

### 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Labour must approach any rewriting of the law with a willingness to depart from outdated and inadequate common law concepts of employment.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

\* Victoria University of Wellington



modification of the common law by statute and of the codification of specialised contractual relationships. It has been achieved in many other areas including credit contracts, sale of goods and in contract law generally. There is no reason the same techniques cannot be used in labour law.

Legislation should address the area of labour law, not employment law. The concept of labour law, central to most OECD jurisdictions, is broader than employment law which focuses on the individual employment relationship and eschews labour law's collective focus. Any reforms must create a comprehensive labour law regime, which embraces and integrates the totality of the labour relationship, including its collective dimension and the joint regulation of working life. This approach seems to lie behind Labour's intention to give its new legislation the title of the "Employment Relations Act". (p.154) Similarly, for this reason, Labour's intention to retain the specialist labour law jurisdiction is to be welcomed.

The Employment Contracts Act has brought all employment relations that are founded on a contract of employment within the scope of the Act. The Act does not, however, cover all matters that can be broadly thought of as labour law. A new Act should, as Labour proposes, cover agreements between unions and employers, and agreements other than contracts of employment that affect the terms and conditions of employment of workers or regulate the relations between employers, workers and unions. Any new Act, while continuing to draw upon the law of contract and to apply to all employment contracts, should also extend the term "employment contract" to cover other employment relationships that exhibit a strong degree of economic dependence, particularly dependent contractors. Clark does not address this latter issue, which, in the light of recent Employment Court and Court of Appeal decisions<sup>1</sup>, is of considerable policy significance.

Any system of labour law in a democratic society should, to the greatest extent possible, protect three fundamental rights of workers - the right to organise collectively, the right to bargain and the right to strike. These three rights are the basis of any pluralist system of industrial relations and of any system that views labour as more than a commodity. They constitute the industrial relations settlement that has been dominant in the majority of developed industrialised countries since World War II. The rights are best expressed in core ILO conventions that have achieved widespread political acceptance in the OECD, primarily through Conventions 87 and 98 and in the decisions of ILO Committees, especially the Committee on Freedom of Association. One of the few ways to achieve some degree of entrenchment of these rights is for New Zealand to ratify core ILO conventions so that breaches may be subject to a complaint to the ILO. Thus, Labour's intention to ratify the core conventions (p.155) is to be welcomed, although a precise identification of Conventions 87 and 98 would have removed any doubt as to their intentions.

Reform must recognise the segmented nature of modern labour markets and in particular the large growth in non-standard employment. This has made it increasingly difficult to deliver universal minimum conditions through collective bargaining. Indeed, even in more propitious circumstances, the national award system was unable to deliver this. Any future law will

<sup>1</sup> *TNT Express Worldwide Ltd v Cunningham* (1993) Employment Court WEC31D/92. This decision has been recently reversed by the Court of Appeal.

require a dual system to ensure that basic conditions for non-standard workers, and those in largely non-unionised secondary labour markets, are protected as well as those in primary labour markets. Labour's proposal to undertake a review of the minimum code and to provide for periodic reviews (p.161) is commendable, but the details provided to date are sparse. In order to address segmented labour markets and equity issues in a decentralised bargaining system, the construction, delivery and enforcement of a strong minimum code will be critical.

Concerns over labour market segmentation lead directly to consideration of employment equity. Women, Maori, Pacific Island people, and people with disabilities are most disadvantaged by labour market segmentation. They suffered most from the economic policies of both National and the previous Labour Government, and have been hard hit by the new bargaining structures of the Employment Contracts Act. The traditional structures of the arbitration system were organised around notions of income equity and protection against exploitation. These objectives were only imperfectly achieved, but the system did mitigate the impact of market-based exploitation. The mechanisms for delivering a measure of equity are now broken, and alternative mechanisms need to be found to remedy the consequences of increasing labour market segmentation. One mechanism will be the minimum code of statutory rights. However, the minimum code will not address the broader issue of employment equity. Clark makes no reference at all to employment equity. This is a remarkable and disappointing *volte face*, particularly in view of the fact that, as Minister of Labour in the last Government, Clark enacted the Employment Equity Act. Nor is the issue covered in Labour's policy document, which contains only one passing reference to employment equity. It is evident that a decentralised bargaining system, such as Labour is proposing, accentuates the gender pay gap. Nonetheless, Labour has no plans to act to remedy this.

