

where differences will result in *radical* not marginal or piecemeal differences in the results of organisation, and bargaining." Further, Foulkes feels that, "In the last three years, the industrial relations system has moved from one dominated by national occupational awards to one based on employer driven enterprise contracting. The Labour Party system will be decisively different from either of these models." Overall however, for the CTU, "Final judgement is reserved".

My contribution analyses the proposed reforms by first considering the significant features of New Zealand industrial relations, how these have been affected by the Employment Contracts Act, and the impact of the proposed reforms. I conclude that, "the proposed Labour reforms as indicated by Clark's paper tend to be superficial rather than substantial, and are cosmetic rather than creative".

The New Zealand Employers Federation, not surprisingly, is very supportive of the Employment Contracts Act. The Federation sees the Labour Policy as contemplating a return to union involvement in industrial relations ". . . just at a time when the Employment Contracts Act has seen more employers than ever before talking directly to their employees, to the benefit of all parties". The NZEF feels that to read Clark's paper ". . . is to be overcome by an extraordinary sense of *deja vu*." The NZEF is largely critical of the proposed reforms and concludes, "To accept now what Labour is offering would, indeed, be to walk forward to the past".

The range of views presented in this symposium illustrates how, in industrial relations, events, issues and policies are viewed differently depending on one's perspective. Hopefully, readers will find these different perspectives helpful in enabling them to understand and judge the current legislation and the proposed Labour reforms.

Employment Relations - the New Direction under Labour

Rt. Hon. Helen Clark*

Central to Labour's overall approach to economic management is the belief that New Zealand needs to organise itself better and work together if we are to realise the opportunities open to us as a nation. We need to rebuild after the painful economic restructuring of the past decade. We know that the present limited economic recovery cannot deliver either the jobs or the increased living standards New Zealanders need and want. On present policies, New Zealand will continue to trail the more dynamic economies as it has for years.

One of the problems we have identified is that New Zealanders feel they have very little control over their lives. The New Zealand approach to decision-making has been top down - from government to people, from employer to worker. That needs to change. We have common interests and a common future. Government needs to involve more people in its decisions. More industries and enterprises need to move down the path of those which have already pioneered worker involvement in decision-making. The chances are that through partnerships and common effort we will achieve the growth rates which have proved so elusive under the present style of economic and industrial management.

Put bluntly, the Employment Contracts Act is not compatible with the economic environment Labour wants to foster. The negotiated economy needs input from organised labour as well as from industry. Organised labour in turn needs a fair set of industrial rules within which to operate if it is to fulfil a role of social and economic partnership. The Employment Contracts Act is destructive of collective action to such an extent that it risks recreating the defensive and inward-looking unionism of the past which focused narrowly on pay and conditions and lacked a broader vision for its members within their industry and the economy.

The lesson to be learnt from the world's more successful economies is that high levels of unionisation have often been part and parcel of their success. The modern, progressive, and well resourced unions of Germany, for example, have played their part in building German prosperity. While German unification has imposed enormous strain on the German economy in recent years, it is much more likely that that will be able to be worked through by the partnership of state, industry, and labour. The lack of such a partnership in New Zealand has impeded us working together as a nation to overcome our economic problems.

The principles of workplace reform have been widely endorsed by those familiar with them in New Zealand, although they have not yet been widely adopted and implemented. Where they have been adopted here and abroad, the role of forward-looking unions has been critical to the success of the programme.

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Overseas, evidence for unions fulfilling an important role in workplace reform can be found in a variety of texts: "*Unions and Economic Competitiveness*",¹ "*Governing the Workplace*"² and "*The New Unionism: Employee Involvement in the Changing Corporation*",³ amongst others. The emergence of a more worker and union friendly administration in the USA is also an indication that this approach, of worker involvement and the acceptance of the legitimate role of unions in that process, is being applied internationally. Robert Reich, Secretary of Labour and recognised as a close friend and confidante of President Clinton, has signalled that the Clinton Administration is concerned with the low levels of unionisation that exist in the USA, seeing it as an inhibitor of economic growth.

