

Women at Work: Ensuring Equity in the Employment Relationship: The Case for a Minimum Code

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Introduction

Next year, 1994, marks the century of the passing in 1894 of the first Industrial Conciliation and Arbitration (IC&A) Act in New Zealand, an act which was to shape the structure and development of New Zealand's industrial relations for almost a century. I have chosen to anticipate that anniversary today. My address is concerned with a broad industrial law topic which has, I believe, particular relevance for this year's anniversary, the suffrage of women.

The first section of my talk concerns the nature of the employment relationship - is it more than a contract?

Is there a need for, or does the relationship demand, more than what the parties agree? Is there a case for somehow providing for minimum terms and conditions, and also for other standard terms which equity requires be mandated in that relationship?

If so, how can such minimum and essential conditions best be achieved? What is the role of the State, and what is the role of collective, as opposed to individual bargaining?

This may sound a large and general theme. I raise it now because I believe it is time to revisit this broader question, after some time to consider the effect of the Employment Contracts Act. In this year, Suffrage Year, it is surely time, in addition to all the celebrations, to examine on all fronts what 100 years of the vote have brought to women in New Zealand. I believe this topic, although of general importance, is of special relevance to the theme of today's seminar, **women at work**. It will also, I hope, serve to provide a framework and a broader perspective for the more detailed analyses of the speakers who follow.

The nature of the employment relationship: a historical perspective

So, is employment a relationship wider than contract?

The history and development of employment law in the last 100 years, not only in New Zealand but in other jurisdictions, has been a history of struggling with just this question. The fact would suggest that the answer to the question must be "yes", the employment relationship is somehow wider, different in kind than a simple contract. I would hardly have

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thought to raise it, were it not sometimes put forward in New Zealand as a possible thesis. So I want to consider briefly why historically, and sometimes painfully, it has been seen to be different and what has been done in terms of legal structures to recognise that fact and to give effect to its implications; and what should be done now, in the era of the 1990s in New Zealand, post the Employment Contracts Act.

In the common law tradition the employment relationship has legally been derived from two sources. First, the law of domestic master and servant. This, while not exactly feudal, carried some overtones of a "status" relationship, and certainly implied duties or obligations on both sides. Secondly, classical, or "pure" commercial contract law, where the parties are free to negotiate and agree on any terms they can - the classic "level playing field". (I am referring to the last time this particular idea was around - the 19th century *laissez faire* model).

From the time of the industrial revolution, it was increasingly clear that neither of these models, either socially or, therefore, legally, fitted the developing employment relationship. There are employment relationships which can be seen as simply "pay for hours of work" (i.e., a "simple" contract), for example, those relationships which were termed independent contractors and of which there are probably more now in New Zealand in the 1990s. For such contracts a simple contractual regime is a sufficient analysis. But on a more realistic level, in most cases that relationship, although no longer governing the whole of the employee's life, does govern a substantial part of it. The common law derived from the first source above has always "implied" terms into the "contract", usually in the form of a series of duties which tended to bear more onerously on the employee than the employer.

The other important complicating factor has been the inherent power imbalance between the employer and the individual employee, so that the terms the employee may be able to establish, or more likely be forced to agree to, may not reflect a true agreement (in other words, the playing field is not level). This is not, of course, a characteristic only of employment contracts. One could cite, in the commercial field, hire-purchase agreements into which terms are incorporated by legislation.

There are two main mechanisms by which these particular features of the relationship can be recognised and addressed: the intervention of the state to establish certain minimum terms and conditions in employment contracts and, secondly, the growth and encouragement, again possibly by the state, of some form of collective organisation and bargaining, to redress the power imbalance on the employee side. Moreover, these developments may well lead to the growth of a separate body of law, and of separate courts and tribunals to develop and enforce it.