Labour law should provide a statutory underpinning to industrial democracy, and the joint regulation of working life at the enterprise level must be addressed. As in many European countries, this need not be based on union structures. It is apparent that not all workers wish to join trade unions, and even where workers support union representation for collective bargaining purposes, they may not always regard this as appropriate for day to day employer-worker relationships. Clark makes no reference to industrial democracy, but Labour's industry training policy makes provision for worker and union involvement in decision-making in these areas. However, it is evident that Labour does not intend to bring New Zealand into line with most other OECD countries by providing some statutory base to a wider system of industrial democracy.

A vital component of any industrial relations system is a statutory base to worker and trade union education. Clark omits any reference to this issue, but it is covered in Labour's policy document. It is not clear whether Labour's commitment to "ensure that training facilities, including paid educational leave, will be available to assist workers, management and unions" (NZLP, 1993: 30) will involve only joint training. Labour does not intend to return to the model of trade union education under the Union Representatives Paid Leave Act 1986, which established the Trade Union Education Authority. It may be that trade union education will be even more important under the ERA, in view of its promotion of collective bargaining and joint decision-making in areas such as occupational health and safety and workplace reform.



### The context of Labour's industrial relations policy

Labour's industrial relations policy must be assessed in the context of its overall policy for economic growth, and especially the proposals to develop an Enterprise Council as a general advisory body to the government on economic policy (NZLP, 1993). Although this proposal is not discussed by Clark, it forms an important part of Labour's policy. The Enterprise Council will be required by its terms of reference to "develop and publish . . . a five year strategic plan for achieving the stated priorities for the New Zealand economy" (NZLP, 1993: 18). It will thus shape, Labour hopes, the wider economic environment in which industrial relations occurs. The immediate relevance of this to industrial relations is that the plan is to include recommendations on "the appropriate incomes policy stance" (NZLP, 1993: 18). The extent to which this will constrain those negotiating collective agreements is, however, not spelt out in the policy document. A fundamental problem is how an incomes policy stance is to be reconciled with the decentralised bargaining structure coming out of the Employment Contracts Act, which Labour does not intend to change substantially. Certainly, Labour does not propose any structural changes to enforce a central wages path and such an approach would be quite inconsistent with the basic direction of its economic policy. A centrally negotiated incomes policy would, it appears, be indicative only, but would exert influence by being a part of what Labour hopes will be a consensus based style of economic management. Its authority would stem from the cross-sectoral support for it evidenced by it being recommended by the Enterprise Council. But the Achilles heel of incomes policies in all countries has always been the ability of local firms and unions to bid wages up or down and, given the changes in the New Zealand economic and industrial relations culture in the last few years, there must be considerable doubts about the degree of support for an indicative central incomes policy.

The Enterprise Council proposal encounters other difficulties characteristic of corporatist arrangements. Will the Strategic Plan be the Enterprise Council's, or the government's, or a compromise document negotiated within the Enterprise Council? If it is the last, then Labour may need to be prepared to depart from its own election policies in order to achieve consensus within the Enterprise Council. This immediately raises the vexed question of electoral accountability which has troubled both Labour and National Governments over the last decade. Labour may believe that this problem will not arise because of the representativeness of the Enterprise Council. But its membership is heavily skewed towards business leaders and government officials. There is no specific provision for representation from women, Maori, Pacific Island people, beneficiaries, elderly, etc. Labour may believe that business (and other) elites are genuinely representative of the community, but many will disagree, and no mechanisms are in place to ensure that they do reflect a wide range of community views.

Labour's Enterprise Council model runs up against the limits of any corporatist structures. As Offe (1981) puts it, the legitimacy of corporatism is continuously threatened by questions about why *those* groups (and not others) should be involved in making decisions on *these* matters of public policy (and not others) according to *these* procedural rules (and not others). Anderson (1979) argues that any system of representation can only be justified democratically if it is embedded in a clearly defined and publicly accepted set of specific goals that decide

the criteria for decision-making, and secondly, if the policies themselves are based on popular consent. Corporatism rarely meets these standards. It tends to be a pragmatic response to economic and political circumstances, adopted for lack of a better alternative, and justified by its capacity to resolve an economic or political crisis. Its criteria for decision-making are not explicit, and do not derive from any public consensus over appropriate goals, but from the changing balance of political forces within it. Its operation becomes steadily divorced from the parliamentary system which embodies, however imperfectly, notions of popular consent.

