

Feuille, P. (1975), "Final Offer Arbitration and the Chilling Effect", *Industrial Relations*, 14(3): 302-310.

Fox, A. (1966), *Industrial Sociology and Industrial Relations*, London, HMSO.

Fox, A. (1974), *Beyond Contract: Work, Power and Trust Relations*, London, Faber.

Geare, A.J. (1989), "New Directions in New Zealand Labour Legislation: The Labour Relations Act 1987", *International Labour Review*, 128(2): 213-228.

Geare, A.J. (1993), *A Review of the New Zealand Employment Contracts Act 1991*, Dunedin, FIRRE.

Kumar, P., Coates, M.L. and Arrowsmith D. (1987), *The Current Industrial Relations Scene in Canada*, Kingston, Queens University.

New Zealand Business Roundtable and New Zealand Employers Federation (1992), *A Study of the Labour/Employment Court*, Wellington, NZBRT & NZEF.

New Zealand Employers Federation (1993), *The Employer*, Wellington, NZEF.

New Zealand Labour Party (1992), *Industrial Relations Policy Paper*, Wellington, NZLP.

New Zealand Official Year Book 1973 (1973), Wellington, Government Printer.

Ramsey, H. (1977), "Cycles of Control: worker participation in sociological and historical perspective", *Sociology*, 11(3): 481-506.

Ramsey, H. (1993), "Recycled Waste: response to Ackers et al.", *Industrial Relations Journal*, 24(1): 76-80.

Wheeler, H.N. (1975), "Compulsory Arbitration: A 'Narcotic Effect'?", *Industrial Relations*, 14(1): 117-120.

Woods, N.S. (1974), "The Industrial Relations Act 1973", *Occasional Papers 11*, Wellington, Victoria University of Wellington.

Forward to the Past: the Labour Opposition's Industrial Relations Policy

New Zealand Employers Federation

To read the Rt. Hon. Helen Clark's account of Labour's current industrial relations policy is to be overcome by an extraordinary sense of *deja vu*. Some of the detail may be different, but the general impression is the same. Like returning to scenes of childhood, we have all been here before.

The opening paragraph reveals a contradiction. If New Zealand has been trailing the more dynamic economies for years, why should a move back to policies very like those which have failed in the past produce a better result?

Paragraph two is on equally shaky ground. It decries the attachment of New Zealand employers to top down decision-making, but overlooks the fact that a union presence in the workplace has frequently hampered, rather than encouraged, the communication process. Employee involvement in decision-making is a very different thing from the kind of union involvement so characteristic of New Zealand industrial relations in the recent past.

And yet, as the third paragraph makes plain, it is union, not employee involvement which this industrial relations policy is contemplating, and 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. It has not been an overnight change but it is happening and the impetus is likely to increase. Employers operating in a competitive economy will not be slow to realise that harmonious industrial relations ensure a competitive edge. Competition is a far more effective imperative than compulsion.

By contrast, what Helen Clark and Labour's policy advocate is a return to the automatic involvement of organised labour in an employer's affairs through the provision of the kind of base union support which makes possible the pursuit of union, rather than employee, interests. If unionism in New Zealand was formerly defensive and inward-looking, as the Policy Paper states, that was precisely because it had no reason to be otherwise. If we have learned anything we should now know that providing unions with statutory protections removes their need for a broader vision. Only in the absence of protection, with proper membership accountability required (as it is under the Employment Contracts Act), is the need for a genuinely expanded view likely to be recognised.

Helen Clark's paper quotes the world's more successful economies with particular reference to the German situation. But consider this quote from a recent (May 31 1993) issue of the American periodical, *Business Week*:

As the recession bites deeper, corporate restructurings are severely straining the social contract among business, labor, and government that has underpinned four decades of post-war growth. Germany's highly unionized, well-paid workers now are being told to shoulder huge layoffs and accede to stagnant or even lower living standards. No longer can workers count on short 35-hour weeks, lengthy vacations, or comfortable sinecures . . .

