Opinion Piece: Creating an Elegant Solution

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Abstract

This opinion piece by Auckland barrister, Helen White, muses on the reasons why some labour reforms become an enduring and entrenched feature of labour law and others fail to do so. She suggests that reforms are likely to be enduring when they resonate strongly with the public, reflect international thinking and are accepted by the courts and legal profession.

Key words

Labour law, employment law, reform.

Introduction

New Zealand is currently experiencing a period in which people of all political persuasions and backgrounds accept the broad problems in the current employment law paradigm, but where governmental efforts to address these problems – on both the left and the right – are specific, crude, and largely ineffective. This opinion piece argues that these problems can be avoided by generalising the principles on which our laws rely, and, instead of protecting individual groups and classes, provide protection to vulnerable parties in all commercial relationships that are characterised by severe power imbalance and dependence. This piece will begin by sketching the successes and limitations of the Employment Relations Act 2000 (ERA) and then proceed to elaborate on the concepts entrenched therein. It will then discuss the limitations of the ERA, as well as the problems with much well-intentioned legislation since its enactment. This piece will then expand upon precisely what principles should be advanced by our law. Finally, it will explain what can be done to solve these problems, and lay out a pathway for necessary reforms in the future.

Since taking office in 2008, the National Government has repeatedly tinkered with the ERA; the Employment Relations Amendment Act 2014 was the fifth such amendment in almost as many years. These changes have not been dramatic, but have steadily eroded the protections originally found in the Act. Since the 2014 Amendment Act, the Government has introduced more changes, again in a haphazard way that reflects a lack of deep understanding of either the extent or the causes of the problems that have become apparent. The attempt to address zero hours arrangements, for example, has been criticised for being more likely to entrench, rather than eradicate, the problem.

The introduction of the ERA radically changed the way New Zealanders approached employment relationships. Margaret Wilson, the then Minister of Labour, successfully integrated concepts that were taking hold in other jurisdictions, such good faith and a distinction between relational and transactional contracts, and extended concepts that were

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already established, such as natural justice. These concepts summed to a legal ethos that is now taken for granted by people of all political persuasions.

This success was for several reasons. Firstly, these concepts resonated with the New Zealand courts and legal establishment because they were part of an international intellectual movement in employment law. Secondly, they were more practical in application than the concepts in the Employment Contracts Act 1991 (ECA), which they replaced. The employment relationship cannot afford to be one of ongoing hostility, is usually sustained, and requires mechanisms and a language that all parties can use to resolve conflict; the ECA ignored this reality, but the ERA understood this implicitly. Thirdly, the independent and specialist institutions that adopted the approach – the mediation service, the Employment Relations Authority and the Employment Court – adequately supported the concepts in the ERA.

ERA Concepts

The changes made by this Government and the approaches to those changes indicate that the following concepts are broadly regarded as entrenched:

- Good faith;
- Employees' personal rights;
- Natural justice (despite 90 day trials);
- Job security for higher paid employees;
- Relational agreements; and
- Legislative protection for the lowest paid employees.

Some concepts are not yet entrenched, or are precarious because they were not successfully dealt with by the ERA in the first place:

- The legitimate place of employment law in addressing the gap between rich and poor and creating higher wages;
- Job security for low and middle income employees;
- The paradigm of employment;
- Collectivity, unions and bargaining; and
- Power imbalance.

New Zealand's latest reforms have further weakened important provisions covering these concepts. These provisions originally existed to advance these ideas, but in practice failed to do so, and certainly failed to entrench them. Although these concepts are taken for granted across the political spectrum, this does not mean they are invulnerable; rather, they are often poorly understood and unappreciated. They are therefore precarious.

Power imbalance

Addressing power imbalance is the most important concept in the ERA, and the recognition of the inherent imbalance of power between employer and employee is the moral and political foundation for all that follows. It is strongly ideological and therefore remains controversial, however it is still there and this Government has not directly challenged it, despite it being

previously disregarded in the ECA.

