A Critique of Probationary Employment Periods

MARK HARCOURT* AND GEOFFREY WOOD**

Abstract

In November, 2006, a private member's bill to introduce a 90 day probationary employment period, which would have allowed employers to dismiss employees for any or no reason and without having to follow a disciplinary procedure, was defeated. A future National government might still introduce probationary employment; other countries have it already. Such reforms represent an important component of a broader neo-liberal agenda to deregulate the labour market. We therefore critically examine arguments made in support of probationary employment, specifically focusing on the New Zealand Bill, and also more generally discuss the potential adverse consequences of probationary employment. In particular, we question whether probationary employment would alleviate the unemployment of so-called high-risk, high unemployment groups. We also maintain that probationary employment would have all kinds of adverse repercussions for employees and even employers. We conclude by exploring alternative, more active mechanisms for enhancing employment within different areas of the New Zealand economy.

Probationary Employment

Since its election in 1999, the New Zealand Labour Government has enacted employment laws to strengthen and extend worker and trade union rights, in an effort to undo some of the more extreme effects of the neo-liberal 1991 Employment Contracts Act. These legal developments in New Zealand have paralleled, though not always mirrored, those in the United Kingdom under New Labour. Most of the more important changes were introduced through the 2000 Employment Relations Act, which established restrictions on the form and content of employment contracts, improved union access rights, provided unions with the exclusive right to bargain collectively, established a union registration system, facilitated multi-union and multi-employer bargaining, provided greater institutional support to mediation, and established mutual, good faith obligations with respect to, for example, collective bargaining, redundancy, and the sale/ transfer of an employer's business. Further

* Professor Mark Harcourt, Department of Strategy and Human Resource Management, Waikato Management School, University of Waikato, Hamilton, New Zealand
** Professor, Geoffrey Wood Department of HRM and OB, Management School, University of Sheffield, 9 Mappin St, Sheffield, United Kingdom
Acknowledgements: We would like to thank Cathy Horrocks, the Waikato Management School Knowledge Manager, for providing research assistance.

reforms were enacted with the 2004 Employment Relations Amendment Act, which introduced so-called bargaining fees, effectively an agency shop, for non-union employees covered by a collective agreement, extended good faith obligations, and strengthened employee dismissal rights, especially during the sale or transfer of a business.

Labour's reforms have prompted a business backlash, with more and more vociferous calls for deregulation. Business lobby groups like Business New Zealand and the New Zealand Business RoundTable have heavily criticised the government for imposing high legislative compliance costs on their constituencies. Since 2003, Business New Zealand has surveyed its membership for their views of these compliance costs. Survey results suggest that compliance costs are high, approximately $3,000 per person in smaller firms and $500 in larger ones (Business New Zealand, 2006). Moreover, employment law compliance consistently accounts for in excess of 20% of total compliance costs, second only to tax law (Business NZ and KPMG, 2006: 21-22). Chief among these employment law compliance issues is employee dismissal (Business NZ and KPMG, 2006: 29-31), with the complexities of dismissal procedure seen as a costly burden, especially if employers fail to 'get it right' and then have to pay compensation to employees (Business NZ and KPMG, 2006).

Against this backdrop, National Party MP Wayne Mapp in early 2006 sponsored a Private Members' Bill, the Employment Relations (Probationary Employment) Amendment Bill, to introduce probationary employment. Although the Bill was defeated in November, 2006, National's attempt to introduce such a law while in Opposition indicates what it intends to do if and when it becomes the government. As a result, far from being a dead issue, probationary employment and its potentially negative consequences remain a highly topical issue both in New Zealand and in other countries where it is already the law.

Had the Bill passed, it would have introduced a 90-day probation period, or a lesser period if agreed by the parties, for all new employees. Probationary employment would have immediately preceded employment under either an individual agreement or collective agreement, as regulated under the Employment Relations Act. It would have given employers the right to dismiss employees during or at the end of the 90-day period for any or no reason. As a result, probationary employees would have had no right to file for a personal grievance for unjust dismissal or to seek redress through any other dispute resolution mechanism, including Department of Labour mediation. An exception would have been made for discrimination and sexual and racial harassment cases under the Human Rights Act. Probationary employees would still have had the right to compensation for these causes of action. The Bill would also have allowed actions for breach of contract at the probationary stage.

