

The “Hobbit Law”: Exploring Non-standard Employment

Contents Page: NZJER, 2011, 36(3)

Name	Title	Page Number
Bernard Walker & Rupert Tipples	Editorial: Introducing the Forum	1-4
A.F Tyson	A Synopsis of The Hobbit Dispute	5-13
Bernard Walker	How does non-standard employment affect workers? A consideration of the evidence	14-29
Helen Kelly	The Hobbit Dispute	30-33
Kate Wilkinson	One Law to Rule them All	34-36
Barbara Burton	Non-standard Work: an Employer Perspective	37-43
Darien Fenton	Insights into Contracting and the Effect on Workers	44-58
Peter Kiely	Independent Contractor vs. Employee	59-72
Pam Nuttall	“...Where the Shadows lie”: Confusion, misunderstanding, and misinformation about workplace status	73-90
Margaret Wilson	Constitutional Implications of ‘The Hobbit’ Legislation	91-99
Nigel Haworth	A Political Economy of ‘The Hobbit’ Dispute	100-109
John Murrie	Book Review of <i>Employment Relationships: Workers, Unions and Employers in New Zealand</i>	110-112

Introducing the Forum

The emergence of this Issue

High profile disputes bring less-recognised employment relations topics to the forefront of public attention. The 2010 dispute surrounding the Hobbit production involved one of the world's major screen productions, an international boycott by actors, and the possibility of the production being relocated to another country. As such, it formed a major event in employment relations. The passion and controversy associated with the dispute gained international attention, creating a renewed interest in the relationships between business, Government, and unions as well as rekindling the debates surrounding non-standard employment and collective representation. The dispute formed a vital case study that warrants dedicated coverage in an employment relations journal.

The full nature of the employment relations issues involved in such public debates is not always well articulated or understood. This Special Issue provides a forum for exploring the issues raised by the Hobbit case in greater detail. The motivation for a journal issue emerged from the discussion surrounding a paper presented by Cecile Rozuel and Julie Douglas (2011) earlier this year. A number of researchers and commentators indicated that they were already working independently on accounts of the dispute. While several isolated opinions and accounts of the Hobbit dispute have been published (Barret 2011; Kelly 2011), this Issue serves as a broader forum that brings together a wide range of perspectives into one volume. The Hobbit events, thus, become the focus of a case study that permits contributors to explore the events from a range of angles, charting the broader contextual dimensions of non-standard employment.

The development of this Special Issue reflects the rather unusual events of 2011. An open call for submissions was issued to all persons interested in contributing to the Issue. Invited comment was sought directly from the core parties that were either directly involved or interested in the events: the Minister of Labour, the Opposition Spokesperson on Labour, the Council of Trade Unions and Business New Zealand. The aim was to create a balanced yet diverse set of commentaries. This was, however, tempered by the availability of contributors; several writers became unable to take part and seismic developments interrupted the Issue's progress. The Issue, thus, represents the contributions of those able to participate at this time¹.

The views expressed in this forum are those of the contributors. The Editors have taken a neutral stance, simply providing a forum for this discussion. Similarly, the content does not purport to be exhaustive, and if there are other aspects that warrant coverage there is potential for contributing articles in subsequent issues of the journal.

The Hobbit dispute and non-standard employment

Somewhat ironically, an earlier article described the New Zealand screen production industry as epitomising non-standard employment (de Bruin & Dupuis 2004). The authors noted that workplace flexibility was a necessary prerequisite in this project-based industry, with its high concentration of independent contractors and freelancers. Those precise topics later formed the key topics in the legal and ideological debates as the Hobbit dispute became synonymous with non-standard employment.

¹ As a consequence some areas have less coverage; for example, the withdrawal of the original Business NZ contributor meant that there is less discussion of recent developments within the ILO regarding contracting arrangements (McKeown and Hanley, 2009).

The Hobbit events were significant at a number of levels. The New Zealand filming of the two-part Warner Bros' production was expected to provide a major boost to the local film industry and benefit the country's economy. The dispute involved a very distinctive set of dynamics; it was an uncommon instance of a direct political intervention in an employment dispute as Crown Ministers and the Prime Minister negotiated with an overseas corporation, and the episode culminated in the passing of legislation under urgency. Union action drew attention to little-recognised matters regarding the conditions of workers within the film industry. The issues under contention in the dispute include questions concerning the rights of business owners and workers, the legal issues associated with trade unions and commercial legislation, and the social and legal consequences of non-standard employment. The first article, by Fiona Tyson, draws on media coverage and other sources to provide a chronological overview of these events, setting the scene for the analysis and commentaries that follow.

A central issue in the dispute was the question of employment status and whether workers are, or should be, contractors or employees. The topic of contracting, as an aspect of non-standard employment, is not particularly new. Recent decades have seen the conversion of many permanent workers to contractors and the topic is contentious. The definition of a contractor centres on the distinction between employees who are engaged under a contract *of* service, and contractors engaged under a contract *for* services. Legally, this classification of a person's employment status is pivotal, influencing a range of issues. Employees gain a range of protections under in the ERA 2000, the minimum code, and common law. Independent contractors lack those protections, but instead have more autonomy, organising their own work, and theoretically, being able to determine their remuneration.

The topic has evolved over recent decades. The era of the Employment Contracts Act saw the growth of contracting arrangements. Employee advocates, however, expressed concern that although workers were classified as "contractors", their real working arrangements were more consistent with an employer-employee situation. Where the worker was dependent on one organisation the practice was known as "dependent contracting". Those workers were seen as being deprived of both the legal protections that accrue from employee status and also of the wider theoretical benefits of a "non-dependent" contracting arrangement. The intent of those drafting the ERA 2000 was to address this issue and ensure that the reality of the arrangement was also taken into account when determining employment status, so that it reflected the "real nature of the relationship" (s6(2)). The application of this legislation was publicly tested in *Bryson v Three Foot Six* [2005] NZSC 34 where a model maker on a film production set contested his classification as a contractor; a decision that had significant implications for the Hobbit dispute.

A central question in the debate surrounding contracting and non-standard employment concerns the consequences for workers in these non-standard roles. Critics allege that the outcomes are negative, hence these people are disadvantaged. As background to this Special Issue, the second article explores recent developments in the literature to ascertain whether such claims are supported or refuted by existing research. The article objectively surveys recent studies that are of direct relevance for the Hobbit case, as well as the broader international literature, but proposes that the answer is not straightforward. The research findings tend to be inconsistent and inconclusive and any answer depends on the measures used and the population studied. While there is considerably more work to be done in this area, the findings also highlight the need to expand the agenda to include exploration of the contextual factors associated with the introduction and use of non-standard employment.

The focus, then, moves beyond those individual-level outcomes and enters into a relatively less-explored direction, addressing the legal and political processes. This becomes the distinctive feature of the Issue which sets the direction for the remainder of the articles.

The first set of articles that follows comprises invited comment from those key parties either involved in, or having an interest in, the Hobbit dispute. Helen Kelly leads with a brief comment from the Council of Trade Unions (CTU), highlighting the limited protections available outside of ERA 2000 and minimum code, and arguing that protections available in employment legislation should be available to all workers. Kelly also proposes that the rights to collective bargaining and freedom of association in ILO Conventions 87 and 98 do extend to contract workers, outlining her views regarding the debate surrounding the application of the Commerce Act and Trade Union Act for contract workers.

The Hon. Kate Wilkinson offers a similarly brief, invited comment as Minister of Labour, explaining the Government's actions. Her article points to the economic value of the film industry, the immediate consequences of losing the Hobbit production as well as the potential longer term harm to reputation affecting future work new projects. The article argues that the 'Hobbit law' brings greater certainty regarding employment status, and reflects the nature and practice of the industry.

Barbara Burton comments from a Business New Zealand perspective, arguing that globalisation, trade liberalisation, and international competition all require flexibility and new ways of working. Burton proposes that non-standard work is an economic necessity which brings advantages for both employers and workers. The article points out that many forms of non-standard work, such as labour hire agencies, part-time, and casual work do afford workers legislative protection as employees and those workers are free to join unions and work under collective agreements.

Darien Fenton MP provides comment from her role at the time as the Opposition Spokesperson, Labour. Her article offers an opposing view, outlining the adverse effects of contracting on workers, providing four case studies from differing industries as illustrations. Fenton outlines a proposed solution to the perceived problems of non-standard employment, outlining the move to introduce a Parliamentary Bill to extend the provisions of the Minimum Wage Act to contractors, and discussing the range of submissions in the Select Committee stage.

The legal dimensions of the Hobbit events and non-standard employment form the focus of the next set of articles. Peter Kiely, senior partner at Kiely Thompson Caisley, offers a practitioner account. This commences with an overview of the traditional tests used to determine the status of a worker and then considers the ongoing relevance of these tests in relation to the Employment Contracts Act and ERA 2000, as well as case law associated with *Bryson v Three Foot Six*. The article, then, explores the practical implications for businesses of the differing types of employment status, including the risks associated with engaging independent contractors.

Pam Nuttall provides further comprehensive analysis addressing three areas; the legislation at the time of the dispute, the Bryson case, and the Hobbit amendment. The article explores the various misconceptions about the law that were expressed in the public debate at the time of the dispute, and contrasts these with the actual legislative provisions and their interpretation. The Bryson case is, then, examined in terms of the legislation and the principles of employment law that were applied. Finally, the article reviews the Hobbit law, that is, the amendment to the ERA 2000 concerning the employment status of workers in the film industry, and its potential interpretation.

Margaret Wilson explores the constitutional implications of the process by which the Hobbit law was introduced. The article questions the tension between the stated need for urgency in relation to

preserving jobs on the Hobbit production, and the need to follow normal parliamentary procedure. It argues that the exercise of Government power bypassed the normal select committee processes and made changes that affected the workers' ability to negotiate their remuneration and conditions of work, without offering the workers an opportunity for consultation or participation. Wilson proposes that this represented an abuse of power and highlights the current lack of constitutional protections, leaving citizens vulnerable to swings in lawmaking, depending on whichever party is in Government at a given time.

The final contribution, by Nigel Haworth, sets the Hobbit dispute in a broader international context, exploring the interaction between the New Zealand government, international corporations, the film industry, local and international unions. The article proposes that the Hobbit dispute was not a single isolated event but part of a chain of events going back to 2009 and beyond. The analysis frames the dispute as being characterised by the power of the major corporations in film industry, coinciding with features of the New Zealand Government such as its attitude to foreign direct investment (FDI), its stance with regard to the film industry and its anti-labour agenda. Alongside this are questions concerning the role of unions, with contrasting views over whether unions can function in a similarly internationalised mode to the international corporations they deal with.

Collectively, this set of articles offers an intriguing account of the many dynamics involved in a specific case study concerning the use of non-standard employment. There are challenging and innovative discussions. A number of articles present explicit criticisms of the events from legal and employment relations perspectives while others defend and support the actions that occurred. Together, they provide new angles on the question of non-standard employment and open up new areas of debate. The topic of non-standard employment is likely to remain as an area of continued discussion and exploration, both in this journal and other forums.

Editorial team

Rupert Tipples, Supervising Editor
Bernard Walker, Guest Editor

References

Barret, J. (2011). Conflict in "Middle-Earth": Employment Law, Globalisation and Independent Film workers. *Web Journal of Current Legal Issues*. 1.

de Bruin, A. and Dupuis, A. (2004). Flexibility in the Complex World of Non-standard Work : the Screen Production Industry in New Zealand. *New Zealand Journal of Employment Relations*. 29(3): 53-66

Douglas, J. and Rozuel, C. (2011). Do you speak Hobbit? Analysing the Dialogue Dynamics during the Hobbit Affair. 25th *Association of Industrial Relations Academics of Australia and New Zealand Conference* (AIRAANZ). 1-4 February, 2011. Auckland: New Zealand.

Kelly, H. (2011). *The Hobbit Dispute*. Retrieved from <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>

A Synopsis of the “Hobbit Dispute”

A.F TYSON*

Abstract

The dispute between New Zealand Actors Equity (NZAE) and The Hobbit Film Production appeared to industry outsiders to have come out of nowhere. However, it was actually the most high profile of a number of actions taken by NZAE to negotiate collective contracts for its members. The intense media interest combined with unexpected cultural and political forces to impact upon the resolution of this industrial dispute. This synopsis surveys media coverage to introduce the main parties to the dispute and draw a chronological overview of the events that led to the National Government changing employment law with regard to film performers.

Summary

The Hobbit employment dispute, in 2010, involved the New Zealand actors’ union, New Zealand Actors Equity (NZAE)¹ and The Hobbit Film Production. It initially centred upon moves by the actors’ union to negotiate a collective agreement with the films’ producers. Previously, NZAE had tried, without success, to negotiate standard contracts for actors in a number of local productions. The New Zealand production companies and directors argued that performers’ rights were protected by the voluntary industry code known as ‘The Pink Book’. The actors’ union, however, was not satisfied by the code and was concerned by the fact that performers had little recourse when its guidelines were not adhered to. After unsuccessful attempts to negotiate with local productions, NZAE pursued the matter with an international production. When NZAE believed that performers’ contracts for *The Hobbit* production failed to adhere to ‘The Pink Book’, the actors’ union joined forces with international actors’ unions in an attempt to get *The Hobbit*’s producers to engage with the actors’ union representatives.

The following is an outline of the progression of the dispute which is drawn primarily from published media reports at that time.²

Key Figures in the Dispute

Actors’ Union Representatives

New Zealand Actors Equity (NZAE)

- President: Jennifer Ward-Lealand
- Equity organiser: Frances Walsh
- Member and public spokesperson: Robyn Malcolm

Council of Trade Unions (CTU)

- President: Helen Kelly

Media Entertainment and Arts Alliance (MEAA)

- National Director: Simon Whipp

* A.F Tyson is a Research Assistant at the University of Canterbury.

International Federation of Actors (FIA)

- FIA represents actor unions in 100 countries, including the US, the UK and Canada.

Key People and Businesses in The Hobbit Production

Film Director: Sir Peter Jackson

Executive Producer and Screenwriter: Fran Walsh

Co-producer: Philippa Boyens

Production Company: Three Foot Six Ltd (owned by Warner Brothers)

Film Studios: Warner Brothers, New Line, MGM

Film Industry Representatives

Screen Production and Development Association of New Zealand (SPADA)

- Chief Executive: Penelope Borland
 - o Lobby group that represents New Zealand producers and production companies

The Dispute

In 2010, renowned New Zealand filmmaker, Sir Peter Jackson, Director of the successful *Lord of the Rings* film trilogy, is working on adapting J.R.R Tolkien's *The Hobbit* into two films for Warner Bros. He intends to film these in New Zealand, as the *Lord of the Rings* trilogy was, and the work provided by such a big budget production is hotly anticipated by film industry workers. In May 2010, The Hobbit production sends contracts to NZAE and actors' agents for their consideration. NZAE believes that the terms and conditions of these contracts do not comply with 'The Pink Book' and do not include residual payments (i.e. a share of the film's profits, including those accruing from subsequent marketing of films as DVDs, games and so on). The union approaches international actors' unions for support in seeking collective bargaining. As a result, in June 2010, the International Federation of Actors (FIA) instructs its members and affiliate unions not to sign contracts until The Hobbit production enters into a collective bargaining agreement. Contracts for The Hobbit production continue to be issued to actors internationally for consideration.

A letter from the General Secretary and President of the FIA is sent to the US directors of Three Foot Six Ltd, the production company producing *The Hobbit*, on 17 August, advising that it has instructed its members not to agree to act in the films until the company enters into a collective bargaining agreement. A copy of this letter is also sent to the Director, Peter Jackson. It notes that previous attempts by the local unions to address the current industry standard of non-union contracts have been resisted by both independent productions and the body that represents New Zealand producers and production companies, SPADA. NZAE argues that these non-union contracts do not provide actors with guaranteed wages and working conditions, and do not contain residual or cancellation payments. The FIA argues that a collective agreement would provide minimum wages and working conditions as well as ensure that performers receive entitlements from "the exploitations of these productions in markets beyond their theatrical release" (Luquer and Haaland, 2010: 1). The company is requested to contact the MEAA's national director, Simon Whipp, to negotiate an agreement regarding terms and conditions for all performers.

Three days later, seven English-speaking unions affiliated with the International Federation of Actors – AFTRA (US), SAG (US), Canadian Actors' Equity Association, MEAA (AUS), Actors' Equity Association USA, ACTRA (Canada) and Equity (UK) – write to Three Foot Seven Ltd advising that they are instructing their members to follow the FIA resolution.

On 31 August, Simon Whipp of the MEAA writes to MGM Studios and New Line Cinema executives advising that the FIA and English-speaking unions are seeking a union-negotiated agreement for performers and enclosing the letters already sent to the production company for their information. In response, a lawyer representing Warner Bros. writes to MEAA advising that the company will not bargain with the union on the grounds that it is not legally permitted to under the New Zealand Commerce Act.

NZAE receives its own legal advice (from law firm Simpson Grier), which offers a different interpretation of the application of the Commerce Act, proposing that the Act “does not absolutely prevent the producers of *The Hobbit* movie from entering into a union-negotiated agreement obtained through collective bargaining” (Craig and Murray, 2010: 1). Craig and Murray argue that if performers are hired as employees, the Commerce Act does not come into play, and that even if performers are hired as contractors, there are exceptions to the relevant section of the Commerce Act that could be applied. The New Zealand union advises its members, on 24 September, that the makers of *The Hobbit* are refusing to meet with the unions to negotiate an agreement and announce a meeting will be held for performers in Auckland in four days’ time.

On 27 September, Jackson releases a four page statement to the media announcing that the FIA has told members not to act in *The Hobbit* until they get a union contract. He argues that the unions’ criticism of his production is driven by a political and financial agenda and reveals a deal for residual payments for non-union actors which he characterises as “Warners doing the decent thing” independent of any union pressure (Jackson, 2010 as cited in 3news.co.nz, 2010). He describes the consequences of the unions’ boycott as not only a potential loss to New Zealand of *The Hobbit* film production and the thousands of jobs it would create but also significant damage to the New Zealand film industry. Suggesting that the loss of *The Hobbit* would leave New Zealand “humiliated on the world stage” and “Warners would take a financial hit that would cause other studios to steer clear of New Zealand,” Jackson blames this development on the MEAA, characterising them as the ‘Australian bully boy’ motivated more by their own industry interests than worker solidarity (ibid.). He then warns that “[i]f *The Hobbit* goes east (Eastern Europe in fact) – look forward to a long, dry, big budget movie drought in this country” (Jackson, 2010 as cited in 3news.co.nz, 2010).

On the same day, the Chief Executive of South Pacific Pictures, a prominent local production company, alleges that production companies cannot legally enter into any agreements with NZAE because it has not registered with the Registrar of Unions in the Department of Labour for the last three years, as it is required to do by the Employment Relations Act 2000 (ERA) and that the union, therefore, has no legal standing.

New Line, Warner Bros. Pictures and MGM announce on, 28 September, that their general policy is to avoid filming in locations where “there is a potential for work force uncertainty or other forms of instability” and they are exploring other locations for making the film (New Line, Warner Bros Pictures and MGM as cited in NZPA, 2010). Other countries reported to be lobbying for *The Hobbit* include Scotland, Ireland, Canada, Australia and the Czech Republic. NZAE president, Jennifer Ward-Lealand, is reported as saying that the union had been trying to meet the producers for over a month as it is “concerned that local actors working on the production receive a fair and equitable contract, just as their international colleagues will do” (ibid.). Jackson disagrees, saying the union is demanding a collective agreement covering all performers. He contends that actors are not employees but are instead independent contractors. This, therefore, would make union representation illegal under New Zealand law as negotiating en masse would constitute anti-competitive price-fixing, a view supported by SPADA’s chief executive Penelope Borland.

At this point, the Council Trade Union (CTU), the union body with which NZAE is affiliated becomes involved in the dispute. Helen Kelly from the CTU arranges a meeting with Peter Jackson. The CTU also meets with NZAE union officials prior to the union’s meeting with its Auckland members. Approximately 400 actors attend this meeting. As a result the union’s official resolution is that it

recommends that all performers wait before accepting any engagement on the production of *The Hobbit* until the production has advised whether it will enter into good faith negotiations with NZ

Actors' Equity with respect to the minimum conditions of engagement under which NZ Actors' Equity will recommend performers work on the production *The Hobbit*, including minimum fees, conditions of engagement, professional protections and residuals. If the production advises it will not enter into such good faith negotiations then NZ Actors' Equity should make a further recommendation to performers on what action should be taken at that time before performers accept engagement of the production (Actors Equity NZ, 2010).

The Office of the Minister of Arts releases a media statement on 29 September, concerning the Crown Law Office's opinion regarding the effects of the Commerce Act. The Minister, Chris Finlayson, reports that this opinion is that the Act prohibits *The Hobbit's* movie producers "from entering into a union negotiated agreement with performers who are independent contractors" (as cited in Bennett, 2010). NZAE respond that their legal advice contradicts this stance. Helen Kelly later alleges that this legal opinion must have solely been formed "on the basis of facts supplied by Peter Jackson; no approach was made to any one of the unions for the facts" (Kelly, 2011). Opposition politicians urge the producers of *The Hobbit* to meet with NZAE to ensure the movie gets made in New Zealand, citing the potential loss of jobs and millions of dollars to the economy.

On 1 October, Helen Kelly (CTU) meets with Peter Jackson (Director), Fran Walsh, Wingnut Films, and Philippa Boyens (Producer) in an attempt to resolve the dispute. There are also phone conversations between Gerry Brownlee, the Minister of Economic Development, and Jennifer Ward-Lealand, NZAE President, during the weekend.

Ward-Lealand announces in a statement that NZAE has been advised by Miriam Dean QC, a senior barrister specialising in competition law, that the law does not prohibit the union from discussing pricing in general terms with the producers. Even if workers are contractors rather than employees, the union can assist contractors with negotiating individual contracts and the union accepts these would be "recommended prices – nothing more" (Ward-Lealand, 2010). Ward-Lealand appears on TV3's *The Nation* the following day, arguing that there has never been a boycott: "We have never said there's a boycott ever. All we have asked for in anything is a meeting and until we get the meeting for our members to hold on signing. That is all" (as cited in Smellie, 2010). She asserts that actors are not seeking collective bargaining but standard terms in a contract for services (that is, as contractors) and says that although NZAE was briefly deregistered for failing to file annual returns in three consecutive years, it is currently registered.

The following statement is released on 3 October after some negotiation: "Helen Kelly, CTU President has met with Peter Jackson and Fran Walsh and we are hopeful that a meaningful dialogue between Equity, SPADA, and Three Foot Six can be established" (CTU, 2010).

On 4 October, Peter Jackson and Fran Walsh meet with Ministers Gerry Brownlee and Chris Finlayson, briefing them on the background to the dispute. On the same day, the movie's Co-producer and Co-writer Philippa Boyens tells Radio New Zealand that at least half a dozen countries, including Australia and the UK, are lobbying to win the right to film *The Hobbit* and alleges that the MEAA made the decision to issue a boycott of the film without talking to NZAE. Concerned that Boyens' comments undermine the outcome of her meeting with Jackson and Walsh, Helen Kelly contacts Jackson. After some discussion, Kelly is advised via email that "any meeting to be held in New Zealand was to be between SPADA [the body that represents New Zealand producers and production companies] and NZ Equity, and that Three Foot Six's involvement would have been simply in an observational capacity" (Kelly, 2011), a statement she interprets as the company backtracking on its agreement in the statement released the previous day to dialogue with NZAE.

Jackson is reported in *The Dominion Post* on 11 October arguing that the NZ film industry is only viable if staff are hired as contractors and that this is also the preference of crew members since they receive higher

wages as contractors. In the same article, a former employee of Three Foot Six Ltd, who worked on all three of *The Lord of the Rings* films, disagrees with Jackson's claims regarding workers' preference to be hired as contractors. Jon Woolf argues that actors are not given a choice and are not in a position to negotiate a contract – "it was a case of taking what he was given" (as cited in Rothwell, 2010).

On 14 October, Minister Gerry Brownlee facilitates a meeting for SPADA, CTU and NZAE. They announce to the media that they have agreed to "work together to update the conditions of engagement for performers in the New Zealand screen production industry" (Brownlee, 2010). After this meeting, NZAE agrees to recommend to the FIA unions that, since the dispute is being settled, the resolution for union members not to sign contracts can be withdrawn.

On 20 October, film workers are invited to a meeting at Weta Workshop, a Wellington visual effects company closely involved with numerous films directed by Jackson (and co-founded by Jackson). After the meeting, 1500 workers march through Wellington protesting against the industrial unrest amid fears that the US\$500 million film will be lost to another country. NZAE has a meeting planned in Wellington that night to discuss the planned negotiation with SPADA, but after actors dining in a Wellington restaurant are abused by angry film technicians the meeting is cancelled.

The following day, Kelly announces that the boycott has been lifted, saying that the issues had been largely resolved. Specifically, she asserts

1. NZAE wanted to negotiate conditions as an industry standard rather than a collective agreement and that good progress is being made on this through revising 'The Pink Book'.
2. Warner Bros. were advised several days earlier, on 17 October, (American Pacific Standard Time) that NZAE had asked SAG to lift any "don't work" orders. The union also prepared a media statement; however, Warner Bros. wanted to make the announcement. Warner Bros. then delayed releasing this information by several days. Kelly claims that Wingnut, therefore, knew the boycott had been lifted when they met with technicians the previous day but did not pass on this information.

Kelly suggests that the union was being framed by Warner Bros., who had already decided to move the production to a country where it could get bigger tax incentives and pay lower wages. In response, Peter Jackson and Fran Walsh assert that the lifting of the union blacklist "does nothing to help the films stay in New Zealand" because the damage "is long since done" (as cited in Cardy and Johnston, 2010). The local producers union, SPADA, issues a media release agreeing with Jackson and Walsh's assertion that the lifting of the boycott does not change the tenuous position of *The Hobbit* production.

In that release, SPADA also outlines their account of the sequence of meetings with the union. They argue that they asked NZAE the previous year, in February 2009, to meet to discuss 'The Pink Book', but that NZAE would only meet to discuss an industry-wide agreement with conditions equal to those in Australia (as negotiated by MEAA), a condition SPADA considered unworkable due to NZ law. SPADA says that more recently it offered to meet NZAE representatives on 1 October, 2010 with no response, and again on the 12th. A meeting finally took place on 14 October when they agreed to renegotiate 'The Pink Book'. The SPADA media release also reported that NZAE agreed at this meeting to rescind the 'no sign' order and that it would not attempt to negotiate or initiate industrial action against individual productions during the period of 'The Pink Book' review.

NZAE spokeswoman, Frances Walsh, announces that a planned meeting of actors in Auckland has been cancelled in light of actors being threatened by protesters in Wellington.

Prime Minister John Key offers to meet Warner Bros. representatives when they visit the following week on the grounds that “[t]his is a very successful growth area for New Zealand and to have the film industry destroyed on the back of the actions of the unions is, I think, reprehensible” (as cited in Cardy and Johnston, 2010). Key suggests the film studio is concerned not only about the boycott, but also about a 2005 Supreme Court ruling that a model maker on the *Lord of the Rings* trilogy, who worked for Wellington production company Three Foot Six, was an employee, not a contractor. Key announces that he will seek advice on a possible law change that would remove the ‘ambiguity’ in the ERA regarding the difference between an employee and a contractor. Key also suggests that Warner Bros. may be after greater tax breaks.

Fran Walsh, the producer of *The Hobbit*, tells Radio New Zealand that the films could be made at Lavesden Film Studios, a former Rolls-Royce factory north west of London owned by Warner Bros.

Warner Bros. Confirms on 22 October that it is looking at offshore locations. Referring back to the union assertions that the company withheld information about the union boycott, Warner Bros. reject the union’s claims that the union boycott was lifted on 17 October and that Warner Bros. had asked to delay this announcement. It claims, instead, that confirmation of the boycott being lifted was not received from SAG and NZAE until a day later, on 21 October, and that it was still awaiting retractions from other guilds.

Helen Kelly warns against rewriting employment laws to please Warner Bros., saying the dispute is not about employment status but about whether independent contractors can bargain collectively.

Jackson comments on Warner Bros.’ concern about New Zealand employment laws, saying that actors citing the Bryson v Three Foot Six court case have raised concerns for the studio: “Now they are saying: ‘What if an actor working on *The Hobbit* wakes up in the night and decides they are an employee, not an independent contractor, just like that other guy?’” (as cited in Cardy, 2010).

On 25 October (Labour Day), approximately 1000 people rally in Wellington to keep *The Hobbit* in New Zealand. Weta Workshop managing director Sir Richard Taylor, *The Hobbit* casting director Liz Mullane, and Wellington mayor Celia Wade-Brown all speak. Taylor reads out a letter from Peter Jackson at the rally where Jackson thanks people for their support, saying New Zealand is “where Middle Earth was born and this is where it should stay” (as cited in Wenzlick, 2010). Jackson also asserts “[w]e don’t open the door to an Australian trade union who will never put the interests of Kiwis first and invest that union with the powers to destroy everything that we have built” (ibid.) and argues that “[t]urning us into another state of Australia under the sway of a destructive organisation carries the very real risk of destroying the great big heart that beats inside our films” (as cited in Broun and Watkins, 2010). Other rallies are held throughout the country, with 1500 people attending a rally in Auckland and smaller groups of people protesting in Christchurch and Queenstown.

Warner Bros.’ staff, including New Line Cinema president, Toby Emmerich, and the company’s chief legal counsel, arrive in New Zealand on 26 October to meet with John Key and Government Ministers Gerry Brownlee (Economic Development), Steven Joyce (Transport Minister) and Chris Finlayson (Arts Minister). Prior to the meeting, John Key asserts that he is not prepared to participate in a bidding war for the films but notes that the high exchange rate may influence a decision to film elsewhere.³

Following a two-hour meeting with the Warner Bros. executives, Mr. Key reports that industrial relations law and financial incentives were the two issues driving the studio to consider shifting the production of *The Hobbit* movies overseas. He describes the central problem as the legal precedent (Bryson v Three Foot Six Ltd) that meant that workers could be legally seen as employees even if their contracts specifically called them contractors:

They’re not arguing people can’t be employees. They’re just saying that if someone is engaged by their production company as a contractor, they want to know if that’s how it’s going to end up, and if

it doesn't, that has other economic consequences for them. They're out of here, if we can't give them the clarity. There's no question about that (Key as cited in Cheng and Harper, 2010a).

There is no decision following the meeting and negotiations continue.

On the evening of 27 October, John Key announces that *The Hobbit* will be made in New Zealand and that legislation, which will only apply to the film industry, will be introduced under urgency to Parliament. The ERA will be amended so that a worker engaged in an independent contract is not able to go to court and claim employee rights and conditions. In addition, *The Hobbit* production will gain increased subsidies. In return, New Zealand will be promoted in all DVDs and other material used to publicise the films with every DVD and download of *The Hobbit* featuring a Jackson-directed video promoting New Zealand as a tourist and filmmaking destination. The movie will also premiere in New Zealand, with the Government planning a major tourism campaign to coincide with its launch. A memorandum of understanding with Warner Bros. is signed.

Parliament debates the Employment Relations (Film Production Work) Amendment Bill on 28 October, a Bill which would make every worker in the film industry an independent contractor. By 10pm when the House adjourned, the Bill has passed its first and second readings. This Bill covers all workers who "engage in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer or entertainer" or who are "engaged in film production work in any other capacity" (Roberts, 2010). Workers and performers involved in television broadcast are not affected by this amendment. While film workers could still attempt to negotiate employment agreements, employers would be under no legal obligation to do so. The Employment Relations (Film Production Work) Amendment Bill passes into law on 29 October after passing its third and final reading. Key and Brownlee decline to release further details about the deal with Warner Bros, citing commercial confidentiality.

Political debate about the dispute resurfaces in December with the release of relevant documents to Radio New Zealand under the Official Information Act. In an email to Minister Gerry Brownlee dated 18 October, Jackson wrote "[t]here is no connection between the blacklist (and it's [sic] eventual retraction) and the choice of production base for *The Hobbit*" (as cited in Cheng, 2010). He goes on to warn that Warners Bros., having previously lost the *Bryson v Three Foot Six* case in the Supreme Court, wants certainty that workers hired as contractors will be legally recognised as contractors in order to protect its business interests. This communication contradicts Jackson's numerous public assertions that union action was to blame for Warner Bros.' looking at alternative filming locations. It also reveals that he was aware that the 'do not sign' order had been lifted prior to the film technician rally and the public rally on Labour Day, despite saying in television interviews on 21 October that he was unsure if the blacklist had been lifted.

