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Precarious Work – New Zealand Experience

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Introduction

The legal regulation of precarious or insecure work is one of the major labour market policy issues facing New Zealand. Although it is difficult to find accurate figures, it appears at least 30 per cent of New Zealand's workforce – over 635,000 people – are affected by precarious/insecure work.[1] Precarious work is characterised by a fundamental uncertainty of pay, conditions and duration of work and includes work described as causal, zero hours, seasonal contracting (including labour hire) and fixed-term types of work. While various types of work have always been insecure, the increase in precarious work globally has increased since the adoption of the flexible labour market practices that are associated with a neo-liberal policy framework.

This article will examine the current legal framework and how it accommodates the trend towards precarious work. This analysis will include the various recent attempts to change the statutory framework to both enable more flexibility and to provide greater legal protections for employees subject to precarious work. Although the focus of the article is on the New Zealand experience, the increase in insecure forms of employment has been experienced globally. The International Labour Organisation (ILO) recognised this trend and its detrimental consequences on both wages and conditions of employment when it adopted the Decent Work Agenda as an operational strategy to implement the 1998 Declaration on Fundamental Principles and Rights at Work. The four strategic objectives of the Decent Work Agenda are to promote and implement international standards and rights at work; to create decent employment and income opportunities for all men and women; to enhance coverage and effectiveness of social protections for all peoples; and to strengthen economic and social dialogue between government, employers, and workers.

New Zealand adopted the Decent Work Agenda and the former Department of Labour (DoL) developed a comprehensive programme to implement a decent work that was set out in detail on its website. This Agenda reflected a commitment to maintaining and promoting labour standards through a tripartite relationship between governments, employer organisations and labour organisations. In the New Zealand context, this tripartite commitment has not been a feature of government policy since 2009 and, therefore, the decent work strategy has not been a focus for government policy. The New Zealand Council of Trade Unions (CTU) however, as one of the tripartite parties, has continued to pursue the issue of decent work and, in particular, a new regulatory framework for precarious/insecure work. At the 2012 NZCTU

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[1] NZCTU "Under Pressure: A Detailed Report into Insecure Work in New Zealand" (October 2013) <www.union.org.nz>.

conference, decent work was defined as a job for all; a living wage; secure work; and safe work.

Research

The specific issue of precarious work was directly addressed at the 2013 NZCTU conference with the launch of research report *Under Pressure: A Detailed Report into Insecure Work in New Zealand*[2]. This Report provides a comprehensive analysis of the effects of precarious work from the perspective of the individual employee and includes proposal for legal reform. The research follows on from the Australia CTU independent inquiry *Lives on Hold: Unlocking the Potential of Australia's Workforce.*[3] Reading both reports, it is apparent the drivers of precarious work are similar though the solutions will reflect the regulatory frameworks of each country. The NZCTU Report noted that New Zealand is recognised by the OECD as having the fourth lowest level of protection relating to temporary work and the lowest level of regulation on temporary agency work.[4] This reflects the government's policy to provide a flexible, employer-friendly regulatory framework. Interestingly, the protections for standard employment workers have been undermined also and reflect the general policy to embed a regulatory framework that supports insecure work as the norm.

The NZCTU Report also recommended stronger legal protections including:[5]

- Stronger legal protections to prevent insecure work
- Improved income support mechanisms for insecure workers
- Support for the Living Wage with greater security of hours
- Government procurement to promote decent work
- Union campaigns and bargaining to support secure work.

Research has also been undertaken by the previous DoL that provides an insight into the lived experience of precarious work.[6] Although the research was reported in 2004 and before the global financial crisis, it is interesting to reflect on the findings. In its conclusion the report noted:

> In this study employees in non-permanent, low paying, poorly supervised forms of work with unequal employment relationships reported that they experienced their form of work as precarious; more women than men reported their work as precarious.
>
> Some employees in the cases studied were prepared to enter casual or temporary employment under a variety of terms to meet their needs.

[2] As above.
[3] ACTU "Lives on Hold: Unlocking the Potential of Australia's Workforce" (2012) <www.actu.org.au>.
[4] OECD "OECD Employment Outlook 2013" (2013) <www.oecd.org> at chapter 2.
[5] NZCTU above n 1 at 1.
[6] Web Research "Report of Exploratory Case Study Research into Precarious Employment" (June 2004) Department of Labour <www.dol.govt.nz>.

