

Contents Page: NZJER, 2014, 39(2)

Name	Title	Page Number
Guest Editors: Margaret Wilson and Pam Nuttall	Introduction	1-2
Keith D. Ewing	Regulating for Decent Work and the Effectiveness of Labour Law	3-21
Margaret Wilson	Precarious Work – New Zealand Experience	22-33
Melanie Nolan	Antipodean Aspirations and the Difficulties of Regulating For Decent Work Now and Then?	34-50
Susan Robson	Regulating dispute resolution in the employment jurisdiction: some insights into regulating for decent work from an empirical study of policy for and the operations of the institutions 1990-2010	51-61
Judith Scott	Mechanisms for Resolving Collective Bargaining Disputes in New Zealand	62-72
Yvonne Oldfield	Safe and Healthy Work: a Human Right	73-105
Anne-Marie McNally	Corporate Manslaughter – does it have a place in NZ law?	106-116

Introduction

The second New Zealand Labour Law Conference was hosted by AUT on 22 November 2013. The theme of the conference was *Regulating for Decent Work*. The purpose of the conference was to enable contributors to analyse and reflect on the theory and practice of the concept of decent work both internationally and domestically. The advent of a neo-liberal labour relations regulatory framework has placed, at risk, the notion of a decent work agenda. The conference provided an opportunity for debate and discussion on the issues that have become evident under the current regulatory arrangements.

The conference attracted 21 papers from academics and practitioners and, consistent with the practice after the first conference, 15 of these are being published in special labour law issues of the NZJER. The after dinner speech of Chief Judge Colgan who introduced participants to the notion of 'legal creep' that has been developing in employment law is also published. These two special NZJER issues include papers from both academics and practitioners and are intended to provide a record of current issues facing labour law today.

The paper covered a variety of topics, with the conference opening with presentations from Professor Ewing and Professor Margaret Wilson that were intended to provide an overview of decent law internationally and domestically. Professor Ewing analysed regulating for decent work within the context of the ILO Declaration on Social Justice for a Fair Globalisation and the Decent Work Agenda that has been adopted by the ILO as a means of implementing decent work into domestic jurisdictions. Professor Wilson's paper focussed on the increasing prevalence of insecure/precious work in New Zealand that undermines the notion of decent work. Professor Ewing also identifies the increasing number of zero contracts and forms of insecure work in the United Kingdom and the problems of regulation in this area.

The whole issue of decent work was examined in its historical context by Melanie Nolan who identified that decent work was a myth for many workers under the IC and A system. She also notes that the various current campaigns for decent work, such as Forestry Safety, Living Wage, Fairness at Work and Campaign of Insecure Work reflect similar to issues raised in the 1890s and early 20th century. The challenge of effectively implementing decent work was explored in Susan Robson's paper that presents empirical research on dispute institutions 1990-2010. The importance of understanding the statutory dispute resolution procedure of facilitation is analysed in Judith Scott's paper.

Other papers identify various employment practices and regulation that influence the reality of decent work in New Zealand. Yvonne Oldfield provides a detailed analysis of health and safety regulation and argues that health and safety is a human rights issue, while Anne-Marie McNally pursues this topic with an argument for legal recognition of the offence of corporate manslaughter after the tragedy at Pike River. The argument that labour rights are human rights is also the subject of Edward Miller and Jeff Sissons' paper on the barriers to collective bargaining. Simon Mitchell's paper, also on collective bargaining, provides the perspective of a practitioner advising union clients.

The value of a practitioner's perspective is seen in Peter Cranney's analysis of the law relating to redundancy that highlights the need for legal certainty in an area that directly affects the rights of employees. Phillipa Wells provides an Australian perspective on the law relating to redundancy. The need for greater legal certainty is also identified in Anthony Drake's paper on the complex issues raised when interpreting the provisions of Part 6A of the ERA. Greg Lloyd, in his paper, identified the uncertainty surrounding conflicts of interest when lawyers represent employers in health and safety issues that affect the interests of workers who have no independent legal representation.

A gender analysis is applied to the provisions of flexible work by Annick Masselot in a comprehensive analysis of statutory provisions relating to leave related to the caring role of women. Finally, Ross Wilson shares his experience of implementing the decent work agenda in Burma. Although several other presentations were delivered at the conference, the papers were not available for publication in the NZJER but may appear in other publications.

The first eight papers discussed above are to be found in this issue of the *Journal* 39(2). The balance of the papers and the Chief Judge's speech will appear in the subsequent issue 39(3).

Overall, the conference fulfilled its objective of contributing to greater understanding of the theory and practice underlying labour law today in New Zealand. The New Zealand Labour Law Society organisers were delighted at the level of support for the conference from the whole spectrum of the community associated with the practice of labour law and would like to acknowledge support from AUT Law School and the NZ Work Research Institute.

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Regulating for Decent Work and the Effectiveness of Labour Law

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I

On 10 June 2008, the International Labour Conference adopted the Declaration on Social Justice for a Fair Globalisation. This was an important initiative, being only the third major declaration in the history of the ILO, building on the foundations established by the other two. The Declaration of Philadelphia of 1944 firmly embedded the principle that ‘labour is not a commodity’,¹ while the Declaration on Fundamental Principles and Rights at Work of 1998 reinforced the importance of four core principles relating to human rights at work (freedom of association and the effective recognition of the right to collective bargaining, the prohibition of forced and compulsory labour, the effective abolition of child labour, and the elimination of discrimination in employment).²

The Declaration on Social Justice was designed in part to institutionalise the ILO’s decent work agenda that had been developed since 1999, thereby placing the latter agenda at the core of the ILO’s policies. Key aspects of that agenda were job creation, the extension of social and labour protection, promoting social dialogue, and guaranteeing rights at work (with an emphasis on freedom of association and collective bargaining).³ Although the Declaration was said to come “at a crucial political moment, reflecting the wide consensus on the need for a strong social dimension to globalization in achieving improved and fair outcomes for all”,⁴ having been adopted on the eve of the global financial crisis, it also came at a spectacularly bad time economically and politically.

The Declaration nevertheless provided that the Decent Work Agenda would be promoted through four strategic objectives, all said to be equally important.⁵ Reflecting the outline of the Decent Work Agenda considered above, the first of these relates to job creation, and the second to ‘developing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances’, including

Policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection.⁶

The third objective is “the promotion of social dialogue and tripartism as the most appropriate methods” for a number of defined purposes. These include “adapting the implementation of the strategic objectives to the needs and circumstances of each country”. But more importantly for present purposes they also include “making labour law and institutions effective, including in respect

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¹ ~~On which~~, See P O’Higgins “Labour is not a Commodity”: an Irish Contribution to International Labour Law” (1997) 26 ILJ 225, and A Supiot and others “Dialogue & Debate: Labour, Constitution and A Sense of Measure: A Debate with Alain Supiot” (2010) 19 *Social Legal Studies* 217-252.

² ~~On which~~, See P Alston, “Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15 EJIL 457.

³ See <www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>.

⁴ ILO Declaration on Social Justice for a Fair Globalisation (2008), Preface.

⁵ At Part IA.

⁶ At Part IA(ii).

of the recognition of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems”.⁷ Note the need for labour law to be “effective”. The promotion of social dialogue is, thus, not an end in itself, but an objective with a number of defined purposes of which the effectiveness of labour law is immensely important, but not the only one.

The fourth and final objective is respect, promotion and realisation of the fundamental principles and rights at work,⁸ these to be found in the ILO Declaration on Fundamental Principles and Rights at Work referred to above. In emphasising the importance of these fundamental principles and rights at work, the Declaration on Social Justice maintains that these rights are valuable not only for their own sake, but also for “enabling conditions that are necessary for the full realization of all the strategic objectives”. According to the Declaration, however, “freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives”.⁹ Note the ‘effective’ recognition of the ‘right’ to collective bargaining.

II

From the partisan perspective of labour law, there are a number of points that stand out in the Declaration on Social Justice, not least the idea of an ‘effective labour law’. This is a concept with which I am unfamiliar, and which does not appear to be well developed in the literature. But it is one which is very intriguing, not least because its meaning is unclear. In terms of the conference theme of Regulating for Decent Work, effective labour law would appear to be an essential starting point.

Despite the uncertainty as to meaning, there is a suggestion in the Declaration that an effective labour law is one that addresses both substantive and procedural matters, that is to say, both the content of the law and the manner of its enforcement. As to the former, at the very least, it must mean a labour law that is wholly **inclusive in terms of its coverage** (hence the reference in the Declaration to the “recognition of the employment relationship”). This, of course, is very important in view of the segmentation of labour law that is taking place in many jurisdictions throughout the world, as new forms of employment relationship are emerging in order to evade the protections which labour law seeks to provide, even though these protections increasingly are very limited.¹⁰

Beyond the question of scope, the idea of an effective labour law raises questions about **the substance of the law**. But if effectiveness relates to substance, how can we determine if labour law is effective if we do not know what it is seeking to achieve? This is a much more challenging issue about which consensus is likely to be difficult, though some sense of the minimum normative content of labour law for these purposes may be revealed by the Declaration itself.¹¹ Less challenging perhaps are the means by which that that minimum normative content is to be met, the Declaration highlighting procedural measures designed to secure the right to collective bargaining,

⁷ At Part IA(iii).

⁸ At Part IA(iv).

⁹ At Part IA.

¹⁰ This is a point pursued in some detail below.

¹¹ A normative content in terms of labour standards is suggested by the reference to “wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection”: ILO Declaration on Social Justice for a Fair Globalisation (2008), Part IA(ii). This is a matter that needs to be more fully considered.

alongside policies relating to pay, working time, health and safety and other undefined conditions of work.¹²

Apart from questions of scope and content, an effective labour law is one that addresses questions of **enforcement of standards**. At an abstract level, that is perhaps uncontroversial, and certainly less controversial than questions about the substance of the law. But not wholly uncontroversial, at least to the extent that there is an assumed need for a system of labour inspection, presumably to remove the burden of enforcement from the vulnerable. Effectiveness as enforcement also raises wider questions about the nature of national legal systems with which not all countries are able to comply. At its most basic, there are wider rule of law questions applicable here about access to justice, the independence of the judiciary, and the enforcement of judicial decisions.¹³

These seem to me to be modest claims for effectiveness. The first and third say little about the substance of the law: if we are to have labour law it should apply to everyone, and it should be properly administered and enforced. The second admittedly begs questions about substantive outcomes, though the demands of the Declaration are far from viewing labour law as a re-distributional tool.¹⁴ Yet, it is clear that there are powerful forces at work to ensure that these modest principles are diminished in the face of a deliberate ineffectiveness of labour law in national systems. Three phenomena, in particular, present a clear and continuing challenge: the segmentation of labour law to which I have already referred, the growing commodification of labour, and the mutation of employer practice.

I propose to consider these latter phenomena through the lens of developments in English law, before returning to the effectiveness of labour law and the decent work agenda. If the effectiveness of labour law is the first step in regulating for decent work, we need to understand the problems the regulator must address. While I make no claims that the British experience is universal, I would be surprised if there are no parallels in other common law jurisdictions in particular.

III

Asda Stores Ltd is a British subsidiary of the US retail giant Walmart, though to claim that Walmart is a giant perhaps does not do full justice to its size. Walmart is the biggest private employer in the world, employing 2.1 million people globally, which places it just below the US Department of Defense, and the People's Liberation Army, respectively.

Step forward a group of Asda employees in the United Kingdom who claimed that their terms and conditions of employment had been unlawfully changed.¹⁵ The company wanted to move all staff onto the same working conditions, leading to 8,700 workers being transferred 'involuntarily' to the new conditions, which led some of their number to bring proceedings for unauthorised deductions from wages, breach of contract and, in some cases, unfair dismissal.

¹² At n 11 above. These latter questions on questions of substance presumably could be dealt with by collective bargaining or by protective legislation, or both.

¹³ This is an issue that has arisen recently in relation to Cambodia. See ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III, Part 1A)* (2014) 74-75.

¹⁴ See above n 11.

¹⁵ *Bateman v ASDA Stores Ltd* [2010] IRLR 370. For comment, see J Hendy and F Reynolds, "Reserving the Right to Change Terms and Conditions" (2012) 41 *Industrial Law Journal* 79.

The issue before the employment tribunal hearing the case was a simple one, namely whether the employees' consent was necessary before these changes could be made. Asda Stores claimed that it had secured authority to make the change by virtue of a passage in its 'Colleague Handbook', which provides that "the Company reserves the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time to reflect the changing needs of the business and to comply with new legislation".

It is not clear whether "colleagues" were always supplied with their personal copies of the handbook (which made clear that not all its terms were contractual). According to the handbook, however, a copy is "displayed on the colleague communication board in your store and on Pipeline, and replacement copies are available from your People Manager". It appears to have been the responsibility of 'colleagues' to keep themselves up to date about changes, "by attending meetings, huddles [informal team meetings] and by keeping an eye on the colleague communication board for any updates".¹⁶

In dismissing the employees' various claims, the employment tribunal, nevertheless, accepted that "the introduction of the new regime was a significant change affecting how much employees would be paid for their work at particular times of the day and night as well as removing certain benefits". It also concluded that "the pay of the claimants was fundamental to the employment relationship and that in the light of the significant changes to the claimants' contractual terms as to pay, Asda was required on ordinary principles to obtain the consent of the employees".¹⁷

So why did the tribunal decide for the employer? The answer lay in the provisions of the handbook, the tribunal accepting "the general principle that employers may reserve the contractual right to vary the terms or to change important aspects of their job irrespective of whether the employee consents or not", adding "such provisions will be scrutinised carefully to ensure that they cover the particular changes made unilaterally by the employer". But "if the change or variation falls within the contractual power to vary, it will be effective even if financial loss ensues".¹⁸

True, the tribunal suggested that there might be a number of safeguards that could operate to prevent the abuse of this power, in what would, of course, be standard form contracts, in which any notion of contract would be pure fiction. But these did not apply in this case, despite claims in an unsuccessful appeal that "most of the employees were not well-educated or even literate or numerate and subsisting on very low wages". Nor was it persuasive that to argue that:

not one of the 150,000 employees who entered a contract on the basis of it, could conceivably have intended or expected its effect would be to leave to the unilateral discretion of the respondent the right to reduce the pay increase or change the hours of work and cut holidays without the need for consent and without the need for notice.¹⁹

We return below to consider what this case tells us about the contribution of labour law to the problems faced by workers in the modern economy. For the moment, perhaps the best that can be said is that *Bateman* was a harsh decision. But it is not the only example recently of employers taking the power to change the terms and conditions of employment unilaterally, or of the courts

¹⁶ *Bateman* at [6].

¹⁷ At [10].

¹⁸ At [13] citing *Wandsworth LBC v D'Silva* [1998] IRLR 193, per Lord Woolf, at [31].

¹⁹ *Bateman* at [22].

looking the other way. Nor is the use of this power confined to retail workers, with similar terms being identified in the contracts of dock-workers, airline cabin crew,²⁰ and bankers.

IV

Labour economists have referred to the segmentation of labour for many years, as employers ‘slice and dice’ the workforce to minimise the risks of employment, by transferring these risks where possible to the worker.²¹ Thus, the worker is used when needed and wages are paid only when required, divesting the employer of responsibility for the worker as a person rather than as a labourer. Labour law has permitted, tolerated and encouraged this development by what might be referred to as the parallel segmentation of labour law.

This segmentation is best seen in the form of a simple pyramid divided into three parts. At the top of the pyramid is a small group of highly paid workers illustrated by the applicants in *Dresdner Kleinwort Ltd v Attrill*,²² in which 104 employees of the bank claimed that “they had been wrongfully denied their contractual entitlement to certain discretionary bonuses for the calendar year 2008 promised by their employers”.²³ According to the judgment of the appeal court which upheld the lower court decision in favour of the claimants, at stake were “sums totaling more than €50 million”.²⁴ The applicants’ claimed that the employer had undertaken to make these payments and was contractually bound to do so, having been caught out by contracts of employment providing that “the Company reserves the right to vary the terms and conditions described in this handbook and the terms and conditions of your employment generally”.²⁵

This top segment of the workforce is a small and elite group: wealthy individuals in very highly paid jobs with generous contractual terms and the personal financial muscle to enforce them. The distinguishing feature of this case (and cases like it in recent years) is that it was heard in the ordinary courts, where justice is very expensive to administer and where the costs of failure are crippling. *Attrill* was a case where both sides were represented by city solicitors and at least two barristers each. The proceedings, at first instance, lasted for 16 days, and the appeal for another three; and this was only after the applicants had survived earlier attempts by the employer to have their action struck out as showing no cause of action,²⁶ in a case involving another expensive team of solicitors and barristers of the highest professional calibre. Indeed, one of the barristers for the bank was subsequently appointed directly from legal practice to the Supreme Court in a unique move, albeit a move reportedly delayed as the individual in question completed his highly publicised and allegedly highly remunerated representation of Roman Abramovitch.²⁷

²⁰ *Malone v British Airways plc* [2010] EWHC 302 (QB), [2010] IRLR 32. See K D Ewing, *Fighting Back – Resisting ‘Union – Busting’ and ‘Strike – Breaking’ During the BA Dispute* (Institute of Employment Rights, 2011).

²¹ See the discussion in N Beerepoot, ‘Globalization and the Reworking of Labour Market Segmentation’, in A C Bergene, S B Endresen and H M Knutsen (eds) *Missing Links in Human Geography* (Ashgate, Farnham, 2010) 220-3.

²² *Dresdner Kleinwort Ltd v Attrill* [2013] EWCA Civ 394.

²³ At [1] (Elias LJ).

²⁴ At [1]

²⁵ The passage continued: “Such changes can only be made by a member of the Human Resource Department and must be communicated to you in writing. When the change affects a group of employees, notification may be by display on notice boards or Company Intranet”.

²⁶ [2010] EWHC 1249 (QB); [2011] EWCA Civ 229, [2011] IRLR 613.

²⁷ This fight to the death with rival oligarch Boris Berezovsky over the entrails of the USSR was fought out in the English courts: *Daily Telegraph*, 31 August 2012: ‘Roman Abramovich has won his \$6.5bn legal battle with his former mentor and business partner, in the biggest private court case in British legal history’. Sumption’s fee in the latter case was reported to be £3m: *The Lawyer*, 6 April 2011.

The *Attrill* case is, thus, important partly because the bankers had access to the most senior judges in the High Court to enforce a massive contract claim with the help of very expensive legal teams. This is not an option available to most workers²⁸ and, indeed, the dangers of losing such a case would have been enough to terrify all but the most reckless or the most financially secure, in view of the costs' order that might be awarded to the successful party.²⁹ The case is also important, however, for illustrating how wealthy litigants are able to enforce their contracts and, in the process, indulge in esoteric and technical aspects of contract law in the enforcement of their claims.³⁰ As indicated, *Attrill* is not alone, and it is an important feature of these recent cases that the courts have indicated a willingness to develop principles to control the wide discretionary powers employers often reserve for themselves in contracts, the courts in these cases beginning to apply to the private law of contract principles that seem to derive from public law and the legal control of State power.³¹

The latter is a welcome development but one with limited application lower down the pyramid. Perhaps, the idea is that there will be a 'trickle down' effect to the second or middle segment of the pyramid, though it was not much evidence of 'trickle down' in *Bateman*. The second segment applies to what is probably still the majority of workers, though it is a category that is shrinking fast for a number of reasons. This is the category of workers who enjoy various employment rights by virtue of their legal status as 'employees'. These are workers whose contracts provide benefits, nothing like the benefits and bonuses available to bankers (who might as well inhabit a different planet), and indeed whose contracts are likely to be subject to detrimental variations in circumstances where the worker in question may have little option for practical (and perhaps also legal) reasons to accept. That aside, these are workers to whom minimum wage, working time, and unfair dismissal protections still apply, along with a raft of other protective legislation, the standards albeit typically set at a low level.

These rights on which this segment of the workforce relies are not enforceable in the ordinary courts, but in specialist tribunals which were designed to provide a cheap and accessible form of rough justice. Recent procedural changes, however, push this category closer to the third segment at the bottom of the pyramid which, as a result, continues to grow. Although workers in the second category may have statutory rights, these rights are increasingly difficult to enforce. Concern has been expressed in political circles about the large number of cases brought annually to employment tribunals, with the statistics for 2010-11 revealing a staggering 50,000 unfair dismissal cases alone. There is clearly a problem here, though there is no consensus about what that problem is.³² Rather than see these statistics as evidence of a general problem of the misuse of employer power in the modern economy, the government, with the support of employers, has read this to mean that access to tribunals is too easy. As a result, employees bringing tribunal claims must now pay the State for the privilege of doing so, with the cost depending on the nature of the claim, but with unfair dismissal claims, for example, requiring the worker to pay £1,200 for the case to be heard.³³

²⁸ Though there are exceptions: *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] ICR 1157.

²⁹ These would be mainly the legal costs of the successful party, as well as also having to absorb one's own costs.

³⁰ See also in this vein, *Societe General, London Branch v Geys* [2012] UKSC 63, [2013] 1 AC 523. For background, see D Cabrelli and R Zahn, "The Elective and Automatic Theories of Termination at Common Law: Resolving the Conundrum?" (2012) 41 *Industrial Law Journal* 346.

³¹ See, for a good example, *Rutherford v Seymour Pierce Ltd* [2010] EWHC 375 (QB), [2010] IRLR 606.

³² For a discussion of this matter, see K D Ewing and J Hendy QC, "Unfair Dismissal Law Changes – Unfair?" (2012) 41 *Industrial Law Journal* 115. Compare D Mangan, "Employment Tribunal Reforms to Boost the Economy" (2013) 42 *Industrial Law Journal* 409.

³³ See Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, SI 2013 No 1893; *R (Unison) v Lord Chancellor* [2014] EWHC 218 (Admin) – legal challenge to fee regime fails. This is in addition to the legal and other

It is not surprising that the introduction of fees should have led to a massive decline in the number of tribunal applications, falling by 79 per cent as access to justice is beyond the means of many workers³⁴ and, in many cases, with the cost of bringing a claim exceeding its value.³⁵ In this way, formally protected workers in the middle segment fall unwittingly into the burgeoning segment of largely unprotected workers in the third segment at the bottom of the pyramid, and do so for procedural reasons. There, they will find workers who are there because they have no rights to enforce, usually because they do not fall within the statutory definition of employee, or because they do not have sufficient continuous service as an employee to qualify for the bringing of a complaint. In order to bring an unfair dismissal complaint, the employee must now be continuously employed by the same employer for at least two years, which for one reason or another typically excludes temporary agency workers and zero hours contract workers, as well as those who have a bogus relationship of self-employment with their employer.³⁶

A measure of the problems facing workers in this third segment is revealed by *James v Greenwich London Borough Council*,³⁷ where the applicant had been supplied to the council by an agency to perform services as a care worker. When the council changed the agencies from whom it recruited workers, Ms James changed to the new agency and continued to provide services to the council, though she was paid more by the new agency. She had a contract with the agency, not the council; and the contract stated expressly that she was engaged under a contract for services rather than a contract of service.³⁸ Following a period of sickness, Ms James was replaced by another worker from the same agency and brought a claim against the council that she had been unfairly dismissed, having worked for the council for three years as a result of her assignments by the two agencies. In order to bring a claim against the council, Ms James would have to establish that she was an employee, an argument she was never going to win. This is because there was “no obligation upon the claimant to provide her services to Greenwich Council and there was no obligation on the part of Greenwich Council to provide the claimant with work”.³⁹

V

Segmentation reinforces commodification, and indeed helps to create extreme forms of commodification, our virtual pyramid suggesting that more and more workers are gravitating from the second to the third segments as more practices are being developed and used by employers prepared to draw workers into the “orbit of the market”,⁴⁰ stripped of even modest social protection.

cost that the employee may encounter in enforcing his or her rights. It should be added that there is a complex system of fee remission for low paid workers.

³⁴ A decline that has caused concern even on the part of the most robust employer-side law firms, one of whom (who shall remain anonymous) reflected on 21 March 2014 that “Few employers opposed the introduction of Tribunal fees and there is little doubt that they have curbed claims perceived as dubious or tactical. That said, it is in the interest of all that the Tribunal system is stable, robust and fit for purpose. The fact that the figures could serve to re-enforce a perception that Tribunals are less accessible casts an unwelcome shadow over the future stability and certainty of the current system”.

³⁵ This would be true, for example, where the employer fails to provide a statement of the terms of the employment, unlawfully withholds wages, or fails to make a redundancy payment to those with short periods of service.

³⁶ Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012 No 989.

³⁷ *James v Greenwich London Borough Council* [2008] EWCA Civ 35, [2008] ICR 545.

³⁸ This meant that she was a self-employed contractor rather than an employee of the agency.

³⁹ *James* above n 37 at [21] citing the decision of the employment tribunal.

⁴⁰ Polanyi, as quoted by S B Endresen “We Order 20 Bodies’: Labour Hire and Alienation” in Bergene, Endresen and Knutsen (eds) above n 21 at 223.

But, while the need for regulation to counteract these developments is obvious, recent attempts to regulate one of the major groups of workers in the bottom third segment in order to provide protection and eliminate the worst forms of exploitation has backfired spectacularly. These are the attempts relating to temporary agency workers, who are said to represent a “purification of the commodity form of labour power”,⁴¹ the attempts at regulation leading, ironically, to the liberation of employers and to limited, contingent and porous protections for agency workers.

Unlike the EU Part-time Workers directive and the EU Fixed-term Workers directive,⁴² the Temporary Agency Workers Directive (TAW Directive) was not the product of the social dialogue procedure in what is now the TFEU. The first of these two directives were a monument to another era now long past, and it is implausible to think that social dialogue will produce any more meaningful regulatory initiatives in the foreseeable future. For all practical purposes, social dialogue is dead as a regulatory tool, killed by the same logic that created the need regulatory intervention in the first place. So it is left to the political institutions to “strike a balance between flexibility and security in the labour market and help both workers and employers to seize the opportunities offered by globalization”.⁴³ But these are the same political institutions dominated by national governments, who include those who have consciously segmented their labour laws in the manner described above for reasons of competitive advantage in the global economy, and who are unlikely to welcome external threats which are inconsistent with the evolution of their regressive regulatory model.

It is, thus, hardly surprising that the TAW Directive should be, at best, seeking to reconcile contradictory impulses: to be simultaneously permissive and protective. Stripped of its presentational rhetoric; however, the first aim reflects the

need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.⁴⁴

In other words, the first purpose of the Directive is to remove national restrictions on the use of agency labour in those countries where it was not previously permitted, or where it was permitted but subject to tight regulation. This aim is reflected, in turn, in the provisions of Art 4 which requires the removal of “prohibitions or restrictions” on the use of temporary agency work, unless these prohibitions or restrictions can be justified,

only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.

In place of “prohibitions or restrictions” are measures designed “to ensure the protection of temporary agency workers and to improve the quality of temporary agency work”.⁴⁵ But, as already suggested, the means by which protection is to be secured – the principle of equality – is deeply flawed. True, Art 5 expresses the principle in apparently wide and unequivocal terms:

⁴¹ At 223.

⁴² Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, and [Council Directive 99/70/EC](#) of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, respectively.

⁴³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, Preamble, Recital 9.

⁴⁴ TAW Directive, Art 2.

⁴⁵ Art 2.

The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job.

But, all is not as it seems, with “basic working conditions then defined narrowly to mean only working and employment conditions relating to (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; and (ii) pay”.⁴⁶ It is then left to Member States to define what is meant by “pay” for these purposes,⁴⁷ while a major omission from the narrow scope of “basic working conditions” is any reference to job security for agency workers, particularly important in view of the real problems encountered by workers such as Ms James above.

But that is not all. Even this narrowly-scoped application of the principle of equal treatment is subject to exceptions. The first – labelled inappropriately as the ‘Swedish derogation’ in Art 5(2) – provides that the principle of equal treatment may be denied by national law to “temporary agency workers who have a permanent contract of employment with a temporary work agency”, and “continue to be paid in the time between assignments”. This is stated to be an acknowledgement of “the special protection such a contract offers”,⁴⁸ and acknowledges also that the agency assumes the risk of paying the worker even though no work is being done on behalf of a client. But it is a grotesquely inadequate provision, which imposes no obligation about the substance of the contract between the temporary agency worker and the agency. Thus, there is no obligation of proportionality, with the agency worker entitled to receive whatever the market will bear rather than what directly employed colleagues of the client are being paid. Nor is any provision made to regulate how much is paid between assignments. Is the agency worker entitled to be paid the same when not working, or only a fraction thereof, and if the latter, how big a fraction thereof?

The other major exception is what might be referred to as the ‘British derogation’ in Art 5(4). Although other countries have since made use of this provision, it appears to have been tailored specifically to deal with the United Kingdom in particular, applying only in Member States where

there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area.⁴⁹

Although this is a distinguishing feature of the British system of collective bargaining, it is far from clear why it is relevant to whether or not there should be a derogation from the principle of equal treatment. On the contrary, it might be argued that, in such systems, the regulatory deficit is likely to be greatest, and the need for regulatory intervention, therefore, most acute. Nevertheless, where these conditions are met, it is possible for the Member State in question to “establish arrangements concerning the basic working and employment conditions which derogate from the principle [of equal treatment]”.⁵⁰ It is specifically provided that “such arrangements may include a qualifying period for equal treatment”.⁵¹

⁴⁶ Art 3(1)(f).

⁴⁷ It is to be noted that by virtue of Art 5(4), “Member States shall specify, in application of Article 3(2), whether occupational social security schemes, including pension, sick pay or financial participation schemes are included in the basic working and employment conditions”. Here the language of obligation being used as a mask to disguise the fact these items may be excluded from the national implementation of the Directive.

⁴⁸ Preamble, Recital 15.

⁴⁹ Art 5(4).

⁵⁰ Art 5(4).

⁵¹ Art 5(4).

The effect of this latter provision, of course, is to ride roughshod over the principle of equal treatment by providing that agency workers who are not employees of the agency have no right to equal treatment for a period of time not determined by the Directive. The old two-card trick is thus complete: no equal treatment if the agency worker is an employee of the agency, and used under a contract of service (Art 5(2)); and no equal treatment where the agency worker is not an employee of the agency, but used under a contract for services (Art 5(4)). The only protection for the worker is to be found in Art 5(5), which provides that

Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing misuse in the application of this Article and, in particular, to preventing successive assignments designed to circumvent the provisions of this Directive.

Although the latter is welcome, it is wholly inadequate. Measures against misuse do not remove the freedom of agencies to alter the way in which they use labour. Nor do they overcome the licence given to the agencies to avoid the commitment to equal treatment.

It is thus open to question just how effectively the TAW Directive overcomes the commodification of agency labour. The truth is that, perhaps, it was never intended to. Rather, by legitimising the practice of temporary agency work throughout the EU and beyond, the TAW Directive has reinforced the acute commodification of this form of labour, and has reinforced it still further by regulatory gaps in the protection the directive was ostensibly intended to provide. To this end, one easily overlooked provision of the directive stands as a metaphor for the text as whole. This is Art 6(2) which provides that

Member States shall take any action required to ensure that any clauses prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment are null and void or may be declared null and void.

It is then provided, however, that temporary agencies may “receive a reasonable level of recompense for services rendered to user undertakings for the assignment, recruitment and training of temporary agency workers”.⁵² To adapt a well-known phrase, under EU law the worker has become “a commodity, no more, no less so than is the sugar”.⁵³

VI

The limitations of the TAW Directive were soon revealed by the implementing regulations in the United Kingdom, where every regulatory gap was fully exploited.⁵⁴ It begins with Regulation 5, which provides that the agency worker is entitled to the same basic working and employment conditions to which he or she would have been entitled had he or she had been directly recruited by the hirer. However, it is open to the agency to defeat the claim by establishing that the agency worker is working under the same relevant terms and conditions as a ‘comparable employee’.⁵⁵ For this purpose a comparable employee means someone engaged on work which is the same or broadly similar, having regard to qualification and skills.⁵⁶ Even where there is no employee doing

⁵² Compare under the Acquired Rights Directive, *Case C-132/91 C-138/91, C-139/91, Katsikas v Konstantinidis* [1992] ECR I-6577.

⁵³ K Marx, *Wage Labour and Capital*, chapter 2.

⁵⁴ Agency Workers Regulations 2010, SI 2010 No 93.

⁵⁵ Reg 5(3).

⁵⁶ Reg 5(4)(a)(ii).

comparable work in the establishment where the agency worker is engaged, the claim can be defeated by the employer establishing that there is a comparable worker engaged elsewhere in the undertaking.⁵⁷

It is important to note here that there may be several comparable workers, not all paid the same. There is no obligation on the part of the agency to identify the “most comparable” worker, and no presumption that the most comparable worker is the one who will best promote the principle of equal treatment. Indeed, it has been pointed out that there is no prohibition on the employer recruiting a “token” employee at a low wage in order to be the comparison for what may be a workforce heavily supplied by an agency.⁵⁸ The principle of equal treatment can, thus, be defeated either by the absence of a comparable worker (not unlikely where the employer is heavily segmented and dependent on agency workers), or by the presence of several categories of comparable worker (not unlikely where a large employer has a mixed workforce).