Such factors reinforce the view that the legal recognition of unions and promotion of the desirability of collective organisation are important building blocks in the process of rebuilding enterprise, industry, and the economy in New Zealand. They are, therefore, central to the new industrial relations framework proposed by Labour.

Labour's policy objectives

The objectives of our policy are:

- (1) to facilitate the achievement of growth on an internationally competitive basis;
- (2) to promote collective bargaining;
- (3) to provide a framework for ensuring that working people are guaranteed protection from discrimination and unfair treatment within the workplace and a fair minimum set of working conditions;
- (4) to provide an integrated framework for negotiating wages and conditions of employment, developing occupational health and safety and equal employment opportunities programmes, and promoting workplace reform;
- (5) to eliminate destructive wages competition.

The working title for the new legislation to replace the Employment Contracts Act is the Employment Relations Act. That title signals that the central issue is the overall management of employment relationships, not the narrower objective of contract negotiation and enforcement. The significance of the employment relationship in people's lives cannot be underestimated. Work is central to our existence. Its tasks and networks define to a considerable extent our relations with others. That means that the labour market is no ordinary market. The commodity on offer is human. Society has an interest in how that

¹ Mishel, L. and Voos, Paula B. (eds) (1992), Armonk N.Y., M.E. Sharpe.

² Weiler, Prof. Paul C. (1990), Harvard University Press.

³ Heckscher, Charles C. (1988), Basic Books, N.Y.

market is organised. It is significant that those who dispute the need for distinctive regulation of the labour market are also disinclined to accept that the concept of society itself has much value. Their focus is only on the individual and on aggregations of individuals. The Employment Contracts Act reflected that narrow perspective with its failure to recognise the collective organisations of workers and its undermining of collective bargaining.

Prof. Weiler provides a powerful critique of the new-right agenda; he attacks the assumptions of the work of Prof. Richard Epstein and others that contracts of employment are just like other contracts.⁴

"In the modern world a job is the major foundation for the economic welfare of individuals and families . . . But unlike the owners of almost any other income producing asset (owners of robots, for example), the worker cannot separate himself (sic) from his (sic) labor: he (sic) cannot diversify his (sic) risk by doing business with a variety of customers . . . Since at any given time a worker must place all his (sic) eggs in one basket, as it were, having a sense of security about what will happen in his (sic) current job is far more important than in virtually any other market setting. And for the reasons that I gave earlier, it is terribly difficult for workers to spread the risk over time by moving to a comparable new job from one that has proved unsuitable or unpleasant . . .

But at the heart of the employment contract is an undertaking by the worker to subject his (sic) person to the authority and direction of the employer . . . The exercise of such managerial authority is closer, more regular, and often more salient to the worker than is the exercise of government authority. For many of the same reasons we as citizens feel entitled to fair treatment at the hands of government officials, we also feel entitled to comparable consideration from management officials."

Labour's legislation will promote collective bargaining and recognise individuals' rights in a manner consistent with International Labour Organisation conventions. Indeed a desire to ratify core ILO conventions underlies the entire policy. That is one of the reasons why there will be no return to unqualified preference. The principle of freedom of association, however, also requires that there be no discrimination against workers on the ground that they are union members and that there should be no interference by other parties in the affairs of union or employer organisations.

The tests that presently exist for workers to meet to show duress, undue influence or discrimination under Part I and sections 28 and 30 of the Employment Contracts Act are nearly impossible to meet unless there is a blatant exercise of power by management. The ILO Freedom of Association Committee has suggested that an alternative means of ensuring that employers do not discriminate is to require that the employer prove that the motive for the intention to dismiss a worker had nothing to do with his or her union activities. This would reverse the present orientation of the decided cases that discrimination is a serious allegation to make and requiring the worker to prove every element of the allegation.

⁴ Weiler, *ibid*, pp.142-143.