Even though the Bill would have partially relieved employers of one of their greatest compliance cost headaches, its official purpose, as described in the Bill's Explanatory Note, focused on providing employment for disadvantaged groups. The Note claimed that probationary employment encourages employers to "... take a chance with new employees, without facing the risk of expensive and protracted personal grievance procedures..." enabling "...people who have not had previous work experience to find their first job and make (sic) it easier for people re-entering the workforce." In the same vein, Business NZ Chief Executive Phil O'Reilly claimed that "...employers can be reluctant to employ people

without a previous positive employment record, and the proposed legislation would help overcome the risks of doing so." He saw probationary employment particularly benefiting teenagers, new migrants, and "other groups whose unemployment rates exceed the average" (O'Reilly, 2006).

Critique of Probationary Employment

This paper critiques probationary employment, especially in the proposed form of Wayne Mapp's Bill. We begin our critique by arguing that the alleged job-creating benefits of probationary employment are based on erroneous assumptions about why some disadvantaged groups have stubbornly high unemployment. We next maintain that there is no evidence to suggest that probationary employment actually reduces unemployment or creates jobs. We extend our critique by arguing that probationary employment could have all kinds of negative impacts on employees and even employers. In particular, probationary employment could undermine employees' statutory employment rights, including their right to bargain collectively for a collective agreement. In addition, it could increase discrimination against disadvantaged groups it is supposed to help. More problematic, it would allow employers to dismiss perfectly good employees for any or no reason. "Scape-goating" probationary employees would be relatively easy, discouraging some managers from investigating and correcting more systemic causes of poor performance or bad behaviour (e.g., inadequate training programmes). Finally, the evidence suggests probationary employment would increase feelings of job insecurity, with adverse implications for commitment to the employer, labour turnover, and job performance.

Wrong Assumptions about Why the Disadvantaged are Unemployed

Supporters of probationary employment like Wayne Mapp assume that the higher than average unemployment rates of youth, minority groups, predominantly female re-entrants, migrants, and others can be primarily attributed to an information problem. The essential idea here is that employers do not have accurate, good quality information about the productivity characteristics (e.g., skills, abilities, motivations) of these workers, in the absence of any work experience (e.g., youth), recent work experience (e.g., predominantly female re-entrants), or easily verifiable work experience and/or qualifications (e.g., the foreign work experience and qualifications of migrants/ immigrants). It follows that employers are naturally reluctant to hire such workers unless permitted to hire them on a probationary basis.

It is true that some New Zealand employers are unsure how to evaluate certain foreign qualifications and work experiences (Bennett, 2006). Facing such uncertainty, they can be unwilling to hire such people for professional and managerial roles. However, a probationary period would do little to overcome this reluctance for several reasons. First, if mistakes caused by a skilled worker were costly, difficult, or impossible to correct, an employer would still not risk hiring an immigrant whose work experiences or qualifications were hard to verify. To take an extreme example, an airport would obviously not hire an air traffic controller, even on probation, whose overseas work experience and training could not be

confirmed. Second, if task complexity or long cycle times made an employee's performance difficult to assess within the short time-frame of a probationary period, employers would still not risk hiring someone they were unsure about. For instance, a university would want to be confident about a lecturer's research and teaching ability prior to hiring, because the long cycle times, especially for completing research, would make performance evaluation virtually impossible within a short, probationary period. Third, if an employee is expensive to recruit, select, and bring to New Zealand, an employer would also want to be reasonably sure that that person had the requisite skills and abilities before commencing employment. No one would spend $20,000 to bring an Irish engineer to New Zealand on a trial basis.

