UNCOVERING THE ORIGINS OF NEW ZEALAND'S *EMPLOYMENT RELATIONS ACT 2000*: A RESEARCH FRAMEWORK

JAMIE LATORNELL[1]

Abstract

It has been argued that the Employment Relations Act (ERA) builds on experiences under the ECA as well as embracing the values of the country's earlier conciliation-arbitration system. A review of New Zealand's history of employment relations legislation reveals that the relational approach of the ERA does indeed maintain a variety of principles embedded within New Zealand employment relations by the ECA. Additionally, the ERA also attempts to re-establish earlier principles rejected by the ECA. However, beyond re-establishing older principles and continuing more recent ones, the ERA also introduces four new concepts into the employment relations system in New Zealand. This paper provides a proposed research framework to fully understand the origins of these key principles underlying the ERA as well as to understand why these concepts were incorporated into the ERA. The paper concludes with a preliminary document analysis of Labour Party policy documents and speeches by key Labour Party members.

Introduction

On 2 October 2000, the New Zealand legislature passed into law the *Employment Relations Act* (the ERA), one of the first major pieces of legislation passed by the Labour Party led coalition government elected the previous year. During the election, a major aspect of the Labour's manifesto was the replacement of the *Employment Contracts Act 1991* (the ECA). Prior to the election, the Labour Party's spokesperson on labour relations signalled that the replacement of the ECA was intended to provide New Zealand with employment legislation which would be long-lived. "Our hope is to provide legislation that is sufficiently well balanced, fair and devoid of ideology that it will attract wide enough support to stand the test of time" (Hodgson 1999: 175). More recently, Margaret Wilson, the Minister of Labour at the time of the ERA's passage into law made the following observation.

[1] Academic Director (Management & Economics) in the Manukau Business School at the Manukau Institute of Technology, Auckland, New Zealand
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> The Employment Relations Act 2000 marked a break with the employment relations regulatory framework of the 1990s enacted in the Employment Contracts Act 1991. It also signalled the advent of a new approach to the employment relationship that built on the experiences of the 1990s as well as the values of the system of conciliation and arbitration. The contractual adversarial stance to employment relations was replaced by a negotiated cooperative approach that was founded on the equitable notion of good faith (Wilson 2004: 9).

The objectives of the ERA are in stark contrast to those of its predecessor, the ECA. The ERA seeks to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship" (Employment Relations Act 2000: s.3). The ECA, on the other hand, sought to "promote an efficient labour market" (Employment Contracts Act 1991: long title). Even so, the structure of the ERA is more consistent with the ECA than with pre-ECA legislation. In this sense, the ERA does build on the experiences of the 1990s under the ECA. However, in its desire to promote collective bargaining, the ERA shares a commonality with earlier legislative approaches in New Zealand. Nevertheless, a number of the principles underlying the ERA are new to employment relations in New Zealand, namely:

1. encouragement of building productive employment relationships;
2. promotion of good faith behaviours;
3. extension of the duty of good faith to all aspects of the employment relationship and employment environment; and
4. recognition of implied mutual obligations of trust and confidence within employment relationships.

It is unclear where these new concepts originated, why they were incorporated into the legislation, or even if they do indeed represent a link to the values of the conciliation-arbitration system or the experiences of the 1990s as argued by Wilson (2004). Nevertheless, the introduction of these new principles within the ERA makes possible the argument that the relational approach is a radical innovation in employment relations legislation rather than an evolutionary change. It is not the intent of this paper to debate the extent to which these concepts are revolutionary or evolutionary change, but rather to provide a preliminary review of documentary evidence regarding the origins of these concepts as well as to discuss a framework for further research to investigate and more clearly establish their origins.

This paper is structured as follows: first, a brief discussion of the four legislative approaches to the regulation of employment relations in New Zealand which have been used between 1894 and the present-day. This leads to an explanation of the significance of the relational approach, the most recent of the four legislative approaches. This explanation considers the key principles underlying the approach relative to the key principles established by earlier legislation thereby allowing an identification of the continuities and discontinuities of key principles between and among the approaches. The paper then turns to the research questions and research framework resulting from the primary issues raised by the earlier sections of the paper. The paper concludes

with a discussion of the results of the preliminary document analysis to identify the possible origins of the new concepts introduced by the ERA.