Labour needs to address these questions of democratic accountability. They have been at the centre of concerns over the last decade that the political system has become more and more inaccessible and less accountable to citizens. The negotiated economy approach is to be applauded in that it represents a genuine effort to incorporate a wide range of opinion, and represents a shift from the last Labour Government's approach to policy-making. But the particular structure advocated by Labour still raises important questions about representativeness and accountability.

### Freedom of association

Freedom of association has been perennially controversial in New Zealand. Legislation governing union membership has been changed on many occasions amidst heated industrial and political debate. Some stability may have been achieved now with Labour's intention to retain, with some modifications, the Employment Contracts Act union membership provisions (Clark, 1993: 156). There is clearly no support for a return to the LRA system.

One difficulty with the Employment Contracts Act provisions endorsed by Labour is, as *Alliance*<sup>2</sup> has made clear, that they permit considerable employer interference in the decision by workers to join a union, in their choice of union and in their operation. However, Labour intends to base its approach to unions on the principles set out in ILO Convention 98, which provides that worker and employer organisations "shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration." The Convention specifically prohibits "acts designed to promote the domination, the financing or the control of workers' organisations by employers or employers' organisations". Following these principles, Labour will require that unions must be democratic organisations, accountable financially and in other ways to their members and that they be independent of employers. But, to be registered, unions are only required to declare that they meet these criteria, with provision for deregistration where unions no longer meet the criteria (p.156). There is to be no independent assessment of this claim, nor is there to be any provision for on-going monitoring of it. Presumably, monitoring and the chance of deregistration will depend on the vigilance and energy of union members. There must be doubts whether this approach can guarantee that all registered unions will be and will remain independent of employers.

One area that has been recognised is the very weak legislative protection for union members

<sup>2</sup> *Adams v Alliance Textiles Ltd* [1992] 1 ERNZ 982



and those involved in union activities. The primary remedy is a personal grievance based on discrimination but these provisions place a difficult burden of proof on the worker. Labour proposes that the employer should demonstrate that discrimination was not an operative factor in a dismissal (p.155). Another deficiency in the law which should be addressed is the lack of provisions to prevent indirect discrimination or devices that raise the potential of discrimination. The Employment Contracts Act, like its predecessors, is much firmer on remedies for discrimination after the contract has been formed than in the pre-employment stage. An obvious example is questions about union membership on job applications. Questions about union membership are designed to dissuade workers from joining or to permit employers to develop a union-free workplace. In either case, they have the effect of frustrating the worker's right to freedom of association.

Freedom of association has come to be defined narrowly in New Zealand to refer only to the right of the individual to choose whether or not to be a union member. Other meanings have been overlooked. A fuller notion of freedom of association embraces collective forms of association as well. It is significant that the title of ILO Convention 87 refers not only to "freedom of association", but also to "protection of the right to organise". Positive freedoms for both individual and collective forms of association are vital to any reform programme as, in the absence of positive and enforceable rights, the right to associate and to organise are largely meaningless. It is not clear whether Labour proposes to go beyond the essentially negative freedom of association provisions of the Employment Contracts Act and recognise the collective dimension of freedom of association. The statement that union members will be required to maintain their membership only "during the initial stages of bargaining" (p.156) seems to indicate that Labour is more concerned with the freedom not to associate rather than with any idea that the collective organisation should be able to make any demands on those who elect to join. For example, allowing unions to insist on membership for a year or for the duration of a collective agreement is hardly an interference with the worker's freedom of association when membership is freely chosen.

The ability for union members to opt out of membership at any time except during the initial stages of bargaining and the similar ability to opt out of collective agreements indicate the extent to which Labour has given priority to individual freedom of association over collective rights. Labour is trying to marry together policy based on individual freedom with the collective organisation of trade unions. The priority given to individual freedom of association, however, jeopardises collective rights of association. Clark states, "It is essential for freedom of association for the collective to have rights that are independent of the individual" (p.156) but is less specific on what those rights are. She does specifically rule out the current destructive practice of employers approaching union members individually to persuade or coerce them to negotiate an individual contract despite the union being engaged in collective bargaining. This is a significant advance and a genuine protection for collective rights of association.

