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An Uneven Playing Field – Partial Strikes

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Introduction

In 2002, fire fighters in the United Kingdom went on strike, creating widespread fear and causing the armed forces to step into the breach to provide emergency service cover. In New Zealand, the announcement in 2011 that 1,800 fire fighters were to undertake strike action provoked far less panic due to the nature of that strike action. The difference was that, whilst the fire fighters in the United Kingdom had been on complete strike, the New Zealand fire fighters were only partially striking. The fire fighters continued to turn up to work and perform core fire fighting duties, but they did not undertake other usual duties such as paperwork, training, equipment maintenance, installation of fire alarms, and community education programmes.

There is a growing trend in the use of strategic or partial strikes as opposed to the traditional form of industrial action whereby employees walk off the job completely. Partial strikes may include bans on particular activities such as answering phones or filling in paperwork, working "to rule", going slow, bans on overtime, or taking breaks at the same time as colleagues, in order to cause disruption to the employer. The reason for this type of strike action is clear – employees do not get paid when they completely withdraw their labour, and have, therefore, sought creative ways to strike without sacrificing pay. As the law currently stands in New Zealand, the Fire Service Commission was not entitled to reduce the wages of the striking fire fighters – and yet, the fire fighters were not fulfilling all the requirements of their employment agreements.

There is a natural balance of power between employees and employers engaging in "traditional" industrial action. Whether the employee is striking or the employer has locked them out, the result is that the employee does not get paid and, the employer does not get any work done. However, the growing trend of strategic or partial strikes is tilting this balance of power in favour of employees. If employees can disrupt their employer's business by undertaking a partial strike whilst suffering no loss of wages, there is no incentive for them to reach an agreement and bring an end to the strike action.

Recent evidence of this consequence has been demonstrated within the public sector over the past two years where partial strike action and work to rule tactics have been a common feature of protracted bargaining. Given the lack of adverse impact on the employees conducting these strikes, the action has, in many cases, carried on for a number of months causing significant disruption to those organisations.

This paper reviews the development of the law in New Zealand and concludes that the balance of power in industrial action has been tilted in such a way that there is now a need for legislative reform.

The Balance of Power

Historically, there has been a natural balance of power between employees and employers in terms of the use of industrial action. The rights of each have been positioned to ensure the freedom of both to pursue their rights and interests in bargaining. This balance has occurred because during a traditional strike or a lockout, whilst an employee receives no wages, an employer has no output. The

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disadvantage experienced by both parties during a strike or lockout places an automatic control on the duration and frequency of such actions. Neither side can undertake industrial action without due consideration of the negative consequence they will experience from such action.

However, this traditional balance of power appears to have been altered by the advent of more creative approaches to industrial action.

Partial Strikes

A partial or strategic strike occurs when employees do not walk off the job completely but refuse to undertake certain parts of their job. For example, university lecturers who refuse to mark students' essays but continue to carry out all the other duties of their position are on partial strike. A 'go-slow' or 'work-to-rule' is also a partial or strategic strike. Employees continue to perform their duties but seek to reduce their productivity and/or efficiency to the minimum necessary to technically perform the requirements of their job description. Any type of partial strike has the potential to significantly impact on an employer's productivity and cause disruption to the employer's business.

The Employment Relations Authority has interpreted the Employment Relations Act (ERA) 2000 in such a way that the only sanction available to employers facing a lawful partial strike is to suspend the striking employees altogether and, consequently, have no work performed. In this regard, the Employment Relations Authority has found that the ERA, in its current form, prevents employers from reducing the wages of partially striking employees.