In reality, informational asymmetries like those described above are not the main cause of high unemployment among disadvantaged groups. More important factors include discrimination, a lack of education, and a lack of work experience among others. Many immigrants are the targets of discrimination. For instance, half of Christchurch's Muslim workers have had major difficulties finding employment, despite having qualifications and work experience in shortage fields like information technology (Bennett, 2006: 2). Others have had problems getting their qualifications recognised at all, or at an appropriate level, by trades or professional bodies or the New Zealand Qualifications Authority (Anonymous, 2006: 2). Still others have lacked the English proficiency to obtain employment where English communication skills are valued.

Many Maori and Pacific people are jobless because they lack qualifications. For youth, the problem obtaining employment is often their lack of relevant work experience. Unemployment rates for Maori, Pacific peoples, and youth are highly pro-cyclical (see, for example, Chapple and Rea, 1998; Te Puni Kokiri, 2000: 23), just as they are for blacks, Hispanics, and youth in the USA. For instance, Clark and Summers (1990: 80) report that a one percent fall in prime-age male unemployment in the US is associated with a four percent increase in teenage employment and, more specifically, a six-and-a-half percent increase in black teenage employment. What accounts for this extreme pro-cyclicality in unemployment rates? Maori, Pacific peoples, and youth are less skilled than their older and/or Pakeha (European) counterparts. Maori and Pacific peoples generally have lower levels of schooling (Maani, 2004; Te Puni Kokiri, 2000; Winkelmann and Winkelmann, 1997) and are less likely to receive employer training (Gibson and Watane, 2001). Evidence of occupational segregation by race (Easton, 1994; Herzog, 1997) also suggests that Maori and Pacific peoples are more likely to be the victims of discrimination, even when they do have the appropriate schooling and/or work experience. Young people may have the formal education, but lack the work experience which would provide job skills (Isengard, 2003; Russell and O'Connor, 2001). The evidence suggests that all three groups are therefore less preferred as employees: the last to be hired and first to be fired (dismissed) (LIFO) (Gibson and Watane, 2001; Grimmond, 1993; Winkelmann and Winkelmann, 1997). If jobs are available, they are ordinarily offered first to prime-age people with better education and/or more work experience (Gibson and Watane, 2001; Winkelmann and Winkelmann, 1997). Employers generally consider hiring inexperienced and/or less educated people only when more preferred people are in short supply (Clark and Summers, 1990). If Maori, Pacific people, and young people do obtain employment, it is more likely to be in the less desirable secondary labour markets of the small business, service sector, where there are more limited

prospects for promotion, pay increases, and training and development (see, for example, Easton, 1994).

The pattern of high youth unemployment is similar in most European Union countries (Russell and O'Connor, 2001: 3). In general, youth unemployment rates are at least twice as high as those for prime-age adults (Isengard, 2003: 360; Russell and O'Connor, 2001: 3). However, a major exception is Germany, where youth and prime-age adult unemployment rates have historically been virtually identical. Much of this success is attributed to the German apprenticeship system, which enables younger workers to work in their chosen field as they study. As a result, younger workers emerge from their training having already had work-related experience, and so are not less preferred like their counterparts elsewhere (Isengard, 2003).

Failure to Lower Unemployment and Create Jobs

Is there any evidence to suggest that probationary periods reduce the relatively high unemployment rates of disadvantaged groups? The short answer is 'no'. Unscientific comparisons across countries also suggest that the answer is 'no'. Britain has a one-year probationary period, similar in most respects, except length, to the one proposed for New Zealand. The USA has the equivalent of an indefinite probationary system called employment-at-will, which allows employers to dismiss private-sector, non-union workers for any or no reason. However, neither Britain nor the USA can claim to have an obviously superior record in reducing the unemployment of, for example, younger or minority workers. In 2003, New Zealand's unemployment rate was 4.7%, but 10% for Maori, 7% for Pacific peoples, 7% for other groups (mainly Asian), and 14% for 16-19 year olds (Statistics New Zealand, 2004: 64-65). In 2001, the USA's unemployment rate was 4.7%, the same as New Zealand's two years later, but 9% for blacks, 6% for Hispanics, and 14% for 16 to 19 year olds (Bureau of Labor Statistics, 2006). In 2003, Britain's unemployment rate was 5.0%, just above New Zealand's in the same year, but 7% for Indians, 15% for Pakistanis, 13% for blacks (Trades Union Congress, 2006: 2), and 15% for 16-19 year olds (London Development Agency, 2006: 145). If anything, New Zealand's record appears slightly worse than the US's and slightly better than Britain's, given a similar average unemployment rate. The US's so-called success may reflect its incarceration of more than two million people, many of whom are young and/or black (Wood, 2004).