Approaches to employment relations legislation

New Zealand's history of employment relations legislation extends back to the late 19th century. During this time, the legislative regulation of employment relations has been characterised by four major approaches: the conciliation-arbitration approach; the 'modified' conciliation-arbitration approach; the contractual approach; and, most recently, the relational approach.

The conciliation-arbitration approach was first established in 1894 through the enactment of the Industrial Conciliation and Arbitration Act (the ICAA). The structures and features of this approach remained largely unchanged for 70 to 80 years until the emergence of the 'modified' conciliation-arbitration approach. Exactly when the conciliation-arbitration approach was replaced with a 'modified' approach is open to some interpretation. For instance, Geare (1993) suggested the modified approach began as late as 1987 with the introduction of the Labour Relations Act, while Hince (1993) argues that the modification of the conciliation-arbitration approach was a more evolutionary process beginning in the 1970s with the introduction of the Industrial Relations Act 1973 (IRA). Other authors place the emergence of a modified approach even earlier. Woods (1975) stresses that while the 1961 shift from 'compulsory unionism' to unqualified preference' may seem of little significance, in reality it was a dramatic change. At the very least, this shift foreshadowed the need to move to a modified approach. For the purposes of this paper however, the modified approach will be considered to have largely been enabled through a series of Acts during the 1970s and 80s: the Industrial Relations Act 1973 (the IRA), the Industrial Relations Amendment Act 1984 (the IRAA), and the Labour Relations Act 1987 (the LRA). In the third, contractual approach, the legislative regulation of employment relations was significantly altered by the provisions of the Employment Contracts Act 1991. In 2000, the legislative regulation of employment relations was again changed with the enactment of the Employment Relations Act 2000. The ERA heralded the arrival of the relational approach.

Significance of the relational approach

It has been argued that the relational approach embodied within the provisions of the ERA is the latest in a series of "frequent, radical changes in employment relations during the last two decades" (Rasmussen 2004: 1). The Labour government stressed that further legislative change was needed since the labour market reforms of the 1980s and 1990s had failed to facilitate labour market adjustment (Clark 2003). Furthermore, the Labour government argues that through the ERA it is attempting to create a new approach to employment relations which not only builds on the experiences of the contractual approach but also draws on the values of the conciliation-arbitration approach (Wilson 2004).

A full review of the literature pertaining to New Zealand's history of employment relations legislation in order to identify the drivers, features and outcomes of each legislative approach is beyond the scope of this paper[2]. Instead this section will summarise the key principles underlying the relational approach as well as highlighting the continuities and discontinuities of these key principles between and among the legislative approaches prior to the relational approach.

The relational approach is attempting to re-establish two principles underpinning employment relations systems recognised by the conciliation-arbitration approach. First, the philosophy of collectivism has traditionally been a fundamental aspect of employment relations in New Zealand since the introduction of the conciliation-arbitration approach in 1894 (Hince 1993). This principle was rejected by the contractual approach as the dominant mode for the regulation of employment relationships in New Zealand. In this regard, Geare (1993) suggests that in addition to the stated objectives of the ECA, the contractual system was also intended to weaken unions and increase the power of employers. Likewise, Morrison (2003) argues that trade unions were viewed as one of the more important rigidities or inflexibilities that needed to be addressed in the New Zealand labour market. As a consequence, the contractual approach established individualism as an underlying philosophy of the employment relations system in New Zealand. In contrast, the relational approach attempts to re-establish the key principle of collectivism through the promotion of collective bargaining as an integral part of employment relations.

The relational approach also attempts to re-balance efficiency and equity concerns as the twin objectives of an employment relations system (Meltz 1989). These twin objectives were supported by the legislation of both the conciliation-arbitration approach and the modified conciliation-arbitration approach. Through the preamble of the ECA, the contractual approach explicitly focused on efficiency as the primary goal of the employment relations system. Walsh and Ryan (1993: 28) observe that the contractual approach's "neo-classical emphasis on labour market efficiency led to a fundamental repudiation of state regulation of the processes of bargaining and representation". In this regard, the ECA is a repudiation of the assumed need to balance efficiency and equity within the employment relations system (Latornell 2005). The relational approach re-balances these twin goals, as seen through the introduction of provisions for good faith behaviours.