However, it is difficult for unions to operate effectively - that is for union members to protect their rights to associate collectively - where individual members or groups of members have the right to switch allegiance at any time, except during the initial stages of bargaining. It is true that in practice union-switching is not likely to be an everyday event, but the possibility introduces an element of uncertainty into union planning while the reality can impede achievement of union objectives. It may be argued that this is a good thing because

it keeps unions "on their toes" and means they have to take account of market uncertainty like any other business competing in a market.

The "unions as businesses in a market" analogy rests upon the notion of unions as comprising a set of managers (the officials) offering a product on the market to potential clients or customers and needing high sales and market share to assure their survival. This is quite the wrong analogy. It encourages a view of unions in which the membership and officials are separate from each other, and in which the members buy services from the officials. The success of this kind of organisation depends on the quality of the products offered by the sellers to the buyers. The success of a union depends on the collective action of members and officials. Unions are collective organisations of workers seeking to advance their common interests. Of course there should be membership competition and of course unions should meet the needs of their members. Unrestrained individual freedom of association is, however, not the best way to achieve that and legislation based on the "unions as businesses" metaphor cannot be anything but hostile to the collective principles of trade unionism.

Obligations come with union membership. Unions are collective organisations with rules about how decisions are reached and implemented. Workers are free to join or not to join but, having done so, should accept the obligations as well as the advantages of membership. Among the most important of these obligations is respect for majority decisions properly arrived at. The diversity of union membership and issues means that there will always be dissatisfied groups of members. If they can be wooed away or are free to leave at any time, it makes a mockery of the principle of majority rule and the individual acceptance of the obligations undertaken on joining. Members should accept that, in a collective organisation operating according to the majoritarian principle, there will be decisions and events they oppose.

### Right to organise collectively

If there is to be a realistic right to organise, the following points are fundamental:

- (a) Workers should have the right to promote union organisation and to arrange meetings on an employer's premises. This includes the display and distribution of publicity material and the right to invite union representatives to meetings.
- (b) Union representatives should have the right of access to their members and potential members for general union business, not purely bargaining related matters.
- (c) Employers should be required to be neutral in relation to union organisation and recruitment, and attempts to encourage or discourage membership or non-membership should be strongly prohibited.

Clark does not discuss access, but in its policy document Labour proposes to strengthen union rights of access to the workplace to allow them to discuss "union business with members, to provide information to workers about the benefits of membership and so they can recruit new members" (NZLP, 1993: 33). The normal convenience restrictions will apply. There is,



however, very little in the policy on union rights in the workplace and on the rights of union delegates. The policy seems to separate union organisation and membership from the day to day lives of members. Unions are seen as something outside the workplace, not as relevant to the everyday worklife of workers.

In the interests of contestability, Labour intends to allow officials from other unions to approach existing union members and attempt to recruit them. This may take place only in a specified period prior to the expiry of the collective agreement. Allowing access to workplaces for union officials on poaching drives is likely to be opposed by employers, and with good reason. Restricting this activity to a period just prior to the expiry of the collective contract may generate an escalating sequence of bid and counterbid.

### The right to bargain collectively

The right to bargain collectively and the legal mechanisms governing that right are at the heart of any industrial relations policy. A key issue is who should be permitted to engage in collective bargaining. Collective bargaining rights should be restricted to trade unions certified as independent. Clark does not state explicitly that only unions will have the right to negotiate collective agreements. She indicates that only registered unions can operate under the Employment Relations Act, and it is strongly implied that only they can negotiate collective agreements (Clark, 1993: 156). The framework of Labour's policy would be undermined if non-registered unions or other organisations could negotiate collective agreements. Similarly, it is not made explicit that membership of a union constitutes authorisation for the union to bargain collectively on that member's behalf. The Employment Contracts Act's requirement of individual authorisation to bargain is unknown elsewhere in the OECD, and its purpose is self-evidently to frustrate collective rights of association.