The article goes on to point out that German industry is, for the first time, being governed by what the market wants and that, to help manufacturers compete in new industries as well as old, labour and government leaders are working together. They are, says the article:

. . . moving to chip away at the restrictive work rules and lavish benefits that middle-income Germans have come to regard as their birthright. If those are to be contained, unions will have to settle for as much as a decade of wage stagnation.

The expectation, therefore, is that unions in Germany will, in the future, have less influence rather than more, and that in spite of the fact that German workers have had a unique involvement in German companies. The concern, however, remains that, ". . . years of prosperity mean German business, labor and government won't be willing to make the sacrifices that have made the German economic model work."

In Germany, as here, industrial relations attitudes need to change. In Germany, this may or may not be possible through the existing industrial relations framework. In New Zealand that was not the case. Ninety-seven years of guaranteed union rights created their own difficulty. In a generally (and inevitably) deregulated economy, changed labour market attitudes could only come through labour market deregulation. It is mere wishful thinking to suppose, as does the Policy Paper, that the German model (which might now be inappropriate for Germany) can be successfully translated into New Zealand terms. Certainly *Business Week* did not think proposed German union-employer accommodations would be possible in the United States, however hopeful certain American commentators might be.

Having looked to the German model for support, Helen Clark's paper goes on to refer to the five policy objectives underpinning the Party's proposals. Not only do these bear the hallmarks of political flourish, but the word "framework" (used twice) highlights their structured nature.

What does a framework constitute? The answer is all too obvious. "Framework" is defined in the Concise Oxford dictionary as ". . . structure, upon or into which casing or contents can be put". In other words, if something has a framework it has a fixed shape, a set form, more like an elephant than an amoeba; flexibility of movement is no longer the primary motivation.

The rationale for this managed approach to industrial relations is to be found in the particular emphasis placed on the relationships themselves. No-one would deny that these are significant or that paid work plays a very important part in most people's lives (although "central to our existence" is a slight exaggeration). Nevertheless it is difficult to see why industrial relations contracts should be thought of as different to other contracts, even given Professor Paul C. Weiler's spirited defence of this approach.

Professor Weiler's words sound fine, but what, precisely, is he saying? That work is so important to people that once employment is gained it should be protected at all costs? Because if that is not what he is saying, then he has to allow that it is never possible to protect all employment for all time - as the German experience of massive redundancies is currently demonstrating. Nor, as the experience of Eastern Europe has all too recently shown, is it possible to guarantee people paid employment - or not for an indefinite length of time.

It is a paradox which those with an interventionist mind set have difficulty in grasping, but paid employment can only be guaranteed at all to the extent that wealth is generated. If wealth is not generated, however binding the guarantees, paid employment will neither ensue nor will existing employment be protected. Commentators such as Professor Richard Epstein do not deny the importance of paid employment but simply explain the paradox. Protections which inhibit flexibility do not carry with them employment guarantees. An employee's position will be far better protected where changing circumstances can be met by a changing response.

Thus contract negotiation and enforcement is not a narrow objective at all but a method of ensuring that employee and employer know precisely what their rights and obligations are. It should not be forgotten that for many people in New Zealand, individual employment contracts, not collective agreements, have always governed the employment relationship.

Labour's intention, however, is to promote collective bargaining so that core ILO conventions can be ratified. This sounds impressive, but is no guarantee of a successful outcome.

For most of its industrial relations history New Zealand has been in no position to ratify either Convention 87 (Freedom of Association) or Convention 98 (Collective Bargaining), for a variety of reasons. Union membership was effectively compulsory, with employees unable to join the union of their choice; government had the right to intervene in the negotiating process; union rules were subject to statutory controls, and so on. But such provisions notwithstanding, it has to be remembered that International Labour Office conventions, being international documents, must encompass a wide range of national circumstances and conditions. As a consequence, specific national provisions may well, at times, be at odds with a convention as strictly interpreted, while representing, for the country concerned, a sensible approach to particular needs.