The history of the development of labour law in New Zealand reflects all these themes. It has, as we all know, been characterised by a high level of state intervention and enforcement. (The reasons for that - for example, in 1894 the buying of industrial peace in return for some certainty in collective organisation - need not be developed here). This has been particularly obvious in New Zealand in the development of a state-participated and enforced bargaining system, in the award system and the Arbitration/Industrial/Labour/Employment Commission and Court, and in the recognition of a form of compulsory unionism. These aspects of "state intervention" have been highlighted in the course of their retrenchment.

But the rise and decline of those features of New Zealand's industrial relations history should not blind us to other parallel developments which have their genesis in the same factors I have referred to above. Terms and conditions were spelled out gradually in a series of statutes which were binding on all, i.e., incorporated into all employment agreements. These covered such issues as minimum wage levels, holidays, leave entitlements (for example, parental leave), health and safety requirements, equal pay, terms of dismissal, the observance of EEO, the anti-discrimination rules. Some of these were strict minimum requirements, a safety net to protect against exploitation. Others were concerned with issues which society deemed important - equal pay and EEO, for example. (These lists are not exhaustive). Many of these terms were "filtered", as it were, through the award system then pertaining, and their observance monitored and enforced in that way.

There was also, however, a parallel development in the common law courts: a growing recognition of the need for terms to be implied in the context of the employment relationship, a development which culminated in a general mutual obligation in the *Goulden* case. The common law courts also acknowledged the advantage of specialist courts or tribunals to administer the law and practice in this area. The tripartite discussions in New Zealand also recognised that there are three key players in this debate: the employers, the employees, and the public good.

All these developments in New Zealand, including some form of collective bargaining, have been paralleled in other developed western legal systems, both civil and common law based, as best fits their own social and legal context. This is, surely, because the factors I have identified are common to the employment relationship.

Similarly, these general factors have been increasingly recognised at an international level and, in terms of what I will call the human rights debate, in the establishment, development and acceptance of the International Labour Organisation. Two themes of that body's Conventions have been the insistence on minimum reasonable conditions of work and the right or freedom to organise and bargain collectively. These themes are also reflected in the International Covenant on Economic, Social and Cultural Rights, Articles 6-8, which set out the "right to work". Without entering into any debate on this in the context of redressing unemployment or state's policies towards that end, one can at least say that the right to work encompasses a state's ensuring a right for its people to work in reasonable conditions.

There are other rights or obligations which are recognised in the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and which are reflected in that "social register" of terms I mentioned - terms ensuring freedom from discrimination, guaranteeing employment opportunities, protection from sexual harassment. Thus there are terms required in the work relationship by the rights, for example, of women, (equal pay) or families (for example, parental leave).

The era ushered in by the Employment Contracts Act might be seen as (and has been hailed as) establishing a simple contractual regime, without regard for the themes I have mentioned. But this is not so. There are sections in the Employment Contracts Act and also outside it which help to establish a statutory minimum code. The separate Tribunal and Court remain. (Some have certainly called for the Act to be amended and other statutory protections to be removed.)

How are these general themes related to the position of women at work?

Briefly, women at work in New Zealand in general benefit from the centralisation and state enforcement of minimum terms and conditions and of other implied terms. This for two reasons. In the absence of state support, better terms have traditionally been negotiated and upheld by strong unions; women traditionally have not been in occupations where unions are strong and also have not, until recently, been supported for their own rights within even strong unions, (*Air New Zealand case* and *Ocean Beach*). Secondly, some terms implied - more accurately, incorporated - into awards, agreements or contracts through legislation can only be effectively administered and enforced by some kind of centralised body. The requirement of equal pay is an example which I am happy to elaborate on this afternoon, if it is not discussed before that.

Now, let us look briefly at emerging patterns of work in New Zealand (and elsewhere). There is a central core of skilled highly paid professionals; a few still highly unionised and organised trades; a growing contractor class; more and more part-time and casual work; a large number unemployed; so, a smaller proportion of the workforce in traditional work patterns, and those more dependent on the local company or workplace and on the individual contract, with less likelihood of union connection, information or support.