Thompson and Ors v Norske Skog Tasman Ltd

In *Thompson and Ors v Norske Skog Tasman Ltd*,[1] the Employment Relations Authority considered the issue of whether employers are entitled to dock the wages of employees who engage in partial strike action. The four employees concerned in this case were control system tradesmen at the Kawarau paper mill. From August to December 2010, they withdrew their labour but remained on site, solely for the purposes of covering essential and emergency services. Initially, their employer, Norske Skog Tasman Ltd, continued to pay them full wages, notwithstanding the partial strike, in the expectation that the strike would be a short one. However, after the strike action had continued for a month, the company reviewed the appropriateness of continuing to pay full wages in light of the prolonged nature of the dispute.

The company then sent the employees a letter informing them that their wages would be reduced by 80%. They were told that they did not need to be on site during their shift but had to lodge their contact details with the Safety and Access Team so they could be contacted as necessary. The employees' union was invited to provide feedback on the proposed arrangement prior to the arrangement being implemented. The union's response was that the company was proposing a variation to the contract. Subsequently, the union claimed that the workers were not on strike. Ultimately, the company docked the employees' wages by 80% reflecting the reduction in output.

In the Employment Relations Authority, the employees claimed that there was no basis upon which their employer could legally reduce their wages, and that the reduction was a breach of s 4 of the Wages Protection Act 1983. Section 4 of the Wages Protection Act states that, except in the specified cases, "an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction."

[1] *Thompson and Ors v Norske Skog Tasman Ltd* [2011] NZERA 291.

If employees are on strike, that is, a total strike, and are not working at all, then wages do not become payable. The employees in this case claimed that during a partial strike an employer has a choice between accepting the partial performance or suspending the striking employees.

The Authority referred to *Postal Workers Association v NZ Post Ltd* (see below) and agreed with the decision in that case that, to apply the doctrine of abatement, would be inconsistent with s 85(1)(c)(i) of the ERA 2000.[2] The Employment Relations Authority held that Norske Skog had acted unlawfully as it was not entitled to make a deduction from the employees' wages, even though both parties accepted that the employees were performing significantly reduced duties.

As a catchall, the Authority stated that, even if this conclusion was incorrect, the company was not able to deduct wages in the way that it did as the deduction was based on an arbitrary assessment of the work carried out. No records were kept and the employer was unable to show that the deductions accorded with the work not being carried out. Ultimately, the Authority made it clear that had the strike been a full strike, the employees' entire wages could have been docked. However, as it was only a partial strike and the employees continued to undertake part of their duties, they were entitled to their full wages, and no reduction could be made.

Postal Workers Association v New Zealand Post Limited

The Authority had reached this same conclusion in an earlier case involving New Zealand Post. In *Postal Workers Association v New Zealand Post Limited*, posties delivered some of the mail assigned to them but posted the rest of their allocated mail back into public post boxes along their delivery routes. The posties were undertaking some of their duties but refusing to carry out others – meaning New Zealand Post faced a partial strike situation. New Zealand Post did not discover what had occurred until the following day, at which point it took immediate steps to suspend the posties involved. New Zealand Post 'backdated' the suspension notices to take effect from the beginning of the day on which the partial strike occurred.

The Employment Relations Authority had to consider two issues – could an employer 'backdate' a suspension notice; and could an employer reduce the wages of an employee refusing to undertake all their duties? The first of these questions was easily disposed of, with the Authority finding that the statutory scheme for suspension was not open to being imposed retrospectively.

This meant that New Zealand Post could not justify refusing to pay the striking workers on the basis that they were suspended at the time the strike occurred. Accordingly, the Authority turned to the second question – is an employer entitled to dock the wages of an employee who is performing only part of their normal duties? The Employment Relations Authority considered the common law doctrine of abatement as this had been applied in the leading United Kingdom case relating to partial strikes *Miles v Wakefield*.[3]

The Authority was asked to consider whether the doctrine of abatement was available in New Zealand employment law for breach of contract as between an employer and an employee, as it is in the United Kingdom. The Authority considered s 85(1)(c)(i) of the ERA 2000; section 85(1)(c)(i) states that "lawful participation in a strike or lockout does not give rise to any action or proceedings for a breach of an employment agreement." This section prevents a lawfully striking employee from being sued for damages for breach of their employment agreement.

