New Zealand Journal of Industrial Relations, **26(1)**: 103-118

The Individual and the Employment Relations Act

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Union density in New Zealand is now estimated at 17 percent of the workforce. Even if this figure increases to the mid-20s it still means that unions and collective bargaining are of marginal importance to the bulk of employees including many of the most vulnerable employees. For this reason it becomes increasingly necessary to reconsider the approach taken to employment law and in particular to consider the extent to which statutory employment law should evolve to reflect the reality of modern employment relationships. This article considers the Employment Relations Act from the perspective of the individual, non-unionised, employee working in an unorganised workplace and asks what the reforms have achieved for such employees. It raises the question whether future changes to the law should pay greater attention to the position of such employees.

Introduction

While the Employment Relations Act 2000 ("ERA") seems clearly intended to introduce a new employment environment in New Zealand labour law, the primary focus of the Act is the restoration and protection of the right of workers to associate in trade unions and to negotiate their conditions of employment though collective bargaining. In 1991, when the Employment Contracts Act ("ECA") came into force, union density in New Zealand was estimated at 41.5 percent. By December 1999 that figure had plunged to 17 percent as total union membership fell from 603,211 to 302,405 members (Crawford et al, 2000). While it is likely that in the more union-friendly environment of the ERA this decline may be halted, and to some extent reversed, only an optimist would envisage union density rising much above 25 percent. The great majority of New Zealand workers will, therefore, continue to have the terms and conditions of their employment settled by some form of individual employment agreement, not through collective bargaining. This situation is, of course, not new, as even before the ECA the majority of employees were employed on individually negotiated contracts. Many such workers were white collar workers in lower to upper management[1]. What is more important for the present discussion is that following the passage of the ECA a significant number of workers, who had previously enjoyed the

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[1] Although it might be remembered that the salary cut off point in many white collar awards was set at a relatively modest level.

minimum protections provided by the national award system, lost that protection. Some of those workers will have made a deliberate decision to opt out of union membership and/or had the skills or experience to obtain favourable employment terms. The majority, however, are likely to have abandoned, or have never taken up, union membership as a result of such factors as the collapse of collective bargaining, employer hostility to union membership, increasing casualisation of the workforce, and the lowered profile and perceived ineffectiveness of unions.

Such workers, including workers who choose not to join unions, remain in need of legislative protection to a greater or lesser degree. Their interests were not, however, the primary focus of the ERA reforms. This article approaches the ERA from the perspective of the individual unorganised employee and asks to what extent the Act has enhanced the position of those employees.[2] The article will look at this from three different although overlapping perspectives – the formation of the employment relationship; terms and conditions during employment; and finally protection from dismissal and associated issues The article will also comment on the degree to which employment law should be further codified, and what changes are needed to improve the current law for individual workers. Before moving to these topics, however, a few brief remarks should be made on the overall legal environment created by the Act.

The legal environment of the ERA

Perhaps the most crucial factor in determining whether the ERA will succeed in its objectives will be the approach taken by the courts, and particularly the Court of Appeal, in interpreting the Act. As the discussion below makes clear the ERA contains a number of provisions whose meaning is unclear and which are likely to require judicial elucidation before the impact of the law can be judged with any certainty. These include not only such broad concepts as "good faith" but also the meaning of more specific provisions.

Since 1991 the Court of Appeal has been extremely influential in developing the shape and direction of the law. In general the Court has taken a conservative, "pure contract"-based approach to employment contracts, which has on the whole favoured employers and resulted in significant erosions in the legal rights of employees[3]. The Court has justified this approach by reference to the changes to the law brought about by the ECA. In its most important statement on its approach, in *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276, the Court emphasised the ECA's "substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining", although noting that statutory provisions such as the personal grievance procedure limited freedom of contract. It went on to state, however, that "the context in

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[2] The article will not discuss the specific position of non-union members where there is a collective agreement in the workplace, although the discussion of such matters as personal grievances clearly applies to all employees.

