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The Employment Relations Act 2000: a Brief Overview and Suggested Changes

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Abstract

This paper gives an overview of the Employment Relations Act 2000, showing its genesis in the Employment Contracts Act 1991 and argues that further amendments to the legislation should be for genuine reason – of improving employment relations – rather than to simply appease self-interested sections of the electorate. Any advancement towards a balance of power between employers, unions and employees represents improvement in employment relations. We call for less rather than more change to allow parties to have confidence in the system and argue that when change occurs, it is prudent that changes be: required in the first instance, widely discussed, well thought out, well drafted and commonsensical. It is proposed that the 90-day trial period be repealed, that redundancy legislation be introduced and other important areas such as dismissal, collective bargaining and unions be left alone to improve employment relations in New Zealand.

Introduction

Our article is concerned with the Employment Relations Act 2000 (ERA). In November 2011, there will be a General Election and the possibility of further amendments to the ERA. If the ERA had represented a significant change to the pre-existing legislation, the parties to employment relations (employers, employees and unions and the state) would still have had over a decade to come to grips with the particular legislative philosophy. The reality is that rather than a decade, they have had over two decades, because as will be argued below, the genesis of the ERA was in fact the Employment Contracts Act 1991 (ECA).

Yet, despite the relative stability of the legislative philosophy, there have been numerous amendments to legislation during this period. We argue that, rather than continue with New Zealand's predilection for incessant tinkering with employment relations legislation, there should be a conscious effort to celebrate stability. The Court of Appeal strongly endorsed this view in *Aoraki v McGavin* [1998] (at 292): "It is imperative that employees and employers be able to plan with confidence and determine what their respective rights and obligations are." While the Court of Appeal was referring, in that instance, to legislation regarding redundancy, the quote is equally apposite to all areas of employment. Consequently, we suggest that proposed amendments be kept to a minimum and should be proposed only after careful consideration and for the purpose of improving employment relations and not simply to appease elements of the electorate.

Background

In marked contrast to the last two decades, the previous decade from 1982-1991 experienced extremely radical changes in legislative philosophy. In 1982, the key legislation was the Industrial

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Relations Act 1973 (IRA) and New Zealand was still in the so-called "Arbitration Era" (Geare and Edgar, 2007), which dated back to 1894 when the Industrial Conciliation and Arbitration Act (ICAA) was passed. Significantly, that Act was entitled "An Act to encourage the formation of Industrial Unions and Associations, and to facilitate the settlement of Industrial Disputes by Conciliation and Arbitration." Certainly, the 1894 Act had been re-enacted and had had many amendments but the underlying philosophy was unchanged. There were some significant changes during the 90 years – in particular compulsory unionism by law from 1936, followed by compulsory unionism by agreement from 1961.

The "Arbitration Era" effectively came to an end in 1984 when an Amendment Act made Arbitration available only if both employers and unions wanted it. The 1984 Labour Government's economic changes opened up the economy to overseas competition and resulted in widespread redundancies and increasing unemployment (see Table 1 below for the drop in employment 1985-9). The union movement was probably at its weakest for decades. Not surprisingly employers refused *en bloc* to take disputes to arbitration.

Although the Labour Government had weakened unions through their economic policies, their intent was expressed in the title to the new Labour Relations Act 1987 (LRA): "to facilitate the formation of effective and accountable unions." The LRA introduced "significant, indeed radical, changes in industrial relations" (Geare, 1989: 213). The Act was notable in that it had been widely discussed and well thought through before enactment. Its aim was to have strong unions able to collectively bargain with employers in an effective manner. Unions were now required to have 1000 members and membership remained compulsory by agreement. The most significant change in philosophy was that strikes (and lockouts) became legal over interest-type disputes – setting terms and conditions. This "Collective Bargaining Era" was to last only five years.

Although Labour was trying, by legislation, to create strong and effective unions, their economic changes had much more impact and the union movement was weakening. Two prominent organisations: the then New Zealand Employers Federation (NZEF) and the New Zealand Business Roundtable (NZBR) published a series of attacks on "unions and union officials, compulsory union membership and the system of wide coverage union-management documents" (Geare, 2001: 289). Time and again there was a call for flexibility in the labour market.

In 1990, National became Government and very quickly introduced the ECA. There were two notable features of the ECA:

(a) It was a very rushed piece of legislation, described as "poorly thought through in legal terms and which contains glaring ambiguities" (Anderson, 1991: 129) and with legal drafting which "was in many areas abysmal" (Geare, 2001: 292).
(b) The purpose of the ECA was "to promote an efficient labour market" and, in effect, this was seen to be achieved by allowing employers to do as they wished. As observed by Dannin (1992: 3) its provisions matched "with great precision" those of the NZEF and NZBR.