> Employees reported that they experienced their form of work as precarious when they felt that:
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> - they were not getting a fair day's pay for the fair day's work they undertook
> - they were not treated fairly at work
> - that they were not able to earn enough to live as they aspired even if those aspirations were modest
> - they were afraid that their family could not survive, or was suffering, because of the state they were in considering their work and home lives.
>
> The formal legal basis of their employment was not a significant factor in their perception of their precariousness.
> Where we found work that was precarious we also found people with little or no labour market power, powerful employers, an absence of bargaining, low knowledge of employment relations, no access to information about employment, low wages, unsociable hours and reduced participation in family and economic life.
>
> The impact most frequently reported to us by people in precarious work was their lack of participation in the lives of their children.
>
> More employees in this study reported that they felt overworked or underpaid or were dissatisfied with their employment than reported that they experienced their work as precarious.

The research also revealed that many of the employees interviewed had limited information or understanding of their legal status or rights. A main concern of the interviewees, however, was the lack of participation in the lives of their children. The all-consuming nature of insecure work in terms of the time it takes from an employee's life is a factor that is often overlooked but was a feature of the NZCTU Report.

Helen Kelly, CTU President, in the Forward to the Report positions insecure work within a community context. The emphasis is not only the detrimental affects to the individual employee, or contractor, but also the damage this lack of certainty and insecurity has on families and the community. Kelly writes:[7]

> Insecure work, for most people, means their lives are dominated by work: waiting for it, looking for it, worrying when they don't have it. They often don't have paid holidays – which can mean no holidays at all. They lose out on family time. They often don't have sick leave. They are vulnerable if they try to assert their rights or raise any concerns. They are exposed to dangerous working conditions and have to accept low wages. They can't make commitments – to family, to sports teams, to church activities, to mortgages, or even to increasing their skills.

It is important to emphasise, however, that insecure work is not new. In the history of paid employment, it is only relatively recently that employees have experienced legal rights and protections. It was only through the combination of employees combining to form trade unions and through employees using their political rights that regulatory regimes have been enacted with specific employment rights. It has been the role of trade unions to promote and protect the rights and interests of employees. The NZCTU has been continuing this role through the research into the extent and consequences of the trend towards insecure work.

[7] At 1.

New Zealand Legal Framework

In New Zealand, the Industrial Conciliation and Arbitration statutory framework regulated employment relations for 90 years until it was repealed and replaced with the Employment Contracts Act 1991. Since the 1890s, New Zealand had developed a system of employee protections that was dependent on trade unions negotiating collectively on behalf of their members and on statutory recognition of minimum standards that must apply to the employees regardless of their union membership. The status and role of trade unions was recognised legally through the Industrial Conciliation and Arbitration Act (IC&A) 1894 and the Trade Union Act 1908. Employee rights and protections were further recognised through the enactment of minimum standards legislation. The Holidays Act 2003, the Wages Protection Act 1983, the Minimum Wage Act 1983, the Equal Pay Act 1974 and the Health and Safety legislation are examples of this minimum regulatory framework.

The means of enforcement of these rights and protections was through the legal system in the form of enforcement of awards and agreements by trade unions and the DoL inspectorate. With the decline of union membership and collective agreements and the withdrawal of both resources and authority from the DoL Labour (now part of the Ministry of Business Innovation, and Employment [MBIE]) the enforcement of employees' rights and protections has become much more difficult. The tragic events at the Pike River mine provided evidence of the lack of priority given to enforcement of employment rights by public officials.

Although the IC&A regulatory framework was not formally repealed until 1991, it was after the Second World War that ideological opposition, particularly in the United States, began to develop to counter the rise and entrenchment of the social and economic rights through statute and state policy.[8] Trade unions and collective bargaining were seen as a major obstacle to a free labour market and, therefore, became a target for change. This ideology did not flower in New Zealand however until the election of the fourth Labour government in 1984 but the policy agenda had been well-prepared previously for implementation once a compliant political environment was achieved.

