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Evaluating Continuity and Change in the Employment Relations Act 2000

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This paper undertakes an overall assessment of the Employment Relations Act in terms of labour market reform, and places it in its historical and policy context. The paper concludes that the legislation represents a sound re-balancing of rights within essentially the same decentralised wage-fixing framework of the previous legislation. There are issues, however, concerning possibly excessive protections for individual workers, as well as uncertainties with the new institutions and the concept of "good faith".

The purpose of this article is to assess the quality of the Employment Relations Act 2000 (the "ERA") as a reform of the New Zealand labour market. While enjoying strong support among employers (though not without some reservations), the Employment Contracts Act 1991 (the "ECA") was widely criticised by union leaders and received a mixed response from the workforce. More highly skilled workers, in a national and global labour market which is increasingly rewarding their talents, were largely comfortable with their personal outcomes under the ECA (Rasmussen, McLaughlin and Boxall, 2000). However, less skilled and less organised workers had greater difficulty exercising appropriate voice and accessing their employment rights generally (McLaughlin, Rasmussen and Boxall, 2000; Rasmussen, McLaughlin and Boxall, 2000). It is the experience of the latter group which has driven the case for reform.

In assessing the overall value of the Employment Relations Act 2000, there are three broad positions we might consider. In one view, the ERA represents an astute re-balancing of the rights of employers and workers that will create a more stable basis for employment relations in New Zealand in the twenty-first century. It keeps what employers really need while making the game fairer for the worker. A second perspective is more left-wing. It takes the view that the ERA leaves intact far too much of the Employment Contracts Act, retaining unfair advantages for employers in the labour market. More broadly speaking, advocates of this view think that the key concepts of economic liberalisation are still too dominating in New Zealand. A third perspective is more right-wing. It sees the ERA as an impractical and costly extension of worker rights that will hurt New Zealand's economic competitiveness and undermine employment.

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In this paper, I compare the ERA with the Employment Contracts Act. I shall argue that the ERA is a fundamentally sound re-balancing of rights which should exercise a stabilising influence in New Zealand's decentralised wage-fixing system. However, there are two qualifications to the argument. First, the ERA has some experimental elements which are worth approaching with an open mind but which are going to need careful evaluation. Second, I raise the question of whether the ERA has gone too far with some of its protections for individual workers – further than is desirable in a statute designed to promote collective bargaining and further than is helpful to workers in a nation of small businesses.

The article is structured as follows. The first section sets the scene with a summary of the main continuities and changes in labour market regulation associated with the ERA. The second section compares the ERA with the ECA against three criteria developed to evaluate major employment statutes. It contains the main arguments for seeing the ERA as a fundamentally sound reform. Finally, the last section qualifies the positive assessment by noting key unknowns and by raising the question of whether individual protections in the Act have become excessive.

Labour market regulation in New Zealand: continuity and change

Key continuities

Like most industrial relations legislation, the ERA affirms important aspects of our current structure of labour market regulation. Table 1 summarises the main continuities. Without following the numbering system in the table, I want to emphasise four key points about the continuities.

First, the ERA retains the focus on *bargaining* in industrial relations, something that has been central to labour market regulation in this country since compulsory arbitration was abolished (by Labour) in 1984. The roots of bargaining go back much further, of course. Arguably, we have been evolving a "New Zealand style of bargaining" over the last 30 or so years which has certain advantages for both parties. We have a preference for dealing directly with each other (which produces better agreements more quickly than is true in systems dominated by arbitration). These agreements have the force of law (an advantage over the traditional approach in Britain). And we get to our agreements without the excessive formalities that often occur in the USA and Australia. In a nutshell, our approach is direct, contractual and not overly formal. While increasing "good faith" procedural requirements, the ERA should largely keep this style intact. The content of agreements – the level of pay settlement and other conditions – come down to what the direct parties *negotiate*. It is possible to argue that s.33 ("duty of good faith does not require concluded collective agreement") is the defining section of the Act.

The ongoing centrality of bargaining means that pressures in sectoral labour markets will continue to play a very important role in pay-setting. "Good faith" provisions are unlikely to drive up wages in those less skilled sectors where there is still an excess supply of labour.

The review of the minimum code will be important for these workers – as the floor of rights underpinning their conditions. However, the problem for these workers will largely remain one of lifting their educational and skill levels, as it is now.

Table 1: The Employment Relations Act - what's *not* changing that's important?

1. Voluntary unionism
   Union membership remains voluntary (as under the Employment Contracts Act 1991);
   Hypothesis: union density may rise from 25 percent but is unlikely to reach beyond 30 percent of employees.

