

Given the political environment of the past decade it should have been no surprise that the Employment Relations Bill would attract such bitter and, at times, hyperbolic opposition from opposition politicians and some sections of the business community. Industrial relations has always been a defining issue in New Zealand politics and, with the increased political polarisation of the era of neo-liberal politics, it was always going to be a tense political battle.

It should also have been no surprise that the essence of the opposition rhetoric tended to be misrepresentations of what was actually in the Bill laced with the traditional dose of anti-union prejudice.

## Anti-union rhetoric

The media obliged by reinforcing the negative presentation of the Bill and unions. A Television New Zealand *Assignment* programme used graphical material portraying union members as sinister looking automatons and unions as dinosaurs. The National Party website used similar imagery. And an article in *North & South* magazine reflected the same refusal to look at the reality of unions today rather than the unions of 10 or 20 years ago.

The reality is that membership of unions is very diverse. It spans doctors and university professors through to rail, port workers and cleaners. More than 50 percent are women, and there are increasing numbers of Pacific Island and Maori members.

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Unions are made up of ordinary New Zealanders reflecting the increasing diversity of our national workforce. We come together in unions because we believe that by working collectively and co-operatively we can more effectively improve our conditions of work and social conditions for our families.

We live in a world whose activities, including economic activity, are becoming increasingly globalised. An emerging part of that globalisation process, given some impetus by the protests at the Seattle World Trade Organisation meeting last year, is an intensification of the pressure for minimum standards of decency in employment.

## Workers' rights are human rights

It is of course no coincidence that the basic principles which underpin the Employment Relations Act (the "ERA") are the same principles which are binding on the more than 170 countries which belong to the International Labour Organisation (ILO) and are bound by international laws which:

> Guarantee the right of workers to organise together in collectives or unions for their common advancement.
>
> Guarantee the right of those workers, as unions, to bargain collectively with their employers over wages and conditions of employment.

The reasons for those rights being enshrined in international law as basic human rights are quite interesting. They are essentially explained in the Declaration of Philadelphia which was drafted (in part by our own Walter Nash) by the Western nations at the end of World War II. In reflecting on the appalling devastation of the war, and its origins in the economic, social and political instability of the inter-war years, they concluded that there could be:

> No peace without social and political stability.
>
> No social and political stability without fairer wealth distribution.
>
> No fairer wealth distribution unless inequality in employer/employee relationships was addressed.

It is these considerations which originally gave rise to the ILO Conventions that underpin the ERA. New Zealand governments have tended to ignore these international law requirements in the past but in a rapidly globalising world it is increasingly difficult to do so, and at the same time demand respect internationally as a world citizen.

The Employment Contracts Act was found by the ILO Mission which came to New Zealand in 1994 to be in breach of the ILO Conventions in several fundamental respects and there has been increasing pressure on our government to bring our law into the international mainstream, which the new Act does.

As recently as two years ago, the New Zealand government delegation to the International Labour Conference, led by Max Bradford and including employer and worker representatives, recommitted us as a nation:

> To respect, to promote and to realise in good faith . . . the principles concerning freedom of association and the effective recognition of the right to collective bargaining.

They did so by voting to support the ILO Declaration on fundamental principles and rights at work. The ERA will give substance to that commitment to implement these workers' rights in domestic law as basic human rights.

## Employee choice

The first human right that the ERA will guarantee is the freedom to associate together in organizations called "unions". Looking at the practical implementation of the ERA, respect for that employee choice to belong to, and be represented by, an independent union is an important foundation for building or re-building cooperative relationships.

The CTU accepts that employee choice may result in new unions being formed and we respect that choice. If genuine new and independent unions do emerge we see that as being entirely consistent with the principle of freedom of association, although it is our view that the resources, experience and skills available through an established union are likely to be of greater benefit to most employees.

But the freedom of association principles, and the new law, also require that new unions be truly independent and not part of an employer initiated strategy. So, for example, we respect the right of Warehouse employees to form their own union, provided they have had a free, and informed choice; in other words provided the long established union covering retail employees, the National Distribution Union, has been given access to the workplace to market itself.

Workplace access is of course a very important right for unions and, like the information disclosure requirements, is based on the premise that employees should have access to the information necessary to enable them to make informed decisions. The "Employers have everything to fear" speeches by ACT Leader Richard Prebble up and down the country warning of 20 or more union officials marauding through workplaces on a daily basis ensured that this was a contentious issue. This has not come to pass although some employers have apparently been confused by advice to either join an exclusive religious organisation, or instal a bed in their workplace as a means of denying union access!

## Good faith

The big area in the new Act is undoubtedly going to be the impact of the good faith requirements. I don't think we should under-estimate just how far-reaching those requirements might be in constraining and influencing behaviour – of both employers and unions.

Although it seems entirely sensible that there should be good faith dealings in respect of an employment relationship which, by its nature, is based in mutual trust and confidence, the good faith requirements are a new concept (as an explicit requirement) in our employment law.

The concept has had its knockers amongst opposition Members of Parliament and some employer spokes people who have complained of the vagueness and lack of detail in the Act and, more fundamentally and tritely, that it is offensive in suggesting that employers have previously acted in anything less than good faith.

Numerous Court decisions from the past decade record for posterity the types of behaviours that have made the good faith requirements necessary. It is also relevant to point out that much statute law (for example, the Crimes Act, the Health and Safety in Employment Act, and the Parental Leave Act) lays down minimum acceptable standards of behaviour without drawing the criticism that they somehow unfairly reflect on those who comply with the law.