The political argument in New Zealand[9] that labour markets must be deregulated to promote economic growth, productivity and jobs was consistent with that used by all western governments that pursued the neo-liberal agenda. At the time of restructuring the economy in the 1980s and 1990s, there was an increase in unemployment. The promise of jobs through greater labour market flexibility was, therefore, attractive. What were never discussed in any detail were the type of new jobs that were being created and the social and economic consequences of removing employment rights and protections from individual employees and their representative unions. The evidence would suggest that precarious jobs are now seen as a necessary and integral

[8] Susan George "A Short History of Neo-liberalism" (March 1999) Global Exchange <www.globalexchange.org>; Peter Evans and William H Sewell Jr "The National Era: Ideology, Policy and Social Effects" (2013) UC Berkeley Sociology Department <www.socialogy.berkeley.edu>.
[9] The Treasury *Economic Management* (July 14 1984) at 234-248.

part of the neo-liberal economy. Davies and Freedland[10] noted in their analysis of flexible labour market regulation that:

> We noted at the beginning of this chapter the US influences on the 'welfare to work' policies adopted by the British government. However, it would be wrong to conclude that the policy focus on the employment rate and on supply-side techniques for addressing the issue are purely Anglo-American phenomena. On the contrary, these policies have been a growing feature of all developed economies over the past two decades. The intellectual foundations for at least a good part of the policies subsequently adopted were in fact provided by the Organisation for Economic Corporation and Development, whose *Jobs Study* of 1994, leading to an OECD Jobs Strategy, was highly influential in promoting supply-side reforms within the overall framework of stable macro-economic management.[11]

Recent research from the OECD itself in its report *Divided We Stand: Why Inequality Keeps Rising*[12] noted:

> The Landmark 2008 OECD report *Growing Unequal* showed the gap between rich and poor had been growing in most OECD countries. Three years down the road, inequality has become a universal concern, among both policy makers and societies at large. … Today in advanced economies, the average income of the richest 10% of the population is about nine times that of the poorest 10%. … The single most important driver has been greater inequality in wages and salaries. … The study reveals a number of surprising findings: … regulatory reforms and institutional changes increased employment opportunities but also contributed to greater wage inequality. …part-time work has increased, atypical labour contracts became more common and the coverage of collective-bargaining arrangements declined in many countries. These changes in working conditions also contributed to rising earning inequality.

The rise of labour market flexibility in New Zealand in the 1980s and 1990s saw the decline of statutory intervention to protect and further interests of employees and the re-emergence of the 19th century notion of contract as the primary instrument of regulation in the workplace. The Employment Contract Act embedded the resurgence of the contract as the basis for the relationship in the workplace. It also signalled the decline in trade union membership, collective bargaining, and the beginning of growing inequality of income.[13] The rationale for this shift was not only economic, however, but also founded on the notion of the liberation of the individual worker to be free from the "outcome-orientated, centralist-collectivist viewpoint to an incentive-orientated, truly individualist viewpoint".[14] Trade unions and the statutory support for employees was characterised as a constraint on the individual's freedom to pursue their self-interest.

[10] Paul Davies and Mark Freedland *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford University Press, Oxford, 2007).
[11] At 223.
[12] OECD "OECD work on Income Distribution and Poverty" (2011) <www.oecd.org>.
[13] Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2012).
[14] Penelope Brook *Freedom at Work: The Case for Reforming Labour Law in New Zealand* (Oxford University Press, Oxford, 1990) at ix.

Maximising the individual's freedom was an important rationale for the advocates of the dominance of market responses to economic issues. This meant that traditional democratic notions, such as equality that had driven much of the rationale for political and industrial reform in New Zealand in the 20th century, were criticised as being results-orientated and denying individuals' equal opportunities. Although much of the rhetoric that surrounded the Employment Contracts Act was contradictory, it did clearly reflect a fundamental shift in political ideology and consensus that had dominated New Zealand politics for much of the 20th century and continues into the 21st century.