Helen Kelly responds to these revelations by asserting that Warner Bros. used "the dispute to ratchet up both money and employment law reductions for workers in the industry" (Skelton, 2010). She questions the Government's refusal to release the Crown Law opinion regarding the legality of the union's requests for collective negotiation, suggesting this indicated that its contents differed from what was announced publicly. Peter Jackson responds to the release of the documents via email to Radio New Zealand, alleging that the MEAA had been manipulating NZAE in order to unionise the film industry and only dropped the blacklist because it faced being sued by Warner Bros. He reasserts that

[t]his is why Warner Bros lost all confidence in filming in New Zealand – because they had just witnessed how a tiny and capricious union, manipulated by an offshore agency, could bring a multimillion [dollar] production to its knees – for no legitimate reason" (as cited in Cheng, 2011).

There is disquiet amongst some of the Government's coalition partners who supported the legislative change, as well as the Opposition. However, Minister Gerry Brownlee announces that he is happy with the Government's course of action and refuses to comment further.

Notes

¹ In 2005, the New Zealand actors' union NZAE became an autonomous office of MEAA, an Australian union. In practical terms, NZAE still negotiates with producers and directors for New Zealand actors but with the backing and support of the MEAA. While MEAA was involved in the origins of this dispute, the actual negotiations are between NZAE representatives and *The Hobbit* director and executives, even though the latter's criticism frequently focuses on the MEAA rather than the NZAE.

² As the dispute played out, it became clear that there was little common ground between the union and film representatives, with both parties having conflicting views on the basis and origins of the disagreement.

³ The New Zealand dollar had been at 55c to the US dollar when the company first planned filming the movie in New Zealand but was now at 75c.

References

3news.co.nz. (2010). *Sir Peter Jackson's Full Hobbit Statement*. Retrieved from <http://www.3news.co.nz/Sir-Peter-Jacksons-full-Hobbit-statement/tabid/418/articleID/178301/Default.aspx>

Actors Equity, NZ. (2010). *NZ Actors' Equity Meeting Resolution and Statement*. Retrieved from <http://www.actorsequity.org.nz/home/103-nz-actors-equity-meeting-resolution-and-statement>

Bennet, A. (2010, September 30). Film's Backers Told NZ Law on Their Side Against Union. *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10677077.

Broun, B. and Watkins, T. (2010, October 26). Hobbit Fans Warned we Could Lose it all. *The Dominion Post*, p. 1.

Brownlee, G. (2010). *Statement on Behalf of SPADA, Actors' Equity and CTU*. Retrieved from <http://www.beehive.govt.nz/release/statement-behalf-spada-actors039-equity-and-ctu>

Cardy, T. (2010, October 22). We may as well not live here. *The Dominion Post*, p. 1.

Cardy, T. and Johnston, K. (2010). *Hobbit Looks Headed Overseas*. Retrieved from <http://www.stuff.co.nz/business/4255670/Hobbit-looks-headed-overseas>

Cheng, D. (2010, December 21). Sir Peter: Actors No Threat to *Hobbit*. *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10695662.

Cheng, D. (2011, January 20). Minister Misled us on *Hobbit*, says Labour. *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10700790.

Cheng, D. and Harper, P. (2010, October 27). Jackson: *Hobbit* Union 'Had Gun to Our Head.' *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/movies/news/article.cfm?c_id=200&objectid=10683359.

Craig, J. and Murray, A. (2010, September 17). *The Hobbit Movie – Commerce Act Advice*. Retrieved from <http://union.org.nz/sites/union.org.nz/files/Hobbit-SimpsonGreirson1.pdf>.

CTU. (2010). *Media Advisory re: The Hobbit*. Retrieved from <http://union.org.nz/news/2010/media-advisory-re-the-hobbit-31010>.

Kelly, H. (2011). *The Hobbit Dispute*. Retrieved from <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>

Luquer, D. and Haaland, A. (2010, August 17). *Engagement of Performers on The Hobbit*. Retrieved from <http://www.alliance.org.au/documents/letter1.pdf>

NZPA. (2010). *Hobbit Producers Considering Other Options*. Retrived from <http://www.stuff.co.nz/entertainment/film/4175633/Hobbit-producers-considering-other-options>

Roberts, J. (2010, October 28). *The Hobbit Law: What Does it Mean for Workers?* *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=10683710.

Rothwell, K. (2010, October 11). *The Hobbit's Little People Revolt*. *The Dominion Post*, p. 3.

Skelton, C. (2010). *Union: Protest Did Not Affect Hobbit Decision*. Retrieved from <http://www.stuff.co.nz/dominion-post/news/4480054/Union-Protest-did-not-affect-Hobbit-decision>

Smellie, P. (2010, October 22). *Hobbit Storm Spills out of Teacup*. *The Dominion Post*. p.2

Ward-Lealand, J. (2010). *Response to Wingnut Films Statement 30 Sept, 2010*. Retrieved from <http://www.actorsequity.org.nz/index.php?start=28>

Wenzlick, S. (2010). *Hobbit Rallies Build up Steam*. Retrieved from <http://www.stuff.co.nz/entertainment/film/4270058/Hobbit-rallies-build-up-steam>

How does non-standard employment affect workers? A consideration of the evidence

BERNARD WALKER*

Abstract

Non-standard employment is an increasingly significant component of labour arrangements. A long-running debate concerns the consequences of this form of employment with opponents arguing that it disadvantages workers. Although considerable research has occurred, the findings are largely inconsistent and inconclusive. This paper explores recent studies and the matters that need to be addressed in order to develop a more comprehensive explanation. It proposes a need to broaden the agenda to explore the processes and contexts leading to the introduction of non-standard employment.

Introduction

At the centre of the *Hobbit* dispute was a fundamental question concerning the difference between contractors and employees. The topic held considerable significance, having been the focus of the high-profile *Bryson* court case. James Bryson, a worker on the production crew from an earlier movie, contested his termination. While the hiring company proposed that Bryson was a contractor, the courts held that he was, in fact, an employee. The case highlighted the stark contrast between contractor and employee status, and the implications for employers and employees. The legal challenge echoed the wider international debates concerning the rights of the parties, and the relative merits of the two differing types of hiring arrangements. Although the debate was complicated by a host of legal and political issues, at the centre of it all was an unanswered question – does contracting benefit or disadvantage workers?

To address that question, this article explores recent research evaluating the consequences of the differing forms of employment at the level of the individual worker. The discussion is not intended as an exhaustive review of the literature, but rather it provides a targeted overview of recent studies that are relevant to the *Hobbit* case and current debates. The primary question is whether this research supports the claims made, especially the allegations of negative effects, associated with independent contracting and non-standard employment in general. The article proposes that the task of evaluating non-standard employment is far from straightforward and while a popular debate, at times, implies there should be a single answer to this question, the complexity of the topic means that it may not be so simple. Instead, the issue is complicated with the outcomes showing considerable variation in relation to factors such as occupation and the form of non-standard work. A range of differing criteria can be used for evaluation and employees appear to weigh up a mixture of costs and benefits rather than perceiving an undifferentiated gain or loss. Overall, there are indications that some employees benefit from, or at least can constructively use non-standard employment, while others are seemingly disadvantaged. It is then argued that while investigations into the effects of non-standard employment on the individual worker are

* Bernard Walker is a Senior Lecturer in Organisational Leadership and Development at the University of Canterbury.

important, they should not be viewed in isolation and should not dominate research to the exclusion of other aspects. There is a need to broaden the agenda to explore the processes and contexts which lead to the introduction of non-standard employment, and shape the context within which workers engage in non-standard employment.

The format of this article comprises three main sections. The first provides an overview of non-standard employment, observing the significant problems with definitions, and then outlines the differing perspectives in the long-running debate regarding the consequences. The next section explores the recent research, noting the various areas of investigation and the many challenges associated with the topic, along with the patterns of findings that emerge. Finally, the article notes future directions including the need to investigate the broader contextual issues surrounding non-standard employment.

Defining Non-Standard Work

Since the 1980s, there has been a radical transformation of western employment with the accelerating growth of non-standard arrangements. The proliferation of diverse forms of non-standard employment (NSE) is claimed to be one of the most spectacular and important evolutions in working life, reflecting changes in labour market regulation, technological change and the increased participation of females (Connelly and Gallagher, 2004; De Cuyper, de Jong, De Witte, Isaksson, Rigotti and Schalk, 2008; Green and Heywood, 2011). The standard work arrangement of the twentieth century was characterised by several main features; it was (a) full-time, (b) continued indefinitely, (c) performed at the employer's place of business under the employer's supervision, and (d) in many cases it brought a range of statutory protections, benefits and entitlements such as a minimum wage and protection against unfair dismissal (Connelly and Gallagher 2004; De Cuyper et al., 2008). In contrast, a wide range of new forms of alternative, or non-standard work have emerged which differ from the standard model in a variety of ways.

Defining non-standard work and utilising consistent terminology is problematic. Studies concerning the growth of non-standard employment and its possible impact have been hampered by the absence of a universally accepted vocabulary and definition (Connelly and Gallagher 2004; De Cuyper et al., 2008). As will be seen, this lack of consistency becomes a major limitation in any attempts at generalisation, and drawing conclusions from reviews of the literature. There are numerous forms of non-standard work, while the topic can also be complicated by dynamics such as the presence of a third-party in temporary agency arrangements. The category is defined largely by what it is not, with the diverse range of work types sharing a common feature of differing from standard work. Non-standard work is distinguished from the former standard employment relationship (SER) with regard to any of that traditional model's core features;

- (a) the notion of ongoing employment is absent, and instead of permanency and continuity there is often limited duration and a fixed termination date
- (b) rather than working at the employer's workplace and on the employer's premise, under his or her supervision, non-standard arrangements can occur at a range of sites, and can be "market mediated" as with temporary agency workers (De Cuyper et al. 2008: 27)
- (c) typically workers in non-standard temporary arrangements have fewer, or even none, of the employment-specific statutory protections and benefits available under standard work¹.

The literature and terminology often focuses on the temporary nature of the main forms of non-standard employment. In Canada and the USA, contingent work, as distinct from other forms of alternative or non-standard work, draws on the definition used by the USA Bureau of Labour Statistics “any job in which an individual does not have an explicit or implicit contract for long-term employment or one in which the minimum hours worked can vary in a nonsystematic manner” (Connolly and Gallagher 2004: 960). In other parts of the world, however, this is referred to as temporary, fixed-term, non-permanent, and even casual employment (De Cuyper et al., 2008).

A number of classification systems have been used regarding the types of non-standard employment. Connolly and Gallagher (2004) for example, propose four broad groupings of contingent work;

- (i) workers directly hired (by the organisation) on a seasonal contract
- (ii) direct-hire or in-house – where the organisation hires temporary workers directly, rather than using an agency – their hours worked can vary
- (iii) temporary staff agencies – where work is of a fixed duration; (see Burgess, Rasmussen and Connell, 2000)
- (iv) workers engaged as independent contractors – also often defined as self-employed, where their work is provided on a fixed term or project basis

The term ‘contractor’ is commonly applied across several of these forms of non-standard employment; however, in each context it has a significantly different meaning. McKeown and Hanley (2009) propose that these can be considered as a continuum in terms of the independence involved. The least independent is the situation of a contractor who is only that in name, but who is effectively dependent on the hiring company in a manner similar to employees (a dependent contractor); the next is the contractor who works for a temporary employment agency, and finally, the self-employed contractor potentially working for a range of clients (independent contractor), has the greatest independence.

The difficulties associated with terminology mean that it is difficult to establish the exact prevalence of non-standard employment; (see Burgess et al., 2004). Spoonley (2004) outlined the New Zealand situation and noted that of all non-standard work forms, casual / temporary had become the most dominant and the fastest growing. McKeown and Hanley (2009) report that, in Australia, self-employed contractors are the second largest group of people in non-standard work, representing 8% of all employed persons in 2004. In the UK, self-employment peaked in 1995, but from 1995-2000 fell for all occupational groups except professionals. In New Zealand, the absence of a national workplace survey (Ryan and Markey 2011) and problems associated with the typologies used in labour force surveys make estimates difficult (Burgess et al., 2004).

The growth of non-standard employment leads writers such as Spoonley (2004) to argue that there is now a mismatch between the changing profile and nature of employment arrangements, compared to the existing legislation and policy framework, which is still built around notions of standard employment.

The debate surrounding non-standard employment

There are a variety of reasons why organisations and workers enter into non-standard employment relationships. For organisations, a commonly cited reason is the pursuit of flexibility as a means to achieving greater efficiency. The concept of flexibility is explored in detail in other articles (for example

see Atkinson 1984; de Bruin and Dupuis 2004; Pollert 1988). There are several dimensions to this; functional flexibility allows workers to be reassigned to different jobs or tasks; numerical flexibility supplies the required number of workers at the times needed, and financial flexible allows employment to match changes in supply and demand in the external labour market. Intertwined with this is the perceived need for labour cost savings associated with downsizing, increased global competition, the introduction of new technology and the need to respond promptly to changes in markets (Burgess et al., 2004). Arrangements such as temporary agency work for example can provide a practical response to shortages of skilled workers in specific occupations.

In implementing the model of the flexible firm, an essential question for organisations is to identify which groups of workers should be the core or the periphery. Lepak and Snell (1999) propose a model for identifying which employee groups are central to the organisation and, hence, should be retained within the firm, and which are most suited to externalised relationships. Two criteria are used; the extent to which a set of individuals and their competencies are a “valuable resource for the firm”, and the extent to which they are “unique or firm-specific” (Peel and Boxall, 2005: 1679). Workers whose skills are low in value and generic are most suited to being contracted out, whereas those whose skills are unique and critical to the firm are best retained as part of the firm’s core. While the use of non-standard employment can benefit firms, it can also have disadvantages; for example, workers who are not attached to the firm are less suited to teamwork and the development of team-specific skills, while contractors may also lack the functional flexibility of being reassigned to other roles (Peel and Boxall, 2005).

For workers, there are also proposed benefits from non-standard employment arrangements, including greater autonomy, increased earning potential, flexibility, and more control over work-life balance allowing workers to balance work and family commitments. Organisations benefit from the fact that non-standard arrangements are outside the usual provisions and protections of governing standard employment relationships, thus, allowing the cost savings and ability to adjust quickly to changing conditions (McKeown, 2005; McKeown and Hanley, 2009). The benefits for employers may, however, constitute costs for workers. There are concerns that this absence of provisions and protections disadvantages workers, especially those on the periphery. The comparative lack of regulation governing temporary agency work, for example, is seen as creating ambiguity concerning contractual relationships, and the status of workers which can lead to a range of adverse outcomes (Burgess et al., 2004). Labour economists have been accused of being too fixated on the benefits of flexible contracts to firms without considering the experiences of employees (Green and Heywood, 2011). An alternative narrative portrays workers in non-standard situations as working without job security, being deprived of statutory benefits and entitlements, including protection against unfair dismissal, minimum wages, sick leave and aspects of annual leave, as well as being disadvantaged in other areas such as lower pay, lacking training and career paths (Alach and Inkson, 2004; Burgess et al., 2004; Green and Heywood, 2011; McKeown, 2005; McKeown and Hanley, 2009; Smeaton, 2003). From that perspective, non-standard employment is viewed as precarious and potentially substandard employment.

Those concerns take on greater significance when seen in the context of the increasing numbers of people moving into non-standard employment as part of a process of casualisation, with standard employment being converted into non-standard work as organisations increasingly utilise outsourcing and temporary agencies. Critics see these trends as part of a broader new approach to managing labour that increases labour productivity by pushing the costs and risks of employment onto workers. Non-standard arrangements are also seen as leading to the de-unionisation of workplaces, lowered levels of health and

safety, and the deterioration of working conditions in industries, leading to an eventual erosion of broader labour market standards (Burgess et al., 2004; Watson 2005).

Within the literature, these debates have led to the emergence of two opposing theoretical models (Smeaton, 2003). One view proposes the move into non-standard arrangements, such as self employment or agency work as being a voluntary move with workers attracted or ‘pulled’ by the lure of superior conditions. Kunda, Barley and Evans,(2002) portray a free agent perspective, where a small number of highly skilled experts opt to work outside conventional arrangements in order to gain a range of benefits including greater financial rewards, control over their work conditions and lifestyle. The *portfolio* model (Arthur, Inkson and Pringle, 1999; Handy, 1996) proposes increasing numbers of well-qualified people being drawn to new entrepreneurial forms of self-employment. These are typically portrayed with examples of highly skilled professionals whose services are in demand, and who can “flexibly exploit an emerging ‘new deal’”(Smeaton 2003: 379). In addition to the attractions of higher earnings and a desire for better work-life balance, the move to self-employment is also a response to a perception that the traditional benefits of promotion and security are no longer available in standard employment relationships, as organisations move to flattened structures with no promise of long-term job security. Managing one’s own career, maintaining employability through a variety of skills and experiences, having autonomy, independence, and other such non-pecuniary aspects of work, all become valued features (Arthur, Inkson and Pringle, 1999; Kirkpatrick and Hoque 2006).

In contrast, an alternative *marginalisation* view proposes that people are ‘pushed’ reluctantly into these alternative forms of employment due to a lack of alternative prospects. The growth in the numbers of self-employed and temporary workers is seen as resulting from large organisations shedding their less-valued workers and changing to subcontracting arrangements. The new non-standard workers are largely “economic refugees” who are unable to find standard employment. As such, they are marginalised, treated as outsiders, and exploited by organisations. The downside aspects of non-standard work include job insecurity, low and variable earnings, the loss of non-pay benefits and training, and having lesser choice of assignments. Workers in these situations are seen as dissatisfied with their non-standard roles, and would generally prefer to return to being employees (Kirkpatrick and Hoque, 2006; Smeaton, 2003)².

These two models do not, however, “purport to be exhaustive nor necessarily even to account for the majority of self-employment”, but rather they “relate to tendencies of change” (Smeaton 2003: 380). Writers suggest that a central issue for policy maker and employers is the need to achieve a balance between the advantages of flexibility, and workers’ desire for certainty and protection (Burgess et al., 2004; Spoonley, 2004). The divergent views portray non-standard employment as having the ability to predominantly bring either costs or benefits for workers, but there may be a lack of clarity as to where the balance currently lies. The challenge for researchers is, therefore, to clarify to what extent either perspective is supported by evidence regarding current experiences.

Evaluating Non-Standard Work

The debate surrounding non-standard employment raises a number of critical research questions. The primary issue concerns the quality of non-standard forms, and how these compare to standard employment for the individual worker. Such an evaluation involves ascertaining the consequences of non-standard employment, with the nature and extent of the costs and benefits involved. A large body of

research has developed over recent decades with the majority of studies coming from the US, Australia, Canada and Europe (Connelly and Gallagher, 2004; De Cuyper et al., 2008). This present overview will focus on recent studies which build on and extend earlier work, illustrating the patterns and challenges in research. The studies selected are from Australia, New Zealand and UK as these share relatively similar legislative frameworks, hence are particularly relevant to the Hobbit case.

Despite the volume of work, earlier studies produced few clear, generalisable findings. Two major reviews summarised the results across a range of areas and found them to be contradictory and inconclusive (Connelly and Gallagher, 2004; De Cuyper et al. 2008). The reviews did, however, agree that there is a need for greater definitional clarity regarding what constitutes non-standard employment. The literature does seem to suggest that workers in non-standard employment are not a homogeneous group with the varying types of work arrangements producing different outcomes. For that reason, this paper will attempt to distinguish the various arrangements in order to note the patterns associated with each.

The present section highlights the challenges associated with the research. This is dealt with in four subsections. The first subsection outlines recent studies concerning independent contracting, the arrangement in the Hobbit law. From there, the attention moves to studies that illustrate the challenge of defining and agreeing upon evaluative criteria, drawing upon studies into temporary agency work. The third subsection turns briefly to the little explored consequences for organisations. Finally, the discussion looks to future research needs, noting areas that are vital for understanding non-standard employment, including the contexts that lead to the introduction of non-standard employment.

Self employment and independent contractors

Self-employment³ and independent contracting are arrangements where individuals are contracted directly by a principal hiring their services. Earlier studies in this area had produced mixed, inconsistent findings. Recently, Smeaton (2003) analysed larger British surveys of workers from 1986 to 2000, discovering rather paradoxical patterns. At one level, the findings were consistent with parts of the earlier research which appeared to support the marginalisation model; they showed an increasing number of older workers, both professionals and non-professionals, being pushed into self-employment as a result of employer changes or redundancy. These workers were subject to externalisation, had limited alternatives, and were seemingly trapped in their self employed status not being able to return to standard employment. However, contrary to the marginalisation model, the income of this group was not significantly different from employed workers; in addition, they were more satisfied, and most preferred to remain self-employed. This latter finding was also in line with earlier studies which suggested that contractors were reasonably content with their situation, as inferred from the data showing that only a small proportion of independent contractors were interested in securing more permanent contractual arrangements (Connelly and Gallagher, 2004). Smeaton's (2003) findings suggested that although there were costs and benefits for workers, the benefits of self-employment may mitigate the disadvantages, leading to the conclusion that these self employed workers were not an exploited group.

In New Zealand, Peel and Boxall (2005) built on the earlier work of Kunda et al. (2002) who studied highly skilled contractors in Canada and the US. In general, Kunda et al. had found that those workers were not marginalised, but were more like portfolio workers; they largely preferred contracting, had

greater opportunities to develop and exercise expertise, felt greater independence and control, and were better paid than permanent employees. These gains did, however, come at a price, as the workers also experienced anxiety, insecurity and estrangement in their work.

Peel and Boxall's (2005) study expanded this perspective to look at both managers and workers in two sectors, meter reading and engineering consultancies. The research traced management and worker experiences of transitions from standard employment to contractor roles. A key finding was the need for mutuality between the parties as a necessary condition for successful long-term contracting. Unlike Kunda et al.'s (2002) more homogenous group, workers in the two contrasting sectors had very different experiences from each other, and this was attributed to differences in skill levels and labour market power. In engineering, contracting was an established industry practice for achieving flexibility in specialisation and staffing levels. The workers had labour market power and their move into contracting roles was a mutual, proactive choice. In contrast, the meter readers had low skill and low labour market power, and their move to contracting was unilaterally imposed with the workers having little choice, with the result that this produced mistrust and resentment rather than mutuality. In those situations, the individual contracting arrangements did not persist as there were later replaced by company-to-company arrangements which allowed the workers to revert to more standard employment roles.

Together, these studies suggest that, there are also differences associated with other variables such as occupation, skill level, labour power, and the nature of the move to contracting, all influencing outcomes. Furthermore, a variety of criteria can be used for evaluation; a worker can experience gains in some areas and losses in others compared to standard work. The task of analysing those criteria and their interrelationships forms the next topic in unravelling the complexity of non-standard employment.

What do you measure? The criterion dilemma

The research concerning other types of non-standard employment evidences further problems inherent in the field. In addition to the problems concerning definitions and terminology noted earlier, methodological difficulties significantly hamper any attempts at inter-study comparisons. A group of recent Australian studies illustrate these difficulties, especially the problem of a lack of agreement upon suitable criteria for evaluating non-standard employment. Significantly, these studies used similar or even identical data, yet drew markedly differing conclusions. The first study, Hall (2006) investigated temporary agency work, utilising data from a survey of agencies, client firms and agency workers as well as the national Household, Income and Labour Dynamics in Australia (HILDA) survey. Hall sought to test claimed benefits of temporary agency work for both companies and workers. Temporary agency work is claimed to contribute to the efficient functioning of labour markets. Companies are seen as benefiting through more efficient matching of demand and supply, and accessing hard-to-find skills; it also benefits workers who do not want long term, full-time hours, offering them diversity, a degree of job security, and pathways to for permanent employment.

Hall (2006), however, found the situation for workers was quite different. From his comparisons of agency workers with direct employees, he concluded that, although agency arrangements benefited firms, they disadvantaged workers. Hall used a range of criteria which reflected poorly on agency work. The workers were more likely to view their pay as unfair, had less control and discretion, were excluded from workplace decision making, and were less likely to be using or developing their skills. They did not

desire their agency role, with two thirds of the workers preferring direct employment. These results largely persisted when occupational categories were controlled for. Hall argued that companies' reasons for selecting this type of employment were to drive down employment costs and replace existing workforces while avoiding responsibilities and liabilities (McKeown and Hanley, 2009). From the workers' perspective, agency work was a marginalised and inferior form of employment that they were pushed into. In general, agency workers were portrayed as exhibiting the "characteristics of marginal, peripheral workers" (Hall, 2006:171).

McKeown and Hanley (2009) followed Hall (2006) in focusing on agency workers, but narrowed their sample to professional occupations. Their study explored the factors that caused workers to enter into, and remain in, this form of work. The findings showed a mixed situation, with both a portfolio-like elite of professionals who benefited from non-standard arrangements, but also low paid workers in insecure situations, vulnerable to income fluctuation and overwork/underwork tensions, consistent with the view of marginalisation and disadvantage. For workers 'pulled' into agency work, that is, those who freely chose to enter this area, the factors that initially attracted them were largely the same factors that, subsequently sustained them in this area of work. Those factors included greater pay, balancing of work and family, and a flexible lifestyle. For some, agency work served as a bridge or a transition on the road to permanent employment. The converse applied however, for those 'pushed' into agency work. For this group, the negative aspects were significant, with irregular work, periods of unemployment, loneliness, low earnings, and an irregular lifestyle. Agency work became a trap, as the persistent lack of choice kept them in non-standard work with few alternatives.

Other studies used broader data sets such as the HILDA survey data utilised by Hall (2006). Wooden and Warren (2004) evaluated the quality of work arrangements in terms of job satisfaction. Reviews of earlier research had shown this to produce mixed and conflicting results (Connelly and Gallagher, 2004). Wooden and Warren (2004) studied two types of non-standard arrangements, fixed-term contracts and casual employment, as well as the more standard permanent or ongoing employment. Fixed-term contract workers appeared to particularly benefit from their non-standard work arrangements; they were more satisfied with their jobs than other workers, both casual and permanent, even after controlling for other individual and job characteristics. Among the casual workers, a subgroup reported lower levels of job satisfaction; however, they represented only a small percentage of non-standard workers. The authors concluded that these two categories of workers did not appear to view non-standard employment as undesirable or sub-standard.

Drawing on precisely the same data-set, however, Watson (2005) highlighted the importance of criterion measures, using an alternative measure to Wooden and Warren (2004) and reaching markedly different conclusions. Arguing that the subjective indicators of job satisfaction used by Wooden and Warren were inadequate criteria, Watson proposed that job-quality should instead be evaluated through a more objective measure, using earnings as his criterion. Casual employees fared worst; in terms of earnings, all categories of casuals responded more negatively, including those casual workers whose job satisfaction overall was positive. Watson therefore refuted the findings of Wooden and Warren, proposing instead that casual work was an inferior type of employment, consistent with a marginalisation view.

Seeking to reconcile the apparent conflict between the two sets of findings, Green and Heywood (2011) created a new composite criterion termed an "index of job quality" which incorporated both objective and subjective aspects. Applying this also to HILDA data, the results reflected Watson's (2005) findings to

some extent, with casual workers once more seeming to be disadvantaged. This group scored lower than permanent and fixed-term workers in terms of pay, security, use of skills, opportunities for skill development, and control over work.

Employee choice, motivation and trade-offs for workers

Earlier reviews did suggest that one relatively consistent finding in earlier research was the relationship between a worker's volition or freedom in their choice to do non-standard work, and their work-related attitudes and behaviours including their job satisfaction (Connelly and Gallagher, 2004). Workers who voluntarily chose contingent employment tended to report more positive organisational experiences compared to those who were only in this arrangement due to a lack of alternatives, being unable to find standard employment. This result differed across the type of employment arrangement, with workers in temporary-agencies or direct-hire arrangements preferring permanent employment, whereas only a small minority of independent contractors preferred more standard, permanent arrangements.

Accompanying this is the related, but distinct, issue of workers' motivation; that is, why they work in a contingent capacity (Connelly and Gallagher, 2004). Some workers may be pushed into non-standard employment by an employer's decision to discontinue standard arrangements, or if they are unable to find "standard" job, their only choice may be between non-standard employment and unemployment. Other workers, however, may enter into self-employment as a part of a deliberate career plan. Connolly and Gallagher (2004) observed that earlier studies had suggested that workers in temporary-agencies or direct-hire arrangements may choose those situations for reasons such as skill development, increased income, or as a transition to permanent work. There was, however, little information regarding independent contractors.

Green and Heywood's (2011) study provides more insight into evaluative criteria and particularly job satisfaction. Using data from the British Household Panel Survey (BHPS) 1999-2004, Green and Heywood (2011) explored whether workers perhaps trade off some areas of disadvantage in return for offsetting benefits in other areas, or over a longer time frame they may gain benefits such as a transition to standard ongoing employment. The study examined the relationship between flexible employment contracts (fixed term, temporary, and other forms), and dimensions of job satisfaction (job security, pay, hours, the work itself, and overall satisfaction) measured through participants' ratings of their satisfaction in those areas. The findings were largely positive for flexible employment. Overall, flexible contracts, in general, had little adverse impact, with either a weak negative influence or no impact on overall job satisfaction, and no impact on overall life satisfaction.

Several qualitative studies provide further insight into the processes by which workers enter into non-standard employment, as well as how they perceive the trade-offs among costs and benefits. Casey and Alach (2004) and Alach and Inkson (2004) studied New Zealand women in temporary work. They found that the majority chose temporary work, aware of the risks and knowing that it involved a higher degree of income insecurity. Their choices, however, were part of a strategy for doing more of what they wanted, with temporary work allowing them to prioritise other non-work activities and relationships that were of high value to them. The respondents also reported benefits such as learning and self development opportunities (Alach and Inkson, 2004). The findings ran counter to expectations that temporary workers, particularly females, would be pushed into non-standard arrangements from a lack of alternatives and

would involve marginalised roles with low skill, mediocre work. Unlike Kunda et al.'s (2002) executive and technical workers however, achieving higher earnings was not their primary objective. Instead these women used non-standard employment and the advantages this brought as part of their own preferred arrangements, seeking to reposition the role of paid work in their lives "in order to pursue more satisfying, more interesting, more varied and more relational lives" (Casey and Alach 2004: 476). In line with Smeaton's (2003) observations, the authors noted, however, that the women's choices may have been partially shaped by their awareness of insecurity and precariousness of contemporary employment in general. Some viewed temporary work as a more reliable and secure source of income than many permanent jobs (Alach and Inkson, 2004), while also potentially leading some to choose a lifestyle that valued aspects other than paid employment (Casey and Alach, 2004).

Kirkpatrick and Hoque (2006) explored similar issues among UK social workers. Their findings revealed a mixed situation. For most of this group, the move into agency work was voluntary. These were skilled workers and a shortages of staff in this field meant workers generally could choose between non-standard and standard work options. Consistent with other earlier research (for example Kunda et al., 2002), many were 'pulled' by the increased pay as well as the flexibility and personal control in both work assignments and accommodating non-work interests. The study introduced a longitudinal dimension though. While these were short-term benefits, agency work involved a complex trade off between these and longer term costs. Workers, knowingly, used agency work as a 'transient phenomenon', with the intention that they would eventually move to a permanent job; (see also Alach and Inkson, 2004; Hunt, 2004; Rasmussen, Hunt and Lamm, 2006). Agency contracts were considered inferior in terms of overall remuneration, development and benefits. Other costs came from marginalisation and being treated as an outsider, doing less desirable tasks, being excluded from decision-making and informal support networks. Staying in agency work too long could adversely affect future employability and professional development, comments also noted in Alach and Inkson (2004).

The move into non-standard employment was not solely a matter of 'pull' though. A 'push' also operated at the same time as workers reacted and sought to escape from 'standard' organisational conditions. In the way that Casey and Alach's (2004) workers reacted to a general malaise concerning standard employment, non-standard employment allowed Kirkpatrick and Hoque's (2006) workers to escape from intensifying work demands, as well as systems that constrained their development and upward mobility, as in Alach and Inkson (2004).

Directions for moving forward

While methodological problems present a barrier to developing any comprehensive knowledge of non-standard employment, the task of resolving those methodological challenges and inconsistencies can provide a direction for moving forward. The dilemma associated with identifying and agreeing upon suitable evaluative criteria represents a crucial challenge. The issue is not simple. One fundamental question is whether researchers' or participants' criteria are more relevant. Researchers using supposedly objective measures such as income levels may be imposing their own values and not representing those of workers. Instead, workers seem to use a much more complex equation where income levels are only one of the variables, with other matters such as non-work activities, work-life balance, personal control and longitudinal perspectives also holding significant importance. The individual evaluative criteria do not seem to exist in isolation, but rather are used as part of a compensatory type of model where losses in one

area can be traded against gains in other, more important areas. Establishing precisely what those equations are appears to be a complex matter and it is unclear how broadly these are shared; it would seem there may even be differences among persons in the same workplace (Alach and Inkson, 2004).