2. Bargaining structure will remain largely based around enterprises (and workplaces) the old structure of occupational awards based on union registration is not coming back except that workers may vote for multi-employer bargaining;
   Evidence suggests that multi-employer bargaining will remain a minor case;
   Hypothesis: most workers prefer enterprise bargaining because they can identify better with the issues and the people involved.

3. The personal grievance machinery will remain available to all employees (as under the ECA).

4. Collective employment agreements must still be ratified by members (as under the ECA);
   This, not registration, is the most important accountability mechanism in unions;
   It also reminds management that it has to win sufficient worker support for any significant changes proposed.

5. There is no return to secondary bargaining or "second tier bargaining" (negotiating a house agreement on top of an award) as abolished under the Labour Relations Act 1987;
   A multi-employer agreement could, however, append different schedules or "enabling clauses" for different employers.

6. There is no return to compulsory arbitration (abolished in the Industrial Relations Amendment Act 1984);
   NZ still has a wage-fixing system based on bargaining.

Secondly, the structure of bargaining is still going to be very decentralised. Individual bargaining, which will remain the dominant form, is naturally decentralised. In terms of collective bargaining, there is greater scope in the new law for multi-employer bargaining but enterprise bargaining is likely to remain the dominant mode. Given that workers of each employer must vote separately in favour of it (s.45(2)), multi-employer bargaining is going to be very difficult to organise. In most situations, it is unlikely to be preferred by the New Zealand worker who can relate much more closely to the issues and people involved when bargaining takes place at the enterprise or workplace level. The survey evidence we have suggests that the average New Zealand worker is reasonably satisfied with their employment and tends to use labour turnover when they are seriously frustrated with an

employer (Boxall, 1997; Rasmussen, McLaughlin and Boxall, 2000). The structure of collective bargaining that emerged under the ECA does not seem to be a major issue for the average New Zealand worker.

Having said this, there are some industries where an industry-based employment agreement could be constructed to work well for both workers and employers – providing a stable structure of employment conditions (which will help to make the industry more attractive to good workers over the long run) while also allowing for workplace flexibility (in order to meet enterprise idiosyncracies). In other words, industry agreements with cleverly worded "enabling clauses" do have some role to play in certain sectors. However, these are likely to be relatively minor (though still valuable) cases which will make little difference to the established structure of bargaining in New Zealand.

It is also very unlikely that the multi-employer provisions will stimulate more strikes and lockouts or increase wage flow-on pressures. Overt industrial conflict is at low levels and the "drivers" of the limited number of strikes we experience are likely to remain what they are now. Strikes are being driven by unrealistic budget constraints in the public sector and their impacts on the "wage-effort" bargain (for example, in the public health sector and in the universities). In the private sector, strikes tend to occur when employers threaten important employment conditions or work norms and won't back off, miscalculating the degree of anger in the workforce.

As at the present time, I would continue to expect to see the worst industrial relations in the public sector because the pressure on the "wage-effort" bargain is greatest there. Table 2 shows the history of strike action in New Zealand over the last ten tears. I have constructed the final column to give a rough-and-ready measure of the point I am making. This ratio is computed after adjusting for the ratio between public and private sector employment. In 1998, for example, there were 19 stoppages in the public sector and 16 in the private sector but since there were 4.65 private sector employees for every public sector employee, we can argue that the likelihood of industrial action is some 5.5 times greater in the public sector. This is only one example, of course, but the figures in the final column do underline the greater strike-proneness of the public sector.

Over the whole economy, there is little chance of a resurgence of 1960s/1970s industrial action – providing inflation remains at low levels. We should recognize that price stability, largely due to the Reserve Bank Act 1989, has made a major contribution to peaceful industrial relations in New Zealand. When workers see that inflation is not a trend that is escalating across years, there is much less incentive to make "catch-up" claims or make inappropriate claims based on wage movements in "hotter" parts of the labour market. Wage-fixing in New Zealand now pays greater regard to the difficulties of recruiting and retaining the specific kind of labour in question. This helps to focus the minds of the parties on important trends in the demand for skills.