The main problem with the regulations, however, relates to the extent to which they have exploited the provisions of Art 5(4) and 5(2) of the Directive. So far, as the former is concerned, the regulations introduce a 12 week qualifying period, which is thought to have the effect of excluding from the scope of the principle of equal treatment about 40 per cent of the United Kingdom’s estimated 1.3 million temporary agency workers.⁵⁹ It will be recalled that the Directive permits a qualifying period only after “consulting the social partners at national level and on the basis of an agreement concluded by them”. This gives rise to questions about why the TUC would have made such a major concession to the government. Extracted on 22 May 2008 (some six months before the Directive was made), it seems that the agreement was a necessary condition of the British government’s support for the directive, the TUC being placed in the invidious position of having to agree to business demands to exclude 40 per cent in order to secure protection for 60 per cent. Having secured this concession from the trade unions, the (Labour) government undertook to “engage with its European partners to seek agreement on the terms of the Agency Workers Directive”.⁶⁰

Implementing this agreement was far from straightforward, the regulations providing that “the agency worker must work in the same role with the same hirer for 12 continuous calendar weeks, during one or more assignments”.⁶¹ The problem here is how to avoid employers effectively extending the qualifying period by (i) introducing short breaks in service, or by (ii) rotating staff and rotating functions, so that it never becomes possible for the agency worker to say that he or she has been continuously employed in the same role for 12 weeks. The danger is made clear in the regulations, which accept that an agency worker may work for the same user, but not in the same role, if the worker is assigned to a new role and the work or duties in that new role are “substantively different” from the previous role.⁶² That said, however, two anti-abuse mechanisms are included in

⁵⁷ Reg 5(4)(b).

⁵⁸ A Davies, “The Implementation of the Directive on Temporary Agency Work in the UK: A Missed Opportunity” (2010) 1 *European Labour Law Journal*.

⁵⁹ Department for Business, Enterprise and Regulatory Reform, *Explanatory Memorandum to the Agency Workers Regulations 2010* (2010) at 13. According to the government, “There is good reason to think the distribution of assignment lengths will change with the implementation of the Directive. One of the incentives to hirers will be to switch towards greater use of short-term agency working (i.e. assignments lasting less than 12 weeks) in an attempt to minimise costs. This will depend on the degree of extra cost, how sensitive hirers are to these cost changes, as well as the overall labour market situation and the feasibility of switching to shorter-term placements”.

⁶⁰ Department for Business, Enterprise and Regulatory Reform, *Agency Workers: Joint Declaration by Government, the CBI and the TUC* (2008). The agreement was only a page in length.

⁶¹ SI 2010 No 93, Reg 7(2).

⁶² Reg 7(3).

the regulations, the first providing that weeks worked either side of a break or breaks in service can count in establishing the 12 week period of continuous employment. The other applies where roles are reassigned deliberately to prevent the worker from building up 12 weeks service in the same role.⁶³

Although the 12 week qualifying period is a significant weakening of the protection offered by the regulations, it is nevertheless the other major concession to employers that has given rise to the greatest immediate concern.⁶⁴ This is the arrangement referred to as ‘pay between assignments contracts’, permitted by Art 5(2) of the Directive. This has been a major concern of trade unions, it being reported shortly after implementation that some agencies were issuing agency workers with contracts of employment in order to defeat the principle of equal treatment, and with unions claiming that, in some cases, agency workers were being paid up to £135 a week less than directly employed staff of the user for doing the same work.⁶⁵ There are clearly concerns to be overcome on the part of the agency before it issues agency staff with contracts of employment, not least because such a move transfers the risks associated with employment from the worker to the agency. If the agency staff are no longer self-employed, the agency will assume liabilities for maternity rights, redundancy and unfair dismissal, suggesting that the costs saved by taking people into direct employment would have to be considerable.⁶⁶

This is a risk to the employer that becomes easier by virtue of the terms of Regulation 10, which requires the employer to provide only a minimum of one week’s pay in any week during which the employee is not assigned to a client. It is a risk that becomes easier still if employers are to follow the example of one contract drawn to my attention in which the agency supplying dock workers places people on contracts of employment with *Bateman*-style terms, whereby

the company reserves the right to vary these terms and conditions for operational, commercial or financial reasons according to the needs of the business. Any changes will be notified to you by direct correspondence.⁶⁷

Not only does all this appear to contradict the terms of the Directive, it also directly contradicts the terms of the agreement between the government, the TUC and the CBI, which states clearly that there should be

Appropriate anti-avoidance measures reflecting Art 9(2), in particular relating to the treatment of repeat contracts for the same worker and the position of workers with permanent contracts of employment with agencies who continue to be paid between assignments; it is not intended that Art 5(2) will be used to evade the aims of the Directive.⁶⁸

⁶³ Reg 9, which refers to “the most likely explanation for the structure of the assignment, or assignments’ being that it was ‘intended to prevent the agency worker from being entitled to, or from continuing to be entitled to, to the [right to equal treatment]” (Reg 9(4)).

⁶⁴ It has also given rise to a formal complaint to the European Commission by the TUC that the United Kingdom has failed properly to implement the Directive: TUC, *TUC Lodges Complaint against Government for Failing to Give Equal Pay to Agency Workers*, 2 September 2013.

⁶⁵ Above n64. See also the ‘Justice for Agency Workers Campaign’ by the Communication Workers Union to have this ‘loophole’ closed: <www.cwu.org/agency-loopholes.html>.

⁶⁶ See J Tanfield, ‘What is the Swedish Derogation and could it be the Answer to your AWR Model?’, *Global Recruiter*: <www.theglobalrecruiter.com/news/features/what-is-the-swedish-derogation-and-could-it-be-the-answer-to-your-awr-model-jim-tanfield-takes-a-look/3198>

⁶⁷ The contract also states explicitly that “by entering into this employment contract you are fully aware that you do not have any entitlement to equal pay in accordance with Regulation 12 of the Agency Workers Regulations”.

⁶⁸ Department for Business, Enterprise and Regulatory Reform, *Agency Workers: Joint Declaration by Government, the CBI and the TUC*, above. The risk to the employer of “pay between assignments” contracts is also much easier for

But – as discussed above – even where the principle of equal treatment applies, it remains the case that it does not apply to all terms and conditions of employment, but only to those relating to pay, the duration of working time, night work, rest periods, rest breaks, and annual leave (including holiday pay). It is true that ‘pay’ is widely defined to mean “any sum payable to a worker of the hirer in connection with the worker’s employment, including any fee, bonus, commission, holiday pay or other emoluments referable to the employment, whether payable under contract or otherwise”.⁶⁹ But it is also true that there is a list of exceptions long enough to fill every place in a football team. Thus, the definition of pay does not include occupational sick pay, pensions or allowances in connection with retirement, maternity or paternity pay, redundancy pay, payment for time off to take part in trade union duties.

VII

The treatment of temporary agency workers in the United Kingdom is a symptom of regulatory failure in an advanced post-industrialised economy now guided by neo-liberal policies. As Bergene, Endresen and Knutsen suggest, the expansion of agencies and the use of agency workers present formidable challenges for unions,⁷⁰ not least because it reflects a declining regulatory role of organised labour in the contemporary workplace.⁷¹ But it is not only the trade union function that is mutating in the modern economy. So, too, are employment practices, with agency work being only form in which working people are being commodified. Mutation takes several forms, one of which we have already encountered. This is the mutation of the nature of regulated activity in order to avoid a regulatory framework, as in the paradoxical example of businesses moving their staff from self-employment to contracts of employment, in order to avoid the principle of equal treatment, by taking advantage of the misnamed ‘Swedish derogation’.

But there are other ways by which employment practices can mutate, partly to ensure that employment falls beyond the regulator’s reach. The experience of the last 20 years is that as certain forms of precarious working relationship has been the subject of regulation, so others have emerged to take their place. The EU has regulated for part time work, it has regulated to address the abuse of fixed-term contracts and, most recently, as we have discussed it has (albeit inadequately) responded to the problem of temporary agency work. But there is now a new virus that will be much more difficult to address, this being the virus called ‘zero hours contracts’. Information about the prevalence of these arrangements attracted a great deal of publicity in the summer of 2013, when some effective journalism revealed failings on the part of the Office for National Statistics properly to account for the practice. The ONS had appeared grossly to underestimate the nature of the problem, as business after business was revealed to make use of such contracts.⁷² Located heavily in retail, hospitality and social care sectors, it is impossible to say how many people are employed on zero hours contracts, revised official now at 1.4 million, believed likely to be an under-estimate.

The controversy about these contracts was fuelled more recently by newspaper claims that the State-owned RBS was recommending the use of such contracts to its small business clients, on the ground

employers to take as a result of the recent changes to the enforcement of employment rights considered above. As was already discussed, these changes have priced the enforcement employment rights beyond the means of many workers, with vulnerable workers – such as agency workers – being likely to be among those most likely to be disadvantaged.

⁶⁹ SI 2010, No 93, Reg 6(2).

⁷⁰ Above n 21.

⁷¹ K D Ewing, “The Function of Trade Unions” (2005) 34 *Industrial Law Journal* 1.

⁷² *Guardian*, 9 March 2014. For a revised estimation from ONS, see *Guardian*, 1 May 2014.

that they are “ideal for employers whose businesses experience variations in demand”.⁷³ As the same newspaper correctly identified, what is involved in these contracts is the complete transfer of risk and responsibility from the employer to the worker, without the need to engage the services of a third party agency or labour supplier. The logic of the employer is why pay someone unless their services are formally required? This leads to arrangements whereby the employer directly retains a pool of workers (who may be required by the terms of the arrangement to provide exclusive service, and prohibited from working for others), and uses them only when work is available. These practices perhaps reflect the final commodification, in the sense that the worker is engaged ad-hoc only when labour is required, and paid only in return for the labour provided. There are no guaranteed hours, there is no regularity of employment, and there is no security of income. It is not surprising, then, that the average income of zero hours contract workers is below the average wage of both permanent staff and agency workers.⁷⁴

For employers, it is the ultimate flexibility, and for workers it is the ultimate insecurity. So far, as the regulatory framework is concerned, two questions confront these workers. The first question is the question of their employment status. Are they employees (and, therefore, covered by statutory minimum standards), or are they self-employed (and, therefore, largely excluded from such standards)? The problem here is that the employer is not required to offer work to the individual, and if work is provided, there will often be a term in the contract that the individual is not required to accept the offer of an assignment, if unavailable for any reason. It will, thus, be difficult for the labourer to say that there is a ‘mutuality of obligation’, which under English law is an essential precondition of having the status of an employee under a contract of employment.⁷⁵ Although the courts have expressed concern about what are no more than sham arrangements to enable employers to avoid obligations to the people they employ,⁷⁶ arrangements of this kind are, nevertheless, common and have even been used to defeat claims by labourers that they have been victimised for reasons relating to trade union membership.⁷⁷

More difficult, however, is the second question, which is that many employment rights have qualifying conditions that must be met, in particular that the employee must have been employed for a minimum period of time in order to be eligible for the benefit in question. This is not the case, of course, in relation to the national minimum wage, working time, or (now following the intervention of the CJEU) in relation to paid holidays. But in the case of other employment rights (such as those relating specifically to redundancy payments and unfair dismissal), there is a requirement that the employee should have been continuously employed for a period of what is now two years following recent Coalition-led changes.⁷⁸ Although legislation provides that various interruptions from employment (such as illness or maternity, as well as a host of others) do not break continuity of service,⁷⁹ an employee with an intermittent employment record as a result of engagement under a

⁷³ *Independent*, 7 April 2014.

⁷⁴ *Independent*, 9 April 2014. In addition, it is said that “more than three-quarters (76 per cent) of workers on zero-hours contracts in London and more than a half outside the capital earn less than the living wage which is currently fixed at £8.80 an hour in the capital and £7.65 elsewhere in the UK”.

⁷⁵ See *O’Kelly v Trust Houses Forte plc* [1984] 1 QB 90.

⁷⁶ See especially *Autoclenz Ltd v Belcher* above n 28. For comment, see A Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 *Industrial Law Journal* 328.

⁷⁷ *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505.

⁷⁸ In the case of unfair dismissal, the length of the qualifying period has fluctuated over the years, depending largely on the political complexion of the government in power at any one time. Labour governments have favoured six months to a year, while Conservative and Liberal Democrat governments have favoured two years. The last Labour government (1997-2010) reduced the qualifying period from two years to one year; the current Conservative- Liberal Democrat government reinstated the two year qualifying period.

⁷⁹ Employment Rights Act 1996, s 212.

zero hours contract is, nevertheless, unlikely to be able to satisfy a continuity of service requirement. This may be true even though the same employer may have engaged the employee in question for a number of years.

The widespread use of zero hours contracts in an abusive way, thus, presents a new regulatory challenge. Some commentators have drawn parallels with forms of employment that operated in a previous generation which, it had been thought, had been eradicated. The parallels were drawn in particular with the employment of dockworkers before the Second World War, when dockworkers would queue for work every day to be selected by the employer or his or her agent.⁸⁰ That practice was stopped by the introduction of the statutory National Dock Labour Scheme (since abolished) for the better regulation of working conditions. The challenge for trade unions today is to reproduce an effective regulatory framework in an environment where the voice and impact of trade unionism are much diminished since 1946 when the dock labour scheme was first introduced. The obvious regulatory solution is collective bargaining, which would accommodate the need for flexibility in a fair and structured environment. However, unlike in 1946 when collective bargaining density stood at 86 per cent, today, it is no more than 30 per cent and falling, being largely absent from the much of the private sector.⁸¹

There is no contemporary evidence to suggest that any future British government will confound the wishes of employers by engineering a restoration of the collective bargaining structures that were once prevalent in the United Kingdom, in common with much the rest of the EU.⁸² The United Kingdom was the first EU member state to construct sectoral bargaining machinery, and the first to dismantle it. As a result, the most likely regulatory solution to the zero hours contract problem will be another round of legislation, likely again to be imperfectly tailored to the nature of the problem, producing an ill-fitting suit that sags at some crucial points and reveals great gaps at others. The basic problem, of course, is that, like water, work is a scarce global resource which needs to be rationed, with a regulatory focus now on minimum hours as much as maximum hours.⁸³ To that end, it ought to be possible to require employment contracts to specify the guaranteed minimum number of hours on a weekly and/or monthly and/or annual basis, and to regulate for abuse by providing that

⁸⁰ S Milne, 'Zero-hours Contracts: in Cameron's Britain, the Dockers' Line-up is Back', *The Guardian*, 6 August 2013.

⁸¹ For an excellent account of the legal and political context of collective bargaining decline in the United Kingdom see A Bogg *The Democratic Aspects of Trade Union Recognition* (Hart, Oxford, 2009). For proposals to rebuild collective bargaining machinery, see K D Ewing and J Hendy QC, *Reconstruction after the Crisis – A Manifesto for Collective Bargaining* (Institute of Employment Rights, Liverpool, 2013). This decline in levels of collective bargaining coverage raises other questions about compatibility with the Declaration on Social Justice, given the undertaking made by states when adopting the latter to "the effective recognition of the right to collective bargaining". The problem of ZHC workers also reinforces the insight in the Declaration about the importance of collective bargaining as a means of promoting all of the four strategic objectives of the Declaration.

⁸² For an account of these structures, see Ministry of Labour, *Industrial Relations Handbook* (1961). There is now no Ministry of Labour and no representation of the voice of working people in government.

⁸³ For a precedent, see ILO Convention 47 (Forty Hour Week Convention, 1935), created in recognition of the fact that "unemployment has become so widespread and long continued that there are at the present time many millions of workers throughout the world suffering hardship and privation for which they are not themselves responsible and from which they are justly entitled to be relieved"; and that "it is desirable that workers should as far as practicable be enabled to share in the benefits of the rapid technical progress which is a characteristic of modern industry". Made in the aftermath of depression at a time of Keynesian expansion in many countries, this attempt to reduce working hours to 40 from 48 hours a week ("in such a manner that the standard of living is not reduced in consequence" (Art 1(a)) did not come into force until 1957 as a result of the low number of ratifications, by which time the reason for its existence had long since passed.

a worker may not be required to work more than a prescribed number of hours beyond the contractual minimum without penalty overtime rates.⁸⁴

It is unlikely, however, that measures of this kind will be adopted, with the Labour Party proposing a number of initiatives, one of which would be to remove the exclusivity requirement that prevents workers on zero hours contracts from being permitted to work for other employers.⁸⁵ But apart from serving to legitimise the illegitimate, such a move could be counter-productive, allowing courts to draw conclusions about zero hours contract workers being self-employed contractors providing labour services to a range of clients. Labour's other proposal appeared to follow the twisted logic of the Agency Workers Regulations 2010, by providing that workers on zero hours contracts will be entitled to be offered a standard hours contract after 12 weeks of employment on zero hours. But while this was better, it was most recently displaced by a much diluted commitment that will allow workers to request regular hours after six months and to be provided with regular hours after 12 months. It is unnecessary to say anything by way of comment, save that, "employers can already see ways to game these rules".⁸⁶

VIII

All of which brings us back to the *Bateman* case with which this soliloquy began. The segmentation, commodification and mutation identified above take place in the context of the disintegration of the standard employment relationship. The latter is, thus, being challenged by both internal and external threats, returning the law to a primitive era when what is now known as labour law was known as the law of master and servant, for good reason.

To this end, it should be emphasised that the *Bateman* case is not alone in exposing what might be described as 'master and servant clauses', so called because they enable the employer unilaterally to change the terms of the engagement. As already suggested, the same kind of term was to be found in the standard form contracts of another large employer, in this case British Airways, which claimed the power to make 'reasonable changes' to the terms of employment of cabin crew.

The problem erupted, there, in a case involving the reduction in the number of cabin crew on long haul flights leading to the intensification of work for the reduced crew.⁸⁷ It was held that even if the change was not reasonable, the court would not, in any event, grant a remedy to prevent the change being imposed. This was because the balance of convenience was 'strongly' against such a course,⁸⁸ on the ground that it would impose 'a quite exceptional burden' on BA in terms of cost, planning and reorganisation.⁸⁹

Problem compounded. Even if there is no right (of the employer), there is no remedy (for the employee). But this is by no means an isolated example of the capture of labour law and the betrayal of its historic purpose. Austerity has led to employers – mainly in the public sector – making changes to working conditions, in circumstances where the employer has omitted to impose

⁸⁴ K D Ewing, 'Zero Hours Contracts: Some Policy Proposals' (Institute of Employment Rights, Liverpool, 2013), where these core ideas are more fully developed.

⁸⁵ *The Guardian*, 8 September 2013.

⁸⁶ *The Guardian*, 1 May 2014. Government proposals are imminent. Labour has made it very easy for the government.

⁸⁷ *Malone v British Airways plc* [2010] EWHC 302 (QB), [2010] IRLR 32.

⁸⁸ At [32]

⁸⁹ At [31].

‘master and servant clauses’ in employment contracts. The normal rule in such circumstances is that no change can be imposed without the consent of the employee.

Yet, we find public sector employers imposing large-scale changes on thousands of employees, in the case of Birmingham City Council alone, the changes covering some 26,000 employees.⁹⁰ The various employers were able to do this by capturing and exploiting what had been designed as a protective redundancy consultation procedure introduced by the Collective Redundancies Directive,⁹¹ in what many saw as a cynical manoeuvre to drive through change.

Employers apparently with no intention of dismissing anyone for reason of redundancy, nevertheless, issued redundancy consultation notices to trade unions effectively to impose a timetable on consultations. The unions were, thus, consulting with a gun at their heads: either agree to change the terms and conditions of members (to their detriment) or risk the selective dismissal of their members who, in some cases, would be left to reapply for their jobs on reduced terms in a competitive process. The unions typically agreed to the changes.⁹²

In these ways, the standard employment relationship is being developed in a manner that suits the interests of employers, the law both facilitating the naked exercise of employer power and, inadvertently, providing procedural frameworks within which that power can be exercised. It is a short step from this to remove altogether the substantive rights that derive from the standard form contract, including the right not to be unfairly dismissed which, as we have seen, is being gradually removed by stealth.

This erosion of substantive rights is, however, an ongoing and dynamic process, as most vividly revealed by a study authored by a venture capitalist, commissioned by the Prime Minister’s Office in 2010. It was the view of Mr. Adrian Beecroft that if unfair dismissal law could not be abolished altogether, a new ‘no fault dismissal’ scheme should be introduced, enabling employers to dispose of workers who were allegedly under-performing at a minimum cost to the employer.⁹³ The proposal does not yet have enough political support.⁹⁴

IX

The problems of segmentation, commodification and mutation referred to above have been deliberately sandwiched in this essay between two slices of evidence that the standard employment relationship is disintegrating. **As the distinction between standard and non-standard employment begins to dissolve, the relationships from which employers are seeking to escape are becoming more like the relationships to which they are seeking to move.**

⁹⁰ G Gall, *Guardian CiF*, 7 July 2011.

⁹¹ Council Directive 98/59/EC of 20 July 1998, implemented in United Kingdom by Trade Union and Labour Relations (Consolidation) Act 1992, s 188 and following (as amended).

⁹² For a brief discussion of this process, see H Collins, K D Ewing and A McColgan, *Labour Law* (Cambridge University press, Cambridge, 2012) at 623-4.

⁹³ A Beecroft, *Report on Employment Law* (2011). For comment, see K Ewing, *Morning Star*, 24 May 2012, (‘24 pages of ideological poison’).

⁹⁴ According to the (Liberal Democrat) Secretary of State for Business, Innovation and Skills, “The UK already has one of the most flexible labour markets in the world . . . At a time when workers are proving to be flexible in difficult economic conditions it would almost certainly be counterproductive to increase fear of dismissal”: BIS, *Statement by Vince Cable on the Beecroft Report on Employment Law*, 21 May 2012..

The dispossession of workers' legal protection and the ineffectiveness of labour law are, thus, profound. Segmentation, commodification and mutation are symptoms and consequences of that ineffectiveness. Segmentation is caused by a failure to observe (i) the first principle of effectiveness to the extent that some workers have no rights, (ii) the second principle of effectiveness to the extent that different workers have rights of variable quality which, in some cases, are unable to meet the limited standards of the Declaration on Social Justice; and (iii) the third principle of effectiveness to the extent that workers lack the capacity or the same capacity to enforce their rights.

Commodification is a direct challenge not only to the principles of the ILO Declaration on Social Justice, but even more profoundly to the first principle of the Declaration of Philadelphia.⁹⁵ Commodification is to be seen in the explosion of agency work and the use of zero hours contracts, which appear to be growing out of control, like a virus exploiting the lack of any form of medical intervention. As such, commodification is a direct result of labour law's ineffectiveness, a consequence of the failure to ensure the robust application of the first principle that labour law should be universal in its scope, a failure clearly revealed by the *James* case (above), the TAW Directive, and the Agency Workers Regulations.

Although commodification is mainly about the failure of the first principle (the denial of some workers any protection), it also leads to a failure of the second in the sense that this extreme form of commodification leaves workers with few rights, and certainly without rights that would meet the expectations of the Declaration. To the extent that rights have been created by legislation, these were accompanied by measures that enable employers to escape the regulatory framework in what could only be described as a carefully constructed attempt to create by legislation a form of labour protection that would be ineffective. Ineffectiveness has been a deliberate policy choice, about to be repeated in relation to ZHCs.⁹⁶

Mutation is, likewise, a symptom of ineffectiveness, in the sense that it allows employers to develop practices that escape the regulatory framework as a result of the lack of comprehensiveness of labour law's scope (principle 1), enabling these employers to make little commitment to substantive terms and conditions (principle 2), leaving workers with few rights to enforce, but in many cases without the means to enforce these rights (principle 3). The main issue of ineffectiveness here, however, is almost certainly the lack of universality that enables employers to take advantage of gaps that governments are largely unwilling to close, even when publicly exposed.

Yet, while segmentation, commodification and mutation reveal clear evidence of ineffectiveness, cases like *Bateman* and *Malone* reveal an even more worrying sign of a different kind of ineffectiveness. Here, the focus is not so much with labour law's scope (principle 1), as it is with its failure to constrain the nature of employer power (principle 2), or to enforce contracts where their terms have been breached (principle 3).

X

The Declaration on Social Justice is an important document that commits governments to various forms of action to put decent work at the centre of economic and social policies.⁹⁷ Integral to one of the four strategic objectives for the development of this agenda is the idea of effective labour law.

⁹⁵ 'Labour is not a commodity'. Compare K Marx above n 53.

⁹⁶ This point is pursued more generally in K D Ewing, "Future Prospects for Labour Law – Lessons from the United Kingdom" in J Riley and P Sheldon (eds), *Remaking Australian Industrial Relations* (CCH, Sydney, 2008).

⁹⁷ ILO Declaration on Social Justice for a Fair Globalisation (2008) Part IIB.

As already suggested, this is an interesting and intriguing idea, and one that demands more attention and fuller treatment than has been possible here, the preliminary inquiry above having identified three basic principles of effectiveness.

But even if we take the idea at the most elementary level proposed above, it is clear that in the United Kingdom at least, it is an idea that is not respected. Apart from the exclusion of many workers from labour law protection, perhaps the most visible illustration of this relates to recent steps to charge what appear to be prohibitively high fees for the enforcement of employment rights. This lack of respect is important not just because of the consequences for workers affected, but even more fundamentally from the lawyer's perspective because it reflects a failure on the part of government to comply with undertakings solemnly undertaken.

Moreover, in 2008, ILO Member States did not simply commit themselves to follow a series of optional principles and random strategic objectives when they adopted the Directive. It also committed them to methods of implementation that would impose obligations on the ILO as an organisation, as well as on member states individually.⁹⁸ Although, no doubt not on the radar of most governments at the moment (if ever in recent times), the Declaration makes clear that Members "have a key responsibility to contribute, through their social and economic policy, to the realisation of a global and integrated strategy for the implementation of the strategic objectives", which encompass the Decent Work Agenda.

And while making clear that it is up to each Member State to determine how to discharge its responsibilities (in consultation with the social partners), they are each urged to consider taking seven different initiatives for this purpose. It is the responsibility of labour lawyers to be informed about these obligations and to remind governments that they were voluntarily accepted at the time the Declaration was adopted. Having made these commitments, governments have a duty to comply with them, the first being "the adoption of a national or regional strategy for decent work", aimed at "targeting a set of priorities for the integrated pursuit of the strategic objectives".⁹⁹

If anyone is reading this, they may like to ask just what steps are being taken by their own national government to this end, the obligation of not being to select one or two aspects of the agenda (such as job creation), but all aspects, including the development of an effective labour law. Although not defined, it would be a good start for national governments to develop their own understanding of the term, and to do so in consultation with the social partners, as the Declaration appears to require. At the risk of repetition and of sounding platitudinous and trite, an effective labour law is surely the first step in regulating for decent work.

This paper is based on a presentation at the Second New Zealand Labour Law Society Conference, "Regulating for Decent Work", at AUT University on 22 November 2013.

My thanks to Pam Nuttall and her colleagues for inviting me to speak at the event.

⁹⁸ Part IIB.

⁹⁹ Ibid, Part IIB(i).

Precarious Work – New Zealand Experience

MARGARET WILSON*

Introduction

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

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

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

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

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

Research

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

The NZCTU Report also recommended stronger legal protections including:⁵

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

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

In this study employees in non-permanent, low paying, poorly supervised forms of work with unequal employment relationships reported that they experienced their form of work as precarious; more women than men reported their work as precarious.

Some employees in the cases studied were prepared to enter casual or temporary employment under a variety of terms to meet their needs.

² As above.

³ ACTU "Lives on Hold: Unlocking the Potential of Australia's Workforce" (2012) <www.actu.org.au>.

⁴ OECD "OECD Employment Outlook 2013" (2013) <www.oecd.org> at chapter 2.

⁵ NZCTU above n 1 at 1.

⁶ Web Research "Report of Exploratory Case Study Research into Precarious Employment" (June 2004) Department of Labour <www.dol.govt.nz>.

Employees reported that they experienced their form of work as precarious when they felt that:

- they were not getting a fair day's pay for the fair day's work they undertook
- they were not treated fairly at work
- that they were not able to earn enough to live as they aspired even if those aspirations were modest
- they were afraid that their family could not survive, or was suffering, because of the state they were in considering their work and home lives.

The formal legal basis of their employment was not a significant factor in their perception of their precariousness.

Where we found work that was precarious we also found people with little or no labour market power, powerful employers, an absence of bargaining, low knowledge of employment relations, no access to information about employment, low wages, unsociable hours and reduced participation in family and economic life.

The impact most frequently reported to us by people in precarious work was their lack of participation in the lives of their children.

More employees in this study reported that they felt overworked or underpaid or were dissatisfied with their employment than reported that they experienced their work as precarious.

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

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

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

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

⁷ At 1.

New Zealand Legal Framework

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

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

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

The political argument in New Zealand⁹ that labour markets must be deregulated to promote economic growth, productivity and jobs was consistent with that used by all western governments that pursued the neo-liberal agenda. At the time of restructuring the economy in the 1980s and 1990s, there was an increase in unemployment. The promise of jobs through greater labour market flexibility was, therefore, attractive. What were never discussed in any detail were the type of new jobs that were being created and the social and economic consequences of removing employment rights and protections from individual employees and their representative unions. The evidence would suggest that precarious jobs are now seen as a necessary and integral

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

part of the neo-liberal economy. Davies and Freedland¹⁰ noted in their analysis of flexible labour market regulation that:

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

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

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

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

¹⁰ Paul Davies and Mark Freedland *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford University Press, Oxford, 2007).

¹¹ At 223.

¹² OECD “OECD work on Income Distribution and Poverty” (2011) <www.oecd.org>.

¹³ Max Rashbrooke (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, Wellington, 2012).

¹⁴ Penelope Brook *Freedom at Work: The Case for Reforming Labour Law in New Zealand* (Oxford University Press, Oxford, 1990) at ix.

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

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

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

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

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

Role of the Courts

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

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

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

¹⁶ An analysis of the various tests developed by the courts prior to the Employment Contracts Act is found in A Szkat's *Law of Employment* (3rd ed, Butterworths).

¹⁷ (Employment Relations Act 2000, s 6 (3) (b)). Employment Relations Act 2000.

¹⁸ ILO Recommendation R198, clause 9 <www.ilo.org>.

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

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

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

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

¹⁹ See (2011) 36(3) NZJER for an account of the Hobbit saga from all perspectives.

²⁰ *Bryson v Three Foot Six Ltd* [2005] NZSC 6.

²¹ See Pam Nuttall, “Where the Shadows lie”: Confusions, misunderstanding, and misinformation about workplace status” (2011) 36(3) NZJER 73 for analysis of the legal implications of the Hobbit Amendment.

²² Helen Kelly “The Hobbit Dispute” (2011) 36(3) NZJER 30.

²³ Employment Relations Act s6(1)(d)(i) & (ii) and s 6(7).

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

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

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

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

Recent Case Law Relating to Precarious Work

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

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

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

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

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

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

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

²⁵ *New Zealand King Salmon Co Ltd v Cerny and Moretti* [2012] NZEmpC 195.

²⁶ *Terranova Home & Care Ltd v Faitala and Goff* [2013] NZCA 435.

²⁷ *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225.

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

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

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

Alternative Approach to Regulation

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

²⁸ *Baker v St John Central Trust Board* [2013] NZEmpC 34.

²⁹ *Muldoon v Nelson Marlborough District Health Board* [2011] NZEmpC 103.

³⁰ *Rush Security Service Ltd v Samoa* [2011] NZEmpC 76.

³¹ *Hill v Workforce Development Ltd* [2013] NZERA 65.

³² *McDonald v Ontrack Infrastructure Ltd & Allied Work Force Ltd* [2010] NZEmpC 132.

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

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

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

Conclusion

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

³³ Professor Keith Ewing “Zero-hours Contracts: Some policy proposals” (13 August 2013) The Institute of Employment Rights <www.ier.org.uk>.

³⁴ Mark Harvey “Economies of Time: A Framework for Analysing the Restructuring of Employment Relations” in Alan Felsead and Nick Jewson (eds) *Global Trends in Flexible Labour* (MacMillan Business, London, 1999) 21.

Antipodean Aspirations and the Difficulties of Regulating For Decent Work Now and Then?

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Abstract

Currently, the NZCTU is waging a number of campaigns for decent work. There is a view that the Industrial Conciliation and Arbitration (IC and A) Act, instituted in 1894, achieved decent work before the 1991 Employment Contracts Act deregulated workplaces and industrial relations. In this paper, I give a more nuanced overview of the IC and A Act's implementation, questioning the extent to which most workers in New Zealand were regulated before 1936, and indicating the ways in which universal 'decent or fair wages' were aspirational. For some time after 1936, too, regulation for women, for instance, meant being paid less than men for the same job and ranking female-dominated occupations as inferior in skill and, therefore, wages to male-dominated occupations. The story about decent work for marginal workers – some women, Māori, Pacific, young, old and those working for small workplaces – differs from the standard story for skilled, unionised male workers.