The notion of contract has been firmly entrenched within both legal and political history. The emergence of the law of contract with the rise of capitalism was accompanied by change in the legal nature of the employment relationship. The master and servant relationship that was defined by the characteristics of subordination, obligations and duties slowly morphed into a contract that assumed the free and voluntary will of the parties to negotiate terms and conditions that defined the legal limits of the relationship. The employment contract, however, incorporated the notion of subordination that remained fundamental to distinguishing it from other forms of employment related contracts. The interventions through legislation into the negotiation and content of the contract of employment and collective bargaining steadily increased throughout the 20th century as employees obtained political influence and the legal rights to organise industrially. Through political organisation and democratically winning political power, parties representing the interests of employees legally gained recognition of employees' rights in the workplace. Since the advent of the contract of employment as the legal instrument to regulate the employment relationship, this has been legally and politically contested territory.[15] The trend toward the increase in precarious work is another chapter in this story. Although the Employment Relations Act 2000 was an attempt to emphasise the cooperative nature of the employment relationship, the current Employment Relations Amendment Bill before Parliament clearly illustrates the government's support for the traditional subordination and control model of the employment relationship. This approach is starkly illustrated in employer's control of employee rest breaks that will only be now given according to what the employer deems reasonable. The criterion for what is reasonable appears to relate only to the needs of the business and not the wellbeing of the employee.

Although the current government policy has supported increasing insecure work, the opposition has been promoting amendments that support legal rights for employees in insecure work. All the members bill have been introduced and discharged by the parliament for lack of majority support. The Minimum Wage and Remuneration Amendment Bill was aimed at providing a minimum wage for paid contractors who were excluded from the provisions of the Minimum Wage Act because they were not classified as being employees. The Employment Relations (Statutory Redundancy Entitlements) Amendment Bill, the Employment Relations (Triangular Employment) Amendment Bill and the Employment Relations Protection of Young Workers (Amendment) Bill were other examples of attempts to provide protections of employees in precarious work.

[15] See P.S. Atiyah *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford, 1979) at 523 - 544; Allan Fox *Beyond Contract* (Faber & Faber, London, 1974) at 175 - 313.

The fundamental issue identified in these statutory amendments is the legal definition of an employee being the initial barrier to access to legal protection however minimal that protection may be. The two legal approaches to the removal of this barrier are either to widen the definition of who is an employee to include dependent contractors and independent contractors who employ no staff and have characteristics of an employee, or to provide a statutory regime that specifically gives legal rights and protections to contractors. At the heart of the distinction between these various contracts is the degree of autonomy exercised by the person providing the labour or service in the performance of the contract. Employment contracts assume a degree of direction and control over performance while the independent contractor is assumed to have total control the performance of the control. The determination of the legal nature of the employee's employment relationship has frequently been left to the courts that have developed a series of tests to guide the parties when entering an employment relationship.

Role of the Courts

Although traditionally the courts in New Zealand had not played a large role in employment relations, the Employment Contract Act elevated the courts to a more determinative role in both defining who is an employee and whether an employment relationship exists on the facts. The courts' interpretation of who is an employee has evolved to reflect the changing nature of the work performed that frequently reflects minimal control in reality by the employer over the work performed. The United Kingdom courts had also developed the notion of implied terms of the employment contract that was followed by the New Zealand courts. The test being evolved by the courts was incorporated into the Employment Relations Act to reflect the evolving practice in the courts.[16]

The Employment Relations Act also attempted to ensure the law reflected the reality of the nature of the employment arrangement. The Act states that when determining whether a contract of service is present the Employment Authority must determine the real nature of the relationship, by considering all relevant matters including the intention of the parties and most importantly "not to treat as a determining matter any statement by persons that describes the nature of their relationship".[17] This statutory definition was consistent with the approach agreed to ILO Recommendation 198 – The Employment Relations Recommendation explicitly recognised the changing reality of the employment relationship and the need to provide national policy protection for all workers, regardless of their technical legal status.[18]

This wider legal definition to accommodate the changing nature of work and the employment relationship was reversed in a recent demonstration in New Zealand of the close relationship between the legal and political in the contract of employment. The events surrounding the 'Hobbit saga' are well known and will not be rehearsed.

[16] An analysis of the various tests developed by the courts prior to the Employment Contracts Act is found in A Szkats *Law of Employment* (3rd ed, Butterworths).
[17] (Employment Relations Act 2000, s 6 (3) (b)). Employment Relations Act 2000.
[18] ILO Recommendation R198, clause 9 <www.ilo.org>.

It is, however, a recent example and reminder of the political nature of employment rights for employees and how a government overnight, without consultation, legally entrenched the interests of capital over the right of employees to negotiate their conditions of employment.[19] It was a crude but effective demonstration of use of executive power in the labour market to fundamentally tilt the so-called level playing field of the market in favour of the employer party. It was also an important reminder of the importance of the law in determining the nature of the employment relationship and how dependent employees are on the law to organise collectively to negotiate their conditions of employment.