In this context, there is a need to distinguish between collective bargaining leading to a collective agreement, and bargaining by individuals or groups of individuals leading to an employment contract. A collective agreement is an enforceable agreement between employer(s) and union(s). The current statutory category of a collective employment contract does not equate to a collective agreement. Individual workers should remain free to negotiate individual contracts (as proposed by Clark: 159) or indeed standard form contracts or multi-party contracts. Such negotiations could be carried on by a bargaining agent and should be subject to protections against harsh and oppressive contracts where there is any abuse of bargaining power or where the contract significantly departs from reasonable standards within the industry.

The procedures for multi-employer bargaining illustrate the degree to which Labour now accepts enterprise bargaining as the norm. Unions are required to secure majority support within the enterprises involved for a multi-employer agreement. It is important to note how much this represents a philosophical reversal by the Labour party and its acceptance of the Employment Contracts Act status quo. Enterprise agreements are now seen as the norm, and departures will require specific membership authorisation by way of ballot. Interestingly, unions require no balloted authorisation to negotiate a series of sub-enterprise collective agreements (although they might have trouble getting them ratified and, in the process, they

may have expended substantial union resources). No justification is offered for this policy change or as to why this particular matter should require specific authorisation. If unions are democratic and accountable (as the policy requires), there should be no need to limit their decision-making authority in one particular policy area, which should be handled in the same way as any other issue within the union.

It should also be noted that Labour has decisively moved away from any effort to promote industry bargaining. The requirement to secure majority support in all enterprises involved puts substantial impediments in the path of industry bargaining for most industries. Labour has taken up a firm position in favour of narrowing the scope of bargaining units and placing impediments in front of those who seek to widen them. This, combined with the effort to confine collective action to the enterprise or employment unit, is an historic policy reversal by Labour, and one we strongly disagree with.

Labour proposes that new workers in a position covered by a collective agreement, and who join the union, will be automatically covered by the agreement (p.156-7). This will resolve the unacceptable situation which has developed under the Employment Contracts Act of new workers being denied collective coverage and being employed on inferior conditions. Labour proposes that collective agreements continue in force for a year after their expiry date, if not renewed. Oddly, however, new workers employed during that year are not automatically covered by the agreement (p.157). It is difficult to see any logic in this. Labour rejects (p.157) any notion of exclusive bargaining agency for a majority union. It is not uncommon in other jurisdictions for a majority union to have stronger rights than other unions, although usually subject to obligations to non-members. Labour is led to this position by its dislike for "an element of compulsion" (p.157), despite this being an accepted part of the Canadian system, which it claims to support in other respects.

Labour proposes to require bargaining in good faith, a concept introduced in the 1990 amendments to the Labour Relations Act, but not tested in practice. This obligation appears to be part of a wider, but as yet undefined, legal obligation "on all parties to act in good faith in all aspects of their collective relationship." (p.158) Few OECD countries have a statutory obligation to bargain in good faith. The leading and most long-standing examples are the USA and Canada. Sweden introduced a similar obligation in 1976 and France in 1982. The most long-standing example, the United States model, illustrates that attempting to impose such a duty is by no means the solution to the promotion of collective bargaining. The United States law imposes procedural and substantive obligations, and it requires a state agency (the National Labor Relations Board) to administer the obligations. Nevertheless, the obligation to bargain in good faith can be evaded despite these statutory provisions. Largely unworkable union recognition provisions, drawn out legal actions relating to bargaining in the low number of cases where recognition is gained, the lack of an obligation to settle, and inadequate sanctions may make the law unenforceable in practice. North American experience also shows that the obligation to bargain in good faith may also generate considerable litigation (Bemmel, et al., 1986). In the face of hostile employers, good faith bargaining without stronger enforcement mechanisms will do little to promote collective bargaining.

In this context, account must be taken of the fact that the Employment Contracts Act has created or reinforced an attitude among some employers that is overtly hostile to unions. It



has also spawned an industry of consultants who encourage such attitudes and openly promote union busting policies. While the idea that the parties should bargain in good faith appeals, the experience of other countries has shown that its effective practice is another matter. If good faith bargaining is to have any meaning, it must be enforceable.

The policy is unsatisfactory on the details of the employer's obligation to bargain. Should an employer be required to bargain with every group, no matter how small, that is represented by a union? If Labour intends this to be the case it must be questioned whether individual freedom of association has been taken to an extent that threatens effective industrial relations and personnel management. Given that all employment relations will be required to be conducted on a basis of trust and confidence (p.159) it seems that an employer may come close to being required to conduct every negotiation in good faith, whether at the individual level or for small minority groupings.