Introduction: Contemporary CTU Campaigns

At the 2013 New Zealand Labour Party conference, Helen Kelly, President of the New Zealand Council of Trade Unions (CTU), discussed the CTU's various workplace campaigns: Forestry Safety, the Living Wage Campaign, the Fairness at Work Campaign and the Campaign on Insecure Work. Its campaign for greater workplace safety was in the wake of corporate and regulatory failures in mining which led to the 29 men dead in the Pike River coal mine disaster in November 2010, but was further inspired by eight deaths in the forestry industry in 2013. The CTU estimated that 570,000 workers out of the total workforce of 2.2 million were employed in one of the five industries with the worst health and safety records: agriculture, forestry, fishery, construction and manufacturing. The CTU's living wage campaign aimed to raise minimum wages for the lowest paid workers to 66 per cent of the average ordinary time wage. The CTU estimated that 573,000 workers earned less than the living wage and raising minimum wages was an attempt to 'raise the floor' and reduce poverty. Its campaign on insecure work and fairness at work targeted the 635,000 or 30 per cent of New Zealand workers, perhaps as high as 50 per cent of workers, in insecure work; including the 192,000 in temporary employment, the 95,000 workers with no usual work time and the 61,000 with no written employment agreement (CTU 2013a). More generally, and from the introduction of the Employment Contracts Act in 1991, the CTU waged a work rights campaign for industrial law and practice ensuring workers' rights to union representation, collective bargaining, equal pay and sharing productivity profits (CTU, 2013b). This was sometimes characterised as a wish to 'turn back' to the 'glory days' before 1991. By 2013, however, the CTU, of course, was not the only group concerned about health and safety, living wages and the workers' rights to secure work.

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The Royal Commission on the 2010 Pike River Coal Mine Tragedy's report, released in October 2012, identified a range of problems with the regulatory environment for workplace health and safety. The Commission recommended that, to improve New Zealand's poor record in workplace health and safety, a new Crown agency focussing solely on workplace health and safety should be established. The 2010 Commission also called on the Minister of Labour to establish an Independent Taskforce on Workplace Health and Safety, and required it to report back to the Minister on the organisational design options for a health and safety regulator. In turn, the Independent Taskforce, which reported in April 2013, identified that each year over 100 New Zealanders died from workplaces accidents. It also reckoned that between 700 and 1,000 other people died as a result of gradual work-related diseases. The Taskforce said New Zealand's workplace culture, with its "high level of tolerance for risk, and negative perceptions of health and safety, Kiwi stoicism, deference to authority, laid-back complacency and suspicion of red tape" affected "behaviour from the boardroom to the shop floor" (Independent Taskforce of Workplace Health and Safety, 2013:31). The Ministry of Business, Innovation and Employment (MBIE) took over workplace health and safety responsibilities from the former Department of Labour in 2012. A stand-alone regulatory body, WorkSafe New Zealand, with a focus on occupational health and safety was established in December 2013, aggregating responsibilities which had been distributed among various bodies including customs, the ministries of Transport, Health, and Business Innovation and Employment, the Civil Aviation Authority and Maritime NZ and "multiple pieces of legislation" (Parkes, 2012: 5). The Taskforce suggested that New Zealand's workplace injury rates were about twice that of Australia and almost six times that of the UK (Lilley, Samaranayaka & Weiss, 2013). Indeed, the Australian model was invoked, especially Australia's tripartism and legal framework. The government set itself the target of changing the workplace culture and reducing workplace deaths and serious injury rates by 25 per cent by 2020, by means of WorkSafe NZ collaborating with workplaces and assisted by new regulations.

Unions joined other groups in a second decent wage campaign in 2012. In April 2012, the Service and Food Workers Union called the first meeting and, with support by more than 50 mostly community and religious organisations, began a 'living wage' campaign, which followed the similar overseas campaigns in the UK, the US and Canada. The Living Wage Aotearoa New Zealand Campaign commissioned a report by the Family Centre Social Policy Research (FCSPRU) to provide an empirical basis for determining the level of a living wage for New Zealand in 2012 (King & Waldegrave, 2012). The idea was that minimum wage legislation would combat poverty in New Zealand. The campaign was inspired by calls to cut the youth minimum wage in 2012 to a lower 'starting-out wage' in an attempt to lower youth unemployment rates. The Minister of Labour, in a periodical review of the minimum wage, took advice from his officials, including submissions by Business NZ and the CTU, and raised the adult minimum wages slightly. The CTU submission had recommended that the minimum wage be raised substantially to 66 percent of the average ordinary time wage, from \$13.50 to \$18.40 an hour (CTU, 2013c). A significant part of the CTU argument was that the New Zealand minimum wage was only 74 per cent of the Australian federal minimum wage and only 60 per cent for casual workers. A large part of the differential, it is argued, was that Australia had maintained an award and national minimum wage order system. The NZ Public Service Association called on the government, as the country's largest employer and funder of public services, to take the lead and to provide a living wage to its employees. Controversially, the Wellington City Council adopted a living wage policy in order to reduce poverty and lift workplace morale and productivity (Dominion Post, 2013).

The CTU's third campaign was more of its own making, marked by the research towards and publication of its report, 'Under Pressure' in October 2013 (CTU, 2013a). By then, however, a number of commentators had also begun to consider 'workers on the margins'. Cybele Locke, for instance,

examined those workers in “low-wage, temporary, casualized or part-time [work]... unemployed or underemployed, or engaged in no-wage work (household labour or voluntary work” (Locke, 2012). She estimated that “by the beginning of the twenty-first century over half of New Zealand workers were in part-time, temporary, subcontracted or outsourced work. Many experienced poor working conditions with no labour protections. The workforce had changed radically since the mid-twentieth century” (ibid). She argued, as did the CTU, that the economic downturn from 1966, and the abandonment of full employment in 1984 and market reforms were significant turning points in the marginalisation process.

Implicit in this social commentary was the idea that, once, New Zealand’s industrial system and its health and safety provisions were world class. Recently, there has been a range of indications that New Zealand has a poor workplace relations and health and safety record compared to other advanced countries. The assumption is that, earlier, New Zealand legislated and provided for uniform, decent wages and conditions, which were lost in late 20th century system reform and market forces (Stock, 2007).

Idealising New Zealand’s Industrial System?

Indeed, New Zealand (and Australia) had a unique arbitration system for nearly a century. The New Zealand Act was repealed in 1973; its descendent compulsory arbitration aspects ended in 1984 in the private sector and in 1988 the public sector. The Employment Contracts Act 1991 ended other important aspects of the industrial relations system: trade union registration, compulsory union membership and the award system. There have been a number of accounts of aspects of arbitration over time but few comprehensive overviews. Most accounts of the arbitration system are empirical and consider the compressed wage structure and relatively high degree of uniformity in wage rates it effected for particular periods for particular groups (Holt, 1980; 1986; Rowley, 1931). Some historians have focussed on contentious moments, such as strikes in 1912, 1913, and 1951 when militant unionists attacked ‘labour’s leg-iron’; others consider periods when employers sought to end the system, as in 1928, while others have considered when the system was abandoned as in the depression, 1932-1936 (Holland, 1912; Martin, 1994). In 1994, the Trade Union History Project marked the centenary of the IC and A Act 1894, which established the arbitration system in New Zealand, by the publication of a book assessing trade unions’ and historians’ experience of the arbitration system (Walsh, 1994a). It argued that arbitration was the central social institution distinguishing New Zealand for most of the 20th century. Subsequently, Peter Beilharz (2014) argued that arbitration was a distinctive innovation that involved the antipodes’ greatest social thinkers.

Despite its seeming advantages, the industrial system was abandoned. Carlyon and Morrow (2013) have examined what they argue as the role of minorities in effecting change in society more generally from a highly regulated postwar New Zealand. Certainly, some non-militant unions considered the protections afforded to them to be their lifeline (Nolan & Walsh, 1994). In the postwar period, however, governments as well as employers and some unionists came to resent the egalitarian wage structures the system generated and its rigid nature to such an extent and sufficiently coordinated to support and effect a “slow walk away from the arbitration system” (Rosenberg, 1970; Walsh, 1994b).

In passing, the ‘centenary book’ pointed to the problem of idealising or romanticising the arbitration system before 1991. First, it took much longer to implement the arbitration system than it is sometimes portrayed in accounts. Although the system was first legislated for in the 1894, most workers in New Zealand were not included in the system until 1936. Moreover, the ‘golden age’ accounts largely overlook the labour market disadvantage of “women, Māori, Pacific Island and other low-income

workers” (Nolan, 2011). In this paper, I consider the process of legislating and providing for decent wages and conditions and the arbitration system in its infancy and adolescence (Burton, 1995; Hancock, 2013). I argue that large numbers of New Zealanders for much of the ‘arbitration’ century had poorer employment conditions than the arbitration standard and the Higgins measure of decent wages. Regulating for universal decent wages and conditions was not achieved even under the best arbitration conditions.

Legislating for Decent Working Conditions and Defining Antipodean Values

The contemporary CTU campaigns discussed above were, indeed, mirrored a century earlier by a range of similar union and social campaigns. Three conspicuous campaigns led to significant industrial legislation:

1. The eight hours movement;
2. The anti-sweating movement and the demand for protective labour legislation; and
3. The arbitration movement and the demands that lead to the benchmark in industrial law, the Harvester Judgment of 1907.

A number of historians have considered the resulting maximum hour regulations, minimum wage laws and compulsory arbitration procedures (Pember Reeves, 1902; Coleman, 1987). They are mainstays for what is described as an ‘Antipodean settlement’ (Macintyre, 1987; Macintyre & Mitchell 1989; Goldfinch & Mein Smith, 2006).

1. Eight hours Movement

English cotton manager and part owner of mills, Robert Owen, supported a ten-hour day in 1810 and an eight-hour day in 1817, ‘eight hours labour, eight hours recreation and eight hours rest’. It is legendary that Samuel Parnell insisted on working no longer than eight hours when erecting a store for the merchant George Hunter in Petone in 1840 at the time of Wellington settlement. The shortage of skilled labour saw Hunter having to accept Parnell’s terms, with eight-hour days becoming widespread among skilled workers particularly in local construction. Similarly, the Otago Association had promoted Dunedin settlers an eight-hour day as part of its new world vision. The eight-hours movement, spread through settlements, as it did across the Tasman. Victoria instituted the first piece of legislation in 1856 (Simpson, 1997). By 1875, the *Official Handbook of New Zealand* was attempting to lure new immigrations with the statement that in “all mechanical trades, and for labourers in general, the standard day’s work is eight hours” (Vogel, 1875).

There were demonstrations in support of an eight-hour law beginning in Auckland and Dunedin in 1882. Matthew Green began introducing eight-hours bills in parliament in 1882, 1883 and 1884. The Maritime Council instituted a “general holiday” or Demonstration Day in 1890, on the anniversary of its formation on 28 October 1889. Parnell led the Wellington procession. Premier Richard Seddon’s response to the 1898 Trades and Labour Council’s criticism of the Lib-Lab Federation and its failure to deliver for working people was to institute an official Labour Day holiday to celebrate the achievement of an eight hour working day from 1899 (Roth, 1990; 1991).

2. Anti-Sweating Movement

In the early 1870s, Waikaia MP, James Bradshaw, championed factory legislation to combat the effects of New Zealand's nascent industrialization – the long working hours, poor conditions and under-employment resulting from the free play of the market forces. Parliament, subsequently, passed its first protective labour legislation for women, the Employment of Females Act 1873. However, by regulating factory working hours for women, the Act introduced the principle of differential state intervention. Further legislation in the 1870s and 1880s broadened the Act by regulating child labour as well, since neither women nor young people were believed capable of combining together “as workmen do in their trades union, to protect themselves and limit the hours of labour” At the same time, economic depression was intensifying calls by organised labour for more state intervention to deal specifically with cheaper female and boy labour because it was displacing adult males or undermining their earning capacity (Appendices to the House of Representatives, 1878; Salmond, 1950; Biggs 1990; 1991).

By the end of the 1880s, a particular hue and cry had developed over the unwholesomeness of women's working conditions in the clothing industry. Their low pay and long working hours were regarded as ‘sweated labour’. Attention focussed on urban areas where there was a higher proportion of women and greater industrialisation: 27 per cent of Dunedin's workforce was employed in the clothing industry, which was 80 per cent female. The furore over ‘sweating’ resulted in the formation of tailoresses’ unions, a commission of inquiry, and demands for further factory legislation and regulation of women's work (Richardson, 1881; Royal Commission on Sweating, 1890; Duncan, 1989; Bassett, 1990).

There was an avalanche of Liberals’ protective labour legislation between 1891 and 1912 (New Zealand, 1909). One theme of this regulation was prescribing when women could work and for how long. The 1891 Factories Act led to alterations and improvements to alleviate overcrowding, and to provide sanitary facilities (which employers had avoided because standards had not been defined in earlier legislation). It redefined the term ‘factory’ to include smaller workplaces and created a new factory inspectorate. The legislation banned night work for women (and boys), restricted their overtime, and required them to take regular meal breaks. Concerns over maternal health were behind the stipulation in the Shops and Shop Assistants Act 1892 that seats were to be provided for female employees and the requirement in its 1894 amendment that the seats were to be used at ‘reasonable’ intervals to avoid fallen wombs (*lapsus uteri*), varicose veins and ‘irregularities’ (*amenorrhoea*). Amending legislation in 1905 limited women's hours to 6pm on four nights and 9pm on the fifth in the major centres and 7pm and 9pm in smaller centres. Girls had a higher minimum commencing age for indenture than boys, which prevented them from becoming apprentices. Work immediately after confinement was also prohibited. Under the Factories Act 1901, women were not to be employed in a factory for the four weeks after giving birth. At the other end of the age scale, gender differentials in superannuation were also introduced. Thus, women's working life was seen as being shorter than men's; women worked shorter hours when they were in employment and earned, on average, less than half the male wage rates (Nolan, 2000).

A second legislative theme was to deem certain tasks too heavy, too dirty or too dangerous for women. Under the Factories Act 1891, women were protected from some of the dirtiest factory work. Girls were not to work on wet-spinning or where there was steam. Boys and girls were prohibited from hazardous tasks, such as silvering mirrors using mercury, dipping lucifer matches, dry-grinding in the metal trades and melting glass. Work involving gas, brine and salt was also specifically closed to girls. There were restrictions on boys and females undertaking the cleaning, lubrication and examination of moving machinery parts, and only males aged 18 and over were allowed to be in control of boilers and machinery.

A third aspect of the legislation directly excluded women from “unsuitable” occupations. The Coal Mines Act 1886 specified that “[n]o female of any age, and no male child under the age of twelve years, shall be employed in any capacity in or about any mine”. Parliament was told that in New Zealand, while “the wages of men were so good”, there could be no occasion “that women and children should be employed in such work”. This was a preventative rather than a remedial measure, as no women were employed in New Zealand mines at the time. The Liberals did not repeal this legislation. Indeed, it moved to exclude women from serving in bars also. It was accepted that women could do the job, but that they ought not to. With much fanfare, members of Parliament decided in 1910 to ban barmaids in the future. Some continued to ply the trade, having being employed as barmaids before 1911 or as publicans’ wives, but, supposedly for their own good and the community’s well-being, no women could enter the trade between 1911 and 1961. Over time this legislation was extended (Equal Pay Commission, 1971). This left men’s conditions worse than women’s but they were considered able to unionise to improve them whereas women could not.

3. *Arbitration Movement*

In 1886, Joseph D. Weeks made one of the first general calls for permanent boards of arbitration in which employers and employed were equally represented and presided over by an “disinterested umpire” to determine industrial conditions nationally (Weeks, 1886). Weeks cited precedents in the guild tribunals, *Conseils des prud’hommes* in France and Belgium and a successfully operating board of arbitration in the English Nottingham hosiery and glove trade, which had been formed in 1860. The Knights of Labour popularised arbitration internationally in 1886-1887 arguing for legislation. In 1887, an earlier Christchurch union changed its name to ‘The New Zealand Knights of Labour’. While the Knights of Labour were a wide-reaching movement, Robert Weir (2009) concludes that the movement achieved its greatest success in New Zealand where more than two dozen Knights were elected to Parliament, and where it enacted most of its political and social platform. So, while Jim Gardner discusses the 1890 House of Commons arbitration bill, he considers the “intellectual property” in Australasia, which was translated into successful bills, quite separate (Gardiner, 2009). William Pember Reeves, New Zealand Minister of Labour, strongly supported compulsory arbitration. He based his successful bill on Charles Kingston’s South Australian bill, with the former ‘beating’ the later to the statute books. Reeves argued that arbitration

would never put an end of labour troubles; but it would ... put a stop to these disruptions of industry by which factories are closed, enterprise checked, work stopped and misery and desolation brought into hundreds and perhaps thousand of homes” (as cited in Holt 1976; 1986)

In Australasia, the Harvester Judgment is regarded as the epitome of the arbitration system, establishing the benchmark for decent wages in a civilised community. As James Holt has argued, “it is more difficult to judge how the unions benefited or failed to benefit from the Court’s policies on wages, hours and conditions” because the New Zealand Arbitration Court “did not announce what its policies were” (Holt, 1980). Moreover, each award dealt with a particular occupational group in a region. By contrast, the Australian Commonwealth Conciliation and Arbitration Court handed down substantial judgments. The New Zealand court piggy-backed on the Australian decisions and, notably, the ‘ethos’ of Harvester and a decent minimum wage were Australasian.

On 8 November 1907, Justice Henry Bournes Higgins, the President of the Commonwealth Conciliation and Arbitration Court, handed down the decision that has come to be known as the Harvester Judgment, from the name of the agricultural machinery manufactured by H.V. McKay. It established a male living

wage that had to be “fair and reasonable”, sufficient to support as “civilized beings” in a standard of living appropriate to a “civilized community”. When Harvester and the living wage are invoked, so too are ‘national values’ as, indeed, occurred at the centenary symposium – The Living Wage and National Values: Remembering Harvester, 1907-2007 – at the University of Melbourne in 2007. The living wage provided a basis for social justice. Francis G. Castles has written a detailed history of the emergence of the male wage earners’ countries – that is, the Australasian wage earner’s welfare state, which embraced protection for white workers in paid employment: tariffs, centralised and compulsory wage-fixing, constrained immigration, and a residual welfare system (Castles, 1985). It was “residual” welfare (as opposed to “universal”) in that the unique compulsory wage-fixing system delivered social protection through a minimum living wage, a relatively egalitarian and compressed wage structure with a high degree of uniformity in wage increases, and a relatively high standard of living.

A number of historians have considered the Lib-Lab’s ‘social contract’ at the turn of the 20th century more broadly. It was a social contract developed upon the basis of a social consensus over continual progress, class harmony and egalitarianism. James Belich and others discuss the “Populist New Zealand compact”. In Australia, this was known as the “Deakinite settlement” until Paul Kelly popularized it as the “Australian settlement” (Belich, 2001; Kelly, 1992; Beilheiz, 2014). Critiques have challenged the degree to which this settlement was unchanging and pointed to the renovation of the settlement in the 1940s and subsidiary aspects (Rowse, 2002; Beilharz, 2008), but common to all versions is the idea that conflict was assuaged by a social consensus over protective tariffs, a residual welfare state and centralised and compulsory wage-fixing.

Realising Laws and Analysing Legislation?

Too few consider the extent to which aspirations and legislation were realised universally. We need to consider the extent to which the eight hours movement, protective labour legislation and arbitration were put into effect. We need to examine the extent to which, and for whom, the ‘deal’ contained in the social contract was applied.

1. Short hours were not universal

OECD figures suggest an even pattern of reduction of working hours per worker internationally from 59 in 1871 to 41.7 in 1981 (OECD, 1985; Cross 1989; Roediger & Foner 1989). Certainly, the IC and A Act 1894 *started* to introduce the 48 hours working week in New Zealand. Bert Roth noted in 1966, however, that “while New Zealand was thus the first country in the world to adopt the eight-hour day, the custom was confined to tradesmen and labourers and lacked legislative sanction” (Roth 1966). The reduction was staggered: the Factories Amendment Act of 1936 fixed a forty-hour week in factories but exemptions were granted until another amendment in 1945. The Shops and Offices Amendment Act 1936 reduced the working hours from 48 to 44, and reduced further in two steps in 1945 and 1946 to 40 hours with Acts providing the same for seamen in 1947 and restaurant workers in 1948 and so on. While hours were stipulated, workers could work ‘overtime’, however, under penalty pay provisions.

For many achieving the half-holiday Saturday was a critical reform. Two weeks’ annual holiday was provided by the 1944 Annual Holidays Act; the 1955 Public Holidays Act ensured uniformity in public holidays, and in 1973, Waitangi Day was added. The 1981 Holidays Act provided for 11 statutory holidays and three weeks’ annual leave. Certainly ‘The Great New Zealand weekend’ was emphatic from the 1930s to the 1970s in paid work until shops were able open again on Saturdays under the Shop

Trading Hours Amendment Act 1980 and Sunday trading was allowed from Christmas 1989. But many of those in agriculture, forestry, fisheries, construction and manufacturing had longer hours, sometimes covered by overtime; and then there were the self-employed and those working in the home who remained unregulated.

2. Protective Labour Legislation

Protective labour legislation continued to be generated throughout the 20th century. Bradshaw's 1871 Act has been described, however, as "preventative rather than remedial" (Martin, 1996; 1997). The evils it addressed appear to have been potential rather than actual. Women did not constitute much more than a quarter of the industrial workforce at their peak. Indeed, the proportion of female labour in registered factories dropped from 26.5 per cent of the total in 1895-6 to 21.5 per cent in 1912-13 (AJHR, 1913). While numbers increased during war, women did not increase beyond the 1895-6 proportion. Up until World War Two, most of the female labour force continued to be employed in domestic work, which was noted for its lack of organisation. Slowly, women moved into commerce, but even there they were scattered in small workplaces – environments not conducive to unionisation or regulation. More importantly, young women were in the workforce for only a short time, leaving paid for unpaid work.

Of course there were attempts to have the 'decent conditions' of female labour extended to men, and those attempts are instructive. Edward Tregear, the Secretary of Labour, believed that the Factories Act 1891 was only a partial measure because it did not 'meddle' with the working conditions of adult men. He argued that men should have more protection; at the very least, an Act was required to limit the hours worked by both sexes. Matters came to a head in 1901 over the Factories Bill. Previous legislation had regulated the hours of only women and children, in keeping with the original ethos of protective labour legislation (Tregear, 1906). Yet, the government's initial 1901 bill, which Tregear shepherded, did not differentiate on the basis on sex. Instead, it attempted to regulate the hours of women and men equally. A storm of protests broke out over this extension of the protection principle to men. Seddon commented that the bill had received more attention than any other for which he had moved a second reading. In reply, Seddon claimed that the wording of the bill had been changed (from 'women and children' to 'person') without his approval. He affirmed that the Act would limit women to 45 working hours a week, except in woollen mills where they were allowed to work the same hours as men. Blaming his officials (that is, Tregear) for the 'error', Seddon put back the clauses specifically protecting women. The attempt to introduce gender-neutral protection had failed (New Zealand Parliamentary Debates, 1901). The failure is important because it runs counter to the agenda of equality that the Liberals promised to implement when elected with massive popular support in 1890. It is also an example of Labour Department zeal being tempered by political considerations.

Hence, the Liberals' programme of protective legislation was inconsistent and patchy, and its results were less impressive than the rhetoric of its implementation. The state did not interfere with domestic service, still the largest paid occupation for single women, at least until World War Two, although it did regulate the fees private registry offices could charge. Nor did it interfere with women's unpaid domestic employment, which was larger still. To do so would have been political suicide, and an administrative nightmare. When it came to domestic work, middle-class, trade union and feminist reformers were pitted against a vigorous doctrine of laissez-faire and opposition (Olssen, 1980). Indeed, most of women's paid work was not regulated by the state until the first Labour government, 1935-1949. It was not until 1936 that clerks, for example, had even a regulated minimum wage and a classification system (Roth, 1986).

It is interesting to consider why so much legislation was directed at new occupations that were in the public view. The most advanced and largest worksites boasted good conditions. Most workers were employed in small business which the Department of Labour inspectorate struggled to regulate and 'nurse'. In 1945, Miss J.R. Menzies was the first person to be appointed as a Nurse Inspector for Industrial Hygiene, and joined factory and shop inspectors. In March 1990, the Department of Labour employed 84 inspectors of factories, 29 construction safety inspectors, 10 bush inspectors and 14 explosives and dangerous goods inspectors (Auckland Star, 1945; NZOYB, 1990).

3. *Arbitration*

Perhaps, most striking was the extent to which the range of conditions existed under the arbitration system. The ethical centerpiece of arbitration, the Harvester Judgment, was aspirational not universal in three respects.

First, most workers were simply not included in the arbitration system until at least after 1936. Arbitration covered skilled workers mostly. There were breaches of awards, or enforcement cases as they were known, moreover, which involved evasions of awards. The more important and more contentious level of exemption, however, was occasioned by the Court's refusal to make an award. The Court refused to bind local bodies to awards because their workers were employed other than for the direct or indirect pecuniary gain of the employer. The Court refused to make awards for domestic workers and farm workers because they largely consisted of family or seasonal workers, and board or lodgings and other necessities of life were provided, and the need to provide a living wage was deemed to be irrelevant (Nolan, 2009). Whether occupations could be defined an industrial or not was the crux. Non-industrial workers, including those working in family business, had poorer conditions.

Research has suggested, secondly, that most unskilled labourers did not receive a basic wage sufficient to support a family of five in the following decades in Australia, let alone larger-sized families (Macarthy 1967; 1969; 1970). Higgins' Harvester Judgment set the minimum wage at an amount – seven shillings per day – that he considered sufficient for a man to support a family in "frugal comfort," supplemented by a "margin of skill" where appropriate. (Commonwealth Arbitration Reports, 1907). In 1919, an Australian Royal Commission on the Basic Wage estimated the cost of living of a "man with a wife and three children under 14 years of age" to be around 50 per cent higher than Higgins's Harvester standard – an amount that, if paid to workers, would have been more than absorbed into the entire national income (Atkinson, 1919; Higgins, 1922). The same is true of New Zealand. Family size was also an important differential. The 1919 Commission chairman, A.B. Piddington, began to propose the introduction of child endowment as a necessary complement to the basic wage. His suggestion prompted the introduction of a modest scheme of child endowment for the federal Australian public service in 1921 and a means-tested family allowance in New Zealand in 1926 (Roe, 1976; Nolan, 2000). The campaign for family endowment for large families was natural corollaries of the male-breadwinner system; that is, there were important attempts to compensate for the "inequality of luck" in the class system. Family size, moreover, was more variable before World War Two than the post-war period (Pool, Dharmalingam & Sceats, 2007). Family Benefit was universal from 1946 until 1985 when it was abolished to target families in need.

Thirdly, there was one obvious way in which a minimum living wage was aspiration: women's wages. The first example of the Arbitration Court ruling that women should receive only a percentage of the male income was the 1903 Christchurch Tailoring Trades Award. Unequal pay did not receive statutory sanction until the 1936 I C and A Amendment which specified that the Court should fix male wage rates

so that they could comfortably support a family of five. However, New Zealand piggybacked on the male breadwinner concept, which was central to its industrial-relations system but articulated in Australia, and differentiated by gender from the outset.

Of course, arbitration was abandoned for men during the Great Depression and was not restored until the 1936 I C and A Amendment Act (Martin, 1994). Arbitration was embellished in 1937 by the introduction the so-called 'blanket clause'. This made an award binding on all industrial unions, employers or associations engaged in or connected to an industry (Woods, 1963). The coverage was extended regardless of whether or not the parties had participated in negotiations. In the postwar period, most workers came to be included in the arbitration system.

Arbitration was not one big universal system for half its existence, at least. As Clinkard noted in 1919 during the first 'arbitration years' the court did much for workers

in the direction of shortening working-hours, raising wages granting preference to unionists, and awarding a multitude of lesser benefits; but no scheme of compulsory industrial arbitration could move the whole economic and social structure unless and until its investigations and jurisdiction governed the whole field of production and distribution (Clinkard, 1919).

Classic Period of the Arbitration System, 1930s to 1960s?

Surely, in its classic phase, from the late 1930s to the late 1960s, relatively decent wages and conditions were universal? The development of good working conditions and leisure were used as bargaining tools in contention with wage negotiations. The Labour government established the Physical Welfare Branch, Internal Affairs, which operated from 1937 to 1954. Steven Eldred-Grigg (1990) characterised the 1930s to the 1960s the period of workers embourgeoisement as espoused in T. Veblen's work. These were the years in which skilled male wages and conditions peaked as the relativities between unskilled and skilled wages narrowed the margin for skill was undermined (Burton, 2001; Nolan, 2011). Even among workers under arbitration, there were skill differentials and, while women did not receive a basic wage sufficient to support a family of four or five, there were differentials among them between 1960 and 1970: women in the public service received equal pay in 1960; women in the private sector in 1972. Any discussion of a classic period, however, needs to consider the slow inclusion from non-waged work of married women and Māori into the paid labour force, at the bottom of wage scales and at lower rates.

The classic period of the arbitration system from the late 1930s to the 1960s was also the period in which new groups were being integrated into paid labour. Indeed, most women were marginal to the workforce and outside the protective system until at least until World War Two. Most young women (between the ages of 16-24 years) were integrated into the paid labour between 1880 and 1939. During economic depression and before World War Two, most married women were not in paid employment. New Zealand had a desperate labour shortage. It was so desperate that the government and employers were prepared to relax the male breadwinner system around World War Two. There was a growth in white collar and other areas of female employment, especially for married women thereafter. The participation rate of married women, especially in part-time work, rose from 3.7 per cent in 1936 to 7.7 per cent in 1945, 9.7 per cent in 1951, 12.9 per cent in 1956, 16.0 per cent in 1961 and 19.9 per cent in 1966: that is, an increase over 500 per cent in 30 years (Nolan, 2003). Similarly, Māori were only belatedly included in the urban occupational wage system. The proportion of Māori living in urban areas rose from 17.3 per cent in 1936 to 70.7 per cent in 1971 (Butterworth, 1991). Even in employment,

Māori found themselves at the bottom of wage scales, skilled and unskilled differentials narrowed at this time. So, even at its peak, there were significant differentials in working conditions. As indicated, Cybele Locke has examined in more detail the insecurity of work and wages from the 1960s.

Conclusion: Variable Experience Amid Constant Aspirations

It is generally accepted that New Zealand skilled male workers had decent wages and conditions in the mid-20th century, but we need to be careful to chart the range of the narratives for those in and outside the paid workforce, those at the margins and those in small workplaces, and in occupations with health and safety issues that have gone under the radar of regulation. When we consider the margins, in particular, we find that legislation or regulations often took some time to be implemented and this continues to be so. This applies to other pieces of legislation and regulation: Colin McGeorge (2006), for instance, examined the Education Act 1877 which established “free, compulsory and secular” primary education. There were many let-out clauses which made it a “long haul to full school attendance”. Similarly, there was a long haul to the spread and influence of the I C and A Act. It is difficult to measure improvements in decent work absolutely, moreover, when the subject is a moving target: work and workers changed during the 20th century. While the CTU’s contemporary campaigns are similar to turn of the 20th century campaigns the backdrop to the former is the existence of a social welfare safety net. Decent work is variable comparatively: equal pay remains elusive for example. So it is not the case of a Whiggish progression ensuring all New Zealanders achieved decent wages and conditions eventually. For some workers, there has been progression. For some occupations, such as cleaners, conditions do not seem to have changed much. Some occupations, such as mining have suffered regression. Antipodean aspirations have remained more constant.

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Regulating dispute resolution in the employment jurisdiction: some insights into regulating for decent work from an empirical study of policy for and the operations of the institutions 1990-2010

SUSAN ROBSON*

Introduction

This paper is based on the premise that regulating for decent work would be dependent on an enforcement system that supports policy objectives aimed at protecting the rights and interests of the vulnerable and/or low paid. It argues that reliance on apparently neutral agencies for enforcement of employee protections may be less effective than resort to partial and collectivised interests, like employer and employee groups.

This proposition is derived from an empirical study of the dispute resolution institutions of the employment jurisdiction from 1991 to 2008, and an analysis of the effect of policies for their operations on the quality of the employment outcomes that were the aim of those policies.¹ This period marks the rise and dominance of individual over collective employment arrangements, and the reliance by employers of the low paid on state subsidies in the form of welfare assistance and tax relief to those in full time employment.

The study establishes that the policy goal of the Employment Contracts Act 1991 (ECA) of greater labour market flexibility was achieved in part as the result of its alignment with the dispute resolution system that was selected for the jurisdiction. The policy decision to modify rather than replace this system during the formulation of the Employment Relations Act 2000 (ERA) resulted in reinforcement of the 1991 policy goal and the undermining of its own, apparently different, aims. A failure to associate advocacy cultures with employment policy objectives and a reliance on institutional neutrals as a substitute for a return to collectivist and protectionist approaches to labour issues may explain why the ERA's core policy goal, a rise of mended over ended employment relationships, never occurred.