Table 2: Patterns of industrial action in New Zealand

Year	Strikes (complete and partial)	Lockouts (complete and partial)	Number of workers involved (000)	*Average* days per worker	Ratio of public to private sector stoppages
1990	136	1	50	6.6	1.4/1
1991	68	3	52	1.9	2.4/1
1992	47	7	27	4.2	2.9/1
1993	53	5	21	1.1	3.7/1
1994	63	6	16	2.4	1.9/1
1995	67	2	32	1.7	3.4/1
1996	69	3	42	1.6	4.4/1
1997	40	2	8	3.2	4.2/1
1998	34	1	15	0.8	5.5/1
1999	31	1	11	1.6	n.a

Source: computed from *Statistics New Zealand* reports

Thirdly, the ERA retains the critical compromise on worker rights that was central to the ECA – it retains voluntary unionism *in conjunction with* universal access to the personal grievance machinery. Voluntary unionism has created major "free rider" problems for the unions, some more than others. However, it has been a boon for their public reputation. Voluntary unions are seen to have a right to exist based on free choice, rather than statutory compulsion. And given that unions are voluntary, it makes sense that the backstop in cases of unfair dismissal (the most important reason for the personal grievance procedure) is available to all employees, not simply to union members (as it was under s.209 of the Labour Relations Act 1987).

There are political differences at the margins of this compromise but the compromise itself seems very secure across party lines. Most politicians accept the value of voluntary unionism and they are no longer prepared to restrict grievance rights to union members. I heard little, if any, debate over this compromise in the passage of the Employment Relations Bill. There are, of course, some problematic consequences. One is the fact that grievances by non-union employees tend to clog the courts, making the process of justice slower for all applicants. The disgruntled, litigious executive ("the sales manager from Hell" and similar) is now something of an archetype.

There are also the difficulties that "free riding" places on unions which could use greater resources to meet the demands they face. Unions often have fewer resources than they need because more people take the benefits of union-negotiated improvements than actually pay for them (through union fees). The role of union organiser is a fairly stressful

one. Not only are organisers faced with the fact that there is a steady stream of new workplaces to organise, but there are plenty of individual members wanting time-consuming personal assistance. These problems are not trivial but the parties seem to accept that the system has these consequences.

Fourthly, the ERA retains the ECA's emphasis on *ratification* of collective settlements (s.51). Ratification of settlements was not one of the strengths of the old award system. It only existed where provided for in the rules of particular unions. Those who eulogise the old award system tend to forget that it was not a very participative process for many workers. The ratification procedure introduced by the ECA, and sensibly retained in the ERA, helps to ensure that workers covered by collective bargaining have good opportunity to participate. One thing we have learnt from the ECA is how valuable this provision is. It helps to ensure union officials are acting in accordance with membership wishes (which is the best incentive to internal union democracy).

Ratification also acts as a powerful reminder to employers of the need to win worker support for their claims. Managers ultimately need to convince their *own* employees of the merits of their position. This helps to improve managerial understanding of the nature of union organisation (which is much closer to the celebrated "inverted pyramid" than company organisation). Unfortunately, the fact that we have voluntary unions which face ratification tests whenever they bargain has not yet dispelled the caricature of unions as third-party interlopers. Political rhetoric was still peppered with this hackneyed metaphor in the debate over the ERA.

Key changes

Table 3 summarises key changes in the ERA. Although the list seems longer, most changes facilitate some power adjustment *within* the decentralised bargaining structure facilitated by the Employment Contracts Act. At the risk of some over-simplification, the changes can be summed up in two main messages.

The first message is about the need to treat unions as socially important organisations representing worker interests. The Act sends a strong warning to those employers who try to interfere with legitimate union activity. However, it does not return us to the undesirable, "monopoly" aspects of the historical arbitration system in respect of coverage and membership. While coverage clauses have renewed significance, there is no "exclusive jurisdiction" or strict demarcation and there is no compulsory union membership. As the Council of Trade Unions noted in its submission on the Bill:

> . . . the Employment Relations Bill is not a return to the past. It does not return to any form of compulsion over union membership. It does not restore compulsory arbitration, national awards, fixed relativities or demarcations in union coverage. It achieves balance, rather than advantage, in employment relations (NZCTU, 2000: 9).

Table 3: The Employment Relations Act - what's changing that *is* important?

1. Union access rights are being improved: unions have the right to enter to recruit (but it must be exercised in a reasonable manner).

2. Union membership confers the right for that worker to be covered by a collective agreement covering the relevant work at that employer (if a CA actually exists).

3. Unions regain the sole right to be the worker party to collective agreements but employers can still negotiate a "standard individual agreement" with representatives of workers who are not in a union.

4. Collective bargaining must be conducted in "good faith":
   - this includes following some very obvious process requirements;
   - unions can call for information to back up an employer claim that they can't afford to pay (which can be channeled through a third party if desired);
   - the ambiguities in the good faith concept could introduce undesirable complications into the collective bargaining process in NZ.