Also, not surprisingly, those two organisations were fulsome in their praise for the ECA and, in a joint publication, considered the Act to be "making an outstanding contribution to productivity growth" (NZBR and NZEF, 1992: 1). In contrast, Gill (2009: 37) points out that the years of the ECA coincided with "a substantial drop in OECD productivity rankings."

The Court of Appeal stated that "the Act is not anti-union, it may fairly be described as union-neutral" (United Food Workers, 1993: 370). Technically, this is correct, but given that, as described

above, previous legislation, for nearly a century, had supported unions and collective bargaining, the sudden and total removal of all support for unions and collective bargaining certainly appeared anti-union and "the impact of the ECA on unions was devastating" (Cooper and May, 2005: 4).

Unions under the ECA no longer enjoyed:

(a) sole bargaining rights
(b) protection from "member poaching" by other unions
(c) compulsory union membership by agreement – indeed that was now explicitly illegal
(d) sole access to the personal grievance procedure – the grievance procedure was now available to all employees, subtly removing a major selling point for unions

Indeed, collective bargaining was no longer supported by this legislation; it was permitted, but so was individual bargaining. The ECA purported to allow employees to "choose" collective bargaining or individual bargaining, but it also gave the same rights to employers. As a result, of course, if the parties had different "choices" only the more powerful would get its "choice."

The wish list discussed earlier of the NZEF and NZBR was granted to a significant degree. Unions were severely weakened, compulsory membership was made illegal and industry, regional and national union-management documents were almost all replaced by workplace agreements.

However, the ECA was not simply the statute. The total Act is the statute and common law – how it is interpreted by the Employment Court and the Court of Appeal. The Chief Judge's sentiments were expressed in his judgement in (*Ford v Capital Trusts* [1995] at 66) when he stated that "fortune may favour the strong, but justice must favour the weak." As argued elsewhere (Geare, 2001), common law resulted in a marked change in the ECA during the period it was in effect.

The Employment Relations Act 2000

Prior to the 1993 General Election, the Labour Party had outlined its proposed Employment Relations Act (ERA), which if they won the General Election would replace the ECA. At that time, those proposed reforms were described as "superficial rather than substantial, and are cosmetic rather than creative" (Geare, 1993: 203). In the intervening period, little has changed and although employer groups greeted the ERA with "howls of protest" (Cooper and May, 2005: 4), the howls soon subsided. Indeed, when the Labour-led Government proposed the Employment Relations Amendment Act 2004 (ERAA), employers again howled in protest, but this time because they considered the ERA did not need fixing. The ERA, with the 2004 Amendment, "represent moderate reform, a degree of re-regulation within a clear ECA context" (Cooper and May, 2005: 4).

It is worth emphasising that the following significant changes introduced by the ECA still remain in effect even after the ERA 2000 and the ERAA 2004 passed by Labour-led Governments:

a) Employers with sufficient power can ensure there is individual bargaining, regardless of the wishes of their employees.
b) In contrast to other Western democracies, compulsory union membership is still illegal.
c) The personal grievance procedure is still available to all employees, thereby removing a major "selling point" for unions.
d) Enterprise agreements, rather than industry or regional documents, are still the norm.
e) Collective bargaining still *may* take place, but unions do not enjoy sole bargaining rights or protection from membership poaching.

Certainly the ERA looks more union-friendly than did the ECA (which pretended unions did not exist). In s.3 the ERA states its object is:

(a) to build productive employment relationships …
  (i) by a legislative requirement "for good faith behaviour" – which, by implication, was more significant than the "implied mutual obligations of trust and confidence."
  (ii) "by acknowledging and addressing (sic) the inherent inequality of power in employment relations" – the acknowledgement is realistic, the claim that the inequality is "addressed" is, as argued below, questionable.
  (iii) "by promoting collective bargaining" – but, again as argued below, without much enthusiasm or significance.

During its tenure, the Labour-led Government did achieve a large increase in the number of unions in New Zealand. This was because the ERA requires that should collective bargaining occur, it is to be between a "union" and the employer. If employers wanted to collectively rather than individually bargain, they had to do it with a "union" so workforces were required to become a paper union to comply with the law. During the period December 1999-December 2001, as Table 1 below shows, the *number* of unions doubled. Union *density* also went up – but only from 21.1% to 21.6%. So, while some of these paper unions may actually function as real unions, there is little evidence to support this. Before passing the 2004 Amendment, the then Minister of Labour claimed she saw "a number of advantages with employers bargaining collectively with unions in good faith" (Wilson, 2003: 124). If the Labour-led Government had been serious about *promoting collective bargaining* and *addressing the inequality of power*, then a lot more needed to be done than what actually occurred. In effect, a return to similar legislation to the LRA 1987 would be required. It is very clear that the Labour Party, both when in power and now in opposition, has no intention of proposing that.