This is true of the Employment Contracts Act. Bearing in mind the policy of the New Zealand government to ratify an international convention only when it believes domestic law to be entirely in harmony (many countries ratify on the understanding that one day domestic law will be in step), ratification would now appear to have been withheld solely on the ground that the Act is neutral on the subject of collective bargaining, rather than, in the words of Convention 98, encouraging and promoting it. On the other hand, collective bargaining as promoted by the convention is voluntary bargaining. Jumping ahead in the Policy Paper discussion, it would be interesting to know whether intervention by the Employment Relations Commission in the bargaining process (as proposed) would produce its own ratification difficulties.

The Policy Paper is not, however, merely concerned that ILO conventions should be ratified; it seems also to suggest that under the Employment Contracts Act employees can be

discriminated against because they are union members, and that other parties (unspecified) are able to interfere in the affairs of union or employer organisations. In fact the reverse is true.

What is more, the tests set out in sections 28 and 30 of the Employment Contracts Act, which the Paper sees as being set very high, are effectively (with minor changes to take account of a contract rather than an award situation) those included by the Labour Government as sections 211 and 213 of the Labour Relations Act 1987 (since repealed). The only difference is that now all employees, not just union members performing work covered by the "registered" union's membership rule, may take advantage of them. The same is true of the undue influence provision, section 8, (formerly section 72).

With regard to the ILO Freedom of Association Committee's stated view that a means of ensuring employers do not discriminate is to require the employer to prove that the motive for dismissal had nothing to do with union activities, it should be noted that any personal grievance allegation (such as a discrimination claim) already involves the imposition of a reverse onus on the employer who must prove, on the balance of probabilities, that the dismissal was justified. (This imposition of a reverse onus in claims of unjustified dismissal was conceded by counsel as long ago as 1978 in *New Zealand Printers Union v Wilson and Horton Ltd* 1978 ACJ, 281.)

The situation is complicated in the case of a discrimination allegation in that, as Goddard CJ stated in *New Zealand Workers IUOW v Sarita Farm Partnership* 1991 ERNZ, 510, direct evidence of discrimination is rarely available. However, if there has been involvement in union activities and evidence of discrimination is provided, it will be proper, in the absence of a satisfactory (employer) explanation, for the Court or Tribunal to infer that discrimination occurred. The onus, contrary to the Policy Paper's assertion, remains with the employer. The only requirement is to provide evidence of the allegation made.

Turning to the question of union recognition, Helen Clark explains that, to operate under the new Employment Relations Act, unions will be required to be democratic organisations, independent of employers. The former blanket coverage system will not return.

Nevertheless, the new system will see the reintroduction of a formal, statutory process of recognition which will bestow on "recognised" unions an authority not available to any other grouping of employees. Here the detail may be different, but what could result is a situation comparable to that which obtained prior to the Employment Contracts Act, a situation of which the ILO's Freedom of Association Committee had this to say:

On the basis of the information provided to the Committee, it considers that the formation of other unions outside the registration system set up by the 1987 Labour Relations Act could be seriously hindered in so far as workers would be motivated to join only registered organisations since such organisations enjoy broader rights, and that the system thus indirectly brings into question the workers' right to form and join organisations of their own choosing.*

* ILO Official Bulletin, vol LXXII, 1989 Series B No 2. Case 1385. Complaint of the New Zealand Employers' Federation against the Government of New Zealand.

Contestability provisions notwithstanding, special protections for particular unions ensure such bodies enjoy a favoured status; if that were not the case, official recognition would be meaningless. Once again, the need to take proper account of employees' views would be undermined.

By contrast, the Employment Contracts Act seeks to ensure genuine union accountability by allowing employees, whether or not they are union members, to select their own bargaining agent. Leaving employees free to choose will, it is hoped, require unions to listen to their members, not pursue their own predetermined path. Of course, a union may provide in its membership rules that union membership and the right to bargain go together. But the freedom of choice remains. Requiring union members to maintain their membership for a predetermined period once bargaining has begun locks them in to union decision-making, right or wrong. The element of choice disappears. The possibility of employee involvement in decisions affecting their own workplaces does not exist.

The Employment Contracts Act's ratification process is not comparable. Ratification, as presently understood, is merely a means of establishing contract acceptance. Opting out is still possible. For "greater stability in bargaining" read "a more authoritarian approach". Under the proposed system, regulation of a collective document once negotiated will lie with the union concerned, not, as now, remain with the employees who work under it.

