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Editorial note

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This is the second instalment of the special issue of the *New Zealand Journal of Employment Relations* which showcases some of the best papers presented at the Fourth Biennial Labour Law Conference of the New Zealand Labour Law Society held on 17-18 November 2017 in Christchurch. The conference focussed on labour law in transition in a global and technological world, with the theme intended to encompass new developments and emerging areas in labour law. The presentations covered a wide range of topics including de-regulation of the workplace and competitive attitudes towards employment issues; aspects and implications of the recent amendments to health and safety laws; workplace stress, bullying and harassment; restructuring, redundancy and redeployment; modern workplace environments and cyber-work; and equality, human rights and precarious work. The conference attracted a large number of participants from within New Zealand, including academics, practitioners, judges from the Employment Court and members of the Employment Relations Authority as well as government and parliamentary officials and union members. A good range of Australian speakers attended the conference, as the New Zealand Labour Law Society has built good relations with the Australian Labour Law Association. Participants from Europe and Asia were also present.

A large number of excellent papers were presented at the conference and submitted for publication to a special issue of the *New Zealand Journal of Employment Relations*. As a result, two special issues have been published. The first special issue 43(2), published in September 2018, focussed specifically on the impact of technology on labour law and the relationship between human rights and employment law. This second special issue includes papers broadly concerned with health and safety and matters related to employment agreements.

It is important to acknowledge the financial support of the New Zealand Law Foundation, The Canterbury Law Review Trust and the School of Law at the University of Canterbury, without which, neither the Fourth Biennial Labour Law Conference of the New Zealand Labour Law Society nor the present publication would be possible.

There are six articles in this second special issue and a summary of this content is provided hereunder.

Dawn Duncan – “A Battle for Hearts and Minds: New Zealand’s Legal Response to Work-Stress-Related Depression and Cardiovascular Disease”

As patterns of work change, so do the resulting patterns of work-related ill health. While medical thinking on stress-related illnesses has shifted enormously in the past decades, the law has not. This paper will explore New Zealand’s legal response to work-stress-related illnesses, especially depression and cardiovascular disease. It will outline the current interaction of the Health and Safety at Work Act 2015, the Accident Compensation Act 2001 and the personal grievances regime in cases of work-related depression and cardiovascular disease, and highlight key areas of reform needed. The law, as it stands, is failing to provide either adequate protection from, or compensation for work-stress-related illness. With heart disease as New Zealand’s leading cause of death, and rates of mental illness on the rise, addressing the more complex relationships between work and health becomes an urgent task for the future of New Zealand labour law.

John Goddard – “Adopting a Health and Safety Framework for the Assessment and Remediation of Earthquake Prone Buildings”

The key question for this paper is whether the revised and recent updated changes to the regulatory regime for managing earthquake prone buildings will prevent loss of life which occurred as a result of the CTV and PGC building failures during the Christchurch Earthquake and whether this would have happened to Statistics House (in Wellington) but for the fortuitous timing of the Kaikōura earthquake.

David Beck – “Resolving Workplace ‘Bullying’”

This Article provides a brief definitional overview of the current law on what is popularly known as the problem of workplace bullying and comments on how to avoid and/or resolve matters from the perspective of a practising employment lawyer, perspective confronted with finding an adversarial legal solution to what is often a breakdown in workplace communication.

Susan Robson – “What if Voters Wanted a Less Flexible Labour Market?”

In the event of a public recognition of the connection between flexible labour markets, wage stagnation and high social inequality ratios, an option for redress in government policy is the re-collectivisation of employers and employees.

The implications for labour law traditions that emerged following the enactment of the Employment Contracts Act (ECA) 1991 (and that were reinforced by the operation of the Employment Relations Act 2000) include dispute resolution mechanisms, currently (in New Zealand) fundamental to flexibility. Analysis of the factors that influenced the transition from collectivist to individualist labour relations suggests a means by which this transition might be reverse engineered. Returning personal grievance resolution, the foundation of the ECA transition, to collectives will be crucial to the success of any reverse transition.

Jonathan Sale – “Labour Law and the Labour Market: A Case Study of Malaysia”

This paper aims to provide some plausible answers to these questions through systems analysis and case study of labour law and regulation in Malaysia and their links to the economy, including the variety or varieties of capitalism, labour market formation and outcomes.

György Kiss - Transition of a Contract of Employment: From the *Locatio Conductio* to the *Relational Contract*

This article displays the correlation between economic background of a given era and legal regulation of labour. It aspires to answer the question: what legal construction suits global economy the most at the moment. The author shows the effect of locatio conductio on the employment contract of today and sketches out three possible scenarios regarding future labour law. One such scenario is the maintenance of the current, traditional concept that strives to secure a balance between security of the employee and flexibility of employment. The second scenario entails possibilities provided by the so-called gig economy. It deconstructs almost all limitations provided by labour law and, at the same time, annuls the structure of labour law as it is today. The third scenario proposes an adaptation of a specific interpretation of long-term contract – relational contract – to labour law.

It is perhaps opportune to note here that the Fifth Biennial Labour Law Conference of the New Zealand Labour Law Society will held on 15th and 16th November 2019 at Rutherford House, Victoria University of Wellington. The official call for papers and registration information will soon be available at <http://www.newzealandlabourlawsociety.nz/>.

A Battle for Hearts and Minds: New Zealand's Legal Response to Work-Stress-Related Depression and Cardiovascular Disease

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Abstract

As patterns of work change, so do the resulting patterns of work-related ill health. While medical thinking on stress-related illnesses has shifted enormously in the past decades, the law has not. This paper will explore New Zealand's legal response to work-stress-related illnesses, especially depression and cardiovascular disease. It will outline the current interaction of the Health and Safety at Work Act 2015, the Accident Compensation Act 2001 and the personal grievances regime in cases of work-related depression and cardiovascular disease, and highlight key areas of reform needed. The law, as it stands, is failing to provide either adequate protection from, or compensation for work-stress-related illness. With heart disease as New Zealand's leading cause of death, and rates of mental illness on the rise, addressing the more complex relationships between work and health becomes an urgent task for the future of New Zealand labour law.