Table 1: Trade Unions, Membership and Union Density 1985-2006

Year	**Union membership**	**Number of unions**	**Potential union membership**		**Union Density**	
	(1)	(2)	Total employed labour force (3)	Wage and salary earners (4)	(1)/(3) **%** (5)	(1)/(4) **%** (6)
Dec 1985	683006	259	1569100	1287400	43.5	53.1
Sept 1989	684425	112	1457900	1164600	47.0	55.7
Dec 1991	514325	66	1518800	1196100	33.9	43.0
Dec 1995	362200	82	1730700	1357500	20.9	26.7
Dec 1999	302405	82	1810300	1435900	16.7	21.1
Dec 2000	318519	134	1848100	1477300	17.2	21.6
Dec 2001	329919	165	1891900	1524900	17.4	21.6
Dec 2005	377348	175	2105600	1719500	17.9	21.9
Dec 2006	382538	166	2109800	1764500	18.1	21.7

(1985 and 1989 are from Harbridge, May and Thickett (2003: 143); the rest are from Feinberg-Danieli and Lafferty (2007: 32)

Possible legislative areas for scrutiny

In the introduction, we indicated our preference was for change to be kept to a minimum, and to be for the purpose of improving employment relations rather than appeasing self-interested sections of the electorate. Political reality makes this hope more than somewhat naïve. However, it is surely problematic that legislative amendments are rarely accepted as necessary or beneficial, for example, the National-led Government's ERAA 2010 introduced changes to unions' right of access. Anderson (2010: 93) states "there was no rational reason for this change, but that is true of many of the changes in the Amendment Act", a view which was supported by Robson (2010: 98) who in considering the changes to mediation felt "it is equally difficult to assess whether this was ever a problem that required a remedy."

Rather than fixing a genuine problem, the change to unions' rights of access is more indicative of a subtle philosophical shift away from the ERA's mandate for increased cooperation and the focus on relationships and back towards the ECA's emphasis on flexibility and resistance towards unions. This amendment increases the power of the employer, thereby increasing the likelihood of conflict between employers and unions, a change that was neither necessary nor beneficial to employment relations in general.

It is, of course, possibly true that a high percentage of both employers and employees allow the never ending amendments to employment law to wash over them without any concern or acknowledgement. However, there is the point made by Davenport (2010: 96) that "participants in industrial relations are likely to view a change in the law as entitling different conduct …", and even if it only impacts a small percentage of participants, it is essential that changes be well thought out and result from a genuine belief they will improve employment relations.

Focusing on the ERA, there are four legislative areas we wish to highlight:

a) dismissals;
b) the 90 day trial period;
c) redundancy provisions; and
d) collective bargaining and unions.

Dismissals

Since the personal grievance procedure was introduced successfully in 1973 after an initial failure in 1970, employees have been able to take a grievance if they considered they had been "unjustifiably dismissed." Until the ERAA 2004 and 2010, the test of justification was left to common law. As argued elsewhere (Geare, 2007), case law developed along different lines. One approach was, as expressed by the Chief Judge in *NZ Food Processing Union v Unilever* [1990], that the dismissal be considered in all the circumstances to be substantively justified and procedurally fair. Within a few years, the Chief Judge expressed things somewhat differently and also somewhat contradictorily in *Drummond v Coca Cola Bottlers* [1995] at 232-3:

> It is now well settled that it is incorrect to look at dismissal separately from the point of view of substantive justification and procedural fairness, especially in that order for it is likely to lead to a mindset that on certain assumptions the dismissal must be justified, leading to a reluctance to defeat the making of those assumptions by criticism of what is sometimes described as 'mere procedure'. The true inquiry is one that looks at the dismissal overall but it would be no exaggeration to say that the inquiry into procedure should come first.

An alternative approval was expressed by the Court of Appeal in *Northern Distribution Union v BP Oil* at 483 as "the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken …" It is possible that the Court of Appeal used the word "would" after careful consideration. We suggest this is highly improbable, given their very reasonable observation in the "Oram" case (*W & H Newspapers v Oram* at 487) that:

> The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of 'could' rather than 'would'.