[2] *Postal Workers Association v New Zealand Post Limited* (2007) 8 NZELC 98,918 (ERA).
[3] *Miles v Wakefield* [1987] 1 All ER 1089.

The contradiction, then, is that the doctrine of abatement is a remedy for breach of contract – but employees are protected from claims for remedies for breach of contract in the event of participation in a lawful strike. On this basis, the Authority held that abatement was inconsistent with the statutory scheme in New Zealand and, therefore, was not available under New Zealand employment law. To apply the abatement doctrine would remove part of the benefit of what is otherwise an immunity for striking workers from civil suit, and would, therefore, be inconsistent with s 85(1)(c)(i). Further, the Authority found that to apply the abatement doctrine would be inconsistent with the provision for the suspension of striking workers. The Authority held that surprise or wildcat strikes are permitted by the legislation and the employer's only redress in these circumstances is to suspend striking workers. Consequently, the posties were entitled to full pay for all hours worked on the day the partial strike occurred.

An employer's statutory power to suspend striking employees without pay is based on s 87 of the ERA 2000. Suspension is not necessary in the case of a full strike as the employees are not undertaking any work and, therefore, are not entitled to be paid. However, the Authority's decision means that the options available to an employer in the event of a partial strike are either to accept the partial strike action and pay the employee full wages, or to suspend the employee and pay no wages.

In a situation such as that faced by New Zealand Post, where the partial strike action was not discovered by the employer until after the event, the employer has no ability to suspend the employee and, therefore, has no option but to pay full wages. The Authority acknowledged that "guerrilla" tactics could legitimately be used by employees, but did not comment on the fact that this could mean that employers would have no ability to respond to employees striking unexpectedly. The result is to give employees significant power to disrupt an employer's business without suffering any repercussions.

Miles v Wakefield

In order to understand the Employment Relations Authority's decision, it is necessary to consider the House of Lords decision in *Miles v Wakefield,* which is the leading English case on partial strikes. The case was about a superintendent registrar of births, deaths and marriages who, as part of industrial action and in breach of his duties, refused to conduct marriage ceremonies on Saturday mornings, although he carried out his other duties on that morning. The Council informed Mr Miles that he would not be paid for work on Saturdays unless he was prepared to undertake the full range of his duties. When he refused, the Council withheld that part of his wages relating to Saturday work. Lord Templeman referred to the situation as Mr Miles refusing to work "efficiently" on the Saturday.

The purpose of declining to work efficiently on Saturday was to inconvenience the public and thereby advance the union's claim for higher salaries. Lord Templeman stated:[4]

> The legislation does not protect the worker against losing his wages during a period of industrial action. If the worker were protected against losing both his job and his wages, nearly every threat of industrial action would result in capitulation of the employer.

The House of Lords recognised that balance in industrial action was necessary and if it was removed, all the power would be in the hands of the employee – inevitably resulting in the eventual capitulation of the employer. Ultimately, the employee hopes that the damage inflicted on the employer due to the industrial action will drive the employer to the bargaining table before the loss of wages suffered by the employee drives the employee back to work.

[4] Ibid, at 1097.

Working properly, Lord Templeman summed up the balance as:[5]

> In a contract of employment wages and work go together. The employer pays for work and the worker works for his wages. If the employer declines to pay, the worker need not work. If the worker declines to work, the employer need not pay. In an action by a worker to recover his pay he must allege and be ready to prove that he worked or was willing to work.

Mr Miles' counsel argued that there were only two options open to the Council: to dismiss Mr Miles or pay him in full.