It is true that ILO Convention 98 envisages collective bargaining as being the prerogative of "workers' organisations", but it is also true that what constitutes a workers' organisation is not defined. Since a collective document can only be negotiated on behalf of a group of employees, it would seem to follow that in a system where freedom of association has real meaning, employees should, individually or collectively, as Convention 87 envisages, be allowed to choose a negotiating agent other than an official union. The contract is no less a collective document because an "official" union has not been involved with it. And yet that is the view which the Policy Paper espouses when it makes collective bargaining the prerogative of unions. Once again, freedom of association is confused with specific union rights. As before, it will be the union that has the freedom, not the employees. An employer who is, as the Policy Paper expresses it, seeking to divide a collective is likely to be doing so because he or she is only too aware of what the enterprise can afford if it is to remain profitable without loss of jobs. Union demands, on the other hand, might be expected to precipitate job loss.

The Policy Paper does not support the introduction of a closed-shop system and this forbearance is to be commended. Its bargaining structure proposals, however, with unions bargaining for specific positions, leave the way open to damaging demarcation disputes. Happily, with the Employment Contracts Act, these are now largely things of the past.

What is more, unions will again have primary bargaining rights, with employers able to initiate bargaining only if a union fails to do so in the appointed time. It is the Labour Relations Act revisited, but with variations. Again, there are set rules, time limits, restrictions. Collective agreements will remain enforceable on expiry, rather than continuing as individual contracts. At least, once a collective agreement has expired, new employees will no longer be able to join the agreement simply by joining the union.

Further problems emerge. Potential demarcation difficulties have already been noted, but if a collective document remains enforceable for only one year after expiry (and providing negotiations for a renewed agreement are ongoing), what is its status after that time, given that three years may elapse before it ends entirely? How will a new matter procedure operate? Will there be a return to third party interventions?

What we have is the mix as before. Little has changed and the reference to workplace reform sits oddly in a context where once again the union is (or unions are) in control. The development of proper management techniques and the introduction of the kind of workplace reform which has proceeded apace, as employees and employers have at last learned to talk to each other, will be badly impeded.

Nor will the problems stop at the enterprise. Current emphasis on the enterprise - the only real way to ensure continuing operational viability and, therefore, continuing jobs - makes real sense after a long period when wage-led inflation could not be controlled. From at least the late 1960s, wage bargaining in New Zealand, if not actually forbidden, was typically accompanied by attempts to keep wage settlements in check. The list is a long one, from the nil general wage order of 1968, through the Stabilisation of Remuneration Act in 1971, the wage freeze of 1982 and the bargaining blow-out of 1985. Only with the Employment Contracts Act, and the move to enterprise bargaining, have settlements which take proper account of enterprise circumstance become possible. A move out from the enterprise, such as Helen Clark's Paper proposes, can only rekindle inflationary fires - fuelled by traditional relativity arguments - which at last have been extinguished.

And what is a duty to act in good faith? Leaving aside the dubious benefits of drawing on a system which may or may not serve others well (in any event, it is a mistake to imagine a simple transfer can be effected and errors avoided in the process), the duties imposed are meaningless without some method of enforcement. At this point, the Policy Paper makes no reference to any enforcement mechanism, but the Labour Opposition's own policy document indicates that the proposed Employment Relations Commission is to take an active role in facilitating the achievement of good faith bargaining. Are we encountering arbitration by another name? Certainly, if a third party is interposed between the bargaining parties themselves, it would seem that some curtailment of bargaining freedom must be anticipated.

Moreover, an imposed duty to provide relevant information is even less desirable when read in the context of multi-employer bargaining such as the proposed Employment Relations Act would encourage. Employers are competitors in the market-place, and the information unions might seek could well prove damaging to employers who must reveal it. And again, will a third party enforce the duty? It seems the right of bargaining parties to manage their own affairs will inevitably be undermined.