The relational approach also continues the tradition - established by the conciliation-arbitration system - of specialist employment institutions to assist in the resolution of employment relations disputes. While the nature and structures of the specialist employment institutions have varied across the four approaches, acceptance of the need to maintain such institutions has been consistent. In fact, the need for specialist employment institutions is the single principle underpinning New Zealand employment relations which has survived unabated through all four approaches.

[2] There is much literature surrounding the historical development of employment relations legislation in New Zealand. In addition to the references in this paper, the author recommends the following as being of particular relevance to the matters covered by this paper: Bray & Walsh 1998; Brook, 1990; Brosnan, Smith, & Walsh 1990; Dannin 1997; Deeks & Boxall 1989; Deeks, Parker, & Ryan 1994; Deeks & Rasmussen 2002; Harbridge & Crawford 1997; Walsh 1984 & 1993.

The relational approach also maintains and continues a variety of principles established more recently during either the modified conciliation-arbitration approach or the contractual approach. The relational approach continues a single legislative structure for the regulation of both collective and individual employment relationships as established by the contractual approach. Until 1991, only collective employment relationships had been regulated through statute; individual employment relationships had been primarily regulated through the common law. The approach also maintained decentralised structures of wage fixing initiated during the modified conciliation-arbitration approach and subsequently greatly expanded by the contractual approach. The principles of voluntarism regarding union membership and freedom of association were established by the contractual approach. The relational approach maintains these principles within the employment relations system in New Zealand. Finally, encouragement of self reliance among the direct parties to an employment relationship were introduced during the modified conciliation-arbitration approach and subsequently significantly extended by the contractual approach. This principle is maintained by the relational approach, although somewhat moderated through the states provision of information and mediation services to assist in the resolution of employment relations disputes.

Beyond re-establishing older principles and continuing and maintaining more recent ones, the relational approach also introduces new principles to employment relations legislation in New Zealand. These principles are:

1. building productive employment relationships;
2. the promotion of good faith behaviours;
3. the extension of the good faith concept to "all aspects of the employment environment and of the employment relationship" (Employment Relations Act 2000: s.3(a)); and
4. recognition of the implied mutual obligations of trust and confidence between the parties to an employment relationship.

The origins of the new principles, embedded within the relational approach, are worthy of question. The patterns of continuity and discontinuity of principles between and among the four approaches to the legislative regulation of employment relations in New Zealand also raise a series of questions regarding the nature of the relational approach. These research questions will be presented in the next section.

Research questions

The foregoing brief analysis of the principles underlying the relational approach and their continuity and discontinuity with the principles originating in earlier approaches raises a series of questions worthy of further consideration.

1. Where have the new principles underlying the relational approach originated? Why have they been included in the legislation?
2. Given the inclusion of these new key principles:

a. is the relational approach an evolution of the modified conciliation-arbitration approach (in the same way that the modified approach was an evolution on the original conciliation-arbitration approach)?
    i. If so, does the contractual approach represent an anomaly in legislative approaches to the regulation of employment relations in New Zealand?
b. to what extent does the relational approach represent a break from the modified conciliation-arbitration approach (and the original conciliation-arbitration approach)?
    i. If so, is the relational approach an evolution of the contractual approach?
    ii. If so, to what extent are the consistencies between the relational approach and the contractual approach continuities or are they contingent similarities?

Research framework

In order to uncover the origins of the new principles introduced by the relational approach and to understand the relationship between the key principles of relational approach and earlier approaches, in-depth research is necessary. In addition to a review of relevant literature to identify the drivers, key features, underlying principles and outcomes of New Zealand history of legislative approaches to the regulation of employment relations, the framework for this research will include the following aspects.

1. A document analysis to identify the origins of new principles underlying the ERA. This document analysis will include:
    a. policy documents as well as speeches and other documents authored by key members of the New Zealand Labour Party; and,
    b. Cabinet and Select Committee papers as well as parliamentary debates from 1999 and 2000 which address the development of the Employment Relations Act 2000.

2. In-depth, semi-structured interviews with key players involved in the development of the ERA, namely politicians and officials from the New Zealand Labour Party and its coalition partners, as well as government officials involved in drafting the ERA. Interviews will also be sought with officials from central lobby groups, such as the New Zealand Council of Trade Unions (NZCTU), the New Zealand Employers Federation (now Business New Zealand) and the New Zealand Business Roundtable (NZBR). All three of these groups sought to influence the drafting and passage of the ERA.