A brief description of the way the entry-level institutions operated precedes analysis of the collectivist and individualist representative cultures of this jurisdiction, with particular emphasis on the role of information provision in the achievement of policy goals. A consideration of the advantages for protective goals of locating their enforcement with stakeholder rather than institutionally neutral agencies concludes this paper.

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Policy and Institutional operation 1991-2008

The ECA's creation of a specialist employment jurisdiction and its universalisation of the personal grievance (the compromise brokered between the advocates for retention of the grievance committee system and those favouring use of the civil courts²) provided a forum previously denied to individualised employees,³ and the legal profession. They were quick to take advantage of the opportunity offered by the mandate for the newly created Employment Tribunal of low level, informal, speedy, fair and just resolution services.⁴ Claim numbers rose, lawyers replaced union and employer association advocates,⁵ and their preference for adjudication over mediation quickly rendered the Tribunal establishment membership of 14 inadequate. Delayed claim resolution soon became endemic.

The administrative response was to offer mediation to those who chose adjudication as a first attempt at resolution, and was available significantly earlier than a hearing.⁶ The result was that rising proportions of resolutions were mediated and declining proportions were adjudicated, but adjudication continued to be the mode of first choice of rising numbers of claimants.⁷ Additionally, the number of claims per application increased,⁸ as did the number of ancillary decisions required of adjudicated outcomes.⁹

Analysis of Tribunal delays following the 1996 post-election Coalition Agreement coincided with a ministerial determination to rid the jurisdiction of the Employment Court. Delay was attributed to an increasingly legalistic approach to adjudication imposed by the Employment Court exercising its supervisory or review function, and the use of legal representation that "introduced a level of formality and a more adversarial approach to claims".¹⁰ The problem was regarded as compounded by the Tribunal's passivity.¹¹

² All unions, many employers, and most submissions to the Select Committee favoured the status quo, as did policy advisers from the Departments of Labour, Justice and the State Services Commission. The Business Roundtable and policy advisers in the Treasury sought abolition of the labour jurisdiction institutions and reliance on the civil courts. The Employers Federation sought abolition of grievance committees but retention of the specialist nature of the jurisdiction. It opposed the civil courts option.

³ The common law action, wrongful dismissal, limited remedies to compensation for the notice period.

⁴ Employment Contracts Act 1991, s 76(c).

⁵ Margaret Robbie *Representation, Procedure and Process in Mediation and Adjudication since the Employment Contracts Act* (Paper for Diploma Industrial Relations Victoria University of Wellington, 1993).

⁶ Of the 683 applications that were actively resolved by 31 March 1992, 47 per cent were solely mediated, 47 per cent solely adjudicated and 6 per cent required adjudication following mediation.

⁷ In the 1992/93 year, 56 per cent of applicants sought adjudication, rising the following year to 62 per cent. The mode of resolution for those years for adjudication was 35 per cent and 32 per cent, and for mediation 64 per cent and 68 per cent. By 1997, adjudicated resolutions were 12 per cent of total resolutions.

⁸ For the year ended 30 June 1992, 2332 applications (containing 2547 claims) were filed, a difference between application and claim numbers of 215, or 8.44 per cent of total claims. The following year the difference was 13.11 per cent. In the 93/94 year, it was 16.26 per cent. By the 97/98 year, the difference was 20.68 per cent.

⁹ In the 1991/92 year, 349 decisions were recorded on 312 adjudicated applications. Substantive decisions made up 89 per cent and ancillary (interlocutory and costs) decisions 11 per cent of the total. The following year 680 decisions were made on 585 applications (86.14 per cent). By the 98/99 year, the proportion of substantive decisions had reduced to 71 per cent and ancillary decisions had risen to 29 per cent of recorded decisions.

¹⁰ Department of Labour "The Supervisory Role of the Employment Court over the Employment Tribunal" undated at [54].

¹¹ As above.

Policy for ERA institutional alternatives was dominated by the problems experienced by the Tribunal. Modes of resolution were separated into the Mediation Service and the Employment Relations Authority, and the Employment Court was relieved of its supervisory powers of review. Mediation was semi-compulsory, the Authority would investigate problems by use of inquisitorial powers, and litigants who favoured adversarial processes could do so at the Court, but only after resolution was attempted via mediation and investigation.

The need to support the employment relationship as a whole in place of the existing focus on defining or resolving contractual issues, and the facilitation of speedy (close to the event), accessible (informal) and fair dispute resolution were the primary policy objectives.¹² The style of both mediation and adjudication would be less formal and legalistic with emphasis on the interpersonal, problem solving skills of mediators and simpler procedures, administration and decision-making for Authority adjudication.¹³ Administrative processes aimed at encouraging informality and increased ease of access to the institutions were thought to be a better solution to the problem of undesirable formality of lawyer representative behaviour than restricting rights of representation.¹⁴ The result was an increased reliance on institutional dispute resolution by individuals but significantly earlier resolution rates,¹⁵ largely as the result of mediation's filtering function.

However, a greater commitment to use of qualitative research for policy purposes after 2000 revealed that the government's desire for a rise in mended over ended employment relationships was never fulfilled. The institutions were dominated by dismissal grievances, as was the Tribunal. Reinstatement, the primary remedy, was rarely utilised. The hope that facilitation of problems by the Service would replace the evaluative mediative style of the Tribunal went unmet. Separation of resolution modes reduced incentives on mediators to offer or exercise statutory powers of decision making when prospects of settlement were unlikely. Settlements were achieved on the basis of the higher costs of proceeding, rather than any meeting of minds about the problem at issue. Compensation levels were lower than the costs of achieving them, particularly if both mediation and adjudication was required.

Two representative cultures

The three advocacy groups in this jurisdiction, lawyers, self-employed advocates and union/employer association advocates, differ in their training and qualifications for the advocacy role, their approaches to issues of process, and in the business opportunity that representation offers. This analysis focusses on lawyers and union/employer association advocates because, combined, they represent over 85 per cent of parties.¹⁶

For union and employer association representatives (for whom advocacy of individual problems is an incident of servicing their memberships' collective interests), individual casework is time consuming

¹² Office of Minister of Labour, Cabinet Submission "Employment Relations Bill – Finalisation of Outstanding Elements" (17 February 2000) at [5].

¹³ Department of Labour "Employment Institutions – Options Paper" (28 January 2000) at 3.

¹⁴ At [41].

¹⁵ Personal grievances dominated the subject matter of mediations. By 2002, they constituted 65 per cent of the workload.

¹⁶ Kathryn Beck and Ian McAndrew "Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority" (paper presented to New Zealand Law Society Employment Law Conference, November 2002).

and requires consideration of the effects of the workplace problem at issue on others. The interests of individual members cannot compromise collective interests.¹⁷

When confronted by conflict, union organisers regard conciliation of employer and employee interests as the fundamental requirement of their task with retention of the job for the employee as a major goal. Much of their effort, therefore, lies in repair of damaged work relationships. This involves a heavy emphasis on negotiation, education and keeping lines of communication open.¹⁸ Unwinding a dismissal or a warning is, therefore, of greater importance than pursuing other remedies like compensation. Much of their effort is expended on avoiding the need for outside intervention.¹⁹ Union member employees are better equipped to recognise problems in need of resolution than their non-union counterparts.²⁰ In larger unionised worksites, union delegates traditionally took on relationship repair tasks, thereby ensuring that attempts at de-escalation of conflict occurred before the need for disciplinary action arose. Union organisers also need to establish working relationships with management to facilitate the dialogue necessary to negotiate problems in the workplace as they arise. Resort to grievance committees prior to 1991 occurred in the name of the grievant's union so that only those grievances with prospects of success were taken. These factors help to explain why the dismissal grievance rate through the 1980s was steady and low, relative to the 1990s.²¹

The speed with which lawyers replaced union and employer association advocates as representatives, the significant increase of personal grievance claims and the predominant choice of adjudication as the mode of their resolution marked the successful establishment of a new jurisdiction for the legal profession in 1991.²²

Lawyers have different professional responsibilities and focus than collective advocates. In part, this arises from the imperative in legal training to identify the source of breach, in conflict, before considering remedy. The first task of the lawyer is, therefore, allocation of responsibility for breach, which, in terms of the client relationship, generally involves a search for fault by the other party.²³ Codes of ethics underline these obligations by endorsing zealous advocacy of clients' causes, short of dishonesty, but without regard to the interests of justice in the particular case or broader social concerns.²⁴ Of itself, this imperative lends itself more easily to position taking and confrontationalism, so that the search for breach renders restoration of relationships much more difficult than assertion of

¹⁷ Members of some employer associations pay for dispute resolution services provided by their association.

¹⁸ Dianne Donald "Unions and Personal Grievance Resolution: Managers of Discontent The Role of Unions in Advancing or Impeding the Informal Resolution of Personal Grievances in NZ Organisations" (MA Dissertation, University of Waikato, 1998).

¹⁹ As above.

²⁰ AC Nielsen "Survey of Employment Disputes and Disputes Resolution" Department of Labour, November 2000.

²¹ Donald shows that about 500 grievances a year were dealt with by the Department of Labour for each of the five years prior to 1991. Department of Labour claim statistics show a rapid rise of claims for each of the five years after 1991, although the annual rates of rise were inconsistent and unpredictable.

²² It was well positioned to take advantage of an increasingly deregulated economic, social and political environment that saw increased numbers of dismissals arising from employer perceptions of more flexibility to *fire at will*, white collar and professional employee perceptions of the economic advantages to be gained by challenging dismissals, and the widespread publication of this means of deriving financial gain: Joanna Cullinane and Dianne Donald "Personal Grievances in New Zealand" (paper presented to Association of Industrial Relations Academics of Australia and New Zealand 14th Annual Conference, Newcastle, February 2000).

²³ "A lawyer should advance their client's partisan interests with the maximum zeal permitted by law" Christine Parker and Adrian Evans *Inside Lawyers' Ethics* (Cambridge University Press, United Kingdom, 2007).

²⁴ Robert Kagan *Adversarial Legalism, The American Way of Law* (Harvard University Press, USA) 2001) at 55.

damage and remedy (compensation), even if restoration of the working relationship is the more desirable option for the client.²⁵ Additionally, lawyers are more likely to accept that resolution of conflict is dependent on exit from relationships,²⁶ with the price of the exit measured in monetary terms. Employees who relied on them were more likely to have been dismissed by the time they sought representation.²⁷ Their remedies (if available) are, therefore, likely to be less immediate than those for unionised employees, notwithstanding that lawyers are more likely to be associated with getting ‘the best deal’ at the other party’s expense, an assumption not generally supported by research.²⁸ A related, but opposing idea, that negotiation on financial matters through lawyers will do little to increase independent communication between the parties has been shown to have some validity.²⁹

Lawyers were associated with the problem of delay at the Tribunal: resort to them obliged other parties to engage lawyers; hearing times were drawn out; scheduling and rescheduling was complicated by their unavailability.³⁰ They were blamed in the business press for undermining the Tribunal’s ability to reach commonsense decisions on dismissals and compensation and as responsible for ignoring its mediation option in favour of arbitration, rendering it slow and legalistic.³¹ However, when they did attend mediation they were regarded as inept: they lacked the skills to negotiate and cut a deal, failing to recognise that their task was to resolve the matter and the mediator [was] a tool of their trade.³² The price of their representation was also a source of concern. Fees were payable regardless of outcome and costs awards never met the full cost of representation.³³ This highlighted the connection between business opportunity and the reluctance of lawyers to acknowledge the validity of non-judicial processes (thus, establishing why the adjudication option remained the preference of grievants at the Tribunal, even after it became clear that the mediation option had many more advantages for them).³⁴

By contrast, the cost of union membership was described as akin to an insurance premium that offered representation for individual problems at no extra charge. If advocacy was required, it carried with it exemption from indemnification of the other party if unsuccessful, the full benefit of any compensation award and vigorous attempts to sort out the problem on the job (i.e. before matters escalated to dismissal).³⁵

²⁵ C Menkel-Meadow “Towards Another View of Legal Negotiation: the structure of problem solving” (1984) 31 UCLA Law Review 754.

²⁶ Richard L. Abel (ed) *The Politics of Informal Justice* (Academic Press, New York, 1982).

²⁷ UMR Research Ltd for Employment Relations Service “Department of Labour Problem Resolution Services Research Project: A Qualitative Study amongst Employees and Employers” (July 2004).

²⁸ PSC Lewis *Assumptions about lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor’s Department, 2001).

²⁹ As above.

³⁰ Minority of the Labour Select Committee “Report of the minority of the Labour Select Committee on the inquiry into the effects of the Employment Contracts Act on the New Zealand labour market” (21 September 1993).

³¹ Graeme Hunt “Employment Tribunal no place for expensive lawyers” *The National Business Review* (New Zealand, 26 February 1993).

³² WRC Gardiner “A Report from the Trenches” (paper presented to International Employment Relations Association Conference, Hamilton, July 1995).

³³ As above.

³⁴ Alan Rau, Ed Sherman and Scott R. Peppet *Processes of Dispute Resolution: The Role of Lawyers* (4th ed, Foundation Press, 2006).

³⁵ Gardiner, above n 32.

Negotiating the resolution of a dispute for lawyers is not a separate process to litigation because litigation is the means by which the negotiations begin.³⁶ By contrast, collectivist advocates look to institutional intervention only after discussion and negotiation fail to produce a settlement. These differences of style (over whether institutional intervention is the first or the last step in the resolution process) affect outcomes, with the higher likelihood that unionised employees will keep their jobs with minimal financial implications of disputing for their employers whilst their non unionised counterparts exchange their jobs for money.

In addition to effects on outcomes, lawyer preferences for adjudication affected the mediation function (in both eras) to the extent that it served two purposes (as the basis of litigation risk analysis, a necessary pre-condition of settlement for legal representatives, or as assisted negotiation with the aim of resolution for collective advocates) and two constituencies: as a first forum for the assertion of party rights and obligations for the legally represented, or a final step in a negotiated resolution process for union members.

The dominant effect on the institutions was lawyer insistence that they operate judicially. Acting judicially was regarded as synonymous with adversarial modes of adjudication: *David v Employment Relations Authority*³⁷ represented an attempt to impose upon the Authority the adversarial mode of adjudication legislatively discarded in favour of the investigative mode. When this failed, passive resistance to ERA policies for informality of process via reliance on causes of action, use of submissions, and separate consideration of substantive and procedural issues proved to be more successful than the direct action that proceedings over Authority powers signified. Additionally, the Mediation Service was forced to abandon facilitative styles of mediation for the evaluative style that was a feature of Tribunal mediation because legal representatives adopted a variety of techniques to avoid contact with mediators known to rely on a facilitative style. Mediators were required to preside over negotiations of relatively small claims that took as long to resolve as higher value or more substantive problems, thus generating the perception that mediation was simply a means of transferring money from employers to employees, as opposed to a forum for the resolution of workplace problems.³⁸ This was viewed as jeopardising the Service's capacity for early intervention in subsisting relationships.³⁹ The behaviour of representatives was regarded as the root of the problem.⁴⁰ It attracted policy scrutiny (the 2004 statutory amendments to the mediation function were designed to counter these negative effects) but resulted in no change to representative style or substance. A later policy initiative devoted to the obstacles that representation posed for informality was successfully diverted to analyses of non-legally qualified individual advocates (e.g no-win-no-fee), notwithstanding this group's low incidence as representatives at the Authority.⁴¹

Employers reported unions as moving to resolve disputes more quickly and pragmatically than lawyers did, and all parties to disputes resulting in mediation assistance expressed the view that the involvement of lawyers in a dispute tended to draw out the process and raised the expense much more

³⁶ Menkel-Meadow, above n 25.

³⁷ *David v Employment Relations Authority* [2001] ERNZ 354.

³⁸ Department of Labour for Minister of Labour "Problem resolution under the Employment Relations Act" (February 2003) <www.dol.govt.nz> at 4.

³⁹ Department of Labour for Minister of Labour "Review of the Employment Relations Act – Proposals for Legislative Fine Tuning" (March 2003) <www.dol.govt.nz>.

⁴⁰ Department of Labour for Minister of Labour Issues Paper "Review of the Employment Relations Act" (undated, c February 2003).

⁴¹ Minister of Labour to Cabinet Economic Development Committee "Review of the Employment Relationship Problem Resolution System" (4 November 2007) EDC (07) 24/6.

than was the case if the employer worked with the relevant union.⁴² This was also the view of the Department of Labour when it opposed a Legal Services Agency proposal to approve legal aid for mediation on the grounds that representation there was unnecessary and would undermine the policy goal of a low-level, informal, non-legalistic, problem-solving function for the Service.⁴³

If collective representatives were regarded as having cheaper and more pragmatic dispute resolution consequences for employers, their resolution mode of choice had similar implications for the public purse. The significance of the difference in time and cost between mediated and adjudicated resolutions has remained constant over both eras,⁴⁴ as has the conformity of resolution outcomes (compensation settlements/awards of less than \$10,000).

Policy and Information Provision

Information provision and its timing was a major policy theme for the ERA.⁴⁵ It is also a marker of cultural difference between advocacy types and the extent to which remedy systems in workplaces are well known, regularised and accessible. The policy hope that the Mediation Service would operate as the source of information about workplace disputing and become a trusted early intervener so that dismissal rates were reduced never materialised. The connections established below between representation, workplace remedy systems, individualism and the need for institutional dispute resolution suggest why.

Workplace remedy systems

Accessible workplace remedy systems are more common in unionised than non-union workplaces, and union members are more likely to be aware of them. Non-union workplaces are more likely to exhibit an absence of uniformity about, or common understanding of, remedy systems, and a low level of awareness about public sources of information relevant to disputes.⁴⁶ This affects satisfaction with

⁴² Tony Waldegrave, Diane Anderson, Karen Wong "Evaluation of the Short-Term Impacts of the Employment Relations Act 2000" (November 2013) Department of Labour <www.dol.govt.nz> at 117.

⁴³ Letter from Department of Labour (IRS: Stockdill) to Legal Services Agency (Banantyne) (16 February 2001).

⁴⁴ In 1990, mediations cost \$415 - \$587, adjudications between \$2470 and \$8258: Department of Labour to Treasury: "Cost of mode of resolution" at 6.3.97.

A cost benefit or utility analysis attributed an economic benefit of \$58.9 million to the Service, a \$3.2 million benefit to the Authority and a negative economic benefit to the Court - its costs were very high and the estimated benefit of its dispute resolution very low: Dr Geoff Plimmer and Chris Cassels report for Department of Labour "Greater strategic positioning of service delivery to achieve outcomes" (undated but c Nov 2005)

The Authority's membership is 35-50 per cent of the number of mediators employed by the Service but it investigates 9-15% of the problems mediated by the Service: Department of Labour and Ministry of Business Innovation and Employment claim and use statistics for the Mediation Service and the Employment Relations Authority Authority determinations cost at least \$7,000 each or more than \$13,000 per proceeding: Department of Labour "Employment Authority Cases 2007-8" (undated c late 2008)

The cost/transfer ratio is 2:6; for every \$2 that form the subject of compensation or costs awards, the Authority costs \$6 to administer: Calculations based on costs of administering the Authority in 2007-8 and compensation and costs awards for those years published on the Ministry of Business Innovation and Employment website

⁴⁵ Requirements of consultation, good faith, bargaining processes, the form and content of employment agreements are some examples of the focus on information provision.

⁴⁶ The Department of Labour Infoline was used by 10 per cent of employees as a source of information about a particular dispute and as a source of information about dispute procedures by seven per cent of employers; its other institutions – the

workplace dispute outcomes: non-union employees are dissatisfied generally with dispute outcomes whilst their employers believe the majority of disputes are settled amicably; unionised employees have higher levels of satisfaction with dispute resolution processes and their employers a more positive view of union involvement in disputes than non-union employers. These differences are replicated in perceptions of the Mediation Service. It has a facilitative role for unionised workplaces but is regarded more suspiciously by their non-union counterparts (as a pseudo court process with the employer on ‘trial’ for alleged breaches).⁴⁷

These connections between collectivisation, information about dispute resolution, and acceptance of the utility of state provided mediation services suggested to mediators that access to early intervention processes to stop problems from escalating and the provision of professional, accurate and partial information to disputants were major constituents of successful workplace remedy systems.⁴⁸

These views were shared by collectivised users of the Mediation Service but not their non-union peers. They were most likely to require assistance to settle the terms of already dissolved employment relationships and did not accept that mediation would have assisted them before termination occurred.⁴⁹ Their employers complained about the emphasis within mediation on risk management (cost of dispute escalation) rather than genuine settlement, the pressure to settle via compromise over money, and the absence of settlement guidelines or information about its processes and outcomes,⁵⁰ thus, establishing a perception of the Service as having a regulatory or judicial, rather than an ameliorative or facilitative, function and as an unlikely early intervener for non-unionised workplaces.

Advocate approaches to information provision

Given that information provision in adversarial arbitration attracts a plethora of formal exclusionary rules (and interlocutory processes), but is regarded as a core resource in the negotiation of collective agreements, it is not difficult to accept that it is also subject to conflicting professional positions between litigators and negotiators. Sharing or corraling information had implications for both the mediative and adjudicative modes of resolution for both eras.

The exchange of collectivist for individualist advocates that accompanied the establishment of the Tribunal highlighted the benefits for the institutions, and of the sifting functions that unions and employer associations performed. They limited their advocacy to grievances with prospects of success. Their substitution by lawyers removed this mechanism for screening out unmeritorious cases.⁵¹ Mediation became the means by which filtering occurred for the individually represented as the result of its function as the forum that preceded adjudication, its use of the evaluative mediation style and lawyer reliance on Tribunal members’ adjudication experience. Thus, mediators provided for those, who engaged lawyers, the function that collective advocates performed themselves, before resort to the Tribunal: the assessment of strength of case or position is a form of information provision that lies at the heart of the advocacy role.

Labour Inspectorate and the Tribunal were a source of information for less than three per cent of each group: AC Nielsen for Department of Labour “Survey of Employment Disputes and Disputes Resolution” (November 2000).

⁴⁷ UMR Research Ltd, above n 27 at 77.

⁴⁸ Phillip de Wattignar to Department of Labour “Response to Green Paper on the Improvements to the Employment Relationship Problem Resolution System” (undated c mid 2008).

⁴⁹ UMR Research Ltd ve n 27.

⁵⁰ As above.

⁵¹ Paul Roth (Editorial) “The Cost of ‘Individualising’ Labour Law” [1997] 5 ELB 82.

Since this is not an assessment that the adversarial advocate is prepared to make until after institutional assistance has been sought,⁵² choice of representative, therefore, had different consequences for disputants. Union/employer association members took the risk that their organisation would refuse to represent them if their prospects of success were too low. Those relying on lawyers had little or no risk of a refusal to assist but they undertook all the risk associated with their prospects of success whilst also assuming liability for the costs of representation that were payable, regardless of risk or outcome. The risk was mitigated by the cost of proceeding further: unmeritorious claims/defences were capable of settlement if compensation was pitched at a price lower than the cost of representation for an Authority investigation.

If lawyers saw mediators as sources of information, they had an opposing view of Authority members. For them, arbiters, as decision-making neutrals, are required to refrain from providing information or advice to parties to avoid compromising neutrality and/or suggesting predetermination. For collective advocates, for whom information is a basis for accurate assessments of negotiating positions, and information exchange as the means by which disputants work towards resolution, the arbiter performs a facilitative function. This conflict about the Authority's investigative function affected those of its members concerned about the extent to which they could facilitate and engage in information provision and exchange, but only in certain circumstances: where one party was unrepresented and the other was legally represented. The anxiety (of attracting allegations of predetermination and inviting challenge) reported by members in those circumstances centred on issues or evidence that unrepresented parties are unaware of the need to establish.⁵³ Since obtaining that information is the essence of the investigative role, this anxiety may be attributable to the tropes of adversarial advocacy.

Authority members, otherwise, reported that they conducted their investigations differently depending on the amount of information about the problem they considered that parties had.⁵⁴ A component of this issue is the bystander effect that occurs when the extent to which representatives take over responsibility for running a dispute relegates parties to bystander status.⁵⁵ Authority members regarded those with legal representation as more vulnerable to this phenomenon when their lawyers resorted to the language of the law by framing facts and behaviours in legal labels as a substitute for ordinary description.⁵⁶ Mediators regard the phenomenon as undermining parties' ability to take responsibility for their role in disputes, and as thus, condemning them to repeat similar mistakes.⁵⁷

Thus is established the connection between information provision, the timing of problem resolution and the need for the institutions: regularised, accessible workplace remedy systems, an informed workforce with early access to partial advice, and reliance on negotiation for problem resolution reduces the need for the institutional resolution of grievances and increases the likelihood that employment relationships can be mended rather than ended.

⁵² Parker and Evans, above n 23. Parker and Evans' adversarial advocate *combines the 'principle of partisanship'* [meaning that the lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer] and the *'principle of non-accountability'* [meaning the lawyer is not morally responsible for either the means or the ends of representation] in order to act zealously to represent the client's interests. (pp14-15)

⁵³ Julie Morton "Reducing Legalism: The impact of the Employment Relations Act 2000" (M.Com Thesis, University of Otago, 2003) at 117.

⁵⁴ At 114: Unrepresented parties, or those with representatives that members believed had not fully explained matters, were more likely to receive more information from members than those with representation that members trusted.

⁵⁵ At 33.

⁵⁶ At 128.

⁵⁷ Phillip de Wattignar, above n 48.

Conversely, the need for institutions is highest where workplace remedy systems are inaccessible or not well understood, employees have an imperfect understanding of their rights and obligations, restricted access to informed partial advice and no power to initiate problem resolution processes, and both employer and employees rely on advocacy which, in turn, is dependent on their ignorance of problem resolution processes as its business opportunity. Workplace remedy systems and representative differences of approach to information provision and the advocacy role are, thus, major determinants of the need for institutional dispute resolution.

If information provision and early intervention are incidents of collectivised representation, an institutional neutral cannot function as a substitute for them (as was hoped) because the information and the early intervention have to come from partial, not neutral, sources that have established relationships of trust with those they seek to assist. Partiality or partisanship – the quality for which adversarial advocates are most admired and criticised⁵⁸ – informs the practices of both individual and collective representatives and must be present at the start of the party/advocate relationship. The timing of this commenced relationship is what differentiates the consequences for collective and individual disputants: partial advice early in a dispute helps maintain employment relationships; at a dispute's late stages it functions as the means to extract compensation for the ended relationship.

Stakeholder roles in enforcement of employee protections

If partiality, pragmatism and filtering are incidents of collective representation, there is little reason why they could not also operate to enforce protective provisions for decent work. Stakeholder enforcement of such provisions would be dependent, however, on collectivisation of both employers and employees in the sectors in which decent work is in issue. Enforcement would result from their interaction – whether it occurred by negotiation or litigation, employer and employee groups affected by any issue would be solely responsible for the resolution of issues as they arose.

The advantages of enforcement by stakeholder include coverage, data compilation, and sequenced or agreed use of litigation. Employees in most need of the protection of decent work are all but excluded from the personal grievance jurisdiction, unless they are unionised: the sleepover, KiwiSaver deduction and gender equity issues before the Employment Court were initiated and funded by the Service and Food Workers Union. Conversely, enforcement of the 90-day notification rule by the Court has worked against the interests of union members.⁵⁹

Data compilation refers to information gathered about work practices, wage rates etc. Its analysis reveals problems that are common across a sector, indicating where enforcement or educative effort should be targeted. As the point made below about the Department of Labour's use of data shows, however, the use of such data may depend on the perspective (partiality?) of the interpreter.

Sequenced use of litigation occurs when organisations that control or dominate an issue vulnerable to litigation decide how, when and why the issue should be presented to the courts. Currently, there is little or no control or organisation over employment policy issues that arise in the Employment Court when individuals litigate. Ensuing decisions have precedent value for litigants who follow, but the

⁵⁸ Parker and Evans, above n 23.

⁵⁹ For example see *Idea Services v Barker* [2012] NZEmpC 112; *Department of Corrections v Waitai* [2010] NZEmpC 164; *Melville v Air New Zealand* [2010] NZEmpC 87.

result is the unsequenced or haphazard development of policy about matters (like justification for dismissal) arising, not from the worst or most extreme examples of the behaviour at issue, but from litigants with the inclination and resources to litigate, and the ability to provide a more favourable, but incomplete, view of the practices of which they complain.⁶⁰

The disadvantage of reliance on enforcement by a neutral can be illustrated by the Department of Labour's use of the research it commissioned, and the data it collected after 2000. Qualitative and quantitative research about disputing in workplaces and in the institutions it administered was extensively cited in policy papers, but never featured in any substantive change to policy or practice. Clues as to why emerge from the Department's attempts to draw together the results of the surveys and studies it commissioned.⁶¹ It did so by a focus on statistics of prevalence – of types of dispute, of employee and employer characteristics, existence of written procedures, satisfaction with and barriers to effective mediation, dispute outcomes. Significance was also attached to departures from other statistical norms, so that Maori, for instance, were recorded as having higher incidences of disputing and union membership than their numbers in the general population.⁶² Thus emerged a profile of the disputant in the workplace (male, Maori, unionised, full-time, in job for 10 plus years, large employer, public sector, earning <\$30,000) that bore little resemblance to the profile of the grievant seeking mediation (NZ European, gender neutral, aged over 25, full time in job for one to four years, non-unionised).⁶³ This focus on statistical data somehow operated to obscure evidence of trends or phenomena relevant to the policy issues regarded as important by the Department – an early intervention role for the Service, for instance – so that the sorts of connection suggested by a comparison of the data available appear not to have been made. The result was that it gathered a data rich resource about disputing in this jurisdiction that it did nothing substantive with.

Conclusion

This study of the NZ personal grievance jurisdiction provided a rare opportunity to draw a number of comparisons: between institutional provision of dispute resolution services under two statutes; between collectivist and individualist approaches to representation; between the operational effects of the desires for judicial and for informal approaches to institutional dispute resolution. The clash of resolution cultures revealed by these comparisons, and the failure of the ERA to meet the policy goals set for it illustrate the importance of aligning dispute resolution policies with the representative culture that is most likely to contribute to achieving policy objectives. Protective regulation designed for a specified group of employees needs the support and interaction of collectivised representation. Its enforcement may depend more on the engagement of stakeholders than institutional neutrals for success.

⁶⁰ Donald Horowitz *The Courts and Social Policy* (Brookings Institution, Washington, 1977) at 38.

⁶¹ Department of Labour "Stock Take of Employment Relations Monitoring Systems" (2005).

⁶² AC Nielsen for Department of Labour, above n 20.

⁶³ This profile comparison is based on the AC Neilson Survey of 2000 and the Martin & Woodhams Snapshot of Mediations of 2007. A more time-congruent comparison is not possible because the profiling of mediation users did not occur until 2007.

Mechanisms for Resolving Collective Bargaining Disputes in New Zealand

Paper for the NZLLS Conference, 22 November 2013, Auckland

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Abstract

The state has provided assistance for parties encountering difficulties in collective bargaining since 1894. In the last three decades, there have been considerable change to the employment institutions and the type of assistance offered. Compulsory arbitration is not a feature of our current legislation. Parties that have serious difficulties can, however, seek assistance from the Employment Relations Authority by way of a facilitation process, introduced in the 2004 amendments to the Employment Relations Act 2000. This paper will review the facilitation process and the cases that have been accepted for facilitation by the Employment Relations Authority. A brief comparison will also be made with mechanisms available for resolving collective bargaining disputes in other jurisdictions.

Overview

The subject of this paper, state provided assistance for collective bargaining is not necessarily seen in the same sexy way it was during the 1970 and 1980s. Those years were a time of unrest in workplaces when industrial conciliators provided assistance to parties encountering difficulties in reaching settlements of their collectives. The era of the think big projects, Mangere Bridge, Bank of New Zealand building in Wellington, Marsden Point, provided lots of opportunities for conciliators and mediators to demonstrate their skills. Despite there being a move away from collectivism to individualism, with a reduction in union membership and fewer employees covered by collective employment agreements assistance in resolving collective disputes, it is still a very important function for the state. Workplace disputes can lead to consequences for a much wider part of society than those involved in the dispute. An extreme example is the strike at the Marikana Mine in South Africa. This conflict resulted in the death of 44 miners, with many more injured and a feeling of deep sadness and helplessness from the South African Conciliation Service.¹ On a less dramatic scale, the Ports of Auckland strike in 2012 filled the news media with stories of tensions and job and profit losses at the Port.²

New Zealand has a unique form of assistance for parties involved in collective bargaining. My presentation will review that system, and compare and contrast it to systems applying in other jurisdictions.

NZ Mediation and Conciliation System 1894-1991

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¹ CCMA presentation, International Agencies Meeting Dublin Ireland, July 2013

² TVNZ "Hundreds of port workers made redundant" (7 March 2012) <www.tvnz.co.nz>.

Statutory assistance for resolving collective bargaining disputes in New Zealand has been provided by the state since 1894.³ The system of industrial conciliation and arbitration introduced in the Industrial Conciliation and Arbitration Act 1894 lasted in one form or another from 1894 to 1991. There were, however, major changes to some parts of the system during that time. For example, voluntary arbitration was introduced at the height of the Great Depression and a highly centralised wage-fixing system based on compulsory unionism and general wage orders was implemented by the first Labour government (1935-1949).