Though the proposed legislation will be geared to multi-employer collective agreements, individual contracts will still be possible. This is not a surprising state of affairs since it appears that the Employment Relations Act, like the Employment Contracts Act, will cover the employment of all employees, whatever position they hold. But the extent to which a requirement to negotiate such contracts, and to conduct the on-going employment relationship on a basis of trust and confidence as a good employer, will add anything to the actual bargaining/employment process is questionable. Existing statutory protections ensure that no

contract can be arbitrarily set aside, even if the document itself allows for termination on notice. The passage from *Employment Contracts: the New Zealand Experience*, edited by Raymond Harbridge, is supposition only. "There would seem to be some scope for the argument . . ." is far from confirmed fact. It is equally arguable that damaging strike action (not, of course available in respect to individual contract negotiations but frequently used to achieve union - not necessarily employee - aims) likewise damages the relationship of confidence and trust. Employment is not a one-way street.

The cited passage, however, sits uncomfortably with a discussion of individual contracts. What the passage seems to be referring to is the employer right to lock out (the exercise of which seemed to come as a surprise to unions quite used to exercising their own right to strike), and the further right to seek to influence the bargaining process by a direct approach to the employees concerned. Such activity may have an adverse effect on union authority, but it does allow an often much-needed message to be conveyed: damaging employer viability ultimately damages employment.

It is noted that the finer detail of how individual contract disputes will be dealt with has not yet been addressed. Can it, therefore, be assumed that some lesser standard will apply to these? At present the institutional arrangements for both collective and individual employment contracts are the same. If collective documents are to take precedence it seems logical to assume that individual contract disputes will have lesser standing.

Reference has already been made to strikes and lockouts and the fact that employers' use of the lockout provision (which is not new - the same provision appeared in the 1987 Labour Relations Act) has come as a shock to many unions. But the one is the quid pro quo for the other. Imposing a statutory strike and lockout-free period once notice of bargaining for a new collective agreement has been issued will serve merely to encourage strikes on other grounds (such as safety and health). To these an employer's only response will be recourse to the very litigation the proposed Act is supposed to avoid. This has been the situation in the past and would doubtless be so again. Enforcing sanctity of contract, while allowing both strike or lockout action once the collective has expired (the present system), makes a clear distinction between the two sets of circumstances, and has the beauty of simplicity. Imposing, as well, a duty to bargain in good faith would add a further complexity, signalling that bargaining parties cannot really be trusted to manage their own affairs. It is intervention by another name.

Nor does it make sense to allow partial strikes but not partial lockouts (what price even-handedness when evenhandedness does not suit?), nor to prevent employers from requiring others to perform the work of striking/locked out employees. Strike action invariably damages employer and employees alike. It should, therefore, be a last resort only, and mitigating employer measures permitted. Employees and employers need each other. There is nothing to be gained from inflicting permanent harm.

On the other hand, if the likelihood of permanent harm is real, employers should, as now, be able to terminate the employment of striking employees. Strike action is, and always has been, a breach of the contract of employment, being a refusal to perform the work for which the employee was engaged. To deny the fundamental nature of the contract breach would be to alter the law as it has long been understood. In any event, the decision to terminate is

susceptible to a claim of unjustified dismissal as the law currently stands. There will, however, be times when such a decision is reasonable.

Regarding the proposed prohibition on partial lockouts, the comment that the employer will have to do as workers do, and reduce the work that is offered, is difficult to comprehend. Is the reference to reduced overtime, or is there a genuine belief that any and all work activity can be reduced at will? Whatever the meaning intended, a reduction in work, with no comparable reduction in pay, would scarcely operate as an incentive to negotiate.

The proposal to bring picketing under the ambit of the Employment Relations Act would represent another significant legal change. Currently, picketing, as such, is not an offence at all, but charges sometimes result where the picket has obstructed a public way. Charges are brought under the Summary Offences Act 1981 and are, therefore, quasi-criminal in character. It would, therefore, be entirely inappropriate for the Employment Court, rather than the District Court (as at present) to have jurisdiction in respect to them. The District Court is far more familiar with charges of this nature. An Employment Court is, or should be, a place where civil actions are heard and, as became apparent in the early days of the 1973 Industrial Relations Act, not geared to the imposition of criminal sanctions. On the other hand, it is difficult to see what other kind of sanction could be imposed since it may well be members of the general public who are inconvenienced.