In this context, it is relevant to note that the Supreme Court in *Bryson v Three Foot Six Ltd*[20] applied this definition to a case involving a contractor working as a technician for Three Foot Six, a film production company, who challenged his employment status as a contractor on the grounds the terms under which he worked in reality were those of an employee.[21] The Supreme Court decided that the contract was, in reality, a contract of service. Helen Kelly notes in her narrative that this case had applied in the industry since 2005 with many productions having taken place since the decision without much difficulty.[22] There was still freedom for the parties to negotiate their own contract but it must reflect the actual conditions of work.

The 2010 Amendment to the Employment Relations Act not only overturned the Supreme Court decision, it also attempted to exclude consideration by the courts of the legal nature of the employment contract by explicitly excluding persons working in film production as "an actor, stand-in, body double, stunt performer, extra, singer, musician, dancer or entertainer" or a person "engaged in film production work in any other capacity". Film production work is also extensively defined to include pre-production and post-production work or services and promotional or advertising work or services.[23] In effect, the government was 'labelling' this work as only being undertaken by a contractor, unless there was a written agreement by the parties stating that the person is an employee. The unreality of this provision to give employees a real choice as to their status becomes apparent when it is realised that the employer is often a company like Warner Brothers that was involved in negotiations with the government at the time of the amendment. Any notion of choice as to an employee's employment status in the film production industry in New Zealand is now illusionary. It is interesting to note that the justification for changing the status of employees was to create jobs, yet recently, it is reported that there is a crisis in the film industry with few projects available to provide jobs. It would appear, therefore, that any advantage in changing the employment status of employees was short-term and that the real issue is the level of government subsided funding for the industry.

The 'Hobbit' legislation was part of the strategy to fundamentally shift the nature of the employment relationship from one founded on consensus through good faith negotiating to one based on an adversarial position being adopted by all parties when

[19] See (2011) 36(3) NZJER for an account of the Hobbit saga from all perspectives.
[20] *Bryson v Three Foot Six Ltd* [2005] NZSC 6.
[21] See Pam Nuttall, "Where the Shadows lie": Confusions, misunderstanding, and misinformation about workplace status" (2011) 36(3) NZJER 73 for analysis of the legal implications of the Hobbit Amendment.
[22] Helen Kelly "The Hobbit Dispute" (2011) 36(3) NZJER 30.
[23] Employment Relations Act s6(1)(d)(i) & (ii) and s 6(7).

conducting their relationship. Interestingly, New Zealand's industrial relations system was founded on the assumption of fundamental conflict between capital and labour, but with the state, through the legal framework providing a reasonable level playing field through the industrial conciliation and arbitration system. It would seem that the current policy framework does not attempt a level playing field but subordinates the interests of employees to those of employers and business in the interests of the economy. The justification for this policy approach is that it will lead to economic benefits through job creation. Again, however, the real question is what sort of jobs.

The causal way in which the decision of the Supreme Court in the *Bryson* Case was brushed aside by the government demonstrates another feature of the current employment relations environment, that is, the tension between court decisions and the government. While this tension is not new, it highlights the determination of the government to ensure their policy prevails. The Employment Court in the 1990s was characterised as in opposition to the policy of labour market flexibility and attempts were made to remove its jurisdiction to presumably what was considered the more compliant environment of the District Court. The fact that the fundamental role of the Employment Court changed with the introduction of the Employment Contracts Act from an arbitration court to a solely legal body does not appear to have always been respected by the executive.

This raises the more fundamental issue of the constitutional relationship between the executive and the judiciary. This is subject beyond the scope of this article but it is relevant to the extent that the Employment Court is now faced with issues that were once resolved through mediation or arbitration. The Court's approach to the resolution of the cases before it is to interpret the law as written in the legislation and in accordance with the provisions of the Interpretation Act 1999. When such decisions are unacceptable to the employer party, the government has often responded with an amendment to achieve the desired result of ensuring the employer has increasing if not absolute flexibility over the conditions of employment. The personal grievance legislation is a classic example of this dance between the court and the government.