I. Introduction

Depression and cardiovascular disease are two of the most significant health issues affecting working people in New Zealand and globally. Cardiovascular disease is ranked by the New Zealand Ministry of Health as the leading cause of death in New Zealand¹ and by the World Health Organization (WHO) as the leading cause of death worldwide.² Depression is also a growing cause of incapacity and death in New Zealand, with suicide being the second leading cause of death for non-Māori males and the third leading cause of death for Māori males.³ Internationally, depression is expected to become the second leading cause of worldwide disability by 2030.⁴

While reliable statistics on work-related cardiovascular disease and depression are not available in New Zealand for reasons explained further below, local and international research indicates that work-stress is a significant factor in the development of, and rates of death from, these diseases, warranting intervention. This paper argues that labour law has a crucial role to play in addressing

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¹ Ischemic heart disease is the leading cause of death for Maori and non-Maori males and non-Maori females, and second leading cause of death for Maori females, but top overall in the New Zealand population. Statistics available on the New Zealand Ministry of Health website at: <http://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/major-causes-death>

² World Health Organisation *Cardiovascular Diseases Factsheet* (May 2017) available at: <http://www.who.int/mediacentre/factsheets/fs317/en/>

³ Statistics available on the New Zealand Ministry of Health website at: <http://www.health.govt.nz/our-work/populations/maori-health/tatau-kahukura-maori-health-statistics/nga-mana-hauora-tutohu-health-status-indicators/major-causes-death>

⁴ C Mathers and D Loncar "Projections of global mortality and burden of disease from 2002 to 2030" (2006) *PLoS Medicine* 3 11, e442.

the problems of work-stress-related depression and cardiovascular disease. This paper explores the gap between current medical thinking on these conditions and the law. New Zealand's legal response to work-stress-related depression and cardiovascular disease is contained in the Accident Compensation Act 2001 (ACA), the Health and Safety at Work Act 2015 (HSWA), the sick leave provisions of the Holidays Act 2003 (HA) and the wider regulation of work in the Employment Relations Act 2000 (ERA), particularly the personal grievances regime. This paper outlines key areas of reform needed to better address work-related depression and cardiovascular disease.

II. The Science, the Law, and the Gaps in Between

The increasing prevalence and economic impact of cardiovascular disease and depression has resulted in a substantial body of research on the causal connection between stressful environments (both work and non-work) and the development of disease. With the mapping of the human genome, the invention of fMRI machines, epigenetic research (allowing for a better understanding the interaction of genes and environment) and the rise of big data, medical thinking has shifted enormously since the mid-20th century. The law, however, has not.

The New Zealand ACC Scheme, for example, was based on the 1967 *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand*, chaired by the then Justice Woodhouse (Woodhouse Report).⁵ The scheme was introduced in 1972, adopting the work-related disease coverage provisions from the previous Workers' Compensation Act 1956, which were much the same as in the previous 1934 Act. Despite reforms to restrict the costs of the scheme in the 1990s, and again in 2010, the work-related health cover provisions have not been substantially updated,⁶ lagging behind other jurisdictions and medical thinking. Likewise, despite recent reforms to New Zealand's health and safety laws, the HSWA remains very much Robens model legislation, meaning its structure and enforcement machinery are based on the *Report of the British Parliamentary Committee on Safety and Health and Work*, in 1972.⁷ The HSWA continues to reflect many of the assumptions and biases of the Robens model and remains primarily designed for work as it was performed in the factories and mines of the mid-20th century.⁸

⁵ Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington, 1967).

⁶ Compare reformulation in Accident Compensation Act 1982, s 28 "disease due to nature of employment." The Accident Compensation, Rehabilitation and Insurance Act 1992 further amended and reformulated the test for "personal injury caused by gradual process, disease or infection arising out of or in the course of employment" in s 7. Section 30 was most recently amended by the Accident Compensation Amendment Act 2010.

⁷ Alfred Robens (Chair) *Report of the Committee on Safety and Health at Work* (HMSO, London, 1972).

⁸ See the critique of the Robens model and its assumptions in Theo Nichols *The Sociology of Industrial Injury* (Mansell Publishing, London, 1997) at 2-3; Philip Bohle "Work Psychology and the Management of Occupational Health and Safety: An Overview" in Michael Quinlan (ed) *Work and Health: The Origins, Management and Regulation of Occupational Illness* (Macmillan, Melbourne, 1993); William Breen Creighton, William Ford and Richard Mitchell *Labour Law: Text and Materials* (2nd ed, Law Book Co, Sydney, 1993) at 1340; Harry Glasbeek "Occupational Health and Safety Law: Criminal Law as a Political Tool" (1998) 11 AJLL 95 at 99.

a. *Changes in medical thinking on stress-related conditions*

While this paper does not aim to provide a proper review of the relevant medical literature, it is useful to start with a brief overview of current thinking on ‘stress’ and its causal connection to disease. Stress is not itself a disease, but an adaptive response of the body to a demand. In contrast to how it is frequently described in human resources literature, “stress is not a subjective feeling. It is a measurable set of physiological events in the body.”⁹ The stress response begins in the brain, with the amygdala, the area of the brain that contributes to emotional processing, interpreting a person’s experiences. When someone experiences a stressful event the amygdala sends a distress signal to the hypothalamus, communicating with the rest of the body through the autonomic nervous system.¹⁰ The nervous system controls involuntary body functions such as breathing, blood pressure, heartbeat, and the dilation or constriction of key blood vessels and the small airways in the lungs. It is divided into two parts, the sympathetic and parasympathetic nervous system. The sympathetic nervous system operates in response to (or what our body perceives to be) an emergency, activating the commonly called ‘fight or flight response,’ releasing adrenaline and the related hormone noradrenaline.¹¹ As Sapolsky explains:¹²

The autonomic system works in opposition: sympathetic and parasympathetic projections from the brain course their way out to a particular organ where, when activated, they bring about opposite results. The sympathetic system speeds up the heart, the parasympathetic system slows it down. The sympathetic system diverts blood flow to your muscles; the parasympathetic does the opposite.