The status of unions

In order to emphasise the right that workers will have to freedom of association, it is important that unions are again recognised in the law and given status as the collective expression of workers who choose to join them.

In order to be recognised and to operate under the new Act, unions will be required to be democratic organisations of workers which are accountable financially and in other ways to their members and are independent of employers. The Act will not specify detailed rules for unions, but will require that the rules they have include those establishing how collective agreements will be ratified. Registered unions must have no fewer than 20 members and be corporate bodies. There will be no return whatsoever to the blanket coverage provisions which characterised the old system of registration.

Registration of unions will be automatic where a union declares that it meets the criteria set out in the Employment Relations Act. This simple means of registration and the requirement for unions to have only 20 members to seek registration will be balanced by a process of deregistration, should the union no longer meet the criteria that the Act requires, in particular the requirement for independence from the employer.

Union membership will continue to be voluntary for individuals and contestable between unions. In order to give some certainty of representation, unions will be able to have rules requiring that those who have opted to join should maintain their membership during the initial stages of bargaining. It is interesting to note that the Employment Contracts Act itself attempted to grapple with the potential problem of unstable bargaining arrangements by requiring that there be a binding ratification procedure to be followed from the time a proposed settlement was first reached. Labour will ensure that there is a ratification requirement, but will also ensure that there is greater stability during negotiation.

Matters to do with union rules and the regulation of the collective are, properly, to be left to unions. With the removal of statutory monopoly rights to require membership by occupation, the role for the state cannot be as intrusive as it was under the Labour Relations Act. There could be an ability for members and unions to be able to approach the Employment Relations Commission and eventually the Employment Court to resolve disputes that relate to the application of a union's rules. This is necessary so that the rights of both the collective and individuals can be protected effectively.

Collective bargaining provisions

Unions will bargain collectively for their members. That is the nature of collective bargaining that is recognised by the ILO conventions and not by the Employment Contracts Act. It is essential for freedom of association for the collective to have rights that are independent of the individual. This means that the temptation for employers to put pressure on the individual is reduced or removed, whereas, if the right to bargain rests solely with the individual the employer may often see advantage in trying to divide the collective. When new workers take

up positions which have been bargained for, they will be covered by the existing collective agreement if they join the union. We have not adopted the American-style system of giving unions coverage of whole sites where a majority of workers vote for such coverage. This is because to do so would be to introduce an element of compulsion into the policy and we believe that the workers should have the right to choose; it is our view that in the end such a system would inhibit constructive organisation as the efforts of unions and employers both become concentrated on some magical tipping point for the right to representation.

Collective bargaining will be initiated by the union where there is no existing, applicable collective agreement. This will be done by a notice that will inform the recipient employer of the union members' names and their positions, and the names of any other unions and employers who are to be involved in the collective bargaining. It is envisaged that any inaccuracies in the notice will not of themselves invalidate it, and that the parties will be required to inform others of difficulties with notices that are within their knowledge.

It is envisaged that unions will be able to initiate a new round of collective bargaining by filing a notice with employers within sixty days of the expiry of an existing collective agreement. Employers may initiate bargaining within 40 days of expiry of a collective agreement if the union has not filed a notice.

Upon the expiry of a collective agreement, it is envisaged that it will continue to be enforceable by the union for up to one year, providing that negotiations for a renewed agreement are ongoing. During this time new workers will not be able to join the collective agreement simply by joining the union.

Collective agreements will be required to be made in writing and will be able to cover what the parties agree to, over and above the basic requirements of:

- (1) containing procedures for the settlement of disputes and personal grievances;
- (2) covering the members of the union and subsequent new members who take up positions which have been bargained for;
- (3) containing a means of bringing the agreement to an end within three years;
- (4) containing procedures for dealing with new matters.

In relation to the last two requirements: the requirement that an agreement end is to protect freedom of association and ensure that the parties at least consider changes to their workplace regulation periodically; the procedure for new matters is required to reinforce the nature of the duty to bargain in good faith as one that is on-going, and to avoid some of the perceived problems with what matters are to be bargained on during the relationship, by requiring the parties to turn their minds to that at the outset. It is also consistent with Labour's objective of encouraging the spread of workplace reform and the involvement of workers and their representatives generally in workplace decision-making.