Origins of new principles introduced by the relational approach

It has already been noted that the relational approach introduces and establishes four new principles underpinning the legislative regulation of employment relations in New Zealand, namely: (1) building productive employment relationships; (2) promotion of good faith behaviours; (3) extension of the good faith concept to all aspects of the employment environment; and (4) recognition of the implied mutual obligations of trust and confidence. In order to identify the origins of these concepts, a preliminary analysis has been conducted of

publicly available Labour Party policy documents as well as speeches and other documents authored by key players within the Labour Party from the period 1990 through 1999. This period is of particular interest as it was during this time that the Labour Party was in opposition. Prior to 1990, Labour Party policy was clear; the Labour Party had formed the government and its policies relating to employment relations were manifest in the legislation of the modified conciliation-arbitration approach. However, the Labour Party lost the 1990 general election and was in opposition through three general elections until 1999. Such an analysis will assist in determining the nature of the shifts in Labour Party policy during their time in opposition. The following sub-sections discuss the potential origins of each of these four new principles as well as advancing questions to be investigated through the interview phase of future research.

Productive employment relationships

The objective of building productive employment relationships is fundamental to the ERA, but the phrase itself is not defined with the legislation. The preliminary documentary review fails to uncover the phrase, leading to the potential conclusion that a key philosophy underpinning the relational approach was not part of policy discussions.

So where did the concept of productive employment relationships originate? What was the intent of introducing such a phrase as a key object of the employment relations legislation? Is this an attempt to incorporate the general concept of 'fairness' into the overall objectives of the ERA? 'Fairness' is a concept which features in Labour Party policy documents as early as 1992 (see for example New Zealand Labour Party, 1992a, 1992b, 1992c) and continues through the later 1990s (Cullen 1993; Maharey 1995; Hodgson 1999). Or, is productive employment relationships merely a phrase which 'sounded good' at the time of the legislation's drafting?

Good faith behaviours

The promotion of good faith behaviours most likely arose out of two concerns. Firstly, as discussed in the previous sub-section, the Labour Party's interest in ensuring fairness within the employment relations system, and secondly, a desire on the part of the Labour Party for New Zealand to ratify International Labour Organisation (ILO) Convention 87 on Freedom of Association and Convention 98 on the Right to Organise and Bargain Collectively. These two conventions are often considered to be two of the six basic human rights (Haworth & Hughes 1995). Ratification of these conventions has been a key feature of Labour Party policy documents on employment relations since at least 1993 and was also a driver for the replacement of the contractual approach with the relational approach. Indeed the second of the two key objects of the ERA is to "promote observance in New Zealand of the principles underlying" (Employment Relations Act 2000: s. 3(b)) these two ILO Conventions. The desire to ratify these ILO Conventions was also provided as a key reason why the Labour Party could not support a return to unqualified preference (Clark 1993), instead favouring voluntarism in trade union membership.

Of particular interest to this paper is the fact that the notion of good faith is typically embedded within the concept of freedom of association. Novitz (1996: 121) notes that there are two

commonly used approaches to the concept of freedom of association which are largely in conflict with each other.

> Upon one approach, freedom of association is merely a natural extension of individual liberty and the continued protection of personal choice is fundamental to its survival. The opposite view is that, within the context of industrial relations, the function of freedom of association is to redress the power imbalance typical of the relationships between employer and employee. Freedom of association therefore requires promotion of collective bargaining.

Novitz (1996: 124) further observes that more recent cases of the ILO Committee on Freedom of Association suggest a duty to bargain in good faith is an appropriate "compromise between the active promotion of collective bargaining and the preservation of freedom of choice".

Preliminary document analysis reveals the concept of good faith took time to appear within Labour Party policy. 'Good faith bargaining' first appears in a 1997 policy document (New Zealand Labour Party 1997). In a later article written during the run-up to the 1999 general election a broader notion of good faith in the employment relationship is advanced (Hodgson 1999). Even then, the concept is a vague one and its intended meaning does not appear within policy documents. While an in-depth analysis of the nature of good faith is beyond the scope of this paper, it is worthwhile noting that it has been characterised in a number of ways and has been equated with the notions of honesty, loyalty, cooperation and a duty of reasonableness (for a fuller discussion, see sources such as: Baron 2005; Burton 2001; Carter & Peden 2003; Davenport & Brown 2002; Finn 2005; Harrison 2001; Lücke, 1987; Wightman 1998). It is also worthwhile noting that the exact nature of the notion of good faith is also subject to considerable debate from time to time.