5. Strike laws are much the same as in the ECA but somewhat strengthened:
   - employers can request, but not require, existing staff to temporarily replace strikers
   - strikes for multi-employer agreements are legal after secret ballots at each employer.

6. Independent contractor versus employee status:
   - should relate to the real nature of the relationship (not simply the wording);
   - will depend greatly on the worker's preference (and ongoing preference).

7. Fixed term contracts are allowable where there are genuine reasons and where employees are properly advised of the implications.

8. Individual recruitment and bargaining now have greater procedural requirements
   - prospective employees must receive a written "intended agreement", be advised of their right to seek independent advice and be given reasonable opportunity to seek it;
   - where a collective agreement applies (i.e. covers the relevant work), the employee must be employed on these terms (or better) for 30 days but thereafter the terms can be varied if the employee does not join the union;
   - in some cases, the Employment Relations Authority could decide "unfair bargaining" has occurred.

9. Mediation becomes the compulsory initial process in personal grievances. If this fails the matter may be referred to the Employment Relations Authority (an investigatory body).

10. Reinstatement returns as the primary remedy in unjustified dismissal (as in the Labour Relations Act 1987).

Through its registration, access and bargaining provisions, the ERA aims to promote the central role of unions – giving workers voice in employment contracting through collective bargaining. The key message is that all employers should cooperate with union access and treat the bargaining table seriously when they are called to it. The vast majority do – as point 1.4 of the interim Code of Good Faith rather amusingly notes – but there are obviously some who will need to show positive change in their bargaining practice.

In terms of actually promoting collective bargaining, the CTU's (2000) submission, along with others, helped to remove the contentious clause 66 from the Bill – which required employment continuity during a collective agreement and as long as it remained enforceable (12 months after expiry). This was a poorly drafted attempt to provide employment security and protect employment conditions when employees are transferred to a new employer. Protecting employees in this situation is a worthwhile aim but had this provision survived, it would most likely have created "perverse incentives" (*New Zealand Herald,* 28 April, 2000, page C3). Employers would have been more inclined to avoid collective bargaining or to reduce the duration of collective agreements or to trade off redundancy provisions against other conditions. None of this would have helped vulnerable workers. The debate over this section helped to illustrate the point that workers actually have an interest in making it *simple* to reach collective agreements with employers. The kind of legislation which makes collective bargaining more complex or more costly than it need be is not necessarily going to promote collective bargaining.

The rather complex "good faith" provisions will clearly have some impact on collective bargaining. When we cut through the wordy lather of the Act in this area, what are the key implications? In a nutshell, employers will need to justify their bargaining stance more carefully (as will unions). It will still be possible to adopt resolute postures but these will require better justification. Better planning for collective bargaining – involving a longer-term perspective and a better quality of internal management debate – will be helpful. It will help if firms are better prepared for financial disclosure.

One positive result of the consultation between the CTU and the Employers' Federation over the Code of Good Faith has been that the interim code talks about giving the parties "guidance" (as does s.35(3) of the Act). It will be best for the negotiating parties if the final code acts as a set of guidelines rather than a prescriptive set of rules which increases the complexity and reduces the flexibility of collective bargaining in New Zealand. In the area of "good faith", less regulation is likely to be better regulation.

The ERA sensibly places the minimum threshold for union formation at a low level – 15 members. We are not being taken back to the 1000 member rule in the Labour Relations Act 1987 and the union amalgamation pressures it fostered – which in some cases were perverse. The revised Bill wisely relaxed some of the registration requirements. This should provide scope for existing small unions to keep their identity and for new ones to emerge. This is important if we seek organic growth of unions. While there are about 10 unions which are big by NZ standards (over 10,000 members and collectively accounting for 75 percent of union membership), there is a cluster of small unions at the other one end of the distribution. Some 48 unions had less than 1000 members at December 1999 (Crawford, Harbridge and Walsh, 2000).

New Zealand unions should benefit in three main ways from the reforms in the ERA. First, there is the psychological boost generated by the recognition in the Act, by greater profile in the media and by the general public reaction. In terms of worker and employer perceptions, the ERA, at this stage, heralds an important change in the "climate" of industrial relations.