[3] For a criticism of the rigid contract based approach to employment, see Chin (1997).

which [the personal grievance provisions] operate is sharply changed by the emphasis in the 1991 Act on contractual freedom." The Court concluded:

> Inevitably there is a tension between a pure contract approach and social and economic concerns inherent in the relationship. The responsibility on the courts is to give effect to the intent of Parliament as expressed in the statute[4].

In approaching this task under the ERA the Court is directed, by a new provision, to have regard to "the object of this Act and the objects of the relevant Parts of this Act" (s.216(b)).

The objects of the ERA differ significantly from those of the ECA and clearly indicate that Parliament has adopted a different philosophy to employment law. The primary object of the Act is to:

> build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship (s.3(a))

Two subsidiary objects are of particular relevance for individual employees. These provide that the principal object is to be attained by:

(i) recognising that employment relationships must be built on good faith behaviour; and
(ii) by acknowledging and addressing the inherent inequality of bargaining power in employment relationships

The most influential concept likely to affect the application of the Act is that of "good faith", a concept clearly intended to have a pervasive influence on the Act as a whole as was made clear in the *Explanatory Note* to the Bill, where the Government stated: "The principle of good faith underpins the Bill, both generally and specifically." While not entirely new, the notion of "good faith" has not been previously developed in the context envisaged by the Act and inevitably its meaning and application in concrete situations will need to be clarified by the Court of Appeal. Although the most detailed provisions relate to collective bargaining, good faith is also important for individual employment relationships[5].

Section 4(1)(a) provides that the parties to an employment relationship must "deal with each other in good faith." While this broad obligation might appear to be limited by para (b), which provides that the parties must not do anything that misleads or deceives the other, it is made explicit that this does not limit the general obligation in para (a). Subsection (2) provides a comprehensive list of "employment relationships" to which the good faith

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4 See also *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA), where the Court stressed that the ECA "repealed" the Labour Relations Act 1987, rather than merely reforming or amending it, and placed emphasis on the objects as set out in the Long Title.

5 See Roth (2000a), which refers to a Department of Labour memorandum containing discussion concerning how the good faith duty might be interpreted in relation to individual employment relationships.

obligation applies, but other than the employer/employee relationship these are more applicable in collective bargaining relationships. Indeed, there are, from the individual perspective and given modern employment practices, several significant omissions from the list. Perhaps the most obvious is the set of relationships that apply where employees are technically employed by a labour supply company but for practical purposes they are under the *de facto* control of the business that benefits from their work. This omission is particularly surprising when one considers the range of matters to which the good faith obligation applies. Additionally, in many cases the legal "employer" will not be the legal entity making the employment decisions, but will be a subsidiary company that has little influence over group decisions. Both situations provide potentially large loopholes for employer avoidance of good faith obligations, and most especially those business decisions likely to affect individual employees by allowing the relevant decisions to be taken by a party other than the one owing the good faith obligation. Clearly the government was not prepared to take the necessary steps, by providing a much wider definition of an employer, to ensure the universal and consistent application of the good faith standards. A definition of "employer" based on that of a related company in s.2(3) of the Companies Act 1993 but extended to include any entity directly benefiting form the work of the employees (to encompass labour supply contracts) would have had the advantage of recognising economic reality over legal form.

The matters to which the good faith obligation applies are defined in subs (4) although it is made clear that these are examples only and not a definitive list (subs (5)). The list nevertheless includes several matters that are likely to have a significant impact on individual employees, including consultations about "the effect on employees of changes to the employer's business"; proposals "that might impact on an employer's employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business"; and "making employees redundant."

Two particular questions need to be addressed. First, is the good faith obligation likely to impact on the practical management of employment relationships? Second, what is the substance of the obligation and will it add anything to the existing law? While answers to these two questions must be tentative at this time, it seems that there is the potential for a significant impact and that employers will need to ensure that their employment practices are expanded or refined to encompass the matters listed in s.4(4). The Employment Relations Authority has jurisdiction to make determinations on "matters about whether the good faith obligations . . . have been complied with in a particular case" (s.161(1)(f)), and it is able to enforce a determination by a compliance order (s.137(1)(a)).