There will be procedures governing multi-employer bargaining. Unions will be able to initiate such claims to cover their members in those enterprises where a majority of those members

support a multi-party agreement. Because Labour recognises that there may be a number of different expiry dates involved as the result of enterprise bargaining with existing collective contracts, workers seeking a multi-party collective agreement will be able to engage in collective bargaining 120 days before the expiry of any existing collective agreement, provided at least one of the collective agreements being replaced is within the 60 day time frame. Also, they will be able to strike or be locked out during that period before the expiry of the collective agreement and any multi-party collective agreement which was negotiated would supersede an existing collective agreement.

Once members have agreed to be part of a multi-party collective negotiation, they will be bound by the decisions of the majority of those involved in the claim. What this means is that the workers and unions that commit themselves to a settlement must accept that the majority of all workers to be covered by the proposed document will have the power of decision. This is to give status to the larger collective that workers and unions have the choice to enter.

Good faith bargaining

One of the most significant changes we propose is that there be a legal duty on all parties to act in good faith in all aspects of their collective relationship. No such requirement exists in law now. The only time it has previously featured in New Zealand labour law at all was in the short-lived 1990 amendments to the Labour Relations Act. At that time it was seen to be more a matter of procedure than is envisaged under the new legislation. The requirement to bargain in good faith is recognised in many countries: the USA, Canada, Japan, South Korea and the Philippines are only some of these. Of those, the Canadian example would be the closest to what Labour proposes; Canada had the chance to avoid some of the problems that are recognised as existing in the USA, and we have had the opportunity also to avoid some of the problems that Canada has faced.

Good faith bargaining in the new legislation will be governed by a set of positive duties which will include:

- (1) a duty to meet and consider proposals made by either party;
- (2) a duty to respect each other's choice of representatives and/or advocates;
- (3) a duty to provide relevant information.

There will not be a mandatory/permissive distinction in relation to the matters that have to be bargained over as there is in the USA. In relation to the obligation to provide information, it is envisaged that the requirements will be spelt out in some detail and provision made for the swift resolution of disputes as to what information is to be made available to the parties. Unions and employers that are actively negotiating multi-party collective agreements will have a defense to the charge that they are not pursuing a settlement of a concurrent single union or employer document. This will protect multi-party negotiation.

The duty to bargain in good faith will also include a duty not to undermine the union party, by, for example, continuing to approach its members on an individual basis. The law will be even-handed, with unions as much bound by this legal duty as employers. There will not be a legal duty to reach a settlement. It is envisaged, however, that settlements are more likely to be reached where good faith bargaining is a requirement. There is no provision for a return to compulsory arbitration at the insistence of the parties in the legal framework we have devised.

Individual employment contracts

Naturally the law will continue to provide for the negotiation of individual contracts by and for those who so choose. As at present, they will retain the right to have a written contract and to have access to personal grievance and dispute procedures. Employers will also be required to conduct the ongoing employment relationship and contract negotiation with those on individual contracts on a basis of trust and confidence as a good employer.

As noted by Peter Kiely and Andrew Caisley⁵:

"There would seem to be some scope for the argument that aggressive industrial tactics do seriously damage the relationship of confidence and trust. However, it is suggested that if faced with such an argument the Courts, given their current approach to bargaining in the new environment, would find that such tactics are expressly recognised by Parliament to be lawful, and in light of that cannot be said to be unreasonable."

While we accept this assessment of the attitude of the Courts, this points out the schizophrenic nature of the Employment Contracts Act and the law in this area. Workers both in contract law and under the requirements of the personal grievance provisions are required to be treated fairly, but seemingly that requirement does not extend to the time of negotiation (unless it be over redundancy) of a collective or individual employment contract's terms. This makes, in Labour's view, the law incompatible with accepted standards of conduct in the employment relationship and therefore the requirement of the good employer, and for trust and confidence, will be spelt out in the legislation.