The government is entitled to amend the law according to its policy but constant amendments do not provide a stable consistent environment nor does it achieve the certainty that is sought by the government and employers. Employment relationships are human relationships and, by their very nature, uncertain. No amount of detailed regulation will achieve the certainty sought and, often, it creates greater uncertainty as each change of the rules is contested and determined by the Authority and the Courts.

Recent Case Law Relating to Precarious Work

An example of the current approach of the government to a decision of the Employment Court with which was contested by employers is seen in *Idea Services Ltd v Dickson*[24] where the Court of Appeal upheld the Employment Court decision that care workers who sleep over as part of their employment are entitled to be paid a rate that was at least that required by the Minimum Wage Act. The Court of Appeal

[24] *Idea Services Ltd v Dickson* [2011] 2 NZLR 522, [2011] ERNZ 192.

in its decision had identified three factors to be considered when determining whether the work performed was within the definition of 'work' in the Minimum Wage Act. Those factors were namely; the greater the constraints on the employee's use of time, the greater the responsibilities of the employee, and the greater the benefit to the employer. The decision was also not confined to the caring industry.

The 'sleepover case' prompted considerable comments and the government's response was to enact the Sleepover Wages (Settlement) Act 2011. Unlike the Hobbit Amendment however, this legislation was enacted after a negotiation with the Service and Food Workers Union (SFWU) and the further appeal to the Supreme Court by the employer was withdrawn. While this may have settled that particular dispute, the general issue of when 'sleepover work' attracts a minimum wage is still a contested legal issue. For example, the question arose also in *New Zealand King Salmon Co Ltd v Cerny and Moretti*[25] where hatchery operators had been required to work from 4.30pm to 8am without being paid the minimum wage. An application for special leave to remove the matter into the Employment Court was rejected by the Court on the ground that no important question of law was involved because of the Court of Appeal decision giving guidance to the parties in such cases. The matter was referred back to the Employment relations Authority. There is a further case currently waiting decision of the Employment Court, namely, *Law v Board of Trustees of Woolford House* that raises the issue in the context of the education sector. It is apparent the issue of 'sleepover work' applies to all sectors and the question arises whether it will attract further statutory amendment.

The legal significance of the Minimum Wage Act was also highlighted in the case *Terranova Home & Care Ltd v Faitala and Goff*[26] where the Court of Appeal dismissed an appeal against the Employment Court decision that the compulsory Kiwisaver employer contribution had to be paid in addition to the minimum wage. The employer practice in this case had been to deduct the payment from the employee's wages that resulted in them being paid less than the minimum wage. The fact that the Minimum Wage Act is proving to provide necessary protection for so many employees highlights the prevalence of low paid that often accompanies a precarious work regime.

An increasing number of cases relating to precarious work have also risen before the Employment Court in cases requiring legal clarification of whether work is causal, fixed-term, or permanent. In the case of *Jinkinson v Oceana Gold (NZ) Ltd*[27], Judge Couch summarised the criteria used in Australia and Canada to identify causal work as being:

> engagement for short periods of time for specific purposes; a lack of regular work pattern or expectation of ongoing employment; employment dependent on availability of work demands; no guarantee of work from one week to the next; employment as and when needed; lack of an obligation on the employer to offer employment or on the employee to accept another engagement; and employee is only engaged for the specific term of each period of employment.

[25] *New Zealand King Salmon Co Ltd v Cerny and Moretti* [2012] NZEmpC 195.
[26] *Terranova Home & Care Ltd v Faitala and Goff* [2013] NZCA 435.
[27] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

Recent cases raising the same issue include *Baker v St John Central Trust Board*[28] (employee held to be casual and not permanent on the facts); *Muldoon v Nelson Marlborough District Health Board*[29] (on the facts the nurse was held to be permanent and not causal employee); *Rush Security Service Ltd v Samoa*[30] (on the facts the security guard was held to be a permanent and not a causal employee). All these cases were dealing with the complexity of current employment arrangements and determining if there was a 'relationship' implying some on-going sense of obligation, or whether it was a time specific arrangement with no expectation of obligation.