Ultimately, the House of Lords held that where strike action is in the form of working inefficiently, the employer may decline to accept any work, and the employee will not then be entitled to wages. Alternatively, the employer can accept the limited work that the employee is offering, and reduce wages to reflect the level of work the employee is providing:[6]

> The worker whose industrial action takes the form of 'going slow' inflicts intended damage which may be incalculable and non-apportionable but the employer, in order to avoid greater damage, is obliged to accept the reduced work the worker is willing to perform. In those circumstances, the worker cannot claim that he is entitled to his wages under the contract because he is deliberately working in a manner designed to harm the employer. But the worker will be entitled to be paid on a quantum merit basis for the amount and value of the reduced work performed and accepted.

In determining the right of the employer to reduce wages, the House of Lords applied the concept of the remedy of abatement. The underlying principle is that wages are remuneration and must be earned; In a claim for wages under an employment contract, the worker must assert that he worked or was willing to work. An employee could only claim wages if s/he was willing to work for them. If the employee was not willing to work, then his/her wages could be abated accordingly.

As Mr Miles had not been ready and willing to work, and even, in fact, refused outright to undertake certain parts of his job, the House of Lords upheld the employer's deduction of salary as appropriate.

The statutory scheme and abatement

As explained briefly above, abatement is a remedy for breach of contract when one party does not provide the other party with the full benefit under that contract. In general, it is confined to contracts for the sale of goods. For example, a purchaser has contracted with a seller to purchase 100 widgets for a total of $200 but only 70 widgets are provided, the cost is abated accordingly and the purchaser only has to pay $140. The doctrine operates as a remedy for breach of contract. The House of Lords has extended the doctrine to employment contracts in the United Kingdom (*Miles v Wakefield*). However, in New Zealand, the Employment Relations Authority determined that it could not apply the common law doctrine as it is inconsistent with the statutory scheme.

The application of *Miles v Wakefield* and abatement in employment cases in New Zealand was considered in passing by the Employment Court, prior to the two recent Employment Relations Authority cases discussed above. In *Bickerstaff v Healthcare Hawkes Bay Ltd* Chief Judge Goddard stated:[7]

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[5] Ibid, at 1098.
[6] Ibid, at 1099.
[7] *Bickerstaff v Healthcare Hawkes Bay Ltd* [1996] 2 ERNZ 680 at 11.

> The doctrine of abatement announced by the House of Lords in *Miles* was based on the premise that the employer could sue the striking employees for damages for breach of contract but should not have to wait so long and could make deductions from their wages at their source in respect of any non-performance resulting from concerted industrial action. The underlying premise of ability to sue for damages in such situations has been rendered unreliable for New Zealand by s68 and accordingly the right to abate at source may have been abolished as well. However, I will reserve the expression of a concluded view on the precise effect of s68 for a case in which the point is argued.

The reference to s 68 is to the now repealed Employment Contracts Act (ECA) 1991. The underlying intent of s 68 was materially similar to the intent of the current s 85 of the ERA 2000. Section 68 required the Tribunal or the Court to dismiss any proceedings brought under the ECA relating to participation in a lawful strike for breach of contract. Chief Judge Goddard's obiter comment was, to the effect, that the reason given by the House of Lords for applying the doctrine of abatement could not be similarly applied in New Zealand due to the statutory scheme preventing breach of contract claims due to participation in lawful strikes.

In taking part in a partial strike by refusing to fulfil all their duties while at work, an employee is breaching their employment agreement. Employers are prevented under New Zealand law for taking any action for breach of an employment agreement against an employee for lawful participation in a strike. The doctrine of abatement is a remedy for a breach of contract action. To the extent that a breach of contract action is statutorily barred, then it does seem that abatement is not available under the present ERA 2000. However, there remains an argument that the employer is not making a 'deduction' from employees' wages, which may be in breach of the Wages Protection Act. Rather, the employer is making a 'reduction' resulting from the employee not being entitled to pay for work that they did not perform.