The mechanisms to ensure that that requirement can be met are not yet finalised. It is possible that the present remedies of compliance and those that are part of the personal grievance provisions will be sufficient. However, the procedures that will be available for remedying complaints of bargaining in bad faith may be more appropriate.

The trust and confidence requirement will substitute for the requirement to bargain in good faith for individuals. This is appropriate as the relationship between a worker's representative and that worker is not a collective one, it is contractual based on the law of agency. The requirement of trust and confidence is also based on the contractual model and that is, therefore, the appropriate requirement for the individual and the employer. That duty can

⁵ (1993). In Harbridge, R. (ed.), *Employment Contracts: New Zealand Experiences*, Wellington, Victoria University Press, p.62.

cope with the type of problems the individual may face from an employer, such as a refusal to give a worker a reasonable opportunity to consider an employer's proposals or sufficient information to make them understandable. Finally, the duty to bargain in good faith is in part designed to address discrimination against workers who wish to collectively associate; protection in relation to that form of discrimination is more problematic and requires more specific provisions.

The policy states that individuals will retain the right to bring personal grievances. It is envisaged that the basic content of the personal grievance provisions will not be significantly changed. Matters that are of concern, however, include: the relationship between personal grievances and other remedies, such as disputes procedures and the use of injunctions; the remedies for personal grievances; and of course the institutional arrangements for dealing with personal grievances.

Strikes and lockouts

There will be some changes to the law governing strikes and lockouts as it is seriously unbalanced at present. As indicated above there will be a right to strike for multi-employer claims where members of unions have voted by majority for multi-employer bargaining to cover their sites. Where there is no existing collective agreement, there will be a statutory period of 40 days once the notice to collectively bargain has been issued which must be free of both strikes and lockouts. This is seen as necessary for the protection of incipient collectives, and to ensure that one of the objects of the duty to bargain in good faith, that of providing the opportunity to have considered negotiation, is given a definite shape to take root. We do not, however, favour the USA concept of negotiation to impasse, believing that that will encourage litigation.

Employers will not be able to lock out workers who are not part of the collective bargaining, nor will they be able to require them to perform the work of those on strike or who are locked out. It will be unlawful for the employer to insist that another worker perform the work of one who is lawfully on strike or locked out. Those who are striking or locked out will not be able to be dismissed because of that status. That does not mean that workers will not be able to be dismissed, but the employer will have to prove that the worker being lawfully on strike or being locked out was not the motive, or partially the motive, for the dismissal.

Partial lockouts imposing the conditions sought in negotiations will not be lawful. The fact that they have been lawful has caused considerable injustice since the coming into force of the Employment Contracts Act in 1991. The employer will have to do as workers do, and reduce the work that is offered, rather than the wages paid for that work. This is a return to the concept of a lockout in the older sense of the word, though not its original meaning.

It is also proposed that the law as it relates to the granting of injunctions to stop industrial pickets be brought within the Employment Relations Act, with jurisdiction given to the Employment Court. This will reduce further the double jurisdiction that results in cases being considered in two Courts on overlapping facts.

Institutions

Labour believes that there is a role for a pro-active labour relations organisation to take over the policy advice role of the Labour Department on industrial relations issues, administer the Employment Relations Act, and work pro-actively to improve the industrial relations environment. We propose to establish an Employment Relations Commission to do that. The Commission would take an active role in facilitating the achievement of good faith bargaining and ultimately in enforcing those provisions of the Act. Canada's labour relations boards have provided useful working models for the Commission here.

The boards in Canada are, however, more limited in their scope of operation than envisaged for the Employment Relations Commission. The scope of the remedies that are available in Canada to relieve "unfair labor practices" and the mode of functioning of the boards, with the use of investigatory officers, to examine complaints of "unfair labor practices" are relevant to New Zealand. Other examples such as the operation of the offices of the Human Rights Commission, Privacy Commissioner and Ombudsman are also relevant. The objective of the Employment Relations Commission will be to respond flexibly and quickly, but still decisively, to resolve problems. The role of the Commission will not simply be that of regulator, it will have a major role in shaping change.