Put simply, this can be understood as:¹³

[T]he sympathetic nervous system functions like a gas pedal in a car. It triggers the fight-or-flight response, providing the body with a burst of energy so that it can respond to perceived dangers. The parasympathetic nervous system acts like a brake. It promotes the “rest and digest” response that calms the body down after the danger has passed.

As adrenaline circulates through the body, it brings on the physiological changes which we typically experience when stressed. The heart beats faster, pushing blood to the muscles, heart, and other vital organs. Pulse rate and blood pressure go up. The person undergoing these changes also starts to breathe more rapidly and small airways in the lungs open wide so lungs can take in as much oxygen as possible. Extra oxygen is sent to the brain, increasing alertness. Sight, hearing, and other senses become sharper. Meanwhile, adrenaline triggers the release of blood sugar and fats from temporary storage sites in the body. These nutrients flood into the bloodstream, supplying energy to all parts of the body.¹⁴

⁹ Nicole Baumann and Jean-Claude Turpin “Neurochemistry of Stress. An Overview” (2010) 35 *Neurochem Res* 1875, at 1876.

¹⁰ Harvard Medical School “Understanding the stress response: chronic activation of this survival mechanism impairs health” (18 March 2016) Harvard Health Publishing available at: <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response>.

¹¹ Robert Sapolsky *Why zebras don't get ulcers* (3rd ed) (St Martin's Press, New York, 2004) at 22 [Sapolsky].

¹² Sapolsky, above, at 11.

¹³ Harvard Medical School, above n 10.

¹⁴ Harvard Medical School, above n 10.

In the healthy individual, the physiological response systems are rapidly turned on and off, limiting the exposure to the potentially harmful effects of the stress response.¹⁵ However, when the stress response is activated too often or for too long, it starts to have negative consequences. This can “exacerbate existing disease processes, or predispose the individual to acquire new diseases” described as becoming “maladaptive”.¹⁶ Long-term effects of an organism’s accommodation to certain types of stress is referred to as allostatic load,¹⁷ meaning the “wear and tear” resulting from “chronic overactivity or underactivity of physiological stress response systems.”¹⁸

Stress is not unique to humans, and the human stress response is very like that in other primates.¹⁹ Many papers suggest that there is simply a mismatch between how our bodies evolved to respond to stressors and the present realities of working life filled with performance reviews, KPIs and increasing workloads facilitated by new technologies. Put better by Robert Sapolsky, for other species “the most upsetting things in life are acute physical crises”, such as being chased by a lion.²⁰ These events require “immediate physiological adaptations” if you are going to survive and the body’s responses are brilliantly adapted to handling such emergencies.²¹ Sapolsky further explains that:²²

...we humans live well enough and long enough, and are smart enough, to generate all sorts of stressful events purely in our heads... Viewed from the perspective of the evolution of the animal kingdom, sustained psychological stress is a recent invention, mostly limited to humans and other social primates. We can experience wildly strong emotions (provoking our bodies into an accompanying uproar) linked to mere thoughts.

b. Stress and cardiovascular disease

Cardiovascular diseases are complex and multifactorial, and a full discussion of the medical evidence is beyond the scope of this paper. There is, however, an increasing body of research into the links between stress and the development of cardiovascular diseases and heart attack risk, which are important to be aware of when evaluating the law in this area.²³ As explained well by the Harvard Medical School’s public health guidance:²⁴

Chronic low-level stress keeps the HPA [hypothalamic pituitary adrenal]axis activated...Persistent epinephrine [the term used for adrenaline in some countries] surges can damage blood vessels and arteries, increasing blood pressure and raising

¹⁵ Sterling P, Eyer J, Fisher S, et al., eds (1988) Handbook of life stress, cognition and health. (John Wiley, New York), pp 629–649.

¹⁶ E A Mayer “The neurobiology of stress and gastrointestinal disease” (2000) Gut 46 6, 861.

¹⁷ B McEwen “Protective and damaging effects of stress mediators” (1998) N Engl J Med 338 171.

¹⁸ Mayer, above n 18.

¹⁹ Sapolsky, above n 11.

²⁰ At 4.

²¹ At 4.

²² At 5.

²³ See discussion of evidence in Mika Kivimaki and Ichiro Kawachi “Work stress as a risk factor for cardiovascular disease” (2015) Curr Cardiol Rep 17, 74.

²⁴ Harvard Medical School, above n 10.

risk of heart attacks or strokes. Elevated cortisol levels create physiological changes that help to replenish the body's energy stores that are depleted during the stress response. But they inadvertently contribute to the build-up of fat tissue and to weight gain. For example, cortisol increases appetite, so that people will want to eat more to obtain extra energy. It also increases storage of unused nutrients as fat.

Repeated activation of the autonomic nervous system is “characterised by lowered heart rate variability, which has been associated with work stress among men in cross-sectional studies.”²⁵ Low job control has been found to predict coronary disease incidence.²⁶ Accumulation of work stress is associated with higher risks of the metabolic syndrome, and incident obesity, both linked to cardiovascular disease.²⁷ Research has shown “[g]reater reports of work stress were associated with a higher risk of cardiovascular disease” and among younger workers “there was a clear dose-response association between greater reports of work stress and higher risks of incident [cardiovascular] events.”²⁸ Greater reports of work stress were also associated with poorer health behaviours in terms of eating less fruit and vegetables and less physical activity.²⁹ To summarise briefly, the research suggests prolonged stress impacts on the functioning of the heart can trigger heart attacks where there is underlying heart disease, and is also linked to a range of other health behaviors known to exacerbate the risk.

c. Work stress and depression

As with cardiovascular disease, increasing rates of depression globally have triggered an increasing volume of international research into the connections between stress and depression.³⁰ There is also important New Zealand research in this area, including a recent study out of the University of Auckland,³¹ and a significant paper resulting from the Dunedin study.³² This study found work stress was linked to the development of depression (and also generalised anxiety disorder) in young working men and women and the combination of multiple work stressors conferred even higher risks.³³ Holding for those with pre-existing mental health problems they

²⁵ Tarani Chandola, Annie Britton, Eric Brunner, Harry Hemingway, Marek Malik, Meena Kumari, Ellena Badrick, Mika Kivimaki, and Michael Marmot “Work stress and coronary heart disease: what are the mechanisms?” *European Heart Journal* (2008) 29, 640–648, at 640. T Vrijkotte, L van Doornen, E de Geus “Effects of work stress on ambulatory blood pressure, heart rate, and heart rate variability” (2000) *Hypertension* 35 880 and H Hemingway, M Shipley, E Brunner, A Britton, M Malik and M Marmot “Does autonomic function link social position to coronary risk? The Whitehall II study” (2005) *Circulation* 111 3071.