Different Approaches

New Zealand

The New Zealand cases discussed above demonstrate an increasingly sophisticated approach to industrial action. The aim of the parties is to cause maximum inconvenience or damage to the other party, whilst minimising the adverse impact on themselves. However, the increasing use of partial strike action does arguably skew the natural balance of power in industrial action in favour of employees. The effect is that employees have the ability to engage in strategic strike action indefinitely, if necessary, without suffering any adverse consequence in terms of loss of pay.

Whilst employers may counter this type of activity by suspending striking workers, this depends firstly on the employer having notice of the strike action. In the *New Zealand Post* case, the employer did not become aware of the employees' actions until it was too late to suspend. Secondly, the employer has to then decide whether to suffer the drop in output which will occur if it is forced to suspend employees outright. The same considerations are applicable to any decision by an employer to lock out.

It is noted that the decision in *Southern Local Government Officers Union Inc v Christchurch City Council* relating to "technical" lockouts provides employers with the option of locking employees out of some but not all of their duties,[8] provided it can ring fence the pay which relates to the specific duties of which the employees are locked. However, this option is not a direct match or counter

[8] *Southern Local Government Officers Union Inc v Christchurch City Council* [2007] ERNZ 739.

balance to the ability of employees to engage in partial strikes, as the employer still suffers a corresponding adverse consequence in the form of a loss of productivity.

United Kingdom

In the United Kingdom, employers may deduct pay from employees taking part in full or partial strike action. An employer is entitled to refuse partial performance by an employee of their duties. The employer can instruct employees that they should only attend work when they are prepared to work in full compliance with their employment agreement. Until they do so, they will have no entitlement to be paid. Alternatively, an employer may accept partial performance and reduce pay accordingly. This raises the question of how an employer may assess the level of deduction to be made from an employee's wages in the event of a partial strike.

Miles v Wakefield found that the reduction in wages does **not** have to be proportionate to the reduction in performance of the employee. Although Mr Miles was carrying some of his duties on Saturdays, he was not paid for any work that he undertook on Saturdays. This principle was also exemplified in the 1989 case of *Wiluszynski v London Borough of Tower Hamlets*.[9] In that case, employees were instructed by their union not to answer elected members' queries. Responding to such queries formed only a very small part of the employees' roles. The London Borough of Tower Hamlets warned the employees, including Mr Wiluszynski, that until they were prepared to work normally and undertake all of their duties, any work carried out would be regarded as voluntary and would not be paid. The employees were not suspended from duty, but were told that their presence on the Council's premises was not required until they were prepared to resume normal working. Mr Wiluszynski was one of the partially striking employees. Consequently, the Council withheld Mr Wiluszynski's whole salary for the duration of the partial strike.

Following the House of Lords in *Miles v Wakefield*, the Court of Appeal found that the fundamental principle is that an employee who sues for remuneration under a contract of employment must aver and prove that he was ready and willing to discharge his own obligations under that contract. The Court of Appeal held that, as *Miles v Wakefield* had established that an employee is not entitled to remuneration under the contract of employment unless he is willing to perform that contract, the Council was entitled to say to Mr Wiluszynski that if he did not fulfil his full range of duties, he would not be paid and should not attend work.

Mr Wiluszynski was not entitled to pick and choose what work he was willing to do under his contract. The Court of Appeal held that he could not have it both ways – he could not refuse to comply with his contract yet demand payment under that contract. The Court of Appeal also held that the Council could not have it both ways – having told Mr Wiluszynski that he did not have to attend work; the Council could not give him directions to work and refuse to pay him. Managers at the Council had been instructed not to pass work on to the striking employees and striking employees were reminded daily that any work they did was voluntary.

The Court found, however, that it was reasonable for the Council to allow staff involved in the dispute to come and go as they wished. The Council could not be expected to take action physically to prevent staff from entering the premises – a lockout was impractical and would simply have worsened relations. Ultimately, the Court of Appeal held that Mr Wiluszynski was in breach of his contractual obligations and the Council was, therefore, entitled in refusing to pay him and had done nothing by way of giving him directions to work or otherwise which disentitled it from asserting that position.