How the detail of the obligation of good faith will develop outside the context of collective bargaining is presently unclear. In the particular case of individual employees regard must be had to s.60, which provides that the object of Part 6 is:

> (c) to recognise that, in relation to individual employees and their employers, good faith behaviour is
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> (i) promoted by providing protection against unfair bargaining; and
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> (ii) consistent with the implied term of mutual trust and confidence in the relationship between employee and employer.

One scenario consistent with s.60 is that the courts will develop a general concept of good faith behaviour from a number of pre-existing sources. One such source is the term of mutual trust and confidence already implied in contracts of employment. Such a term was accepted in two Court of Appeal cases in 1985,[6] and it has since been applied in a range of employment situations, especially cases of constructive dismissal. The Court of Appeal has defined the term as requiring that:

> employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee[7].

Another source is the established principles on "consultations". These principles would seem relevant to several of the matters covered in s.4(4), and given that good faith is likely to be concerned primarily with fair process these would seem to be particularly applicable. In *Julian and others v Air New Zealand Ltd* [1994] 2 ERNZ 612 the Employment Court identified a number of propositions (at 637-638) derived from its own and from High Court and Court of Appeal precedents, which it saw as part of a consultation process. These included, for example, that consultation is not a perfunctory process; that it requires the provision of "sufficiently precise information"; and that the party to be consulted "be given a reasonably ample and sufficient opportunity to express views or to point to problems or difficulties". It was also held that there must be a "genuine effort . . . to accommodate the views of those being consulted", and that even if a party has a working plan in mind, it "must keep its mind open and be ready to change and even start afresh."

Ultimately, however, good faith based on the above approach is largely a matter of process, and while it may affect the manner in which decisions are implemented, it is unlikely to have impact on the substance of the decisions made. What will be of interest, but currently unpredictable, is whether the good faith obligations will have implications not only for the way decisions are made but also for the substance of the decisions. For example, a recent press report quoted unnamed employment lawyers as suggesting that employers may have difficulty in making employees in a profitable part of a business redundant, or that decisions to restructure a business where the business is viable may no longer be possible[8]. This may occur, but for it to do so would require the Court of Appeal to significantly reverse the approach adopted in *GN Hale & Son Ltd v Wellington Caretakers Union* [1991] 1 NZLR 151, a step that seems unlikely in the absence of a much clearer legislative direction. It may be, however, that it will be employees who will be most affected by the addition of new or extended substantive obligations. It has been suggested that a combination of the new obligation and developments in common law is likely to see employees required to be more pro-active in their employer's interests (Roth, 2000a).

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6 *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 and *Marlborough Harbour Board v Goulden* [1985] 2 NZLR 376.

7 *Auckland Electric Power Board v Auckland Local Authorities IUOW* [1994] 2 NZLR 415 at 419.

8 Weir, J., "Terralink layoffs may turn nasty for the Government" *The Dominion*, 27th January 2001: 14.

Forming an employment relationship

The time of formation of an employment relationship is crucial because the terms entered into at that time are difficult to change and will thus dominate the whole relationship. The point of formation is also the point at which the implementation of the Act's object of "acknowledging and addressing the inherent inequality of bargaining power in employment relationships" is likely to be of most concern, as in general employers are better placed to dictate the terms on which employment is offered. Three particular issues seem to emerge from the new Act: will the worker be an "employee"; what opportunities are there for the potential employee to consider and be advised on the employment offered; and to what extent can unfair bargaining behaviour be challenged. Before looking at these aspects of the Act the point should be made that a number of issues critical to formation are dealt with elsewhere. For example the Human Rights Act 1993 deals with discrimination when seeking employment. It might be noted, however, that neither that Act, nor the ERA prevent a potential employee from being discriminated against on the grounds of union membership or of union activity. Union activity or membership is not covered in the Human Rights Act, and the definition of a "person intending to work" in the ERA (s.5) requires that a person has been offered and accepted work, which means that there must be a concluded employment agreement before a personal grievance based on that Act's definition of discrimination can be initiated. This gap would seem to permit such practices as blacklisting union activists.