One criterion that may be more widely agreed upon, however, is that of worker well-being, especially if this relates to more readily measurable and observable aspects. At present, however, the findings in this area are not clear, although it may be influenced by the type of arrangement (Connelly and Gallagher, 2004; De Cuyper et al., 2008). Connelly and Gallagher (2004) reported studies suggesting that workers in temporary and contract employment had higher levels of subjective health problems than workers in standard jobs, while others proposed that self-employed workers, for example, experience lower levels of health complaints.

Consequence for organisations

Research has also investigated other outcomes concerning workers' organisational attitudes and behaviours. These are not primarily matters of benefit or disadvantage to the individual worker but rather are of interest to those managing organisations. De Cuyper et al.'s (2008) review included the areas of job satisfaction, organisational commitment, wellbeing and productive behaviours, but again, the findings proved to be inconsistent and inconclusive. Reviewers question whether this may possibly be attributable to constructs developed in the context of 'standard' work situations having different properties for temporary workers (Connelly and Gallagher, 2004; De Cuyper et al., 2008). Organisational commitment, for example, may need to be redefined for temporary agency work where there is a triangular relationship between the worker, the agency, and the client-organisation. The worker may have dual commitments to the client firm and/or the temporary staffing agency, with the literature suggesting commitment towards the user client firm may tend to be greater (De Cuyper et al., 2008). Several recent studies illustrate some of the types of issues involved.

Coyle-Shapiro's (2006) survey of agency workers explored the determinants of commitment, finding that workers' commitment to the client organisation was positively related to both the perceived support from that organisation, as well as the organisation's attractiveness to workers. The worker's perception of the way their employing agency has treated them was also influential, directly affecting commitment to the agency, and also indirectly affecting their commitment to the client organisation. McKeown's (2003) study of professional agency workers found commitment to a client organisation was related to the initial pull factors that drew the worker into agency work, while commitment to the contracting agency is related to the initial push factors. This suggested that organisations gain greater commitment where the worker benefits from the move to agency work, whereas agencies benefit where the worker is disadvantaged. Biggs and Swailes' (2006) study of call centre staff highlighted implications of the differing levels of commitment, suggesting that the presence of less committed agency workers could negatively influence the commitment of permanent workers.

It seems possible that the theoretical frameworks used in relation to non-standard employment, such as work stress, fairness in social comparison and social exchange theories, may function in differing ways for each type of employment arrangement. Again, this reinforces the potential need to distinguish the varying types of contingent work in order to identify the specific processes occurring in each area (Connelly and Gallagher, 2004; De Cuyper et al., 2008).

While the debate surrounding non-standard employment has focused on the consequences for workers, the costs and benefits for organisations have received comparatively less attention. Non-standard employment may offer short-term benefits such as reduced wages; however, there may be costs with non-standard workers bringing, for example, lower levels of commitment and loyalty, and negatively affecting the commitment of permanent workers (McKeown and Hanley, 2009). The use of contingent workers may adversely affect the attitudes, behaviours, and job design of permanent employees. As noted earlier, organisational development through teamwork, multi-skilling or learning organisations may not be possible with non-standard workers, while contractors may lack functional flexibility (Connelly and Gallagher, 2004; Peel and Boxall, 2005).

Peel and Boxall's (2005) research suggested that management choices to introduce contracting arrangements tended to be driven by "ideological fashion" rather than research or careful analysis (p.1684). Organisational choices regarding non-standard employment may be poorly informed; there may be situations where, from a holistic long-term perspective, non-standard employment produces more costs than benefits for organisations.

Conclusion: reframing the question

It seems that the original question of whether contracting benefits or disadvantages workers is not readily answerable. The catch-cry that "non-standard work is substandard work" is neither proved nor disproved. The broader literature on non-standard employment shows few clear conclusions; it does not unequivocally suggest that non-standard employment has positive or negative effects on workers. That literature does, however, indicate that methodological limitations may potentially account for the apparent inconsistencies in the existing research. Workers in non-standard employment are not a homogenous grouping and the outcomes appear to depend upon a range of factors, including the type of work arrangement, the specific group of workers, their occupation, their labour market situation, and the criteria used for evaluation.

International surveys using aggregated classifications of self employed, independent contractors tend to suggest that these workers are not disadvantaged in terms of pay, and do not wish to move to standard employment. It is, however, difficult to gauge whether those figures capture workers who have been pushed out of standard employment, or entrepreneurs who prefer their independent roles.

Peel and Boxall's (2005) case study provides a more differentiated example of the contrasting experiences of non-standard employment, with one group seeming to benefit from the change while the other group return en masse to standard employment. The engineers and designers entered into contracting arrangements through a mutual process in a manner that afforded choice; they held an amount of labour market power and the arrangements were seen as largely beneficial. This is in line with wider patterns where groups characterised by features such as higher skill levels and labour market power can achieve relatively better outcomes in non-standard settings. In contrast, the meter readers experienced the converse and, consequently, sought to leave non-standard employment. While it may be argued that some of the differing experiences may result from individual preferences and personality, Peel and Boxall (2005) propose that external factors have a greater bearing, affecting collective groups of workers.

Typically, workers report a complex picture involving a mixture of both costs and benefits, with the appraisal depending on the individual's values and the situation. Any evaluation of non-standard employment hinges on the criteria selected, but there is little consensus on what constitutes appropriate criteria, and the extent to which this should acknowledge the worker's own preferences. Further complicating the situation is the use of workers in standard employment as a reference group. That form of employment is itself subject to change and uncertainty so that the negative aspects of standard arrangements may also create a less obvious factor 'pushing' workers towards non-standard employment (Connelly and Gallagher, 2004; Kirkpatrick and Hoque, 2006).

There is a need for a theoretical model which provides an adequate account of non-standard employment. Given that the evidence suggests that there are perhaps multiple types of non-standard employment situations, the outcomes will depend on the variables at play. Attempts to apply research findings to employment arrangements such as the Hobbit are also further limited by the absence of comparisons; there is no suitable comparison group of workers in standard arrangements in the same industry, nor are there pre-post comparisons in an industry which has had non-standard employment for some time (de Bruin and Dupuis, 2004). Additionally, little attention has been paid to the situation of workers who have been in non-standard employment for some time and have experienced termination of their work engagements in the absence of protection against dismissal.

The Peel and Boxall (2005) and Kirkpatrick and Hoque (2006) case studies also highlight the significance of the organisational and industry contexts that lead to the introduction and growth of non-standard employment. The Peel and Boxall (2005) study illustrates the factors involved in management decisions, with crucial questions of when and whether non-standard employment is beneficial for organisations, as well as the potential costs. Decisions that are not informed by prior analysis may lead to unnecessary adverse outcomes for both companies and workers. Other studies point to the little explored HRM issues of having non-standard employment arrangements (Coyle-Shapiro and Morrow, 2006; McKeown, 2003; McKeown and Hanley, 2009). The contextual factors are not confined to management choices though. While De Bruin and Dupuis (2004) propose the need to explore particular industries, Kirkpatrick and Hoque (2006) allude more broadly to the need to chart the wider political, legal and economic factors involved. In the same way that costs and disadvantages can occur for organisations, there may need to be recognition of those same issues for nation-states.

These aspects introduce new angles in the debate concerning non-standard employment, and offer the potential for informed decisions in a variety of areas as part of a more comprehensive understanding of the multiple elements that shape non-standard employment. The articles that follow will move to explore and debate some of those aspects with regard to the Hobbit case study.

Notes

¹ New Zealand casual employment is characterised by the limited range of entitlements in areas such as payment for sick leave and public holidays, and protections against dismissal or redundancy. European employment regulations for temporary workers, however, offer greater protection (De Cuyper et al., 2008).

² Some writers initially proposed for example, a bifurcation among agency workers and self employed persons, comprising the highly skilled, highly paid professionals and a second category of low paid workers with constant job changes (Burgess et al., 2004).

³ This refers to ‘own account self employment’ where a person is self employed but does not have employees (Spoonley, 2004).

References

- Alach, P. and Inkson, K. (2004). The New “Office Temp”: Alternative Models of Contingent Labour. *New Zealand Journal of Employment Relations*. 29(3): 37-52
- Arthur, M.B., Inkson, K. and Pringle, J.K. (1999). *The New Careers: Individual Action and Economic Change*. London: Sage
- Atkinson, J. (1984). Manpower Strategies for Flexible Organizations. *Personnel Management*. 16: 28-31
- Biggs, D. and Swailes, S. (2006). Relations, Commitment and Satisfaction in Agency Workers and Permanent Workers. *Employee Relations*. 28(2): 130-143
- Burgess, J., Rasmussen, E., and Connell, J. (2004). Temporary Agency Work in Australia and New Zealand: Out of Sight and Outside the Regulatory Net. *New Zealand Journal of Employment Relations*. 29(3): 25-36
- Casey, C. and Alach, P. (2004). ‘Just a Temp?’ Women, Temporary Employment and Lifestyle. *Work, Employment and Society*. 18(3): 459-480
- Connelly, C.E. and Gallagher, D.G. (2004). Emerging Trends in Contingent Work Research. *Journal of Management*. 30(6): 959-983
- Coyle-Shapiro, J.A-M. and Morrow, P.C. (2006). Organisational and Client Commitment among Contracted Employees. *Journal of Vocational Behaviour*. 68: 416-431
- de Bruin, A. and Dupuis, A. (2004). Flexibility in the Complex World of Non-Standard Work: the Screen Production Industry in New Zealand. *New Zealand Journal of Employment Relations*. 29(3): 53-66

De Cuyper, N., de Jong, J., De Witte, H., Isaksson, K., Riggotti, T. and Schalk, R. (2008). Literature Review of Theory and Research on the Psychological Impact of Temporary Employment : Towards a Conceptual Model. *International Journal of Management Reviews*. 10(1): 25-51

Green, C.P. and Heywood, J.S. (2011). Flexible Contracts and Subjective Well-Being. *Economic Inquiry*. 49(3): 716-729

Hall, R. (2006). Temporary Agency Work and HRM in Australia. *Personal Review*. 35(2): 158-174

Handy, C. (1996). *Beyond Certainty: The Changing Worlds of Organizations*. New York: Harvard Business Press.

Hunt, V. (2004). Call Centre Work: Careers for Women? *International Employment Relations Review*. 10(2): 111-131

Kirkpatrick, I. and Hoque, K. (2006). A Retreat from Personal Employment? Accounting for the Rise of Professional Agency Work in the UK Public Services. *Work, Employment and Society*. 20(4): 649-666

Kunda, B., Barley, S.R and Evans, J. (2002). Why do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labour Market. *Industrial and Labour Relations Review*. 55(2): 234-61.

Lepark, D.P and Snell, S.A. (1999). The Human Resource Architect: Toward a Theory of Human Capital Allocation and Development. *The Academy of Management Review*. 24(1): 31-48

McKeown, T. (2003). Commitment from a Contractor Workforce? *International Journal of Manpower*. 24(2): 169-186

McKeown, T. (2005). Non-standard Employment: When even the Elite are Precarious. *Journal of Industrial Relations*. 47(3): 276-293

McKeown, T. and Hanley, G. (2009). Challenges and Changes in the Contractor Workforce. *Asia Pacific Journal of Human Resources*. 47(3): 295-317

Peel, S. and Boxall, P. (2005). When is Contracting Preferable to Employment? An Exploration of Management and Worker Perspectives. *Journal of Management Studies*. 42(8): 1675-1695

Pollert, A. (1988). The 'Flexible Firm': Fixation or Fact? *Work Employment and Society*. 2(3): 281-316

Rasmussen, E., Hunt, V. and Lamm, F. (2006). New Zealand Employment Relations: Between Individualism and Social Democracy. *Labour and Industry*. 17(1): 19-40

Ryan, R. and Markey, R. (2011). What do we Need to Know about New Zealand Workplaces? 25th AIRAANZ Conference. 1-4 February, 2011. Auckland: New Zealand.

Smeaton, D. (2003). Self-employed Workers: Calling the Shots or Hesitant Independents? A Consideration of the Trends. *Work, Employment and Society*. 17(2): 379-391

Spoonley, P. (2004). Is Non-standard Work Becoming Standard? Trends and Issues. *New Zealand Journal of Employment Relations*. 29(3): 3-24

Watson, I. (2005). Contented Workers in Inferior Jobs? Re-assessing Casual Employment in Australia. *Journal of Industrial Relations*. 47(4): 371-392

Wooden, M. and Warren, D. (2004). Non-standard Employment and Job Satisfaction: Evidence from the Hilda Survey. *Journal of Industrial Relations*. 46(3): 275-297

The Hobbit Dispute

HELEN KELLY*

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

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

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

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

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

The Freedom of Association Committee says

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

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

* Helen Kelly is the President of the New Zealand Council of Trade Unions

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

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

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

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

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

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

The Commerce Act does not absolutely prevent the producers of the Hobbit movie from entering into a union-negotiated agreement obtained through collective bargaining for the engagement of performers in New Zealand.

... However there are two possible exceptions that may apply:

The "recommendations as to price" exception in section 32 which allows associations of more than 50 people to make recommendations as to prices for services; and The joint venture exception in section 31, which excludes from S30 agreements that relate to the joint supply of services in pursuance of a joint venture (ibid).

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

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

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

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

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

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

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

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

References

Craig, J. and Murray, A. (2010, September 17). *The Hobbit Movie – Commerce Act Advice*. Retrieved from <http://union.org.nz/sites/union.org.nz/files/Hobbit-SimpsonGreirson1.pdf>.

International Labour Organization. (2008). *Freedom of Association, Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*. (5th ed.). Geneva: International Labour Office

Onfilm. (2010, September 29). Attorney-General Weighs in on *Hobbit* Dispute. *Onfilm – NZ's Screen Production Industry Magazine*. Retrieved from <http://www.onfilm.co.nz/2010/09/29/attorney-general-weighs-in-on-hobbit-dispute-2/>

One Law to Rule Them All

KATE WILKINSON MP*

On 28 October 2010, the Employment Relations (Film Production Work) Amendment Bill received its first reading in the New Zealand House of Representatives. On that day, some regarded this Bill as controversial.

The events that ultimately led to the drafting of this legislation had played out very publicly. Claims and counter-claims filled the media for weeks, if not months; personal reputations were damaged, perhaps irretrievably so, and New Zealand's own reputation as a film production destination suffered.

The history of the Hobbit dispute has been written and re-written from many viewpoints, and the motives of the parties involved can be argued eternally. Regardless of the cause, the consequences for our film industry were potentially dire with other nations quickly lining up to make offers to host the two Hobbit films the moment conflict erupted.

The film industry is worth \$2.8 billion to the New Zealand economy. The two Hobbit films are expected to bring in \$670 million dollars alone, creating 3000 jobs over their duration.

Should *The Hobbit* have left our shores, the short-term economic impetus this investment will bring to New Zealand would have been lost, along with the publicity and profile such a production generates. Furthermore, new projects would almost certainly have looked elsewhere in the future, forcing a highly skilled and motivated workforce to look offshore for work opportunities.

In essence, the worst case scenario on the table was the complete decimation of an important industry that was not only bringing jobs and investment into New Zealand, but enhancing our reputation for innovation and ease of business.

The potential consequences of this dispute are, in themselves highly, relevant in that they inform the need for the law change being discussed in this Journal, and that they stemmed from the very problem this law seeks to resolve – lack of certainty.

The Government was aware that the threat of industrial action combined with the outcome of the Bryson v Three Foot Six Ltd case had led Warner Bros. to believe the employment relations environment in New Zealand was unstable. It considered production could be derailed and its investment put at risk. The decision was made to produce a legislative response to remove that uncertainty.

The 'Hobbit law', as it is known, was drafted in an effort to bring greater certainty to the regulatory environment the film industry operates under. The test of good law is in how its intent marries with practice and whether the resulting consequences are desired, or at least expected.

* The Hon. Kate Wilkinson is the Minister of Labour.

The previous law allowed an agreement in relation to a person's employment status to be challenged and overturned by the courts. Despite what the contract or agreement said, the courts could 'look through' it and decide whether the relationship was a Contract for Service or Contract of Service.

For the film industry, this created a degree of uncertainty as productions are entirely events-based employment and, as such, those employed are deemed to be individual contractors brought in for a specific project. The law, as it stood, challenged that understanding, making it possible for a contractor to be deemed an employee in certain situations, as discovered in the Bryson case.

The Employment Relations (Film Production Work) Amendment Bill was carefully drafted to clarify this issue. It is not unprecedented. Sharemilkers and real estate agents already have industry exceptions.

It reflects what is common industry practice – actors, crew members and production staff are hired as independent contractors. Statistics from 2008 showed there were over 1600 contractors active in this industry earning nearly \$350 million. The number of big-budget productions filmed in New Zealand since then would suggest those figures are likely to have risen (Statistics NZ, 2008).

The law change makes it clear that the status of these workers as contractors or employees is based on the decision they make at the beginning of the employment relationship. If they sign on as an independent contractor, they are an independent contractor. If they sign on as an employee, they are an employee.

As employment lawyer, Peter Cullen, told TV3 news at the time:

If they sign a document saying they're contractors, then that should be the end of it... We don't want some disgruntled person, who was happily a contractor for 10 years reaping all the benefits of that, when we end the contract saying he's really an employee and suing us (as cited by O'Brien, 2010).

The Government had a view to being pragmatic in amending the law. The type of work affected by this law change was explicitly spelled out to ensure any confusion was removed. The law does not cover production work on programmes initially intended for television.

It does not alter how the parties will approach their employment arrangements. The law does not remove rights from anyone. It is not retrospective and does not affect any existing employment agreements. It is, in all respects, business as usual.

Criticism of the legislation has largely focussed on the events that led to its creation rather than the law itself. The Government did not create the situation, it responded to it.

It was essential that the film industry and the livelihoods of thousands of skilled New Zealanders were protected. The law has not changed how they are employed or how they view themselves, and employment agreements remain an option for those who are genuine employees.

In the eight months since this legislation passed through Parliament, the Government has not been inundated with complaints from film industry workers. Barely an eye has been batted, as it did not impact on how the industry already operated in practice.

Howevr, by providing greater certainty around the status of film workers, the regulatory environment governing the industry has been clarified, allaying fears that large-scale projects are likely to be caught up in protracted court battles.

New Zealand's film industry has battled hard to establish itself on the international scene and a highly skilled workforce has built up around it. This law was created out of the necessity to protect their interests and the Government stands by that decision.

References

O'Brien, T. (2010). *Employment lawyer backs Hobbit law Change*. Retrieved from <http://www.3news.co.nz/Employment-lawyer-backs-Hobbit-law-change/tabid/418/articleID/183311/Default.aspx>

Statistics New Zealand. (2008). *Screen Industry in New Zealand: 2008*. Retrieved from http://www.stats.govt.nz/browse_for_stats/industry_sectors/film_and_television/screen-industry-in-nz-2008/labour-and-employment.aspx

Non-standard Work: an Employer Perspective

BARBARA BURTON

Introduction

This paper examines the issue of non-standard work from an employer/business perspective, beginning with a brief look at the development of international labour standards as a means of providing protections for an industrial work force. It goes on to consider the extent to which these labour standards (contained in International Labour Organisation conventions and recommendations) have been adopted and the effect they can have on local legislation. The paper notes how difficult it is to make international comparisons, and goes on to address some of the arguments made against non-standard work. It points out that in New Zealand, basic employment protections are now contained in a statutory code, and that the code, as such, relates to most forms of non-standard work. The paper refers to the increasing use made of non-standard forms of work and suggests reasons why this seems to be so. The fact that non-standard forms of work are now far more common than they might once have been is acknowledged, and the paper suggests that this can be explained not only in terms of employer requirements, but by the reality that non-standard work forms are a way of meeting the needs of what is now a very diverse labour market. The paper also examines the various forms of non-standard work and explains the extent to which these are covered by New Zealand's statutory code. Particular reference is made to the intermittent nature of many jobs and the consequent use of the triangular employment relationship – labour hire employees – as a means of accommodating lulls in workplace activity. The paper concludes by questioning the wisdom of constantly extending the reach of employment law, and suggests that non-standard forms of work is one consequence of making it rather too hard to employ on a full-time basis.

Times change, and the increasing use of non-standard forms of work simply reflects what might, paradoxically, be described as that immutable fact. The emergence of the ILO after the First World War was a response to calls for greater, even some, protections for workers. As its website states, the ILO: “was created ... to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice” (ILO, n.d). It was, and still is, distinguishable from other international organisations not only by its longevity, but by its tripartite – Government, union and employer – structure. Essentially, however, from the beginning the ILO was, and continues to be, more worker than employer-focused. Today some consider a better balance is needed.

World wars tend to breed pious sentiments rather than concrete actions; the ILO's creation has not fulfilled its aim of achieving universal and lasting peace. But, what its standards' development process has achieved is a considerable improvement in the working lives of those in formal employment, almost to the extent that, once they have been taken on, employees enjoy something like a proprietary right in the jobs they are employed to do.

Of course, while ILO standards (conventions and recommendations) are thrashed out in debate, they remain, by nature, compromise documents; a compromise that is more likely to favour unions than employers, which is a reflection of the ILO's origins. Now, while Governments are not obliged to ratify conventions once negotiated, many will do so in the expectation of gaining ILO support to help achieve compliance, but with no necessary intention of implementing convention provisions,

or certainly not in the near future. For the ILO, there has always been a tension between those countries that effectively observe its standards, even if they do not ratify them, and those that, whether they ratify or not, are unable to comply with a convention's standard.

New Zealand, for example, does not ratify any conventions unless its domestic legislation is seen as being in strict compliance, which is not always the case given that many conventions are overly prescriptive and that, self-evidently, one size rarely fits all. But non-ratification does not prevent expanded ILO requirements from gaining acceptance. New Zealand now provides for 14 weeks' paid parental leave even though, along with very many other countries, it has not ratified the latest Maternity Protection Convention which requires that amount of paid leave to be granted.

The notion of paid parental leave has now gained general acceptance, but for anyone in business, an ever-expanding list of requirements for daring to employ can be quite daunting. For smaller business owners, who often have a great deal invested in their business, and are highly indebted, the effect can be particularly off-putting, and understandably, they will look for other ways to employ. In the process, their concerns help to encourage the growth of non-standard forms of work.

However, employer concerns are far from being the only reason for the development of non-standard forms of work. Some commentators see non-standard work forms as a product of globalisation and trade liberalisation. Thus, another possible reason for its growth is to assist countries with demanding labour standards compete more effectively against those with inferior standards.

This view assumes that protections applying to the full-time employment relationship will not extend to non-standard work, which for much non-standard work, at least in New Zealand, is far from being the case.

Those who decry the use of non-standard work as part of a competitive strategy are, in the writer's opinion at least, likely to be of a protectionist frame of mind both in relation to freer trade, and in the sense, that full-time employment is seen as the desirable norm. Such individuals are unwilling to recognise globalisation and freer trade as offering new employment opportunities, encouraging the development of new enterprises and new ways of working and facilitating the private sector growth that in turn facilitates economic growth and allows poorer countries to improve their standard of living. On the other hand there are many who believe the opposite to be true. What emerges is that the non-standard work issue is a question of balancing competing interests and outcomes, not of substituting one for another.

Other commentators cite new technology as a contributor to the growth of non-standard forms of work, and certainly, in many countries, new technologies have helped significantly to change the way work is done. Due to technology, many of the unpleasant and dangerous jobs that were perhaps the original impetus for the ILO's creation no longer exist.

All else aside, in light of the changing nature of work it is hardly surprising that those who see themselves as technicians rather than 'workers' often now look for more flexible employment arrangements than might once have been available.

The word flexibility has become something of a buzz word with calls for workplace flexibility increasingly heard. But objections to non-standard work and demands for flexibility will often conflict, since to decry non-standard work – or certainly some of its manifestations – is to decry flexibility. Essentially, flexibility and non-standard employment go hand in hand since without the

ability to work in a non-standard way many individuals would have no opportunity at all to work in paid employment. Non-standard work has its advantages - for employers and workers alike.

What constitutes non-standard work will vary from country to country and its advantages and disadvantages will differ from person to person, depending on the non-standard work arrangement in place, and whether it is the only form of work available or whether it was specifically chosen. It is also the case, Danesi (2011: 4) pointed out, as a speaker at a recent ILO regional conference in Lagos, that while the term is used globally, "... there is no internationally agreed definition of [non-standard work arrangements]"

While standard work is full-time employment, what constitutes full-time employment is not strictly defined. In some countries it will be 30 hours a week, in others 40, with doubtless many possible variations. For instance, work and its various permutations are heavily defined in the European Union whereas in the Pacific they are minimally regulated. The variations are less to do with general categorisation of different economies and whether they are developed or developing, and more to do with the proportions of the viable workforce that work in the formal and informal economies of their respective countries. So it will rarely be a matter of comparing like with like and attempts at international comparisons are fraught with difficulty from an accuracy point of view. In some places, for example, anything under 30 hours may be seen as non-standard while in others, fewer than 40 hours will attract the non-standard label.

Then, there is temporary, casual and fixed term employment and employment in a contracting capacity, all non-standard. Yet all provide jobs that might otherwise not be on offer, giving those who take them on the opportunity to participate in the labour market when without such jobs, they might not have been able to do so.

Put another way, whenever employers look for more accommodating employment arrangements there are always individuals seeking employment who are happy to work for fewer than full-time hours, however defined. Maternity protection legislation (parental leave) requires employers to keep open the job of anyone who takes the leave. But if the job was full-time then it is the full-time job that must be kept open, something that not all women returning from parental leave want. Frequently the employee would prefer the employment to be part-time or, in other words, non-standard, and that can present the employer with a difficulty. It needs to be recognised that it is to non-standard work that the pressure for workplace flexibility most often leads. It will be interesting to see whether, in due course, the courts will decide that an employer, in the parental leave return situation, can be required to provide reduced work hours if that is what the employee is seeking.

So, a conflict operates here. And not just in relation to part-time work. Apart from looking for part-time work, many persons will work on a casual basis, frequently willingly so. As with part-time work, casual work this will sometimes be a way of accommodating caring responsibilities, sometimes to supplement household income or a student allowance, sometimes in order to cope with benefit abatement rates. Whatever the reason, labour force attachment is maintained or, for younger persons, valuable work experience gained. There is no doubt that work experience, at whatever age it is obtained, is a valuable asset. Employers looking to take on new employees will frequently use lack of work experience as a factor when deciding who to, or rather who not to, employ.

At the other end of the working life spectrum there will be employees who want to reduce their hours but still keep their hand in. Non-standard employment also offers the possibility of achieving that aim.

Casual work is sometimes referred to as ‘precarious’ employment but due to employment relations protections in New Zealand, casual work cannot be seen within the precarious category. Although at common law, a strictly casual employment relationship involves a new contract on every occasion, therefore, the employee has no record of continuous service with the employer, with most employing organisations permanent casuals are more the norm than the exception.

It is sometimes thought that casual work is not ‘good’ work, particularly if it is lower paid, and the same derogatory terminology is often used of any lower paid employment. But lower paid work is a better choice than life on a benefit, with no work experience to offer the hope of a ‘better’ job. And lower paid jobs are there to be done. Shouldn’t anyone be asked to do them?

Then there is fixed term employment. Fixed term employment, too, maintains workforce attachment with the advantage that it can be fitted in around other activities. For many people it is an ideal way of working, allowing individuals to engage in whatever other needs or interests they may have or to accommodate other responsibilities.

And it must not be forgotten that in New Zealand all non-standard work as an employee – and all the jobs so far referred to involve an employment relationship – is covered by the same employment protections that full-time employees enjoy. Often it seems there is some confusion on this point. But whether employees work standard or non-standard hours or in a standard or non-standard capacity, they are nevertheless entitled to the holidays and leave for which the Holidays Act provides, and to at least the minimum wage. They can also take a personal grievance if things go wrong, must have a safe and healthy working environment and are covered by ACC.

Non-standard employees are free to join unions and to work under collective agreements. This is true even for those who work for a fixed period of time unless they have chosen to enter into a contract for services relationship.

Working in a contracting capacity is far from new, nor are the arguments about the nature of contracting arrangements. Self-employment, in the form of so-called dependent contracting where there is only one employer involved, has frequently led to controversy. As other writers will have doubtlessly pointed out, should a dispute arise, long-established indicia will determine whether someone (or keep ‘the person concerned’) is an employee or a contractor.

The difference, since the Employment Relations Act 2000, is that while the court and the Employment Relations Authority are required to look at what the parties intended, somewhat confusingly, they must not treat “... as a determining matter any statement by the persons that describes the nature of their relationship” (ERA s6(3)(b)). In other words, if challenged, what was contractually agreed is likely to mean very little.

Dependent contractor arrangements are often, for a business, a matter of economic necessity, just as are other non-standard work arrangements. They may even reflect the nature of the industry. There appears to be very little general understanding of the need firms can have to keep costs down if they are to remain viable and continue to offer paid work. Legislative requirements make employment a considerable cost over and above wages payable, so that direct employment relationships are beyond the means of some firms, to the detriment of many without paid work. Unfortunately there are individuals who would prefer anyone working as a dependent contractor to be unemployed rather than engaged in a gainful activity, and one with its own tax benefits. Again, the term precarious employment will frequently be heard and yet self-employment is more often than not a genuine choice, another aspect of the desire for flexibility.

And, as indicated, dependent contracting can always be subject to scrutiny by the courts or the Authority. The Employment Relations Act subscribes to the belief that from the beginning has driven the ILO, namely that there is an imbalance between employer/employee bargaining power. But that was then and this is now. Today, there are many occasions when the reverse applies.

So there should be a modicum of sympathy for employers who having legitimately entered into a contract can find it undone because one party's intentions have changed since the contract was signed. At the same time, it is accepted that the ability to challenge the nature of a contractual relationship is a significant safeguard should real exploitation occur.

Contractors with more than one employer are another matter, entirely. These self-employed individuals sink or swim on their own unless, if a contract goes wrong, they can afford expensive litigation.

If contracting is not always a contentious activity, rather more contentious is the growing use of just-in-time workers engaged via labour hire firms. Again, such developments do not happen out of the blue; they are a response to a specific need. Labour hire arrangements come about when the cost of employing makes it no longer feasible to offer permanent, full-time employment.

Many jobs are by nature intermittent. The construction industry is full of examples of jobs that need to be done but can be done only in the right weather conditions. This industry is one to which managing overall costs is critical. Prospective new home owners are unlikely to be happy, for instance, with having to pay wages to idle builders, electricians and so forth when the weather is wet and no work is performed.

And retailers, cafés and restaurants all have peak times and times where customers are scarce on the ground. Some firms experience lulls when the work just does not arrive. All such businesses need people to work in them, just not all those people all of the time. After all, to be able to employ a firm must have the ability to pay but if the work dries up and there is no money coming in then, quite soon, finding the means to pay can be difficult, impossible even. But that does not relieve employers of their employee obligations. Whether or not clients, customers or contractors pay *their* bills, the liability to employees does not go away.

Consequently, for many businesses the answer is entry into what is referred to as a triangular employment relationship, usually with a labour hire company. A relationship of this kind means individuals can be taken on when work is available but without becoming the firm's direct responsibility. When the job finishes so does the labour hire contract. The system does not guarantee permanent employment but it does offer work and, therefore, pay. And as a basis for working it can suit many people. It also allows anyone hired in this way to assess a variety of workplaces and possibly to gain a variety of skills. It is another way to gain useful work experience.

The labour hire relationship relieves the hiring firm of direct responsibility for the person hired although there is now some concern that an arrangement of this kind will not hold good in all circumstances. One such relationship has recently come under the Full Employment Court's scrutiny.

In the case of *McDonald v Ontrack Infrastructure Ltd and Anor*, a trainee track worker worked for the defendant for eight months before his assignment came to an end. He sought to argue that Ontrack was his employer rather than Allied Work Force, the labour hire company that had placed him with Ontrack, and, therefore, the end of his assignment constituted unjustifiable dismissal.

The Full Employment Court noted that there could be no argument about the plaintiff's status (he was clearly an employee), and that the question of whether the employment relationship was with Ontrack or with Allied was one of fact to be determined by a single judge. Had there been a point when the plaintiff entered into a contract of service with Ontrack, making Ontrack thereafter the employer? The Court was of the view that it would be unhelpful to formulate any list of rules or factors into which account must be taken. In the end, all relevant matters would need to be considered.

As the Full Court indicated, this was the first case it was aware of that had addressed the issue of triangular relationships, therefore,

...Courts should move cautiously in developing doctrines such as implied triangular employment relationships, especially where, as in this case, only very broad principles can be stated. As in many such cases, the inquiry will be intensely factual and the result of the case determined accordingly (NZEmpC 132: 51).