²⁶ H Bosma, M Marmot, H Hemingway, A Nicholson, E Brunner, S Stansfeld “Low job control and risk of coronary heart disease in the Whitehall II (prospective cohort) study” (1997) *BMJ* 314 558.

²⁷ Tarani Chandola, above n 25.

²⁸ S Kunz-Ebrecht, C Kirschbaum, A Steptoe “Work stress, socioeconomic status and neuroendocrine activation over the working day” (2004). *Soc Sci Med* 2004; 58:1523–1530, at 642.

²⁹ Tarani Chandola and others, above n 25.

³⁰ See for example, Matias Brødsgaard Grynderup, Ole Mors, Åse Marie Hansen, Johan Hviid Andersen, Jens Peter Bonde, Anette Kærgaard, Linda Kærlev, Sigurd Mikkelsen, Reiner Rugulies, Jane Frølund Thomsen and Henrik Albert Kolstad “A two-year follow-up study of risk of depression according to work-unit measures of psychological demands and decision latitude” (2012) *Scandinavian Journal of Work, Environment & Health* 38, 6, 527.

³¹ Markus Rantala, Severi Luoto, Indrikis Krams and Hasse Karlsson “Depression subtyping based on evolutionary psychiatry: Proximate mechanisms and ultimate functions” (2017) *Brain Behav. Immun* (in press).

³² Maria Melchior, Avshalom Caspi, Barry Milne, Andrea Danese, Richie Poulton and Terrie Moffitt “Work stress precipitates depression and anxiety in young, working men and women” (2007) *Psych Med* 37, 1119.

³³ *Ibid.*

found “work stress precipitates the occurrence of psychiatric disorder in previously healthy individuals.”³⁴ The precise causal mechanisms involved are complex and not completely understood, but the prevailing thinking is some combination of the direct neurotoxic effects of cortisol on the brain, down-regulation of the glucocorticoid receptor, which impairs affect regulation, an increase in pro-inflammatory cytokine levels and the leaking of non-pathogenic commensal bacteria from the gut in to peripheral circulation.³⁵ To summarise, prolonged stress results in biological changes to the functioning of the brain that can cause or trigger depression, and make it more difficult to recover from it. The research also highlights that cardiovascular disease and depression frequently co-occur and depression is a strong predictor of cardiovascular disease onset, cardiac events, and death from cardiovascular disease.³⁶

d. Complexity in causal connection

Despite the significant evidence of the causal connection between work stress and illnesses, such as depression and cardiovascular disease, the causality is far from simple or direct. The physical and psychological interaction of the worker’s body with their working environment is likely to be a complex combination, influenced by genetics, early development and prior stress exposure, outside work stressors, other health conditions and support available.³⁷ There are also differences in “stress reactivity.”³⁸ “[T]here is wide acknowledgment that both the genome and early experiences account for some share of the variance in phenotypic stress responses.”³⁹ Those people whose genes predispose them to greater biological effects of stress are referred to as people with highly reactive phenotypes. A significant piece of research into highly reactive phenotypes by

³⁴ Above, at 1126.

³⁵ See Markus Rantala, above n 31.

³⁶ Diana Chirinos and Neil Schneiderman “Depression and Cardiovascular Disease in Women: Behavioral and Biological Mechanisms Involved in this Association” in Kristina Orth-Gomer, Neil Schneiderman, Viola Vaccarino and Hans-Christian Deter (eds) *Psychosocial stress and cardiovascular disease in women* (Springer International, Switzerland, 2015).

³⁷ See, for example, T Eley, R Plomin “Genetic analysis of emotionality” (1997) *Curr Opin Neurobiol* 7:279. E Mayer, C Saper, C Ladd, R Huot, K Thirivikraman “Long-term behavioural and neuroendocrine adaptations to adverse early experience” in *The biological basis for mind body interactions*, vol. 7, 122 (Elsevier, Amsterdam, 2000).

³⁸ Reactivity has been defined in the scientific literature as “the deviation of a physiological response parameter from a comparator or control value that results from an individual’s response to a discrete, environmental stimulus.” See K Matthews “Summary, conclusions and implications” in K Matthews, S Weiss and T Detre (eds) *Handbook of stress, reactivity and cardiovascular disease*, (New York, Wiley Interscience, 1986). J Cacioppo, G Berntson, W Malarkey, J Kiecolt-Glaser, J Sheridan, K Poehlmann, M Burleson, J Ernst, L Hawley and R Glaser “Autonomic, neuroendocrine, and immune responses to psychological stress: The reactivity hypothesis” (1998) 840 *Annals of the New York Academy of Sciences* 664; A Alkon, L Goldstien, N Smider, M Essex, D Kupfer and W Boyce “Developmental and contextual influences on autonomic reactivity in young children” (2003) 42 *Developmental Psychobiology* 64; M Allen and K Matthews “Hemodynamic responses to laboratory stressors in children and adolescents: The influence of ages, race and gender” (1997) 34 *Psychophysiology* 730; M Meaney “Maternal care, gene expression and the transmission of individual differences in stress reactivity across generations.” (2001) 24 *Annual Review of Neuroscience* 1162; See also S Suomi “Individual differences in rhesus monkey behavioural and adrenocortical responses to social challenge: Correlations with measures of heart rate variability” (1987) referred to in Thomas Boyce and Bruce Ellis “Biological sensitivity to context: I An evolutionary-developmental theory of the origins and functions of stress reactivity” (2005) 17 *Development and Psychology* 271.

³⁹ Thomas Boyce and Bruce Ellis, above, at 275.