For a worker to enjoy the protection of the ERA and other protective employment legislation they must be an employee. Following *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695, it was assumed that, other than in limited circumstances, a clearly stated intention that a contract was not intended to be contract of employment was sufficient to displace the common law indicia that would have led to the conclusion that there was such a contract – in other words legal form took precedence over economic substance. Attempts to reform the law to deal with this situation proved one of the most controversial aspects of the reforms and the final Act differed considerably from the original Bill. In essence the Bill set out the common law indicia (or at least one version of them) as the primary consideration in determining employment status, and required that "less weight" be given to any statement of status (cl.6(2)). The Act itself contains a weaker requirement that involves the determination of the "the real nature of the relationship" and directs that the Court must consider "all relevant matters" and "not treat as determining" any statement by the parties that describes the nature of the relationship (s.6(2)-(3)). It is unclear exactly how this provision will operate in practice. "Real" presumably is intended to refer to economic reality (rather than legal reality!) and the need to consider all relevant matters would seem to invite the use of the accepted common law indicia as applied to the facts of a particular case. If this is so, the only significant differences between the post-ERA law and that following *Cunningham* would seem to be, first, that the stated intention of the parties is not determinative of status and, second, that greater weight may have to be given to both the factual circumstances and the respective bargaining position of the parties. The Act's object of addressing inherent inequality in bargaining power, in particular, would seem to support an interpretation that favours a finding that a person is an employee in cases where there is a strong degree of dependency in the relationship or where the

contract is an attempt to avoid statutory minima,[9] or possibly to exclude personal grievance protections. Until decided cases give a clearer picture, however, the impact of the changes will remain unclear because, as with much of the Act, the outcomes seem heavily dependent on the overall interpretative approach favoured by the courts.

The Act has dealt with two issues relating to the form of the employment agreement. Section 67 provides that a probationary or trial period must be stated in writing in an agreement but also provides that such a statement does not affect the application of the law relating to unjustifiable dismissal. This section would appear to maintain the current legal position that a dismissal during such a period must be justified (*Mazengarb*, 2001: para [ER103.21]).

The second provision is s.66 which deals with fixed term contracts and which is presumably intended to at least partially negate the decision of the Court of Appeal in *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116. While the provision in the original Bill (cl.81) would have reversed *Hagg*, the Act took a more equivocal position. In summary, the Bill provided that the expiry of a fixed term contract was to be treated as unjustifiable dismissal unless the employer could justify the need for the fixed term and show that those reasons continued to exist when the contract period expired. Section 66 takes a more conservative approach. It provides that fixed term contracts are permissible if the employer has genuine operational reasons based on reasonable grounds for imposing the fixed term, and it requires that the term and the reasons for the employment ending in that way be notified to the employee. There is no specific requirement for this information to be reduced to writing. The section also provides that fixed terms cannot be used to exclude either the rights of employees under the Act or to establish suitability for employment. This provision is unclear on the consequences of breaching the section. Presumably if the employer's reasons are not genuine the precondition to imposing the fixed term is not met and the term can be avoided with the employment becoming of indeterminate duration, thus allowing a personal grievance if an attempt is made to terminate the contract. The impact of s.66, as with much of the Act, will again require judicial clarification. It seems possible that, as was the case under *Hagg*, there will be relatively few cases brought under this section given that the justification for the fixed term need only exist when the agreement is formed. Nevertheless, some interesting situations may arise. For example, could a policy of appointing senior managers for a fixed term be justified as being for genuine reasons?

One area where s.66 could potentially have an impact is in the case of what might be called "permanent casuals"; that is, where employers employ workers as so-called casuals but in practice provide long term and reasonably regular, albeit part-time, employment[10]. Such cases would seem to breach both the genuine reasons requirement as well as the

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9 For example, the terms of the so-called "contractors" in *Cashman v Central Regional Health Authority* [1996] 2 ERNZ 159 would seem such a case.

10 It seems to be the practice in some cases to use varying rosters and the like to disguise the true nature of the employment.

prohibition on using fixed terms to exclude statutory rights. If this interpretation is correct it would have the effect, possibly unintentionally, of providing a degree of employment security to a significant group of workers.