The part of the system that did not change greatly was conciliation, a similar process to the mediation provided by the Ministry of Business Innovation and Employment, to assist collective bargaining today. While the Arbitration Court issued general wage orders and set wage relativities, most settlements were determined between the parties as part of a conciliation process. Conciliation councils continued to operate successfully and formed the basis for settling collective bargaining disputes until 1991. Collective employment arrangements were made by way of Awards of the Arbitration Court or by industrial agreements agreed between the parties. An analysis of the total of 2,000 awards made by the Arbitration Court between 1947 and 1960 showed that 75 per cent were complete settlements reached by the parties. During the same period, 1,005 industrial agreements were made; meaning that out of 3,005 enforceable documents the court had a direct hand in settling some of the terms in only 486 documents.⁴

The system developed into what became known as the annual wage round. The key players were the Federation of Labour, and the Employers Federation. The Department of Labour also played a role by providing mediation and conciliation services and representing the public interest. Terms and conditions of employment for union members in the private sector were determined in one of two ways; either by an award, made in a conciliation council or, by the Arbitration Court (the predecessor of the present Employment Court), or by an agreement between the parties. The system gave unions the ability to bind employers who were not parties.⁵

The conciliation process commenced when a union created a dispute with an employer party by seeking a change to an award. The change sought would usually be a simple claim made at a level that would not be readily accepted. The matter would then be referred to a Conciliation Council made up of representatives from both employers and unions. The parties met together with a conciliator to bargain for an award. The first document to be negotiated, in the 1970s and 1980s, usually the 'metal trades' or 'general drivers' awards, would set the standard for the rest of the wage round. The system was centrally controlled by the Employers Federation and the Federation of Labour. Government funded the conciliation process, paying for travel and costs plus a small daily allowance for those appointed to assessors' positions on conciliation panels. Lawyers were banned from conciliation proceedings in New Zealand, although a person with legal training not holding a practising certificate could be used.⁶

The 1960s and 1970 were a time of increasing industrial disputes, and an increase in enterprise bargaining created by a tight labour market.⁷ These developments contributed to placing the

³ Industrial Conciliation and Arbitration Act 1894.

⁴ Sir Arthur Tyndall "The New Zealand System of Industrial Conciliation and Arbitration" (1960) 82(2) Int'l Lab. Rev. 138.

⁵ James Holt *Compulsory Arbitration in New Zealand: The First Forty Years* (Auckland University Press, Auckland, 1986) at 16.

⁶ AJ Geare *The System of Industrial Relations* (2nd ed, Butterworths, Wellington, 1988).

⁷ Herbert Roth *Trade unions in New Zealand past and present* (Reed Education, Wellington, 1973).

conciliation and arbitration system under growing pressure. The government's response was to introduce the 1970 amendment to the Industrial Conciliation and Arbitration Act. The Act provided for personal grievances, improved procedures for handling rights disputes and a new industrial mediation service. Support for collective bargaining remained with the Arbitration Court and a separate conciliation service. While the title of the Court changed in subsequent legislative amendments to the Labour Court and later to the Employment Court, its role and that of the conciliation service continued until 1987 when the Labour Relations Act 1987 merged the mediation and conciliation services into a new mediation service led by a Chief Mediator. The service had statutory independence and dealt with personal grievances, disputes and collective bargaining.⁸

From the inception of the Industrial Conciliation and Arbitration Act 1894, the State Sector was largely exempted from its provisions.⁹ The State Sector had a different structure established under various State Sector acts. The majority of State Servants had their pay and conditions set by a determination. Pay and conditions were then adjusted on an annual basis by a ruling rates survey or by bargaining between the union and employer. Where agreement could not be reached they also had recourse to compulsory arbitration before the State Sector Tribunal. The Tribunal had a similar format and structure to the Arbitration Court.¹⁰ This separation of State and private pay fixing continued until the government enacted the State Sector Act 1988, thereby incorporating the state sector into the private sector system.

During the last half of the 1980s, the New Zealand economy substantially deregulated. Only minor changes were made to employment legislation, but in 1991 the arbitration system was swept away by the Employment Contracts Act (ECA). This act described as “a measure to promote an efficient labour market” and “freedom of association” was to continue the trend that had been established by the Labour government for the deregulation of pay fixing and the labour market. The move to treat employment relationships in contractual terms removed the previous support that was available by way of mediation and/or arbitration for collective bargaining disputes. The Act established a new framework for employment arrangements. Voluntary union membership was introduced and awards abolished. In place of unions, workers could choose any bargaining agent to represent them in bargaining with their employer but there were no requirements for employers to negotiate with the workers' representatives. Bargaining agents were given limited rights of access to workplaces and only had to be ‘recognised’ by employers; there was no requirement to bargain with them.

An Employment Tribunal (comprising of one member in any particular case) was established to provide both mediation and arbitration services. Parties, who were unhappy with the decisions of the Tribunal, could appeal to the Employment Court on matters of fact or law. There was no compulsory arbitration available for collective bargaining. A collective was only formed if the parties concluded their own agreement. The highly centralised system of bargaining that had been in place since the 1890s was overnight changed to a completely decentralised system. Unions no longer had a pivotal role in wage setting. Individual employment contracts were prevalent and enterprise agreements were the main type of collective employment contract.¹¹

⁸ Ian McAndrew “The Employment Institutions” in Erling Rasmussen *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2010) 74.

⁹ Industrial Conciliation and Arbitration Act 1894, s 91.

¹⁰ See for example State Sector Conditions of Employment Act 1977.

¹¹ Ian McAndrew & Sean Woodward “The New Zealand Employment Tribunal: A Review of the First Few Years” (paper presented to Industrial Relations Research Association Meeting, New Orleans, January 1997).

Collective bargaining's role as a means of determining terms and conditions of employment was reduced significantly under the Employment Contracts Act 1991 when union membership number plummeted.¹²

The Framework for Collective Bargaining under the Employment Relations Act 2000

In 2000, the Minister of Labour, Hon Margaret Wilson, introduced a bill changing the emphasis on employment based on contracts to one based on relationships and good faith.

The Employment Relations Act 2000 (ERA) emphasised that relationships between employers and employees were an important feature of productive employment relationships. It recognised that employment relationships should be built on good faith, and that parties were the best suited to address any problems between them, but on the occasion when they could not do so, specialised assistance should be available. In keeping with the intentions of the Act, a mediation service was established to support successful employment relationships.¹³ The mediation service was given wide responsibilities to provide information and other services to assist parties in resolving their employment relationship problems by being speedy and flexible. In order to insure the independence of the service special provisions were made in the legislation and the confidentiality of the process was reinforced.¹⁴ The majority of employment problems are resolved in mediation; however, when they cannot be resolved at this level, provision is made for them to be referred to the Employment Relations Authority (the Authority) for determination.¹⁵ Authority determinations are not available for collective bargaining matters except for in very limited circumstances. These are discussed later in this paper.

One of the overriding intentions of the ERA was the promotion of collective bargaining. With a few exceptions, where there are special legislative provisions, i.e. police, military and positions covered by the Higher Salaries Commission, any party in an employment relationship can technically be a party to a collective employment agreement. The legislation establishes the process for bargaining. The Act gives unions the role of bargaining agents in what seems like an effort to both increase union membership numbers and promote collectivism. Despite the high hopes of the unions and government and the dire predictions of business, this did not eventuate in the way the government intended.¹⁶ The move to individualism in employment relationships that had been a feature of the 1990s continued through into the new millennium. Bernard Walker suggests that the most notable feature, by 2002, was the lack of change and that union numbers had not altered significantly since the introduction of the Act.¹⁷

The collective bargaining objectives of the Act were emphasised in 2002 in the Labour Party policy and the speech from the throne. In that year, the government announced a proposal to review the Act

¹² Department of Labour "Union Membership Return Report 2012" <www.dol.govt.nz>.

¹³ Employment Relations Act 2000, s 143.

¹⁴ Section 148.

¹⁵ Section 156.

¹⁶ Erling Rasmussen *Employment Relationships: New Zealand Employment Relations Act* (Auckland University Press, Auckland, 2004).

¹⁷ Bernard Walker and R.T Hamilton (2009) "Grievance Processes: Research, Rhetoric and Direction for New Zealand" (2009) 34(3) NZJER 43.

to identify if any “fine-tuning was needed, either in the law or in its administration”¹⁸ for the Act to achieve its “statutory objectives of promoting productive employment relationships, good faith, collective bargaining and the effective resolution of employment problems”.¹⁹ The review undertaken was extensive, drawing on a number of sources, including Department of Labour research projects assessing the impacts of the Act,²⁰ along with case law developments, as well as submissions from a range of groups such as practitioners, the Council of Trade Unions (CTU) and Business New Zealand.

The ERA recognised that employment relationships must be built on good faith, section 3(a)(i), and required that parties to an employment relationship deal with each other in good faith, section 4(1)(a), but there was no penalty provided for breaches of good faith. Good faith did not require parties bargaining for a collective agreement to conclude an agreement, section 33(b). The lack of a requirement to conclude bargaining and penalties for breaches of good faith were of concern to the union movement as, apart from strike action, there was nothing they could do if an employer party chose to stop bargaining.

The review considered legislative amendments required to ensure that the Act fulfilled its statutory objectives in respect of the promotion of productive employment relationships, good faith, collective bargaining, and the effective resolution of employment problems. During the early years of the ERA, the CTU had expressed concern that, while one of the objectives of the Act was to promote collective bargaining, it did not adequately do so.²¹ They made a number of submissions to the Committee reviewing the Act, including a suggestion that third party intervention was required in order to resolve misunderstanding or breaches of the duty of good faith, behaviours aimed at undermining collective bargaining, or protracted disputes. Submission were made suggesting that various forms of arbitration be provided to assist in the resolution of collective bargaining, especially “greenfields” bargaining and multi-employers bargaining, or where there had been a breach of good faith that undermined the collective bargaining. They asked for greater resources to be made available (specifically) mediation services.

The bill introduced, following the review proposed, that a new process to promote settlements in collective bargaining be introduced. Interestingly, rather than a return to the compulsory arbitration process available for most of the 20th century, emphasis was to remain on the self-determination. In some defined cases, however, third party assistance was to be made available.²²

The new concept of facilitated bargaining was introduced. The policy intent underlying the introduction of facilitation was to provide additional assistance to parties who were experiencing difficulties in concluding a collective arrangement. With the exception of special provisions for the defence force and police contained in their respective legislation,²³ it was not until this December 2004 amendment that provision was made for a form of compulsory assistance in bargaining.²⁴

A new section 50A made provision for the Employment Relations Authority to assist parties having serious difficulties in concluding a collective agreement by providing facilitation services. Actions or

¹⁸ Hon Margaret Wilson *Review of the Employment Relations Act – Overview of Proposals for Legislative Fine Tuning* (Minister of Labour, Paper to the Cabinet Economic Development Committee, 2004).

¹⁹ Secretary of Cabinet 2003a, *Secretary of Cabinet*, 2003d.

²⁰ T Waldegrave, D Anderson and K Wong *The Effect of the Employment Relations Act 2000 on Collective Bargaining* Report to the Department of Labour 2003.

²¹ Hon Margaret Wilson, above n 18.

²² Employment Relations Law Reform Bill 2004.

²³ Compulsory Arbitration continued in these areas through the ECA and ERA periods.

²⁴ Employment Relations Amendment Act (No 2) 2004.

conduct occurring after 1 December 2004 could be used as grounds for obtaining facilitation assistance from the Authority.

In addition to the facilitation process, a new form of ‘compulsory arbitration’ provided for fixing terms and conditions of Collective Employment Agreement in cases where good faith was breached.²⁵ This was seen as only being likely to apply in extreme cases, a remedy of last resort. The threshold was, therefore, set at a high level with a potentially high risk outcome for offenders, the remedy under section 50J being that a third party, the Employment Relations Authority, could effectively set the terms and conditions of employment for a group of employees where a serious and sustained breach of duty of good faith had occurred.

Specific provisions were made in an attempt to overcome the unions’ concerns about the lack of requirement on employers to conclude bargaining. The amendment to the Act provided for section 33 to be extended to require parties to conclude a collective agreement unless there was a genuine reason not to do so. Philosophical opposition to a collective agreement and disagreements over bargaining fees are specified as not being genuine reasons for failing to conclude an agreement. Further, when a union and employer have reached a deadlock over a matter they must continue bargaining about other matters where agreement has not been reached.²⁶

Other changes introduced in an attempt to enhance collective agreements included the extension of the good faith provisions to prevent an employer from passing on terms and conditions agreed to in a collective to non-union members, section 59A, penalties for breaches of good faith, section 4A, a subsequent parties clause, section 56A, and a bargaining fees provision, part 6B.

Facilitation Process

Facilitation is a two-stage process with the Employment Relations Authority being the gatekeeper. Any or both parties involved in collective bargaining can make application to the Authority for facilitation; however, the Authority is unable to accept an application unless it is satisfied that one of the grounds set out in the ERA is met. The grounds in section 50C include;

In the course of the bargaining, a party has failed to comply with the duty of good faith in and the failure was serious and sustained; and it has undermined the bargaining:

The bargaining has been unduly protracted and extensive efforts (including mediation) have failed to resolve the difficulties that have precluded the parties from entering into a collective agreement

In the course of the bargaining there have been one or more protracted or acrimonious strikes or lockouts

In the course of bargaining, a party has proposed a strike or lockout and if it were to occur, it would be likely to affect the public interest substantially

A strike or lockout is likely to affect the public interest substantially if—

the strike or lockout is likely to endanger the life, safety, or health of persons: or

the strike or lockout is likely to disrupt social, environmental, or economic interests

and

the effects of the disruption are likely to be widespread, long-term, or irreversible.

²⁵ Employment Relations Act 2000, s 50J.

²⁶ Section 32(1)(ca).

Once a matter has been accepted for facilitation a different Authority Member is assigned the case to provide facilitation services.

Initially, the Authority set a high standard for acceptance of matters for facilitation. The first application for facilitation was made in December 2004. The application from EPMU sought facilitation on the grounds of alleged breaches of good faith. The Authority member determined that facilitation was to be provided where “serious” difficulties were encountered, not just “ordinary” difficulties. Strike action over 17 days, one 24 hour stoppage, pickets, police involvement and trespass notices were not sufficient to get over the hurdle required in section 50C.²⁷

Service and Food Workers Union lodged an application in January 2005 alleging that their bargaining with Air New Zealand had been unduly protracted, or alternatively that the strike action they had taken had been acrimonious or that the further strike action proposed was likely to substantially affect the public interest.²⁸ This case was important in establishing the standard required to get over the facilitation bar. The Employment Relations Authority determined that each ground in section 50 was intended to stand alone, and that the initial role of the Authority was to see whether any grounds existed. The Authority, in accepting that the strike was acrimonious, determined acrimony to be “bitter in manner or temper”. The requirement to display bitterness by words or conduct was not merely the parties experiencing bitterness of feelings. During the bargaining, there had been a number of problems between the parties resulting in disciplinary action against some employees. On that ground, even though the other grounds were not proven, facilitation was accepted.

Since that time, another 41 applications for facilitation have been made to the Employment Relations Authority. Of the cases referred, only six applications have been dismissed. In another matter between Service and Food Workers Union and Air New Zealand, The Authority considered “protractive bargaining” and while acknowledging that extensive efforts made by the parties had failed to resolve bargaining, determined that 12 months was not reason for finding bargaining unduly protracted. The length of time since the parties had commenced bargaining was a factor, however, when bargaining took place was a matter that needed to be factored into the decision. The bargaining had been protracted due to the bargaining taking place in other collectives, not the time the parties had been in actual bargaining over this collective.²⁹

The rejection of a proposed settlement on two occasions and bargaining over 10 months was not found as grounds for facilitation in *Service and Food Workers Union v Spotless Services (NZ) Ltd*.³⁰

The bargaining between NZ Professional Drivers and Transport Employees Association Inc and Transportation Auckland Corporation Ltd was difficult because of changes in advocates. There were disagreements about what had been agreed between the parties. The Applicant in this case, a small union with less than 20 members, claimed that the respondent had delayed negotiations because of negotiating another collective with another union and asked the Authority to order that collective employment agreement conditions be fixed under section 50J. The Authority declined and refused to grant facilitation. They found that the respondent had not breached obligation to be responsive and communicative as the change of negotiating teams by both parties had caused the delay. The

²⁷ *PMP Print Ltd and Anor v New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc* CA162/04, 22 December 2004.

²⁸ *Service and Food Workers Union v Air New Zealand* AA11/05, 19 January 2005.

²⁹ *Service and Food Workers Union v Air New Zealand* AA172/08, 9 May 2008.

³⁰ *Service and Food Workers Union v Spotless Services (NZ) Ltd* WA71/05, 6 May 2005.

respondent did not undermine, mislead or backtrack on agreements reached and the bargaining was not unduly protracted and efforts to reach resolution not extensive.

In the course of bargaining, parties should seek mediation assistance prior to seeking facilitation, however, on occasions, the Court or the Authority will all grant facilitation but delay the implementation to allow mediation or further mediation to occur. Air New Zealand sought facilitation assistance from the Authority during bargaining with the Flight Attendants and Related Services Association in 2010.³¹ The application was made prior to mediation taking place. The applicant then requested an adjournment of the proceedings so that they could attempt mediation and if this was unsuccessful, they could use facilitation. The Authority did not see the process as one that could be granted and then put aside for a raining day. They could either continue, in which case the application was unlikely to succeed, or withdraw. The applicant withdrew and made a further application when bargaining hit a difficulty the following year. This later application was granted.³² However, in *Service and Food Workers Union Nga Ringa Tota Inc and Air New Zealand*, the Authority held an investigation meeting with the parties to consider a reference to facilitation. Following the meeting, the Authority directed the parties to use mediation before the investigation proceeded. They granted an adjournment to allow this to occur. When this was unsuccessful the hearing resumed with the application for facilitation being granted.³³

The Employment Court has considered two cases. An appeal by McCain Foods New Zealand Ltd against an Authority decision granting facilitation was dismissed on the grounds that bargaining over 34 months was unduly protracted, and extensive efforts including mediation had failed to resolve the difficulties the parties had encountered in concluding a collective employment agreement. This was the first time the Court had considered the intention of the 2004 amendment. The Court upheld the Authority's determination to grant facilitation. Their broad interpretation of section 50A was confirmed in *Service and Food Workers Union Nga Ringa Tota Inc v Sanford Limited*, when a decision of the Authority to not grant facilitation was overturned. The Court concluded that the efforts to resolve difficulties were sufficiently extensive. While facilitation was granted the Court directed that it be delayed for a month to allow the parties to continue mediated collective bargaining.

From these and the other cases that have been decided, it is clear that the facts of the particular case are the important determining factor in overcoming the facilitation bar. Twelve months may be sufficient in one case but not in another, it is all of the surrounding circumstances that are important. One of the overriding objectives of the legislation is that mediation is the prime problem-solving mechanism.³⁴ Problems in relationships are more likely to be successful if the parties resolve them themselves, but sometimes other assistance needs to be made available.³⁵ Despite the high number of successful application, both the Employment Relations Authority and the Court seem to accept this principle and consider whether the parties have exhausted all other options prior to granting facilitation. For example in *Service and Food Workers Union Nga Ringa Tota Inc and Air New Zealand*,³⁶ the Authority directed the parties use mediation before the Authority investigation proceeded and in *Service and Food Workers Union Nga Ringa Tota Inc and Spotless Services (NZ) Ltd*, the application was rejected and the parties were directed to mediation.³⁷

³¹ *Air New Zealand v Flight Attendants and Related Services Association* AA363/10, 18 August 2010.

³² *Air New Zealand v Flight Attendants and Related Services Association* [2011] NZERA 309.

³³ *Service and Food Workers Union v Air New Zealand* above, n 29.

³⁴ Employment Relations Act 2000 s 3(a)(v).

³⁵ Sections 143(b) and (c).

³⁶ *Service and Food Workers Union v Air New Zealand*, above n 29.

³⁷ *Service and Food Workers Union v Spotless Services (NZ) Ltd*, above n 30.

Facilitation, what is it?

The legislation does not define facilitation, other than to say that “the purpose of clause 50B to 50L is to provide a process that enables parties who are having serious difficulties in concluding a collective agreement to seek the assistance of the Authority in resolving the difficulties.” The process must be conducted in private,³⁸ and is what the Authority determines it to be.³⁹ The collective bargaining that the facilitation relates to also becomes a process conducted by the Authority.⁴⁰

The facilitation process is not an investigation by the Authority⁴¹ but recommendations as to processes to be followed or contents of a collective agreement may be made.⁴² Recommendations are not binding but they may be made public. An Authority recommendation has only been made public on one occasion. Stagecoach New Zealand Ltd and The New Zealand Tramways Union had been negotiating for seven months prior to making an application to the Authority for facilitation. After lengthy facilitation, the parties did not accept the Authority’s decision; however, the Authority decided to release their recommendation to the public.

The only provision in New Zealand employment law for a determination to fix terms and conditions of employment is in section 50J, where there is a serious and sustained breach of duty of good faith and it would be appropriate in all the circumstances for the Authority to fix the terms. A successful claim has not been made under this provision. Only one case has been brought before the Authority. It appears from the papers that this was not a particularly strong example to argue as the Authority not only refused to set the terms and conditions of employment, but also declined to grant a facilitation hearing.⁴³

International Comparison

Internationally, there are numerous processes supporting collective bargaining. I have chosen three different ones to compare and contrast with New Zealand system. In order to do so I have chosen a dispute in the aviation industry in each jurisdiction to discuss the different ways the dispute was managed in the different jurisdictions.

Canada

In March 2012, Air Canada received notice from the International Association of Machinists and Aerospace Workers (IAMAW), representing the airline’s approximately 8,600 mechanics, baggage handlers and cargo agents in Canada, that it intended to take strike action on Monday March 12, 2012. Pilots were also threatening strike action. The strikes were scheduled to take place in the midst of the peak March break travel period. The Airline had also threatened to lock workers out. The parties were in discussions over terms and conditions of employment and had attended mediation with a federal mediator.

³⁸ Employment Relations Act 2000 s 50E(1).

³⁹ Section 50E(2).

⁴⁰ As above.

⁴¹ Employment Relations Act 2000, s 50E(3).

⁴² Section 50H.

⁴³ *NZ Professional Drivers and Transport Employees Association Inc v Transportation Auckland Corporation Ltd* [2011] NZERA 400.

The Minister of Labour asked the Canadian Industrial Relations Board to investigate the matter based on health and safety issues. The Airline carried pharmaceuticals and other health products into remote areas.⁴⁴

When bargaining breaks down and a strike or lockout is threatened, the Canadian government can pass legislation to end the strike or a lockout by implementing compulsory arbitration or by determining a new contract without negotiation. The cost of the government appointed arbitrator is equally divided between the parties.

In this case, in addition to the Health and Safety investigation, the government introduced back to work legislation. Bill C33, entitled the Protecting Air Services Act, banned strikes or lockouts until new collective agreements were signed. The legislation extended the existing collective agreements until a new one came into effect. It removed Air Canada's right to lockout or the union's right to strike while the existing collective agreement remained in place and appointed an arbitrator to provide final offer arbitration. The Arbitrator was given 90 days in which to determine the matter. The decisions, when issued, became the new collective employment agreements for pilots and machinists employed by the Airline.

Under final offer arbitration, the arbitrator chooses either the union or the employer's final offer. This then becomes the applicable collective agreement. A note of interest, final offer arbitration is not unknown in New Zealand. It is the system that applies when collective bargaining negotiations break down between the New Zealand police and the Police Union.

Guidelines were given to the arbitrator to assist him with his decision. These were promulgated in the legislation. The Act says that he was to be guided by the need for terms and conditions of employment that are consistent with those in other airlines and provide flexibility to ensure short and long term economic viability and competitiveness of the employer. In both cases, the Arbitrator found in favour of the Airline's final offer. This resulted in collective employment agreements that are in effect until 31 March 2016.

While in this case, the Act specified the criteria the arbitrator was to give weight to, this is not always the case. For example, Bill C39, "Restoring Rail Services" legislation, which orders Canadian Pacific Rail workers back to work and prevents their employer locking them out does not specify criteria for the arbitrator. It merely states that the Arbitrator's decision must be set out in a form that would allow it to be incorporated into the collective agreement.

Australia

In August 2011, Qantas announced a restructure, which proposed a reduction in their workforce by 1,000. At the same time, there had been long and ongoing industrial action by three unions representing engineers, baggage and catering staff, and long-haul pilots. The unions were seeking improvements to pay and conditions.

Qantas alleged that the strike action resulted in at least 80,000 passengers being affected, more than 600 flights cancelled and seven aircraft grounded, and in response they indicated that they would be

⁴⁴CBC News, posted: March 08, 2012 11.23 AM ET, (20 November 2013).

locking out their workforce, in effect grounding the airline. They did this. The federal government intervened and an urgent hearing before Fair Work Australia was held on the 31 October 2011. An order was made to terminate industrial action and gave the parties 21 days to try and determine an outcome between them. Unfortunately, this was not able to be achieved so, under the Fair Work Act 2009, the Tribunal was required to make a determination as to how the matter should be settled. Hearings were held between 23 March and 26 June in the following year. A determination was issued on the 8 August 2012

New Zealand

The first matter that was accepted for facilitation, bargaining between the Service and Food Workers Union and Air New Zealand was done so after the parties had been in lengthy bargaining, there had been strike action, and further strikes were proposed. Mediation had been offered and accepted under section 90 of the ERA. When mediation was unsuccessful the parties applied to the Authority for facilitation. Facilitation was granted. The parties meet in an investigation meeting with James Wilson. The investigation meeting was carried out in private in terms of the legislation. Following the meeting, the parties were able to successfully conclude their collective agreement. Unlike the Canadian and Australian situations, unless there are serious breaches of good faith, there is not provision in legislation to allow a third party to impose a solution without agreement of the parties.

Conclusion

New Zealand has had a long history of State assistance for parties encountering problems in collective bargaining. Since the introduction of the ERA in 2000, the emphasis in New Zealand has been for parties to employment relationships to work together in good faith to sort out any difficulties they may encounter in collective bargaining. The legislation emphasises self-resolution while recognising that on occasions parties may need assistance. Mediation is the prime dispute resolution process and most collective bargaining matters are resolved either by the parties themselves or with mediation assistance. The assistance provided both in mediation and facilitation is designed to support their relationship and, except for very limited circumstances, not to impose solutions on them. The Employment Court and the Employment Relations Authority both recognise the importance of mediation assistance but when this has not been successful, parties are granted the right to facilitation assistance. There has been very little research into the success or otherwise of the New Zealand system. This is a matter I hope to address as part of my PhD research.

Safe and Healthy Work: a Human Right

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Abstract

Workplace incidents and work-related diseases are major causes of death and disability worldwide, but especially in the developing nations. Although rights to health and safety on the job appear in all major human rights instruments, such issues have not consistently been framed as human rights issues and have not attracted the same level of attention as other human rights issues. This paper explores the reasons for this, including the theoretical issues that arise in relation to the question whether workers' rights are human rights. It critiques the ILO's decision to identify a narrow core of workplace rights (excluding workplace health and safety) in the 1998 Declaration on Fundamental Principles and Rights at Work, and makes a case for the inclusion of rights to health and safety in this core.

The final section of the paper considers the difficult questions of how such a right might be defined and what the role of the State, as duty holder, might be. It concludes with a brief attempt to evaluate New Zealand's health and safety regime in human rights terms with particular reference to the State obligations set out in the Maastricht Guidelines on economic, social and cultural rights.

It concludes that the recommendations of the recent Report of the Independent Taskforce on Workplace Health and Safety would need to be implemented in full for the standard set by the Maastricht guidelines to be achieved.

Key words

Human Rights, Labour Law, ILO, Declaration on Fundamental Principles and Rights at Work, Workplace Health and Safety, Health and Safety in Employment Act 1992

Introduction

Fatal workplace incidents or work-related diseases claim over two million victims a year worldwide.¹ The numbers who lose their lives at work far exceed the numbers who die as a result of the death penalty² or from armed conflict.³ The situation in the developing economies has been described as a crisis, with American commentator Jeff Hilgert asking:⁴ "Is the search for cheap labor by the world's multinationals

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¹ International Labour Organisation "Work-Related Fatalities Reach 2 Million Annually" <www.ilo.org/global>.

² The Guardian "Death Penalty Statistics Country by Country Visualisation and Data" <www.guardian.co.uk>.

³ World Health Organisation "World Report on Violence and Health" (2002) Ch 8 <www.who.int>.

⁴ Jeff Hilgert "A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right" in James A Gross and Lance Compa (eds) *Human Rights in Labor and Employment Relations* (Labor and Employment Relations Association) 43 at 50.

better characterized as a search for disposable labor and an unspoken license to kill workers when production demands”?

Given that workers’ rights (including rights to health and safety on the job) appear in all major human rights instruments, it might seem settled that these statistics give rise to human rights issues. Yet, failures to protect worker health and safety, along with other issues relating to workers’ rights, have not consistently been framed as human rights issues and have not attracted the same level of attention as other human rights issues.⁵ While the notion that workers have rights is neither new nor radical, the basis and scope of such rights have been matters of ongoing debate. So have questions about whether a rights-based analysis can usefully be applied to help protect workers from abuse, exploitation and danger on the job. This paper sets out to show that workers’ rights, generally, and health and safety rights in particular, can and should be addressed within a human rights framework.

It will begin by offering some indications as to why human rights discourse has not always had a clear place in discussion about workers’ rights. From there, it will go on to look at some of the theoretical issues that arise in relation to the question whether workers’ rights are human rights.

The next section will outline the broad range of workplace rights (including rights to a safe and healthy workplace) which are contained in key human rights instruments and which have historically been advanced by the International Labour Organisation (ILO). The paper will then critique the ILO’s decision to identify a narrow core of workplace rights (excluding workplace health and safety) in the 1998 Declaration on Fundamental Principles and Rights at Work,⁶ and make a case for the inclusion of a wider range of workplace rights, including rights to health and safety, to be included in this core.

In doing so, however, it acknowledges that certain difficult questions must be tackled in asserting the right to a safe and healthy workplace. These are questions about the extent of any such right and about who the duty holders might be. In the final section, this paper will return to the question of how such a right might be defined, with reference to the New Zealand health and safety regime, which has been under scrutiny since 2010 when 29 men died in the Pike River mine explosion.

What Ross Wilson of the Council of Trade Unions (CTU) has described as: “a tragedy which should never have occurred”⁷ had the effect of drawing public and government attention to our ongoing poor workplace health and safety statistics. Workplace accidents kill at least 80 New Zealanders, on average, each year⁸ while over three hundred more live with permanent impairment.⁹ Up to a thousand die or suffer chronic ill health from work-related diseases such as asbestosis.¹⁰ These figures are much higher than in other developed countries: double that of Australia and four to six times that of the United

⁵ Virginia A Leary “The Paradox of Worker’s Rights” in Lance A Compa and Stephen F Diamond (eds) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press, Philadelphia, 1996) 22 at 22.

⁶ International Labour Organisation Declaration of Fundamental Principles and Rights at Work, adopted at its 86th Session Geneva June 18 1998.

⁷ New Zealand Council of Trade Unions “Submission to The Royal Commission on the Pike River Coal Mine Tragedy” Transcript of Phase Four Hearing at [5487].

⁸ Statistics New Zealand “Serious injury outcome indicators: 1994–2010” (2011) <www.stats.govt.nz> at 59.

⁹ Above at 59.

¹⁰ Independent Taskforce on Workplace Health and Safety “Safer Workplaces Consultation Document” <www.hstaskforce.govt.nz/documents/Consultation_doc.pdf> at 2.

Kingdom.¹¹ Against this background, this paper concludes with an assessment of whether New Zealand's statutory health and safety regime meets State obligations as enunciated in the Maastricht Guidelines on economic, social and cultural rights.¹²

Are Workers' Rights Human Rights?

The Contested Place of Rights Discourse

The idea that human rights apply in the workplace is not new, even if, as some argue, it has recently gained more traction.¹³ Parallels have long been drawn between "violations caused by a tyrannical government and violations caused by tyrannical force in an economic system."¹⁴ Tonia Novitz and Colin Fenwick, for example, point to the influence of Catholic teaching that workers have rights in natural law, independent of any deal they might negotiate individually or collectively.¹⁵ The existence of such rights is premised on the view that, before they are servants, employees, or human resources, workers are, first and foremost, human beings. This view was restated in a 1981 papal encyclical in the following terms:¹⁶

...work is...a source of rights on the part of the worker. These rights must be examined in the broad context of human rights as a whole, which are connatural with man, and many of which are proclaimed by various international organisations and increasingly guaranteed by the individual States

...

American Linda Lotz has traced such ideas back even further to the Hebrew story of Moses freeing the Jewish people from Pharaoh. Framing this as an organised walkout by exploited workers (rather than a rebellion against a tyrannous state), she noted the ongoing resonance of this narrative in Judaism, Christianity and Islam.¹⁷

Sarah Joseph describes labour rights as having been: "at the vanguard of the modern human rights movement" citing efforts to fight slavery and child labour as good examples of a common history between human rights and labour issues.¹⁸ Despite these shared beginnings, however, workplace rights and general human rights have not developed in an integrated discourse. Workplace rights have been

¹¹ Above at 1.