The independent courts enthusiastically embraced the concept of power imbalance, relying on it repeatedly. This way of approaching the employment relationship likely appeals because it accords with the experience of specialist judges, so it resonates. The courts can legitimately use this concept to justify their response to issues of consent and agreement, for example.

Power imbalance is not something that many practitioners in employment law necessarily understand. In a politically polarised field of law, many working in the field are working exclusively for large employers or wealthy employees, so the experience of power abuse is not a given. It is a concept that is increasingly alien to wealthy parts of our society. Increasing inequality in our society is well documented, so it should come as no surprise that many people have no concept of the need to redress this imbalance.

Collectivity

The basic purpose of collective organisation is to correct this power imbalance by empowering the workers who are likely to be individually vulnerable. As a society, therefore, popular acceptance of the value of collective organisation necessarily relies upon popular understanding that it plays this role. Unfortunately, public education on this issue has been limited; while it survives, and is judicially applied, there is little understanding of the broader issues at stake.

This failure of understanding manifests in a legislative backlash whenever collectivity is perceived to obstruct some economic goal. Consider the Ports of Auckland dispute,[1] or the changes in collective bargaining within the film industry;[2] in both cases, industrial disputes prompted abrupt legislative changes to weaken unions.

At the 2014 New Zealand Law Society Employment Law conference, Margaret Wilson said plainly that she had failed to foster collective bargaining in the ERA.[3] That is undoubtedly true; at a macro level, the ERA and the last Labour Government failed to address the widening gap between rich and poor. This author contends that these are closely linked; the mechanisms chosen to strengthen the bargaining power of workers failed, workers were weakened, and so the gap between rich and poor widened. This does not mean that collectivity and unions are not entrenched concepts, of course: it is a matter of degree. It is a small irony that, whenever the Rt Hon John Key discusses unions, it is with the assumption that they are still powerful institutions. This is true of many others of his political persuasion; there is an assumption that, no matter how hard unions are kicked, they will continue to exist. There is also an assumption that collective bargaining is here to stay. Unions and collective bargaining may be seen as negative forces that are used to coerce employers, but they are nonetheless assumed, and are therefore entrenched in the popular consciousness to some extent. That is not to say that they are working perfectly, or even well, or that they are not vulnerable; indeed, when they start

[1] *Maritime Union of New Zealand Inc v Ports of Auckland Ltd* [2012] NZEmpC 54.
[2] Employment Relations (Film Production Work) Amendment Act 2010, enacted under urgency as a response to concerns that the *Hobbit* film trilogy might be filmed overseas rather than in New Zealand. The issue of whether contractors could collectively bargain sparked significant public debate and led to a dispute between union interests and production company interests.
[3] Professor Margaret Wilson "Employment Relations Act – 15 years on" (Keynote Address, New Zealand Law Society 10th Employment Law Conference, Auckland, 13–14 October 2014).

becoming effective they are eroded, as we have seen with the Ports of Auckland or the *Hobbit* fracas.

The Way Forward: Learning Lessons From What Went Wrong

The successful entrenchment of some concepts, such as good faith, and the failed entrenchment of others, such as collectivisation, pushes the interactions between individuals in employment towards increased individualisation and legalisation of the employment relationship. The area is now highly legalistic; unions may resist that fact, but ignore it at their peril. This is realistically the way in which people are now engaging with their employers or employees when something goes wrong.

The last years of the Labour Government were those of missed opportunity. Changes were made to try to address the failings of the ERA, but these were disjointed and lacked the consistent, easily understood principles evident in the original Act. These changes did not address the fundamental injustices that had become apparent by that time, and were therefore more vulnerable to erosion as a consequence.