In this picture of the developing workforce, women are likely (to put it at its lowest) to be over-represented in the part-time and casual sectors, and in scattered and increasingly non-unionised workplaces. All of these groups are those likely to be most affected by any decrease or falling away from minimum standards. At the same time, advances for women across the board at work, such as equal pay, protection from discrimination, whether direct or indirect, including the removal of barriers to EEO (for example, flexibility of hours), protection from harassment, parental leave, which have all been made in the context of strong central control (i.e., legislation and the award system) are in danger of being less effective, or enforceable, (however much they remain on the statute books) for these groups. Even if they are well supported and advanced by large profitable companies and workplaces.

The point of all I have been saying is this. As we consider where to go forward with or after the Employment Contracts Act we need to recognise that the factors and truths I have mentioned concerning the employment relationship will not go away. Nor will our international obligations in respect to them. I am not, and am not to be heard to be, advocating a return to the package as before - the historical setting for the IC&A Act and its successors has passed and it would be foolish nostalgia to yearn for its return. The way forward for industrial relationships and their legal framework in the 1990s must be forward. But it must be made with recognition of the special features of the employment relationship I have mentioned.

That is, perhaps, the real thrust of my paper today. I'm asking for us to reclaim our historical memory on these issues.

Whatever the package that follows any reappraisal of the Employment Contracts Act, it must be one that makes clear the content of minimum conditions for employees, including, where appropriate, casual and part-time workers, that allows for the incorporation of those terms into employment instruments and that provides some mechanism for their effective enforcement.

The rest of the paper is much more sketchy. It is, in effect, a series of pointers and questions.

The content of a minimum code

What should be in a minimum code and whom should it cover? (I have already indicated many of the features).

Issues of content include thus, for example, hours of work, and questions of penalty rates, entitlement for leave, particularly sick leave, minimum notice to be given in terms of termination of employment, unfair dismissal provisions, redundancy pay and conditions, anti-discrimination, health and safety and possibly protection against excessive casualisation.

The current minimum code is statutory, a compilation of the Minimum Wage Act 1983, the Wages Protection Act 1983, the Holidays Act 1981, the Equal Pay Act of 1972, the Parental Leave and Employment Protection Act 1973, the Factories Commercial Premises Act 1981 and elements of the Employment Contracts Act 1991.

These acts and their amendments, together with the modifications introduced by the Employment Contracts Act, for example, s11(A) of the Minimum Wage Act which outlined that a working week was "... 40 hours over five days unless varied by the parties" are the current Minimum Code. An important addition to that is the recent ruling by the Employment Court in terms of statutory holidays. So another point: the Code can be interpreted in the Employment Court. The common law courts will also have a role to play.

A separate issue is whom the code should cover. Thus the question of a minimum wage, particularly for those people under 20, is a structural question. There are other large questions here too, concerned with, for example, training and experiential learning, and informal training.

Then there are questions concerning other traditionally vulnerable groups: part-time employees, casual workers, volunteers. Should applicable sections of a code apply to them. Should there be some censure against "reclassification" to avoid a minimum code?

There is also the question of the process of consultation in terms of the development of a minimum code.

The enforcement of the minimum code

Traditionally the observance of minimum standards has been monitored either by the State through the inspectors of the Labour Department, or by the unions. Compulsion for union membership will not return to New Zealand, I believe, and certainly will not return to small scale enterprises, particularly in the service and parts of the production sectors. The Department of Labour's Inspectorate has been diminished rather than increased to compensate. For those groups who are most marginalised in the workforce the monitoring and enforcement

of a minimum code is, and appears for the foreseeable future to be likely to be, minimal.

So, who might monitor and enforce observance of a minimum code in New Zealand's industrial relations structure in the 1990s? This is the question and challenge I want to leave with you this morning. It could be a State agency, or a part of a State agency, the Department of Labour for example. It could be an independent commission like the one I work in. What is important is that there should be somebody whose base job it is to monitor those minimum standards and to see that they are observed to protect all those in the New Zealand workforce.