Added to this psychological boost are two key practical benefits in the Act. One is the open access to workplaces for registered unions for the purposes of recruitment (s.20(3)(b)). The other builds on this basis. With open access, unions have a platform to turn recruitment into a *superior* kind of collective agreement for the workers they cover. If, and when, a superior collective agreement is achieved, the key provisions of "join the union, join the agreement" (s.56(1)(ii)) and the 30 day rule (s.63(2)) become vehicles for lifting union density. In other words, new union members and new employees can then come under the collective agreement without employer obstruction or pressure to do otherwise. This is important because employers largely dominated the choice of contract structure – individual or collective – under the Employment Contracts Act (Rasmussen, McLaughlin and Boxall, 2000: 52).

The "if" in the last paragraph is important: none of this is necessarily easy for unions. The disciplines of worker organisation, claim generation and conflict resolution remain hard work but the access and organising opportunities are clearly greater than those under the Employment Contracts Act.

The second key message in the ERA is about reaching agreement with individuals on the form and terms of their employment relationships. This is symbolised in the shift in terminology from "employment contract" to "employment agreement" (although they amount to the same thing). As on the collective side of the Act, there is a psychological change going on here.

In terms of specific changes, the ERA strengthens existing individual rights and creates various new ones. These include rights to:

- information,
- independent advice and representation (including the right to join or not join a union),
- a form of contract that is consistent with the real relationship involved (and therefore generates the related rights),
- consultation before restructuring or redundancies occur,
- mediation (for "employment relationship problems") and (if appropriate) rights to subsequent legal determination in the Authority/Court system,
- have an agreement based on "unfair bargaining" reviewed (and possibly varied) by the Employment Relations Authority.

Without going into all the details, the key implication is that employers will need to be more careful in constructing individual offers and in negotiating with individuals. This is not a major issue for those employers with sufficient resources to afford their own in-house human resource advisors. Well-resourced HR staff will work to ensure greater line manager compliance with the ERA provisions, as they gradually did with the grievance provisions of the Employment Contracts Act. Other well-resourced firms would be well-advised to retain their most effective external HR consultants – those who have built up a careful assessment of the firm's HR problems.

When, however, we start talking about the archetypal small, undercapitalised New Zealand business, with no in-house HR staff and irregular or non-existent external HR advice, we are talking about some serious compliance problems (as noted in the Roundtable's

submission on the Bill (NZBR, 2000). Bearing in mind that some 80 percent of the workforce works in firms smaller than 100 employees, we clearly have an issue here.

Individuals can take non-compliance issues (say, a lack of time to get independent advice or lack of a written offer) to the mediation service but the whole idea of pursuing compliance this way will be seen as undesirable by many New Zealand workers. Furthermore, there is a question mark over how far the Labour Inspectorate will be involved in enforcement. The Inspectorate's role in enforcing the minimum code is well-established and is reinforced in the ERA (s.229). Whether the Inspectorate will be tasked and resourced to go beyond this and enforce the individual bargaining provisions of the Act is unclear (see ss.223 and 135 (b) and (c)).

The balance of change

Overall, then, how much is changing in the regulation of the labour market? To state the obvious, we are not returning to compulsory arbitration or compulsory unionism. In terms of bargaining structure, not much is likely to change. The process of wage fixing will remain highly decentralised. The ERA, however, shifts the balance of power somewhat within this decentralised setting by promoting the collective bargaining activities of voluntary unions and by strengthening individual rights in the contracting process.

Assessing the quality of the ERA

Our task now is to make an overall assessment of the mix of continuity and change contained in the ERA. Here I build on an earlier assessment of Labour Party industrial relations policy (Boxall, 1993a) to define three overlapping criteria for assessing the major employment statute of a country. This section compares the ERA with the ECA against each of these criteria and then reaches an overall assessment.

Criterion one: Does the statute facilitate bargaining arrangements which are consistent with sound economic management?

The question here is about the extent to which the ERA is a logical part of the current *system* of economic management. Does it fit appropriately into an open economy with an emphasis on sustainable growth, low inflation and, under the current government, more equitable distribution of economic gains? The traditional arbitration system was discredited partly because it formed part of a seriously dysfunctional system of economic controls in the 1970s and 1980s (Boxall, 1993b). As Don Brash (1999, 2000) emphasizes, there is no credible argument for returning to economic policies which failed repeatedly to restrain inflation and which therefore undermined economic competitiveness, real wages and retirement savings.

There should be little doubt that decentralised bargaining is the best option for New Zealand – given that we operate in an open economy where firms must be responsive and given that we lack the kind of "encompassing" employer and union organisations needed for effective centralisation (Calmfors and Drifill, 1988; Wooden and Sloan, 1998). In workplace and enterprise bargaining, we get the kind of negotiation in which productivity and relativity concerns are more appropriately balanced. The ERA should perform well on this criterion because, as noted, it does not fundamentally challenge the decentralised bargaining structure we have evolved under the ECA. In effect, both the ERA and the ECA perform well in terms of the rationality of bargaining structure.