The existing Employment Tribunal is not working. Labour is therefore considering a return to a system where the initial determination of issues (where mediation cannot resolve the matter) could be done with the Commission, without the legalistic requirements of adjudication before the Tribunal. A decision is still to be made as to whether this should be accompanied by a return to *de novo* appeals. This raises the issue of how to effectively deal with the appeal of these cases, and the spectre of "trial by ambush" at the appeal stage.

It is very important for the functioning of the Employment Relations Act that the Employment Relations Commission is able to function effectively. The achievement of a viable and vital requirement to bargain in good faith will only flow from the Commission when the inevitable difficulties arise.

The minimum code

There remains the very important issue of ensuring adequate wages, conditions, and protection for those who will not be covered by collective agreements. Many of these will be workers in the less skilled, more transient sections of the labour market in which it has always been difficult for collective organisation to take root. Labour proposes not only to maintain the statutory minimum wage, but also to ensure that there are statutory minimum wage levels for those aged under 20. On taking office we will immediately undertake a review of minimum wage levels and the statutory minimum conditions of employment with a view to implementing and enforcing a comprehensive minimum code. Decisions will be made after tripartite discussions. Thereafter the Employment Relations Commission will be required to conduct an annual tripartite review of the statutory minimum code and will be required to make public its recommendations to government.

Policy integration

Finally and most importantly, the policy is an integral part of Labour's overall macroeconomic policy, much as the Employment Contracts Act was the cornerstone of the National Government's approach to the economy. Raising the level of skills, productivity growth, and getting an emphasis on quality are the pathways to a better economy and society. That requires co-operative workplace relations and genuine empowerment of the workforce. Those developments can only happen with sympathetic legislation.

Labour's New Deal: A Bargaining Framework for a New Century?

Gordon Anderson and Pat Walsh*

Introduction

Labour proposes a new vision of labour law. It will reflect Labour's new overall policy of participative, consensus based government and will, Labour believes, remedy the inadequacies of the Employment Contracts Act. As the centennial of the Industrial Conciliation and Arbitration Act 1894 draws close, one might ask whether Labour has forged a policy that, if enacted, may have the same influence in the 21st century.

A critique of a political party's industrial relations policy should start by setting the values which inform that critique against the direction of the proposed policy. Political (and other) constraints place limits on the degree to which those values can be realised in policy, but nonetheless, they serve as a basis on which to assess proposals for labour law reform. We can then consider where Labour's industrial relations policy fits into its wider economic policy and proceed to examine specific aspects of the policy.

Statutory regulation of the employment relationship should recognise the common and conflicting interests of employers and workers and provide a basis for reconciling these in a manner which protects both efficiency and equity concerns. Any future labour law should therefore be based on a realistic analysis of the inability of contract law, particularly in its neo-classical version, to achieve these aims. Reputable analysis of contract law demonstrates that the neo-classical contract model of two equal and freely contracting parties inadequately describes the employment relationship. It is evident from Clark's discussion (Clark, 1993: 155) of Weiler's critique of Epstein and other new right theorists that Labour recognises this.

Labour must approach any rewriting of the law with a willingness to depart from outdated and inadequate common law concepts of employment. In particular, the refusal of the common law to take any real account of worker collectivities must be taken into account. This refusal should be compared to the judicial reification of the limited liability company which ignores the actual economic reality of corporate structures. The new legislation should concentrate on the unique and special characteristics of the employment contract and should be written to specify the duties and obligations of the parties to achieve a balanced contractual regime. Labour's movement towards a generalised obligation to act as a good employer may mark the beginnings of such a reform (p.159). This proposal for a contractual regime strongly influenced by statute is hardly novel. New Zealand has a strong tradition of

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