Labour's approach to union recognition forms part of its proposed regime of good faith bargaining. This includes a duty to meet and consider proposals made by the other party (p.158) and the proposed duty not to undermine the union party (p.159). These provisions will effectively require recognition of the union for bargaining purposes. Labour's proposals (p.158) relate primarily to the procedural aspects of bargaining rather than its substance. Such requirements may be able to be enforced without undue difficulty. It is not difficult to identify a refusal to attend meetings or to meet with an appropriate union. Information disclosure is intended to be specifically dealt with (p.158) and may not pose problems, although it is possible that delays similar to those achieved in the release of official information will not be beyond the parties. Beyond this, however, real difficulties arise in ensuring that bargaining moves towards the final settlement of a dispute. If the good faith requirement is to be meaningful, any enforcement body will need to consider the substantive content of the bargaining in addition to the procedural aspects. Even if a settlement cannot be imposed, a body assessing the lack of substantive good faith will need to assess likely settlement parameters in deciding whether there has been a lack of good faith. It is clear that enforcing a good faith obligation will require the development of a considerable body of jurisprudence as to the meaning of the term in the New Zealand context. Of more importance are the remedies that will be available if there is a lack of good faith. In the absence of clear and effective remedies, especially in situations where there is a clear disparity of bargaining power, the obligation will be meaningless.

It is notable that Clark makes no specific reference to the public sector. Although the public and private sectors have been under the same legislation since 1988, there are still distinctive issues arising out of the employment relationship in the public sector. One obvious example of current policy and public concern is procedures for the resolution of disputes in essential public services. Another relates to the future role of the State Services Commission and the Cabinet Sub-Committee on State Wages.

### The rights to strike and lock out

The rights to strike and to lock out are critical to any system of collective bargaining. The right to strike, in particular, must rest on a firm legal base that allows workers the ability to

exercise their collective strength against the collective strength of capital. The current law imposes unnecessarily restrictive conditions on that right by attempting to confine the right to strike to the group of workers involved in negotiations. These restrictions prevent workers effectively deploying their collective strength against the corporate structure by whom they are employed, let alone allowing them to support other workers, while at the same time placing few restrictions on employers in exercising their power. Moreover, the restrictions have left many workers defenceless against offensive lockouts by employers. Any reform of labour law must restore an effective right to strike, including the right to engage in secondary strike action, and to support locked out workers. It must also be realised that while workers' power is restricted to striking, employers not only have the ability to lock out, but also have considerable additional economic power such as an ability to divert work elsewhere or to find new sources of supply. Employers are also free to employ strike-breakers. The right to take secondary action is needed to equalise the position of workers.

The present underlying structure of the law on strikes and lockouts is satisfactory. That is the concept of lawful strikes and unlawful strikes, with persons involved in lawful strikes enjoying protection from common law actions. The Employment Contracts Act, however, has narrowed the definition of a lawful strike to such an extent that the effectiveness of the strike is seriously impeded in many cases. Only some of the needed reforms have been addressed by Labour. One major weakness in the current law is the lack of protection against dismissal for individual workers. At common law, any strike is likely to be held to be a repudiation of the contract of employment and, while a dismissal may be able to be challenged through the personal grievance procedure, the law in this area is uncertain. Labour's proposal to prohibit the dismissal of workers lawfully on strike or locked out is thus to be welcomed (p.160). Thought should also be given to the position of those who are not lawfully on strike. While their position may be less deserving of protection, there should still be some requirement for a warning or other procedural steps, especially if a strike is undertaken where there is legal uncertainty as to its status. A clear statutory provision for automatic suspension, as opposed to a possible common law termination, of the contract in the case of all strikes would also be a helpful reform. In this context one must remember the extraordinarily wide definition of a strike in New Zealand. There is also a need to recognise that the realities of industrial relations are that such strikes may be fomented, be a reaction to employer practices, or in some cases may be genuinely believed to be lawful. A classic case is a health and safety strike (which for some peculiar reason is currently neither lawful nor unlawful), where the immediacy of the danger may be a matter of degree. Requiring a compliance order or injunction, or possibly a declaration that the strike is unlawful, could be a required prerequisite to dismissal.