Some idea of the potential employment or unemployment effects of probationary periods is apparent in the fixed-term contracting research. In some respects, probationary periods resemble fixed-term contract periods, in that workers can be dismissed for any or no reason. With fixed-term contracting, this is only permitted at the end of a particular period - e.g., one or two years. With probation, this can be during or at the end of a particular period - e.g., one year in the UK. Some economists have examined the effects of allowing fixed-term contracting in France (Blanchard and Landier, 2002), Germany, (Hunt, 2000; Hagen, 2002), and Spain (Dolado, Garcia-Serrano, and Jimeno, 2002). In general, they have not found strong evidence of either increased job creation or unemployment reduction (Blanchard and Landier, 2002; Dolado, Garcia-Serrano, and Jimeno, 2002). Ironically, frictional unemployment has actually risen, since fixed-term contracting typically involves more spells

of unemployment, as workers often finish one job and become unemployed prior to taking up a new job (Blanchard and Landier, 2002; Dolado, Garcia-Serrano, and Jimeno, 2002: F282; Hagen, 2002: 701). Employment has become more precarious, as many employers have switched from open-ended to fixed-term employment relationships (Blanchard and Landier, 2002; Dolado, Garcia-Serrano, and Jimeno, 2002). Fixed-term relationships also generally appear to be associated with lower wages, 13% lower in Britain (Brown and Sessions, 2003: 504), approximately 10% lower in Spain (Dolado, Garcia-Serrano, and Jimeno, 2002: F284), and approximately 20% lower in France (Blanchard and Landier, 2002: F240) and Germany (Hagen, 2002: 667). The reduced duration of employment relationships has discouraged employers from offering training and opportunities for advancement as well (Dolado, Garcia-Serrano, and Jimeno, 2002: F284).

Denial of Probationary Employees' Statutory Rights

In principle, probationary employees would ordinarily have the same or similar rights as other employees with respect to, for example, holidays, health and safety, and minimum wages. In practice, probationary employees who exercised such rights could be lawfully victimised by their employer, in the absence of a right to file a personal grievance for unjustified dismissal or disadvantage. To take just one example, probationary employees who complained about employer health and safety violations could be dismissed for doing so. Likewise, a probationary employee who accompanied an inspector on a workplace inspection, provided evidence relevant to a health and safety investigation, or acted as a workplace health and safety representative or committee member could be dismissed. If fears of victimisation discouraged probationary employees from exercising their statutory rights, there would be a corresponding decline in enforcement activity and rise in undetected violations. A study of bullying in the British higher education sector (Simpson and Cohen, 2004) confirms that probation is generally disempowering, and so would leave employees more open to unlawful and/or unethical management behaviour.

Failure to protect probationary employees from victimisation could have far-reaching effects on the legality and/or ethicality of employer actions. Some workplaces employ workers for only a few months, perhaps because of the seasonality of their industry or perhaps because their pay and conditions are too unattractive to retain staff. If most workers were probationary, most might also be reluctant to complain of unlawful mistreatment by the employer. Even non-probationary employees might feel apprehensive about exercising their rights, if they felt unsupported or even undermined by their more numerous and more compliant probationary colleagues. In a worst case scenario, a general climate of fear could allow employers of mainly probationary labour to openly and extensively flout the law. Paying workers less than the minimum wage and requiring them to work on public holidays could become routine in some companies. Such unlawful behaviour has now become commonplace in the Philippines, following the introduction of a six-month probationary period (Skene, 2002: 495).