Therefore, for the future, any firm wanting to enter into a labour hire relationship will need to be very careful to ensure the relationship is properly managed. Firms hiring someone on a temporary basis do not, subsequently, want to find themselves the object of a personal grievance. Unjustifiable dismissal claims are generally a source of unpleasantness for everyone involved. A recent Department of Labour (2010) study found that the personal grievance process was stressful for both parties and that the stress, and the fear of costs had been exacerbated by the thought that the process might be drawn out. Entering into a labour hire relationship, apart from its usefulness in allowing firms to cope with varying workforce needs, has hitherto spared them the drama of a personal grievance. Possibly, that immunity may not last.

In conclusion, this is the where the wisdom of constantly extending the reach of employment law needs to be reconsidered. No-one doubts the need for employee protections but as noted, these now appear in the form of a statutory code. Nor are most employers out to take advantage of their workforce. That is not the way to get the best from an employee. As an aside, the introduction of a 90-day grievance-free probationary period received much adverse comment. But employers do not employ to dismiss, that is far too expensive an exercise, and to suggest that they do is to misunderstand completely what the hiring process involves. The 90-day period (now severely restricted by the Employment Court) was intended as an incentive to hire, not to fire.

Unfortunately statutory obligations can impose a cost that an organisation cannot bear. When that happens, businesses will look to labour hire contracting or to directly hiring contractors in place of employees. The work is there to be done and to be done to an acceptable standard. Treating anyone in a contractual relationship badly, whatever form the contracting takes, will not achieve those outcomes.

As well, labour hire employees have the right to take claims against the labour hire company. And like other non-standard employees, they are covered by relevant statutory provisions. Coverage under collective agreement terms and conditions is also possible.

Therefore, to use a currently popular phrase, the only real elephant in the room is work that is contracted out to a self-employed person who works only for the one firm. Tax benefits to the contractor have been mentioned but there is a need for greater understanding of the reality that without the ability to contract work out in this way, that work would not likely be done at all. Is it really better to deny individuals paid work because the way they choose to work does not conform

to preconceived ideas of what employment should involve? Dependent contracting is not informal work as that term is known overseas. The informal sector has no connection whatsoever with mainstream employment.

Most non-standard work in New Zealand is not, as is so often the case overseas, removed from the formal employment sector; it is very much a part of it. And non-standard work forms are increasingly used to accommodate the needs of employees, perhaps more so than employers, given there is now a statutory right to request flexible, non-standard hours.

We have come to recognise that full-time employment does not suit everyone. More women are employed than was once the case, improvements in technology allow increasing numbers of disabled persons to be in paid work, individuals reaching retirement may want reduced employment hours, young people want work experience, people with caring responsibilities want to work when they are able to, the list goes on. Any or all such individuals may require a form of non-standard work, including work as a dependent contractor. Why deny them? Non-standard work is as much a response to supply side as to demand side factors. We are no longer at the start of the twentieth century and times do change.

References

Danesi, R.A. (2011). *Nonstandard Work Arrangements and the Right to Freedom of Association in Nigeria*. Paper presented at the IIRA Regional Conference Lagos. Retrieved from http://www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/5thsession/session_a/nonstandardwork.pdf

Department of Labour. (2010). *Employer & Employee Views of the Personal Grievance Process: a Qualitative Study, April 2010*. Retrieved from <http://www.dol.govt.nz/publications/research/personal-grievance/personal-grievance-process.pdf>

ILO. (n.d). *Origins and History*. Retrieved from <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>

NZEmpC 132 McDonald v Ontrack Infrastructure Ltd And Anor. Retrieved from <http://www.justice.govt.nz/courts/employment-court/documents/2010-%20NZEmpC%20132%20McDonald%20v%20Ontrack%20Infrastructure%20Ltd%20And%20Anor.pdf/view>

Insights into Contracting and the Effect on Workers

DARIEN FENTON MP*

Abstract

For the past three decades, there has been a steady growth in non-standard contracts and arrangements in New Zealand, including temporary workers, casual and labour hire workers, and a substantial increase in the use of independent contracting. While it may sound inviting to be “one’s one boss”, the reality of contractor relationships is that workers are not protected by New Zealand law in the way those workers classified as employees are. Being classified as an independent or dependent contractor can have many shortcomings, such as losing stable income and rights that someone in a similar job, called an “employee” has under New Zealand law. As a result, many New Zealander today find themselves struggling to make a living whilst being exposed to unacceptable working conditions, with no legal rights or law to protect them.

This paper will analyse the work conditions of those in contracting arrangements in New Zealand and attempt to demonstrate the negative effects this type of work has had on range of people through the analysis of four different case studies. Finally, this paper explores the attempt to legislate the most basic of entitlements of a minimum wage for contractors and looks to the future with ideas.

Introduction

For the past three decades there has been a steady growth in non-standard work arrangements, including temporary workers, casual and labour hire workers and a substantial increase in the use of independent and dependent contracting.

Some contractors are highly skilled, entrepreneurial individuals, who are able to extract a significant premium for the efforts outside traditional employment. However, for many the opportunities of earning a secure and stable income are remote, because they are classed as independent or dependent contractors for labour law purposes. This effectively gives them no rights to the minimum protections provided for those classified as employees under New Zealand Law.

This means that the employment relationship, with its rights and obligations under current law, has become meaningless for tens of thousands of workers.

Context

There is now widespread international agreement that the traditional legal categories, also current in New Zealand, such as employee, independent or dependent contractor, subcontractor, etc. no longer fit with the economic and social reality of today’s working environment. New Zealand is just one of many countries who are experiencing this change.

The ability of employers to avoid the indirect employment costs of regulation and taxation has

* Darien Fenton MP was the Labour Party Spokesperson on Labour Issues.

become a major competitive factor in the market and as a result, there are growing armies of dispossessed and vulnerable contractors.

The International Labour Organisation (ILO) has taken the employment relationship as the reference point for examining the various types of work relationships and the change in the global environment. In the past few years, the ILO Conference has held discussions on self-employed workers, migrant workers, homeworkers, private employment agency workers and child workers, as well as workers in cooperatives and workers in the informal economy.

In 1997 and 1998, the ILO Conference had an item on contract labour (ILO, 1998). The intention was to protect certain categories of unprotected workers through the adoption of a convention and recommendation.

The Conference failed to reach agreement on a new instrument, but passed a resolution that the unresolved matters around those workers who were being denied protection must be addressed.

A tripartite meeting of experts on workers needing protection was held in Geneva in May 2000, and later and noted:

The global phenomenon of transformation in the nature of work had resulted in situations in which the legal scope of the employment relationship did not accord with the realities of working relationships..... It was also evident that while some countries had responded by adjusting the scope of the legal regulation of the employment relationship, this had not occurred in all countries (ILO, 2006).

This was followed by a formal discussion in 2003 and 2004 on the scope of the employment relationship (ILO, 2003).

The conclusion reached was that the protection of workers “is at the heart of the ILO’s mandate. Within the framework of the Decent Work Agenda, all workers, regardless of employment status, should work in conditions of decency and dignity” (ILO, 2006: 6).

Who are New Zealand’s Contractors?

The extent and problems relating to contracting in New Zealand are not well known. Apart from a small number of Employment Court cases around dependent contracting, the odd District Court case, and some headlines when the issue becomes contentious, there is little data available that does these issues justice or that helps to bring the serious nature of the expansion in contracting in New Zealand to light in any empirical way.

However, in the New Zealand context we do have a data set on self-employment which gives some indication of the number of workers who could be either dependent or independent contractors.

According to the Statistics NZ June 2010 Quarter of the New Zealand Income Survey, there are 351,900 self-employed workers in New Zealand, 16% of the Labour Force. 115,000 (33%) of these workers are women. The number of self-employed people has gone down in the last 5 years from 367,000 in 2006, rising to a peak of 385,000 in 2008 then falling to 351,900 in 2010 (Stats NZ).

Compared to most of the OECD countries New Zealand has high levels of self-employment.

According to the OECD (2010) “Entrepreneurship and Migrants” Report, the percentage of the workforce self-employed in Australia, UK and the OECD average of the 26 countries are:

- Australia – average of 17.55%
- UK - average of 12.65%
- The 26 countries making up the OECD - average of 13.28%

New Zealand’s self-employed are not highly paid

- According to the June 2010 Quarter of the New Zealand Income Survey, the median (average) weekly income for a self-employed person as at June 2010 was \$575.
- This compares to the median weekly income for a salary or wage earner of \$769. That’s a \$194 or 33% wage gap.
- In June 2006 the median weekly income for a self-employed person was \$821, so the weekly income for self-employed people dropped by \$246 from 2006 to 2010.
- A significant proportion of these self-employed workers will be dependent on only one “buyer” of their labour, which may well account for the low income average for New Zealand’s self-employed (Stats NZ, 2010).

The situations of New Zealand workers who have been caught in arrangements where they have virtually no rights are many and varied and growing in numbers. For most, their only option to challenge unfair contracts and working conditions is to hire an expensive lawyer to argue their case in the District Court, or to take the long route through the Employment Court to argue that they are in fact employees. These are avenues that those on the margins cannot even contemplate.

The move from the employment relationship to independent or dependent contracting has affected even highly skilled workers, who are left doing the same job with less pay and in worse conditions than when they were employees. It is clear that significant pockets of labour have developed where independent or dependent contracting has become a way to reduce reward, undermine security, increase risk and cost to workers.

There are many sectors of the New Zealand economy where independent contracting is having a negative impact: fast food delivery workers, truck drivers, couriers, construction workers, caregivers, security guards, cleaners, telemarketing workers, forestry workers, and even those workers in our much prized arts community – actors and musicians – all have a similar story to tell. Below, I give a number of examples compiled from my own experience and information I have gathered as a Member of Parliament and Labour’s spokesperson for Labour Issues.

Case 1 : Visionstream – the destruction of good jobs

On 25 June 2009, Telecom announced that its two biggest network Engineering contractors, Transfield and Downer EDI had lost their contracts to look after the Northland and Auckland

network to a new company, Visionstream. 700 lines engineers were informed that their jobs were redundant and they would only get work if they transferred to Visionstream as dependent contractors. This meant buying their own vans and equipment (costing up to \$60,000) and taking all of the risks of the job on themselves.

Some highly skilled lines engineers simply walked away, taking redundancy and their invaluable industry experience and skills with them. Newer workers had no entitlement to redundancy, so were in a much more precarious situation. Some were migrant workers who had been brought to New Zealand under the skilled migrant category when there had been a shortage of lines engineers. Their work permits did not allow them to transfer from being an employee to self-employed, so they had few options.

An independent analysis of the contracts offered by Visionstream calculated that as owner operators, the workers could lose up to 50% to 66% of their income. There was no guarantee of work, no minimum level of income, they would be told what to do where and when and could be fined by Visionstream without the company needing to prove the fines were justified. Widespread industrial action was organised by the workers' union, the Engineers, Printing and Manufacturing Union (EPMU), and funds for financial support were raised and distributed. Despite this, the lines engineers were made redundant. Many were starved into submission, and one by one reluctantly became their own bosses.

The EPMU made a formal complaint under the OECD Guidelines on Multi-National Enterprises, contending that the dependent contractor model was a breach of the guidelines, but in the end there was nowhere to go with the situation. The Ministry of Economic Development in New Zealand responded to the complaint by concluding that Telecom and Visionstream's actions were within the law.

The consequences have not just impacted on the lines engineers, customers are paying too. Collins (2011) from *The New Zealand Herald* reported on 7 July 2011:

Maintenance of Auckland's telephone network at its worst in years - but the company in charge denies taking up to five days to fix faults.....

Australian-owned Visionstream told its subcontractors last week that the business was "going through the worst performance" it had experienced since taking over maintenance of the region's fixed-line network in 2009.

The company asked all installation and fault technicians to postpone days off between June 28 and July 8, and acknowledged that this came on top of having staff working every weekend for the previous nine weeks.

For the last nine weeks, on average up to 1000 customers per day in the Visionstream-managed areas have had their service impacted in one form or another" the internal memo said.

A technician, who asked to remain anonymous but has worked on the Telecom network for 37 years, claimed many subcontractors were deliberately damaging underground cables to get more money for repairs.

Visionstream paid them only a flat \$80 for above-ground repairs that could take several hours, but \$400 to fix underground cables.

I met many of these workers during the industrial action and see them still. They are still driving the same Chorus “badged” vans they used to and still performing highly skilled and essential work; but they have lost all employee entitlements to holiday and sick leave, and have had their pay cut significantly. Ask any of them if they are doing better as self-employed “entrepreneurs” and the answer is a resounding no.

Case Two – Underpaid, overtired and above the speed limit

Every week in New Zealand one person dies from a truck related accident and several people are injured. The social costs of truck related death and injury amounts to more than \$400 million a year. Successive governments have responded by increasing road safety measures and requirements, including restrictions on driving hours, the requirement to have a half hour break after five and a half hours and chain of responsibility legislation. But the link between contracting arrangements for owner-drivers and safety has never been examined.

In April 2010, the *Sunday Star Times* featured an article entitled “*Underpaid, overtired and above the speed limit*”.

The story reports a former truck driver for a major food company speaking out about contractors are driving more than the legal hours to make ends meet, leaving them exhausted and a threat to public safety .

Hugh Dearing, who quit the food company two years ago over his \$30,000 salary, is concerned about truck drivers allegedly working up to 100 hours a week...

Several drivers said companies they were contracted to had slashed hundreds of dollars off their weekly pay during reviews, claiming drivers were overpaid. But they said managers would not disclose financial calculations showing how delivery runs could be done on less money. One driver said in his last pay review his income was cut so low that he now earns \$9 an hour before tax for an 80-hour week.

I said [to the company], I’ll have to drive seven days a week. They said, “we don’t want to know that, that’s up to you to sort out”

He said the Land Transport Rule: Work Time and Logbooks 2007 – banning drivers of commercial or heavy motor vehicles from working more than 13 hours in 24 and working more than 5 1/2 hours without a break – was a “joke”.

You cut corners, you don’t employ relief drivers, you use family members to pack and help on your run. You basically don’t pay bills you should pay, like ACC and tax, until they come after you, and then you’re in such financial stress you have to remortgage because the money just isn’t there.

I met these drivers. They had some horrific stories. They faced financial pressures and long hours, which was impacting on their families. They told me how they scrimped on maintenance with tyres worn down to the rims and concealed on the inside wheel. Sometimes they were so tired they fell asleep at the wheel, stopping just in time at a compulsory stop. Any attempts by the drivers to complain, including trying to enforce health and safety requirements were met with punitive responses from the company. Their runs were cut, or added to with impossible deadlines. Some runs

were given to another more compliant driver and the original drivers given 90 days' notice of termination of their contract. I have come across many such examples. One truck driver who contacted me told how he was employed as an independent contractor. He was promised \$1,000 a week of driving work but heard nothing again for weeks. He was finally assigned a job driving every Saturday on a contract worth less than \$100 a week. The driver eventually got two more contracts, but the three jobs altogether paid only \$450 a week, less than half of what he had been promised. On top of that, he had to work long and sometimes dangerous hours. When the driver approached the principal contractor, his advice to the truck driver was that if he had a problem, "he should go to the Disputes Tribunal".

While the New Zealand Government studiously ignores the problem, the Australian Government is taking action. After a campaign by the Transport Workers Union and a 2008 report by Australia's National Transport Commission found contracts rewarded truck drivers who drove fast or worked long hours, which it said was "fundamentally at odds with other nationally agreed safety reform" (Australian Government, 2010: 7). It recommended minimum pay for all truck drivers to end economic incentives to drive dangerously. The Australian Government has released a discussion paper called "Safe Rates, Safe Roads" and has already taken action in other ways.

New Zealand truck drivers are not that different from Australian truckies. While there are fewer of them, they do not travel the distances of their Australian colleagues and our road trains are smaller, but the issues for New Zealand's owner-drivers need proper examination. Owner drivers invest a huge amount of money in their biggest asset – the truck. For this investment they take out mortgages and put their homes on the line. But many are, in the end, completely dependent on one company to provide them with the work. The impact isn't just on the drivers. The driving public is at risk as well.

In July 2011, 23 Waikato truck drivers were banned from driving trucks for a month after spending too long at the wheel. The drivers appeared in Court in Te Awamutu on charges, including falsifying their logbooks, exceeding the hours they are allowed to work and not having rest breaks. Their employer, John Austin Ltd, was also in court on a total of 82 charges and was fined \$20,000. The New Zealand Transport Agency says the offending was at the extreme end of the scale, with some drivers working over 300 hours without a day off. The Agency described fatigued truck drivers being as risky as drunk drivers. Pressure on owner-drivers is increasing, yet the link between low rates of pay for owner truck drivers and safe driving has had no attention (as cited in Tiffen, 2011).

Last year, I called for a Select Committee inquiry, but this was given short shrift by the National Party-dominated Transport and Industrial Relations Select Committee. I am currently sponsoring a petition to the House of Representatives calling for an inquiry into whether there is a link between truck driver remuneration, payment methods, unpaid work, driving hours, waiting times, incentive based payments and safety outcomes in the transport industry.

Case three: "We don't even earn minimum wage"

The courier industry is a good example of the impact that contracting can have on workers. As vehicle drivers have been converted from employees to contractors, drivers have been required to provide their own vehicle (and pay for the badging of the company's name), pay for vehicle maintenance, insurance registration, and other running costs.

Their contract for service requires them to ensure package delivery irrespective of their day-to-day personal circumstances. I have had numerous contacts with courier drivers. I have seen their

contracts, and there is no doubt that most are barely scraping together a living. A recent email from a franchise courier driver said:

Earlier in the year, when a Fastway courier was killed on the job in Taranaki, you were quoted as calling for an inquiry into the road transport industry including courier drivers. I think something does need to be done, but wonder whether you are aware of all the pressures that can be placed upon a franchisee courier in particular?

A Fastway franchisee has to meet timetable demands (return to the depot to exchange freight etc.), also Fastway have delivery standards that have to be met - regardless of the amount of freight going into/out of your territory, failure to comply with these requirements puts your investment in "your business" under threat. The two main threats Fastway use are: 1). You are in breach of contract, which can lead to termination of the contract, and 2). Any undelivered freight in your bay will be delivered by someone else at your expense (at a lot higher cost than you get paid for delivery).

Whether or not it is physically possible for you to deliver all your freight (as well as pick up freight) in one day would seem to be totally irrelevant as far as sanctions being imposed. When a courier is working over 12 hours a day and is still unable to get all the freight delivered, Fastway's solution (in our case) was to charge \$2.50 per parcel to have it delivered – this despite the fact that they had for sometime been aware of the problems for that particular run – in fact a written request to split the run into two manageable territories had been given them some six months earlier (it took over 5 months for them to reply in writing refusing the split).

Inquiries with NZ Transport Agency regarding the chain of responsibility resulted in the information that the only way to test the 'chain' was for the courier to be prosecuted – a \$2000 fine and loss of license for a month – and it would then be investigated as to whether undue pressure was being applied to the courier, so not much help there!

Fastway offered neither help/practical solutions as to how to make the run manageable by one person – just threats to meet the delivery requirements in your contract. The stress and frustration from this situation resulted in my husband walking away from his business - the fourth courier in Manawatu to do so since October last year (makes me wonder what the number is nationwide that walk away from a Fastway franchise?). To walk away from a sizeable investment is not something one does lightly.

..... Interestingly, it was only after the death of the Taranaki courier that we were made aware of the requirement to have a half hour break after five and a half hours work, and the 13 hour work day."

The tragedy the writer refers to was the death of a 21-year old courier driver in a collision with a truck (Anthony, 2011). Some of his workmates spoke out about the under-regulation of the courier industry, saying it is pushing its drivers to the limits, with courier drivers clocking up to 13 hours of driving time and nearly 500 kilometers with no rest every day – all for about \$80 per day. Industry experts in the courier industry are also saying many earn below minimum wage, and that something has to give (Scoop, 2010).

In a press release in December 2010, the Managing Director of a major courier company said that many New Zealand courier drivers are struggling to earn a viable living as courier companies have aggressively slashed prices they charge to gain customers, a practice that increased significantly during the recession (Scoop, 2010).

Urgent Courier's Managing Director Steve Bonnici says many courier firms are charging prices as low as they were 20 years ago. During that time input costs for the likes of fuel and vehicles have soared for driver contractors who are obliged to operate their own businesses.

"Many of our competitors pay no attention to the social impact of their businesses and have cut prices back to ridiculous levels," Mr Bonnici says. "While the cut pricing continues, it's impossible for contractors working for the discounters to earn a living wage."

While courier drivers have few of the benefits of employees, they are still obliged to wear a corporate uniform, work certain hours, apply for annual leave, and work exclusively for one company, as well as providing their own vehicle to work from

Their plight mirrors those contractors working in the film industry; earlier this month the government amended labour laws for workers on films such as *The Hobbit* to ensure that if they sign up as independent contractors they cannot subsequently legally claim to be employees.

In the same release, Paul Holdom, who developed Courier Post Urgent for NZ Post, and is now sales manager at InterCity Urgent, and who has been a player in New Zealand's courier industry for almost 25 years said that real courier revenue has probably dropped 20-30% since 1990 to around \$3,000 to \$4,000 a month. This is at the same time the costs of operating their own business has climbed and congestion has reduced the ability of drivers to make multiple journeys in cities such as Auckland.

"It's sad what's happened to our industry; there are plenty of owner-drivers out there whose revenue before expenses is barely the minimum hourly wage. After they have paid costs out of this revenue they are below the poverty line," says Holdom.

"They've invested in vehicles worth \$10,000 - \$30,000 and they've got families and mortgages..."

Mr Holdom says courier prices would have to rise some 30 per cent to get back to where couriers can earn a sustainable living (Scoop, 2010).

There have been attempts by courier drivers to organise themselves into groupings where they can have some bargaining power, but they have proven difficult. One courier driver I met recently was banned from entry to the base where he needed to be able to pick up his deliveries. His crime? He had the cheek to distribute a notice from the EPMU inviting them to a meeting to discuss pay and conditions for courier drivers employed by NZ Post – a State Owned Enterprise. This driver was involved in earlier attempts to set up an Owner Drivers Organisation and took a case against NZ Post in the Employment Authority to determine whether these very dependent workers were in fact employees. He got as far as mediation. NZ Post made some changes to the contracts, but in the end, he was deterred because of the costs of taking the case further.

Case Four – Out in the Cold

There has been a long tradition in New Zealand of young people delivering newspapers and leaflets. More recently, stories have come to light about the abuses of the independent contracting system used to employ workers in this line of work. Some useful research was conducted by Caritas into children's

work in 2003 (see Caritas Aotearoa New Zealand, 2003). As a follow up to that survey, a report called “Delivering the Goods” was produced in 2006, from a survey of newspaper and leaflet delivery workers aged 10 to 16 years (see Caritas Aotearoa New Zealand, 2006). The majority of workers surveyed were self-employed contractors to one of three distribution companies which operate nationwide; in one case this involved contracting to a local distribution franchise.

Examples of (independent) contracts for leaflet deliverers included:

Contract A: *“The parties acknowledge that this agreement is entered into by both parties on the basis that the Deliverer is an independent Contractor and that the Deliverer is not an agent or employee of the Company....The Contractor is an independent Contractor and as such is free...to select the Contractor’s own means and methods of performing the services and, subject to the delivery window requested by [Company], the hours during which the Contractor will perform those services.”*

Contract B: *“You are employed by [Company] under a contract for services, which means that you are an independent contractor. This contract does not therefore create an employment relationship between you and [Company].”*

Contract C: *“All Distributors are Independent Contractors and therefore are required to file an IR3 at the end of each year.”*

Contract D: *“The Contractor is an independent Contractor and as such is free (in addition to the Contractor’s freedom to engage sub-contractors and others to use carrying equipment...) to select the Contractor’s own means and methods of performing the services...The Contractor shall bear all costs and expenses incurred by the Contractor in connection with the performance of the services.*

Based on a crude assessment of the data, Caritas estimated that most of the pay rates fell somewhere between \$1.67 and \$6.25 per hour. In 2007, Fair Go ran a story about children employed as independent contractors to deliver junk mail. The children, some as young as 12 and others aged nearly 16, were earning as little as 25c an hour. To make matters worse, they had recently had their pay unilaterally cut. Fair Go reported that it had more responses to that story than to any other story in that year. I was not surprised because this is a classic example of how so-called independent contracting can exploit the most vulnerable.

Sadly, it is not only children affected. More and more older workers are involved in today’s leaflet delivery industry, because they need to supplement meager pensions or benefits.

When this issue hit the headlines in 2007, I drafted a members’ Bill that would outlaw the employment of children under the age of 16 as independent contractors and require them to be employed as employees. This would at least give them rights to be treated fairly, as well as rights to personal grievance, to written agreements, and other employment entitlements. The bill has been submitted to the ballot over the past couple of years, but has not been drawn. Caritas (2006) recommended that the single most important step likely to deliver protection to child workers would be to require a direct employment relationship. It strongly endorsed the approach in this bill as the best way to improve children’s overall working conditions.

Other instances of hardship are listed in Appendix A.

Legislating a Solution: Minimum Wage for Contractors

Since becoming a Labour List MP in 2005, I have proposed a number of members' Bills to deal with non-standard and vulnerable work, including the Minimum Wage and Remuneration Amendment Bill, the Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill, the Employment Relations (Triangular Employment) Amendment Bill (which later become a Government Bill (Mallard, 2008) and the Employment Relations Protection of Young Workers (Amendment) Bill.

The Minimum Wage and Remuneration Amendment Bill, which was drawn from the ballot in my first year in Parliament was a Bill originally drafted by the Hon. David Parker. The Bill, as introduced, extended the Minimum Wage Act's provisions to apply to all persons working under a contract for service (independent and dependent contractors).

The proposed mechanism was the same as it is in the current Minimum Wage Act for workers under a contract of service. The Governor-General would be able, by Order in Council, to make regulations prescribing the minimum rates of remuneration payable to any person working under a contract for services. That does not sound too hard does it? After all is every New Zealand worker not entitled to expect to be paid at least the equivalent of the prevailing minimum wage?

Predictably, there was opposition: Kate Wilkinson, the then Opposition Labour Spokesperson, described it to the Lexis Nexis Employment Relations Conference in 2007 as "interference in a commercial relationship and such a commercial relationship should not be blurred into an employment relationship" (Wilkinson, 2007).

As a former workers' advocate I naively thought the Bill was pretty straight-forward. In my first reading speech I argued that minimum remuneration is a baseline protection that should apply equally to all workers, regardless of whether they are in a traditional employment relationship or whether they have entered into a contract for services. "This most basic of protections will help New Zealand keep pace with the changing world of work in the 21st century and reflect the realities of new forms of work"(Fenton as cited in NZ Parliament, 2006: 4817).

The Bill passed first reading with support of Labour, Greens, United Future and the Maori Party and was referred to the Transport & Industrial Relations Select Committee. The Select Committee process was instructive. Most submitters agreed that the principle behind the Bill was correct, even those from the Business Community who opposed it.

Many contractors contacted me during the process of considering the Bill:

- A pizza delivery worker who was employed as a contract driver, not as an employee. His boss decided that he should work 10 hours straight, as well as below the minimum wage.
- A waitress employed as an independent contractor with her own "waitressing business", where her pay was dependent on the numbers of tables she served.
- A hotel housekeeper was contracted on a room by room cleaning basis.
- A worker, in her brief experience as a subcontractor, hired to mop floors and dust offices later discovered that other workers had also signed an independent contract with the licensee of a commercial cleaning company. She was told where and when to clean, and told to buy hundreds of dollars' worth of supplies. 10 months after signing her contract, after working for what amounted to less than \$6 an hour, she has no cleaning business and the company is still recruiting workers with employment ads that say: "Be your own boss".

Some contractors told the Select Committee that they could not even prove whether they had been paid fairly, or paid at all, because the contractor who engaged them did not keep any records. Interestingly, given what came later with the Hobbit debacle, the Actors Equity and the Musicians Union called on politicians to support the bill, saying:

The poor pay and conditions of many actors and musicians are not commonly known. That's because they are classed as dependent or independent contractors, they are expected to work for a whole lot less than the minimum wage (Scoop, 2008).

Labour Department officials worked hard to find ways to make the Bill a success. To their credit, so did Business NZ, even though they fundamentally opposed the bill.

While we were quickly able to dispose of the sillier criticisms the National opposition made (e.g: someone contracted to mow lawns would be covered), there was a genuine attempt made to figure out how minimum wage could apply to contractors in the New Zealand context. The calculation of current minimum wage law is a time-based or output-based measure. In contracting, it is often more complex than this.

Workers, not employees?

In Britain, the minimum wage applies to “workers”, not employees. Workers are defined as any individual who has entered into, or works under a contract of employment, or any other contract where the individual undertakes to do or perform personally any work or services for another party to the contract.

The UK jurisdiction excludes the genuinely self-employed and presumes that they agree a price for the job with the customer in advance and are paid by an invoice or a bill at the end.

Then there is **unmeasured work**, which allows the parties to come to a written agreement over a sensible estimate of the hours to be spent on the work – provided they are realistic and fair. The minimum wage is only required to be paid for the hours in the agreement rather than those actually worked. However, if there is no agreement reached, then minimum wage must be paid for all hours worked.

Making it work in New Zealand

I believe Labour came up with a Bill that would have provided for the most vulnerable of New Zealand contractors to be protected by a minimum wage calculation.

The proposed Bill required that the parties to a contract for service agree with the Principal (defined below) on what is a reasonable time to provide the service. The remuneration rate for such provision of service (which only includes the labour) should equate to at least the minimum rate set by Order in Council under the Minimum Wage Act.

The Principal would be required to keep records as to the hours agreed and remuneration paid. If there was an agreement as to the reasonable time to be worked, minimum remuneration would be

calculated (provided the time agreed is reasonable), but there could be no claims for additional minimum hourly wages or other remuneration.

If there was no agreement to the reasonable time required to perform the service, the principal contractor could be liable for recovery of minimum remuneration for all hours worked. In summary, the parties could agree on a reasonable time to provide the labour component of the service. It only became a problem if the time is not reasonable.

An outline of this Bill is provided in the Appendix B.

While probably more complicated than it should have been (and it was a Members' Bill, not a Government Bill), the work done provides a pointer to the possibility of regulating basic entitlements like Minimum Wage for vulnerable contractors. In the end, it came down to voting power and politics. The Labour and the Green Party voted strongly in favour of the legislation; the New Zealand First party and United Future became wobbly; the Maori Party's four votes were not reliable, and the Independent member, Taito Philip Field, was influenced by local interests to defend the status quo. Note: Many compromises were made in the development of this Bill to try to reach broader agreement with the NZ First Party. These are not necessarily indications of where Labour might go in a future Bill.

Sadly, after months in Select Committee and after a General Election where the Government changed, the Bill was eventually defeated at the Committee of the Whole in mid-2009. In doing so, New Zealand missed an opportunity to provide leading legislation to deliver the most basic of rights for vulnerable contractors.

What Labour is doing today

Labour believes that workers should be protected against harms and risks that are broadly seen as being unacceptable, and below a necessary floor below which people should not be required to provide their labour.

In our policy development process, Labour is considering stronger protections for those who are employed in these often-precarious arrangements. Different statutory support and legal rights may be required for non-standard workers, such as independent and dependent contractors than to those in employment relationships.

Consideration could be given to extending the right to organise and collectively bargain to contractors, as well as ensuring there is an effective and cheap disputes resolution procedure. Labour is engaging with unions and businesses who are concerned about the direction that contracting has taken in New Zealand.

While we accept that there are advantages for businesses in different contracting arrangements and, for that matter, advantages for some highly skilled workers, these must be balanced against the fundamental Labour value of fairness and equality. There is a lot of discussion and thought required. But in the end, we do not believe that it is the Kiwi way for a "law of the jungle" to prevail. If we fail to regulate the growing incidences of independent and dependent contracting, we expose growing legions of workers to having no rights at all. And in doing so, we make every other job that relies on the foundations of the employment relationship vulnerable to unacceptable competition.