Boyce and Ellis, in 2005, is changing the way the interaction of genetic susceptibility and the causal contribution of the workplace is viewed.⁴⁰ Boyce and Ellis suggest:⁴¹

Rather than acting as a unidirectional risk factor for poor health outcomes...high-stress reactivity has been shown repeatedly to operate in a bivalent manner, most often escalating the risk of maladaptive outcomes in high-stress contexts, but diminishing such risk and acting protectively under supportive, low-stress conditions.

What this potentially means is that for those people genetically more susceptible, it may be more likely that their exposure to the current stressful environment is responsible for their particular health problems. This paper does not aim to present the evidence for the relationship of causation, but rather only highlight that there is a significant gap between medical thinking and the drafting of the law.

III. New Zealand's Current Legal Response

New Zealand's legal response to work-stress-related depression and cardiovascular disease is contained in the operation and interaction of the ACA, the HSWA, the sick leave provisions under the HA and the wider employment relations regime, particularly personal grievances. Each of these areas is discussed below with current gaps highlighted.

e. Current ACC cover for "cardiovascular episodes"

In other countries, work-stress-related depression and cardiovascular diseases receive compensation under their relevant workers' compensation regimes. The New Zealand ACC scheme provides no, or very little cover to either condition, even where shown to be caused by work. Stress-related health conditions fall outside the definition of "accident" in section 25, the cover of "gradual process, disease or infections" under section 30, and the Schedule of Occupational Diseases. Section 30(5)(a) expressly excludes any work-related health conditions caused by "non-physical stress." The exclusion of stress-related cardiovascular conditions from ACC has been recently confirmed in *MacFarlane v ACC*⁴² in 2014 and further in 2016 in *Carter v ACC*.⁴³

ACC cover for cardiovascular disease is limited to the circumstances described in section 28(3) of the ACA. Cover is only available "if the [cardiovascular] episode is caused by physical effort or physical strain in performing ... employment that is abnormal in application or excessive in intensity for the person."⁴⁴ Essentially, cover is only available where the heart attack is "caused by" some unusual physical exertion on the part of a worker in performing an unusually physical task in their ordinarily sedentary work. For example, in *Estate of Wei v ACC*⁴⁵, Wei died of a fatal

⁴⁰ Ibid.

⁴¹ At 283.

⁴² *MacFarlane v ACC* [2014] NZACC 141.

⁴³ *Carter v ACC* [2016] NZHC 1140.

⁴⁴ ACA, s28 (3).

⁴⁵ *Estate of Wei v ACC* [2004] NZACC 338.

heart attack after being assaulted by a group of youths while working in his electronics shop. Although the judge considered the “physical effort in the struggle during the assault” may meet the requirements, this could not be said to have “caused” the cardiovascular episode, meaning Wei’s estate could not obtain compensation.⁴⁶ The medical evidence revealed underlying asymptomatic heart disease. The court recognised that the additional physiological stress may have triggered the heart attack but this did not amount to cause. It also acknowledged that had the assault not occurred the heart attack may have been prevented with medical intervention. Although stress was a factor here, the judge held that “physiological stress” did not meet the definition of “physical stress.”⁴⁷

What this case highlights is the change in medical thinking that has occurred since the original inclusion of the cover provisions. Heart attacks were, in the early part of the 20th century, considered by policy makers to be caused by physical exertion, essentially, the heart gave out through overwork.⁴⁸ Just like a muscle could tear from too much force being exerted, so too, a heart was thought to be injured by excessive force, and so it was thought of as an “accident”. Nowadays, heart attacks are viewed as acute events caused by a blockage in blood vessels to the heart in cases of cardiovascular disease.⁴⁹ It would be extremely unlikely for a worker to have a heart attack in the circumstances set out in section 28(3) without pre-existing heart disease or a pre-existing structural defect, meaning the section, as drafted, offers little assistance to workers in the contemporary workplace. As in the case of *Wei*, the physical exertion would, at best, be considered to operate as a trigger to an inevitable event, and would not likely, on review of the medical evidence, be considered “the cause.”

f. Current ACC cover for depression

Work-stress-related depression is usually also excluded from ACC cover under section 30(5)(a). In 2008, section 21B was added to the ACA to provide cover to mental health problems arising in a narrow range of circumstances that involve exposure to traumatic incidents. Section 21B provides cover where “mental injury is caused by a single event” in particular circumstances.⁵⁰ A person is required to experience the event directly and the event is required to be “an event that could reasonably be expected to cause mental injury to people generally.”⁵¹ A person “experiences, sees, or hears an event directly” if they are involved in or witnesses the event, and are “in close physical proximity to the event at the time it occurs.”⁵² This section was inserted following lobbying by transport unions that had members affected by transport accidents involving pedestrians or suicidal people.

⁴⁶ At [13].

⁴⁷ At [13].

⁴⁸ See discussion on changing thinking in the time in Mel Bartley “Coronary Heart Disease – A Disease of Affluence or A Disease of Industry?” in Paul Weindling (ed) *The Social History of Occupational Health* (Croom Helm, Kent, 1985). See also the discussion in Commonwealth of Australia *Work-Related Cardiovascular Disease Australia* (April 2006).

⁴⁹ *Ibid.*

⁵⁰ Accident Compensation Act 2001, s21B(1)(b) [ACA].

⁵¹ Section 21B(2)(b).

⁵² Section 21B(5)(a) and (b).