Denial of Probationary Employees' Freedom of Association

In some cases, probationary employees have been openly denied their statutory rights. For example, in the Philippines, probationary employees, unlike others with longer tenure, have no right to receive a thirteenth month of pay, overtime pay, social security, and retirement benefits, and no right to join a union (Lloyd and Salter, 1999: 7-8). In New Zealand, the Probationary Employment Bill would have deprived probationary employees the right to bargain collectively for their terms and conditions of employment through a union. Had the Bill been passed, it would have directly contravened international conventions concerning freedom of association which New Zealand officially supports. Article 20 of the United Nations' Universal Declaration of Human Rights states that: "(1) Everyone has the right to freedom of peaceful assembly and association; and (2) No one may be compelled to belong to an association." Similarly, the International Labour Organisation's Convention 87 states that: "Workers and employers, without distinction whatsoever, shall have the right to establish, and subject only to the rules of the organization concerned, to join organizations of their own choosing."

Council of Trade Unions President Ross Wilson argues that up to 200,000 workers would have been negatively affected (Huggard, 2006). In other words, approximately 10% of New Zealand employees would have been denied the right to be covered by a collective agreement every year. For New Zealand unions, this would have translated into a loss of as many as 30-40,000 members, given membership levels of 340,000 (May, Walsh, and Otto, 2004: 85).

In some workplaces, prohibiting probationary employees from bargaining collectively would have caused a collapse in union membership levels. The problem would have been particularly acute in workplaces with relatively high turnover and relatively low union density. If, for example, a union had represented only 25% of employees in a supermarket, not allowing probationary employees the right to bargain collectively could have prompted such a large drop in membership as to make continued collective bargaining and union representation untenable. Declining membership and financial resources could have so sapped a union's powerbase that it became totally unattractive as a bargaining agent, even to the most committed unionists among non-probationary employees. Firms presently organized by the National Distribution Union and Service and Food Workers Union might have proven especially vulnerable to this sort of collapse.

Some employers could have avoided unionization altogether by continually hiring people for no longer than the probationary period. This form of rotational hiring has become widespread in the Philippines, following the enactment of a six-month probationary period (Skene, 2002: 495).

More Discrimination against Disadvantaged Workers

A probationary employment period is supposed to encourage employers to take a chance on employing so-called high risk applicants. However, a probationary period would probably have the opposite effect, if the only protections provided probationary employees, as in the Probationary Employment Bill, were for discrimination or sexual/ racial harassment. New Zealand evidence suggests that women, older people, new immigrants, and people with disabilities are the most likely to file a complaint for discrimination or sexual/ racial harassment under the Human Rights Act (Human Rights Commission, 1999: 17 and 36). It

would be reasonable to expect that among probationary employees these groups would also be the most likely to file a complaint, no doubt for genuine reasons. By contrast, non-disabled, white males in their 30s would be much less likely to feel discriminated against or harassed and thus much less likely to file a complaint. In this scenario, probationary employee legal cases would be dominated by gender, age, nationality, and disability issues to the virtual exclusion of anything else. Even if there were few cases, their media salience could convince employers that women, immigrants, the disabled, and those over 50 were likely to be litigious. Given this belief, employers might develop a stronger preference for hiring seemingly easy to dismiss, 30-something-year-old, white men. Some commentators argue that this is precisely what has happened in the USA with the anti-discrimination exception to employment-at-will (Roehling, 2003).

The Dismissal of Competent Probationary Employees

Probationary employment would allow managers to dismiss any probationary employee for any or no reason. Incompetent, aggressive, or moody managers could resort to firing probationary subordinates for the most minor reasons. Disagreements over trivial issues could lead to instant dismissal for subordinates who are too competent, outspoken, or ambitious in the eyes of some managers. Sadistic managers might even enjoy firing workers. Impatient managers might also rush to dismiss probationary employees, whose poor performance had little or nothing to do with a lack of skills, abilities, knowledge, or motivation. Poor performance could reflect any number of other factors, including ambiguous instructions, ambivalent staff in supporting roles, malfunctioning machinery and equipment, and inadequate or nonexistent training.