In terms of economic assessment, we should also note the debate over the aggregate impact of the ECA on New Zealand productivity levels (Boxall, 1997). Although there are measurement problems with productivity data, the best studies to hand indicate that New Zealand's productivity performance has improved since the early 1990s. When measured on the same basis as the Australian series, New Zealand productivity growth has been comparable to Australia's over the last decade (Conway and Orr, 2000; Diewert and Lawrence, 1999).

As many commentators realise, the productivity debate needs to be set in a broader context. Having an economically efficient bargaining structure is important but there is much more involved in productivity performance than labour market regulation. In the "knowledge economy", a major part of the improvement we seek in productivity can only come from better funding of advanced research (to build our scientific and technical capacity). Alongside this, there is the need for better funding and better standards in public education (to generate a more adaptable workforce). Any major improvements take time to filter through. Although New Zealanders are improving their educational performance and firms are more adept at handling the open economy, it will take some time for New Zealand to significantly lift its rank among wealthy nations (Brash, 1999; Conway and Orr, 2000).

In terms of the productivity impacts of management and union interactions at the workplace, it would be helpful if we could start now to think about initiatives in the labour market which don't involve the legal framework. We might usefully take a lesson from the Blair government's employment law reforms which were accompanied by a growth of interest in labour-management "partnerships" in the United Kingdom (and some government funding). How can we stimulate the kind of labour-management cooperation in the New Zealand workplace that enhances productivity growth and improves outcomes for workers? What ideas and processes are most suitable to New Zealand-scale enterprises? These sorts of questions could usefully be approached through multi-party dialogue.

On criterion one, then, both the ECA and the ERA can be rated as sound statutes.

Criterion two: How well does the statute meet both employer and worker needs?

The second criterion is about the benefits to the parties within the general bargaining structure. A good employment statute will work well for both direct parties – employers and workers – over the long-run. This is the main criterion on which the Employment

Contracts Act fell short. It rightly fostered decentralised wage bargaining, recognising that New Zealand had a tradition of semi-centralised wage fixing which did not adequately focus on problems of business competitiveness (Boxall, 1993b). This has generally worked well for employers by allowing them to align bargaining with their business needs. In other words, the ECA fostered bargaining around logical economic units – the enterprise and the workplace. (Under the award system, bargaining structure was largely determined by the registered rules, or coverage zones, of the unions.)

However, the ECA did not do enough for the expression of worker interests. By undermining union rights and weakening collective bargaining, it inevitably created the need for further reform. In thinking about worker needs, it helps if we use the distinction between workers in the "primary labour market" and workers in the "secondary labour market".

The notion of the "primary labour market" is useful to describe the experience of workers who:

- have higher formal education and workplace skills
- have good pay levels
- have better security
- have some sense of career progression
- have less problem advancing their interests through "collective voice"
- often do well out of individual bargaining and "exit" (labour turnover).

These sorts of workers have done relatively well under the Employment Contracts Act. They have generally enjoyed the benefits of rising demand for advanced skills in the "information age". Where they are stressed, it stems mainly from having too much work – they enjoy their work but there is often too much of it (Rasmussen et al, 2000).

On the other hand, the notion of the "secondary labour market" describes workers who:

- have lower education and skills
- have low to modest pay levels
- have low security and little sense of career progression
- often work in small workplaces where high labour turnover is more common.

This category includes the "working poor" (those who experience significant "income stress") (Rasmussen et al, 2000). These are the workers who were most disadvantaged by the Employment Contracts Act. As a result of the way the Act made union organising difficult in low skill sectors, they have had less access to collective bargaining despite needing it most. Their "choices" under the ECA were the most constrained.

Improved provisions in the ERA for union recognition and access are designed to help the more vulnerable workers. The ERA's intention is to promote collective bargaining, in line with International Labour Organisation conventions, and with what we should have learned about our own industrial history: we should have learned that vulnerable workers are far more likely to have influence in setting their employment conditions when they are collectively organized and professionally represented. Having said this, we should

recognize that many workers – typically those in very small, scattered or short-lived enterprises – will not come within the reach of the registered unions and will most likely not benefit from the ERA's collective provisions in any practical way.

