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The Hobbit Dispute

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Even before the Government passed the Employment Relations (Film Production Work) Amendment Act, which allows a contracting relationship to exist unquestioned within the film industry for workers in that industry, regardless of whether or not the relationship is actually one of employment, performers in New Zealand faced the difficulties that all contract workers face in accessing their international rights to collective bargaining and freedom of association. It is hard enough for many New Zealand employees to join a union and bargain, even though their rights extend through the Employment Relations Act (ERA) 2000 to protection from unfair dismissal, extended union rights and other minimum code provisions. However, for contractors, who are outside the coverage of the ERA 2000 and are without a formal employment relationship, the limited rights they have come with high risks for any who seek to exercise them. The Hobbit dispute simply highlighted this.

I have written a detailed account of the dispute over the Hobbit, which can be found at http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm

This short piece is to make the link between the Hobbit dispute and the general legal issues of contract workers. It is limited, in both regards, to an introduction.

The international rights to collective bargaining and freedom of association extend to contract workers who are explicitly recognised by the International Labour Organisation (ILO) in the decisions of the Freedom of Association Committee.

The principles are enshrined in the constitution of the ILO. Regardless of whether or not a country has ratified the core conventions of 87 and 98, all members of the ILO are considered bound by the principles of these conventions through their commitment to the Organisation's constitution. While New Zealand is still yet to ratify 87, it is nonetheless required to meet its obligations in this area.

The Freedom of Association Committee says

> By virtue of the principles of freedom of association, all workers – with the sole exception of members of the armed forces and the police – should have the right to establish and join organisations of their choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which so often is non- existent , for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organise (ILO, 2008: 53)

"No provision in Convention No 98 authorizes the exclusion of staff having the status of contract employee from its scope" (ILO, 2008: 180). The contract status of the performers on

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The Hobbit was used viciously and wrongly by the Government, Warner Bros. and Peter Jackson to avoid negotiations on terms and conditions and to discredit the performers claims to collectively negotiate.

Numerous legal opinions were sought on the implications of the Commerce Act on the claim, and a variety of opinions were given. Despite providing a copy to Warner Bros., the Attorney General has refused to release the Crown Law opinion upon which he relied when claiming in the media:

> There is an issue as to whether New Zealand's Commerce Act 1986 ("the Act") prevents the Hobbit movie producers from entering into a union-negotiated agreement with performers who are independent contractors. The New Zealand Government has obtained advice from the Crown Law Office... that confirms the Act does prevent the producers from doing so. Section 30 of the Act effectively prohibits competing independent contractor performers from entering into or giving effect to a contract, arrangement or understanding that has the purpose, effect or likely effect of fixing, maintaining or controlling process for good or service – which would include performance services (as cited by Onfilm, 2010).

Peter Jackson's legal representative also provided an opinion from employment lawyer, Peter Churchman:

> You will appreciate by now, a collective agreement such as you have been seeking, is prohibited by S30 of the Commerce Act as constituting an arrangement or understanding that has the purpose, effect of likely effect of fixing, maintaining or controlling prices for goods or services. It is also prohibited on the basis that it would substantially lessen competition in the market place.

The Media Entertainment and Arts Alliance (MEAA) got an alternative but limited view from Simpson Grierson's James Craig and Alicia Murray (2010: 1).

> The Commerce Act does not absolutely prevent the producers of the Hobbit movie from entering into a union-negotiated agreement obtained through collective bargaining for the engagement of performers in New Zealand.
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> ... However there are two possible exceptions that may apply:
> The "recommendations as to price" exception in section 32 which allows associations of more than 50 people to make recommendations as to prices for services; and The joint venture exception in section 31, which excludes from S30 agreements that relate to the joint supply of services in pursuance of a joint venture (ibid).

Simpson Grierson also raised the issue that unless the performers could be seen as being "in competition with each other" the Act may not apply.

These legal views raise implications for all contract workers, given the prevalence of this type of work in New Zealand, and if the Government's view of the rights of contract workers to bargain is correct, then clearly New Zealand is in breach of its international obligations. It cannot be consistent with public policy that rights as fundamental as the core ILO conventions can be so easily removed when there is so little protection against the misuse of contracting provisions – creating, as we saw in the Hobbit, huge incentives for employers to favour this type of employment arrangement over others.

I am not sure, however, that the legal view is correct for two reasons.

Firstly, these legal views only represent one part of the Commerce Act; in particular, the purpose of the Act and the definition of what competition is (are actors for different roles rally in a competitive market). What is not represented is whether the Commerce Commission's wide powers to grant authorisations for restrictive trade practices would be available to a group as vulnerable to exploitation as employees employed in a contract ruse. This includes before or after a contract is entered into and if it is satisfied that the contract in all circumstances results in a public benefit that outweighs the lessening of competition. None of this was discussed in the hysterical baying of "it's illegal!" during the disputes over the Hobbit.

Secondly, it was a trade union that was seeking to negotiate for these workers so the Trade Union Act 1908 is, therefore, relevant. This Act applies to workers beyond 'employees' covered in the ERA 2000. Developed from UK law where, in the 1860s trade unions had been declared by the courts to be cartels, and in restraint of trade for seeking to bargain within the master/servant relationship (an employment relationships similar to today's version of a contractor), the Trade Unions Act provides important exemptions for unions to the Commerce Act.

In particular, a Trade Union, in the TU Act, means a combination for regulating the relations between workers and employers for imposing restrictive conditions on the conduct of any trade or business, irrespective of whether such a combination would or would not have been deemed to have been an unlawful combination by reason of one or more of its purposes being in restraint of trade. The Act is clear that the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void any agreement. Clearly, Warner Bros could have entered into negotiations during *The Hobbit*, but the killer is that it did not have to under the law; they also chose not to and, in turn, got massive state support for that position.

However, regardless of this, the Hobbit dispute raises some very important issues about the suitability of the current law for protecting contract workers with regards to the thousands of workers who are selling their labour but are being denied the full benefit of the employment relationship. An employment relationship provides more than simply the right to bargain – it creates obligations to negotiate and a whole range of other protections including union rights, protection from dismissal, minimum code provisions etc. These provisions should be available to all workers who are simply selling their labour. Wider tax refunds should be available to workers who, by nature of their work, spend their own income on winning employment (actors spend money on audition travel, costumes, make up, training etc, but this would not be deductable from their income if they were employees). Incentives for employers to use contractor relationships to engage working people should not include the removal of rights to the most basic provisions.

The employment relationship evolved from the exploitation of the master/servant norm of the previous century. The relationship evolved to provide workers with rights enabling them to organise and get a better life for themselves. Now however, it is being wound back to a place where the previous master/servant regime is considered a normal part of commerce; it has now been imposed on the entire New Zealand film industry and no doubt others will follow.

References

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