Two significant reforms introduced by the ERA are, first, the imposition of a long overdue requirement that the core terms of an employment agreement be reduced to writing (s.65), and second, that employees have the right to seek advice before entering into an agreement (s.64). If an employer fails to provide the opportunity for obtaining advice the agreement may be challenged under s 68 as having been obtained by unfair bargaining. One major difficulty that is likely to arise is from the requirement that "the individual employment agreement . . . be in writing." This term has posed some difficulties as to whether the writing must include the whole of the contractual terms, and as to the ability to vary the contract by oral agreement[11]. In *Northern Local Government Officers Union v Waitakere City Council* [1991] 2 ERNZ 753, the Employment Court took a liberal approach to a similar term and accepted that the written contract need not be fully comprehensive and that the writing need not consist of a single document. Employment contracts of course have been held to include a variety of common law implied terms and in practice oral variations are common. Again, the meaning of s.65 will require further judicial elaboration and raises a number of possible pitfalls. It might be expected that in order to meet the "in writing" requirements that employers will draft agreements in broad discretionary terms and manage the employment relationship by oral arrangements. The danger is of course that such oral arrangements may later be changed to disadvantage the employee[12]. Such changes might potentially be challenged as a personal grievance or as a breach of good faith, but these remedies are uncertain. Greater clarity and certainty might have been achieved by a straightforward requirement that an expanded list of specified matters be in writing[13].

Given that employers are generally better placed to dictate terms of employment, an important aspect of employee rights is the ability to challenge an employer's negotiating conduct that results in unfair terms, and the ability to challenge unfair terms, or the unfair application of a term, during the term of the employment relationship. The approach of the ERA to these issues is tentative. On the one hand, it includes provisions relating to unfair bargaining, but on the other limits the ability to later challenge unfair terms. The approach appears to be that if an employee, in the absence of unfair conduct and having had the opportunity to be independently advised, chooses to enter into an agreement that contains harsh or unconscionable terms, than that is their concern and they will be bound by the consequences. This policy appears to be driven by a desire to promote collective bargaining by reducing the protection provided to individual employees when compared

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11 See *Mazengarb* (2001): para [ER54.5].

12 For an analogous situation consider *Lowe Walker Paeroa Ltd v Bennett* (1998) 5 NZELC 95,806, concerning the requirement that collective employment contracts be in writing.

13 As is the situation in the United Kingdom; see the Employment Rights Act 1996.

to those bargaining collectively[14]. Section 68 sets out a number of circumstances which constitute unfair bargaining such as taking advantage of the diminished capacity of the other party, relying on the (presumably misleading) skill, care, or advice of the other party; and inducing a party to enter the contract by oppressive means, undue influence, or duress. Once this conduct is established, the party may apply to the Authority for various remedies under s.69 including the cancellation or variation of the agreement. These provisions are good so far as they go, but the problem is that they do not appear to go far enough. Section 68 is limited to unfair conduct at the time of entering into the agreement, but does not extend to terms and conditions that are themselves harsh or oppressive or to the harsh and oppressive application of a term[15]. Indeed, s.68(4) specifically prevents a subsequent challenge to an agreement on the ground that it is unfair or unconscionable[16].

Terms and conditions during employment

Section 65 provides that an individual employment agreement "may contain such terms as the employee and employer think fit." This freedom is constrained by the requirement that the terms must not be contrary to law or inconsistent with the Act. The policy of the Act is that, subject to these restraints, the contents of an employment agreement are in general a matter for the parties. The first restraint includes of course that an agreement must provide for at least the various minimum requirements found in the Minimum Wage Act, the Holidays Act and other protective legislation. Secondly, s.65 requires that certain clauses are included in agreements although in general these relate to the subject matter and do not prescribe the content of the clause. The matters required to be covered are:

(i) the names of the employee and employer concerned; and
(ii) a description of the work to be performed by the employee; and
(iii) an indication of where the employee is to perform the work; and
(iv) an indication of the arrangements relating to the times the employee is to work; and
(v) the wages or salary payable to the employee; and
(vi) a plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised

This list is fairly basic and does not purport to dictate any particular content. Indeed, even the Bill's suggestion that the agreement should cover "hours, days and times the employee is required to work and the rest and meal breaks that the employee is entitled to" seems to have been regarded as too prescriptive and was not carried forward into the Act.

