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SYMPOSIUM

The Employment Contracts Act 1991: introduction

The Employment Contracts Act 1991 is the most controversial piece of labour legislation ever passed in New Zealand. It attracted considerably more opposition than the introduction of compulsory arbitration in 1894. The Act reverses almost a century of legislative development and, in particular, attempts to significantly reduce the central role that collective organizations and union - employer negotiations have played in industrial relations over that period. It also ends the national award system which provided minimum standards of protection for most New Zealand workers through the subsequent parties provisions in the previous legislation. The new Act is largely the product of intense lobbying by supporters of the New Right supported by some employers who have rightly seen the passage of the Act as an opportunity to mount a major attack on wages and working conditions. Outside this group, the introduction of the Act enjoyed little popular support.

The changed perspective of industrial relations which is central to the Act, is that espoused by the New Right. The objects clause of the Act reflects this new perspective. The stated objects of the Act are to:

> promote an efficient labour market, and in particular,-
> (a) To provide for freedom of association:
> (b) To allow employees to determine who should represent their interests in relation to employment issues:
> (c) To enable each employee to choose either -
> (i) To negotiate an individual employment contract with his or her employer; or
> (ii) To be bound by a collective employment contract to which his or her employer is a party:
> (d) To enable each employer to choose -
> (i) To negotiate an individual employment contract with any employee:
> (ii) To negotiate or to elect to be bound by a collective employment contract that binds 2 or more employees:
> (e) To establish that the question of whether employment contracts are individual or collective or both is itself a matter for negotiation by the parties themselves.

This list of objects contrasts markedly with the objects of labour legislation since 1894. The objects of New Zealand's first comprehensive industrial legislation, the Industrial Conciliation and Arbitration Act 1894 were to "encourage the Formation of Industrial Unions and Associations, and to facilitate the Settlement of Industrial Disputes by Conciliation and Arbitration." Objects of this nature have characterized labour legislation since that time. The objects of the Labour Relations Act 1987, the most recent example, were:

> (a) To facilitate the formation of effective and accountable unions and effective and accountable employer organisations:

(b) To provide procedures for the orderly conduct of relations between workers and employers:

(c) To provide a framework to enable agreements to be reached between workers and employers:

That Act, in marked contrast to the Employment Contracts Act, followed one of the most comprehensive and prolonged periods of public debate and consultation that has preceded the enactment of any legislation. The new Act makes no pretence at balancing the interests of various groups. It is first and foremost an ideological instrument designed to reshape employment relations in the image of New Right theories. The words "industrial relations" and "union" have been removed from the legislative vocabulary and workers are now defined in terms of their subordinate legal status as "employees". The objects of the Employment Contracts Act stress first, economic values, and secondly, the primacy of the role of the individual employee and employer in the labour market. Collective industrial relations are reduced to secondary significance and collective organizations are ignored. The employee choices of bargaining referred to in the objects are severely constrained by limits on collective action, giving the effective choice of bargaining options to employers.

This symposium contains papers that cover the impact of the Employment Contracts Act and which examine a number of different aspects of the Act. The first paper, by Simon Deakin, places the Act in an international perspective and allows it to be assessed against the different tendencies in labour law reform in Europe and the US. The particular contribution that Deakin makes to the symposium is to show that there are significant differences of approach to reform in the US and Britain on the one hand, and the majority of members of the European Community on the other. The obsession of New Zealand policy makers with Thatcherite Britain and the Chicago School in the US has meant that New Zealand has missed the benefit of alternative models that may well be a more appropriate basis for reform. Deakin argues that the model adopted in Britain is not only economically questionable but socially divisive. The European systems, based on a clear floor of legal rights, on the other hand, are more likely to lead to social cohesion and supply-side efficiency.

The remaining papers discuss a number of different aspects of the Act. Anderson's paper considers the implications the Act will have for future industrial relations. Anderson first discusses the political and ideological background to the Act and how the agenda of those promoting the reforms was carried into the Act. The point is made that the Act shifts the central focus of labour law away from a collective towards an individual orientated centre and treats the fundamental relationship as that between employer and employee. More importantly, as Anderson demonstrates, the interests of workers are seen as being confined to their own workplace, the Act allowing little room for broader collective interests or mutual support. Anderson does, however, make the point that the New Right were not completely successful in their aims and that a significant body of law has been carried forward from the old legislation into the new Act. Of particular significance is the preservation and extension of the jurisdiction of the old Labour Court, now renamed the Employment Court, and the retention of the personal grievance and disputes procedures. These elements of the Act have meant that the New Right's pure contract model of regulation has been substantially modified. The creation of a single body of labour law within the jurisdiction of a specialist judicial structure is seen as a base on which future developments in labour law might proceed.