Labour proposes to provide some protection for those refusing to perform the work of strikers and to prevent the lockout of those outside the bargaining unit (p.160). While the former is to be welcomed, the latter seems to reflect existing law. The fact that such workers will still be able to be suspended (effectively locked out) renders these changes, especially the latter, of a cosmetic nature. Additionally, serious consideration should be given to prohibiting the employment of strike-breakers during a lawful strike.

Most importantly, the grounds for a lawful strike need to be broadened. Labour proposes to permit strikes relating to multi-employer agreements (p.160) but has generally avoided the problem of sympathy and secondary strikes. The failure to address or to touch on these issues



is a fundamental defect in the policy. The right to strike lawfully, and the ability to counter lockouts, depends on some ability to engage in sympathy and secondary action. The extent to which this is to be permissible must be addressed if the policy is to be coherent. There are also strong reasons for considering other classes of lawful strikes. These should include the LRA concepts of a "new matter" and redundancy. The former will be required to be dealt with in collective agreements but the parameters of this requirement are not specified (p.157). There is also a strong argument that workers should be free to be involved in actions designed to ensure the application of international minimum standards.

Labour has not addressed the issue of strikes having a serious impact on public safety. It may be wise to enact special dispute settlement procedures, similar to those in the Labour Relations Act, to allow government intervention in disputes where there is a serious threat to public safety and health. Without them, governments may be tempted to introduce ill-judged emergency legislation.

Labour's proposal to prohibit partial lockouts that impose the conditions sought by the employer is to be welcomed (p.160). Whatever the legal semantics of this procedure, in reality it allows a unilateral variation of the conditions of work. When combined with the restrictions imposed on strikes, the use of the partial lockout has resulted in a massive shift of power to employers and, in many situations, an ability to impose changes without resistance and without cost to the employer. The idea of a cost-free (for employers) lockout seems totally foreign to normal ideas of industrial action which, if it is to be used as a bargaining tool, is normally regarded as an exercise imposing costs on both sides. Partial lockouts are little more than a device to allow unilateral variations to a contract and, as they impose no cost on the employer, are unlikely to be productive of an agreed settlement.

The proposal to give the Employment Court jurisdiction over industrial pickets (p.160) seems logical, but is an issue that will need to be advanced with care. Any suggestion that picketing should be confined in the same way as lawful strikes will be a major attack on freedom of expression and should be resisted. Picketing that involves significant disorder or violence is within the realms of the criminal law in most cases, and the implications of giving the Court jurisdiction of this type will need careful thought. Some fine distinctions may have to be made, and there may be a need for a dual jurisdiction between the ordinary courts and the Employment Court.

### Institutions

The lack of comment on the personal grievance jurisdiction or disputes procedures presumably means that Labour intends to make no changes in these areas. The major reform that is needed to personal grievances is to restore reinstatement as the primary remedy, and to make both reimbursement and compensation mandatory, possibly according to a fixed formula, where a dismissal is found to be unjustifiable.

Labour's intention to retain the Employment Court is to be applauded. However, the reasons for establishing the Employment Relations Commission (p.161) are not stated. Labour proposes to combine some or all of the functions of the Employment Tribunal with the policy

advice functions of the Industrial Relations Service of the Department of Labour. No reason is given for either the advantages of establishing the Employment Relations Commission or the problems associated with the present operation of the Industrial Relations Service. At some point, presumably, the reasons for this proposal will be advanced and be open to evaluation. The possible confusion of roles if the Employment Relations Commission is responsible for both policy advice and delivery of mediation and adjudication functions will need to be addressed. Finally, if the Employment Relations Commission is to take over the mediation and adjudication functions of the Tribunal there are clear issues relating to the independence of the Employment Relations Commission in relation to these functions. Both the Tribunal and the Mediation Service were independent of the Department. The main problems with the Tribunal at the moment are the delays in securing a hearing and excessive legalism and the costs associated with an action. Resolving the first issue requires extra resources, regardless of institutional location, while resolving the second may require an alternative procedure to that of adjudication before the Tribunal. Labour is considering this and the related issue of whether or not to restore *de novo* appeals to the Employment Court.