For example, by 2006, it was clear that the practice of contracting out was causing serious problems. While permanent employees could negotiate over time for improved conditions and remuneration, contracting out broke up the principle of collectivity and caused a bidding war among the contractors, driving down wages dramatically. The legislative response was Part 6A. The change came about as a result of specific events and specific lobbying, and as a result listed a specific group of occupations for protection, instead of reflecting overall vulnerability. This meant that workers on the same wage and facing the same mischief were not afforded the same protection. Part 6A ensured that an employee on $120,000 per year had protection of employment terms and conditions when contracted out as a caterer, but an employee on $40,000 per year doing maintenance in the city parks did not. Protection by occupation was often arbitrary. When I appeared in *Lend Lease*[4] for the maintenance employees who were found not to be covered, counsel for the Auckland City Council noted that the Council of Trade Unions' submission had been that the law meant to protect "Pacific Island women cleaners", which in turn led to the exclusion of the largely male maintenance employees. This arbitrary categorisation means there is no clear and defensible concept to reinforce through case law.

Future changes to the law must instead act through clear and universal principles. This will reinforce the value of concepts and mechanisms that would otherwise be vulnerable to erosion over time, and serve an educational role in persuading the public of their importance.

Job security for people on lower and middle-incomes

Recent case law has left behind the superficial and impractical view of the employment relationship as a transactional contract. Consider the latest case between Auckland Farmers Freezing Company (AFFCO) and the Meatworkers Union, which reinforces the rights of seasonal employees to their jobs next season;[5] further, other cases indicate the development of

[4] *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86.
[5] *New Zealand Meat Workers & Related Trades Union Inc v AFFCO New Zealand Ltd* [2015] NZEmpC 204

a right to redeployment for those whose positions are restructured.[6] Change here has been widespread and significant; legal rights to fair treatment, natural justice and substantive justification of termination of employment all reinforce job security for those in permanent employment, and, despite the 90-day provision, there is a real assumption and assertion of these rights by employees who have the money to do so.

These theoretical rights, however, mean very little for those without the ability to pursue them, either through unions or personal means. These principles have been deepened and reinforced through case law, and, unsurprisingly, highly paid or socially elite individuals have taken the lead on many of these cases.[7] Ironically, while these rights were originally intended to protect blue-collar employees, the simultaneous weakening of collectivity means those same blue-collar employees are more likely than ever to miss out.

In theory, these cases reinforce the rights of all employees. In reality, however, a personal grievance system is only usable to the extent that it is affordable; for many blue-collar employees, neither the cost nor the risk of using the system is sustainable, and so their legal rights are irrelevant. This situation is getting worse; for example, consider that there is a likely adoption of a scale of costs akin to the High Court for the Employment Court. The tariffs in the Employment Court will, of course, be lower than those in the High Court, but when I roughly calculated a recent case for a blue-collar employee on the High Court scale, I could have claimed $63,000.[8] In that case, the employee won, but if the defeat came with that kind of price tag, litigation would be out of the reach of any but the most confident or most well-funded employees. Furthermore, this case was an appeal de novo, and the employee had won in the Employment Relations Authority only to have to re-litigate in the Employment Court. Even at the level of the Authority, while the inquisitorial approach eases this problem somewhat, challenge is de novo and therefore very expensive.

In summary, therefore, while individual rights and security of employment have been reinforced, they are only the rights of those individuals who can realistically litigate. Employers are aware of this, and can therefore treat employees differently depending upon their capacity to legally challenge their treatment: lower paid or otherwise vulnerable employees may therefore be dismissed for less serious offences.

Blue-collar employees may often find that the cost of litigation is far more than the remedy they seek. Reinstatement rights have officially been eroded under the current National Government but, in the author's opinion, the practice has not changed much as it had become a rare remedy, despite the law stating it was the primary one. Without access to justice, job security and personal rights are worthless, and that access in New Zealand is severely restricted by prohibitive costs and legalistic complexity. Solving this problem should be a fundamental aim of further reforms in this area; perhaps one component of this could be the entrenchment of a right to specific performance, which is to say, reinstatement.

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[6] See, for example, *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825; *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102; *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142; *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39.

[7] For example, in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, the employee was represented by her ex-husband who had been an extremely experienced lawyer.