Overall, I rate the ERA a better statute than the ECA on this criterion. The ERA should facilitate better expression of worker voice in employment relations without threatening the efficient form of bargaining structure that has evolved since the ECA. However, there will still be gaps in the labour market where workers do not have the benefits of collective representation.

Criterion three: To what extent does the statute represent a social consensus and thus provide longer-term stability?

The last criterion is an extension of the second. Will citizens at large regard the statute as fairly balancing the rights of employers and workers? Will it become a statute whose structure remains substantially intact across the electoral cycle? Here again the Employment Contracts Act fell somewhat short. Even if they have not been personally disadvantaged, people have heard of others who have been and generally think that employers have had too much power under the ECA (Rasmussen et al, 2000).

I suggest that the heart of a social consensus about New Zealand's labour laws lies in the following four features of the regime that has come together through the ECA and the ERA:

- decentralised wage-fixing *with*
- promotion of collective bargaining
- voluntary unionism *with*
- universal grievance rights (most importantly, with protection against arbitrary dismissal).

Decentralised bargaining is needed for macro-economic stability and for employer acceptance of the system. Promotion of collective bargaining (incorporating a good right to strike and lockout) is needed to help manage power imbalances and thus gain union and worker acceptance of the system and enhance international political acceptability. Voluntary rather than compulsory unionism is needed to ensure employer and wider public acceptability of union activity. Universal grievance rights are useful on democratic grounds and enhance the peacefulness of industrial relations by providing for resolution of dismissal cases without industrial stoppages (as with other "disputes of rights"). While some amendments of details will undoubtedly be necessary, multi-party acceptance of these four fundamental features of employment regulation would create a very stable basis for New Zealand's industrial relations in the twenty-first century.

The biggest risk to stability is a statutory challenge to the promotion of collective bargaining. If a political coalition on the Right decided to work toward repealing this feature of the current regulatory pattern, there is a strong likelihood of serious social conflict in New Zealand. A new government which introduced a Bill aimed at removing the promotion of collective bargaining would most likely generate serious protest and threaten

industrial stability in a way that would hurt this country internally and damage it internationally.

Overall, then, the ERA represents an astute balancing of employer and worker rights within a sensible economic regime. On the first criterion, the ECA and the ERA are both sound statutes but the ERA is better on the second and third criteria, putting it ahead overall.

Unknowns and excesses in the ERA

Having made this general assessment of the ERA, I suggest there are two qualifications that need to be noted. First, there are some "unknowns" which represent interesting experimentation and about which we should have an open mind. However, amendments in these areas are likely to be needed. Second, there is the question of whether the new level of individual protection in our labour market is excessive.

Unknowns: the new institutions and the impact of "good faith"

The objectives for the new institutions are really the same as those for the ECA institutions. However, it is not at all clear that they will perform any better. Nearly everyone agrees that we need speedy, low cost and just resolution of grievances and disputes of interpretation. The idea of compulsory mediation is certainly worth trying. Whether there are sufficient resources in mediation and whether the new mediators will win the respect of the parties are open questions at this stage. The investigatory nature of the Employment Relations Authority is also a novel step. There ought to be room for this kind of innovation in employment relations but we will need a serious evaluation of its benefits, costs and consequences in due course.

The return of reinstatement as the primary remedy in dismissals also raises questions. Will reinstatement be applied where it *should* be and *only* where it should be? We do need reinstatement for cases such as victimisation for legitimate union activity. It is clearly wrong that people should lose their jobs for legitimately pursuing their rights and those of their work mates. It is also wrong that competent employees should lose their jobs when they are falsely accused of misdemeanor or when they are the victims of internal jealousies and power-abuse in organisations where management politics are poorly controlled. Beyond these sorts of examples, caution is needed. Will reinstatement be applied to situations where the worker seeking it is a poor performer and their participation is an unfair tax on the firm and their colleagues?

The way the statute enlarges the concept of "good faith" also raises unknowns. Everyone supports the basic notion of "good faith" because we all expect representations in employment contracting to be truthful. How far legal regulation should go beyond this basic point is the issue. Some parts of the "good faith" procedures are clearly valuable to workers, particularly:

- the right to be consulted before redundancy
- the right to have their authorised representative treated with respect and
- the right to challenge a secretive employer to provide information to justify their bargaining stance.

Aspects of the "good faith" provisions do strengthen or bring into statute existing legal concepts, as the government argues. However, "good faith" is a notoriously loose concept which could be interpreted in ways which are unhelpful for both workers and employers. How much will this nebulous concept increase "legalism" for no real gain to the parties? At this stage, we should proceed with an open mind but serious evaluation of this aspect of the Act would be in everyone's interest.