References

- Anthony, J. (2011). *Deadly Cost of Delivery*. Retrieved from <http://www.stuff.co.nz/business/4521363/Deadly-cost-of-delivery>
- Australian Government. (2010). *Safe Rates, Safe Roads. Directions Paper*. Retrieved from <http://www.deewr.gov.au/WorkplaceRelations/Policies/SafeRatesSafeRoads/Documents/DirectionsPaper.pdf>
- Caritas Aotearoa New Zealand. (2003). *Protecting Children at Work: Children's Work Survey, 2003*. Retrieved from <http://www.caritas.org.nz/sites/default/files/Protecting%20Children%20at%20Work.pdf>
- Caritas Aotearoa New Zealand. (2006). *Delivering the Goods: a Survey of Child Delivery Workers 2006*. Retrieved from <http://www.caritas.org.nz/sites/default/files/Delivering%20the%20Goods.pdf>
- Collins, S. (2011, July 7). Sabotage Claim as Phone Maintenance Falls Behind. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10736836
- ILO. (1998). *Report V (2B). Contract Labour*. International Labour Conference Report, 86th Session in Geneva. Retrieved from <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-v2b.htm>
- ILO. (2000). *Report III (Part 1B)*. International Labour Conference Report, 88th Session in Geneva. Retrieved from <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/r3-1b.pdf>
- ILO. (2003). *91st Session of the International Labour Conference, 3-19 June, 2003*. Retrieved from <http://www.ilo.org/ilc/ILCSessions/91stSession/lang--en/index.htm>
- ILO. (2006). *Report V(1). The Employment Relations*. International labour Conference Report, 95th Session. Retrieved from <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf>
- Mallard, T. (2008). *Stronger Protections for Casual and Temp Workers*. Retrieved from <http://www.beehive.govt.nz/release/stronger-protections-casual-and-temp-workers>
- NZ Parliament. (2006, August 23). Parliamentary Debates. *HANSARD*. 23(663): 4763-4827. Retrieved from http://www.parliament.nz/NR/rdonlyres/E6D77990-D695-4A54-848D-6A988B655B45/58533/48HansD_20060824.pdf
- OECD (2010), "Entrepreneurship and Migrants". Report by the OECD Working Party on SMEs and Entrepreneurship, OECD. Retrieved from http://www.oecd.org/document/51/0,3746,en_2649_33931_43009971_1_1_1_1,00.html
- Quinlan, M., FSIA and Wright, L. (2010). *Remuneration and Safety in the Australian Heavy Vehicle Industry: a Review Undertaken for the National Transport Commission*. Report prepared for the National Commission, Melbourne. Retrieved from <http://www.ntc.gov.au/filemedia/Reports/RemunSafetyAustHVIndustryNov08.pdf>
- Scoop. (2008). *Actors Equity Urge Politicians to Respect Performers*. Press release from Actors Equity. Retrieved from <http://www.scoop.co.nz/stories/CU0805/S00220.htm>

Scoop. (2010). *NZ Couriers Drivers Often Earn Below Minimum Wage*. Press release from Urgent Couriers. Retrieved from <http://www.scoop.co.nz/stories/BU1011/S00339/nz-courier-drivers-often-earn-below-minimum-wage.htm>

Stats NZ. (2010). *New Zealand Income Survey: June 2010 Quarter*. Retrieved from http://www.stats.govt.nz/browse_for_stats/income-and-work/Income/NZIncomeSurvey_HOTPJun10qtr/Commentary.aspx

Sunday Star Times. (2010, April 18). Underpaid, Overtired and Above the Speed Limit. *Sunday Star Times*. Retrieved from www.stuff.co.nz/sunday-star-times

Tiffen, R. (2011). *Fatigued Truckies as Risky as Drunk Drivers*. Retrieved from www.3news.co.nz/Fatigued-truckies-as-risky-as-drunk-drivers/tabid/423/articleID/217657/Default.aspx

Wilkinson, K. (2007). *Speech to LexisNexis 2nd Annual Employment Law and Human Resources Conference*. Retrieved from <http://www.national.org.nz/Article.aspx?ArticleID=10180>

Appendix A

Here is another recent example of the kind of hardship I regularly receive in my Inbox:

For years my daughter has done junk mail deliveries for various companies, all paying around the same measly pittance. Of course she is a contractor, but unlike those contractors further up the tree, she has no opportunity to negotiate her remuneration at all. So any delusion that the contract is fairly arrived at by mutual negotiation, needs to be completely dismissed as the disgrace it really is.

Also under these contracts, she has to perform each time every time regardless of the weather and if she needs a day off, she has to find her own replacement for her runs. Moreover there are provisions for her to be fined for misconduct. Such a merciless miserly contract designed to exploit those who can't otherwise help themselves.

Recently she had to deliver booklets each copy the size and weight of an average magazine. The bundles were big and heavy. A special outing was required to deliver these. When the pay sheet arrived I noticed that she got only one cent gross per copy which of course is one dollar per hundred. Let's not forget that from that dollar per hundred, she pays tax, ACC levy and equipment maintenance costs. So would she get 50cents net per Hundred?

It is manipulative exploitation of the defenseless by those who pose as New Zealand's really worthwhile people. Kids are better off doing anything else other than getting used to being so exploited. There is no good lesson in this for kids.: move to Australia."

Appendix B

Under the proposed Bill :

“Principal” was defined as a person in trade who engages a specified person (listed in the schedule) under a contract of services

Remuneration was defined as a payment by the principal to a specified person providing services that relate to the provision of labour (only).

Specified person was defined as a person who provides a service listed in the Schedule under a contract for service, or a company that has only one shareholder and one director and who personally provide the service.

Specified persons included those providing contracts for service in:

- (a) building and construction services (labour only)
- (b) cleaning services
- (c) courier services
- (d) food catering services
- (e) fast food delivery services
- (f) newspaper or pamphlet delivery services to letterboxes
- (g) personal home care support
- (h) public entertainment services as a musician or singer.
- (i) Manufacturing of clothing, footwear or textiles.
- (j) Telemarketing services
- (k) Market research
- (l) Licensed security guard services
- (m) Forestry Industry services related to planting, pruning or felling.
- (n) Truck driving services delivering goods.

Many of the categories had additional narrowing criteria - (b), (d), (g), (i), (m) all had two additional criteria:

- i. The service is provided on an ongoing basis or under a series of regular or frequent contracts for service; and
- ii. The specified person does not employ any employees to provide the service or subcontract the provision of the service to any other person.

(c and (n) had an additional criteria to the two above :

- iii. The specified person primarily receives his or her income from one principal.

Independent Contractor vs. Employee

PETER KIELY*

Introduction

The distinction between independent contractors and employers has long been a contentious issue in employment law and the subject of much litigation. The focus of the first part of this paper is the development of judicial tests traditionally used to determine the status of a worker. This will include a review of notable judicial authorities on the matter, along with a consideration of the ongoing relevance of these tests following legislative developments on the independent contractor/employee distinction in more recent times.

The second part of this paper will explore the practical implications associated with the distinction, including a consideration of the advantages and disadvantages associated with each status. This section will include a brief discussion of the potential financial and legal implications for a business where a worker, initially thought to be an independent contractor ('contractor'), is found to be an employee.

Historical Legal Background

The statutory definition of "*employee*" is a relatively recent phenomenon. Historically, the distinction between whether a worker was an employee or a contractor was first developed by the Courts in the context of vicarious liability cases, when determining when an employer was liable to a third party for the torts of its employees (*Quarman v Burnett*, 1840). The distinction between employees and contractors has become more significant over time as the statutory protection afforded to employees has developed, and other factors such as tax, copyright and intellectual property implications "came to be" affected by the distinction of whether a worker is an employee or a contractor.

In the early decision of *Marshall v Whittaker's Building Supply Co*, Windeyer J provided an insightful explanation: "the distinction between an employee and independent contractor is rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own" (p.217).

Given the absence of express statutory guidance, over the years the Courts have developed and employed a number of tests to distinguish between whether a worker was an employee or a contractor. Examples of these common law tests include the Control Test, the Integration/Organisation Test, the Fundamental/Economic Reality Test, and the Mixed Test. It is important to note that no one test has ever been considered entirely determinative and they have often been used in combination when assessing the nature of a particular relationship. The variety of tests indicates that the employee/contractor distinction is by no means easy to draw. Furthermore, the fact that they have remained in regular use, even after the advent of a statutory definition of

* Peter Kiely is Senior Partner at Kiely Thompson Caisley, solicitors in Auckland and Wellington. He has practised in the field of industrial law, employment relations and employment law since 1980. He is Adjunct Professor of Employment Law at Victoria University, Wellington.

“employee”, confirms the complexity of this aspect of employment law and is indicative of Parliament’s intention that they should continue to play a role in determining whether a worker is in fact an employee or contractor.

The Control Test

Historically, the most influential of the various tests developed by the Courts was the Control Test. Under the Control Test, the court enquired as to whether the alleged employer had significant control over the individual. A contractor tended to have the freedom to provide the relevant services in the manner he/she saw fit. Where control was found to have been exercised by the alleged employer, this was found to indicate an employment relationship.

The Control Test was first recognised in New Zealand in 1904 in a case known as *Inspector of Factories v McIntosh* where the test was framed in the following way:

The test usually applied is whether the employer retained control of the work and the men were bound to obey him....in the case of a contract the contractor is at liberty to do the work in his own way, free from the control of the other parties (p.265).

What mattered was the “ultimate control” over the employee (*Inspector of Awards v Michael Parnemann Limited* 1998). In other words, the Control Test did not require the alleged employer to exercise continuing detailed control over the work being done. Rather, instead of asking whether control was actually exercised, the test asked whether the alleged employer had the right to control the alleged employee.

Many commentators pointed out the deficiencies of the Control Test (see Drake, 1968; Mills, 1979; Merritt, 1982). It is particularly difficult, for instance, to see how a managing director of a one-person company can be said to be under the company’s control. Yet, in the Privy Council case of *Lee v Lee’s Air Farming Limited*, Mr. Lee, who was the governing company director, and held all but one of its 3,000 shares, was held to be an employee of the company. It was held that the right to control existed, even though it would have been for Mr Lee, in his capacity as agent for the company, to decide what orders to give himself. Looking at the matter from a different viewpoint, a high level of independence on the part of the individual is inconsistent with a high level of control by an employer or principal.

This test has been applied in more recent times; in *Challenge Realty Limited v Commissioner of Inland Revenue* where the Court of Appeal found that the employer’s ultimate ability to control its employees pointed to the existence of an employment relationship. A few years later when the Control Test came back before the Court of Appeal in *TNT Express Worldwide (New Zealand) Limited v Cunningham*, the Court of Appeal held that while control remained a relevant factor in determining whether a worker was an employee, it was not the decisive factor; it is only one of several factors to consider when determining whether a worker was an employee or contractor.

The Integration/Organisation test

The Integration Test was a move away from the Control Test as the primary means of determining whether an individual was an independent contractor or an employee. It was first “applied” in the case of *Stevenson Jordan & Harrison v MacDonald & Evans* by Lord Denning, who explained:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of a business, and his work done is an integral part of the business;

whereas under a contract for services, his work, although done for business, is not integrated into it but is only accessory to it.

This Integration Test has enjoyed academic support as being consistent with the “economic reality” of employment relationships in the late 20th century and, as emphasising the economist’s distinction between one who sells his or her labour power to the enterprise of another and one who operates his or her own enterprise (Wedderburn, 1986). The Court of Appeal adopted the integration test in *Challenge Realty Limited v CIR* where it said:

The issue that must be settled in today’s case is whether the worker is genuinely in business on his own account or whether he is “part and parcel of” – or “integrated into” the enterprise of the person or organisation for whom work is performed (p. 118).

In *Telecom South Limited v Post Office Union*, the Court of Appeal again referred to the Integration Test. The Court held that a clause in a contract providing for payment of salary on a monthly contract fee, which was transparently a tax device, was held to be outweighed by the fact that, among other things, the individual concerned was “fully integrated into the company’s organisation”.

The problem with the Integration Test is that, while it appears to be deceptively simple and logical, it is rather difficult to apply in practice. In particular, it does not reveal what degree of integration into the employer’s business is required (*Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance, 1968*). How, then, does one determine what constitutes an integral part of the business of the organisation? Furthermore, there are some genuine independent contractors, such as IT specialists, whose work is often integral to the business of an organisation. In such cases, the Integration Test is of little assistance in determining whether an individual is an employee or not.

The Fundamental/Economic Reality Test

A further test adopted by many judges is based upon the concept of economic dependence. The test examines the practical realities of the economic relationship between the parties rather than scrutinising in detail the terms on which the individual is formally engaged. In *Re Porter*, Gray J said: “the level of economic dependence of one party upon another, and the manner in which that economic dependence may be exploited, will always be relevant factors in the determination whether a particular contract is one of employment” (p. 184-185)

The test has also been described as the “Fundamental Test” (see Goddard CJ in *TNT Express World (NZ Limited v Cunningham)*) and the “Business Test”. Essentially, the Economic Reality Test is a mirror image of the Integration Test. Whereas the integration test asks whether a person is part of the organisation, the economic reality test asks whether that person is truly independent of it (Anderson, 1995). The Court asks whether the individual has risked his/her own capital, and whether the individual has had an opportunity to profit from the work depending upon how he/she arranges the work in question. In *Market Investigation Limited v Minister of Social Security*, Cooke J gave the test an authoritative formulation:

Is the person who has engaged himself to perform the services performing them as a person in business on his own account? If the answer to that question is “yes”, then the contract is a contract for services. If the answer is “no”, then the contract is a contract of service.

A similar analysis occurred in *NZ Dairy Workers Union v Southern Fresh Milk Co Limited*, a decision referred to by Goddard CJ in the *TNT* case. Goddard CJ explained:

The ownership of a truck was one of two factors which persuaded me in *NZ Dairy Workers Union* ... that the driver who owned it was “capital” rather than “labour”; the other factor was that he was permitted to back-load his truck with products of persons other than the dairy company to which he was mainly contracted. This reinforced the claim that he was in business on his own, and not on the dairy company’s account.

More simply put, where a worker supplies their own tools, has a chance of a profit or a risk of loss, the economic reality will likely be that they are running their own business.

The Mixed/Multiple Test

The Courts have also opted for an approach that combines a number of the tests together. This approach is often referred to as the Mixed or Multiple Test. In *McMillan Holdings Limited v Auckland Clerical Workers Union*, Blair J observed:

The correct approach is to look broadly at the whole transaction and apply the various tests which the Courts have from time to time suggested should be used in deciding the category in which the particular workers should be (p.531).

In taking a Mixed/Multiple test approach, the Court would consider a number of factors

- (i) The right to engage and terminate;
- (ii) The power to delegate the performance of work;
- (iii) The payment of wages and other remuneration;
- (iv) Whether the person owns and maintains their own equipment;
- (v) The intention of the parties;
- (vi) The “label” that the parties have attached to their relationship.

(*Challenge Realty v CIR, 1990*).

Employment Contracts Act 1991

The word “employee” was first defined in the New Zealand employment law context in the interpretation section of the Employment Contracts Act 1991, which provided the following definition:

Employee –

- (a) means any person of any age employed by an employer to do any work for hire and reward;
- (b) includes-
 - (i) A homemaker; or
 - (i) A person intending to work:

A significant early decision under the Employment Contracts Act 1991 was the judgment of the Court of Appeal in *TNT Express Worldwide (New Zealand) Ltd v Cunningham*. In that case, TNT Couriers engaged Mr Cunningham as an owner/driver in the company’s courier division. He transported small packages from the premises of customers to designated destinations. The owner/driver contract contained a provision which stated that Mr Cunningham a contractor and not an employee.

The contract bound Mr Cunningham to work exclusively for TNT. It required him to wear TNT's uniform, have his vehicle painted in TNT's colours, work set hours and provide personal service. On the other hand, Mr Cunningham was to provide the vehicle, the transport licence and insurance and be remunerated principally on a per trip basis. He was responsible for GST and ACC payments and it was over to him to employ relief drivers.

The contract contained termination provisions whereby TNT was entitled to terminate for cause, or either party was able to end the relationship on four weeks' written notice. TNT terminated the contract on 6 August 1991. Mr Cunningham claimed that the termination was unjustified and procedurally unfair and commenced a personal grievance claim under the Employment Contracts Act 1991 claiming he was an employee.

The Employment Court found that Mr Cunningham was an employee, relying upon both the Control Test and the Fundamental Test (*Cunningham v TNT Express Worldwide (NZ) Limited*, 1992), Mr Cunningham had been subject to a considerable degree of control and was considered to be fundamental to the company's business.

Interestingly, the Employment Court's decision was subsequently overturned by the Court of Appeal, which approached the case as one of interpretation of contract. The Court held that, where the terms of the contract were reduced to writing, the intention of the parties about the nature of the relationship was to be arrived at from a consideration of the contents of the written document read in the light of all the surrounding circumstances at the time of its execution. The Court held that "the parties' intention was to be discerned from the contents of the written contract, construed in accordance with ordinary principles. The parties label was not decisive" (ibid: 695).

Although acknowledging that TNT exercised tight control over its couriers, the Court of Appeal regarded the degree of control as more a reflection of the need for business efficiency in the courier industry rather than affecting the fundamental nature of the contractual relationship. In short, the Court of Appeal ruled that the exercise of control and other features of the dealings between the parties may only be illustrative of the terms of the contract rather than determinative of its nature. Justice Robertson observed that "in my view he [the Chief Judge] focused too much on the admittedly important aspect of control to the exclusion of the clear words of the written contractual arrangement" (ibid: 718).

Employment Relations Act 2000

The judgment of the Court of Appeal in *Cunningham* was viewed by some commentators as enabling employers to impose independent contractor relationships on workers when, in reality, the workers were working in situations that were identical to an employment relationship. To counter this, the Employment Relations Act (ERA) 2000 provided the Courts with an extended definition of the word "employee". Section 6 of the ERA provides:

- (1) In this Act, unless the context otherwise requires, employee –
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes –
 - (i) a homemaker; or
 - (i) a person intending to work; but
 - (b) excludes a volunteer; who –

- (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) **must determine the real nature of the relationship** between them.
- (3) For the purposes of subsection (2), the Court or the Authority,
 - (a) must **consider all relevant matters**, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[... **Emphasis added**]

Although the definition of employee remained almost the same as it had been under the Employment Contracts Act, under s6(2) and (3) of the ERA, the Court is now required to determine the “the real nature of the relationship” between the parties. In determining the “real nature” the Court is required to consider all relevant matters, including any matters that indicate the intention of the persons but is not to treat, as a determining matter, any statement by the persons that describes the nature of their relationship, such as the words of a contract. Such an approach was seen as a move away from the emphasis on the primacy of the written contract over other indicators of the relationship.

When the Employment Court considered the new s6 test for the first time in *Koia v Carlyon Holdings Ltd* (2001), the Court reiterated the commonly held view that the Court of Appeal’s decision in *Cunningham* was evidence that, under the ECA: “the clearly expressed contractual intentions of the parties prevailed over all other considerations” (ibid: 25).

Subsequently, however, in *Curlew v Harvey Norman* (2002) another of the early authorities where the Employment Court applied the new ERA definition of employee, Judge Colgan (as he then was) disagreed that the Court of Appeal in *TNT* had relied purely on the words of the contract. Rather, he noted that the judgments in *Cunningham*:

... all, to a greater or lesser degree, rely in deciding the case upon a consideration of all the relevant factors of which such an expressed term was one evidencing the intention of the parties at the time the contract was entered into (ibid: 25).

On this basis, it appears that the Court of Appeal’s judgment in *Cunningham* was misinterpreted in *Curlew v Harvey Norman* and that, even before the enactment of the ERA, consideration was, nonetheless, given to other relevant matters by way of the various tests developed over the years. Judge Colgan in *Curlew* also considered that these traditional tests, including the Control and Integration Tests, remained relevant in determining the real nature of the relationship under s6 of the ERA.

Bryson v Three Foot Six

The leading authority on “the s6 definition” is the judgment of the Supreme Court in *Bryson v Three Foot Six* [2005] NZSC 34. Mr Bryson had been a model-maker hired to work on miniatures for the *Lord of the Rings* films. While not given an employment agreement when he started work, he was later provided with a written contract for all crew, which refers throughout to ‘Contractor’

and 'Independent Contractor'. He worked fixed hours. He was subsequently made redundant and alleged unjustified dismissal.

The Employment Court considered that Mr. Bryson had been an employee (*Bryson v Three Foot Six, 2003*). It noted that the label given to the relationship was not to be treated as decisive. The Court had recourse to a wide range of matters, such as the control exerted over Mr Bryson and the extent of his integration into the business. For example, he could not accept other work engagements and had fixed hours of work, taxes were deducted at source; payment for statutory holidays was at double time or a day in lieu; the company provided him with protective equipment; all items created were to be the sole and exclusive property of the company, Three Foot Six.

Mr. Bryson had also worked closely with other members of the miniatures team and, as such, was thoroughly integrated. At the beginning of his engagement, he had received six weeks of training so it could not be said that he had contracted his skills from the outset. The Court also noted that Mr. Bryson's contract with the company read like a contract of service and rejected submissions that such terms and conditions were nothing more than common industry practice. The Employment Court determined that the real nature of Mr. Bryson's relationship with the company was that of employee and employer. Judge Shaw made the point that the decision was one made based on Bryson's particular circumstances.

The Court of Appeal overturned the Employment Court's decision. It relied particularly on the fact that he had signed an agreement describing himself as a contractor, and on industry practice, noting that a majority of workers in the film industry are contractors. The Court observed that this practice was common, given that a project could be terminated at any time, giving rise to constant fluctuations in labour requirements. The Court of Appeal was concerned that finding Mr. Bryson to be an employee would have an adverse impact on the New Zealand film industry by increasing costs and creating uncertainty. In finding that Mr. Bryson was a contractor, it observed:

In light of industry practice there is no basis for holding Mr Bryson's relationship with the appellant was other than what was provided for in the contract he signed. It also follows that the Judge was wrong in treating industry context as confined solely to what the intentions of the parties were. It is directly relevant to the "real nature of the relationship" between the parties (*Three Foot Six Limited v Bryson, 2004: 11*).

The Court of Appeal's decision was, subsequently, appealed to the Supreme Court which found that that the Employment Court had duly considered industry practice. On that basis, Three Foot Six's appeal to the Court of Appeal was not based on any error of law. The Court of Appeal did not, therefore, have jurisdiction to hear the appeal and the Employment Court's decision was restored (*Bryson v Three Foot Six, 2005*).

The Supreme Court made a number of other observations. In particular, their Honours had reference to the terms and conditions of the crew deal memo which contained much that indicated a contract of service. They also noted that Mr. Bryson's engagement was effectively full time, with predictable hours. He was also fully integrated into Three Foot Six's business. The Supreme Court noted that evidence of industry practice did not seem to describe relationships similar to that between Mr. Bryson and Three Foot Six, and that prevailing industry practice ought not to obscure a consideration of the contract as it had operated in reality.

The Supreme Court ruled that while a Court is required to consider the words of the contract, these must be examined against the backdrop of the way the relationship operated in practice. On this basis, it was open to Judge Shaw in the Employment Court to conclude that the written contract was

not determinative because it did not give any reliable indication of the real nature of the relationship. Their Honours provided a helpful list of “all relevant matters” for the purposes of s6. These were said to include:

- (a) the written and oral terms of the contract given that they often contain indications of the common intention of the parties
- (b) any divergence from those terms and conditions in practice
- (c) the way in which the parties have actually behaved in implementing their contract
- (d) features of control and integration and a consideration of whether or not the person has been working on his or her own account.
- (e) Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.
- (f) Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.
- (g) Taxation arrangements, both generally and in particular are a relevant consideration however care must be taken to consider whether these may be made as a consequence of the labelling of the person as an independent contractor (*Bryson v Three Foot Six*, 2005: 32).

The law following *Bryson*

At the time the Supreme Court’s decision in *Bryson*, there was a great fear that it would open the “flood gates” to successful claims of status as an employee (Cullen Law, 2010). However, authorities decided since *Bryson* have shown that this is not the case.

A little over a year after the *Bryson* decision, the Employment Court considered the employee/contractor distinction in the case of *Clark v Northland Hunt Incorporated*. Mr. Clark was engaged by Northland Hunt as a huntsman and signed a series of contracts for services. He was engaged to maintain the Northland Hunt’s pack of hounds. He had considerable autonomy in maintaining and breeding hounds, and provided his own equipment. Mr. Clark was also registered for GST and invoiced Northland Hunt for his services.

In applying the Control Tests the Court noted that Northland Hunt had very little control over how Mr Clark used the property, maintained the pack of hounds and maintained other equipment. The Court was also not convinced that Mr Clark was integrated within Northland Hunt as an employee (*ibid*).

Finally, the Court was heavily persuaded by the Fundamental Test. The Court considered that Mr. Clark structured his engagement with Northland Hunt as a separate business and took advantage of minimising tax liabilities accordingly. As a result the Court held that Mr Clark was not an employee but an independent contractor.

A further recent significant authority on this issue is the decision of the Employment Court in *The Chief of Defence Force v Ross-Taylor*. In Assessing Dr. Ross-Taylor’s status, the Employment Court had recourse to the “relevant matters” expounded by the Supreme Court in *Bryson*.

The Court found that Dr. Ross-Taylor was an experienced medical practitioner, who was familiar with running her own practice, and that she fully understood the nature of the contracts that she had signed on four separate occasions.

The Court was satisfied that the contracting arrangements had clear advantages for both parties and that it was their intention that Dr. Ross-Taylor would be an independent contractor. It was also relevant that, during the currency of the final contracting agreement, Dr Ross-Taylor had specifically addressed the issue of becoming an employee with the General Manager of the New Zealand Defence Force (NZDF), but had not progressed matters any further. The Court noted that it was not until the events that led to the termination of the agreement that Dr. Ross-Taylor claimed for the first time that the real nature of the relationship was one of employment and referred to the following warning in *Massey v Crown Life Insurance*: 581

In the administration of justice the union of fairness, common sense and the law is a highly desirable objective. If the law allows a man to claim that he is a self-employed person in order to obtain tax advantages for himself and then allows him to deny that he is a self-employed person so that he can claim compensation, then in my judgment the union between fairness, common sense and the law is strained almost to breaking point... (ibid: 581).

The Employment Court reviewed the arrangements entered into by Dr. Ross-Taylor and the NZDF and noted that:

It is a very serious matter for the Authority or the Court to find, notwithstanding the clear intention of highly capable and knowledgeable persons who have equal contracting strength and sound reasons for the arrangements they have mutually entered into, that, after those arrangements have terminated, the real nature of their relationship was completely different. That is what the Authority found in this case on the basis of the skilful legal submission made on behalf of the defendant. I too had the benefit of these submissions (para. 30).

The Court noted that, while the intention of the parties is not determinative of the real nature of the relationship between the parties, it would be considered as part of “all relevant matters” as required by section 6 of the ERA.

In terms of the Control Test, the Court considered that Dr. Ross-Taylor was not under any close control of the Navy Hospital as to the performance or hours of her work. Her performance was not supervised and she was accountable only to the Medical Council of New Zealand and to her patients. She was able to decline work and free to work the hours that she chose.

The Court looked at the extent to which Dr Ross-Taylor was integrated into the Navy Hospital and found that, while her services were essential to the proper running of the Hospital, she was not integral to the NZDF’s organisation of the Navy Hospital.

Finally, the Court considered the extent to which Dr Ross-Taylor was in business on her own account (the Fundamental or Economic Reality Test). The Court referred to the fact that Dr. Ross-Taylor was registered for GST and issued invoices under her letterhead. She engaged her own accountant and had claimed various tax deductions on the basis that she was self-employed. The Court considered that even though Dr. Ross-Taylor was working exclusively for the Navy Hospital, by the time arrangements came to an end, she was clearly working on her own account.

The Court concluded that the common law tests did not undermine the express intention of the parties, as evidenced by the contractual arrangements negotiated by them on four occasions. Accordingly, Dr Ross-Taylor was a contractor and was not entitled to any remedies following the termination of the contracting arrangement by the NZDF.

This decision disproves fears stemming from the Supreme Court's decision in *Bryson* that contractual labels would be disregarded at the expense of other factors. Instead, the assessment is clearly a balanced consideration of all relevant matters.

Practical implications of the choice

Before choosing whether to engage a worker as an employer or a contractor, an employer should weigh up the various advantages and disadvantages of each relationship. The difference between the two relationships can have important practical and legal implications.

Employees are offered significant protection under the law. Such protections are not afforded to contractors. The importance of the distinction is highlighted in the case of *Telecom South v Post Office Union* when Richardson J (as he then was) observed "the contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing" (p.772).

It is that "special relationship" which gives rise to the whole body of legislation and jurisprudence called employment law. That body of law is not only found in the ERA but also in what is colloquially known as the "minimum code". The "minimum code" is, in fact, made up of a number of statutes, all of which provide an umbrella of protection to employees. By way of summary, employees' rights include:

- (i) employment protections under the ERA, including access to personal grievance and dispute procedures;
- (ii) The right to protection of employment while taking parental leave;
- (iii) The right to paid statutory holidays and annual leave;
- (iv) The right to sick or bereavement leave;
- (v) The right to minimum wage protection;
- (vi) The right to protections as listed under the Human Rights Act 1993.

The availability of the above minimum requirements is the reason it has become so essential to be able to identify when an employment relationship exists, as compared to an independent contractor relationship and the reason this issue has been so widely litigated.

Independent contractor agreements are particularly attractive to businesses where there is a need to cover a temporary increase in workflow or where a specific short term project arises. An independent contractor agreement may also be appropriate where a business wishes to retain ongoing part time consultancy services. The obvious advantage when engaging a worker as a contractor is that an independent contractor agreement can be terminated on notice when the contractor's services are no longer required. This offers a business greater flexibility to increase or downsize its labour force than would otherwise be possible with an employment relationship.

If a business identifies a significant and ongoing need for additional labour, and desires the exclusive service of a particular worker or workers, an offer of employment may be desirable. Such an arrangement will allow a business to exert greater control over the worker. The disadvantage in engaging a worker as an employee is that the worker will have access to the full range of statutory employment protections, including personal grievance provisions. An employer which attempts to terminate an employment relationship in the absence of misconduct, poor performance or a genuine redundancy situation may find her/himself facing a claim of unjustified dismissal.

When engaged as an employee, a worker will also be entitled to accrue sick leave, bereavement leave, and annual holidays along with any other leave entitlements provided under the relevant employment agreement, such as paid public holidays. These entitlements can constitute significant contingent liabilities, and the ongoing cost should be considered before an offer of employment is made.

Tax implications

There are also tax obligations to be considered. Classification as an employee rather than an independent contractor radically alters the tax obligations of both the employer and the employee.

Contractors generally handle their own tax payments, deducting business expenses, registering for GST and paying their own ACC contributions. Employees, on the other hand, have tax deducted by the employer (PAYE) and are not eligible to be GST registered or deduct expenses against their employment income. For these reasons, the use of an independent contractor agreement may be attractive to a business because of the reduced administration costs.

Risks when engaging independent contractors

Engaging an individual as an independent contractor can involve risk. Even if an individual signs an independent contractor agreement, it is always open to that individual to contest their status and claim that his or her relationship with the company is, in reality, that of an employer/employee. It is not unusual for such claims to occur when the engagement ends, particularly if it is at the business' initiative.

There can be serious legal and financial consequences for a business if a worker, once thought to be a contractor, is later found to be an employee. If a worker is found to be an employee, they may successfully bring an action for unjustified dismissal, leaving the employer liable for payments of holiday pay, lost wages and compensation for hurt and humiliation. There is even the potential for the former "contractor" to be reinstated to their former position within the business.

Employment obligations aside, where parties have proceeded on the basis that an independent contractor relationship exists, a Court decision or other settlement to the contrary would lead to a reassessment of both the employee's and the employer's tax liabilities and payments to date. The IRD may even choose to prosecute the employer for failing to deduct PAYE tax and other levies.

The risks associated with engaging independent contractors have not gone unnoticed by businesses, and the issue remains topical. During the course of negotiations last year regarding the production of the *Hobbit* series of films, Warner Bros. indicated that the "uncertainty" of New Zealand employment law was affecting their decision on whether to commit to filming in this country. In particular, they were concerned about the potential uncertainty surrounding the legal definition of "employee" following the decision of the Supreme Court in *Bryson v Three Foot Six Limited*.

To allay Warner Bros.' concerns and secure the production of the *Hobbit* film in New Zealand, Parliament swiftly enacted the Employment Relations (Film Production Work) Amendment Act

2010 under urgency. The Amendment Act came into force on 30 October 2010 and provides that all workers involved in film production are considered to be independent contractors, unless they have written employment agreements that expressly provide they are employees.

Conclusion

Businesses are advised to take particular care when choosing to engage a worker as independent contractor. It is particularly important to ensure consistency between the wording of the particular contract and the way the contract operates in practice over time. Where other factors point to the existence of an employment relationship, these may override express wording describing the worker as a “contractor”.

Those who use independent contractor agreements need to be aware that the real nature of the relationship can change over time, so what starts off as an independent contractor arrangement may change during the operation of the contract into, what is in effect, an employment relationship.