[8] *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198. Since the time of writing, this case has gone on to be considered for leave to appeal. Leave was declined, but in such cases the cost of litigation severely erodes the awards.

Extending appropriate protections to all those who should have them

In recent years, large numbers of New Zealanders have technically become contractors, leaving permanent employment to become self-employed. However, many of these individuals remain employees for all practical purposes; they cannot move freely in the market, and hence have all the disadvantages of employment with none of the protections. There is widespread agreement, from both sides of the political aisle as well as from the judiciary, that this problem exists – s 6 has been expanded and *Bryson* confirmed that the state of being an "employee" could, in actual fact, exist even in the absence of an employment agreement[9] – but these reforms have failed to take hold, and the problem persists unabated. I have previously written papers on this problem,[10] so will not expand upon the exact causes here, but grappling with the issue remains fundamental.

Protecting these individuals is critical to an equitable and self-consistent system of employment law. Rather than focussing on strict legal categories of workers, we should determine whether dependence is present, and, if exploitation of that dependence occurs, the result should be consistent. Recognising and remedying the underlying injustice in a reliable way reinforces expectations of good faith and fair treatment, and achieves better outcomes for all concerned.

I am not claiming that there is no difference between an overbearing franchise and an employment agreement, but fundamentally the mischief is the same and, where the mischief is the same, the solution can be too. This principle can be set in general terms: where a more powerful business partner unjustly exploits a vulnerable party, the legal system is justified in, and indeed obliged to, step in. Broadening the issue from employees, consider the power imbalance inherent in contracts between even quite significant New Zealand businesses and multinational giants. Where the latter acts to abuse that relationship, the state should prevent that abuse. In the case of supermarket chains exploiting their suppliers, for example – suppliers who cannot easily move around in the marketplace, and hence are vulnerable to price setting by the buyer – the state should likewise step in.

Applying other existing legislation and legal trends to the employment relationship

Acknowledging the bigger and changing problem of power abuse in the commercial world may provide a key to finding solutions that appeal to New Zealanders from all walks of life. Contract law and consumer law are moving to find solutions and, just as Margaret Wilson did, it is possible to catch the crest of these changing responses in developing a response that is consistent with these developments.

One very interesting example is the Fair Trading Act 1986, which was amended to bring New Zealand in line with Australia's fair trading laws. Our fair trading laws are identical by virtue

[9] *Bryson v Three Foot Six Limited* [2005] NZSC 34, [2005] 3 NZLR 721.

[10] See J Ryan Lamare and others *Independent, dependent, and employee: Contractors and New Zealand's Pike River Coal Mine Disaster* (2015) 57(1) JIR 72; Helen White "Contracting – Good for business and/or employees?" (presented at the New Zealand Employment Relations Association, Auckland, May 2012), available at <www.helenwhitelaw.co.nz> ; Helen White "Employers finding ways around job law" *The New Zealand Herald* (online ed, Auckland, 31 January 2011).

of a free trade agreement between New Zealand and Australia.[11] New Zealand has adopted the Australian test for identification of overbearing consumer contracts and the mechanism of blue-pencilling to remedy the injustice caused. While this only applies to some contracts, it is an effective mechanism not only for fixing problems for the affected consumer but for disincentivising the practice of proffering exploitative contracts.[12]

Changes such as this are not even viewed as ideological. They are not criticised as 'nanny state', despite being a direct interference with individuals' freedom to contract. In consumer contracts that offend by being overbearing, interference has not been criticised any more than it has in areas, such as aged care, where exploitation has resulted in regulation for many years.

Extending and revitalising contract law

Blue-pencilling exists in the Illegal Contracts Act 1970[13] and now in the Fair Trading Act 1986. This capacity to blue-pencil could be extended to all contracts where there is significant dependence of one party on the other created by the agreement between them, for example, franchises. Overbearing power of one party over the other is a simple and clearly understood mischief. If this exploitation of power in commercial arrangements is repeatedly and consistently rejected, this may change the expected norms and values of our society.