¹² Philip Alston et al "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" (1998) 20.3 HRQ at 691.

¹³ Tonia Novitz and Colin Fenwick "The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) 1 at 6.

¹⁴ James A Gross "A Long Overdue Beginning" James A. Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) 1 at 4.

¹⁵ Novitz and Fenwick, above n 13, at 6.

¹⁶ Pope John Paul II "Laborum Exercens On Human Work" (1981) at para 16 <www.osjspm.org>.

¹⁷ Linda A Lotz "All Religions Believe in Justice" in James A Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) at 183.

¹⁸ Sarah Joseph "UN Covenants and Labour Rights" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, Oxford, 2010) at 331.

dominated by the paradigms of social justice and economics¹⁹ while the idea that workers' rights are human rights has waxed and waned in influence.²⁰

This has resulted in part from the priorities of activists. Virginia Leary noted in 1996 that Amnesty International was, at that time, the only leading non-government human rights organisation working closely with the ILO.²¹ Perhaps some activists have regarded issues about 'first tier' civil and political rights as more pressing, and as necessary antecedents to other rights. Others, according to James Gross, have joined forces with big business and the proponents of the free market, asserting the supremacy of "negative rights" whilst opposing economic and social rights.²² The result, he says, is a "lack of attention" that:²³

...has contributed to workers being seen as expendable in worldwide economic development, and their needs and concerns not being represented at conferences on the world economy dominated by bankers, finance ministers and multinational corporations.

It might be reasonable to suppose that trade unions would have made a high priority of promoting workers' rights, but unions do not always apply a human rights framework to workplace issues. The first reason for this is that unions, as well as employers, often situate employment in an economic context. Although in Europe, historically, workers have at times pursued their demands within a human rights framework, using the language and legal tools of international human rights,²⁴ in the United States the market analysis has left little space for human rights-based strategy. Economic demands dominate routine collective bargaining and pressure to compromise means sectional interests are prioritised (sometimes at the expense of other workers) even if the wider union movement supports human rights goals. As a result, a market analysis prevails, with the workplace characterised as an arena where competing interests are to be balanced. Jeff Hilgert goes so far as to say "from the earliest foundations, human rights were marginalised ideas and took a backseat to what became the constructed vision of the labour market and its acceptable regulation".²⁵

Trade unions have also been suspicious of what they see as the individualistic nature of rights discourse.²⁶ Hilgert suggests that this is based on the fear that it will "impede the idea of community, solidarity, civic virtue and, in our context, the goals of collective bargaining".²⁷

This mistrust of a rights-based approach is not limited to organised labour, or to the United States. Simon Deakin has argued that this approach may also be perceived as a potential threat to the social contract that underpins the modern welfare state:²⁸

¹⁹ See for example Hugh Collins "Theories of Rights as Justifications for Labour Law" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 137 at 137.

²⁰ See for example, Harry Arthur "Labour Law after Labour" in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 13 at 23.

²¹ Leary, above n 5, at 24.

²² Gross, above n 14, at 4.

²³ Gross, above n 14, at 3.

²⁴ Tonia Novitz and Colin Fenwick "Conclusion: Regulating to Protect Workers' Human Rights" in Colin Fenwick and Tonia Novitz (eds) *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing Oxford and Portland, Oregon, 2010) 585 at 587.

²⁵ Hilgert, above n 4, at 62.

²⁶ Hugh Collins "The Productive Disintegration of Labour Law" (1997) 26 *Indus LJ* 295 at 306.

²⁷ Hilgert, above n 4, at 62.

Depending on one's point of view, social rights could be a bulwark against neo-liberalism and a mechanism for equipping the welfare state to survive in a globalised world; or, alternatively, a corrosive force, which by individualizing legal claims to access to resources undermines those solidaristic forms of social cohesion around which the twentieth century welfare state was constructed.

In recent decades, however, it has become clear that collective bargaining, the primary mechanism by which unions promote the interests (and rights) of their members, cannot realise a good "market value" for the labour of all workers. Hugh Collins attributes this failure to a "type of deafness in relation to issues of distributive justice" saying:²⁹

The system of industrial relations presented collective agreements as a fair mechanism for setting the distribution of wealth and power in society...This analysis failed to acknowledge the possibility of segmented labour markets, where outside the realm of collectively agreed terms and conditions, there was a substantial sector of low paid employment, populated often by women and minorities, where the industrial structure and the transitory nature of the businesses precluded the development of bargaining structures.

To make matters worse for workers, even in developed economies, the sector "outside the realm" of collective bargaining has been growing. Manufacturing has been in decline and with it the reach of organised labour. Increasing emphasis has been placed on the individual employment contract as a means of regulating working relationships, and labour or industrial law courses have been re-labelled as courses in employment law.

As James Gross has noted, the multi-national corporations of today exceed many nation states in money, power and influence. Individuals may be as much, or more, at risk from abuse by such entities as they are from governments, yet often, as Gross suggests, they lack mechanisms to address this situation: "...while assertions of individual rights and freedom are commonly made against the exercise of power by the state, rights and freedom are routinely left outside the factory gates and office buildings with barely a murmur of protest".³⁰

New ways were, therefore, needed for workers to deal with the challenges of a global economy and an increasingly segmented labour market. Women and other disadvantaged groups were looking for solutions to workplace inequalities.³¹ It is in this context that the human rights approach has gained (or re-gained) ground. As Novitz and Fenwick argue:³²

there appears at least to be consensus amongst workers and their organisations, at the national, regional and international levels, that they must present their claims in terms of human rights, even if not exclusively so. The imperative to present their claims as human rights comes from the desire to utilize the potentially powerful legal methods of securing advantage to pursue their claims, and also from the perceived need to respond to employers' willingness to use these arguments and tools themselves.

²⁸ Simon Deakin "Social Rights in a Globalized Economy" in *Labour Rights as Human Rights*, Philip Alston (ed) Oxford University Press (2005) 25.

²⁹ Collins, above n 26, at 306.

³⁰ Gross, above n 14, at 4.

³¹ A C L Davies "*Perspectives on Labour Law*" (Cambridge University Press, Cambridge, 2004) at 5.

³² Novitz and Fenwick, above n 24, at 587.

The latter part of the 20th century saw the United Kingdom, Canada, Australia and New Zealand pass a raft of legislation concerned with employment rights. In this country, this included the Equal Pay Act 1972, the Parental Leave and Employment Protection Act 1987, and the Human Rights Act 1993. Anne Davies argues that this programme of statutory protections marked the point at which a human rights perspective really began to achieve traction in the employment context.³³

Theories of Rights in the Workplace

It is probably uncontentious to say that some labour issues clearly are *not* human rights issues. For every right there is a duty, and a duty holder. It follows that not all claims (indeed not all needs) amount to rights, as this will depend on whether there is a basis for imposing a duty on another party. Claims for paid professional development leave, for example, would probably be regarded by most as matters for negotiation between employer and employee.

We do, however, freely apply the language of rights to the workplace. We speak of “rights” to a minimum wage, to protection from unfair dismissal, and to a safe workplace. All of these examples are enshrined in New Zealand’s domestic law, and all can be described as “labour rights” or “employment rights.” Does this mean that they (or any other labour rights) are human rights?

The term “human right” is used in this paper to mean “universal human right” in the sense, as Hugh Collins puts it, of a right which “stresses how human rights are universal, natural, and inalienable” and justifies interference in the affairs of a sovereign state.³⁴

Such a right is not something that is earned, or even legislated into existence. It attaches to the very fact of being human and cannot be bargained away. In becoming the holder of entitlements, a worker is “cast as a self-sufficient and independent rights-bearer whose assertion of rights amounts to a vindication of ...autonomy, personhood and dignity”.³⁵

If (as set out in the previous section) activists have taken awhile to decide that labour rights *should* be pursued within a human rights framework, scholars have been cautious about confirming that they *can* be. As Virginia Mantouvalou has noted: “some endorse the character of labour rights as human rights without hesitation, while others view it with scepticism and suspicion”.³⁶

Mantouvalou identifies three ways in which the literature tends to approach the question. The first is a positivist approach, by which the existence of labour rights, in various international human rights instruments, is taken as indicating that they are indeed human rights. The second is an instrumental approach, by which the success of strategies promoting labour rights as human rights confirms that that is what they are. The third is a normative one.³⁷

³³ Davies, above n 31, at 36.

³⁴ Hugh Collins “Theories of Rights as Justifications for Labour Law” in Guy Davidov and Brian Langille (eds) *The Idea of Labour Law* (Oxford University Press, Oxford, 2011) 137 at 144.

³⁵ Claudia Geiringer and Matthew Palmer “Human Rights and Social Policy in New Zealand” [2007] *Social Policy Journal of New Zealand* 12 at 15.

³⁶ Virginia Mantouvalou “Are Labour Rights Human Rights?” (18 February 2012) *European Labour Law Journal* <<http://ssrn.com/abstract=2007535>>.

³⁷ At 1.

The positivist approach, as she points out, has limitations. The biggest is that conceptions of rights vary greatly between different instruments. What has been included and what has not has usually come down, in practice, to negotiation and compromise, rather than any reasoned basis.³⁸ So while looking at human rights documents can give us some idea of the variety of labour rights which have been labelled as human rights, it does not provide a definitive answer to the question whether, or which, labour rights are human rights.

The instrumentalist approach, typified by Philip Alston asking whether it is: “helpful or appropriate to approach labour rights as human rights”³⁹ is, in Virginia Mantouvalou’s view, the prevailing one.⁴⁰ We have already seen in the previous section that labour unions and other activists have identified the potential for a human rights approach to provide a powerful way of dealing with the challenges of a global economy and an increasingly segmented labour market. It is not difficult to see why some scholars might also turn, or return, to human rights discourse for the tools and language they need to grapple with workplace issues. The human rights approach means that, instead of being framed exclusively in economic terms, certain issues will be looked at in light of values that emphasise the duties owed to a person by virtue of their humanity. The existence of rights also provides a way to resolve competing interests, at least some of the time, since rights will take priority over other claims.

Mantouvalou notes that the instrumentalist approach has received a boost in recent years in that the European Court of Human Rights (EctHR) “has been receptive to workers’ claims in a development that led labour law scholars to change their position towards labour rights as human rights”.⁴¹ She observes that this has been a factor in the increased willingness on the part of unions to adopt human rights strategies.⁴²

However, Mantouvalou also notes that the instrumental approach to whether labour rights are human rights often amounts to an empirical treatment of the question, which exposes what is probably the greatest weakness of the approach:⁴³

the success of a strategy leads to endorsement, the failure leads to rejection of labour rights as human rights...The costs of abandoning rights as a discourse, however, are not always carefully considered. These include a loss in aspirational standards and impoverishment in normative legal scholarship.

In practice, this impoverishment will mean, as noted in the previous section, that efficiency arguments and considerations of social justice will dominate thinking about labour and employment law. Hugh Collins has suggested that neither provide a reliable justification for constraints on the freedom of individuals and markets.⁴⁴ Arguments based on the need to ensure the efficient functioning of markets readily tend towards a call to do away with labour laws altogether, while a variety of redistributive mechanisms (many unrelated to labour law) can provide alternative ways of achieving social justice

³⁸ At 3.

³⁹ Philip Alston “Labour Rights as Human Rights: The Not So Happy State of the Art” in Philip Alston (ed) *Labour Rights as Human Rights* Oxford University Press 2005 1 at 4.

⁴⁰ Mantouvalou, above n 36 at 1.

⁴¹ At 10.

⁴² At 11.

⁴³ At 11.

⁴⁴ Collins, above n 34, at 137.

objectives. The New Zealand labour and employment relations system is a case in point. Since the first inroads into compulsory arbitration in 1973, the labour market has been increasingly deregulated,⁴⁵ while the low paid are assisted through measures such as Working for Families.⁴⁶

This leads to consideration of Mantouvalou's third category for determining the question whether labour rights are human rights: the normative approach.

Collins has observed that there is an attraction in basing a theory of labour law on a "strong theory of rights" that "forecloses the discussions of efficiency and welfare by an appeal to an overriding value that justifies labour law".⁴⁷ The operative word here is "strong" since as he points out:⁴⁸

Not all theories of rights deliver the required degree of foreclosure... only rights regarded as having pre-emptive force provide a theoretical basis for labour law that can securely withstand attacks that promote other values and goals which may argue against regulation of the labour market and the workplace.

Collins doubts whether labour rights are really human rights although he is prepared to say that they may be "some other kind of 'fundamental rights' with exclusionary force".⁴⁹ I will come back to what other kind of rights he thinks they may be. First, however, I will discuss his reasons for disputing that labour rights are human rights, and the counter arguments developed by Virginia Mantouvalou.

Collins identifies four crucial features of human rights: that they are claims with moral weight, universal application, stringency and consistency over time.⁵⁰ He says that labour rights differ from human rights in respect of all four features. Mantouvalou has challenged Collins' assertions about all of these supposed points of difference.

With regard to the first (that labour claims lack the requisite moral weight of human rights), she argues that while not all labour issues necessarily have the moral weight of human rights issues, some certainly do. She equates the physical assault, sexual abuse and inadequate meals suffered by many migrant domestic workers in the United Kingdom with such "compelling and absolute" human rights issues as the prohibition of torture.⁵¹ (A similar comparison may indeed be made with loss of life or serious impairment arising from dangerous working conditions.)

Her response to his assertion that labour rights are not universal claims (because they apply only to workers and not to everyone) is that: "because a right is conditional upon a particular status does not mean that it is not a human right".⁵² She cites for comparison the fact that refugees and migrants enjoy protection from extradition to places where they may face torture. A similar example might be found in an alleged criminal's rights to due process and a fair trial. And a majority of individuals are likely to be workers at some time in their lives when (at least one hopes) rather fewer will be charged with a crime or

⁴⁵ See Industrial Relations Act 1973, Labour Relations Act 1987, Employment Contracts Act 1991.

⁴⁶ New Zealand Government "Working for Families" <www.workingforfamilies.govt.nz>.

⁴⁷ Collins, above n 34, at 139.

⁴⁸ As above.

⁴⁹ At 140.

⁵⁰ At 143.

⁵¹ Mantouvalou, above n 36 at 12.

⁵² As above.

be at risk of torture.

The third criterion on which Collins bases his conclusion that labour rights are not human rights is whether they are stringent claims. He suggests that:⁵³

it seems likely that what will be regarded as fair pay and a reasonable holiday must depend to a considerable extent on what the relevant society can afford, whereas respect for dignity and liberty seems to require observance of minimum standards below which no government should be permitted to operate.

Mantouvalou points out that this argument could be applied equally to any economic, social or cultural rights that are affected by resource constraints. She argues that there is no basis on which requirements to provide a minimum core, and to achieve progressive realisation, should not be applied to labour rights in the same way as to other such rights.

Finally, on the question whether labour rights are timeless entitlements, Collins suggests that such rights will change over time with changes to production systems, work methods and the labour market. Once again, Mantouvalou rejects his argument, suggesting that a claim may remain timeless even though the way it is expressed develops and evolves. Her example is the timelessness of privacy rights in the face of changing technology. Another which springs to mind is the right to free speech in the age of the internet.

Mantouvalou's overall conclusion: that at least some labour rights "are not necessarily and by definition different in nature to other human rights. It can therefore be said that some labour rights are human rights on that normative analysis." Others, she acknowledges, may be categorised differently (perhaps as labour standards).⁵⁴

Mantouvalou has, thus, successfully rebutted Hugh Collins' appraisal that all labour rights fail to meet the four criteria for inclusion as human rights. Her analysis leaves the way open for a normative assessment as to which labour rights can be considered to be universal human rights. This question will be considered with respect to health and safety rights later in this paper.

First, however, it is worth returning briefly to Hugh Collins' discussion of other conceptions of rights which may help us understand workers' rights. Collins focusses on two alternatives to labour rights being human rights (as defined at the start of this section). Both, he suggests, offer theoretical justifications for the idea of a labour right being a "forceful constitutional type of right."

The first draws on liberal theories of justice and Rawls' 'veil of ignorance'. Collins puts the question:⁵⁵

Assuming (behind the veil of ignorance) that the rational person does not know whether he will be an employer, a worker or unemployed, but he or she knows that in a market economy most people earn the necessary income to support themselves and their families by taking a job... what protective guarantees would the rational person insist upon?

Although Rawls himself did not include workers' rights within the canon of protections that might be

⁵³ Collins, above n 34, at 142.

⁵⁴ Mantouvalou, above n 36 at 23.

⁵⁵ Collins, above n 34, at 142.

sought from behind the veil, Collins sees value in the methodology since it gets around issues of universality: the model enables us to consider what rights might properly apply to a particular subgroup or community.

Collins concludes that: "...we can feel reasonably confident that, given the centrality of work in the achievement of primary goods, some special protections for workers might be found to be necessary." He mentions, for example, the right to work.

Collins also sees approaches based on the dignity or autonomy of the individual as being relevant to justification for labour rights,⁵⁶ especially given that they are consistent with the ILO's historic assertion that "labour is not a commodity".⁵⁷ Using Jeremy Waldron's work as an example, he notes that: "respect for human agency as an end in itself" leads to the conclusion that "...at least some social and economic rights should be guaranteed, in order to prevent the level of destitution that would deny individuals any dignity at all (that is, undermine their civil liberties)".⁵⁸

An approach based on equality leads to a similar conclusion. As Emily Spieler has noted: "Rights-based theory confronts the problems of inequality in a segmented market by asserting an entitlement to a common floor, based on ideas of justice and humanity".⁵⁹

For labour issues outside the strictly defined category of universal human rights, therefore, approaches based on justice, dignity and equality provide ways of establishing that some of these should have the status of rights at the domestic level. Later in this paper, these approaches will be helpful in helping define the right to a safe and healthy workplace.

Applying a Rights Approach in the Workplace

The Role of the International Labour Organisation

The International Labour Organisation (ILO) is a specialised agency of the United Nations (UN) with 185 member states. Its purpose is to promote "social justice and internationally recognised human rights" which it claims to achieve by "drawing up and overseeing international labour standards".⁶⁰

The ILO, in fact, predates the UN itself. Set up in the aftermath of World War I, it owed its existence to a mixture of humanitarian, political and economic considerations. At the end of the war, trade union groups had pushed for any peace treaty to include provision for international minimum labour standards and an international labour office. Fear of further political and social unrest, and a wish to head off the potential spread of communism, made the original nine member states receptive to this proposal.⁶¹

⁵⁶ At 151.

⁵⁷ International Labour Organisation "ILO Declaration of Philadelphia" 1944 <www.ilo.org>.

⁵⁸ Collins, above n 34, at 152.

⁵⁹ Emily Spieler "Risks and Rights: the case for Occupational Safety and Health as a Core Worker Right" in James A. Gross (ed) *Workers Rights as Human Rights* (Cornell University Press, Ithaca, 2003) 78 at 93.

⁶⁰ International Labour Organisation "About the ILO" <www.ilo.org>.

⁶¹ International Labour Organisation "Origins and History" <www.ilo.org>.

As a result the 1919 Constitution of the ILO, Part XIII of the Treaty of Versailles provided for the establishment of a tripartite body made up of representatives of trade unions and employer groups as well as member states. It also acknowledged the critical place of workers' rights, including the right to a safe and healthy workplace, in the following terms:⁶²

Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, ... the protection of the worker against sickness, disease and injury arising out of his employment.

Health and safety issues were also one of the eight "areas for improvement" listed in the preamble to the Constitution.

Unlike the other creation of the Treaty of Versailles, the League of Nations, the ILO was to survive. Between the two world wars, it demonstrated its relevance and effectiveness with a raft of labour standards. Most of these focussed on working conditions, including health and safety. Today, nearly half of all ILO instruments deal with some aspect of workplace health and safety,⁶³ with over 40 standards and a similar number of Codes of Practice addressing issues relating to national policy as well as specific sectors, industries, and risks.

In 1944, the ILO restated its aims and purposes in the Declaration of Philadelphia. This document (which is essentially a high-level statement of fundamental principles) does not contain a specific reference to health and safety but its first principle has become a famous phrase: "labour is not a commodity".⁶⁴

In 1949, the ILO became the first specialised agency of the new United Nations, retaining its tripartite structure. It was the engine of the international labour rights system, which Alston has described as having been "long held up as one of the most successful of international regimes".⁶⁵

Throughout the cold war period, the ILO was seen as having a key role in helping maintain the social contract between labour and capital that underpinned the mixed economies of Europe. (Although it was viewed with suspicion by the United States which, to this day, has ratified a very paltry list of conventions.)

Eventually, with the demise of the communist threat, this aspect of its influence was perceived as less critical. By the mid-90s, the ILO was facing pressure to prove its ongoing relevance in a new era of globalisation. Sarah Joseph suggests that rights discourse had its part to play in the ILO's search for a new direction and quotes Philip Alston as saying, in 1994, that "a clear ideological position in favour of basic human rights can be the Organisation's only viable *raison d'être*."⁶⁶

⁶² International Labour Organisation "ILO Constitution" <www.ilo.org>

⁶³ International Labour Organisation "Occupational Health and Safety" <www.ilo.org>.

⁶⁴ International Labour Organisation "ILO Declaration of Philadelphia Declaration Concerning the aims and purposes of the International Labour Organisation" <www.ilo.org>.

⁶⁵ Philip Alston "Core Labour Standards and the Transformation of the International Labour Rights Regime" (2004) 15 EJIL 457 at 458.

⁶⁶ Joseph, above n 18, at 363.

Workplace Rights in key Human Rights Instruments

Although, as Sarah Joseph points out, the core United Nations treaties have not given rise to a significant body of jurisprudence,⁶⁷ workers' rights have been acknowledged as human rights since they were first included in the 1948 Universal Declaration on Human Rights, Article 23 of which provides: "Everyone has the right to live, to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment..."⁶⁸

A limited group of labour rights (those which are accepted as essentially negative or first tier rights) are included in the International Covenant on Civil and Political Rights (ICCPR).⁶⁹ Articles 8(1), 8(2) and 8(3) prohibit slavery and forced labour, and Article 22 provides for freedom of association. ICCPR rights are expressed with relative strength in that state parties are required to guarantee these rights. They are also justiciable pursuant to the optional protocol to the convention. This means that individuals are able to complain about State failures to protect these rights to a monitoring body: the Human Rights Committee.

The United Nations International Covenant on Economic, Social and Cultural Rights (ICESR)⁷⁰ addresses a wider group of labour rights. There is some overlap with the ICCPR: Article 8 of the ICESR provides the right to join a union, reinforcing Article 22 of the ICCPR. Anti-discrimination provisions are also common to both the ICCPR (Articles (2) (3) and (26)) and the ICESR (Article 2).

The ICESR also provides for further "second tier" or positive rights. Most importantly for the purposes of this paper, Article 6 provides the right to work and Article 7 the right to safe and healthy working conditions. Also relevant to workplace health and safety is Article 9 which sets out rights to social security (which includes workers' compensation). Under these provisions, workers who are unable to earn a living due to injury on the job are to be supported and compensated. Of further potential application to health and safety on the job are Article 10(2) which provides for paid parental leave and Article 10(3) which provides for protection of young workers. Finally Article 12 (which deals with health rights generally) requires states to take measures to improve industrial hygiene and combat occupational diseases.

The rights in the ICESR are weaker than those contained in the ICCPR. States are not required to guarantee these rights; all that is required is for them to take steps to achieve their progressive realisation. The rights in the ICESR have also been much harder to enforce, since they were justiciable only by means of group action. However, due to the adoption of a further optional protocol for the instrument (in December 2008), individuals now have the same rights of enforcement under the ICESR as they have always enjoyed under the ICCPR.

Article 2 of the ICESR is also of significance in relation to questions about the impact of globalisation on labour rights and health and safety. It deals with international assistance and cooperation. Compliance with this obligation means that states will not undermine the rights of others, and "may be required to

⁶⁷ As above.

⁶⁸ Universal Declaration of Human Rights art 23.

⁶⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

⁷⁰ International Covenant on Economic, Social and Cultural Rights 990 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976).

take positive actions to improve enjoyment of those rights, particularly when a latter state is unable to provide for minimum core rights”.⁷¹

The Declaration on Fundamental Principles and Rights at Work

In 1995, in Copenhagen, the United Nations World Summit on Social Development reached agreement that certain fundamental workers’ rights should be safeguarded as a priority. The Fundamental Declaration on Principles and Rights at Work (The Declaration) was adopted three years later in 1998. It sets out as follows:⁷²

The International Labour Conference ...

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions, namely:

1. freedom of association and the effective recognition of the right to collective bargaining;
2. the elimination of all forms of forced or compulsory labour;
3. the effective abolition of child labour; and
4. the elimination of discrimination in respect of employment and occupation.

The Declaration pulls together the content of a group of existing Conventions⁷³ which are a small but critical subset of the workplace rights contained in other ILO standards and conventions. Prohibitions on forced labour were first set out in Convention 29 in 1930 and expanded upon in Convention 105 in 1957. The right to freedom of association and related recognition of collective bargaining were enshrined in complementary Conventions (87 and 98) in 1948 and 1949 respectively. Discrimination came a little later with Convention 100 (Equal Remuneration) in 1951 and Convention 111 (Discrimination, Employment and Occupation) in 1958. Finally, the abolition of child labour was addressed in Convention 138 (Minimum Age Convention) in 1973 and Convention 182 (Worst forms of Child Labour) in 1999.

The Declaration is explained by the ILO itself as a response to the impacts of globalisation and a universal market economy,⁷⁴ although Philip Alston suggests that the idea of identifying a core of “basic human rights” in the workplace had been around for as long as 40 years.⁷⁵ He traces its eventual acceptance by the members of the ILO to the fall of communism when he says it became part of a move to “refine and sharpen the original system of classifying international labour standards according to their subject matter as well as to their centrality to the work of the Organisation and to human rights.”⁷⁶

⁷¹ Joseph above n 18, at 336.

⁷² International Labour Organisation Declaration of Fundamental Principles and Rights at Work, adopted at its 86th Session Geneva June 18 1998.

⁷³ International Labour Organisation “The International Labour Organisation’s Fundamental Conventions” <www.ilo.org>.

⁷⁴ International Labour Organisation “History” <www.ilo.org>.

⁷⁵ Alston “Core Labour Standards,” above n 65, at 484.

⁷⁶ As above.

Certainly by the late 1990s, rising inequality indicated a need to strengthen international labour standards, and it was perceived that this would be assisted by prioritisation and clarification of the “unwieldy and unenforceable list of ILO conventions” currently in existence.⁷⁷

The Declaration, as its name suggests, is a soft law instrument. Writing in 1998, a former deputy legal adviser of the ILO, Hillary Kellerson, extolled its “intrinsic” value, in that it reaffirmed “the universality of fundamental principles and rights at a time of widespread uncertainty and questioning of those rights”.⁷⁸ Acknowledging that it is a soft law instrument, he nonetheless argued the advantages of this by asserting that:⁷⁹

A remarkable aspect of this approach is that it represents a collective decision to pursue social justice by the high road – drawing on people’s aspiration for equity, social progress and the eradication of poverty – rather than by sanctions which can be abused for protectionist purposes in international trade.

It was adopted on the basis that it restates fundamental obligations of the ILO Constitution and Declaration of Philadelphia. For this reason, it applies to all member states whether or not they have ratified the key conventions which underpin it. Its expressed intention is to complement the existing system rather than replace it.⁸⁰ As Alston describes it, the dominant narrative around the adoption of the Declaration was that it “...provided the necessary flexibility in the face of forces of globalisation and universalized the reach of the core labour standards. While it left intact the pre-existing labour law regime, it made it potentially more effective”.⁸¹

The Declaration has achieved support outside the ILO with the Organisation for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF), and the World Bank all having agreed, in principle at least, that the four rights identified here are core workplace rights.⁸²

Meanwhile workplace matters outside this set of four rights – including all issues pertaining to working conditions – have been relegated to a lower tier. Health and safety, regarded as an aspect of working conditions, is in this category.

Sarah Joseph has argued that: “claims for the primacy of a small core of labour rights could only be made if a workable boundary were drawn between the core and other labour standards”.⁸³ So what distinguishes the core from all the rest?

What the four have in common is that they can be seen as so-called “first tier” human rights: negative rights or freedoms from interference. Essentially, they all correspond to fundamental civil and political rights. This makes them relatively uncontroversial. Importantly for the defenders of the free market, all four rights “are about the formation of the labor market and not the establishment of any minimum

⁷⁷ Spieler, above n 59, at 82.

⁷⁸ Hilary Kellerson “The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future” (1998) 137.2 Int’l Lab Rev 223 at 227.

⁷⁹ As above.

⁸⁰ At 223.

⁸¹ Alston “Core Labour Standards,” above n 65, at 458.

⁸² Spieler, above n 59, at 83.

⁸³ Joseph, above n 18, at 363.

standards within the employment contract”.⁸⁴ On this assessment, freedom of association is effectively a procedural right that impacts on the workplace in much the same way as the way the right to vote impacts civil society. The associated ability to bargain collectively may influence the labour market but will not fundamentally impede its functioning. Working conditions, because they were seen as lying within the scope of the employment contract, would be determined through negotiation.

Several factors influenced the decision to restrict the range of the core rights to the “first tier.” One was the prevailing economic orthodoxy that (given the range of variables impacting on the wage bargain), the free market was best left to itself to achieve optimal outcomes in relation to working conditions. Another was the acceptance that developing economies could not afford first world conditions of employment and would lose any competitive advantage they had if pushed to meet external standards before they were ready. Political differences, and suspicions that the developed world had a protectionist agenda, also presented obstacles to consensus on a wider core of rights.

Associated with the decision to identify a core of rights was a commitment by the ILO to channel its resources into those priorities. Kellerson has described this as adding further “potential value” to the Declaration.⁸⁵

The promotional effort called for in this Declaration implies a reorientation of the ILO’s constitutional, operational and budgetary resources in support of the priorities determined in the global reports, themselves based on annual reports and other official information available to the ILO. The full value of the Declaration, which depends on the active implementation of the follow-up by many in and outside the ILO, will only emerge in the course of time. The challenge facing the ILO in the next millennium will be to ensure that the Declaration achieves the significance and the impact it offers.

Essentially, Kellerson saw the Declaration as giving the ILO a mandate to work with its members on a set of key concerns on the basis that securing these rights will be a necessary first step towards improving the position of workers in developing nations.⁸⁶ Joseph suggests that the ILO has indeed been restructured around the core which gets “special priority and processes”, including provision of technical and advisory services and support for economic and social development.⁸⁷

Not all the ILO’s energies have gone into the core, however. Before evaluating the core rights approach is necessary to acknowledge the Decent Work Agenda and the Seoul Declaration.

The Decent Work Agenda and the Seoul Declaration

In September 2000, the United Nations adopted its Millennium Declaration which set eight goals to be achieved by 2015.⁸⁸ The first of these, which addresses poverty, was amended in 2005 to include the objective of “achieving full and productive employment and decent work for all, including women and young people”.⁸⁹ Within the United Nations, the ILO has responsibility for monitoring progress towards

⁸⁴ Spieler, above n 59, at 83.

⁸⁵ Kellerson, above n 78, at 227.

⁸⁶ At 225.

⁸⁷ Joseph, above n 18, at 363.

⁸⁸ United Nations Millennium Declaration GA Res 55/2, A/55/L.2 (2000).

⁸⁹ International Labour Organisation “Millennium Development Goals” <www.ilo.org>.

this goal and has structured its Decent Work Agenda to support it.⁹⁰ The four strands of the Decent Work Agenda are employment creation, social dialogue, social protection, and rights.

While safe work is part of the decent work programme but it also has been the subject of its own specific document. The Seoul Declaration on Safety and Health at Work was adopted on 29 June 2008 by the Safety and Health summit of the XVIII World Congress on Safety and Health at Work.

The Congress was organised by the International Labour Office, the International Social Security Association, and the Korea Occupational Safety and Health Agency. The preamble to this Declaration recognises that safety and health at work is a fundamental human right in the following terms:⁹¹

Recognizing the serious consequences of work-related accidents and diseases, which the International Labour Office estimates lead to 2.3 million fatalities per year world-wide and an economic loss of 4 per cent of global Gross Domestic Product (GDP),

Recognizing that improving safety and health at work has a positive impact on working conditions, productivity and economic and social development,

Recalling that the right to a safe and healthy working environment should be recognized as a fundamental human right and that globalization must go hand in hand with preventative measures to ensure the safety and health of all at work.

The Seoul Declaration does not change the fact that workplace health and safety is not the fifth core right. It can, however, be construed as some acknowledgement of the seriousness of health and safety as a human rights issue, and an attempt to address the issues raised by those who have criticised the failure to include it in the core four. It has now been signed by some 50 different union, employer, and government agencies from around the world.