In order to reduce the risk of this happening, companies should carefully monitor the manner in which the contractor relationship is conducted, to ensure factors that are indicative of an employment relationship do not unwittingly occur with the passage of time. For example, a business should take care to ensure that a contractor does not become too integrated into the business and retains a degree of independence in the way the contractor operates. Although a determination of the “real nature of the relationship” will always be a heavily fact-specific question, the following general questions, distilled from the common law tests, may be useful to a business wishing to ensure that an independent contractor is not or does not, over time, become an employee:

- What degree of control does the business assert over the contractor? It should not be similar to how an employer would control an employee.
- Is the contractor in business on his or her own account?
- Does the contractor only work for the particular business, or does he or she contract with a number of organisations?
- How independent is the contractor? Are the hours fixed or variable?
- Would it look like the contractor is a part of the organisation?
- Does the contractor supply their own equipment or tools?
- Where and when is the work carried out?
- Does the contractor invoice the business or is he or she paid by salary?
- Do payments to the contractor include GST?
- Does the business deduct PAYE and ACC levies or are these the responsibility of the contractor?

Arguably, however, a worker is no more likely to be found to be an employee under the ERA than would have been the case under the ECA. Through the use of the traditional tests, the Courts have long had regard to a range of relevant factors, and the label given to the relationship was never determinative. On this basis, the perception that *Cunningham* was decided solely on the words of the contract appears misplaced. Furthermore, *Bryson* was decided on its specific facts, given that the way the relationship operated in reality was different from the “contractor” label used by the parties. Recent authorities have disproved fears *Bryson* would open the floodgates, leading to a great many workers described as “contractors” being found to be employees. The label given by the parties to the relationship remains a valid consideration, along with all other relevant matters.

References

- Anderson, G. (ed). (1995). *Butterworths Employment Law Guide*. (2nd ed). Wellington: Butterworths
- Cullen Law. (2010, October 11). Contractor or employee? Cameras roll on touch issue. *The Dominion Post*. Retrieved from http://www.cullenlaw.co.nz/Site/Publications_Media/2010/Contractor_or_employee.aspx
- Drake, C.D. (1968). Wage-Slave or Entrepreneur? *The Modern Law Review*. 31(4): 408-423
- Merritt, A. (1982). "Control" v. "Economic Reality": Defining the Contract of Employment. *Australian Business Law Review*. 10: 105-124
- Mills, C.P. (1979). Defining the Contract of Employment. *Australian Business Law Review*. 7: 229-245
- Wedderburn (Lord), K.W. (1986). *The Worker and the Law*. (3rd ed). London: Sweet & Maxwell.

Cases

- Bryson v Three Foot Six* [2003] 1 ERNZ 581
- Bryson v Three Foot Six* [2005] NZSC 34
- Challenge Realty Limited v CIR* [1990] 3 NZELC 97, 917
- Challenge Realty v CIR* [1990] 3 NZLR 42, 56 (CA)
- Chief of Defence Force v Ross-Taylor* [2010] NZEMPC 22
- Clark v Northland Hunt Incorporated* [2006] 27 November, Perkins J, AC 66/06
- Curlew v Harvey Norman* [2002] 1 ERNZ 114
- Inspector of Factories v McIntosh* [1904] 5 BA 263
- Inspector of Awards v Michael Parnemann Limited* [1998] NZILR 604
- Koia v Carlyon Holding Ltd* [2001] ERNZ 585
- Lee v Lee's Air Farming Limited* [1961] AC 12
- McMillan Holdings Limited v Auckland Clerical Workers Union* [1969] NZLR 530
- Market Investigation Limited v Minister of Social Security* [1969] 2 QB 173

Marshall v Whittaker's Building Supply Co [1963] 109 CLR 210

Massey v Crown Life Insurance [1978] 2 All ER 576

Quarman v Brunett, [1840] 1516 ER 509

Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497

Stevenson Jordan & Harrison v MacDonald & Evans [1952] 1 TLR 101

Telecom South Limited v Post Office Union [1991] 1 NZLR 275

Telecom South v Post Office Union [1992] 1 ERNZ 711

Three Foot Six Limited v Bryson [2004] 2 ERNZ 526 (CA)

TNT Express Worldwide (NZ) Limited v Cunningham [1992] 3 ERNZ 1030

TNT Express Worldwide (New Zealand) Limited v Cunningham [1993] 3 NZLR 681

TNT Express Worldwide (NZ) Limited [1993] 1 ERNZ 695 (CA)

Re Porter [1989] 34 IR 179

Workers Union v Southern Fresh Milk Co Limited [1989] 1 NZILR 1059

“...Where the Shadows lie”: Confusions, misunderstanding, and misinformation about workplace status.

PAM NUTTALL*

Abstract

The “Hobbit” amendment was passed through the New Zealand Parliament under urgency on 28 and 29 October, 2010 with the declared intention of providing clarity and certainty about the status of workers involved in film production work. The public discourse surrounding the controversy that produced the “hobbit” amendment revealed considerable confusion, misunderstanding and misinformation about the law governing the status of workplace relationships. This article analyses the legislative provisions and common law principles governing employment status at the time the amendment was enacted, as confirmed in the leading case *Bryson v Three Foot Six Ltd*. From this basis, the article then considers the statutory interpretation of the amendment as enacted, concluding that the current wording does not provided the clarity and certainty its promoters intended.

Introduction

The Hobbit amendment was passed through the New Zealand Parliament under urgency on 28 and 29 October 2010 with the intention of providing “clarity and certainty about the status of workers involved in film production work” (Wilkinson, 2010a: 14940). The Minister of Labour, in introducing the Bill into Parliament, stated that amendment of the current law was necessary so that the film industry would “continue to make a significant investment in our economy and...film the *Hobbit* movies in New Zealand” (Wilkinson, 2010a: 14941).

Much of the media reporting surrounding the controversy that produced the Hobbit amendment revealed considerable confusion, misunderstanding and misinformation about the existing state of the law governing the status of workplace relationships. The *Bryson* case had provided a settled and relatively orthodox interpretation of the statutory requirements, which distinguish an employment agreement from contractor arrangements. According to the media coverage, however, concern persisted that, because of the *Bryson* case, workers who were “really” contractors could in some way be “deemed” to be employees by the court.

On TV3 News, for example, Duncan Garner (2010) reported that:

The law change stops contractors suing their employer for wrongful dismissal,¹so contractors can’t argue they were an employee...Former *Lord of the Rings* model maker James Bryson was a contractor and took Sir Peter Jackson’s company to court in 2005 – successfully arguing he should be treated as an employee.

Similar views were attributed to by Harper, 2010.

Actor Mark Harrison, who started the Facebook group and organised rallies across New Zealand...Mr. Harrison did not have any concerns with the Government’s planned legislative changes to ensure contracted film workers cannot later argue in court they were employees.

* Pam Nuttall is a Senior Lecturer in Law at Auckland University of Technology.

“This is an area that needed clarification ever since the [James] Bryson case,” he said. “It should have been changed by the Labour Government.”

And in December, Karyn Scherer’s column (2010) described the “...now-infamous Bryson case which prompted the law change. Bryson is a former Weta model-maker who successfully argued before the courts that he was really an employee, even though he had been hired as a contractor.

Senior National Party politicians also publicly espoused a similar view of the *Bryson* case. On October 27, 2010, Cheng and Harper from the New Zealand Herald reported that:

Speaking yesterday after meeting with the [Warner Bros] executives, Mr. Key said the “paramount” problem was that film workers on independent contracts could be legally seen as employees, even if their contracts specifically called them contractors. That followed a Supreme Court ruling in 2005 on James Bryson, a model maker on the *Lord of the Rings* movies, who was deemed an employee, even though he was hired as a contractor.

And in the First Reading debate on the Hobbit amendment, Gerry Brownlee (2010: 14944) stated that:

Further, a wee time ago there was a case called the Bryson case. What came out of that was that if the inland revenue tests were applied in Bryson’s case, it was deemed that he might not have been a contractor and that the relationship was more in the nature of employer-employee. ...if someone signs up and says that he or she wants to be a contractor, then where is the right for the person who is on the other side of that – the contractee – to expect that that is what the person is. I think it is utterly ridiculous to have a provision that says that people may run off at any time to the Employment Court and ask for help to change their status...But that is what happened in the Bryson case.

This article examines the relevant legislative provisions and their interpretation at the time the Hobbit amendment was enacted, before reviewing the concerns expressed above in light of the material law. The following sections of the article elaborate on the well-established principles of employment law applied in the *Bryson* case, concluding with a legal overview of the Hobbit amendment and its potential interpretation in light of existing employment law jurisprudence.

Legislative Provisions

Prior to the enactment of the Hobbit amendment, the provisions of the Employment Relations Act 2000 (ERA) governing whether a worker is an employee or contractor read as follows:

6 Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee-**
- a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - b) includes –
 - (i) a homeworker; or
 - (ii) a person intending to work; but
 - c) excludes a volunteer who –
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and

- (ii) receives no reward for work performed as a volunteer.
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the Court or the Authority –
- a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

These sections incorporated and expanded the statutory definition in the Employment Contracts Act 1991 (ECA), which now appears as s6(1)ERA. An employee is defined as “any person of any age employed by an employer to do any work for hire or reward under a contract of service”. A ‘contract of service’ is a term from the common law to denote an employee, in contrast to a worker engaged under a ‘contract for services’ – a contractor. In s5 ERA the term is also used to define an employment agreement: “employment agreement...means a contract of service”.

Traditionally, the common law distinction between these two working relationships has been established by applying a range of “tests” developed through the cases over the last century – the Control, Integration and Fundamental Tests.² These common law tests are imported into any consideration of the distinction between “employee” and “contractor” because the statute defines employment in terms of the common law. Presumably, the common law tests are the “inland revenue tests” to which Gerry Brownlee referred in the First Reading debate (above), though their ambit is wider than taxation issues. In New Zealand, the other usual context for determining employment status is to establish the right to access minimum code conditions and employment protection provisions, such as personal grievance dispute resolution. In other common law jurisdictions, leading cases have also arisen on issues such as vicarious liability for personal injury or intellectual property rights to a worker’s outputs.³

In the *Bryson* Employment Court case, Judge Shaw summarised the principles to be applied to interpreting the expanded definition of “employee” in s6 ERA 2000 as follows:

- The Court must determine the real nature of the relationship.
- The intention of the parties is still relevant but no longer decisive.
- Statements by the parties, including contractual statements, are not decisive of the nature of the relationship.
- The real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration and the “fundamental” test.
- The Fundamental Test examines whether a person performing the services is doing so on their own account.
- Another matter which may assist in the determination of the issue is industry practice although this is far from determinative of the primary question.

Subsequent Employment Court decisions have produced variants of wording in setting out the criteria for applying the statutory provisions but no substantive changes (see, for e.g. *Chief of Defence Force v Ross-Taylor* [2010], *Tsoupakis v Fendalton Construction Ltd*). The Supreme Court endorsed Judge Shaw’s summary of the applicable principles:

We are unable to find in her judgment anything concerning s6 which does not appear faithfully to reflect the words of the section... Judge Shaw accurately states what the Court

must do and lists the matters which are relevant... The only criticism which might fairly be made of the Judge's list is that it does not expressly direct attention to the substantive contractual terms... but it is clear from the following section of the judgment, headed "*Conditions of employment*", that she was very much alive to the need to begin by looking at the written terms and conditions..." (at [32] & [33]).

Common misconceptions

In the light of this analysis, the earlier quoted comments in the media and from Government ministers reveal several common misconceptions:

1. **A statement in an agreement or contract that a worker is a contractor is enough to make this so.** Referred to in case law as a "label argument", this misconception is that because the written document makes a statement that says that the worker is a contractor, that is what they are in law or in reality. Even the Minister, in introducing the legislation, appears to suggest that employment status is established in this way when she stated:

Under the current law, a previous agreement in relation to a person's employment status can be challenged and overturned by the courts. Despite what the contract or agreement states, the courts can look through it and decide whether the relationship is a contract for service, or a contract of service (Wilkinson, 2010a: 14941).

However, long before the *Bryson* case⁴, it was settled law that "labelling" a worker as either an employee or a contractor does not decide the matter. The courts will not recognise an arrangement that it finds to be a "sham", designed by the parties in collusion for the purpose of evading legal obligations, irrespective of whatever label the parties may decide to attach to the situation; and even where the situation is not a "sham", the label will not be taken as determinative or given much weight as against other factors that the court must take into account.

In *Cunningham v TNT Worldwide Express (NZ) Limited*,⁵ four out of the five members of the Court of Appeal made comments in separate judgments on the weight to be attached to a "label" clause in deciding if the courier driver, Mr. Cunningham, was an employee or a contractor.

Cooke (1976) cited clause 7 of the written agreement between the parties:

7. THE relationship between the Contractors and the Company is and shall be for all purposes that of independent Contractor and neither this Agreement nor anything herein contained or implied shall constitute the relationship of employer and employee between the parties.

He commented "I set out here cl 7, although being a mere label it is in itself of little or no importance (see *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817)..."

Casey, J said, "The tribunal approached the matter in this way, correctly placing little weight on the fact that cl 7 specified the relationship to be that of employer and independent contractor."

McKay, J said:

In this case the contract includes a clause stating that the relationship between Mr. Cunningham and the company is that of independent contractor and not that of employee and

employer. The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates, and not by the label the parties put on it. At most that label may be an indication of intention which may assist in resolving any doubt as to the construction of other clauses.

Robertson, J said: “The fact that in the written contract they declared that Mr. Cunningham was an independent contractor and not an employee is not determinative.”

Though the Court of Appeal in this *TNT* case found the courier driver to be an independent contractor, it did **not** do so on the basis of a statement in the contract labelling his employment status. The Employment Relations Act 2000 (ERA) in s6(3) now specifies that “the Court or Authority...is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

However, the *Bryson* Employment Court decision did acknowledge that, while not decisive, a written statement of employment status cannot be disregarded “if it reliably indicates the real nature of the relationship” and that it remains “an element to be considered”(at [24]). The relative importance of all the factors to be weighed up in determining employment status is considered in greater detail below.

2. **The second misconception is that employment status can arise in some “real world” dimension where it exists quite separately from the legal rules** which define the workplace relationship as that of a contractor or employee. However, a worker is an employee or a contractor because the law, as applied by the courts, defines that worker as either one or the other.

Alterations in the law may occur through statutory amendment or through case law development which change the rules that determine employment status. But “being a contractor” or “being an employee” is a construct created by applying the legal rules to the factual situation; and ultimately, it is for the courts to determine the outcome of this process. When Mr. Bryson was working for Three Foot Six Ltd, there was no point at which he could have been “hired as a contractor” or have been “a film worker on an independent contract” because the courts found that he was an employee.⁶ Similarly, there cannot be “a previous agreement in relation to a person’s employment status” which is then “challenged and overturned by the courts” as the Minister asserted in the First Reading debate. The existence and nature of the agreement and the employment status of the person are determined by the Court’s application of the relevant law to the facts of the case. It is for the courts to decide if the agreement exists, what it says and what employment status it establishes. The agreement or the employment status does not have any separate existence apart from this construction.

Furthermore, in terms of work carried out in the film production industry, there is no intrinsic predisposition towards either employment or contracting as the legal structure for working relationships. In some common law jurisdictions, it is the practice for work in the industry to be carried out by unionised employees pursuant to collectively negotiated agreements. The *Hobbit* amendment seeks to establish the contrary presumption in the New Zealand jurisdiction. However, the nature of the work itself does not establish some inherent bias towards one form or the other of engaging workers.

3. **The third misconception is that perceived legal confusion or difficulties, which the *Hobbit* amendment was intended to redress, were created by the *Bryson* case.** However, as we have seen above, a statement in a written document specifying that Mr. Bryson was a contractor was

never, in itself, going to be enough to make him a contractor. The law was already clear long before the *Bryson* case. The genesis of the amendment was not in any confusion over the law but in the Supreme Court's unequivocal confirmation that the law as applied in his particular situation, defined Mr. Bryson's working status as that of an employee. This meant that the law applied to everyone **even to the film industry**.

The *Bryson* decision applied well-established principles of employment law. The decision that Mr. Bryson was an employee was made by a Judge in the Employment Court on a plain reading of the applicable provisions of ERA 2000 in light of settled principles of common law. The decision was appealed to the Court of Appeal which found that Mr. Bryson was a contractor.⁷ However, a bench of five Supreme Court Justices, hearing the first employment law matter to come before that body, unanimously found that the Employment Court judge had not made any error of law in reaching the decision that Mr. Bryson was an employee. In the subsequent five years, this correct understanding of the applicable law was not challenged or appealed in further decisions on the contractor/employee issue.

The six bullet points in Judge Shaw's decision provide a framework for discussion of the major legal issues that arose in the *Bryson* case – the real nature of the relationship in light of the written document, the weight to be attached to the intention of the parties, the continuing relevance of the common law tests and the significance of industry practice as a determining factor. We will now turn to examining this law in more detail.

Role of the written document

Mr. Bryson was offered a permanent position in April, 2000 as an on set model technician with Three Foot Six Ltd, following a two week secondment from Weta Workshop, where he had worked as a model-maker. For the first few weeks he received training. Despite negotiating his hours of work and receiving a pay rise in the intervening period, he was not supplied with any written document until October, 2000. Months after commencing work, he reluctantly signed a company-generated weekly invoice with a "crew deal memo" on the reverse, as a condition of continuing to be paid.

Judge Shaw's analysis of the document provided a detailed description of the terms and conditions, including an annexure of a full copy at the end of the judgment. She commented that it "is questionable whether the crew deal memo reliably indicates the real nature of the contract," (at [32]) and the Supreme Court ruled (at [32]) that it was open to her to reach this conclusion. She concurred with the Authority's recognition that there were elements in the memo indicative of an employment relationship.

In spite of the references to independent contractor in the crew deal memo much of it reads like a contract of service. Even a provision such as the one which records no entitlement to annual and sick leave is compromised by the later statement that payment could be made for sick leave at the discretion of the production company" (at [74]).

The document included a clause specifying that Mr. Bryson was engaged as an independent contractor, not an employee, and referred throughout to the worker as a contractor. The Supreme Court concurred with Judge Shaw in noting that "s6(3)(b) requires that the statement in the crew deal memo that Mr. Bryson was an independent contractor is not to be treated as determinative" (at [32]), and commented that "[i]n that respect s6 confirms what is to be found in *TNT*."

However, the *TNT* decision may also be taken to establish that employment status was to be determined by discerning the intention of the parties from an interpretation of the wording and effect of the comprehensive written terms of the contract. Although expressed in slightly different terms, each of its five judgments focussed on a classical, formal contractual analysis of the intention of the parties at the moment of formation as set out in the written contractual document.

For example Cooke said:

When the terms of a contract are fully set out in writing which is not a sham... the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined (*Cunningham v TNT Worldwide Express (NZ) Limited* [1993] at 701)

Casey J (ibid at 711) stated

The parties signed a written contract and it can be assumed that they were working in accordance with its terms. On ordinary principles of construction their intention about the nature of their relationship is to be arrived at from a consideration of the contents of that document read in the light of all the surrounding circumstances at the time of its execution...

And Hardie Boys, J:

The case is about the meaning and effect of a written contract. The Court's function is to ascertain the intentions of the parties when they entered into it. That intention is to be ascertained from the words they used, with such assistance as can be found in the surrounding circumstances.

Not surprisingly, then, the *TNT* decision was generally considered to stand for the importance of the terms of the written contract in determining the status of a person as an employee or an independent contractor. For example in *Koia v Carlyon Holdings Ltd*, Judge Colgan stated:

Under the Employment Contracts Act 1991, the clearly expressed contractual intentions of the parties prevailed over all other considerations: ... So if the contract was wholly reduced to writing, that was the end of the inquiry" (ibid at 594).

The extended definition of "employee" found in s6 ERA 2000, however, requires that "the Court or the Authority... must determine the real nature of the relationship" and "must consider all relevant matters, including any matters that indicate the intention of the persons". In applying the wording of the statute, Judge Shaw's questioning of "whether the crew deal memo reliably indicates the real nature of the contract" indicates a reduced deference to contractual form as determining employment status. The Supreme Court decision found that, with the replacement of the ECA 1991 by the ERA, the "Court or Authority must therefore, even when the written contract is apparently comprehensive, take into account other matters which are relevant" (at [23]).

The important implication of this position is that s6 mandates that the inquiry undertaken by the Court or Authority is "for the purpose of determining a question of fact" (at [23]). The Supreme Court decision comments that the appeal in the *TNT* case "appears to have proceeded on the basis that the employee/contractor question was open to appeal as a question of law because the case was of the exceptional kind" (at[22]). The SC quotes Cooke in *TNT* as saying that, because the contract was wholly in writing, the *TNT* case must turn on the correct interpretation of the contract, which is a matter of law, although in more typical employment cases the question of classification is one of "mixed fact and law" (at[22]).

However, now that the Supreme Court has ruled that the inquiry undertaken under s6 ERA 2000 is one of fact, the "ultimate conclusion reached by the Court in a given case concerning the nature of

the relationship is thus not ordinarily amenable to appeal to the Court of Appeal under s214” (at [23]). Whether or not the appellate Judges might have reached a different conclusion, they cannot hear an appeal from the Employment Court decision unless an error of law can be established, and interpretation of the written documentation no longer provides the foundation for an appeal as a matter of law.

The intention of the parties

Under Judge Shaw’s second bullet point, the intention of the parties is still relevant but no longer decisive. As the employment relationship is formed by agreement, it is always necessary that any intention of the parties about the worker’s employment status should be a common intention. The Employment Court judgment found that it was not possible to establish if any common intention existed.

The absence of any written record of engagement at the commencement of his work for Three Foot Six means that there is no evidence of any mutual turning of minds to the true nature of Mr. Bryson’s employment at that stage” (at [36]).

The majority in the Court of Appeal had been concerned that Judge Shaw’s approach to determining the nature of the employment relationship could leave little scope for significant weight to be placed on contractual intention. The Supreme Court however, “did not read her judgment in that way” [33]. They found that “[s]he considered the terms and conditions” [33] and “made a factual finding that it was not possible to establish if the parties had any common intention as to their working relationship” ([9] p 379). Mr. Bryson, she found, “did not turn his mind to the matter”. The “Three Foot Six witnesses” ([9] p 380) assumed that he was a contractor because they said that was invariable industry practice. However, Judge Shaw looked for “any mutual turning of minds to the true nature of his employment” ([9]p 380) and said that the assumptions of the employer about the employment status of the worker “could not be taken as determinative” ([9] p 380).

In light of this analysis, the comments by Gerry Brownlee (2010) in the First Reading debate appear to indicate a misunderstanding of the case law. The Judge made a factual finding that Mr. Bryson did not sign up and say that he wanted to be a contractor – that he did not “turn his mind to the matter” at all so there was no common intention as to Mr. Bryson’s employment status. It was, in fact, Mr. Brownlee’s “contractee” who incorrectly assumed what the status of the working relationship was. Mr. Bryson could not “run off at any time to the Employment Court and ask for help to change his status” when a correct analysis established that he was and had always been an employee.

Judge Shaw’s third bullet point deals with contractual statement by the parties about the nature of the employment relationship or labels which we have already discussed above. We now turn to the fourth and fifth bullet points which relate to establishing the real nature of the employment relationship through applying the historic common law tests.

The common law tests.

We have already noted that the common law tests are imported into an analysis of employment status because the statutory definition of “employee” is expressed in terms of the common law concept of “contract of service”. Following detailed analysis, Judge Shaw concluded that the application of these traditional tests did support the contention that Mr. Bryson was an employee. There was

significant control imposed over Mr. Bryson's work, and how and when he did it. He required about six weeks training after he started with Three Foot Six "because he had no previous experience in the techniques...This training indicates he was not employed in his area of expertise, namely model-making. He was required to learn new skills..." (at[39]). "Mr. Bryson was required to be at work between specified hours each day and to perform the duties as directed on a day to day basis" (at [48]). Though he did use some of his own tools there was no requirement for him to supply any tools or equipment and, in practice, damaged or lost personal tools were replaced.

Judge Shaw also found that Mr. Bryson's work was an integral part of Three Foot Six business and that, apart from his tax status, there was no evidence at all of Mr. Bryson operating a business on his own account.

He had no separate legal identity as a trust, a company, a partnership, or even as a sole trader. His income from Three Foot Six was not linked in any way to the profits or losses made by that company. He was paid a regular wage based on an hourly rate. The invoices that he was paid on were generated by Three Foot Six and not by Mr. Bryson himself and appear to be a device to record the hours worked..."(at[57]).

The role of the traditional tests, in determining the nature of the employment relationship, was specifically affirmed by the Supreme Court. " 'All relevant matters'...clearly requires the Court or the Authority to have regard to features of control and integration and to whether the contracted person has been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law." A prerequisite to applying these tests is to consider the terms and conditions of the contract and how it operates in practice (pp 386-387).

The Supreme Court found no error of law in Judge Shaw's statement "that the real nature of the relationship could be ascertained by analysing the tests that have been historically applied... "although "obviously" they could not "be applied exclusively" (p. 387). The Supreme Court found that "[s]he correctly used them, in conjunction with the other relevant matters to which she referred, in an endeavour to determine the real nature of the relationship , as directed by s6(2)" (p 387).

Industry practice

Every level at which this case was heard, dire consequences for the film production industry were predicted if Mr. Bryson was found to be an employee. In the Employment Court, Judge Shaw said:

It is clear from the evidence that the defendant and the film and television industry in general has a real and genuine concern that any changes to the present employment arrangements which have been in place for many years will cause significant disruptions in the film industry with potentially adverse outcomes both in economic terms and in terms of attracting overseas film companies to bring the productions to New Zealand...Whilst these concerns are acknowledged, I am of the view that, in the context of this case, they are overstated (at [68]).

In finding that Mr. Bryson was an employee, she emphasised "that the decision in this case is based solely on the individual circumstances of Mr. Bryson's employment and is not to be regarded as affecting the as yet untested status of any other employee in the film industry" (at [75]).

In the Court of Appeal, although the Employment Court decision was objected to on a number of grounds, it appeared that ultimately it was the consideration of industry practice that lead the majority to conclude that Mr. Bryson was a contractor. "It seems to us," said the majority that the

approach taken by Judge Shaw in effect involves a claim to require the restructuring of the way in which the film industry operates” (at [113]) (for more information, see Nuttall and Reid, 2005).

The dissenting judgment, however, vigorously disputed this approach. McGrath, J said:

...to say that film industry workers are all independent contractors is a label argument. This Court is required by the 2000 Act to assess the real nature of the respondent’s relationship with the appellant and to determine its individual character... While it might be said that the respondent is an ordinary worker in an industry where such persons are independent contractors, there is a risk in applying such an argument that a whole industry will be treated as excluded from the provisions of the Act where nothing in the language of the statute indicates an intention to deal with engagements on an industry wide basis... It is accordingly not open in my view to the Court under the definition of “employee” in the 2000 Act to reach a decision that has general application to the film industry... (at[33] and [35]).

The Supreme Court found that Judge Shaw “did not overlook or ignore the evidence of industry practice” and that what she “said in relation to industry practice” did not amount to legal error. (p88). She had found that “industry practice was not helpful in relation to establishing the common intention of Mr. Bryson and Three Foot Six...” (p 388). The Supreme Court decision recognised that Judge Shaw’s view was that “Mr. Bryson’s position was **not** similar to that described by the witnesses of industry practices” (p 388) and that industry practice was given little weight in her assessment because his working conditions “did not appear to be typical of the industry” (p 388). However, any concern that this implies all film industry workers would be classified as employees would be as much of a “label” argument as deciding that they must all be contractors.

The Supreme Court decision in *Bryson v Three Foot Six Ltd* reinstated a traditional, straight forward approach to determining employment status. For five years, the upshot of the *Bryson* case was that decisions about employment status continued to be based on the usual analysis of the relevant factual matrix in any given situation at Employment Court level. None of these decisions were appealed and films continued to be made in New Zealand. According to a New Zealand Herald report

Mr. Key did not know why an issue from a 2005 court case was now the main problem for Warner Bros, given that it should be no more of an issue than it was before the boycott was called, when there was no question the films would be shot anywhere but New Zealand (Cheng, 2010).

Perhaps, the answer might be sought in the rationale for distinguishing employees from contractors. New Zealand precedent is about eligibility for minimum code conditions and access to personal grievance procedures, but the distinction is also crucial under s83 ERA 2000 as to when participation in industrial action is lawful. Even the restricted statutory right to strike under New Zealand law does not extend to independent contractors.

The Hobbit amendment

The Hobbit amendment altered the definition of “employee” in s6 ERA 2000 by adding s6(1)(d), s6(1A) and s6(7) as set out below:

6. Meaning of employee

- 1) In this Act, unless the context otherwise requires, **employee-**

....

- d) excludes, in relation to a film production, any of the following persons:
 - (i) a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer:
 - (ii) a person engaged in film production work in any other capacity.
- (1A) However, subsection (1)(d) does not apply if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee
-
- 7) In this section –
 - film** means a cinematograph film, a video recording, and any other material record of visual moving images that is capable of being used for the subsequent display of those images; and includes any part of any film, and any copy or part of a copy of the whole or any part of a film
 - film production** means the production of a film or video game
 - film production work** –
 - (a) means the following work performed, or services provided, in relation to a film production:
 - (i) work performed, or services provided, by an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer (whether as an individual or not):
 - (ii) pre-production work or services (whether on the set or off the set):
 - (iii) production work or services (whether on the set or off the set):
 - (iv) post-production work or services (whether on the set or off the set):
 - (v) promotional or advertising work or services (whether on the set or off the set) by a person referred to in subparagraphs (i) to (iv); but
 - (b) excludes work performed, or services provided, in respect of the production of any programme intended initially for broadcast on television
 - video game** means any video recording that is designed for use wholly or principally as a game
 - video recording** means any disc, magnetic tape, or solid state recording device containing information by the use of which 1 or more series of visual images may be produced electronically and shown as a moving picture

What did the Government intend⁸ to achieve by this amendment?

In the Explanatory note to the amendment when first introduced as a Bill to Parliament, the General policy statement reads:

This Bill amends the Employment Relations Act 2000 so that workers involved with film production work will be independent contractors rather than employees, unless they choose to be employees by entering into an agreement that provides that they are employees. Film production work includes production work for video games, but not production work on programmes initially intended for television.

The Bill reflects common practice for film-related work. The Bill provides clarity and certainty about the status of workers in the film industry; it provides assurance that workers

involved in the film industry can be independent contractors, and will help prevent unnecessary litigation (Legislation NZ, 2010).

In introducing the Bill, the Minister of Labour stated:

The bill makes it clear that the status of these workers as contractors or employees is based on the decision they make at the beginning of the employment relationship⁹. If they sign on as independent contractors, they are independent contractors. If they sign on as employees, they are employees (Wilkinson, 2010a: 14940).

It would appear, then, that what the Minister is seeking here is to validate the “label” argument, referred to by McGrath, J in his Court of Appeal dissent, which excludes a whole industry from the protections of the ERA 2000 on the basis of how the worker’s status is described in the written document. This view is supported by the Minister’s further statements in the Second Reading debate:

This bill amends the Employment Relations Act 2000 so that it is clear that a person involved in film production work either is an independent contractor or is an employee, based on his or her employment agreement¹⁰. This status cannot be challenged in court. The issue is described by employment law specialist Peter Cullen, who says: “If they sign a document saying they’re contractors, then that should be the end of it (Wilkinson, 2010: 14961).

In attempting to achieve this end, the amendment creates a broad exclusion from the definition of “employee” for all film production workers. The category of excluded workers is more fully identified by the definitions in s6(7).

However, as the Minister indicated in her Third Reading speech, the Bill

...recognises that in some instances the parties may agree that rather than a contract for services, an employment relationship is more appropriate in particular circumstances. In those cases, the parties can enter into an employment agreement that provides that the worker is an employee and therefore will be covered by the employment relations legislation” (Wilkinson, 2010b: 15048).

Accordingly, s6(1A) provides an exemption from the blanket exclusion of film workers from employee status “if the person is a party to, or covered by, a written employment agreement that provides that the person is an employee.”

It seems, then, that the Government intended that the effect of the Hobbit amendment would be that all workers in the film industry would be contractors unless an employment agreement provided that they were employees.

Interpreting the amendment

As this Hobbit amendment was enacted under urgency, we have only restricted extrinsic materials from which to make further assessment of the legislative policy from which it arose. The entire general policy statement in the Explanatory Note is quoted in the section above, there were no Select Committee hearings or Report and the Minister made three brief speeches, which are already extensively excerpted above.

We do, however, have the example of two other industries where legislative intervention has restricted the employment status of workers. The enquiry mandated by s6(2) and (3) ERA 2000 into the real nature of the employment relationship does not limit or affect the Sharemilking Agreements Act 1937 or the Real Estate Agents Act 2008. Sharemilkers are explicitly excluded from employment status: “the relationship of the parties is that of farm owner and independent contractor and not that of employer and employee, nor that of a partnership” (Sharemilking Agreements Act 1937 s16).¹¹

Real estate salespeople “may be employed by an agent as an employee or may be engaged by an agent as an independent contractor”, but under s51(2) Real Estate Agents Act 2008: “any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.”