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14 See *Mazengarb* (2001), para [ER68.4], for a discussion of the policy development of this section.

15 This is discussed below.

16 See below for a discussion of oppressive terms.

Given the unwillingness to prescribe any conditions of employment, other than the statutory minima, it is perhaps surprising that the ERA has no provision for challenging terms that may be oppressive or which are enforced in an oppressive manner. Indeed, s.68(4) specifically prevents a challenge to an agreement on the ground that it is unfair or unconscionable. In this respect the ERA falls short of the ECA, which allowed a challenge to a term of the contract which was harsh and oppressive (s.57). While the standard required to be met by the ECA was unduly onerous, a modified provision based on ss.9 and 10 of the Credit Contracts Act 1981, which are considerably more generous than s.68, would seem appropriate and likely to discourage the use of oppressive conduct or the use of oppressive terms. It is perhaps worth quoting the Credit Contracts Act to illustrate the protection that might have been afforded:

> **9.** **Meaning of "oppressive"** - In this Act, the term "oppressive" means oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice
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> **10.** **Re-opening of credit contracts** - (1) Where, in any proceedings (whether or not instituted pursuant to this Act), the Court considers that —
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> (a) A credit contract, or any term thereof, is oppressive; or
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> (b) A party under a credit contract has exercised, or intends to exercise, a right or power conferred by the contract in an oppressive manner; or
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> (c) A party under a credit contract has induced another party to enter into the contract by oppressive means —
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> the Court may re-open the contract.

Two points in particular might be noted. The first is the liberal definition of "oppressive", and the second is that s.10 allows a challenge to both terms that are oppressive and to the oppressive exercise of a right or power. The ERA contains a provision equivalent to s.10(c) of the Credit Contracts in s.68(2)(b), but not to s.10(a) or (b). That is not to say that the ERA does not provide some protection, primarily through the personal grievance provisions, but that protection is less certain and in particular does not allow a direct challenge to the validity of oppressive terms and is less than clear on oppressive behaviour that would appear to fall within, or be permitted by, the terms of the agreement. Oppressive conduct may, in some cases, breach the implied obligation of mutual trust and confidence, or some other implied term, and thus be challenged under s.103(1)(b) as unjustifiable action, but it would have been of benefit to provide greater clarity by specifically including a provision similar to s.10(1)(b) of the Credit Contracts Act in either the definition of a personal grievance or as part of a general prohibition on oppressive conduct.

Given that New Zealand law contains no clear provisions on such matters as maximum hours of work, rest periods, requirements for minimum breaks between work periods and the like, the need for clear powers to challenge unreasonable employer demands would seem to be required. Such provisions would achieve better balance between the economic and other advantages of allowing flexibility in employment arrangements, and the need to prevent the abuse of that flexibility.

Employment security and personal grievances

Since 1973 the primary mechanism for protecting employment security in New Zealand has been the ability to bring a personal grievance. While the great majority of personal grievances concern allegations of unjustified dismissal, grievances also encompass a range of other complaints such as sexual harassment and discrimination. The substantive principles of personal grievance law were well established before the ECA came into effect, and in general legislative changes to the substance of the law under both the ECA and now under the ERA have been relatively minor. Probably the most important relate to remedies and in particular the weighting given to reinstatement as a remedy,[17] and the role of contributory conduct.[18] Changes to the substantive law during the period of the ECA were brought about not through legislation but by decisions of the Court of Appeal, particularly in relation to fixed term contracts and redundancy. No legislative changes have been made affecting dismissal in cases of redundancy, notwithstanding the extremely pro-employer approach to redundancy adopted by the Court of Appeal which gives only the most minimal protection to employees. Indeed, provisions in the Bill which would have dealt with some aspects of this matter were not adopted in the Act (cl.66). If the Court of Appeal reconsiders its approach in light of the objects of the ERA,[19] some changes of benefit to employees may occur, but substantial change would require legislative action to deal with such issues as employee rights in transfers of undertakings or statutory rights to compensation in cases of redundancy. It appears that the government is moving to develop policy in the former area, but there is no indication of if or when reform will take place.