As to the creation of a pro-active labour relations organisation - that is a real step back in time. Pro-active labour relations bodies have come and gone. None has achieved what was hoped for it. The Industrial Relations Council flourished briefly, but its passing was scarcely noticed. The Industrial Commission was merged with the Arbitration Court a mere five years after its creation. A wage freeze suspended all collective bargaining for a two-year period but when that ended, tripartite wage talks, aimed at setting a ceiling for post-freeze negotiations, singularly failed in their objective. Nothing really worked. Even the Arbitration Commission, child of the Labour Relations Act, served only to complicate the bargaining process, avoiding the real need for parties to act responsibly on their own account.

Again, there is the dependence on others' ideas. Why should something which may suit Canada also suit New Zealand? If abuses occur, the Employment Court and Tribunal are there to deal with them. What more would this further body accomplish? It is intervention for intervention's sake and, as such, to be abhorred.

The idea that change can be shaped from outside is prevalent in some areas, but inherently misconceived. Change occurs, not because it is imposed (when it will be resented and unlikely to work), but when the necessity for change is recognised and faced up to.

Nor would by-passing the Employment Tribunal because it is not, at present, working speedily, produce a better result. The lack of speed identified is not an indication of failure, but rather the reverse. All employees now have access to low-level disputes resolution procedures. Under earlier regimes, only union members had that privilege. What might replace the Employment Tribunal is not yet clear but to revert to a previous regime would achieve nothing. Change for the sake of change is never acceptable, particularly if, as might be supposed, what is made available to non-union members becomes less effective.

And finally, there is the question of minimum standards. These are already provided by a raft of legislation which underpins all contracts of employment. Annual and public holidays and special leave are guaranteed by the Holidays Act, the provision of a safe and healthy working environment is the subject of the Health and Safety in Employment Act, new rules apply in relation to privacy and so on. Whether the setting of a minimum wage level operates to do more than exclude people from employment (at whatever age) remains a matter of argument. But, addressing the current situation in France, *The [British] Economist* of 26 June 1993 recently noted:

It matters just as much that governments avoid doing things that make unemployment worse. There is little doubt, for instance, that France's anomalously high rate of unemployment among the young is partly due to the national minimum wage - at nearly 50% of average earnings (covering roughly 12% of wage-earners), this is high by international standards, and must price many young workers out of the market.

As for tripartite discussions on the subject, these have not, in the past, produced a helpful result. Is there any reason to suppose they would, in the future, prove more successful? Labour's industrial relations policy is, Helen Clark concludes, an integral part of its overall macroeconomic policy, intended to raise skill levels, to encourage productivity growth and to place emphasis on quality. The Employment Contracts Act she sees as divisive and obstructive of union activity. The implication is that the Employment Contracts Act has failed to achieve what Labour's policy will achieve. But is that really so?

If current economic indicators are anything to go by - and they are all we have - the Employment Contracts Act, by making it possible for employers to manage all aspects of their businesses, is playing an important role in New Zealand's quest for recovery. It may not be perfect, but it has achieved what legislation in the past has never achieved: by focusing directly on the enterprise it has facilitated wage settlements reflecting ability to pay and has thus enabled wage-led inflation to be brought under control. But more than that, it has thrown into sharp relief the importance of employer/employee communications. It is ironic that as more and more countries are coming to understand the need to move from intervention to workplace co-operation, Helen Clark should be telling us to retrace our steps.

Not only has a country like Sweden shown interest in New Zealand's industrial reforms - as witnessed by recent and planned visits of people working in the area - but the *Australian Financial Review* of 2 June 1993 reported:

"A revolution is beginning in our workplaces - a revolution which will affect all Australians whether they like it or not.

In its vanguard is a move towards much more enterprise bargaining. This involves employees talking and negotiating directly with their employers, rather than relying on union officials and industrial tribunals to do the negotiating for them."

It is this path, as the article acknowledges, which New Zealand has chosen to follow. To accept now what Labour is offering would, indeed, be to walk forward to the past.