Excessive regulation?: the new level of individual rights

A second qualification of the positive assessment concerns the new level of individual rights in employment. Given that something like 70 percent of the New Zealand workforce will continue to be employed on individual contracts, any future review of the Act should give serious attention to whether the Act's protections for individuals are set at the appropriate level. Have they gone too far?

While not endorsing the argument that the Act is fundamentally flawed, the most credible critique of it concerns its impact on individual contracting. One key question concerns those who could join a union but freely choose not to. In a statute which aims to promote union access and collective bargaining, what is the appropriate level of rights for individuals who choose *not* to become union members? A second key question concerns those parts of the labour market where unions are needed but are absent: what level of individual protection is best for workers in needy but unorganised areas?

Clearly, this is not an easy assessment and it is not one that could have been debated effectively in the short consultation time that preceded the enactment of the ERA. However, there is strong employer support for the view that we need to put a circuit-breaker in the escalation of individual rights if we are concerned to make it relatively easy for firms (particularly small ones) to employ workers on a legitimate basis. To quote from the New Zealand Employers' Federation submission on the Bill:

> At a purely practical level employers, particularly those in small and medium enterprises, and potential employers, are concerned to ensure the costs of employing staff and complying with the proposed changes to institutional processes are not prohibitive, and that the ability to adjust to market fluctuations is not unreasonably constrained.
>
> Should any or all of these areas of liability, cost and flexibility be seen as being against them, confidence to invest and employ is automatically undermined, with the inevitable negative outcomes such a loss brings (NZEF, 2000: Part A).

Employer submissions did help to improve the workability of the Bill, including its individual aspects (Knowles, 2000). For example, the sections on fixed term contracts, dependent contractors, directors' liabilities and on the links between individual and collective agreements were better balanced in the Act than they were in the Bill.

However, the broad question being raised here remains an issue, one that affects both employers and workers. We live in a country where there are plenty of young and low-skilled workers who need to establish a good work record. Their best chances of establishing themselves in the labour market generally come through a fairly low paid job in a small business. These sorts of jobs start to give them the on-the-job training, experience and reliable work habits that employers value so highly and on which individual development is based.

Where, then, should the line be drawn? Does the new doctrine of "unfair bargaining" (ss.68 and 69) go too far, as the Employers' Federation (2000) argues? These sections include various ambiguous grounds that could be used by the Employment Relations Authority to vary an individual agreement (after mediation is exhausted (s.164)). Take age, for instance (s.68(2)(i)). Does this mean people who are too young or too old? Or take sickness (s.68(2)(ii)). Just how sick, and in what way, does one have to be?

The point here is that we need to review the escalation of individual rights in the labour market. At what point does the trend to increasing individual protection work against the interest of individuals to have ready access to legitimate employment opportunities?

Conclusions

In conclusion, the Employment Relations Act represents an important and valuable attempt at re-balancing bargaining power within the fundamental structure of the wage-fixing regime that evolved under the Employment Contracts Act. Like the ECA, the ERA sits well within a framework of economic policies designed to foster low inflation and sustainable economic growth. It should perform better than the ECA, however, in meeting the needs of *both* parties – employers and workers. On this basis, it should, as the Council of Trade Unions (2000) says, be "warmly welcomed". If a social consensus can solidify around the value of four critical features of our current employment regime – decentralised wage fixing, promotion of collective bargaining, voluntary unionism and universal grievance rights – then we are likely to have a very robust basis for employment relations in the twenty-first century.

However, the new statute was somewhat "rushed to market" and will need adjustment. There are some experimental aspects – such as the new institutions and the good faith provisions – which will need careful review. It will not be helpful if, for example, good faith proceduralism becomes overly prescriptive and creates litigious, drawn-out disputation. Although the Act makes much of the notion of "good faith", the concept could have dangerous fellow-travellers (such as excessive complexity and time-wasting). Both unions and employers like to form collective agreements in a relatively simple and efficient manner. We have evolved a "New Zealand style of bargaining" over the last 30 years which is direct, contractual and not overly formal. Legislators should try to preserve this style because it suits the parties and is a strength of our workplaces when compared internationally.

There is also a major question mark over the desirable level of protection in individual employment agreements, a problem highlighted in the submissions of the Employers' Federation (2000). In a regime designed to promote collective bargaining, what really is the appropriate level of protection for individuals who choose not to become union members? More generally, at what point does the level of individual rights become counter-productive for workers? These questions need some serious review in New Zealand.

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