The experience of employment-at-will in the USA suggests that good probationary employees could, and almost certainly would, be sacked, if probationary employment ever became law in New Zealand. In the USA, “an estimated 150,000 to 200,000 employees are dismissed annually who could assert legitimate claims under the good cause standard,” if it were available to them (Barber, 1993: 193). Such unjustified dismissals would be both unfair to affected probationary employees and wasteful and inefficient for the economy. Furthermore, frequent spells of probationary employment, interspersed with periods of unemployment, could be unjustifiably stigmatizing for some workers, permanently confining them to low-paying, dead-end jobs. However, there is presently no evidence for or against such a link. Some research does suggest that casualisation, more generally, can trap employees in dead-end jobs (Silver, Shields, and Wilson, 2005). Other research suggests that the majority of casual workers do eventually enter more permanent employment (Gaston and Timcke, 1999; Green and Leeves, 2004).

Early Career Employer Opportunism

Probationary periods would facilitate what Schwab (1993) refers to as early career employer opportunism. Early career employer opportunism is a special case of unjustifiably dismissing

good probationary employees. The idea here is that probation would encourage employers to be non-committal in their hiring. Some earlier applicants might be hired for their immediate availability rather than job suitability, and then replaced before the end of probation with better (e.g., more able or skilled) or cheaper (e.g., lower salaried), later applicants. This practice could have severe negative effects on earlier applicants. In the extreme, some might end up among the long-term unemployed, especially if older than 50, having relinquished a secure and well-paying position to take up a perhaps better paying, but more insecure, probationary one. Others might find alternative employment relatively quickly, but still face major costs in moving, selling their house, transferring a spouse's job, and settling children in a new school. No doubt, early expenditures on training or induction would discourage such employer opportunism. However, the case law under employment-at-will in the USA (see Schwab, 1993: 39-40) suggests that it would still happen in New Zealand.

The New Zealand Council of Trade Unions (2006) has suggested that fears of such employer opportunism could discourage a lot of desirable labour mobility, which would otherwise benefit employees, employers, and New Zealand society as a whole. For instance, some people might be less interested in re-training for shortage occupations, knowing that their initial employment was going to be probationary. Similarly, insecurity of employment might dissuade many from accepting lucrative job offers in other regions with lower unemployment. In the extreme, probationary employment might discourage many potential highly skilled migrants from coming to work in New Zealand.

The Use of Exit Rather than Voice to Address Poor Performance or Misconduct

Many poor performance and misconduct problems are potentially rectifiable. For instance, misconduct may be prompted by alcoholism (e.g., gross negligence in driving while drunk), exhaustion from overwork (e.g., failure to follow safety rules), anger at the unfairness of management decisions (e.g., disobedience), or retaliation for being ignored or mistreated (e.g., theft). That is why unjust dismissal law presently requires employers to use ‘voice’ (Hirschman, 1970) in managing poor performance or misconduct. More specifically, the employer cannot simply dismiss without first finding out what happened and why by interviewing witnesses and those accused of any misconduct or poor performance. As such, unjust dismissal procedures are very much an essential part of a problem-solving approach based on ‘voice’.

In contrast, probationary employment would allow employers to use ‘exit’ (Hirschman, 1970) by instantly dismissing a poor performer or wrongdoer, without first investigating whether and to what extent this may be justified. As against ‘voice’, early, unjust ‘exit’ of probationary employees would have two main disadvantages. First, it would help to mask organisational performance and discipline issues. For example, unjustly dismissing poorly trained employees might conceal or suppress, but would not remedy, major, ongoing deficiencies in training programmes. Second, ‘exit’ would enable firms to pass along their so-called problem probationary employees, one to the next, in an endless game of ‘pass the parcel’, without ever taking responsibility for rectifying employee shortcomings. For example, unjustly dismissing cantankerous or belligerent probationary employees, not guilty of any misconduct, might be cheaper and easier than providing counseling. However, in the

absence of corrective action, such employees could end up permanently less productive, resulting in an efficiency loss to the economy. More seriously, the stigmatisation of ongoing dismissal could render them permanently unemployable and a major drain on social security and social services.