The Labour-led Government decided to "repeal" Oram in the 2004 Amendment and included a test of justification in s.103A:

> For the purpose of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

We see this reverse back to "would" as unfortunate. Taken literally, it implies that *no* dismissal is justified unless *all* fair and reasonable employers would do the same thing and dismiss. Research shows that seemingly fair and reasonable employers can take a variety of approaches to the same issue. For example, in a study of 150 general or plant managers' reactions to a theoretical case of employee theft where an employee admits theft to a supervisor, responses varied greatly (Geare, 1996). Indeed, some 78% stated they would probably dismiss, while 22% stated that they would give counselling and/or a warning. Of course, not all those surveyed may be considered fair and reasonable. However, 57 outlined their approach indicating impeccable procedural fairness, with a further 37 giving a reasoned response, but showing some procedural inadequacies. The final 56 gave a knee-jerk reaction to dismiss on the spot.

The ERAA 2010 appears to acknowledge this divergence and reverts back to "could", a move we consider sensible. The 2010 Amendment also specifies basic procedures and in s.103A(5) goes on to put in statutory form, what was well accepted in common law:

> The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –
> "(a) minor; and
> (b) did not result in the employee being treated unfairly."

Further amendment to this area is undesirable.

90-day trial period

The 90-day trial period was introduced by the ERAA 2008 and applied to employers with 19 employees or fewer. The ERAA 2010 amended the section so that it now applies to all employers.

The 2008 Amendment was rushed through under urgency. Roth (2009: 7) points out that "fast law tends to be bad law" and that the 90-day trial is a good example of this. Given that the 2010 Amendment simply extends the legislation to apply to all employers, the problems Roth observed still remain and so "it is not likely to accomplish what it is intended to do, and is more likely to achieve the opposite if employers are relying upon it for dismissals free of any legal consequence." (Roth, 2009: 7)

The Department of Labour Report on Trial Periods (Johri and Fawthorpe, 2010) summarised the official objectives of trial periods as:

- to encourage small and medium enterprises to take on employees
- to reduce employment relationship problems experienced by small businesses
- to provide opportunities for those who might suffer disadvantage in the labour market, including
    - women
    - youth
    - first-time workers
    - Maori and Pasifika
    - people returning to work after a period of unemployment or child rearing
    - people with disabilities or mental illness
    - migrants, or
    - people with overseas qualifications.

Those objectives are highly laudable but, unfortunately, there is little evidence that they will ever be achieved, and little probability that any policy maker actually believed they could or would be achieved.

We believe the 90-day trial period was introduced to appease those employer groups who had convinced themselves that there was a "grievance gravy train" (Woodhams: 8) encouraged by "no win no fee advocates" and even that some employees "may be provoking confrontations in the hope of winning a financial settlement through such advocates" (ibid). That report (p. 6) goes on to point out that those allegations had no foundations and also that "the median direct cost of all ERPs (employment relationship problems – on merit) including those proceeding to legislation represented was about $5,000, of which $2,800 represented payouts to employees."

A further myth about grievances is that small businesses experience more grievances than do large businesses. This is a misinterpretation of survey data and results in such claims as Roth (2009: 7), who suggests "surveys indicate that small and medium sized employers are more likely to have unjustifiable dismissal claims raised against them than larger employers, and such claims tend to occur within the first six months of employment." In fact, surveys only show that small businesses have more grievances *per 100 employees*. Woodhams (2007: 11) states

> the incidence rate per 100 employees per year was higher for small businesses (2.9) than for large businesses (1.2), indicating that employees are more likely to experience an ERP if they work for a small business than a large one.

What this means is that an *employee* in a small firm is more likely to be involved in an employment problem than an *employee* in a large firm – but *not* that small businesses have more grievances than large. In fact, Woodhams (2007: 11) shows

> smaller businesses were less likely than larger businesses to experience a problem (6% of small businesses had experienced a problem during the survey period, as opposed to 53% of large businesses. This is not surprising, given that large businesses employ more staff.

Overall, Walker and Hamilton (2009) consider there is a low incidence of grievances.

Some oppose the 90-day trial because it disregards "the elementary human dignity of consultation before dismissal" (Hughes, 2009: 3). We have sympathy with that sentiment, but our primary objection is that the 90-day trial period panders to employers who are poor managers. As Rosenberg (2010: 80) puts it, the

> legislation is encouraging poor personnel management practices such as failing to supervise employees adequately, failing to give them feedback to enable them to improve their performance, and using dismissal rather than good interview and employment practices to address the quality of the appointment process.