The Case for a Fifth Core Right

Criticisms of the Core Rights Approach

The decision to isolate four rights as core rights has been subject to criticism. One of its most prominent detractors has been Philip Alston.⁹² His first concern relates to the inclusion of the word “principle” in the title of the Declaration. If the contents of the core are essentially in the nature of first tier rights, then why (he asks) use the weaker term “principle” at all? He also fears that the move towards “soft promotional techniques” could result in the downgrading of the role of the ILO’s “traditional enforcement mechanisms”.⁹³

⁹⁰ International Labour Organisation “Decent Work Agenda” <www.ilo.org>

⁹¹ Seoul Declaration Secretariat “Seoul Declaration of Safety and Health at Work” <www.seouldeclaration.org>

⁹² Alston “Core Labour Standards,” above n 65, at 457.

⁹³ At 458.

Most relevantly for the purposes of this paper, he is also concerned that the Declaration creates a “normative hierarchy” which could privilege the four core rights at the expense of others.⁹⁴ He seems to see this as a futile attempt, noting that there has never been agreement on a preeminent human right or value (be it dignity, equality or anything else). Emily Spieler makes a similar point by rejecting the suggestion that the core four might be “self-defining and universal” and so distinguishable from matters to do with working conditions. She says the core four will, like any other rights, require analysis depending on the context.⁹⁵ This argument seems strong: it cannot be self-evident, for example, at what age a child labourer becomes a young working person, or whether a workshop in a poor town is exploiting children or teaching them vital skills.

Alston argues that the decision as to which rights would be in the new core was “neither scientific nor deliberate”⁹⁶ and notes that while commentators may seek to extract a rational basis for such decisions after the event, at the time they are usually the outcome of negotiation and accommodation between the holders of conflicting positions. In this case, he suggests that:⁹⁷

The choice of standards to be included ... was not based on the consistent application of any coherent or compelling economic, philosophical, or legal criteria, but rather reflects a pragmatic political selection of what would be acceptable at the time to the United States and those seeking to salvage something from what was seen as an unsustainably broad array of labour rights.

Although he does acknowledge that there is some coherence in the core rights grouping in that they are process rather than result-orientated in a way that is consistent with a free trade agenda, Alston concludes that a “handful of exclusively civil and political rights have been selected” to the exclusion of rights contained in other human rights instruments⁹⁸ and says that it is inevitable that rights outside the core four will be neglected:⁹⁹

To the extent that the Declaration has succeeded in one of its principal objectives, which is to make it easy for other actors ranging from corporations, through international financial institutions, to international labour rights monitors, to narrow their gaze and focus on the four core rights, it has by implication taken the pressure off them in relation to the non-core rights, whatever rhetorical assurances to the contrary might issues forth from the ILO or those other actors.

He suggests that one of the criteria by which the success of the new regime should be assessed is that: “the promotion of this limited range of core standards does not serve to undermine the status of other labour rights which have long been recognised as human rights”.¹⁰⁰

Francis Maupain, former legal adviser to the ILO, has responded to what he calls Alston’s “polemic” on the core rights approach.¹⁰¹ He agrees that core rights came out of a process of debate and compromise

⁹⁴ As above.

⁹⁵ Spieler, above n 59, at 92.

⁹⁶ Alston “Core Labour Standards,” above n 65, at 485.

⁹⁷ As above.

⁹⁸ At 486.

⁹⁹ At 488.

¹⁰⁰ Alston “Core Labour Standards,” above n 65, at 461.

¹⁰¹ Francis Maupain “Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights” (2005) 16.3 EJIL at 439.

and reflect only a very small part of the body of ILO standards, but rejects the assertion that the category is “neither scientific nor deliberate.”¹⁰² Instead he argues:¹⁰³

...there is a sort of ‘Kantian’ thread running through their diversity...freedom from forced labour and child labour as well as non-discrimination relate to the autonomy of the will and freedom of association and collective bargaining are the extrapolation of this autonomy from the individual to the collective level. It points to the fact that the concept of ‘social justice’ ...cannot be defined so much in terms of a pre-defined product as in terms of fair processes which are themselves inseparable from its proclaimed values of human dignity, freedom and dialogue...

...the fundamental workers’ rights category enjoys a ‘functional coherence’ which relates to their impact on the achievement of other rights...as enabling rights or process rights, they empower workers with the tools that are necessary for the conquest of other rights.

Maupain denies that identifying a core of rights has the effect of relegating the rest “into a second class”.¹⁰⁴ He says that the Declaration should not be looked at in isolation as it is complemented by the Decent Work strategy. Together, he says, they are part of “an effort to underline the necessary complementarity and interdependence between the various aspects of workers’ protection and rights”.¹⁰⁵

He disagrees that the strengthening of the core rights will affect progress in respect of other rights and suggests that empirical evidence is what counts. That is to say, wait and see whether “the emphasis on fundamental rights [is] a boost for, or a break in, the protection of other labour rights”.¹⁰⁶

Although there is more than a touch of asperity in the tone of Maupain’s response to Alston, he does not appear, essentially, to disagree with the substance of what Alston says about the core rights approach. He does not deny that process rights have been prioritised in the hope that they will enable workers with the capacity to work for the other rights on their own behalf. Where he differs is rather that he thinks the core rights strategy has a chance of working, and believes only time will tell if he is right and Alston is wrong.

It remains now to assess whether a case can be made for the inclusion of health and safety as a fifth core right.

Health and Safety on the Job – A Human Right?

As discussed in the early part of this paper, there is a case to be made (on a positivist, instrumentalist and normative basis) that at least some workplace rights amount to fundamental human rights. This conclusion is consistent with the fact that all 185 members of the ILO have been able to agree on four core rights that are considered universal and capable of binding them all.

What is less clear is whether other labour rights, beyond the scope of the four included in the core, can also be said to be human rights and, in particular, whether the right to a safe and healthy workplace is one such right. I now attempt to answer that question using Virginia Mantouvalou’s approach of reviewing

¹⁰² At 446.

¹⁰³ At 448.

¹⁰⁴ At 447.

¹⁰⁵ At 462.

¹⁰⁶ At 443.

the positivist, instrumentalist and normative arguments to support the notion that health and safety is a human right.

The inclusion of health and safety in key human rights instruments (as set out above) indicates that the positivist argument, for what it is worth, is strong. It may not be worth very much; however, if counter arguments (such as those of the neo-liberal economic agenda) continue to dominate popular discourse and policy making as they have done in recent decades. The circularity of the positivist approach (it is a human right because it is in the instrument and it is in the instrument because it's a human right) renders it ineffective unless it is supported by other arguments with more substance.

The instrumentalist approach is, as Mantouvalou noted, the approach many commentators take to the question. Even leading scholars like Alston are prey to this charge: as noted already, Maupain has described his writing on the issue of the core rights as “polemical” in tone and criticised its lack of analysis.¹⁰⁷

Alston observes that amongst those who argue for additional rights to be included in the core, there is consensus that “the list should include the right to a safe and healthy workplace”.¹⁰⁸ Emily Spieler articulates that consensus view when she argues that concern about the exclusion of working conditions from the core rights is “especially justified when one considers the particular problems posed by health and safety hazards”.¹⁰⁹ She suggests that even if there were a case for preferencing certain rights, the exclusion of working conditions from the core could be said to overlook the fact that many workers endure punishing hours in hazardous conditions for wages that are insufficient to feed them and their families.¹¹⁰ And Hilgert (also in a defiantly polemic tone) proclaims that “the human rights analysis argues all workers have a right to return home from work as alive as when they punched in, regardless of the business cost estimate”.¹¹¹

Maupain defends the exclusion of health and safety from the core on the basis that the core rights are procedural rights and that “workers’ health and safety... even though it may in the strict sense be regarded as of ‘vital’ importance, cannot be regarded as fundamental in the sense of being an enabling right”.¹¹²

Procedural rights, as noted already, safeguard access to the labour market. Women and others who might be excluded have their place secured, as do organised workers, while protections are erected against the potential distortions that might arise from the use of unpaid or child labour.

Spieler points out that health and safety issues also impact on access. Workers face a “circular problem”.¹¹³

The ability of workers to seek improved conditions is contingent on their ability to quit, to withhold their labour, to bargain (individually or collectively) and to seek alternative employment; the ability to seek alternative employment is contingent on the continued health of the worker. In order for workers

¹⁰⁷ At 441.

¹⁰⁸ Alston “Core Labour Standards,” above n 65, at 457.

¹⁰⁹ Spieler, above n 59, at 86.

¹¹⁰ At 85.

¹¹¹ Hilgert, above n 4, at 66.

¹¹² Maupain, above n 101, at 449.

¹¹³ Spieler, above n 59, at 92.

to have sufficient means to withhold their labor or quit jobs in order to bargain for improved wages and benefits, their health must be protected.

Since workers who lose life and limb are unable to participate in the labour market, perhaps health and safety rights can be described as enabling rights with a legitimate place in the core, even on the proceduralists' terms.

The procedural position is that once their place in the market is secured, it is up to workers to take action on their own behalf to secure safe working conditions. The instrumentalists are not prepared to wait. They point out that in a global economy where there is a market for everything, even regulatory frameworks,¹¹⁴ industry will move to whichever location offers the most favourable conditions for business: "What is new about the more recent appearance of regulatory competition is the exploitation of new possibilities for entry to and exit from jurisdictions, in particular by corporate entities".¹¹⁵

The market may eventually respond to industry relocation. Worker power will grow as demand for labour increases and, eventually, conditions will equalise. The timeframes for these market corrections may, however, be unacceptable in terms of human lives. Emily Spieler says there is only one way to address these issues, and it is not through the core rights approach:¹¹⁶

...the extension of human rights to the private sector is critical, as the increasingly complex web of governmental and private arrangements means that private entities function internationally in ways that mirror governmental functioning. Pure reliance on an unregulated market permits the persistence on human rights abuses in workplaces that are the equivalent of direct political oppression by governments.

While Deakin argues that the outcome of this process is not "pre-ordained" and that low regulation regimes will not necessarily trump others in the quest for investments,¹¹⁷ it remains nonetheless that "...emerging hazards and the absence of the regulatory state that protects human rights over employer property rights means workers in the global south bear a disproportionate burden of the world's dangerous work".¹¹⁸

(If need be, of course, local legislation may even be amended on demand to meet the bottom line, as we saw in New Zealand with the 2010 amendment to s.6 of the Employment Relations Act.)

The instrumentalists assert that relying on the market to deliver safe working conditions is, at best, a long-range strategy, and, at worst, will fail to deliver at all. They make a good case for saying that it is in workers' interests to use whatever strategies they can to pursue the objective of safe and healthy work. It remains to be established, however, whether that objective amounts to a human right.

It is time to turn to a normative assessment. For consistency, the same four features of human rights by which labour rights generally were evaluated are now applied to health and safety rights. These are moral weight, universal application, stringency, and timelessness.

¹¹⁴ Deakin, above n 28, at 38.

¹¹⁵ At 39.

¹¹⁶ Spieler, above n 59, at 79.

¹¹⁷ Deakin, above n 28, at 39.

¹¹⁸ At 52.

The moral weight issue appears relatively straightforward. A right that goes to issues of survival, especially in circumstances where affected individuals are not certain to have knowledge of or control over the risks they face, would seem to be of fundamental importance. Indeed, one commentator, Tonia Novitz, has gone so far as to say that workplace health and safety amounts to “one of the many facets of the inalienable right to life”.¹¹⁹

Universal application has been discussed already. Most people are workers at some time in their lives, but even for those few who are not, the possibility of having to earn a living exists for everyone in the same way that the possibility of being falsely accused exists for everyone. Whether we choose it or not, we are all members of the category “potential worker” so, to that extent, the right to health and safety of the job has universal application.

The final two categories are more problematic. No activity (work or any other) can be made entirely risk free. Any right to health and safety must be bounded by some limitations as to reasonableness. It is suggested that whether health and safety meets the tests of stringency and timelessness will depend on how the right is defined. This crucial point will be explored more fully in the next section but it is suggested that, with care, it may be possible to define a stringent right to health and safety.

The final point to be made in relation to a normative assessment of health and safety as a human right is the close connection between health and safety and the key values which underpin human rights: liberty, equality and dignity. To lose one’s health, possibly one’s life, is a frontal assault on all three, and compounded for many workers by the absence of choice.

Defining and Protecting the Right

It must be acknowledged that risks are associated with work as they are, inevitably, with any human activity. If there can be said to be a right to health and safety, then further questions immediately follow, concerning the extent of the right and the corresponding duty and as to who bears that duty. As Spieler has put it:¹²⁰

One might boldly (and simplistically) assert the proposition that health and safety should be viewed as a human right, and leave it at that... [but] an undefined labor right has a tendency to migrate to an unsatisfactory least common denominator. The alternative approach is to begin the challenging process of further definition of the right to health and safety.

This section will consider how that right might be defined and then go on to consider how the protections available in New Zealand domestic law stand up in comparison.

The Extent of the Right and the Threshold for Protection

Spieler acknowledges that there is a “spectrum of health and safety risks” in the workplace.¹²¹ At the most serious end, hazards may arise out of a deliberate act by an employer, such as violence towards

¹¹⁹ Novitz and Fenwick, above n 13, at 13.

¹²⁰ Spieler, above n 59, at 97.

¹²¹ At 100.

domestic workers and deaths in factory fires where exits had been locked to prevent theft. Infamous cases include those in 1993 in Bangkok, where two hundred workers died,¹²² and in 1911 in New York, where 147 lost their lives.¹²³

Spieler says that acts at this end of the spectrum (which might fall to be addressed by the law of negligence or by the criminal law) should always be regarded as breaches of human rights.¹²⁴ If the right were to be defined at this minimum level (as some might say) it might be seen, as she notes, as “a non-waivable right to be free from excessively dangerous working conditions or from grave danger”.¹²⁵

However, she asserts that the human right to health and safety goes further than this, and should extend to situations where harm can be avoided by safety measures which (in the local context) are straightforward and affordable.

But what of cases where hazards are not readily identifiable, or where there are known risks, but the cost of prevention would threaten the viability of the business, and the livelihoods of the very workers whose protection is desired? Work is, of course, as inherently risky as any other human activity. At the other end of the scale from the Thai factory with the bolted fire exits, workers may be exposed to risks which are unforeseeable to them and their employers, or in respect of which there is no mechanism for prevention.

Spieler does not see such cases as human rights violations, accepting that the scope of the employer’s duty can be modified to accommodate the location and circumstances of the workplace. However, she rejects any suggestion that it follows from this that health and safety is not a human right, or should not be part of the four core rights. Health and safety, as she sees it, is not fundamentally different in this way from the core four.¹²⁶

The fact that implementation of a right may in part be locally contingent undeniably creates uncomfortable ambiguity in the definition of rights. It encourages the search for a least common denominator that is a universal *standard* for violation of the right: no child under six should be working; no worker should be locked in to a workplace without regard to fire hazards. But there is a difference between the development of local standards for the implementation of a right and the fundamental nature of the right itself.

Spieler is also careful to note, however, that multinational corporations that shop around for the least restrictive regulatory framework, as described above, should not be able to rely on being held to the same standard as local employers.

She also acknowledges that, in some cases, a worker might expressly accept a known risk (perhaps in consideration for additional remuneration) thus justifying: “A two-tier approach with a non-waivable right to “levels of safety that reasonable workers would not wish to relinquish” and waivable but presumptive rights to further protections”.¹²⁷

¹²² New York Times “May 9-15; More Than 200 Die in Thailand Toy Factory Fire” <www.nytimes.com>.

¹²³ Cornell University “Remembering The 1911 Triangle Factory Fire” <www.ilr.cornell.edu>.

¹²⁴ Spieler, above n 59, at 103.

¹²⁵ At 99.

¹²⁶ Spieler, above n 59, at 104.

¹²⁷ At 100.

¹²⁷ At 99.

This leads her to frame the right itself in the following terms: ...the right to work in an environment reasonably free from predictable, preventable, serious risk”.¹²⁸

How, then, does New Zealand domestic legislation measure up against this proposed standard? Consideration of this issue requires some background as to the philosophy which underpins our health and safety regime.

Throughout most of the 20th century, workplaces in New Zealand, the United Kingdom, Australia and Canada were governed by a regulatory framework which imposed detailed, industry specific requirements on employers. This was monitored and enforced by state agencies which were perennially overstretched and under-resourced. In 1972, the United Kingdom’s Robens report concluded that the existing system was inadequate to the task of reducing workplace accidents.¹²⁹ It proposed to curtail the body of specific regulations and to impose a general duty on employers, backed up by provision for worker participation in the monitoring of health and safety on the job. In this way, it was felt that the primary responsibility for maintaining workplace safety would sit with those who had the most control over the workplace, and those who were most affected by hazards.¹³⁰

The report can be seen very much as a product of its time and place. In an economy dominated by manufacturing industries with high union density, British workers willingly exchanged the machinery of a highly regulated system for one in which they, through their unions, took on shared responsibility for maintaining workplace safety. The views espoused in the Robens report also met with wide support outside the United Kingdom and shaped the redevelopment of health and safety laws in Canada and Australia. Then in New Zealand, a 1988 tripartite advisory group also endorsed the approach, advocating a major overhaul and simplification of workplace health and safety laws. The end result, enacted after an intervening change of government, was the Health and Safety in Employment (HSE) Act 1992.

Consistent with the underpinning philosophy of the Robens report, New Zealand, Australia, Canada and the United Kingdom all found the employer duty in respect of health and safety on the notion of what is “reasonably practicable”. Section 6 of the New Zealand HSE Act requires employers to take “all practicable steps to ensure the safety of employees while at work”.

Section 2 of the HSE Act defines “all practicable steps in relation to achieving any result in any circumstances” as “all steps to achieve the result that it is reasonably practicable to take in the circumstances” provided these are circumstances the employers knows about or ought reasonably to know about, and having regard to a list of factors. These factors include the nature and severity of the potential harm, and the current state of knowledge about the harm, its nature and severity, and its likelihood. Other factors to be taken into consideration include the means available to achieve the result, their efficacy, cost and effectiveness.

So what does “reasonably practicable” mean? What has been called a “classic definition”¹³¹ was set out in the 1949 judgment of Asquith LJ in *Edwards v National Coal Board*¹³²

¹²⁸ At 99.

¹²⁹ R W L Howells “The Robens Report” (1972) 1 Indus L J 185.

¹³⁰ Anthony D Woolf “Roben’s Report – The Wrong Approach?” (1973) 2 Indus L J 88.

¹³¹ *Buchanans Foundry Ltd v Department of Labour* [1996] 1 ERNZ 333.

“Reasonably practicable” is a narrower term than physically possible and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale, and the sacrifice involved and the measures necessary for reverting the risk, whether in money, time or trouble, is placed in the other; and that if it can be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident.

This definition has been expanded upon, here, in *Buchanan’s Foundry Ltd v Department of Labour*, in these terms: “It is clear what the Act requires is that an employer takes all reasonably practicable steps to guard against potential hazards, rather than a certain, complete protection against all potential hazards”.¹³³

The current British legislation is the Health and Safety at Work Act 1974, section 2(1) of which sets out the general duties of employers in the following terms: “It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”.

In 2007, the Commission of the European Communities asked the European Court of Justice (ECJ) to determine whether the “reasonably practicable” standard was sufficient to meet the United Kingdom’s obligations under Article 5(1) and (4) of Council Directive 89/391/EEC of 12 June 1989, broad duties which provide that “the employer shall have the duty to ensure the safety and health of workers in every aspect related to the work...” And:

This Directive shall not restrict the option of Member States to provide for the exclusion or the limitation of employer’s responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers’ control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care.

The Commission argued that the words “so far as is reasonably practicable” in the legislation of the United Kingdom, limited the scope of the employer’s duty in a way which was inconsistent or incompatible with Article 5. While acknowledging that no employer can provide a zero risk workplace, it submitted that the duty on the employer is absolute. Effectively, it sought to have the directive construed as requiring member states to impose strict liability on employers. Argued in this way, the case failed.¹³⁴

However, in an opinion to the ECJ, Advocate General Mengozzi attempted to “define specifically the substance and extent” of the general duty in Article 5(1) which he considered was expressed in “absolute terms”.¹³⁵ He concluded that it was “to prevent or reduce, so far as possible and taking into account technical progress, all of the risks to the safety and health of workers that are actually foreseeable”.¹³⁶

¹³² *Edwards v National Coal Board* [1949] 1KB 704 at 712.

¹³³ *Buchanans Foundry Ltd v Department of Labour*, above n 131, at 333.

¹³⁴ *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* European Court Reports Case C-127/05.

¹³⁵ Advocate General Mengozzi “Opinion” 18 January 2007 European Court Reports 1-04619 at [100].

¹³⁶ At [111].

He then went on to express these reservations as to whether the “reasonably practicable” standard was compatible with this duty:¹³⁷

In my view, since it introduces a criterion for assessing the appropriateness of the preventive measures taken which is less rigorous than sheer technical feasibility, the reference in section 2 (1) of the HSW Act to the concept of what is reasonably practicable is incompatible with the cope that should attach to the general duty to ensure safety laid down in Article 5(1).

Perhaps, the question whether the “reasonably practicable” test adequately safeguards worker rights to health and safety might yet be revisited.

In the meantime, the new Australian Model Work Health and Safety Act 2011 appears to raise the standard slightly with the introduction of the following “...regard must be had to the principle that workers and other persons should be given the highest level of protection against harm...as is reasonably practicable”. An “although the cost of eliminating or minimising the risk is relevant in determining what is reasonably practicable, there is a clear presumption in favour of safety ahead of cost”.

It will be interesting to see what effect these new provisions have on Australian jurisprudence in the area.

Rights to Information

To expose someone to risk without their knowledge seems intuitively wrong, and as Spieler points out, it is also inconsistent with an economic perspective on work, since markets cannot function properly (thereby, producing market solutions) unless the participants in the market exercise informed choices. In the context of employment negotiations, as Spieler explains, imperfect information transfer results in market failure, whereas:¹³⁸

if a worker knows of the risks, she or he can make effective choices: the worker can consent to exposure to the risk, or bargain for a compensating wage differential or refuse the employment. The labor market will thereby create optimal incentives for safety and compensation for injury.

At the very least, therefore, workers must have access to information about the dangers they face on the job. The New Zealand HSE Act recognises this, providing at s.7 that employers must identify and assess workplace hazards, including new hazards as they arise, and at sections 11 and 12 that the results of monitoring of the workplace are to be given to employees.

However, Spieler argues that even good faith attempts to communicate may not be effective, with workers making poorly informed choices because they have not understood the implications of the information provided, or out of desperation because there is no alternative work available. From a human rights perspective, therefore, rights to information are “necessary but not sufficient to the right to healthy and safe working conditions”.¹³⁹

Freedom to Raise Concerns or Decline Unsafe Work

¹³⁷ At [113].

¹³⁸ Spieler, above n 59, at 98.

¹³⁹ As above.

The level of risk associated with a job may not be constant over time as the circumstances in place at the start of employment may change. Unforeseen hazards may emerge when equipment fails, new technology or work methods are introduced or when the broader environment changes. A worker who, in a perfect (hypothetical) labour market, has evaluated and accepted a particular level of risk in return for an agreed rate of pay may subsequently re-evaluate the risk in light of such developments.

Spieler argues that many such changes, and the risks associated with them, will be outside the control of the workers who are affected by them. If they are, simply knowing about the risks will not do the workers much good: they will need to be able to raise their concerns and (if those concerns are not addressed, or cannot be addressed in a timely fashion) to decline to perform the unsafe work.¹⁴⁰

By this, of course, she means free to do so without retaliation or punishment from the employer. She acknowledges that (given the core right of freedom from forced labour) any employee is free, in theory at least, to quit a dangerous job. If the labour market were working perfectly, it would follow that it would become hard to find staff to work somewhere that was known to be dangerous, forcing the employer to remedy the situation. However, Spieler points out that those workers who are subject to the worst and most dangerous working conditions are often also the ones who often lack any ability to move to another job.¹⁴¹

The right to refuse unsafe work (a subset of rights to refuse an unlawful or unreasonable instruction from an employer) exists at common law.¹⁴² Section 28A (1) of the HSE Act 1992 enshrines that right by providing that “an employee may refuse to do work if the employee believes that the work that the employee is required to perform is likely to cause serious harm to him or her”.

Section 28A (2) places the employee under an obligation to attempt to resolve the matter with the employer “as soon as practicable” but if the matter is not resolved and “the employee believes on reasonable grounds that the work is likely to cause serious harm to him or her” the employee may continue to refuse work.

The right is qualified by s.28A (5) which provides that an employee may not decline work that: “because of its nature, inherently or usually carries an understood risk of serious harm unless the risk has materially increased beyond the understood risk.” This provision ensures that those engaged in particularly hazardous work (such as firefighters) are not at liberty to decline what are (for them) normal duties.

Rights of Participation

Spieler also draws a connection between the right to protest or refuse dangerous work and the core right to freedom of association which she says gives rise to the right to organise and “the choice to “stay and fight” rather than to quit.” It could be inferred that this gives rise to a right on the part of employees to participate in decisions that affect their health and safety. As noted already, the Robens report was, to some extent, predicated on the continued predominance of the male-dominated, unionised blue-collar

¹⁴⁰ At 99.

¹⁴¹ As above 99.

¹⁴² *BB Ltd v Dohrman* (2006) 7 NZELC 98, 436 (ERA).

workplace of post war Britain. In that environment, trade unions provided a ready-made mechanism for participation in identification, monitoring and enforcement of health and safety rights.

By the time New Zealand came to adopt a similar model, union density here was already trending downwards, especially in the private sector. Since then, our statutory participation provisions have been through a couple of iterations. The purpose of participation in the current scheme, as set out in s.19A of the HSE Act is for “all persons with relevant knowledge and expertise” to “help make the place of work healthy and safe” and for employers engaged in making health and safety decisions to have the benefit of “information from employees who face the health and safety issues in practice”.

Section 19B requires every employer to provide “reasonable opportunities” for employees “to participate effectively in ongoing processes for improvement of health and safety in the employees’ places of work”, but what is reasonable depends on a range of factors, including the number of employees, the number and geographic spread of work sites, the type of work and work systems, “the likely potential sources or causes of harm in the place of work” and the willingness of employees and unions to develop employee participation systems.” In the event that a functioning health and safety committee or health and safety representative makes a recommendation regarding health and safety in a place of work, the employer must either adopt the proposal or provide a written statement to the health and safety committee or health and safety representative setting out the reasons for not adopting the proposal.

It is suggested that these protections, which have been in place since 2003, are considerably weaker than the right to active participation that Spieler seemed to be supporting. They are, indeed, weaker than the provisions they replaced, which required employers to involve employees in the development of health and safety procedures.

Monitoring and Enforcement: the Role of the State

The role of state parties in relation to the International Covenant on Economic, Social and Cultural Rights (ICESCR) was the subject of high level consideration in 1986 when the International Commission of Jurists, the Maastricht Centre for Human Rights of the University of Limburg and the Urban Morgan Institute for Human Rights at the University of Cincinnati brought together a panel of academics and United Nations personnel to discuss the implementation of the ICESCR. This exercise produced the “Limburg Principles” which Jochnick and Petit have described as “an authoritative summary of the state of international human rights law” at that time.¹⁴³

However, Dankwa et al. consider the Limburg Principles to be only a “first effort to substantiate the meaning of violations of economic, social and cultural rights”.¹⁴⁴ Ten years later, the subject was revisited when a similar group produced the “Maastricht Guidelines” (the Guidelines).¹⁴⁵ As with the Limburg Principles, the Guidelines were intended primarily for use by the Covenant Committee (to aid the interpretation and application of the ICESCR) but also provide a tool for use in the interpretation and application of other domestic and international human rights instruments.¹⁴⁶

¹⁴³ Chris Jochnick and Javier Mujica Petit (1999) 2 Yale Hum Rts & Dev L J 209 at 212.

¹⁴⁴ Victor Dankwa, Cees Flinterman and Scott Leckie “Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” (1998) 20.3 HRQ at 710

¹⁴⁵ Alston et al “Maastricht Guidelines,” above n 12, at 691.

¹⁴⁶ Dankwa, Flinterman and Leckie, above n 144, at 705.

The overarching theme of the Guidelines is the continuing need for states to acknowledge the legitimacy of economic, social and cultural rights. Guideline 2 reiterates that “as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights”.¹⁴⁷ A similar point is made in Guidelines 4 and 5, respectively, which provide that “states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights” and that failure to comply with economic, social and cultural obligations under the ICESCR (and other instruments) is a violation of those treaties.¹⁴⁸

Guideline 6 breaks down state responsibility into component “obligations to respect, protect and fulfill” (a characterisation of what states are required to do which is attributed to Special Rapporteur Asbjorn Eide).¹⁴⁹ The separate obligations are explained in the following way:¹⁵⁰

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfill. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfill requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

The first component, the obligation to respect, correlates to what is often regarded as the predominant feature of “negative” rights. In the context of workplace health and safety, it would restrict any activity on the part of the state which might undermine or reduce workplace health and safety, arguably including action by the state in its capacity as a major employer.

The second, the obligation to protect, comes in to play in relation to the actions of third parties. As Sarah Joseph says:¹⁵¹

The ‘protection’ obligation corresponds with the state’s obligations to prevent or punish human rights violations by non-state actors. Such obligations are discharged by the enactment and enforcement of legislation, and the taking of reasonable steps to appropriately control the actions of private entities. The latter obligations are important in the arena of labour rights, given the increasing dominance in most countries of the private sector over the availability of work.

The employment related example set out in the Guidelines is, of course, specifically relevant for our purposes. It illustrates the application of the guideline by asserting that the state is required to act to

¹⁴⁷ Alston et al “Maastricht Guidelines,” above n 12, at 691.

¹⁴⁸ As above.

¹⁴⁹ Dankwa, Flinterman and Leckie, above n 144, at 705.

¹⁵⁰ Alston et al “Maastricht Guidelines,” above n 12, at 691.

¹⁵¹ Joseph, above n 18, at 335.

ensure that employers do not breach workers' rights, such as rights to work and to reasonable conditions, which include safe conditions.

As discussed already, the New Zealand HSE Act imposes on employers a general duty to take all practicable steps to ensure the safety of employees at work¹⁵² as well as duties to identify and manage hazards.¹⁵³ A breach may be prosecuted by the Department of Labour and will be classified as an infringement or offence depending on how serious it is, and on the level of knowledge the employer had of the risk involved.¹⁵⁴ Sanctions extend to imprisonment of up to two years.

In practice, however, the Department of Labour prosecutes only a small proportion of accident cases, and while few prosecutions fail, it is rare for sentences imposed by the courts to utilise the full range of penalties available. Although a maximum fine of \$500,000 is possible, the highest fine awarded to date (in *Department of Labour v Fletcher Concrete and Infrastructure Ltd t/a Stresscrete*) was less than half that. That fine was imposed after a crane rope broke, causing the lifting beam to fall and kill a worker below.¹⁵⁵ It was found that the company knew that the crane required a replacement part and also knew that without it the rope was at serious risk of breaking. (A quote for the necessary part had been sought and arrived the day of the fatality.) Nonetheless, workers were instructed to continue to operate the crane in order to avoid production losses.

The third element, the obligation to fulfill, is linked to the duty to work for the progressive realisation of economic, social and cultural rights.¹⁵⁶ Dankwa et al. consider that this duty requires states to be proactive in respect of "legislation, administration, budget and the judiciary".¹⁵⁷

In the context of workplace health and safety, this may mean that the state has an obligation to provide (along with effective enforcement mechanisms) specialist technical advice and services relating to inspection, monitoring, and reporting. The legislation required to deliver all this would seem to be in place in New Zealand. The HSE Act provides for the imposition of codes of practice and regulations,¹⁵⁸ the warranting of inspectors with rights to enter and inspect workplaces,¹⁵⁹ the issuing of improvement, hazard and prohibition notices,¹⁶⁰ and powers for coroners to call for reports into fatal accidents.¹⁶¹ However, whether the system is adequately administered and resourced may be another matter, as will be discussed below.

Guideline 7 deals with obligations of conduct and result that run through all three of the elements just discussed. The guideline provides that:¹⁶²

¹⁵² Health and Safety in Employment Act 1992, s. 6.

¹⁵³ Health and Safety in Employment Act 1992, ss 7, 8, 9 and 10.

¹⁵⁴ Health and Safety in Employment Act 1992, ss 49 and 50.

¹⁵⁵ *Department of Labour v Fletcher Concrete and Infrastructure Ltd t/a Stresscrete* DC Papakura CRN 05000000763, 26 March 2007.

¹⁵⁶ International Convention on Cultural, Economic, and Social Rights, art. 2(1).

¹⁵⁷ Dankwa, Flinterman and Leckie, above n 144, at 705.

¹⁵⁸ Health and Safety in Employment Act 1992, s 20.

¹⁵⁹ Sections 29, 30, 31, 32 and 33.

¹⁶⁰ Sections 39, 40, 41, 42, 43, 44, and 45.

¹⁶¹ Section 28.

¹⁶² Alston et al "Maastricht Guidelines," above n 12, at 693.

The obligations to respect, protect and fulfill each contain elements of obligations of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right...The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard.