So sharemilkers are always independent contractors and real estate salespeople are always independent contractors when there is a written agreement which explicitly states that they are independent contractors.

However, the Hobbit amendment comes at the issue from a different direction. The amendment does not say that all film industry workers are contractors or that all film industry workers, who have a contract specifying that they are contractors, are contractors. What the amendment says is film workers are excluded from being employees but this exclusion does not apply if they are employees. How do we know if they are employees? They will be a “party to, or covered by, a written employment agreement that **provides**” that they are employees.

The legislative exemption to the exclusion from employee status does not say that the written employment agreement must “expressly state” that they are employees. So, in interpreting the exemption, there are two enquiries:

1. Is the worker a party to, or covered by, a written employment agreement?
2. Does the agreement “provide” that the worker is an employee?

How do we answer the first question? The definition of an employment agreement under s5 ERA 2000 is that it is a “contract of service”. The common law discerns whether an agreement is a contract of service by applying the established common tests discussed above. The ERA s6(2) says that we decide if someone is employed under a contract of service by determining the “real nature of the relationship”. The Supreme Court said that when Judge Shaw summarised the requirements for determining how to recognise a contract of service in the six “bullet points” in her judgment she made no error of law. It seems that in order to decide whether the agreement governing the working relationship between the film worker and the employer is a “contract of service”, we are back to the same enquiry conducted in the *Bryson* case; and in this situation both the common law and the statute provide that a “label” argument is not conclusive.

How do we decide if the agreement “provides” that the worker is an employee? The legislation does not say that exemption from the exclusion from employee status requires that the agreement expressly or explicitly states that they are an employee. So deciding whether the agreement “provides” that the worker is an employee is also likely to involve the same enquiry as that necessary to answer question one.

These drafting issues were pointed out during the passage of the Hobbit enactment by Charles Chauvel and the Government's response was to introduce a Supplementary Order Paper (SOP) at the Third Reading stage of the amendment's enactment changing the proposed wording of s6(1A) from "employment agreement" to "written employment agreement". What would the situation be if the agreement were not in writing?

The enquiry to be undertaken here would also involve two questions:

1. Is this unwritten agreement an employment agreement?
2. What is the effect in terms of s6(1A) ERA 2000 of the agreement not being in writing?

The established jurisprudence provides guidance to the Courts in finding, in the absence of writing, whether an agreement is an employment agreement (for e.g. *Muollo v Rotaru*, 1995). Evidence should be admissible of expressions of intention of the parties by oral declarations of intention or evidence of their conduct at the time of the formation of the agreement. Where the Court finds there is an employment agreement which has not been reduced to writing, what is the effect of the requirement under s6(1A) that a worker is exempt from the blanket exclusion from "employee" status by means of a written employment agreement?

A collective agreement has no effect if it not in writing and signed by the parties (ERA 2000 s54(1)). While an individual employment agreement must also be in writing, when bargaining for an individual employment agreement, the onus is on the employer to provide a written copy of the intended agreement to the other party and to retain a copy (ERA 200 s63A(2) and s64(2)). The statute specifically provides that employer non-compliance does not affect the validity of the employment agreement (ERA 2000 s63S(4)). The Court of Appeal has also upheld the position that the lack of writing does not render the individual employment agreement unenforceable. In *Warwick Henderson Gallery Ltd v Weston*, the Court stated that to find the agreement unenforceable would be:

...inconsistent with the language and policy of the ERA construed in accordance with standard principles of statutory interpretation and indeed with the employee's entitlement under article 23 of the Universal Declaration of Human Rights to just, as well as favourable, conditions of work [at 15].

The Court said:

It would be an extraordinary result if, while breach of s 64(2) does not affect the validity of the individual employment agreement, a result explicitly stated by the section, that very agreement should somehow by implication from s 65(l)(a) become unenforceable as not being in writing [at 23]

Whether the courts would also find that an employment agreement which had not been reduced to writing was enforceable to provide employment status in the context of s6(1A) remains moot. The developing jurisprudence on implementation of "90-day trial periods" (see *Heather Smith v Stokes Valley Pharmacy, 2009 Ltd*, 2010; *Blackmore v Honick Properties, Ltd*, 2011), however, suggests that the Employment Court, at least, will uphold strict construction of legislative provisions which remove access to justice, and it seems unlikely that this would not apply to an amendment which removes an entire industry from statutory employment protections.

What is clear, though, is that the Hobbit amendment has not provided clarity and certainty as to the employment status of film production workers, and that the amendment does not ensure that employment status in this industry cannot be challenged in court.

Conclusion

It is of concern when public discourse around statutory change reflects a level of inaccuracy and misunderstanding about what the law is, and how it has been interpreted by the courts. John Hughes has commented on an analogous situation in relation to the changes to the test for unjustifiable dismissal under s103A ERA 2000. The persistent and pervasive view that it is sufficient to specify employment status in an agreement is misleading as to the law prior to the enactment of the Hobbit amendment, but also most unfortunate in the expectations it raises as to what the amendment may have achieved. This article makes the case that the Hobbit amendment was based on a misconceived view of the previous jurisprudence and that it is not, in fact, effective to ensure clarity and certainty as to the employment status of film production workers.

Notes

¹ Under the current statute, everyone is prevented from suing in wrongful dismissal, which is a common law cause of action. Presumably, the intended reference is to the statutory process of bringing a personal grievance on the grounds of unjustifiable dismissal. If a worker is a contractor they do not have an employer – the other party to the contract is the principal.

² Control Test : No longer the sole determining factor (*Cunningham v TNT Worldwide Express (NZ) Limited* [1993] 3 ERNZ 695 CA), this test now asks whether there is a right to control a purported employee's actions and how or when they must do them. This right is irrespective of whether or not continued, detailed oversight is actually exercised. The question is whether the ultimate control lies elsewhere than with the worker (*Challenge Reality Ltd v Commissioner of Inland Revenue* (1990) 3 NZLR 42).

Integration Test: "In a contract of service a person's work is integral part of the business whereas under a contract for services the work is not integrated into it but accessory to it" (*Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101)

Fundamental Test: Is the person who has engaged him/herself to perform the services performing them as a person in business on his/her own account? If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service" (*Market Investigations v Minister of Social Security* [1968] 2 QB 173).

³ *Hollis v Vabu Pty Ltd* [2001] HCA 44 decided the issue of vicarious liability for personal injury by accident caused by bicycle couriers.

⁴ For analysis of the Court of Appeal decision in the Bryson case see Nuttall and Reid, 2005; For comment on the Court of Appeal and Supreme Court decision in a more general legislative context see Nuttall (2007:).

⁵ *Cunningham v TNT Worldwide Express (NZ) Limited* [1993] 3 ERNZ 695 (CA). The leading case about employment status decided under the Employment Contracts Act 1991.

⁶ This point is most strikingly illustrated in *Bryson v Three Foot Six Ltd* [2005] ERNZ372 (EC) by the submissions of counsel for Three Foot Six Ltd. The *Bryson* case returned to the Employment

Court because the Employment Relations Authority found that Mr. Bryson had raised his grievance out of time. It was argued to the Employment Court that “exceptional circumstances” applied, and that the grievance could be raised out of time because the “crew deal memo” did not contain the clause relating to resolution of employment problems required under s65 and this constituted “exceptional circumstances” under s115(c). Judge Shaw’s decision said:

[44] For the defendant, Ms Muir submitted that the crew deal memo which governed Mr. Bryson’s employment was not intended to constitute an employment agreement but rather an independent contract and it would be unjust to infer that s115(c) should apply retrospectively. [45] I do not accept that submission. However, the defendant characterised the crew deal memo at the time that it was presented to Mr. Bryson, his employment had been conclusively found to have been that of an employment relationship. This relationship commenced when he began working for Three Foot Six Ltd and continued until he was made redundant. The requirement for the explanation concerning the resolution of employment relationship problems was required by s65 from 2 October 2000 when the Employment Relations Act 2000 commenced. It is not a case of applying s115(c) retrospectively. The law applied to Three Foot Six Ltd from that date.

⁷ For analysis see Nuttall and Reid, 2005, above at n9. However, the SC decision undermined any basis for the case to have gone to the Court of Appeal, since leave to appeal requires that the decision of the Employment Court must be found to be wrong in law. “An appeal cannot however be said to be on a question of law where the factfinding Court has merely applied law which it has correctly understood to the facts of the individual case” *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [25]).

⁸ Note that the policy intention of a Government in introducing legislation into Parliament does not necessarily equate to the “intention of Parliament” referred to in the rules of statutory interpretation.

⁹ Presumably this also refers to the contracting relationship.

¹⁰ Of course an independent contractor does not have an employment agreement but presumably this was intended to refer to any contract of engagement to work.

¹¹ The exclusion of agricultural workers from the ambit of industrial conciliation and arbitration was one of the factors that ensured the passage of the original legislation in 1894 and the continuation of the award system in 1908. See James Holt. (1986). *Compulsory Arbitration in New Zealand: the First Forty Years*. Auckland: AUP. pp24-25, 76-88.

References

Brownlee, G. Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Week 58, Volume 668)*. (pp. 14945-15006). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/45A0CF3F-AF88-40E3-B045-B5B873BD9BF5/180605/49HansD_201010296.pdf

Cheng, D. (2010, October 27). Employment law in the spotlight. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10683282

Cheng, D. and Harper P. (2010, October 27). PM: I'm not going to write cheque NZ can't afford. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10683389

Garner, D. (2010, October 28). How The Hobbit Came to Stay in NZ. *3 News*. Retrieved from <http://www.3news.co.nz/How-The-Hobbit-came-to-stay-in-NZ/tabid/418/articleID/183575/Default.aspx>

Harper, P. (2010, October 28). Fans Enthusiastic about *Hobbit* Deal. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/employment-relations/news/article.cfm?c_id=189&objectid=10683644

Hughes, J. (2011). Interpreting the new justification test: Part 1. *Employment Law Bulletin*. 13-18

Hughes, J. (2011). Interpreting the new justification test: Part 2. *Employment Law Bulletin*. 25-34

Legislation NZ. (2010). Employment Relations (Film Production Work) Amendment Bill. Government Bill 229-1. Retrieved from <http://www.legislation.govt.nz/bill/government/2010/0229/latest/whole.html>

Nuttall, P. (2007). There and back again: Shaping the employment contract in the Antipodes. *International Employment Relations Review*. 13(1): 43-55

Nuttall, P. and Reid, P. (2005). Employee of Independent Contractor? Comments on: Three Foot Six Limited v Bryson (CA 246/03, 12 November 2005). *New Zealand Journal of Employment Relations*. 30(1): 87-92

Scherer, K. (2010, December 3). The Big Picture. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/government-spending/news/article.cfm?c_id=221&objectid=10691502

Wilkinson, K. (2010a). Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Week 58, Volume 668)*. (pp. 14945-15006). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/45A0CF3F-AF88-40E3-B045-B5B873BD9BF5/180605/49HansD_201010296.pdf

Wilkinson, K. (2010b). Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Continued on Friday 29 October 2010) (Week 58, Volume 668)*. (pp. 15007-15064). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/NR/rdonlyres/929A1EA5-3505-4CFA-B4E6-EC1FB7BEFEAC/180627/49HansD_201010299.pdf

Cases

Blackmore v Honick Properties Ltd [2011] NZEmpC 152

Bryson v Three Foot Six Ltd [2003] 7 NZELC 97,317; [2003] 1 ERNZ 581; (2003) 2 NZELR 105 (EC),

Bryson v Three Foot Six Ltd [2003] 1 ERNZ 581 (EC)

Bryson v Three Foot Six Ltd [2005] ERNZ372 (EC)

Bryson v Three Foot Six Ltd [2005] NZSC 34,

Bryson v Three Foot Six Ltd ERA Wellington WA1/03, 7 January 2003.

Challenge Reality Ltd v Commissioner of Inland Revenue (1990) 3 NZLR 42

Chief of Defence Force v Ross-Taylor [2010] NZEmpC 22,

Cunningham v TNT Worldwide Express (NZ) Limited [1993] 3 ERNZ 695 (CA)

Heather Smith v Stokes Valley Pharmacy (2009) Ltd [2010] NZEmpC 111

Hollis v Vabu Pty Ltd [2001] HCA 44

Market Investigations v Minister of Social Security [1968] 2 QB 173

Muollo v Rotaru [1995] 2 ERNZ 414

Stevenson, Jordan & Harrison v MacDonald & Evans [1952] 1 TLR 101

Three Foot Six Ltd v Bryson (2005) 7 NZELC 97,653; [2004] 2 ERNZ 526; (2004) 2 NZELR 29 (CA)

Tsoupakis v Fendalton Construction Ltd EC Wellington WC16/09, WRC36/08; 18 June 2009.

Warwick Henderson Gallery Ltd v Weston [2005] ERNZ 921 (CA).

Constitutional Implications of 'The Hobbit' Legislation

MARGARET WILSON*

Abstract

In October 2010 an amendment to the Employment Relations Act 2000 was passed under urgency. This amendment redefined the employment status of workers in the film industry. This article addresses the constitutional implications of this process, contrasting the stated need for urgency in relation to the need to necessary to preserve jobs on the 'Hobbit' film production, with the costs in terms of removing the opportunity for consultation with the workers affected, altering their employment status and their capacity to negotiate their remuneration and conditions of work.

Introduction

On 28 October 2010, the National-led Government rushed through Parliament, under urgency, an amendment to the Employment Relations Act (ERA) 2000 that, in effect, redefined, by Government fiat, the employment status of workers in the film industry. The legal and employment implications of this decision have been discussed in detail elsewhere. In this article, I want to address the constitutional implications of this decision. It will be argued that the exercise of power by a Government that legally alters the status of employees and, thereby, their capacity to negotiate their remuneration and conditions of work without any opportunity of those affected to be consulted let alone participate in the decision, is an abuse of constitutional power.

The rushing through Parliament of legislation without reference to a Select Committee is uncommon, even in these times of an increasing use of urgency by the Government. The Government justified the legislation on the grounds that it was necessary to preserve jobs on *The Hobbit* film production. This justification would appear to be questionable in the light of the Kelly (2011) narrative of events, but even if it was necessary for that purpose, the question arises, does this action justify ignoring the rights of a section of the working population to be heard? It is time for the Parliamentary Standing Orders to explicitly define the grounds on which the urgency process can be used to depart from the normal legislative procedure for the enactment of an Act of Parliament.

It will be further argued that, given the lack of democratic constitutional process in the enactment of the legislation, it is time to consider the explicit recognition of citizens' economic and social rights in the workplace through the incorporation of these rights within New Zealand's constitutional arrangements. The fragility of a citizen's rights under the current constitutional arrangement has again been highlighted by The Hobbit saga. Although in the past, New Zealanders have resisted attempts to entrench specified fundamental rights of citizens, especially social and economic rights, the time may have come to debate whether reliance on the good practice and goodwill of Governments to promote fundamental rights is a sufficient safeguard against an abuse of power. This issue was raised during the debate on the Bill of Rights in the 1980s when New Zealand was embarking on economic reforms that have significantly altered the institutional and representational protections traditionally given to workers. The changes in economic policy since the 1980s have removed progressively protection and representation traditionally provided by trade unions to employees in the workplace. This has left many employees very vulnerable and without effective

* Margaret Wilson is Professor of Law and Public Policy at the University of Waikato, New Zealand

representation or legally enforceable employment rights. Without effective workplace representation, employees must rely on political representation to ensure recognition of their right to have a say in the decisions that affect them. The Hobbit saga has demonstrated that, under the current constitutional arrangements, neither the political process nor the law has been sufficient to protect workers' employment status or rights.

Helen Kelly, in her narrative of the events surrounding The Hobbit saga, identified the essence of the issue when she noted:

Fundamentally this was simply a situation where a group of workers sought to have a say on the setting of their terms and conditions. This was not just in relation to the Hobbit – but in all productions made in New Zealand. This desire sits aside from all the legal questions about employment status, status of the union and all other considerations – that is simply what was it was, regardless of all barriers that were subsequently put in their way (Kelly, 2011).

The Changing Employment Relations Framework

The right to participate in the decisions that affect citizens is a fundamental democratic political right. That right is normally expressed in New Zealand's constitutional arrangements by voting for representatives, who exercise the power to make decisions that affect others through the institution of Parliament. While the right to participation is recognised in a political constitutional context, it has always been a contested right in the workplace. In New Zealand, however, it was recognised by Government early in the development of the country that workers combining together to further and protect their interests was a political reality. The Liberal Government in 1893, therefore, recognised that it was in the public interest to legitimise the right of unions to negotiate for workers wages and conditions in the workplace through the provision of a regulatory regime. The result was the enactment of the Industrial Conciliation and Arbitration Act that governed industrial relations for 90 years. It was also a regime that enabled Governments to regulate the labour market and control the price of labour through a tripartite system of decision-making. Central to that system was the recognition of the right of workers to participate in the decisions that affected them in the workplace through their representative trade unions. (Woods, 1963; Holt, 1986)

Although the changing nature of the world economy through globalisation required the industrial relations statutory framework to reflect this reality, the right to participate in decisions that affected citizens remained in various forms until the Employment Contracts Act (ECA) 1991. This Act signalled the end of Government regulatory support for trade unions as the representatives of labour in the workplace. Although the ERA 2000 restored the right to participate in the decisions that affected employees through union representation, changes in the labour market have effectively reduced the trade union movement's capacity to provide comprehensive protection to employees in the workforce (Rasmussen, 2004; 2010).

Today, 20.9% of wage and salary earners are still represented by trade unions, but the majority of employees are not. In fact, unions represent only 17.4% of the total employed workforce. It must also be noted the majority of unionised employees work in the public sector (Department of Labour, 2009). It is noted, however, that the launch of *Together* by the Council of Trade Unions (CTU) is an example of the union movement's initiative to find new ways to provide representation for individual employees. Despite this development, most employees remain unrepresented so the question arises how do employees protect and further their employment interests? When relatively low union membership is combined with low coverage of collective agreements, it also becomes apparent that there is an effect on both wages and conditions of employment. The admission from

the Minister of Finance Hon. Bill English that New Zealand should take advantage of being a low wage country was an acknowledgement of the changed nature of the labour market (Fallow, 2011).

Why Employment Status is Important

At present, individual employees must rely on the law and their capacity to negotiate a contract of employment with their employer. As an employee, the law guarantees specified employment rights, such as the right to a written contract, to expect to be dealt with in good faith in all employment matters, the right to rest breaks, to sick leave, not to be unjustifiably dismissed, the right to four weeks holiday and the right to a minimum wage amongst other employment rights. The employment rights that are attributed to an employee are not, however, available to a non-employee who is classified as a contractor. How an employee's status is legally defined determines their legal employment rights. This is why the question of legal classification and how that classification is made is so important.

Re-classification of a class of employees as non-employees, for the purposes of the law, lies at the heart of the controversy over *The Hobbit* saga. The purpose of the Government in making this change was to deprive a class of employees' access to employment rights in the expectation that this would lower the cost of labour for the benefit of the employers on *The Hobbit* project. The benefit for the employee was to have a job, but not one that carried benefits or rights unless they could be negotiated as part of a contract for service. Further, the law change was designed to prevent those classified as contractors from combining together to negotiate a contract for their employment services.

In the course of the dispute, there had been a flurry of legal opinions exchanged on the right of contractors to combine to negotiate contracts. The Government had argued in the legal opinion from Crown Law that such a combination was a restraint of trade and therefore, a breach of the Commerce Act that is designed to promote competition. Whether the legal opinion actually stated this is uncertain because it has not been released, but the Attorney General, Hon. Christopher Finlayson, who sought the legal opinion sent a letter to both the producers of *The Hobbit* and the NZ Actors Equity that stated "the New Zealand Government obtained advice from the Crown Law Office ... that confirms the [Commerce] Act does prevent....competing independent contractor performers from entering into or giving effect to a contract..." (Onfilm, 2010). The CTU countered this with its own legal advice and a reference to the Trade Union Act 1908 stating that trade unions were combinations that were exempt from the restraint of trade legal restrictions (stuff.co.nz, 2010).

The Trade Union Act makes it clear that a combination of regulating relations between workers and employers or imposing restrictive conditions on the conduct of any trade or business is not acting criminally or unlawfully if the pursuit of such objectives is registered under the Act. Whether the provisions of the Commerce Act override the historical recognition, both here and overseas, that unions' activities are exempt from restraint of trade provisions, would make an interesting legal case. Such a case is likely to turn on whether contractors are workers for the purposes of the Trade Union Act, and therefore, clearly exempt from any restraint of trade constraint. This question of who can be classified as a worker in the current labour market with its growth of non-standard precarious work is the real underlying issue in *The Hobbit* case. The changing nature of work and the labour market has now left many workers without any employment rights. The fact that the changing nature of work is no longer reflected in the law has enabled the Government to conveniently change the legal definition on the grounds of clarifying the law without addressing the more serious question of bringing the law into line with the labour market (Wilkinson, 2010).

The Changing Nature of the Contract of Employment

The fact that the current unreality of the law suits the political interests of the Government is not surprising. Since the advent of the contract of employment as the legal instrument to regulate the employment relationship, this has been legally contested territory (Atiyah 1979; Fox, 1974). It is worth reflecting briefly on the development of the law in this area because it clearly identifies that the issues surrounding the legal classification of work have provoked a political struggle since the rise of capitalism. The issues raised in *The Hobbit* saga are not new, and reflect competing ideologies on the rights of employees, not only in the workplace but also constitutionally. Without political power, workers could not change the law to ensure their right to participate in the workplace decisions through their trade union. It was through the formation of trade unions and collective bargaining that the inequality of bargaining power in the workplace was addressed in the latter 19th and much of the 20th century. The notion of the contract, which provided the legal support for capitalism, was inadequate legal protection for those in the workplace. There was, however, a deeply held suspicion by the courts of workers combining to pursue their self interest in the workplace. A similar suspicion existed by members of Parliament in the 19th century. Capitalism required a free unrestrained environment in which to thrive. The notion of individual workers combining to restrict that freedom has been the site of continuous industrial and political struggle for a long time and continues to be so.

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 in distinguishing it from other forms of employment related contracts. The interventions through legislation for 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 recognised employees' rights in the workplace.

After World War II, much of the legal analysis of the employment relationship centred on the shift from a contractual to a status definition of the relationship. The growth of a statutory framework of minimum standards guaranteeing workers' rights which were independent of collective bargaining was seen as undermining the contractual notion of the employment relationship. These statutory terms were implied in the notional contract of employment. The rise of neo-liberalism in New Zealand in the 1980s saw the decline of statutory intervention to protect and further the interests of employees, and the re-emergence of the notion of contract as the primary instrument of regulation in the workplace.

The ECA reinforced the resurgence of the contract as the basis for the relationship in the workplace. The rationale for this shift was 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" (Brook, 1990: ix). Trade unions and the statutory support for employees were characterised as a constraint on the individual's freedom to pursue their self-interest. The traditional democratic notions, such as the 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 individual equal opportunity. Even though much of the rhetoric that surrounded the ECA 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.

Changing Legal Definition of an Employee

Although the neo-liberal rhetoric was founded on the right of the individual to be free to choose the nature of their employment agreement, it did not liberate the law to reflect the changing nature of work and remove the historically embedded notion of subordination in the contract of employment. Some attempts have been made through statutory definition to recognise that the nature of work has changed and, therefore, so should the test for distinguishing an employee from a contractor. For example, attempts to include dependent contractors within the employee definition have been discussed but resisted by employers. The ERA also attempted to ensure the law reflect 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” (Employment Relations Act 2000, s6 (3) (b)).

In this context, it is relevant to note that the Supreme Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 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 that the terms under which he worked, in reality, were those of an employee. The Supreme Court decided that the contract was, in fact 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. 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 ERA not only overturns the Supreme Court decision, but it attempts 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” (Employment Relations Act 2000, s6 (d) (i)(ii)). Film production work is also extensively defined to include pre and post-production work or services and promotional or advertising work or services (Employment Relations Act s6(7)). 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 Bros., which 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 illusory.

The Hobbit legislation may also signal the end of the attempt of the ERA to construct a new consensus around the employment relationship. The Government’s disregard to proper constitutional processes undermined the whole notion of good faith when dealing with employment-related matters. Good faith dealings require full disclosure of information and an opportunity to participate in the legal arrangements that govern the parties to the agreement. The Government’s action also raises the question of whether there will be a return to policy that resulted in the ECA. This policy explicitly rejects any notion of inequality of bargaining in the workplace and focuses only on the freedom of the employer to organise the workplace to produce the maximum profit for the shareholder. The argument is that this policy promotes economic growth, which will benefit the workers through the provision of jobs (Davies and Freedland, 2007).

The evidence would suggest, until the global financial collapse, unemployment was low but the evidence would also suggest the quality of the jobs has been affected through the growth of

precarious employment and the decline in wages (Felstead and Jewson 1999; Web Research, 2004). This economic policy has also required state support for wages and salaries through the Working for Families subsidy. The economic recession has also identified the need to start to rethink the form and nature of the employment relationship to ensure it is consistent with the need for both sustainable employment and a living wage. The legal tools required to support these policies include a rethinking of how the legal status of employees is determined and defined.

Constitutional Implications

The lack of debate of employment-related issues in constitutional terms is partially attributed to the nature of New Zealand's constitutional arrangements, and partially due to the fact that economic and social rights are not seen as a constitutional issue. The Report of the Constitutional Arrangements Committee described a constitution in the following terms:

A constitution governs the exercise of public power. It sets out the rules under which the various branches of Government operate. It affects, and is affected by, our economy, society and culture. We consider that the nature and operation of New Zealand's constitution should be of interest to all those who are interested in the exercise of public power in New Zealand (NZ House of representatives, 2008: 7).

While constitutional matters should be of interest to New Zealanders, they do not attract a great deal of debate or discussion. This may be because the lack of written constitution makes it difficult to identify exactly what is a constitutional matter, or it may be that New Zealanders like the idea of flexible constitutional arrangements that can easily be changed to accommodate our pragmatic approach to decision making. These were both matters identified in the 2005 constitutional review along with the conclusion that

Although there are problems with the way our constitution operates at present, none are so apparent or urgent that they compel change now or attract the consensus required for significant reform. We think that public dissatisfaction with our current arrangements is generally more chronic than acute" (NZ House of Representatives, 2008: 8).

Although it is arguable whether New Zealand's constitutional arrangements have reached the acute level of concern, the chronic nature of our constitution arrangements continues to cause concern and requires attention. The Government announced, on 8 December 2010, a new constitutional review in compliance with the Relationship and Confidence and Supply Agreement between the National and Maori Parties (English and Sharples, 2010). This review will provide an opportunity to debate further constraints on the power of the executive as well as whether it is time to once again entrench fundamental values and rights in a Bill of Rights that includes economic and social rights in accordance with the International Covenant on Economic, Social and Cultural Rights, which New Zealand ratified on 28 December 1978.

While a discussion of constitutional reform is not appropriate in this context, The Hobbit saga has raised the issue of whether the Cabinet Manual and the Standing Orders of Parliament are sufficient protection against an executive abuse of power when enacting legislation. The Hobbit amendment should have been referred to a select committee for submission and a public debate on the implications of the legislation. It did not involve a matter of public importance that required a suspension of the normal procedure for the enactment of legislation. Yet, the Government did not break any law or offend any constitutional requirement in acting in this way. If, however, there had been a written constitutional requirement for consultation, then the Government would have been obligated to follow it. Such a requirement may not be a written constitution but it does need an amendment to the Standing Orders. Unfortunately this is unlikely, given that all changes to the

Standing Orders need near unanimity of all parties in Parliament. This highlights again the fragility of a Parliamentary system that requires the parties to act constitutionally as well as politically.

The issue of the use of urgency by Governments has recently been reviewed by the New Zealand Centre for Public Law and the Rule of Law Committee of the New Zealand Law Society. The project considered, amongst other questions, the use of urgency from a constitutional or democratic legitimacy perspective, which is the main concern of this article in relation to the use of urgency to enact The Hobbit legislation. In its submission to the Standing Orders Select Committee – in its review of Standing Orders – the Urgency Project submission emphasised the importance of the select committee process (Geiringer, Higbee and McLeay, 2011). It expressed the reason for legislation to be submitted to a select committee as being

... because of the select committee system's important role in enhancing the House's deliberative and scrutiny functions, in providing opportunities for public participation, and in thereby enhancing the quality of legislative output. In our view, this use of urgency ought to be rare, and justified by a genuine need for haste in relation to the particular measure (Geiringer et al.: 9).

The question, then, is whether the use of urgency to enact The Hobbit legislation reflected a genuine need for haste. It is difficult to believe that once the Government had announced it was going to enact the legislation Warner Bros. would have withdrawn their support for the project. The Government had the numbers and a delay of a day or even a week, to provide time for submissions would seem unlikely to have placed the project in doubt. The larger issue, however, is whether this is an example of the ends justifying the means. While I would argue, in this instance that it did not because there was time to follow some form of constitutional process that admitted of public participation, there are others who would argue that the economy takes precedent over all other matters. The Hobbit may be an example of the reality of the limited power a New Zealand Government has in the age of the globalisation and where the power of a transnational company is greater than that of a sovereign Government.

A larger constitutional issue is the need, in the absence of a written constitution, to entrench fundamental rights, including economic and social rights. This was attempted in 1990 when the New Zealand Bill of Rights Act was discussed but failed through lack of Government support. While Government opposition is likely to continue, it is time to renew the debate because, as the effects of current economic policy become obvious, it is apparent that without an agreed employment relations statutory framework to protect and further the interests of employees, the only protection of employment rights is through a constitutional acknowledgement of those employment rights. Again, this would not require a written constitution, but it could be achieved through amendment to the Bill of Rights Act to include economic and social rights as agreed to under the International Covenant on Economic, Social and Cultural Rights and for those rights to be entrenched so any government action in breach of those rights can be contested in court.

Conclusion

In conclusion, The Hobbit amendment has identified the fragility of employees' employment rights when faced with an executive that is not prepared to observe constitutional good practice, and a Parliament that is powerless to prevent such action because the majority rules in all matters. The Hobbit amendment also highlighted the need for the law to reflect the reality of the labour market and the changes in work practices, and their effects on individual employees. The old division between employee and contractor needs to be revised to take account of non-standard precarious work. If such a change in status cannot be achieved, then employees in non-standard precarious employment must be free to form unions to protect and further their interests without the restraint of

trade constraints. While a level playing field cannot be expected under the current economic policy, those who support this policy could not object to a gentle slope on the field of workplace relations by supporting fairer negotiating arrangements for collective contracts by contractors.

References

- Atiyah, P.S. (1979). *The Rise and Fall of Freedom of Contract*. Oxford: Clarendon Press.
- Brook, P. (1990). *Freedom at Work: the Case for Reforming Labour Law in New Zealand*. Auckland: Oxford University Press.
- Davis, P. and Freedland, M. (2007). *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s*. Auckland: Oxford University Press
- Department of Labour. (2009). *The Effect of the Employment Relations Act 2000 on Collective Bargaining*. Retrieved from <http://www.dol.govt.nz/publications/research/collective-bargaining/collective-bargaining-2009.pdf>
- English, B. and Sharples, P. (2010). *Relationship and Confidence and Supply Agreement between the National and Maori Parties*, Retrieved from <http://www.beehive.govt.nz/release/govt-begins-cross-party-constitutional-review>.
- Fallow, B. (2011, April 9). It's time to take on the Aussies, says English. *The New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=10718151
- Felstead, A. and Jewson, N. (1999). *Global Trends in Flexible Labour*. Basingstoke & London: Macmillan Press
- Fox, A. (1974). *Contract: Work, Power and Trust Relations*. London: Faber & Faber
- Geiringer, C., Higbee, P. and McLeay, E. (2011). *Standing Orders Review 49th Parliament. Submission to the Standing Orders Committee – The Urgency Project*. Retrieved from http://www.parliament.nz/NR/rdonlyres/988AE9D2-5459-44CB-A9B2-74EFE7EA1ED8/188249/49SCSO_EVI_00DBSCH_INQ_10324_1_A177554_NewZealandC.pdf
- Kelly, H. (2011). *The Hobbit Dispute*. Retrieved from <http://www.scoop.co.nz/stories/HL1104/S00081/helen-kelly-the-hobbit-dispute.htm>
- New Zealand House of Representatives. (2005). *Inquiry to Review New Zealand's Existing Constitutional Arrangements: Report of the Constitutional Arrangement Committee*. Retrieved from http://www.parliament.nz/NR/rdonlyres/575B1B52-5414-495A-9BAF-C9054195AF02/15160/DBSCH_SCR_3229_2302.pdf
- Onfilm. (2010, September 29). Attorney-General Weighs in on *Hobbit* Dispute. *Onfilm – NZ's Screen Production Industry Magazine*. Retrieved from <http://www.onfilm.co.nz/2010/09/29/attorney-general-weighs-in-on-hobbit-dispute-2/>
- Rasmussen, R. (ed.). (2004). *Employment Relations: New Zealand's Employment Relations Act*. Auckland: Auckland University Press.