Section 21B excludes all but a very narrow range of cases. For example, in *KB v ACC*⁵³, the case involved a claim made by a police officer attending a particularly distressing suicide, and having to counsel the family which she alleged caused her condition. The court found that “the appellant has experienced a significant number of events in the course of her work”⁵⁴ and an event meeting the requirements of section 21B “must be one that is in effect a one-off event, and which results in the more or less immediate onset of the factors involved in the medical condition of Post-Traumatic Stress Disorder.”⁵⁵ In *OCS Ltd v TW*,⁵⁶ a claim was made for a mental health problem resulting from a pattern of bullying and harassment which culminated in an incident of minor assault. The court decided that “minor incidents” were outside the mischief that section 21B was introduced to remedy, and the incident complained of had to be sudden.⁵⁷ However, in the 2016 case of *MC v ACC*,⁵⁸ the claimant suffered a series of traumatic events in the course of employment as a police officer, and in active combat in Afghanistan. The judge in this case took a wider view of the single incident requirements and it remains to be seen what, if any, impact this case may have on the interpretation of the section. Even if the decision in *MC v ACC* does widen the approach taken to section 21B, it is still a very narrow category of cover, leaving the vast majority of work-stress-related mental illnesses outside the scope of ACC.

g. The consequences of exclusion from ACC cover

Where employees suffering these conditions are excluded from cover under ACC, they may have entitlements to sick leave under contract and could pursue legal action, most typically through the personal grievance for unjustifiable disadvantage, discussed further below. If, as will be the case for most workers, they do not have additional sick leave, or a successful legal claim, they have only private insurance, or the benefit system to fall back on. In 2013, research was conducted into the socioeconomic impact of the difference in financial support between ACC and Work and Income New Zealand (WINZ) on a group of people of a similar age and level of functional impairment.⁵⁹ The study concluded that those in the illness group (not covered by ACC) had “considerably poorer socio-economic outcomes,” did not return to work as early, and were the “most vulnerable for decline into poverty and ill health.”⁶⁰

Another important consequence of exclusion is a lack of statistical information on work-stress-related depression and cardiovascular disease. In New Zealand, work-related injury and illnesses statistics come primarily from ACC administrative data, meaning that, because there is no cover for these conditions, there is also no resulting data on these conditions. This makes it very difficult to evaluate the size of the problem, the costs of the problem or how best to respond to it. The lack of data has a flow on effect on health and safety, making it difficult to isolate industries in greatest need of intervention, the types of hazards most commonly associated with the development of these conditions and other factors that impact on the prevalence of work-stress-related illness.

⁵³ *KB v ACC* [2013] NZACC 41.

⁵⁴ At [24].

⁵⁵ At [25].

⁵⁶ *OCS Ltd v TW* [2013] NZACC 177.

⁵⁷ At [83].

⁵⁸ *MC v ACC* [2016] NZACC 264.

⁵⁹ Sue McAllister and others “Do different types of financial support after illness or injury affect socio-economic outcomes? A natural experiment in New Zealand” (2013) 85 SSAM.

⁶⁰ At 100.

h. Other avenues for compensation: personal grievances

If excluded from ACC cover, employees can take a personal grievance where their work-related depression or cardiovascular disease results from some unjustifiable disadvantage. There may also be negligence, breach of statutory duty or breach of implied term claims that can be made. Perhaps most well-known of these cases is the Court of Appeal decision in *AG v Gilbert*.⁶¹ Mr Gilbert suffered work-stress-related depression and a heart condition as a result of stressful employment as a parole officer at the Department of Corrections. The court found his health conditions were caused by work overload and management failure, “not just from stress necessarily inherent in his work, but from avoidable additional pressure of workload, office dysfunction, and inadequate resources.”⁶² The Court of Appeal concluded that the employer owed Mr Gilbert a contractual duty to comply with the health and safety legislation as well as the terms of the contract providing him with a safe working environment. It also concluded that this amounted to a personal grievance. This case has been relied on in a number of other cases relating to workplace stress, such as *Crutchley v MSD*,⁶³ *Clear v Waikato District Health Board*⁶⁴ and *Rosenberg v Air New Zealand Ltd*.⁶⁵

There are significant hurdles for workers in taking these cases, and, even where successful, outcomes are generally less favourable when compared to ACC cover. A personal grievance requires an employee to sue their employer and prove fault, which the Court of Appeal has described as posing “formidable obstacles.”⁶⁶ It can be difficult and expensive to prove the required causal connection, given the timeframes and complexity of factors leading to the development of chronic diseases. There are also the additional financial and emotional burdens of bringing a legal case, which may be a particular deterrent for a person suffering a work-stress-related heart condition or depression. The employee’s personal grievance remedies are usually limited to the remedies of reimbursement of lost wages, or a wrongly denied sick leave entitlement, and compensation for “humiliation, loss of dignity, and injury to the feelings” under section 123(1)(c)(i) of the ERA. Most of these cases are likely resolved through the Employment Relations Mediation Service, with sums recorded in confidential settlements, making it difficult to fully evaluate the impact of this option on worker outcomes. Generally, however, the sums agreed to in such cases are relatively small and unlikely to be equivalent to the ongoing weekly compensation and treatment costs, rehabilitation and return to work support available under the ACC scheme.

i. Other avenues for compensation: sick leave

Employees with stress-related illnesses may be able to access sick leave under section 63 of the HA, or a contractual entitlement with their employer. It is unclear whether or, to what extent, stress-related depression and cardiovascular disease impacts on sick leave use or associated cost, given the lack of data. It seems likely, however, there is some effect, especially where there is additional contractual provision for accrual and use. The 2017 *Wellness in the Workplace Report*, which is a survey of New Zealand businesses and their employees, conducted by Business New

⁶¹ *A-G v Gilbert* [2002] 2 NZLR 342.

⁶² At [8].

⁶³ *Crutchley v MSD* [2008] NZERA 196.

⁶⁴ *Clear v Waikato District Health Board* [2007] NZERA 33.

⁶⁵ and *Rosenberg v Air New Zealand Ltd* [2009] NZERA 556.

⁶⁶ *A-G v Gilbert* [2002] 2 NZLR 342, at para [87].

Zealand and Southern Cross Health Insurance, provides the most recent information on sick leave.⁶⁷ It found that “stress was up 22.9% across businesses” over the past two surveys, and “46% of kiwis still turn up to work when sick.”⁶⁸ There is little explanation as to why almost half of New Zealand employees turn up to work despite having a paid entitlement to leave, although it seems likely to involve a number of factors, such as staffing levels, workload, deadlines or targets, the structure of responsibility for particular projects, fear of retaliation or being seen as disloyal. It also raises questions about the suitability of New Zealand’s sick leave laws for the present reality of work.