The Negative Effects of Job Insecurity for Employers

Even employers could suffer under a probationary employment regime. Probationary employment would increase actual, and perceived, job insecurity, at least for the probationary period. Workers worried about the security of their jobs tend to focus more on preparations to leave than on making their employers productive or profitable. Research evidence suggests that higher job insecurity would lower commitment (Adkins et al., 2001; Ashford et al. 1989; Bishop, 2002; Buitendach and de Witte, 2005; Davy et al, 1997; de Witte and Naswall, 2003; Yousef, 1998), including commitment to change (Chawla and Kelloway, 2004; Pate et al., 2000; Preuss and Lautsch, 2002; Rosenblatt and Ruvio, 1996), lower performance (Rosenblatt and Ruvio, 1996; Yousef, 1998), and raise intentions to quit (Ashford et al. 1989; Rosenblatt and Ruvio, 1996).

Implications

General, market-oriented policies like probationary employment are inappropriate for addressing the specific unemployment needs of disadvantaged groups. More focused state interventions are needed. For instance, if skill deficits really are a major unemployment issue for Maori, Pacific peoples, and youth, these deficits should be addressed directly. The government should provide more support for apprenticeships and other training programmes likely to get younger workers, in particular, into jobs. More support for training could mean a student allowance for shortage occupations or help with re-payment of students' loans, following programme completion. However, the success of any apprenticeship initiative would be contingent on suitable institutional and contextual support. In the absence of an active state and union role, via effective and relevant tripartite forums, in defining the scope and nature of apprenticeships, employers may be tempted to use apprentices simply as a source of cheap, short-term labour rather than as the basis for building an industry-specific skill base for long-term competitive advantage (Hall and Soskice, 2001; Wood and James, 2006).

The government could also provide support to bridging, work-study programmes, similar to those in Germany, which help polytechnic or university students obtain career-related work experience while still studying. This would help to ensure that the broader skills acquired at universities remain relevant to employers requiring industry-specific skills. If employers do not know how to value immigrants' or migrants' qualifications and work experiences, this problem should also be addressed directly. The New Zealand Qualifications Authority could reduce the hiring risks by publishing more information on the quality of foreign credentials. Industry associations could do the same for foreign work experience, especially if associated with larger and better known organisations overseas.

Should anything be done to alleviate employer concerns about dismissal compliance costs? This is certainly a political problem, regardless of whether or not it is a serious economic one. Failure to tackle employer concerns is likely to prompt a future National government to enact probationary employment, whatever its negative impacts. If firing incompetents or wrongdoers is so difficult in the New Zealand workplace, and it is not clear that it is, this should be addressed directly through specific changes to existing dismissal law rather than indirectly and only partially through probationary employment. At present, ambiguities and inconsistencies in the common law rules that necessarily emerge from the many decisions of the Employment Court and Employment Relations Authority can create confusion and uncertainty for employers, adding unnecessarily to their compliance costs. In future, greater clarity could be achieved by placing explicit, default dismissal procedures for poor performance, misconduct, and redundancy in a new schedule in the Employment Relations Act. Codified procedures could also be used to instigate a harsher disciplinary regime, which would allow employers to summarily dismiss employees for major offences and after just one warning for minor offences (or poor performance). The quid pro quo could be much harsher penalties for employers who failed to adhere to dismissal procedures in the schedule. Clearer legal, guidelines would make it less necessary for both parties to litigate to enforce their rights. If litigation were pursued, clearer guidelines would make the process more predictable and thus less financially risky to those who used it. Employees might also gain by knowing more precisely where they stood.

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