Dankwa et al. note that the conduct obligation is consistent with the idea of progressive realisation, and signals a departure from earlier notions that placed most emphasis on outcomes.¹⁶³ They also suggest that it emphasises the “permeable, intertwined and equal nature” of rights.

In respect of workplace health and safety, the obligation of conduct will include effective monitoring and assessment, capture and benchmarking of data on accident and mortality rates, and the adoption of plans to maintain or reduce accident rates. Obligations of result will require states to meet appropriate targets that have been set in this way.

Also of particular relevance to this discussion are Guidelines 9 and 10 that relate to minimum core obligations and availability of resources. Guideline 9 provides that:¹⁶⁴

Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of the rights...”

Guideline 9 also provides that these obligations apply whatever level of resources is available to the state concerned. Guideline 10 reinforces this principle with the comment “resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights”. As Dankwa et al. put it, states which have taken on the legal obligations set out in the ICSCR must ensure provision of the minimum core: “under all circumstances, including periods characterized by resource scarcity”.¹⁶⁵

So how is our own track record in meeting these obligations?

In April 2012, in the wake of the Pike River disaster, the government established an Independent Taskforce on Workplace Health and Safety (the Taskforce). It was charged with conducting a full strategic review of the workplace health and safety system.¹⁶⁶

In September 2012, the Taskforce issued its consultation document: “Safer Workplaces”.¹⁶⁷ Presented largely in the language of management and economics, with rights and duties rarely mentioned, it showed no sign of having been informed by a rights-based perspective. Instead, it suggested that employers are to be incentivised and influenced to provide safe working conditions, and drew attention to the cost of lost productivity compared to the cost of health and safety protections.¹⁶⁸ The Terms of Reference for the

¹⁶³ Dankwa, Flinterman and Leckie, above n 144, at 711.

¹⁶⁴ Alston et al “Maastricht Guidelines,” above n 12, at 694.

¹⁶⁵ Dankwa, Flinterman and Leckie, above n 144, at 705.

¹⁶⁶ Independent Taskforce on Workplace Health and Safety “Strategic Review of the Workplace Health and Safety System” <www.hstaskforce.govt.nz>.

¹⁶⁷ Independent Taskforce on Workplace Health and Safety, above n 10.

¹⁶⁸ At 79-81.

Taskforce also required it to “identify the net and gross fiscal and economic costs and benefits of our recommendations and, if applicable, how they should be financed”.¹⁶⁹

More promisingly, however, this is how it describes the role of government: “...government sets the rules of the workplace health and safety system and determines the approach that is taken to enforcing these rules and the level of resourcing provided for support, guidance and enforcement activities”.¹⁷⁰

It also makes three points about effective regulation which are consistent with the approach set out in Guidelines 8 to 10. The first is that a regulator must have a clearly defined role and functions. Mention is made of the new Australian Model Health and Safety Act 2011 which sets out, in greater detail, than our own (or any previous Australian legislation) what a regulator must do in respect of monitoring and reporting, and in respect of provision of advice and information.¹⁷¹ The second is that the regulator must operate within a legislative framework that will enable performance of the role and functions.¹⁷² Finally, the point is made that the system must have the capacity and capability to deliver.¹⁷³

The Report of the Independent Taskforce on Workplace Health and Safety (the report) was issued in April 2013.¹⁷⁴ A full discussion of the work of the Taskforce is outside the scope of this paper, but a brief overview of the report indicates that the existing health and safety regime in New Zealand is unlikely to comply with the Maastricht Guidelines.

The report notes our poor health and safety performance compared to other countries, which adopted the Robens model, and describes the existing New Zealand model as “Robens Light” in part because of resource constraints that dated from its implementation.¹⁷⁵ While the report continues to see that model as sound, it identifies a number of key weaknesses of the New Zealand system.¹⁷⁶ These include confusing regulation,¹⁷⁷ a weak regulator,¹⁷⁸ poor worker engagement and representation,¹⁷⁹ poor data and measurement,¹⁸⁰ insufficient oversight of major hazard facilities,¹⁸¹ and a lack of support for small and medium enterprises.¹⁸²

To address these issues, the report recommends the enactment of new workplace health and safety legislation based on the Australian Model Law.¹⁸³ This would include strengthened provision for, and powers of, worker representatives.¹⁸⁴ It proposes making the “reasonably practicable” test more explicit

¹⁶⁹ As above.

¹⁷⁰ At [14].

¹⁷¹ At [74].

¹⁷² At [75].

¹⁷³ At [73].

¹⁷⁴ Independent Taskforce on Workplace Health and Safety “Report” (April 2013) <hstaskforce.govt.nz/documents/report-of-the-independent-taskforce-on-workplace-health-and-safety-pdf>.

¹⁷⁵ Independent Taskforce on Workplace Health and Safety, above n 174, at 20.

¹⁷⁶ At 21.

¹⁷⁷ As above.

¹⁷⁸ At 22.

¹⁷⁹ At 24.

¹⁸⁰ At 30.

¹⁸¹ At 33.

¹⁸² At 34.

¹⁸³ At 47.

¹⁸⁴ At 57.

and strengthening the legal framework for worker participation. The report also recommends that the object of the new legislation should include:¹⁸⁵

...a principle to inform duty holders and regulators on the level of health and safety being sought. We need to adopt the principle in the Model Law that “workers should be given the *highest level of protection* against harm to their health, safety and welfare from hazards and risks arising from work...as is reasonably practicable.

The report also recommends the establishment of a new regulator: a health and safety agency with statutory independence, legislative and monitoring functions and tripartite governance.¹⁸⁶ It does not shy away from acknowledging that more resources are needed in this area. It specifically recommends that, over a two to three year period, the ratio of frontline inspectors to workers be lifted from the current 0.84 per 10,000 workers to the mean level in Australia (1.07 per 10,000 workers).¹⁸⁷

This paper has sought to make the case that (subject to appropriate definition) safe and healthy work is a human right. It appears that this right has not been adequately respected, protected, and fulfilled in New Zealand. While the recent Taskforce has not adopted a rights-based approach to its review of workplace health and safety, it has identified a pressing need for the state to establish and resource an effective framework to support, monitor and enforce the safety of New Zealand workplaces.

If the Taskforce recommendations are adopted, it will be a significant step toward securing the right to safe and healthy work for all New Zealand workers.

Conclusion

Hazards and diseases at work are major causes of death and impairment. The development of a global economy is compounding these problems in the medium term, as the size, influence and mobility of multinational corporations make workers just as vulnerable to abuses of power by these entities as citizens are to abuses of state power. Legal remedies based on the contractual nature of the employment relationship obscure the fact that many workers have no choice about taking unsafe, unhealthy jobs.

This makes a rights-based approach an increasingly attractive strategy to combat abuse, exploitation and danger on the job. The suggestion that workers' rights are human rights is supported by positivist, instrumental and normative analysis. At least some labour rights will meet the tests of moral weight, stringency, universal applicability and timelessness. A human rights approach is also grounded in the basic premise that labour is not a commodity and frames workplace issues in terms of human dignity and equality.

However, difficulties in establishing consensus around which labour rights amount to human rights has led the ILO to prioritise a narrow group of four core rights. These four rights mirror relatively uncontroversial civil and political rights and impact on the formation and composition of the labour

¹⁸⁵ At 52.

¹⁸⁶ At 47.

¹⁸⁷ At 120.

market rather than its operation. Matters relating to working conditions are excluded. They are regarded as social rights, at most, or as claims that should be left to bargaining.

Health and safety issues relate to working conditions and do not, therefore, fall within the core group. This paper, however, argues that a case can be made for the inclusion of health and safety in the core four. This argument is based on an assertion that the right to safe and healthy work meets the four tests set out above and is a matter of the right to life, dignity and equality. Finally, it can be argued that, like the other core rights, it is essentially a process right, in that it is about retaining the capacity to have a place in the workforce.

However, it is acknowledged that the right needs to be carefully defined if it is to be elevated to core rights status. It is crucial to identify its boundaries and component elements. The current review of New Zealand's statutory health and safety framework provides an opportunity for us to establish that a safe and healthy workplace is indeed a human right.

Corporate Manslaughter – does it have a place in NZ law?

ANNE-MARIE McINALLY*

There can be no more fundamental work right than the right not to be killed at work.

Sadly, this right is denied to many New Zealand workers with persistent regularity. Most dramatically in recent years was the explosion of the Pike River mine on 19 November 2010, which resulted in the deaths of 29 workers.

The Royal Commission on the Pike River coal mine tragedy¹ concluded that

even though the company was operating in a known high-hazard industry, the board of directors did not ensure that health and safety was being properly managed and the executive managers did not properly assess the health and safety risks that the workers were facing. In the drive towards coal production the directors and executive managers paid insufficient attention to health and safety and exposed the company's workers to unacceptable risks.²

As a result, 29 workers lost their lives.

The commission called for “legislative, structural and attitudinal changes”.³

This paper addresses one aspect of that challenge – how do we hold companies and their senior managers responsible for workplace deaths? Are we sending the right message to those responsible for workers deaths? Do our laws reflect this? Or is there a need for change?

In approaching these issues, I will review the current legislative framework, including those changes on the horizon in Bill form. Secondly, I will look at the approach taken to corporate manslaughter in the United Kingdom and Australia. Thirdly, I will consider what we can and should do, now, to respond appropriately to instances where companies cause workers to be killed.

The Current Legislative Framework

Health and Safety in Employment Act 1992

The Commission on the Pike River Tragedy considered the Health and Safety in Employment Act and noted that there is a need to pay legislative attention to company directors whose responsibility for health and safety is not currently recognised in legislation.

The object of the Health and Safety in Employment Act 1992 is:⁴

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¹ Graham Panckhurst, Stewart Bell and David Henry *Royal Commission on the Pike River Coal Mine Tragedy Te Komihana a te Karauna mot e Parekura Ano Waro o te Awa o Pike* (October 2012).

² Volume 1, at 12.

³ Volume 1, at 35.

⁴ Health and Safety Act 1992, s 5.

to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by –

- a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and
- b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions; and
- c) imposing various duties on persons who are responsible for work and those who do the work; and
- d) setting requirements that –
 - i) relate to taking all practicable steps to ensure health and safety; and
 - ii) are flexible to cover different circumstances; and
- e) ...
- f) recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work; and
- g) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and
- h) prohibiting persons from being indemnified or from indemnifying others against the cost of fines and infringement fees for failing to comply with the Act.

The Act creates a general duty on every employer to “take all practicable steps to ensure the safety of employees while at work”.^{5,6}

To understand the flavour of the HSE Act, two definitions are important to note: firstly, “serious harm” includes death⁷; and, secondly, “all practicable steps” means the steps it is reasonably practicable to take in the circumstances, having regard to the nature and severity of the harm that may be suffered, the current state of knowledge about the likelihood of harm of that nature and severity, the current state of knowledge about the means available to achieve the result and the likely efficacy of each of those means, and the availability and cost of each of those means.⁸ This is an objective test, and the obligation to take all practicable steps applies only to circumstances that the person knows or ought reasonably to know about.⁹ The focus of the Act is on foreseeable and preventable harm, with an emphasis on prevention rather than punishment.

How, then, does it deal with situations where the employer fails to take all practicable steps and workers are killed? There are two offences under the HSE Act and section 49 deals with offences likely to cause serious harm, providing:

Where a person who, knowing that any action [or failure to take any action] is reasonably likely to cause serious harm to any person, takes the action [or fails to take the action]... contrary to a provision of the Act, then the person is liable on conviction to imprisonment for a term of not more than 2 years; or a fine of not more than \$500,000 or both.¹⁰

For this most severe offence under the HSE Act, the offender must have failed to meet the requirement of taking all practicable steps and must have knowledge of the reasonable likelihood of serious harm.

⁵ Section 6.

⁶ Sections 15, 16 of the Act also impose general duties on employers to ensure employees actions or inaction do not harm any other person and extend these duties to people in the workplace or its vicinity.

⁷ Section 2.

⁸ Section 2A.

⁹ Section 2A(2).

¹⁰ Section 49.

Section 50 of the HSE Act, on the other hand, is targeted towards breaches of duties under the Act where knowledge of the likely harm does not have to be established.¹¹ For those offences, one is liable to a fine not exceeding \$250,000 and there is no potential for imprisonment.

A point to bear in mind about the offences under the HSE Act is that the emphasis is on the offender having created risk (whether knowingly or unknowingly). The offences do not focus on the consequences of the offender's actions or inaction, and the degree of harm that has occurred is only one of the factors to be taken into account in sentencing.¹²

Nowhere in the HSE Act is there an offence that singles out for punishment an employer whose action or inaction causes workers deaths. While such offences could be captured by either s49 or s50, those offences are more diffuse and do not reflect, by language or penalties, the public opprobrium with which killing is generally met.

Health and Safety Reform Bill

The Health and Safety Reform Bill is due to be introduced into parliament in December 2013. It has been a year in the making and reflects a new emphasis, in the wake of the Commission on Pike River.

The purpose of the Bill is described at section 3:

- (1) The main purpose of this Act is to provide for a balanced framework to secure the health and safety of workers and workplaces by –
 - (a) protecting workers and other persons against harm to their health, safety, and welfare through the elimination or minimisation of risks arising from work or from specified types of plant;
 - (b) providing for fair and effective workplace representation, consultation, cooperation, and resolution of issues in relation to work health and safety; and
 - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and
 - (d) promoting the provision of advice, information, education, and training in relation to work health and safety; and
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and
 - (f) ensuring appropriate scrutiny and review of actions taken by persons performing functions or exercising powers under this Act; and
 - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety.
- (2) In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work or from specified types of plant as is reasonably practicable.¹³

¹¹ Section 53 makes it a strict liability offence, with no need to prove the defendant intended the action or inaction that constitutes the offence.

¹² Section 51.

¹³ Health and Safety Reform Bill (192-1), cl 3.

The emphasis in the HSR Bill is slanted towards viewing enforcement measures as a tool to achieve compliance. Neither the HSE Act nor the HSR Bill aims to punish for punishment's sake.

The Bill's use of a standard of providing the highest level of protection as is "reasonably practicable" is new and represents a shift from the current "all practicable steps" test.

"Reasonably practicable" means:

that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including –

- a. the likelihood of the hazard or the risk concerned occurring; and
- b. the degree of harm that might result from the hazard or the risk; and
- c. what the person concerned knows, or ought reasonably to know, about –
 - i. the hazard or the risk; and
 - ii. ways of eliminating or minimising the risk; and
- d. the availability and suitability of ways to eliminate or minimise the risk; and
- e. after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.¹⁴

It can be seen that the tenor of the Bill remains preventative, but the shift in emphasis given to cost factors signals less tolerance for sub-optimum standards of care.

The HSR Bill also introduces the concept of "a person conducting a business or undertaking" (a "PCBU") and imposes on a PCBU stringent and specific duties that flesh out the "reasonably practicable" requirement and which emphasise an intention to have work environments without risks to health and safety.¹⁵

This sharper focus on eliminating sources of potential harm is complemented by an obligation on officers of PCBUs. Section 29 of the Bill is a clear response to the call for action from the Commission on Pike River. It provides:

1. If a PCBU has a duty or an obligation under this Act, an officer of the PCBU¹⁶ must exercise due diligence to ensure that the PCBU complies with that duty or obligation.
2. In this section, due diligence includes taking reasonable steps –
 - a. to acquire and keep up-to-date knowledge of work health and safety matters; and
 - b. to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and
 - c. to ensure that the PCBU has available for use and uses appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
 - d. to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and responding in a timely way to that information; and
 - e. to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and

¹⁴ Clause 9.

¹⁵ Interestingly, there are specific duties on PCBUs who design plant, substances or structures. This is perhaps a reflection of the widespread concern about the design of the CCTV building that collapsed during the Christchurch earthquake.

¹⁶ An officer is defined in section 4 of the Bill and means a company director; any partner in a partnership; or in more loosely structured organisations, any person in a position comparable to that of a director of a company and it includes anyone who makes or participates in making decisions that affect the whole or a substantial part of the business of the PCBU such as the chief executive or a chief financial officer.

- f. to verify the provision and use of the resources and processes referred to in paragraphs (c) to e).

In addition to those obligations on officers of PCBUs, the HSR Bill proposes three new offences.

The most serious of these is where a person has a health and safety duty under the Act and,

without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to a risk of death or serious injury or illness; and is reckless as to the risk to an individual of death or serious injury or illness.¹⁷

Under this offence, the proposed penalties are graduated, depending on the status of the offender. For individuals, there would be a maximum term of imprisonment of five years or a fine not exceeding \$300,000 or both. For an individual who is a PCBU or an officer of a PCBU, the maximum five years imprisonment is retained but the maximum fine increases to \$600,000. And for a body corporate, there would be a fine not exceeding \$3 million.

For an offence of failing to comply with a health and safety duty that exposes an individual to the risk of death or serious illness or injury, without the element of recklessness, there is no imprisonment and the fines proposed are \$150,000 for individuals, \$300,000 for a person who is a PCBU or an officer of a PCBU; and for a body corporate, a fine not exceeding \$1.5 million.¹⁸

The proposed fines reduce further to \$50,000 for individuals, \$100,000 for PCBUs and officers of PCBUs and \$500,000 maximum for a body corporate convicted of a simple breach of a health and safety duty.¹⁹

Whereas the current HSE Act offence under section 49 is concerned with the knowing creation of risk, the HSR Bill calls for a subtly different inquiry into whether the offender has created a risk to which an individual is exposed and the offender is reckless as to whether the potential harm ensues from that risk.

Under the HSR Bill, the penalties for directors and senior managers who cause workplace deaths would be more substantial than those available under the current HSE Act.

The Crimes Act 1961

No review of the legislative framework in the area of workplace deaths is complete without considering the criminal statute.

The Crimes Act 1961 defines homicide²⁰ as the killing of a human being by another, directly or indirectly, by any means whatsoever. Under section 160(2) homicide is culpable when it consists in the killing of any person by an unlawful act; or by an omission without lawful excuse to perform or observe any legal duty; and culpable homicide is either murder or manslaughter, the penalty for which is life imprisonment.²¹

¹⁷ Clause 32.

¹⁸ Clause 33.

¹⁹ Clause 34.

²⁰ Crimes Act 1961, s 158.

²¹ Section 177.

While greater than what is currently available under the HSE Act, a potential penalty of five years imprisonment under the HSR Bill, even with a substantial fine imposed, is a relatively low level penalty compared with the potential outcome of a conviction for manslaughter.

One may, therefore, question whether a corporate killer and the senior management of companies who kill should continue to be treated more leniently than a private citizen who commits manslaughter.

Crimes (Corporate Manslaughter) Amendment Bill

The Crimes (Corporate Manslaughter) Amendment Bill (“the Corporate Manslaughter Bill”) is a private members’ Bill that has been put forward by Andrew Little, MP. The purpose of the Bill is to add the offence of corporate manslaughter to the Crimes Act 1961. The general policy statement at the commencement of the Bill summarises it thus:

Corporate manslaughter is culpable homicide when committed by a body corporate. It will be a charge that is appropriate to situations where the actions or omissions of the directors or senior managers of a body corporate cause a person’s death when those actions or omissions amount to a gross breach of a relevant duty of care owed by the organisation to the deceased. The introduction of this charge remedies a gap that currently exists in New Zealand law, as demonstrated by the Pike River Mine tragedy.²²

This Corporate Manslaughter Bill proposes that an organisation will be guilty of an offence:

if the way in which any of its activities are managed or organised by its senior managers causes a person’s death and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.²³

A “relevant duty of care” means any duty of care which, but for the accident compensation system, may be said to exist as a matter of law, whether the law of negligence or any other law.²⁴

Under this Bill there will be a “gross breach” of a duty of care if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organisation in the circumstances.²⁵

In terms of penalties for the offence of corporate manslaughter, the Bill proposes that an organisation be liable to a maximum fine of \$10 million; that any senior manager whose acts or omissions contributed materially to the offence be liable to imprisonment for up to 10 years; and that the Court have the discretion to make a “publicity order” requiring the organisation to publicise, in a specified manner, the fact that it has been convicted of the offence; specified particulars of the offence, including the names and positions of any senior managers who are convicted; and publicising the amount of any fine or term of imprisonment imposed. Orders would specify a time in which they must be complied with and may specify the manner and form of publication including whether publication should be in the organisation’s statutory or other annual report.²⁶

This private members’ bill goes significantly further than the HSR Bill in holding companies and their officers accountable for workplace deaths; and it represents a substantial departure from the two years imprisonment and \$500,000 fine available under the HSE Act.

²² Crimes (Corporate Manslaughter) Amendment Bill (Draft for Consultation) (explanatory note).

²³ Proposed s 177A.

²⁴ Subs (3)(b).

²⁵ Subs 3(c).

²⁶ Section 177A.

Whereas the HSR Bill requires evidence that the accused person has recklessly exposed the individual to a risk of death, the Corporate Manslaughter Bill (CMB) shifts the focus from risk creation to the occurrence of harm. Under the CMB, liability accrues because there has been conduct “far below” what can reasonably be expected. While this is evaluated objectively against the standard of what a fair and reasonable employer would be expected to have done in the circumstances, it also carries a nuance of disapproval of those who fall far below reasonably expected standards. And by avoiding the need to show recklessness, the Corporate Manslaughter Bill adopts a more objective test that is more likely to be able to be enforced.

The United Kingdom

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) abolished the common law offence of manslaughter by gross negligence in relation to organisations covered by the Act.²⁷

Prior to the Act coming into force in April 2008, there were prosecutions under the common law but the great majority failed to secure convictions because of the difficulty of identifying an individual to whom blame could be attributed. The larger the company, the harder that task became. Most of the literature in this area focusses on that shortcoming in the common law and contrasts this with the approach under the CMCHA.

New Zealand’s Corporate Manslaughter Bill mirrors some aspects of the CMCHA, most significantly in the definition of the offence and in the adoption of the concept of publicity orders. For that reason, those provisions are not duplicated here.

However, the CMCHA also utilises “remedial orders” by which the organisation can be required to remedy the breach in issue or “any deficiency, as regards health and safety matters, in the organisation’s policies, systems or practices of which the relevant breach appears to the court to be an indication”.²⁸

The CMCHA has the same definition of “gross” breach of a duty of care as appears in the NZ Corporate Manslaughter Bill. That is, that there is conduct that falls far below what can reasonably be expected. But in addition, it requires the jury to consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach and, if so, how serious that failure was and how much of a risk of death it posed.

This intertwining of the general health and safety law with the offence of corporate manslaughter is interesting. It both reinforces acceptable standards of conduct and acknowledges there is perceived to be a difference between general health and safety offences and the over-arching crime of killing people at work.

In addition, the jury may also consider, when deciding if there has been a gross breach of duty, the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it.²⁹

These considerations indicate a seismic shift from the common law search for responsible individuals who can be said to embody the mind of the company, and allow an aggregation of responsibility that

²⁷ Corporate Manslaughter and Corporate Homicide Act 2007 (UK), s 20.

²⁸ Section 9(1)(c).

²⁹ Section 8.

may have its source at a systemic level of the organisation, spread amongst a number of individuals no one of whom is individually responsible for the failings but whose collective shortcomings give rise to fault on the part of the organisation.

The CMCHA provides that an organisation that is guilty of corporate manslaughter or corporate homicide (as it is known in Scotland) is liable to a fine. The level of fines is open ended and addressed through sentencing guidelines.

Australia

Like the UK, Australia has, at times, invoked common law corporate manslaughter charges, with equally little success. Taylor and MacKenzie³⁰ have summarised that the position in Australia regarding corporate manslaughter remains similar to the UK's pre-CMCHA position, except as regards the Australian Capital Territory (ACT) and it is extremely difficult to successfully prosecute corporations due to the frequently insurmountable difficulties associated with identifying a senior individual in the corporation who is or was both the "directing mind" of the corporation and someone also personally guilty of the crime of gross negligence manslaughter.

In *R v Denbo Pty Ltd*³¹ the company was prosecuted, under the common law, when one of its drivers was killed when his truck's brakes failed. It was found that the company's vehicle service record was appalling. The company pleaded guilty to a charge of corporate manslaughter so a conviction resulted, and it was fined \$80,000. But overall, achieving a conviction under the common law is difficult, with good cause: It has been said that:

The criminal law was not developed with companies in mind. Concepts such as *mens rea* and *actus reus*, which make perfectly good sense when applied to individuals, do not translate easily to an inanimate fictional entity such as a corporation. Trying to apply these concepts to companies is a bit like trying to squeeze a square peg into a round hole.³²

In 1995, the Commonwealth Criminal Code Act introduced the notion of corporate liability into Australian law, but the Code only applies to Commonwealth offences, and manslaughter is not a Commonwealth offence. Only in the ACT has industrial manslaughter legislation been introduced, other States having considered and rejected similar proposals.

The ACT's Crimes (Industrial Manslaughter) Amendment Act 2003 makes it an offence if a worker dies in the course of employment and the employer's conduct causes the death of the worker; and the employer is reckless about causing serious harm to the worker or negligent about causing the death. The maximum penalty for this offence is 20 years imprisonment.³³

There is also an offence by a senior officer of an employer if that senior officer's conduct causes the death of the worker and the senior officer is reckless about causing serious harm or negligent about causing the death. This, too, carries a maximum penalty of imprisonment for 20 years.^{34, 35}

³⁰ Des Taylor and Geraldine Mackenzie "Staying focused on the big picture: Should Australia legislate for corporate manslaughter based on the United Kingdom model?" (2013) 37 Crim LJ 99 at 106.

³¹ *R v Denbo Pty Ltd* (1994) 6 VIR 157.

³² James Gobert and Maurice Punch *Rethinking Corporate Crime* at 10, as cited in Rick Sarre "Sentencing those convicted of industrial manslaughter" (paper presented to National Judicial College of Australia Sentencing Conference, Canberra, February 2010).

³³ Crimes (Industrial Manslaughter) Amendment Act 2003 (ACT, Australia), s 49C.

³⁴ Section 49D.

³⁵ A senior officer is a person occupying an executive position who makes or takes part in making decisions affecting all or a substantial part of the functions of the entity: see section 49A.

Interestingly, where there is a conviction of corporate manslaughter, under the ACT Act, the Court may (as in the UK and as proposed in the NZ Corporate Manslaughter Bill) order the company to publicise the offence, the deaths and the penalties imposed.

But it may also, alone or in conjunction with other penalties, require the company to “do stated things or establish or carry out a stated project for the public benefit even if the project is unrelated to the offence”.³⁶

The cost of compliance is capped at \$5,000,000, including any fines, and the court must take into account the financial circumstances of the company.³⁷

The carrying out of a project by way of making amends to the community is potentially a powerful tool to provide a legacy for those whose lives were lost; to stand as an ongoing caution and deterrent to other companies; and to make a meaningful response to the killing in circumstances where a company is cash-strapped or, at the other extreme, so substantial that a fine has little impact.

While it is yet to be tested, I suggest the ACT Act has harnessed a suite of responses to the white collar crime of corporate killing that should prove flexible, robust and effective whatever the circumstances of workplace deaths.

Options for New Zealand to Consider

The HSE Act is aspirational. It sets out to promote excellence in health and safety management and it is not particularly prescriptive about how this will be attained. Such standard setting is a legitimate function of legislation that can influence community attitudes over time.

But some members of society require more than gentle persuasion. Thus, deterrence plays a role in our law-making. Companies that kill must know that they are likely to be held accountable and that the consequences will not be desirable. The senior office holders in such companies must receive the message that they will be personally responsible for their actions and inactions if workers are to be made genuinely safe at work.

Wong³⁸ notes that some commentators believe that the existence of the HSE Act renders otiose the need for a corporate manslaughter offence. They contend that the only added advantage of such an offence is stigma. One can imagine that this refrain is likely to be heard even more loudly in light of the increased levels of fines and duration of imprisonment available under the HSR Bill. But sight must not be lost of the value of stigma in society. It has its place. As Wong observed, current legislation fails to properly reflect the moral outrage that the community feels when a death occurs through the gross negligence of the employer, and fails to reinforce the notion that all workplace fatalities are unacceptable.³⁹

Similarly, there is intolerance in society for the idea that companies are beyond the reach of the law. Almost 170 years ago Lord Denman CJ remarked that:

³⁶ Section 49E(2).

³⁷ Section 49E(4),(5).

³⁸ Jonathan Wong “Corporate Manslaughter: A proposed Corporate Killing Offence for New Zealand” (2006) 12 Canterbury Law Review 157.

³⁹ At 167.

There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by indictment against those who truly commit it, that is the corporation, acting by its majority; and there is no principle that places them beyond the reach of the law for such proceedings.⁴⁰

Sarre⁴¹ points to the way in which white collar crime has increasingly been captured by the reach of the criminal system, and he considers that causing death in the workplace is another type of white collar criminal activity for which the offender should be held accountable. It is a view this writer endorses.

But he has identified a limitation in the way we tend to punish companies who break the law. The problem is that fines do little or nothing to address the wrongdoing if they are not paid. In *R v Denbo*, for instance, a fine of \$80,000 was levied against the company for causing the death of a truck driver. But at the time of its conviction, Denbo was in liquidation. The company was wound up six months before sentencing and never paid the fine. Later, it was reborn as another company and recommenced operations. The successor company did not pay the fine either. In reality, no one was held accountable for the worker's death.

Again, in 2006, Lydia Carter died at a work function at a go-kart track in Victoria. Her seatbelt did not fit properly and safety barriers were incorrectly installed. The company was convicted and fined \$1.4 million but it had already gone into liquidation and will never pay the fine.

A similar problem arose in New Zealand following the Pike River tragedy when substantial reparations were ordered to be paid to the families of the deceased, in relation to offences under the HSE Act, but the company had gone into liquidation and shareholder companies refused to assume the burden of liability for that cost.

Nothing in the common law or the legislation considered in this paper, including the two Bills, fully addresses this concern. The conviction and sentencing of individual office holders may go some way towards ensuring tangible results from a successful prosecution, but it is timely to consider how companies can be prevented from escaping the consequences of their actions. Perhaps we need to consider a prohibition on going into liquidation in circumstances where a company is facing prosecution, or a mechanism whereby reparation orders and fines take priority in the distribution of funds from such companies. Innovative thinking by both company and criminal lawyers and other disciplines is needed to ensure that responsibility is sheeted home when companies kill.

In a similar vein, we should not adopt an escalating scale of fines without working through the benefits and drawbacks. For instance, it would not necessarily serve the public good if a fine is so substantial that the company is forced into liquidation with subsequent job losses. But Taylor and Mackenzie⁴² have made the point that, when we look into this area of the law, the quantum of fines is not the issue. They say that the purpose of the (UK) legislation is not to increase the fines that can be imposed ... its purpose is to make the prosecution of corporations for corporate manslaughter easier and more likely to be successful.⁴³

This, surely, needs to be New Zealand's main objective too. The formulation of the offence in the Corporate Manslaughter Bill would meet that objective. As to sentencing options, publicity orders

⁴⁰ *R v Great North of England Rly Co* (1846) 9 QB 315 at 327 cited by Rosemary Craig "Tho shall do no murder: a discussion paper on the Corporate Manslaughter and Corporate Homicide Act 2007" (2009) 30(1) *The Company Lawyer* 17 at 20.

⁴¹ Sarre, above n 33.

⁴² Taylor and Mackenzie, above n 31.

⁴³ At 108.

naming responsible individuals within an organisation may go some way towards holding companies genuinely accountable, and deterring other companies from indulging in a similar lack of care for workers safety. This is a feature of the Corporate Manslaughter Bill that is noticeably absent from the HSR Bill.

Thought should also be given to the ACT option of requiring the organisation to carry out a project of benefit to the community, but I would suggest it is also desirable to impose such an obligation on individual office-holders in the event that the company has ceased to exist or if the Court thinks, for other reasons, that it is desirable to do so.

Arguably, the HSR Bill's potential for officers of a PCBU to face up to five years imprisonment will provide a deterrent effect. So, too, would the potential for imprisonment of up to 10 years under the Corporate Manslaughter Bill. The mechanism of imprisoning senior managers has the potential to achieve accountability on the part of those responsible for workplace deaths even if the company itself goes into liquidation.

It is time for the introduction of an offence of Corporate Manslaughter in New Zealand. This does not mean that there is no place for the proposals in the HSR Bill. But there are instances, like the killing at Pike River, that cry out for greater accountability than the health and safety legislation provides. Corporate killing should be criminalised and the Courts empowered to hold criminal employers to account.

But we can do better even than the Corporate Manslaughter Bill. We have the opportunity to glean from other jurisdictions ways in which convictions can best be assured and penalties meted out that are appropriate to the offence. We also have an opportunity to rethink what can be done about companies that go into liquidation to avoid being held accountable.

One thing is certain, in a country like New Zealand, with such a poor record of workplace deaths, we are poorly served by legislation that has proven to be ineffectual in responding to those events. We have a responsibility to every worker and their families to send out a clear message that corporate killing will not be tolerated or met with lenience.

We cannot bring back the Pike 29. But we have no excuse to tolerate a legislative framework that fails to hold companies who kill to proper account. An offence of corporate manslaughter is long overdue.