Rasmussen, R. (ed). *Employment Relations: Workers, Unions and Employers in New Zealand*. Auckland: Auckland University Press.

Stuff.co.nz. (2010, October 21). *CTU's Hobbit Statement*. Retrieved from <http://www.stuff.co.nz/entertainment/film/4258476/CTUs-Hobbit-statement>

Web Research. (2004). *Report of Exploratory Case Study Research into Precarious Employment*. Retrieved from <http://www.dol.govt.nz/publication-view.asp?ID=194>

Wilkinson, K. (2010). Employment Relations (Film Production Work) Amendment Bill. In New Zealand House of Representatives. *Hansard Debates – Thursday, 28 October 2010 (Week 58, Volume 668)*. (pp. 14945-15006). Wellington: House of Representatives. Retrieved from http://www.parliament.nz/en-NZ/PB/Debates/Debates/Daily/a/5/0/49HansD_20101028-Volume-668-Week-58-Thursday-28-October-2010.htm

Woods, N.S. (1963). *Industrial Conciliation and Arbitration in New Zealand*. Wellington: Government Printer.

A Political Economy of ‘The Hobbit’ Dispute

NIGEL HAWORTH*

Abstract

This article analyses the “Hobbit Dispute” in terms of a political economy of the global film industry and its connections in New Zealand. It explores the dynamics of the inter-relationships between New Zealand and the globalised world economy, the international film industry and production companies, and the domestic employment relations system. These are proposed as framing the political and legislative processes that occurred in the local film sector, bringing a number of consequences for the domestic labour movement.

Introduction

This article analyses briefly the Hobbit Dispute in terms of a political economy of the global film industry and its connections in New Zealand. Its thesis is that in a globalised world economy, a key actor (Sir Peter Jackson) in a global industry, “contingently”¹ located in New Zealand, engaged in a nexus with international companies in that sector to secure the subordination of both the domestic political order, and the domestic employment relations system, to the needs of that sector and that actor. In this subordination, the domestic political order, subordinated to and in thrall of both actor and sector, took advantage of its subordinated role to achieve a weakening of the domestic labour movement.

Employment Relations and Economic Openness

New Zealand has long confronted a condition of its creation as a settler state and its location as a peripheral economy, that is, how it is to integrate into the global economy. This was as true in the early export days, as it was in the import substitution phase, and is now in the trade and investment openness phase. The debate about openness to the international economy impinges on the employment relations (ER) legislation that New Zealand has introduced over the past 120 years. New Zealand is generally thought to have been through three phases of employment relations legislation since the 1840s. The first, simplistically, was the “adaptation of UK legislation” approach up to the early 1890s. The second was the radical departure involved in the creation of the arbitration system in the 1894 Industrial Conciliation and Arbitration Act (ICAA). The third, from 1990, was the introduction of a “market-driven” ER model in the Employment Contracts Act (ECA) 1991, as subsequently revised by the Employment Relations Act (ERA) 2000. The 1894 legislation was path breaking, yet we often emphasise two aspects of its operation – its tripartism and its stability – and understate a third, important dimension. The 1894 legislation, emerging as it did from the aftermath of the 1890 Maritime Strike, was also intended to provide industrial peace for a successful export economy. The links between the legislation, trade and

* Nigel Haworth is Professor of Human Resource Development in the Department of Management & International Business, University of Auckland. Private Bag 92019, Auckland, New Zealand. Email: n.haworth@auckland.ac.nz

global integration are explicit. This is equally true for the ECA and the ERA; both are predicated on the view that ER legislation should support a successful globally-integrated economy.

On Analytical Frameworks

The argument underpinning the following discussion understands that the global film industry, through a cycle of mergers and acquisitions, and accompanying restructuring, has substantially “massified” and, in the process, has become subject to increasing financial performance expectations, often driven by investors with no “creative” interest in the sector (see Arsenault and Castells, 2008). Massification involves larger organisations commanding greater power in decision-making and operating across national boundaries in a comprehensively global fashion. Financial performance expectations have grown in parallel.

This reconfiguration of the sector over the last 20 years or so has also involved a reconfiguration of the relationship between the sector and the state. On the one hand, the global film industry, often now configured within far broader media interests, is part of an apparatus wielding considerable political leverage, even in the largest nation states. On the other, the size and scale of productions within the global sector make them an attractive proposition for nation states wishing to become preferred production locations (often in the hope of longer-term spin-offs).

Hence, Warner Bros. and MGM appear in New Zealand as key players in that restructured sector, acting on a supplicant state and, most importantly, with a key agent of that global sector in a powerful position within New Zealand. It is, for the New Zealand labour movement, an almost perfect storm.

The Demands of Global Capital: Warner Bros. and MGM

Warner Bros. and MGM constitute key actors in the global film sector, operating to the imperatives demanded by massification and expectation of financial performance. However, large and important they may be, the pressures created by massification and expectations were significant.

For both Warner Bros. and MGM, the earning potential of the two films is massive, as an effect of the success of *The Lord of the Rings* trilogy². MGM needed a successful completion of the two films as it faced on-going restructuring difficulties. By 2010, the studio faced mounting debt, bankruptcy and was also the site of a major battle between two potential “white knights” (Carl Icahn, who owned large amounts of MGM debt and proposed a merger of MGM with his own Lionsgate operation, and the preferred Spyglass Entertainment). MGM was rescued as a result of a debt-restructuring arrangement and successful Hobbit films would help to consolidate a firmer future for the embattled major. Warner Bros. faced different challenges. With the end of the Harry Potter franchise, Warner Bros. were looking for a new “tent pole” film success. Both companies needed a relatively prompt completion and launch of the two Hobbit films and were, by late 2010, already concerned about delays in the production schedule.

Thus, both majors were simultaneously dependent on the success of the two films and were concerned that they be completed promptly. Moreover, they were keen that they be delivered by Sir Peter Jackson as Guillermo del Toro had walked away from the production as a result of delays. This placed Sir Peter Jackson in a powerful position in the international nexus surrounding the project. It was his capacity to

deliver the films, on time and at high quality, that defined the project. In this sense, both Warner Bros. and MGM were both supplicants in and drivers of the events that surrounded the two films.

Analytically, the arrangements between the two majors, Sir Peter and related companies are *au fond* based on commercial integration. They are not a potentially fraught engagement between two competing fractions of capital – one nationally-based and the other globally-based, but rather they are about arrangements within a global fraction or sector, which happens to be, in part, located in New Zealand. Equally, they are not about a managed clash between New Zealand and globalisation or globalised culture, and that of New Zealand. Rather, it is an arrangement between elements of the global sector based in New Zealand engaged in the sector and the wider sector, all facing the performance expectations noted previously.

The Role of Sir Peter Jackson and Associates

Bearing in mind the imperatives driving the two majors for which the films were to be made, Sir Peter's role became pivotal in many ways. For the majors, he could deliver the successful films. He was vital for them. For the New Zealand Government, and in much popular discourse, his success and that of the penumbra of film-related operations that has grown up in Wellington have become touchstones of cultural and commercial success in the film world. Knighthoods, the chairing of review panels on the New Zealand film industry, popular and commercial adulation have all followed. There is a sense that Sir Peter has been elevated to a status unachieved by most successful business people, perhaps more akin to that of Sir Edmund Hillary and a handful of sporting figures, beyond reproach and in some ways untouchable. For people working in the industry, he has been hugely successful in establishing and completing projects that have provided jobs and income.

That status has, however, not been achieved unchallenged. Sir Peter himself has been in legal dispute on occasion with his international partners. Actors have taken legal action against Sir Peter's production in relation to residuals and, above all, there was the Three Foot Six versus Bryson case, in which Sir Peter's preferred employment arrangement – that of a contractor – was challenged successfully in the courts. One can only speculate on the significance of this legal reverse for Sir Peter but, given the outcome of the Hobbit Dispute, it is reasonable to assume that Sir Peter's operations were more comfortable with contractor-based arrangements, and are supportive of the amendments made to the ERA 2000 by the Key Government.

In analytical terms, Sir Peter and his associated operations (Weta etc.) are fully integrated into the global film sector. They depend on opportunities forthcoming from that sector. They are driven by the global dynamic of that sector, rather than by any domestic economic imperatives. In this, the domestic respect for Sir Peter and his associates is a secondary factor, no doubt appreciated personally, but providing no significant leverage in the global sector. Where such leverage does occur is in the relationship with the New Zealand state. As noted above, Sir Peter's reputation and commercial power, and that of the wider Wellington Film sector, provide direct access to the highest levels of New Zealand Government and is able to exert considerable influence on Government, in terms of the configuration of the domestic sector and of the form and allocation of government subsidies.

It is important, therefore, to understand that the nexus of operations around Sir Peter is not to be understood as a marginal domestic sector directing itself outwards into the global sector. Rather, it is an

integrated element of the global sector operating, sometimes, in New Zealand. Thus, the Government's relationship with that nexus is *de facto* arrangement with a powerful force within that global sector.

The Role of the Government

The role of the Key Government was defined by three factors – its ideological position on openness, its weakness in the face of the alliance of the global film sector, and its serendipitous use of the *Hobbit* Dispute to further its anti-Labour movement agenda.

We need spend little time on the first factor. The Key Government is committed to free trade and openness to Foreign Direct Investment (FDI). In general, this it is little different from previous Governments, though it does differ on some key issues. For example, it is open to privatisation and the prospect of further foreign ownership of New Zealand assets and is explicitly open to increased involvement of FDI in mining and other economic exploitation of New Zealand's natural resources.

In terms of the global film industry, the New Zealand Government is a supplicant. For many years, and through multiple governments, New Zealand has sought simultaneously to build a domestic film sector for national identity reasons, and become a technically proficient and cost-effective site for international productions. It has undertaken reviews of the sector, has a subsidy model in place comparable with those offered by other countries and sees wider publicity and tourist advantages in a strong film and TV production sector. The Wellington complex is complemented by the west of Auckland TV and film operations. The two imperatives do not necessarily sit easily together. A creative sector, wanting to put a New Zealand mark on international film culture, may not be moved by, for example, the opportunities offered by "*Spartacus*"³. And in a context in which Government funding is limited and rationed, tensions between the fully-integrated global operations of Wellington and the domestic "creative" sector could be anticipated.

However, in the case of the Key Government, a simple approach was adopted. Any threat to the production of *The Hobbit* films was a threat to the New Zealand film sector. In this, the status of Sir Peter played two different roles – first, that of national icon, offended by the unions, and to be sympathised with; second, agent of the global film sector, able to call shots both internationally and, because of his sectoral power and his personal status, domestically. With a Government ideologically committed to business and openness, the combination of factors became irresistible and, of course, eminently newsworthy. In every sense, political support for Sir Peter and his films made sense to the Key Government.

Here, the third factor came into play. The Key Government came to power in an aura of pragmatism. One of its first initiatives was the Jobs Summit, a tripartite meeting, which seemed to promise a break from National's ideological commitment to neo-liberalism in the 1990s. Two years later, that aura has dissipated. Under the guidance of Minister Kate Wilkinson, the views of the business sector have been enacted into legislation. There has been an inexorable erosion of employee rights over the two years, and a concomitant rise in the power of the employer. The pendulum of power is swinging back to the employer with further movement in that direction expected should National remain the dominant power in Parliament after November 2011. In this context, it is hardly surprising that the Key Government should not only take the side of the global film sector in the matter of *The Hobbit*, offering further

generous subsidies, but should also feel comfortable with the amendments made to the ERA in relation to employment in the sector.

Thus, analytically, the New Zealand state simultaneously conceded, financially and legislatively, to the global film sector whilst taking the opportunity to further its ER liberalisation and attack the domestic trade union movement.

The Role of Unions

Let us begin by establishing a principle, perhaps first developed in extended form in the modern period by Levinson (1972), and subsequently subject to considerable discussion. That principle is that trade unions, facing the development over a century or more of FDI and globalised capital, must develop equivalent international institutions and practices. It is a principle that rests, for example, at the heart of the ILO, the international organisation charged with the protection of international labour standards, and an organisation to which New Zealand belongs. New Zealand's membership of the ILO requires it to adhere to the "core" labour standards defined by the ILO in 1998 in the "Declaration on Fundamental Principles and Rights at Work". They endorse the use of international action by trade unions in support of extended collective bargaining and the right to organise⁴. Of course, such an endorsement says little about the practical difficulties – organisational, resource-wise and political – that such action entails.

In this case, therefore, international involvement in The Hobbit Dispute should have been expected and, if not welcomed, understood as acceptable and proper. It should not have been condemned in the chauvinist manner used by some (see number seven in Notes section). Moreover, in this case, it was to be expected that domestic and international unions would work together and draw on each other's resources, as would the resources of the domestic peak union body (in this case, the NZCTU) also be called on.

A second principle enshrined in the ERA is the right of employees to make collective claims in bargaining with employers, provided that they are employees. Such collective claims need not involve a subsequent collective agreement as outcomes might be included, and frequently are, in an array of individual agreements. It is equally possible that, where contractors are involved, collective discussions outside the provisions of the ERA might usefully be conducted around industry standards⁵. There is nothing improper in any group of employees or contractors making reasonable representations to employers or those offering contracted work. This is an important principle, overlooked in most of the popular coverage of the Hobbit Dispute, for it casts light on a history of attempts to engage in discussion of conditions in the film and TV sector over many years. The Hobbit Dispute was not a sudden, new catastrophe. It was one incident, albeit a big one, in a chain of events going back to 2009 and beyond, in which the domestic union, Equity, had campaigned for the certainty of a standard performers' contract. It is also clear that employers, in general, were not interested in standard conditions and, at times, according to Equity, threatened to recast if pressure for such conditions persisted.

Operating under these two principles, the performers' contract offered for *The Hobbit* gave grounds for further discussion. First, they appeared to sidestep best-practice arrangements that were agreed between SPADA (representing the domestic film industry employers) and Equity, codified in 'The Pink Book'. Second, there were questions to be considered around residuals⁶, an issue that had arisen previously in relation to *Lord of the Rings*. The arguments put against such a negotiation are not strong. First, the inability of unions to negotiate a deal for any previous film production does not invalidate further

attempts to do so. Second, the argument that the negotiation should have been with SPADA, not *The Hobbit* production, flies in the face of the enterprise and project focus of New Zealand bargaining. Where else in New Zealand is industry bargaining promoted by employers, one wonders? Third, the argument that a specific, Hobbit-based negotiation would undermine the rest of the sector attracts the same comment made in relation to the second argument above.

Finally, there is the thorny issue of union tactics. There is no doubt that a combination of circumstances, in part of its own making, did harm to the union case. The FIA-MEEA-Equity link was rarely understood by commentators, who tended to adopt the xenophobic tone of Sir Peter and the Government⁷. The legitimacy of international union involvement when dealing with Warner Bros. and MGM, and their New Zealand nexus was substantially lost in popular coverage. This set the tone for coverage of union involvement, such that the problem-solving approach attempted by the NZCTU was also substantially lost, an outcome exacerbated by some unfortunate exchanges that captured popular attention. Thus, at key stages of the dispute (for example, when the boycott threat was withdrawn), the bona-fides of union announcements could be challenged by both employer and Government regardless of the truth of the matter. For the NZCTU, this was galling in two senses. First, what they understood to be true was being flatly denied by others in the media. Second, media and political coverage conflated all elements of union involvement into one presence when, in fact, one had to distinguish, particularly, between the International Federation of Actors (FIA) and the Media Entertainment and Arts Alliance (MEEA) on the one hand, and the problem-solving intervention of the NZCTU, on the other.

Analytically, we see the trade union movement, operating domestically and internationally, seeking to mobilise “equal and opposite” power to that wielded by the film majors and their nexus in Wellington. Moreover, the unions were attempting to act in this way in the face of a Government alliance with the employer/investor parties. The difficulties in imposing that “equal and opposite” power, however legitimate, are clearly shown by the Hobbit example.

Telling the Story

We can now tell the story, schematically, as a political economy.

i. The Domestic Context

The Hobbit Dispute arose in a country in which openness to external investment was long established, and in which successive Governments had promoted the benefits of FDI. They had also promoted, at different times and in different ways, sectoral development in the cultural industries, in part for reasons of “national identity”, and in part to promote diversification of a commodity-bound economy. In general, popular discourse accepts the argument that the advantages of FDI outweigh the disadvantages, although reservations abound around issues such as land sales and privatisation into either domestic or international hands.

Importantly, New Zealand’s ER system has been systematically governed by measures that promote economic openness. The extent to which openness was tempered by domestic concerns – the ICAA might be presented as embodying a greater level of “national identity” than, for example, the ECA – is open to debate, but it is incontrovertible that an underlying historical rationale for the New Zealand ER system has been to promote successful trade and improved productivity in a global economy.

These events were also taking place in an economy and political order deeply enmeshed in the dilemma of declining economic fortunes. The New Zealand economy has performed relatively poorly in the long years since the early 1950s. New Zealand has forged a dominant view that the structural adjustment model is the correct way forward for economic policy. The fundamental macro-economic stabilities required by neo-liberalism are a shared political vision. There are differences on the margins – taxation policy, for example – but that consensus shares a view that New Zealand’s future lies in improved productivity and competitiveness in global markets.

The Government in place at the time of the dispute was conservative, anti-trade union and pro-FDI. It took an uncomplicated view of the dispute. The Hobbit production was important for investment in the sector, for the on-going performance of the domestically-based film industry, for the technical skill base, for tourism and for New Zealand’s international reputation. It was, as one would expect, also under the thrall of Sir Peter’s (and his wider associates) domestic and international reputation. It was predisposed to a view that the unions were in the wrong in attempting to gain standard conditions for the domestic sector. There was little Government interest in taking the union case seriously. The Government placed investment issues ahead of its commitments to global labour standards

The unions involved initially were in a weak position. Equity membership was not high. There had been a history of attempts to improve conditions which had foundered on the basis of employer opposition. The majority of the technical staff in the sector was not unionised. The prevailing ideological perspective in the domestic sector was unitarist, and echoed the approach of much of New Zealand’s employer group. The dispute took place against the background of a longer-term crisis for the union movement, which began with the introduction of the ECA 1991. Union density in New Zealand had halved under the ECA, and the ERA 2000 had had only a marginal positive impact on that density. Union relations with the government were worsening.

The NZCTU’s strategy might be understood as a combination of “critical engagement” and rebuilding the movement. The former accepted that a national peak body should engage robustly and where possible, constructively with Government. The latter accepted that without higher density and presence, such engagement would not be backed up by the power to act.

Sir Peter and his wider associates have gained immense popular recognition domestically. The particular success of *The Lord of the Rings*, and the international recognition of the creative and technical skills that had agglomerated in Wellington, placed his wider operation in a unique position in New Zealand. He and his associates were, in many ways, on a pedestal, understood somehow as national icons. Two key aspects of this position are particularly important. First, despite that status, *The Lord of the Rings* had come under some scrutiny around residuals, and the Bryson case had gone against the employer argument. In terms of performers and technicians, the film sector in New Zealand had important ER challenges that remained unresolved, particularly around the issue of contractor status.

Second, and this is fundamental, Sir Peter and his wider associates were powerful, even dominant, figures in the global sector. Majors such as Warner Bros. and MGM looked to Sir Peter and his wider team for commercial success. His creativity along with that of his associates’ was a powerful resource in the global sector. Indeed, as argued above, this resource was a global resource residing in New Zealand, not a domestic resource with some international status. The Wellington film operation is an archetypal example of a global, networked operation “accidentally” in New Zealand, but equally capable of being located elsewhere, and regularly undertaking commissions on a global scale.

ii. *The International Context*

The global film sector was going through a simultaneous process of “massification” as media empires spanning film and other sectors consolidated through mergers and acquisitions. Two consequences followed from this. First, expectations of strong financial performance grew; for it was expected that massification would lead to improved cost advantage. Second, as operation massified, their global reach and engagement grew. The sector was also not universally successful. The famed MGM was just clinging to existence in 2010 as it sought a white knight. It needed further international success as a matter of survival. Warner Bros. were in better shape, but needed a “banker” or “tent pole” production to pick up the slack created by the end of the Harry Potter series. *The Hobbit* films were, for both, important prospects, long delayed because of funding difficulties and, potentially, not going to be made. This was a developing crisis for the majors, a crisis that could be resolved by Sir Peter producing two successful films. The majors needed Sir Peter to repeat his *The Lord of the Rings* success.

iii. *The domestic-global nexus*

The domestic and global contexts came together in the dispute. We should recognise that other scenarios were possible. The unions might not have chosen to take action on *The Hobbit* production, in which case, the films would have been made with the agreed subsidies and the rewards and conditions laid out by Sir Peter in his September 2010 statement. However, the unions did act, in a manner which, as we have argued above, was appropriate. It would be inappropriate only if one believed that international capital could act internationally but not the workforce affected by that capital.

The dispute was conducted in an environment reminiscent of battle in which dust and smoke cloud the observer’s vision. The essentials of the dispute tended to be lost in a confusion of statements and actions. We suggest that the essentials are as follows:

- The majors resolve funding problems associated with the production and look urgently to Sir Peter to take over from Guillermo del Toro to finish the two films
- The international unions, already waging an international campaign on a number of fronts against a “massifying” global film sector, identify the production as a target, recognising that there is a history of difficulty around residuals and conditions in New Zealand productions. They launch their campaign
- The majors become concerned immediately because they fear disruption of the production. Sir Peter, in particular, and his wider associates, respond aggressively and foster the idea that unions will lose the production for New Zealand⁸
- An array of actions follow, in part promoted by the domestic employers, designed to create an anti-union response. This is helped by the weakness of the union movement in both technical and performer sectors and also reflects a longer-established anti-union approach by employers in the film and TV sector in New Zealand. Mis-steps by the union movement contributed to its weakness
- The Government and the NZCTU step in, both seeking to broker a constructive outcome. This was an opportunity for a successful tripartite outcome. Unfortunately, the Government takes a politically-contingent, anti-union view, thus allying itself with the sector’s unitarist traditions. Government also sees the potential political advantages of weakening a union movement already under attack, and gaining the kudos of “brokering the solution”

- A three party axis comprising of the majors, Sir Peter, and the Government constructs an outcome that is strikingly successful for the allies. The majors receive higher subsidies and the prospect of the films being completed on time. Sir Peter and the domestic sector are favoured with the amendment of the ERA. The Government gains the kudos of brokering a solution and, not to be underestimated, an opportunity to attack the union movement at an institutional and personal level. It was, as suggested above, a perfect storm for the unions
- Government is comfortable with the amendment not only because of its contingent aspect, but also because it conforms to its commitment to openness in the global economy. For Government, it is a signal of New Zealand's flexibility towards FDI and the global economy.

Conclusions

It is rare indeed to observe such a textbook case of national interests being so comprehensively subordinated to the interests of international capital and its domestic agents. It is even more remarkable that this happened in an economy, which purports to be advanced, developed and conscious of its international commitments. The excision of a sector of the workforce from the legislation open to the majority of workers in an economy is an extraordinary outcome, all the more so given the speed in which the amendment was passed and the evident lack of any real understanding of its seriousness in many political quarters⁹. As we argued at the time, if the domestic film industry deserves special ER arrangements, what is the logical argument to oppose demands by, for example, Fonterra for a special ER regime? At about 20% of New Zealand's exports by value and 8% of its GDP, its case for a special ER regime would be far stronger than that of the film industry. Is it the case that, henceforth, special pleading by employer groups is to be the measure of the New Zealand ER system? These are indeed challenging issues.

Notes

¹ By "contingently", we mean that the production units based in New Zealand are based here, in a sense, accidentally, and will move productions elsewhere on the basis of costs and control of labour conditions. In other words, the sector in New Zealand sets a price at which its "New Zealandness" is to be sacrificed for improved profits elsewhere. In this sense, "New Zealandness" is a coat to be worn when useful and discarded when not.

² Indeed, one might speculate why the much slighter book is being made into two films and come to the conclusion that two high-earning films are better than one.

³ Spartacus is a 13-part television series for the American network, Starz Entertainment. It is the latest television project by (American) producer, Rob Tapert; it was confirmed in early November that the third season would also be filmed in Auckland, New Zealand (Herald Online, 2011).

⁴ Such is the clarity of this commitment, one wonders if a complaint to the ILO about the ERA amendments made in relation to The Hobbit might not be in order. The amendment, in its explicit exclusion of a particular group of workers from opportunities to bargain available to others, seems to fly in the face of this commitment.

⁵ This argument is sustained in the absence of any public scrutiny of the advice on this matter offered to the Government by its own legal advisers, made available, we are told, to the firms involved in the dispute but not to the unions or the New Zealand public.

⁶ The returns to performers, writers etc. that result from repeat performances of a work in which they have an interest.

⁷ Sir Peter, in his statement of September 2010 “I can’t see beyond the ugly spectre of an Australian bully-boy, using what he perceives as his weak Kiwi cousins to gain a foothold in this country’s film industry. They want greater membership, since they get to increase their bank balance” (as cited by Burgess and Hunt, 2010). John Key says “They’ve (the union) done some real damage to the way that they view New Zealand and on that basis, I can’t guarantee that the movies will be made as a result of the negotiations we have with them” (as cited by Channel 4, 2010).

⁸ We cannot know how serious the threat of a relocation of the production was. Those suggesting that it was, have a vested interest in that argument and vice-versa applies. Our view is that relocation was never a serious issue, and the “loss of jobs” argument was an important red herring.

⁹ It is a *de facto* excision, given the attitudes and behaviours of employers in the sector, who are unlikely to take up the opportunity for collective bargaining that they can trigger under the amendment.

References

- Arsenault, A. and Castells, M. (2008). The Structure and Dynamics of Global Multi-Media Business Networks. *International Journal of Communication*. 2: 707-748
- Burgess, D. and Hunt, T. (2010, September 27). Hobbit Film to go Offshore? *Waikato Times*. Retrieved from <http://www.stuff.co.nz/waikato-times/news/4170277/Hobbit-film-to-go-offshore>
- Channel 4. (2010, October 25). *New Zealand Rallies to Keep Hobbit Films*. Retrieved from <http://www.channel4.com/news/new-zealand-rallies-to-keep-hobbit-films>
- Levinson, C. (1972). *International Trade Unionism*. London: Allen and Unwin.
- Herald Online. (2011). Third Spartacus Season to be Filmed in NZ. *New Zealand Herald*. Retrieved from http://www.nzherald.co.nz/television/news/article.cfm?c_id=339&objectid=10764583

Book Review

Erling Rasmussen. (2010). *Employment Relationships: Workers, Unions and Employers in New Zealand*. Auckland: Auckland University Press.

JOHN MURRIE*

This new assessment of the Employment Relations Act 2000 (ERA) makes a valuable contribution to the literature on New Zealand employment relations. It is a follow-up to a similarly edited book in 2004 (Rasmussen, 2004). Coming on the back of his recently updated textbook *Employment Relations in New Zealand* (2009) by Pearson, the new edited book – ‘Employment Relationships’ – establishes Rasmussen as one of the principle contributors to this academic field in New Zealand.

‘Employment Relations’ makes a timely and significant contribution to the field during a period of unusual legislative stability. As the Introduction states,

It is also the first time in nearly three decades that radical, sweeping employment relations reforms are not high on the political agenda or being touted as a ‘solution’ to wider economic and social problems (p. 1).

The recent 2011 General Election proves a case in point, with employment legislation and employment relations hardly featuring in public debates around the policies of various parties, particularly surprising given the global economic crisis. It was a mainstay of political discussion throughout the 1980s and 1990s, with constant questions over the direction and shape of the employment relations system, but it now seems to have lost its traditional place at the forefront of public and political thought. The question remains, though, whether this will last.

While there appears to be more legislative stability, several chapters point to underlying labour market changes as well as several important industrial disputes. The current situation of two major disputes – Port of Auckland and their waterside employees, and the meatworkers and ANZCO – as well as the employment impact of the Hobbit dispute indicate that employment relations is, as always, a very contested terrain. Several chapters also advocate that it is necessary, with further changes, to fulfill the ERA’s explicit support of collective action (see the chapters by Wilson, Harre, and Kelly). These proposed changes cut across the current direction of the National-led Government and the changes sought by the employer associations. Furthermore, ‘Employment Relationships’ also alludes to two other important questions: what has this period of unusual stability brought us, and just what do the major actors within the New Zealand system think of it?

* John Murrie is PhD student in the School of Aviation at Massey University

'Employment Relations' attempts to answer these and other questions, and does so through the inclusion of the ideas and analyses of all the major actors in the employment relations system. While the views of academics feature predominantly, this is not unexpected in what is mainly an academically orientated text. However, the inclusion of contributors from Business New Zealand, the New Zealand Council of Trade Unions (NZCTU), the legal profession and former Cabinet Ministers provides a well balanced discussion. Perhaps the only problem is the absence of a voice representing non-union workers (some 80% of the total workforce). However, given the difficulties in finding a suitable contributor the opinions expressed by the NZCTU and academics are more than sufficient.

While predominantly focussed on recent historical events, 'Employment Relations' assumes that the reader is more than familiar with the unique history and development of New Zealand's employment relations system. Consequently, the text does lean more toward the educated reader, but still succeeds in offering the uninitiated a valuable and easily understood insight into issues at the heart of employment relations in this country. More importantly, the inclusion of varied contributors does provide a strong degree of forward thinking. In particular, the clear divergence between the views of unions and employers shows that the system's current stability may not be a sure thing.

The ERA is an enigma, as Rasmussen states (p. 1), since this can be pointed both to the impact and the lack of impact that this legislation has had over the last ten years; although this clearly depends entirely on whose perspective you take. The stability the ERA has provided is unusual as far as the last 30 years are concerned, but not if one examines the entire history of employment relations in this country. We did have, under the Arbitration System, a period of relative stability that lasted nearly a century from 1894 to the late 1980s and 1991 with the passage of the Employment Contracts Act (ECA). However, it has been the habit of many, even academics, to perhaps overstate the stable nature of the arbitration period. That system came under constant attack from all sides and had to weather a number of strong challenges in its role and place in this country. 'Employment Relations' suggests that, while the basic structure of the ERA remains unchallenged, the various pieces of supporting legislation and the workings of the system itself are under constant challenge, just like the Arbitration System. The contributors make some significant points in relation to these challenges and the possible direction the ERA may take.

The structure and operation of key employment institutions such as the Mediation Service, the ability of the ERA to improve New Zealand's poor productivity performance, and the ability to help foster a high-wage high-skill economy are all debated within the text. There is also an interesting discussion of the break-through of employee representation in the amendments to the health and safety legislation which may align participative and productive aspirations in employment relations in the future. In this manner, 'Employment Relations' provides some rather surprising information and research angles, particularly in relation to employers' perspectives and attitudes. These perspectives and attitudes remain an underexplored element within the New Zealand academic literature, and it is perhaps here that the text makes its most important contribution.

As a current PhD student, I feel that it is the diversity of opinions, and the surprising frankness of the discussions that make it such a valuable source of information. This is particularly the case in relation to employers, and their role in employment relations which form the core focus of my PhD. That employers vociferously opposed the introduction of the ERA is well known, though 'Employment Relations' hints that there are somewhat contradictory public policy positions. It is most surprising that there is an undercurrent of tacit support for the basic system 10 years on. However, employers still see significant problems with the current framework, not least with increasing transaction and compliance costs associated with changes to the statutory minimum code and other regulatory frameworks. It is also telling, and highly relevant, that several chapters link the stability of the ERA to the relative economic prosperity of the Labour-led Governments. This, again, suggests that the global economic crisis and New Zealand's own economic problems since 2008 may precipitate the need for future, possibly radical, changes to the ERA – although the general theme of the contributions is that continued stability and gradual change is more likely.

The text also focuses on the traditional elements found with the New Zealand literature: unions and collective bargaining. Given that the ERA has failed to achieve its objective of promoting collective bargaining, this is not surprising. Consequently, the analysis of why this is the case and of the impact of this on the wider success or failure of the Act's other objectives remain central to the text, and rightly so. However, these are balanced by the discussion of other, perhaps more relevant, issues such as productivity, worker participation and training and skills.

Overall, 'Employment Relations' is an important text within the New Zealand literature on employment relations, and provides students, researchers and practitioners with a solid foundation for exploring the topic in more detail. This book can be highly recommended to anybody who is interested in furthering their understanding of the current, and future, shape of employment relations in New Zealand.

References

Rasmussen, E. (2009). *Employment Relations in New Zealand*. Auckland: Pearson.

Rasmussen, E. (ed). (2004). *Employment Relationships: New Zealand's Employment Relations Act*. Auckland: Auckland University Press.