Under both the ECA and ERA, legislative change has largely been limited to procedural matters, although it has included changes to the definitions and scope of permissible grievance. For example, the ERA added racial harassment as a grievance (s.109), and incorporated a new definition of discrimination to bring the definition into line with that of the Human Rights Act (s.105). On the other hand, the Act significantly reduced the protection for employees engaged in "union activities." Section 107, which now provides that union activities "means" the activities listed in the section, appears intended to negate the decision in *Tranzrail Ltd v NZ Rail and Maritime Union* [1999] 1 ERNZ 460, thus potentially leaving employees vulnerable to retaliatory action for such activities as distributing union information, union organising activities, participating in a strike, and the like.

While these reforms are important, their practical impact is likely to be limited given the few grievances brought on the grounds in question. The reforms that will have an immediate significant impact are those affecting procedures and the means of resolving personal grievances. This article will not comment on the new resolution procedures

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17 Reinstatement was revoked as the primary remedy by the ECA and restored by s.125 of the ERA.

18 Sections 40(2) and 41(3) of the ECA required employee contribution to be taken into account. See now ERA s.124.

19 See Roth (2000b): 325-326, and Churchman and Roth (2000): 40-41.

through the mediation services and the Employment Relations Authority. The procedures used by the latter are novel and likely to be of considerable interest, but their success or otherwise in providing speedy and effective resolution of grievances will take some time to evaluate. The only comment that might be made is that some aspects of the new procedure seem overly bureaucratic; for example, the need to involve the mediation services to sign off agreed settlements (s.149) seems unnecessary where the parties have their own advisors. Judgment should be reserved on the new procedures. If they succeed in providing speedy settlements this in itself will be a major benefit – the adage of justice delayed is justice denied had, unfortunately, a ring of truth given the long delays in resolving many personal grievances. In the majority of cases it is important to resolve the issues, often by compromise, and allow the parties to move on. That being said, however, speed should not take precedence over legal rights.

Probably the most important "reform" brought about by the Act is the provision that the only way to challenge a dismissal, or any aspect of it, is through the personal grievance procedure (s.113). The inclusion of this provision would seem to reflect a long term Department of Labour goal for bureaucratic tidiness rather than any real need for change. The removal of an employee's common law rights is not a light matter and the Department's reasons for abolishing the cause of action were not particularly convincing[20]. The effect of the change is to abolish the right of employees to sue for breach of contract when wrongfully dismissed and to compel them to use a procedure which, while arguably providing wider remedies, imposes a limitation period considerably shorter than that for the common law action. This reform is also seriously one-sided in that employers remain free to allege a breach of contract following termination of contract for the full six year period. It is also not entirely clear that the implications have been fully considered. For example what is the situation if, four months after employment ends on a "mutually agreed" basis, an employer alleges a breach of a confidentiality or similar clause and the employee wishes to counter-claim that the employer repudiated the contract sufficiently to amount to a constructive dismissal? Such a counter-claim would seem to be excluded by s.113, thus leaving the employee without what may well have been a tenable defence. The wording "to challenge that dismissal, or any aspect of it, for any reason" is extremely broad and potentially may result in injustice if a contractual or other action is brought against an employee outside the 90 day period.

The ERA retains the 90 day period within which a personal grievance must be raised with the employer. This period is remarkably short and significantly shorter than the standard limitation period. The reasons for retaining the 90 day period, and hence subjecting employees to special limitation rules, are unclear. Apart from allowing employers to be aware of possible actions, a courtesy not extended to other potential defendants including employees, the most obvious reason is the policy of the Act to promote mediation and minimise judicial intervention as well as to encourage workplace level settlements. These objects, however, seem to be imposed at the expense of enforceable legal rights and to

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[20] See Hughes (1998) for a discussion of the origins of this provision and the potential consequences. For discussion of the consequences of the ERA provision, see Roth (2000b): 326-327 and 335-339, and Churchman and Roth (2000): 49-51.

some extent ignore the complexity of the rights involved. It also has the effect of suggesting that employee rights protecting their economic security are second class rights that do not enjoy full legitimacy. Even if the grievance is raised within 90 days, proceedings must be commenced within three years (s.114(6)), a limitation that is not imposed on other civil actions. It is difficult to see any reason why employees should be disadvantaged in this way, particularly when this restriction is in practice purely one-way. Employers of course remain free to bring actions for six years.