Blue-pencilling has been considered acceptable with regards to illegal contracts for a very long time. Restraints of trade can be blue-pencilled without a judge being viewed as acting politically left-wing. Intervention in unfair contract situations does not need to be done with a sledgehammer, however the power to blue-pencil may help to reinforce expectations of fair dealing. It may also close a door to the avoidance of employment protections where dependency is required, by making contracting less desirable.

Restricting restraints of trade and insisting upon substantial separate consideration may also help to give employees the power to increase their wages. Currently, if the local barista wants to move from his café to one in the same neighbourhood, he cannot.[14] His consideration is his wage, which is likely to be around $18 per hour.

If strongly implemented, such a move may be criticised for creating uncertainty in the commercial world, but this is the way in which contract law is developing anyway. There has been a movement away from favouring certainty and towards principles of fair dealing. *Wholesale Distributors v Gibbons* is an important indicator of this, and draws on an international trend in jurisprudence:[15]

> Notwithstanding its widespread acceptance in most common law and civil jurisdictions in the world and growing judicial support, the courts have not yet incorporated the doctrine of good faith into our law. There is a widespread belief that existing doctrines or judicial devices already encompass a requirement of good

[11] Australia New Zealand Closer Economic Relations Trade Agreement 1329 UNTS 22307 (signed 28 March 1983, entered into force 1 January 1983).
[12] See Fair Trading Act 1986, ss 46A, 46I and 46J (amended in 2013).
[13] Section 7(1).
[14] See *Fuel Espresso Ltd v Hsieh* [2007] 2 NZLR 651, in which the Court of Appeal held a restraint of trade clause in a barista's employment contract to be enforceable.
[15] [2007] NZSC 37, [2008] 1 NZLR 277 at [149].

> faith. It would, it is said, add nothing to the existing tools and principles of the common law, such as estoppel and implied terms. This case serves to demonstrate that this belief is misplaced. It is clearly arguable that WDL have not acted, and are not acting, in good faith. Indeed, if such a doctrine existed in the law, it is doubtful whether the courts would have been troubled by the company's attempt to achieve an interpretation contrary to its actual intention. I would firmly hold it to that intention.

The footnotes that accompany this dicta indicate the deep thought going on internationally about extending these concepts. The judge cites:[16]

> Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433; See for example the observations of Bingham LJ, as he then was, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at pp 439 and 445 (CA); See for example Bridge, "Doubting Good Faith" (2005) 11 NZBLQ 426, p 428. For a refutation of this point, see Bigwood, "Symposium Introduction: Confessions of a 'Good Faith' Agnostic" (2005) 11 NZBLQ 371, pp 374 – 375.

There has been movement at a fundamental level in contract law as judges recognise the injustice of the old approach. In many jurisdictions, courts have replaced the parole evidence rule with a greater concern towards enforcing the good faith intentions of the parties. The law is responding to a new world by giving less priority to certainty and more priority to just enforcement.

Revitalising collectivity

Collective bargaining and unionisation are proven to be successful mechanisms for increasing living standards and addressing poverty and the increasing gap between rich and poor, but the public tend not to be aware of this. The perception of unions obviously varies, however, many New Zealanders consider unions to be out of date and view collective bargaining as a form of bullying.[17] Proving that unions and collective bargaining are social goods is beyond the scope of this paper, the purpose of which is to consider how best to succeed in changing this view and entrenching proposed solutions or, if that is not practical, to create an environment where other solutions address those problems.

The view of unions and collective bargaining as ineffective and outdated is also, in the author's view, strangely but tellingly loaded with an assumption that the way we relate in the workplace as a result of these features, and these concepts themselves, are entrenched: that unions, for example, will be there forever, no matter how they are treated, protecting New Zealanders and promoting their interests, regardless of whether they are even employees. Unions are blamed for not doing enough, while being starved of resources and repeatedly undermined. The same

[16] At n 87–89.