So where and when did the concept of good faith behaviours originate? Was it anchored in the desire for New Zealand to ratify and observe ILO Conventions? Or was it anchored in broader, but more general notions of incorporating fairness into New Zealand's employment relations? Or both?

All aspects of the employment relationship

As noted in the previous section, a duty to bargain in good faith is inherent to employment relations concepts such as freedom of association and the promotion of collective bargaining. However, the relational approach extends the notion of good faith to all aspects of the employment relationship and the employment environment. This extension goes beyond that which exists in most, if not all, employment relations legislation in developed countries. The intent to have legislation which governed the "overall management of employment relationships" (Clark 1993: 154) has been a concern of the Labour Party during the 1990s, with the argument that legislation should not focus on the "narrower objective of contract negotiation and enforcement" (Clark 1993: 54). It was not until 1999 however, that evidence can be found which directly links the concept of good faith with the broader notion of the employment relationship. Even so, the linkage between the two concepts is not developed and in fact, immediately

following the passage making the linkage, good faith is defined in terms of a duty to bargain in good faith in collective relationships.

> Importantly, the legislation will require that the relationship between workers and employers are governed by good faith. The Act will set out that good faith bargaining includes an obligation to meet and consider proposals of another party, to provide information necessary for the purpose of bargaining, and so on. The duty to act in good faith will not imply a duty to settle a collective agreement (Hodgson 1999: 173).

So why did the notion of duty good faith bargaining get extended to all aspects of employment relationships?

Mutual trust and confidence

Recognition of the implied mutual obligations of trust and confidence in employment is the final key concept introduced by the relational approach. Like 'productive employment relationships', the preliminary document analysis does not uncover the term 'mutual trust and confidence' in Labour Party policy. However, the development of this concept and its inclusion in the relational approach is a process which was largely independent of party politics. The common law in New Zealand had begun to develop 'mutual trust and confidence' as an implied duty within employment contracts a number of years prior to its explicit adoption as a concept within the relational approach.

> New Zealand Courts, as least since the decision of the Court of Appeal in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* (1985) ERNZ Sel Cas 136; [1985] 2 NZLR 372 (CA), have developed the concept of 'trust and confidence' as a mutual obligation between parties to an employment contract and applied it as an implied term in the contract of employment (Brookers Online 2003: ER4.06).

It is worth noting that while this implied duty of mutual trust and confidence was being developed within the common law, the duty of good faith was not enjoying the same treatment. Furthermore, in the first version of the ERA, mutual trust and confidence was in a position of prominence with good faith behaviours in a subordinate position. In the 2004 amendments to the ERA, the concept of good faith was broadened, explicitly placing the notion of mutual trust and confidence in subordinate position.

So, was the inclusion of a common law principle in legislation a reflection of the notion of fairness which appears to run through Labour Party policy? If so, then why was a more developed concept (mutual trust and confidence) placed in subordination to a lesser developed one (good faith) within the legislation? What is the intended nature of the interplay between these two concepts?

Concluding comments

A review of the historical development of the four approaches to the legislative regulation of employment relations in New Zealand reveals that the most recent relational approach continues and extends a number of concepts and themes introduced in earlier approaches. Some of these concepts, such as the role of collectivism in employment relations have a long history dating back to the conciliation-arbitration approach of the late 19th century. Other concepts, such as voluntarism, are fairly recent developments in New Zealand, having been introduced during the modified conciliation-arbitration approach of the 1970s and 1980s and significantly developed during the contractual approach of the 1990s.

However, this review also reveals that the relational approach of the 21st century also introduces a series of four new concepts which are key underpinnings to the approach, namely, building productive employment relationships, good faith behaviours, all aspects of the employment environment and mutual trust and confidence. While some documentary evidence provides clues to the origins of some of these new concepts, some concepts – for example, 'productive employment relationships' – are not discussed or disclosed in policy documents. If we are to fully understand the nature and intent of the relational approach and its legislation, we must understand the origins of these new concepts. To do this further research is necessary. This paper has proposed a research framework of further document review and in-depth, semi-structured interviews designed to improve this understanding.

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