The HA provides that “an employee is entitled to 5 days’ sick leave for each of the 12-month periods specified in section 66(2)” and “an employee may carry over up to 15 days’ sick leave to a maximum of 20 days current entitlement in any year.” The current rules for sick leave relate to the circumstances in which employees may take sick leave and sufficient evidence of sickness, on the presumption that employees will, whenever possible want to use their sick leave entitlement, even when not genuinely sick.⁶⁹ There is no explicit legal requirement to ensure that employees can actually use their accrued sick days (although this could fit within broader duties of good faith or reasonableness) and no obligation to ensure work can be covered, or to ensure staffing levels are appropriate, although there may be such provisions in workplace policies and collective employment agreements.

In addition to the lack of minimum regulation, there is almost no regulator guidance on the role of sick leave in achieving worker health goals, or management of workers with depression or cardiovascular disease. The Ministry of Business, Innovation and Employment (MBIE) guidance is limited to a description of the minimum accrual and evidence requirements. WorkSafe NZ offers no advice on sick leave and worker health either, despite its issue of *Healthy Work: WorkSafe’s Strategic Plan for Work-Related Health 2016 to 2026*⁷⁰, prioritising the importance of occupational health. There is no guidance on practices or policies that might be appropriate or evaluation tools provided to employers. There is also no guidance on the potential role of health and safety representatives and committees in relation to stress-related illnesses, or on the monitoring of sick leave use as an early indicator of poor workplace health.

As mentioned above, employment agreements, particularly collective agreements can and do provide for additional wellness policies and sick leave entitlements, including for long-term use. Where these additional provisions do occur, they are often tested in situations of stress-related illness, such as where an employee suffers from depression or some incapacity due to cardiovascular disease. Policies typically tend to be discretionary and exercises of discretion may become the subject of a personal grievance as illustrated in the cases of *X v Bay of Plenty DHB*,⁷¹ *Lankes v CDHB*,⁷² and *Leota v CE of MSD*.⁷³

⁶⁷ Business New Zealand and Southern Cross Health Insurance *Wellness in the Workplace Report 2017*, available at: https://www.businessnz.org.nz/__data/assets/pdf_file/0009/128547/Wellness-in-the-Workplace-Survey-2017.pdf

⁶⁸ At 6.

⁶⁹ Holidays Act 2003, ss65 and 68. [HA].

⁷⁰ WorkSafe New Zealand *Healthy Work: WorkSafe’s Strategic Plan for Work-Related Health 2016 to 2026* (Wellington, WorkSafeNZ, 2016).

⁷¹ *X v Bay of Plenty DHB* [2009] NZERA 501 (Auckland).

⁷² *Lankes v CDHB* [2016] NZERA 162 (Christchurch).

⁷³ *Leota v CE of MSD* [2016] NZEmpC 142.

j. The HSWA and work-stress-related depression and cardiovascular disease

The HSWA was introduced in response to New Zealand's health and safety failings, highlighted in the *Report of the Royal Commission on the Pike River Mine Tragedy*⁷⁴ and the *Report of the Independent Taskforce on Workplace Health and Safety*.⁷⁵ The HSWA states that it is based on "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."⁷⁶ Section 36 establishes the primary legal duty that a PCBU⁷⁷ "must ensure, so far as is reasonably practicable, the health and safety of workers who work for the PCBU, while the workers are at work in the business or undertaking."

The objects of the HSWA and the drafting of section 36 are clearly wide enough to encompass work-related stress, however, the machinery sitting beneath those primary duties fails to provide much practical assistance. The problems are not in the general duties, (although section 36(3) could do with an additional subparagraph, as discussed in other papers⁷⁸) but rather in the lack of enforcement machinery and regulations sitting beneath those duties. Australian research highlights that, even when psychosocial hazards are expressly included within the primary duties of the legislation, they remain "a marginal area of inspectorate activity."⁷⁹ Psychosocial hazards "are commonly invisible to traditional methods of workplace inspections,"⁸⁰ they are also more complex, time-consuming and resource intensive to investigate.⁸¹

k. No suitable inspection or enforcement tools

The assumption in the HSWA, as in the previous legislation, is that the inspection and enforcement tools designed for the physical hazards of 20th century mines, factories and workshops are perfectly suitable for the types of hazards that give rise to stress-related health problems. Despite recent reforms, Worksafe NZ still does not have the legislative tools (or the regulatory standards) needed to be able to properly address the problem of stress-related illnesses.⁸² There has been a marked absence of prosecution or public enforcement action since the express inclusion of work-stress within the definition of hazard in 2003.⁸³ The position of WorkSafe NZ seems to be encouraging workers to address these issues through personal grievances.⁸⁴ Just as personal grievances are not

⁷⁴ Royal Commission on the Pike River Coal Mine Tragedy *Report of the Royal Commission on the Pike River Coal Mine Tragedy* (October 2012).

⁷⁵ Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (April 2013).

⁷⁶ Health and Safety at Work Act 2015, s 3 [HSWA].

⁷⁷ PCBU is a person conducting a business or undertaking, defined in s 17, and is wider than employer.

⁷⁸ See Dawn Duncan "Addressing the chronic health effects of work: A model for regulatory standards and enforcement," delivered to the 2016 Australian Labour Law Association conference and in preparation for publication.

⁷⁹ Richard Johnstone, Michael Quinlan and Maria McNamara "OHS inspectors and psychosocial risk factors: Evidence from Australia (2011) 49 Safety Science 547.

⁸⁰ At 548.

⁸¹ At 550-551.

⁸² See Dawn Duncan "Addressing the chronic health effects of work: A model for regulatory standards and enforcement," delivered to the 2016 Australian Labour Law Association conference and in preparation for publication.

⁸³ *Department of Labour v Nalder & Biddle (Nelson) Ltd.* [2005] NZHSE 20.

⁸⁴ See the most recent statement in WorkSafe New Zealand *Bullying at Work: Advice for Workers* (WorkSafe NZ, 2017) available at: <http://www.worksafe.govt.nz/the-toolshed/tools/bullying-prevention-toolbox/#page=15> (accessed 14 November 2017). Additionally, Worksafe's prosecution priorities can be found here:

the optimal way to ensure workers harmed at work have fair and accessible compensation, so too, they are not the optimal way to enforce the country's health and safety laws.