[9] *Wiluszynski v London Borough of Tower Hamlets* [1989] IRLR 259.

Mr Wiluszynski had only refused to undertake a very small portion of his duties. Nonetheless, the Court of Appeal accepted the Council's position that Mr Wiluszynski was entitled to no pay at all for the days on which he refused to undertake his full duties. This case has very particular circumstances in that the Council specifically informed the striking employees that they would not be paid, continued to inform them of this daily, did not require their presence at work, and did not direct them to undertake any work. However, it demonstrates that the situation in the United Kingdom is the polar opposite from New Zealand. Under New Zealand law, a partially striking employee is entitled to full wages. Under United Kingdom law, a partially striking employee is entitled to no wages.

Australia

On the face of it, the situation in Australia is much less complicated than in either New Zealand or the United Kingdom as it is specifically dealt with in statute. Under Australia's Fair Work Act 2009, if employees undertake "partial work bans" the employer has a range of options from which to choose how to respond. A partial work ban is the Australian term for what we refer to as a partial strike – employees performing part of their duties but refusing to undertake others.

Under s 471 of the Fair Work Act, an employer can dock an employee's wages due to the employee refusing to perform part of their duties. The employer must give the employee written notice that, because of the industrial action, the employee's pay will be reduced by a specified proportion. The employer is then entitled to reduce the employee's pay in accordance with that written notice. Regulation 3.21 of Australia's Fair Work Regulations 2009 outlines how the proportionate reduction in payment is to be determined:

- **Step 1**: identify the work that the employee is failing or refusing to perform.
- **Step 2**: estimate the usual time that the employee would spend on performing that work during a day.
- **Step 3**: calculate the time estimated in step 2 as a percentage of the employee's usual hours of work for a day.

  The solution is the proportion by which the employee's payment will be reduced for a day.

A second option open to the employer is to inform the employee that they will not be paid at all and refuse to accept the performance of any work by the employee until the employee is prepared to perform all of his or her normal duties. This is equivalent to the ability under New Zealand legislation to suspend the employee for the duration of the strike, but appears to be framed in a less confrontational manner.

Australian employers are, therefore, able to respond effectively to a partial strike. The employee's wages can be reduced in direct proportion to the work that they are not undertaking; or the employee can be suspended on no pay until they agree to fulfil all of their duties. This means that the traditional balance in industrial action between the interests of the employer and employee is maintained during a partial strike. There is equal incentive for both parties to return to the bargaining table.

An employee must be notified of the proposed reduction in wages and is consequently able to decide whether the proposed partial strike action is worth the reduction. If the employee considers that the proposed reduction in wages is not reasonable, the employee may make an application under s 472 of the Fair Work Act and have Fair Work Australia determine the amount by which the payment should be reduced. Fair Work Australia is the Australian national employment relations tribunal (equivalent to New Zealand's Employment Relations Authority).

An employer can only reduce wages from the day *after* written notice is given. Consequently, were the circumstances of the New Zealand Post strike explained above to occur in Australia, the employer would not be able to reduce wages for the day on which the partial strike action occurred. If the Australian employer does not know about the partial strike action – there is still no effective sanction.

It is interesting that whilst the Australian legislation sets out a specific formula for employers to apply in determining the reduction in wages, if the issue is put before Fair Work Australia, that authority has a broad discretion to determine the appropriate reduction in wages. Fair Work Australia's discretion involves taking into account:

- whether the proportion specified by the employer was reasonable having regard to the *nature and extent* of the partial work ban; and
- *fairness* between the parties taking into consideration *all the circumstances* of the case.