### *Code of good faith*

We now have an Interim Code of Good Faith agreed between the CTU and the Employers Federation. That in itself is an achievement and it is good to see the promotion of orderly collective bargaining as a specific agreed objective and the need to take account of Maori protocol and cultural differences.

I hope we can build on this Interim Code during the consultation process. I would like to see more practical guidance. For example I think the Code could codify some of the likely implications of the principles in the Act from, for example, Canadian court decisions. Such a practical adaptation of Canadian jurisprudence would seem to me to both meet the employer criticism of vagueness and uncertainty as well as minimise litigation which is likely to produce the same judicial outcome.

## No prescribed bargaining outcomes

The rhetoric against the ERA has obscured the reality that it is a framework for bargaining – not a prescription for arbitration or required outcomes. The CTU argued for some limited arbitration (i.e. where bad faith behaviour by an employer has

destroyed a bargaining unit) and some prescription of outcomes (the transfer of undertaking issue), but in the end these were resisted by Government.

So the good faith requirements are about process and procedure. The content of collective agreements will come down to what the parties can negotiate – and of course s.33 (possibly the most important section in the Act) is very explicit about this:

> The duty of good faith . . . does not require a union and an employer bargaining for a collective agreement –
>
> (a) to agree on any matter for inclusion in a collective agreement; or
> (b) to enter into a collective agreement.

So the pressures of the market will continue to play a very important role in negotiations. Despite the political rhetoric the Act is not, in itself, a magic bullet for improvements to wages and conditions of employment.

Several points flow from this:

It is not a return to the 1970s and 1980s bargaining. Given the effect of our de-regulated open economy the good faith provisions will not in themselves drive up wages in sectors where there is no excess supply of labour – particularly unskilled labour.

Bargaining success will be dependant on organising success. As provided for under the ILO Conventions, the right to organise and effective organising an the foundations of collective bargaining.

The minimum code – and the Government programme to upgrade it – will continue to be very important for a large section of the workforce.

We must see the ERA in the context of the other Government policies such as industry training and development. To get major income and productivity gains for many workers we need to create better skill formation and ensure that more workers can move into higher paid jobs.

To do that we need to encourage the development and enhancement of constructive and co-operative relationships between unions and employers – at both an enterprise and an industry level.

## Building skills

So as well as meeting union members' short term expectations that the ERA will increase their bargaining power – we see the Act in the context of the longer term strategy

of building the skills of our members and future members — by greater investment in public education and industry training, and by strategic investment in industry development.

We see fairness as extending to employees who have not previously had an opportunity to exercise their guaranteed human rights. Those groups may include employees in the service and retail sectors who have taken the brunt of the ECA.

The fairness may extend beyond narrow bargaining to include employees collectively being able to negotiate safer workplace conditions, both in terms of environmental hazards and also protections from human hazards (sexual harassers) as well.

We believe that the restoration of fairness in employment law can translate into a re-building of social capital – of the goodwill and co-operation that have been absent from many workplaces during the ECA era, and which has undermined productivity growth.

No one pretends that this will be easy. It is not a simple matter of learning the language of a global knowledge economy and hoping that things will somehow fall into place. We want to see the government encourage an environment of investment and growth. It also needs to ensure some minimum standards of fairness that the market alone will not deliver.

But we need more than a law as the touchstone for good faith. Whether the ERA will lead to more harmonious industrial relations is a matter which is in our hands as employers, employees and unions. Good relationships can only be developed in any real sense through honest and fair dealings. The CTU seeks to build such constructive relationships and change the culture in many New Zealand workplaces.

The CTU's overall objective is to promote a bargaining environment of intelligent consideration and debate. Intelligent debate is more likely to occur if it is properly informed debate. We therefore see disclosure of relevant information as being an essential part of both respecting the process of bargaining and respecting the negotiators' responsibility to address issues seriously.

Notwithstanding the attempts of the last decade to destroy us, destruction of business, or even the socialisation of the means of production, are not the objectives of the CTU in the 21st Century.

## CTU vision

Our vision is of an economy that works for the benefit of all people; not one where people are just commodities to fuel the economy as has been the case during the 1990s.

The purpose of economic and social life cannot be just to play host to successful business. The maximisation of shareholder value and the single-minded pursuit of

economic efficiency must not become ends in themselves. Other human values – the need to sustain families, to treat all men and women (of whatever race) equally, to safeguard the environment, and to foster creativity, dignity and fairness in the workplace – also require expression. These are surely the end to which successful business is but the means.

The CTU subscribes to the growing recognition internationally that there must be a wider corporate accountability. Maximising shareholder value is not enough. Too many of our corporates are prepared to sacrifice our environment and biosecurity, to ignore social and ethical responsibilities, and to compromise the health and safety of their employees — all in the pursuit of greater profits for their shareholders.

As the largest democratic organization in our country we have a duty on behalf of working New Zealanders to act as a counterweight to the power of the corporates, which have dominated the political agenda for the past decade.

Unions have an important role to play not only at workplace level but as a voice for working people. For the CTU this is not about going back to the structures of the past. It is about going forward to an environment where the union movement is recognised as a legitimate stakeholder.

The challenges of the new economy are going to be very real. The diversity of work and labour market situations in the modern world means that a traditional standardised trade union agenda can be neither practically effective nor ideologically resonant. The challenge for us organisationally is to move to a new model of unionism that replaces organisational conformity with coordinated diversity.

As stated above, we in unions are just ordinary people who want to see strong economic growth build on constructive and inclusive workplace relationships.

Whether the new ERA will result in more harmonious relations depends as much on employers as it does on us. I hope we can make a joint commitment to getting past the stereotype images of employers and unions, and make the new Act work for the benefit of all New Zealanders.