### Conclusion

Overall, Labour's policy continues the trends to a more permissive industrial relations regime that began with the Labour Relations Act and which were taken to an extreme in the Employment Contracts Act. The proposed Employment Relations Act should make a number of important and needed practical changes to the industrial relations environment, but the form of the legislation may look little different from the Employment Contracts Act. Labour's Act will be based on the principles set out in the main ILO Conventions. It will place a greater emphasis on the promotion of collective bargaining, including multi-employer bargaining, and there will be a requirement that bargaining take place in good faith. Unions will be recognised in the Act subject to the fulfilment of criteria relating to internal democracy, financial accountability and independence. The Act will also strengthen the role and rights of unions in the workplace, especially in relation to access.

The general thrust of the policy is in line with Labour's overall policy objectives of a more co-operative, consensus based model of economic management that recognises the role and importance of workers and their unions in this process. The proposed regime is, however, far removed from that in the Labour Relations Act. While the strong anti-union component of the present law will be reversed and unions given greater organisational rights, it is clear that union success in the future will depend on their ability to organise and retain workers, albeit in a somewhat less hostile legislative environment. The new regime will allow for non-union bargaining and provide a clear role for individual employment contracts.

The most obvious theoretical defect in the policy, and one of major historical significance in the light of Labour's origins, is the inability or unwillingness to come clearly to terms with the nature of trade unionism, collective organisation and collective rights and obligations. Unions are not business organisations which sell services to customers. They are *collective organisations of workers* formed for their mutual protection and the advancement of their collective interests. As such, they provide some counter to capital's ability to organise in limited liability companies and in complex corporate structures. Labour's policy goes some



way towards recognising this, but until it moves beyond the notion of unions as businesses in a market, its legislative proposals will continue to make only limited progress towards a just and equitable system of industrial relations.

## References

- Anderson, C. (1979), Political Design and the Representation of Interests. In P. Schmitter and G. Lehmbruch (eds) *Trends Towards Corporatist Intermediation*, London, Sage.
- Clark, H. (1993), Employment Relations - the New Direction under Labour, *New Zealand Journal of Industrial Relations*, 18(2): 153-162.
- Bemmels, B., Fisher, E.G. and Nyland, B. (1986), Canadian-American Jurisprudence on "Good Faith" Bargaining, *Relations Industrielles*, 41(3): 596-621.
- New Zealand Labour Party (1993), *Labour's Plan for Economic Growth and Jobs*.
- Offe, C. (1981), The Attribution of Public Status to Interest Groups: Observations on the West German Case. In S. Berger et al. (eds), *Organising Interest Groups in Western Europe* Cambridge, Cambridge University Press.
- Weiler, P. (1990), *Governing the Workplace*, Cambridge, Harvard University Press.

## The Labour Party's Policy on Industrial Relations: A Critique

Peter Boxall\*

### Introduction

This article offers a personal review of the policy on industrial relations released by the New Zealand Labour Party in September 1992 and elucidated in the paper by Labour's spokesperson on industrial relations (Clark, 1993). The first section evolves criteria for assessing contemporary labour market policy in a discussion which reviews the relevant local and international background. The second section applies these criteria to make a general assessment of Labour's policy and to comment on certain specifics. The article closes with brief conclusions.

### Criteria and background

The development of appropriate criteria for evaluating labour market policy is no easy matter. A complex of changing political, social, technological and economic forces impacts on employment relationships. In the process of establishing such criteria, three sets of difficulties should be carefully considered.

First, there are a variety of interest groups affected by labour market policy. These are commonly recognised as employers (incorporating both owners and managers, but not necessarily treating their interests as identical), workers (both employed and unemployed, organised and unorganised) and the state (perhaps seen as holding a responsibility for the "public interest"). It is relatively easy to advocate the interests of one particular group (or quite commonly today, simply one subsection of a group) and labour market debates are full of such discourse. It is much more difficult to develop public policy which will enable most, if not all, groups to advance their interests in what they perceive as an equitable manner.

A good question to ask of any policy proposal, then, is: to what extent does it "accommodate" the interests of the various parties affected by it? Failure to adequately accommodate the legitimate concerns of any "strategic constituency" is a dangerous business. (One must acknowledge, of course, that those groups which constitute the "strategic constituencies" do vary somewhat over time.)

\* Senior Lecturer, Department of Management Studies and Labour Relations, University of Auckland. The author is grateful for comments by Dr Erling Rasmussen on an earlier draft. Responsibility for the views expressed and for any errors of fact remains solely that of the author.