For good managers, the 90-day trial period is unnecessary. Good managers utilise effective selection processes, ensure new employees not only know what is required of them, but also are able to perform, or are receiving training, and monitor their performance and work attitudes. If there are problems, they are addressed. In rare cases employees may be dismissed – but the need for dismissal will be considerably lower when there is careful monitoring of performance and attitudes. Good employers reserve the use of dismissal for situations where the trust and confidence in the relationship has been destroyed.

Unfortunately for poor managers, the 90-day trial is likely to exacerbate the situation and make them worse by allowing them to continue in managerial roles with inadequate managerial skills because they feel they have the "let-out" of dismissal within the 90 days, there is no incentive for them to upskill. These poor managers will be less likely to monitor performance and attitude and so mediocre employees, who could have become adequate with monitoring, will be disadvantaged. Furthermore, employees bound by the 90-day trial period are at risk of being "let-go" for *less than* breaching the trust and confidence in the employment relationship because there are no legal consequences for the dismissal. While incidence statistics, according to Walker and Hamilton (2009) vary widely, overall they appear comparable to those internationally.

Although a National-led Government will almost certainly leave the 90-day trial period in place to appease employers with poor or no managerial skills, we strongly advocate its removal.

Redundancy legislation

In contrast to the 90-day trial period where we advocate a repeal of legislation, with regards to redundancy legislation we advocate that the new Government finally take redundancy out of the "too hard" basket and introduce redundancy legislation. The case has been argued over the years (Geare, 1983; Geare, 1999; Geare and Edgar, 2006) and consequently we will put forward only a brief discussion.

In the absence of comprehensive redundancy legislation, employees who do not have a redundancy agreement will receive whatever their employer chooses to give, what they are able to negotiate when in a very weak bargaining position or whatever compensation they are able to receive by taking a personal grievance over the manner of the dismissal. Over the years, liberal minded judges

have "interpreted" union-management agreements and legislation in what could be claimed either as "very liberal" or "judicially active", depending on your viewpoint.

The Court of Appeal in *Aoraki v McGavin* made a valiant effort to curb the judicial activism, which began back in 1983 with *Wellington Local Bodies* and continued through *Wellington Caretakers IUW v GN Hale & Son Ltd* [1990] 836 and *Brighouse and Bilderbeck*. However, while the Court of Appeal tried hard, it did not stop activism and it appears that it "simply required more creativity on the part of activists. Every comment in a decision is seen as a possible loophole and opportunity for further activism" (Geare and Edgar, 2006: 379).

As we argued in the introduction, employers and employees should be able to clearly determine what both their rights and obligations are. However, the absolute lack of clarity as to what is required in redundancy situations is illustrated in a very recent case *Vice Chancellor of Massey University v Wrigley and Kelly*, which involved the extent of information to be provided and consultation to occur over a redundancy situation, and whether information obtained "in confidence" can be kept confidential. New Zealand needs comprehensive, well thought out redundancy legislation – not the "piece-meal, half hearted" (Geare and Edgar 2006: 381) efforts made by the Labour-led Government in 2004. We very much hope that whoever wins the Election will have the courage and foresight to introduce comprehensive redundancy legislation – but we are not in the least confident that this will occur.

Collective bargaining and unions

We have already commented on this area so this will be brief. Given the Labour Party's apparent reluctance to address the "inherent inequality of power in employment relations" via collective bargaining, which would require increased support for proper unions and a legislative requirement for collective bargaining, this is one area we recommend be left alone. Alternatively, we advocate for stability of the dismissal legislation, for the 90-day trial period to be repealed and for the introduction of legislation for redundancy situations as a means to address, in part, the current inequality of power in employment relations.

As we, yet again, witness a gradual pendulum shift in employment relations in New Zealand, we argue for some stability for our legislative framework. Motivated by recent governmental concern for improving workplace productivity, this arena is currently witnessing either the proposal or introduction of a raft of legislative changes. These changes, according to the Department of Labour, are aimed at creating "a more flexible and responsible labour market", which in turn "is expected to contribute indirectly to improved productivity in a number of sectors" (Department of Labour Annual Report, 2010: 5). In all honesty, can the Government claim these changes are for the mutual benefit of employers and employees, or even for the benefit of enhancing employment relations in general? We think not. We see implicit in them a subtle shift in power leading to a deregulation of the labour market, evidenced by a weakening of employee rights and a gradual return to numerical flexibility – features very much reminiscent of the early 1990s. These changes will not prosper the employment opportunities of the disadvantaged, but rather they will work against them – inherently discriminating against the young and against women who leave and re-enter the workforce more frequently than do men.

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