Another issue related to precarious work that is currently being determined by the Court is the legal rights and obligations that flow from triangular employment relationship that are increasingly common as more work is contracted out. In *Hill v Workforce Development Ltd*[31], the Court was faced with a classic triangular arrangement where Ms. Hill was employed by Workforce Development Ltd to undertake work contracted to it by the Corrections Department. When Corrections decided Ms Hill could not only be employed for breach of their protocols and she was dismissed by Workforce Development, the issue was whether she had been unjustifiably dismissed, and the Court found on the facts she had been unjustifiably dismissed. This case is being appealed so it will be interesting to see how the Court of Appeal deals with this form of employment. The complexity of the legal issues that arise in such situations was first addressed by the Employment Court in *McDonald v Ontrack Infrastructure Ltd & Allied Work Force Ltd*[32] when the Full Court agreed with the proposition that "in a tripartite employment situation, where the arrangements are genuine and represent the actual relationship, it will be a rare case where the Court will imply a contract between the workers and end users". Whether such a situation was present on the facts of the present case was referred to a single Judge for determination.

The above cases provide a sample of recent decisions that have arisen from the increasing use of precarious work. While the courts are developing a principled approach to determine the legal status and rights of employee and employers in precarious work, it is apparent that statutory guidance is required. As noted above, the emphasis on reforming the law has focussed on the legal definition of who were employees and the nature of the employment relationship. This involves the court interpreting the terms of any written agreement and the statutory definitions. As noted, the attempts at reform have also focussed on the statutory definitions and determination on the legal nature of the employment relationship.

Alternative Approach to Regulation

While statutory clarification of who is legally an employee has much merit, it may also be useful to consider a different approach, namely, to focus on the legal regulation of the time engaged in working. Concern over the effects of zero contracts

[28] *Baker v St John Central Trust Board* [2013] NZEmpC 34.
[29] *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103.
[30] *Rush Security Service Ltd v Samoa* [2011] NZEmpC 76.
[31] *Hill v Workforce Development Ltd* [2013] NZERA 65.
[32] *McDonald v Ontrack Infrastructure Ltd & Allied Work Force Ltd* [2010] NZEmpC 132.

in the United Kingdom has resulted in Professor Ewing proposing an approach that focusses on the regulation of hours of work.[33] He suggests a Working Time regulatory framework be enacted that requires the worker to know the conditions of employment, including the hours to be worked. The contract, therefore, must provide for the number of hours to be paid over a stated period. He suggested that to avoid employers stating one hour of employment in the contract, it be unlawful to work more than the stated number of hours unless there is an agreement with the trade union. Also, if the worker is on-call or a zero hours contract, he argued that a minimum on-call payment must be made and that payment must be the same as a minimum wage.

It is open to argument whether the approach advocated by Professor Ewing would work in New Zealand. The emphasis on regulation of time worked does not avoid the legal definition of who is an employee or a worker, though this could be overcome if a new regulatory regime applied to all work performed for another, whatever its legal nature. The idea of regulating the hours of work is an old one. In New Zealand, the first strike was over the eight-hour day. Today, the main issue has been not too many hours worked, but not enough hours or certainty of the hours to be worked. Hours of work have always been linked to benefits, such as the number of holidays, time off for sick leave.

If an organising principle for future reform is sought then the notions of hours worked may be a useful starting point for discussion. This also is not a new notion as under the previous arbitration system a standard wage and hours of work were set. Also, such an approach would acknowledge a more fundamental reality that the way we use time is changing and the regulation to determine the value of time and how we use time must also change. The value of time being the focus of regulation has been explored by Mark Harvey, who highlights the under-valuation of caring and work at home normally undertaken by women.[34]

Conclusion

Whatever approach is taken, the need for a new regulatory regime is required if those who use their labour and skills for the profit of others are to be recognised as having enforceable legal rights as well as obligations. It is essential that any regulatory regime reflect the reality of the labour market and the workplace. It is also essential that it reflect the values of the society. This is the fundamental question facing New Zealanders – have we changed from out traditional values of equality and fairness to values founded on economic or financial value only. Currently, the regulatory regime reflects a conflict between these values, but with an increasing tendency towards the dominance of economic and financial values being the driver for labour market regulation.

[33] Professor Keith Ewing "Zero-hours Contracts: Some policy proposals" (13 August 2013) The Institute of Employment Rights <www.ier.org.uk>.
[34] Mark Harvey "Economies of Time: A Framework for Analysing the Restructuring of Employment Relations" in Alan Felsead and Nick Jewson (eds) *Global Trends in Flexible Labour* (MacMillan Business, London, 1999) 21.