In the period preceding the passing of the Employment Contracts Act, supporters of the new system made much of the need for a minimum code of employment standards. In practice, this code has failed to eventuate. The minimum statutory standards existing before the Act have only been slightly improved - 5 days of special leave and an extension of the personal grievance procedure - but, because of the abolition of the national award system, many more workers will depend on these standards. Such workers

will now be protected only by the minimum floor of rights that is created by various pieces of legislation. Brosnan and Rea examine the content of this code, but more importantly they examine the interrelationship of the code with the other supports to individuals provided both by the state and privately. Their conclusion is that the Act is unlikely to achieve the labour market improvements that its advocates contend but that, on the contrary, it is likely to accentuate existing disadvantages. An improved minimum code is seen by them as not only necessary to protect the vulnerable and the disadvantaged but as an incentive to the more effective utilization of labour.

The theme that the Act will disadvantage particular groups is also taken up by Sayers who examines the implications of the Act for women in the context of worldwide changes in labour processes. Sayers concludes that the changes that the Act will bring about will be to the disadvantage of most women, especially to those in the increasingly casualized peripheral workforce, but also to those in the service sector where the disadvantages will be compounded by the repeal of employment equity legislation. At best, only a small group of women in the elite service classes may be advantaged by the Act, but that, even for this group, possible gains may be negated by the repeal of employment equity legislation .

One of the major aims of the Employment Contracts Act was to reshape the structure of employer and employee negotiations. Walsh's paper explores the options for bargaining presented by the Act. Walsh makes the point that, even in the new bargaining environment, which gives employers much greater power to shape the outcomes of bargaining, employers will wish to retain a structure which is administratively convenient and minimizes disruption. For these reasons, and because union membership is likely to remain attractive for many workers, Walsh envisages that collective bargaining and collective contracts will continue to be of central importance for many employers and especially in the State sector where central government will wish to retain control for fiscal reasons. Outside the State, however, these agreements are likely to be enterprise based. Walsh argues that the new bargaining freedom will affect the pattern of contracts. Employers will attempt to rationalize their bargaining arrangements on the one hand, and on the other, groups of employees, encouraged by the new breed of bargaining agent, will be tempted to negotiate outside existing structures. This is most likely where they have some special bargaining strength or where there is a significant group of dissenters within a union. Finally, Walsh notes that even if wholesale change in bargaining arrangements are unlikely in the immediate future, there is considerable change in the contents of contracts as employers rush to take advantage of their new powers.

The paper by Hughes looks at the nature of the new Employment Tribunal and the reconstituted Employment Court. Two particularly important points emerge from this paper. The first is that there are considerable jurisdictional problems resulting from the changes. The Act has not created a unified employment law jurisdiction and as a consequence actions, even if arising from the same facts, may need to be divided between the Employment Court and the ordinary courts. The second is that the respective roles of the Tribunal and Court are not entirely clear and as a consequence there is room for considerable uncertainty, at least until the roles of the two bodies becomes clarified. Hughes also looks at some aspects of the law of contracts as it has been modified by the Act for employment contracts. His comment, that some aspects of this law are "little short of bizarre", reflects the difficulties that the drafters of this part of the legislation must have had in attempting to create a new and untried scheme of labour law to meet the demands of a political agenda rather than the needs of a thoughtful reform process.

The Employment Contracts Act will reshape New Zealand industrial relations. In the immediate future there is likely to be considerable uncertainty as unions and employers adjust to the new environment, and as the Tribunal and Court wrestle with the difficulties of the new law. In the longer term, the picture is less clear and to a large extent will depend on the result of the next election. Even should Labour win that

election there is little chance of a return to the old system. For better or worse, the Employment Contracts Act must be the base for future reforms. The papers in this symposium demonstrate that reforms will be needed if New Zealand is to continue to espouse any vision of equity and social justice, or even a "decent society".

The Editors