Another reform of significance is s.115, which defines certain circumstances that constitute exceptional circumstances for the purpose of allowing a grievance to be raised out of time. Two of these circumstances, those relating to the employer's failure to comply with obligations under ss.54, 65 and 120(1) are more in the nature of enforcement provisions than genuine exceptional circumstances, and that in paragraph (b) (failure of agent) is likely to be of limited application. Paragraph (a), which covers trauma arising from the grievance, may be of use in some circumstances but again is unlikely to apply in a great many cases. In essence the government has elected to continue with the previous legal position under which the Court of Appeal has taken an extremely strict view of exceptional circumstances and made only minor reforms. Of these, those in paragraphs (c) and (d) (failure to inform employee of 90 day time limit and failure to provide a requested statement of reasons for dismissal) would seem to be most significant.

The basic protection New Zealand employees enjoy through personal grievance law is, by world standards, very good. The ERA has addressed a number of definitional and similar issues relating to personal grievances, and while these are of importance the overall impact is mixed and, in terms of the quantity of grievances, relatively marginal.

One major criticism of the law is that in practice it provides financial compensation for unjustified loss of employment rather than reinstatement in employment. The ERA has provided that reinstatement is to be the primary remedy, although whether this will result in a significant increase in reinstatement orders has yet to be seen. Prior to 1991 such orders were not common.

The major gaps in employment protection in New Zealand at present, however, would seem to be the use of non-standard employment arrangements such as casual employment or fixed term contracts to avoid personal grievances, and the absence of any realistic protection in the case of redundancy, particularly redundancies in situations other than insolvency. In insolvency cases more complex questions arise relating to the funding of compensation, and while these should be addressed, reform of personal grievance law is probably not the place to address these issues. The ERA has partially addressed the issue of fixed term contracts, although the solution is less than satisfactory. It has failed to address redundancy at all. Given that redundancy does not involve employee fault and in many cases is purely for commercial convenience, the failure to deal with this issue must be seen as a major failure of the reforms.

Conclusion

The ERA has achieved the important goal of moving New Zealand employment law back to a more balanced position, and in particular has restored both unions and collective bargaining to a central position in the law and in so doing has brought New Zealand law into line with the country's international obligations and internationally accepted standards of human rights. Quite rightly, the main focus of the Act was on achieving those objectives. That being said, however, it is debatable whether the Act has provided gains that might have been expected for non-organised employees. The experience of the last decade and current rates of union membership clearly indicate that collective bargaining will not benefit the great majority of employees, and the reality is that many of those employees need some of the protection previously provided through the national award system. The only method of achieving this is through legislation. The government has taken some initiatives, such as raising the minimum wage, but in general the reform programme has not focussed on unorganised employees. The discussion above indicates that in general such employees have made few positive gains from the ERA and that in some respects at least the deterioration in their legal position during the period of the ECA has been consolidated by the failure of the ERA to clearly reverse some of changes that occurred over the last decade. From the perspective of the individual employee, the ERA is a mixed blessing. Political caution appeared to prevent many desirable reforms, and there is no clear indication that the government intends to pursue a particularly vigorous employment reform agenda in other than limited areas.

Nevertheless, it seems apparent that future employment law reform must take much greater account of the fact that collective bargaining will only benefit a minority of employees, and that it cannot provide the necessary protection for many vulnerable employees. Changing employment patterns, employer attempts to avoid protective legislation, and a range of other drivers of employment practices all indicate a need to carefully reconsider the objectives and the requirements of modern employment law. It is suggested that any review of the ERA must be both wide-ranging and imaginative, and concerned not with remedying the abuses of the past but of anticipating the future.

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