[17] I appreciate I am not backing this with any data. It may well exist, but my statement is based on the comments made to me in the course of my work and even comments made by opposing counsel in cases in which I appear. In one recent case, the defence advocated by opposing counsel to justify her client's agreement to a term it did not then honour was that her client had been under a kind of duress (being the threat of lawful strike). Not all New Zealanders share this view of unions, however, this perception is out there and has sympathy from many who still consider the use of these tools by unions very negatively.

people who attack collective bargaining assume that unions are stronger than they are and expect them to carry out a much wider role than they can possibly do without proper support. For example, unions are constantly seen as the voice of the precarious worker, who is not actually even a member of a union and may well not be an employee but a contractor. Currently, the law makes no allowance for the social justice role that unions play. Union members pay the price for the spill over benefit to many other employees of the standards they set and the benefits they win regarding terms and conditions. The reality is that unions set the industry standard, which is then passed on, like it or not.

The role of collective bargaining and unions must be revitalised. However, current proposals from the Council of Trade Unions and the Labour Party tend to ignore the reality that much of the New Zealand public do not support collective bargaining or unions, and need to be won over. In order to be effective, solutions may need to be more subtle and responsive to this view and build upon what the public can see clearly has value.

There has been a growing expectation of compliance with health and safety, for example. There is also a screaming and legitimate need for this. There is plenty of evidence that workplace engagement is vital to really addressing this issue.[18] The recent health and safety reforms are notable for their lack of vision or even common sense. New Zealand has had a health and safety crisis because our laws have that consequence. The Pike River Mine collapse was a dramatic and tragic result of poor health and safety regulation. Any legislative change to health and safety that purports to address this is likely to fail, because it requires strong employee participation that simply does not exist. The safety imperative is, in the author's opinion, more than just a device to make the public understand the value of unions and employee participation; it is one of the most important reasons why collectivity is valuable.

Solutions that appear to directly reinforce the power of the union movement and to dictate terms and conditions, such as awards, are likely to be viewed as backward-looking and a left-wing power grab. However, supporting employee engagement in health and safety is more likely to be received positively by the public. If presented sensitively, employee engagement has the potential to be understood as part of the future of work, rather than the past.

The key is to work with, not against, the public view. Solutions should be designed to foster collectivity, by allowing employees to experience it and enabling society to rediscover its value. New Zealanders need to be reintroduced to the very idea of collectivity. Health and safety representation provides that opportunity, as it has compelling practical benefits and moral weight. Employee participation is very important, particularly given it is often too hard for an individual to challenge their employer.

Present and future changes need to recognise and promote the value of employee participation in addressing the challenges that face this generation:

- Safer workplaces;
- Fairer distribution of wealth; and
- Secure work.

[18] See Independent Taskforce on Workplace Health and Safety *Main Report of the Independent Taskforce on Workplace Health and Safety* (April 2013), Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy: Volume One and Volume Two* (October 2012); in addition, there is much written on this subject.

Conclusion: New Thinking

As stated above, Margaret Wilson was very successful in entrenching some concepts. Good faith and relational contracts are related concepts that she was aware would resonate with the international and local legal community. She grafted onto this way of thinking, and thus made changes that survived. This author would also cynically suggest that some of the changes that survived also did so because they created a self-interested industry for lawyers.

The next reforms that really create lasting change and a better society must be as elegant and well aligned with international and local changes in the way we think about our society, however, that does not mean they have to be weak. The changes suggested here are quite brave and would let the courts move the law in the right direction further and more quickly.

Both the current National Government and the last Labour Government have tinkered with employment law without really addressing the problem or moving the public perception, for example, the changes to Part 6A, which are misunderstood because they are not principled – they are opaque and messy.

The next changes must address safety, the gap between rich and poor, and the security of work. There is an appetite for this internationally and locally, and there is a very real need. There are a myriad of potential solutions and those proposed here may not be the right ones, but what is important is the way we think about those changes, so that when they are attempted they are both successful in achieving the desired result and in becoming entrenched. Successful solutions need to be as elegant and fundamental as were those that Margaret Wilson successfully entrenched.