Given that the factors to be taken into account by employers and Fair Work Australia are different, it would not be surprising for them to come to different conclusions in relation to the appropriate reduction in wages. The case of *Transport Workers Union v Department of Territory and Municipal Services (ACTION)*[10] demonstrates this. In this case, the employees were bus drivers who gave notice to their employer that they intended to undertake a partial strike by refusing to collect cash fares. In response, the employer issued notices pursuant to s 471 of the Fair Work Act informing employees that their wages for each day, if they took part in the partial strike, would be reduced by two thirds.

The union took the case to Fair Work Australia claiming that a reduction of two thirds was disproportionate and that the collection of fares by drivers would account for no more than five or six minutes of a driver's time on an average shift. The union argued that applying the three step formula in the Regulations would lead to a much smaller reduction in wages.

Fair Work Australia accepted that the employer had to apply Regulation 3.21 but emphasised Fair Work Australia's greater discretion in light of s 472. Fair Work Australia was not required, or allowed, to determine the dispute merely by applying the formula in Regulation 3.21. Ultimately, Fair Work Australia determined that the proportion of two thirds specified by the employer was not reasonable and found that fairness required it to determine a reduction more reasonably representing the "extent" of the action proposed.

This case demonstrates that whilst an employer could undertake an exemplary calculation in applying the formula in Regulation 3.21, Fair Work Australia must take into account different considerations which can substantially alter the final determination. It seems incongruous to have the employer's and Fair Work Australia's calculations being undertaken on substantially different bases.

The second difficulty with the Australian approach is the requirement for employees to appeal the matter to the equivalent of the Employment Relations Authority if they are not happy with the proposed reduction. Industrial action may occur without much notice, and accordingly a more responsive and flexible approach would seem to be preferable.

Proposed Solution

The obvious solution to the imbalance of power currently created in New Zealand by the ability of employees to undertake partial strikes with no reduction in wages is to provide a mechanism for the proportionate reduction of wages in such situations. The approach taken in the United Kingdom of docking a partially striking employee's wages completely would not fit well in the New Zealand

[10] *Transport Workers Union v Department of Territory and Municipal Services (ACTION)* [2010] FWA 4558.

context as it does not appear to accord with the principle of good faith. Furthermore, it appears to distort the balance of power between the parties in favour of the employer.

Whilst the Australian scheme provides flexibility and seeks to address the power imbalance issues, the difference in the tests to be applied by the employer and Fair Work Australia in assessing the reduction in pay, appears to encourage litigation. New Zealand needs to find a flexible solution to the problem that fits within the New Zealand context and is relatively easy to implement. Firstly, the solution needs to allow for a reduction in wages that is fair and proportionate to the employee's reduction in work. As the employer and employee are likely to disagree on the appropriate reduction in wages, it is necessary to provide quick access to an independent decision maker.

In the New Zealand scheme, Labour Inspectors are independent experts who already have a statutory role in determining pay issues applying broad discretion. The ERA could be simply amended to enable an employer to reduce the wages of a partially striking employee in the amount to be determined by a Labour Inspector. In making such a decision, the Labour Inspector would hear from both parties and have discretion to determine the issue in accordance with the principles of natural justice.

Rather than allowing one of the parties to make a decision on reduction in the first instance, likely leading to disputes in the majority of situations, the initial decision would be made by an independent authority. Parties wishing to dispute the Labour Inspector's determination could appeal to the Employment Relations Authority. This would allow a fast, effective and flexible response to employees undertaking partial strike action.

Taking this step would redress the current imbalance of power that exists in industrial action, and would create an incentive for both parties to return to the bargaining table. This is surely consistent with the principles of the ERA 2000.

Post Script

Subsequent to writing this paper, there have been two developments. Firstly, the National led Government has announced its intention to amend the ERA to address the issue of partial strikes – the mechanism is still unclear. Second, the Employment Relations Authority has referred a case to the Employment Court which deals directly with this issue.[11] That case is due to be heard in April 2012.

Whether the Employment Court's decision supersedes the need for legislative intervention remains to be seen.

[11] *NZPSA v Secretary for Justice* [2011] NZERA 528 9428.