Resolving cases of work-stress-related depression or cardiovascular disease through confidential mediated settlement offers little prospect of achieving meaningful change to working conditions that cause stress-related illnesses. There is little incentive for employers to take action, as there is little prospect of penalties for employers failing to meet their obligations under the HSWA, and a free mediation process to quietly resolve any issues that do arise at an individual level. As WorkSafe NZ is eager to point out,⁸⁵ there are business reasons for wanting to ensure the health and productivity of the workforce, however, for a number of employers, it is simply cheaper to exit package any affected workers than address excessive workloads or unhealthy (albeit profitable) business practices.

IV. Reforms Needed to Address Work-Stress-Related Depression and Cardiovascular Disease

The work being performed in New Zealand, and the medical thinking on the health effects of that work has changed a great deal since Woodhouse and Robens were writing their reports in the late 1960s. While the science is complex and not yet perfectly understood, the development of work-related depression or cardiovascular disease will likely have a genetic, early life and outside of work component. That poses a challenge for laws designed for accidental injuries that typically have simple and direct causal connections, e.g. getting crushed in a mine collapse or being degloved by unguarded machinery. New Zealand law-makers have tended to respond to the challenges of complex causation with a mix of nervous ad hoc tinkering, obfuscation, avoidance, fear of floodgates arguments and cost-saving claims. If the law in these areas is to serve the working people of New Zealand, it needs to be designed to respond to complexity and, as argued further below, the best way to do that is to start with clear policy principles. New Zealand's laws need to be designed, first and foremost, for the promotion of worker health.

a. ACC reform: The legacy of the past and the complexity of the future

The area in most urgent need of reform is the cover provisions of the ACC scheme. Although the lack of data makes it difficult to know how many workers are affected, looking at trends internationally, there are potentially significant numbers of people without access to compensation, treatment or support for their work-related conditions and the costs for those workers, business and wider society is considerable. Reform to the ACC scheme faces two key challenges, overcoming the legacy of the past, and responding to increasingly complexity in the relationships between workers and their working environments in future.

One of the key problems in the current ACA is the lack of definable policy principle as to where the boundary lines of cover ought to be drawn. As set out in other papers, confining the ACC scheme to cover 'accidents' was a political compromise needed to ensure the success of the

<https://worksafe.govt.nz/laws-and-regulations/operational-policy-framework/operational-policies/prosecution-policy/>

⁸⁵ WorkSafe New Zealand *Work-Related Stress* (17 March 2017) at: <http://www.worksafe.govt.nz/worksafe/hswa/health-safety/topics/stress>

proposal at the time.⁸⁶ This, however, created an inherent rationing problem with a particularly detrimental effect on the cover of chronic health problems in the years that followed.⁸⁷ The ACC scheme covers some, but not all, work-related health problems, with no clear basis in principle for why particular conditions are excluded. In countries with workers' compensation regimes, the tests for cover revolve around two questions, first, whether the claimant is a 'worker' as defined, and second, whether their condition sufficiently related to work. These schemes do not break down cover by diagnostic category and, as a result, these schemes are generally better able to respond to changes, both in work and medical thinking, than ACC. These schemes have generally also been better able to provide for workers with work-stress-related depression and cardiovascular disease.

Responding to future complexity is the second challenge, but this, too, could be assisted with the inclusion of a clear set of policy principles for the boundary lines of cover. The tests of cover need to be reformulated to ask not 'what is the causal relationship between work and this given diagnosis?' but the more nuanced, 'what, given, the explicit policy goals of this section, ought to be treated as sufficient causal connection between this person's work and their health condition?' The causal tests for the cover of work-related health problems need to be paired with a clear legislative statement of policy purpose and a process for decision-making and review that allows for those purposes to be foremost in decisions of cover.

The cover provisions of the ACC scheme need to be directed towards the goals of fair and equitable compensation, recognising the legal rights of workers to compensation, improving worker health and also improving the health and safety in New Zealand's workplaces. Redrafting the ACA provisions relating to worker health with a clearer statement of purpose and principle may offer a solution to an increasingly complex and rapidly moving scientific understanding of the relationship between human beings and their working environments.

b. Reforms to the HSWA: More suitable regulations and enforcement tools needed

The HSWA also needs to be able to better respond to complexity in the causal relationships between workers' health and their working environments. WorkSafe NZ needs a set of enforcement tools designed for inspection and enforcement in situations of stress-related depression and cardiovascular disease. As mentioned in other papers,⁸⁸ one response to this problem may be a much simpler review process, paired with an evaluation tool (ideally included in healthy work focused regulations). This, coupled with a more explicit set of employee rights, and a role for the regulator in evaluating the reasonableness of the employer's actions could provide a simple and practical solution to the current problem of attempting to apply traditional 'inspection' techniques to complex jobs.

⁸⁶ See Dawn Duncan "ACC and workers' health: Compensation, compromises and consequences" in Gordon Anderson, Alan Geare, Erling Rasmussen and Margaret Wilson (eds) *Transforming Workplace Relations in new Zealand 1976-2016* (Wellington, VUP, 2017).

⁸⁷ *Ibid.*

⁸⁸ See Dawn Duncan "Addressing the chronic health effects of work: A model for regulatory standards and enforcement" presented to the Australian Labour Law Association conference in 2016 and in preparation for publication.

c. Coordinated laws directed toward the goals of improved employee health

As set out above, the ACA and HSWA are currently supplemented by the sick leave provisions in the HA and the personal grievances regime. Reforms to the ACA and HSWA need to be viewed in a wider employment relations context. For example, it may be time to draft rules or issue guidance on the management of sick leave beyond simply accruals, the calculation of pay, or the requirements for medical certificates. Sick leave may need to be considered as part of workplace health and safety, with specific roles for health and safety representatives and committees in monitoring employee health and in workplace health advocacy.

The new Labour-led Government campaigned on a policy of introducing Fair Pay Agreements. It is unclear yet what these will look like, but the Party's website defines these as follows.⁸⁹

Fair Pay Agreements (FPAs) will be agreed by businesses within an industry and the unions representing workers within that industry. FPAs will set basic standards for pay and other employment conditions within an industry, according to factors including job type and experience.

These agreements have the potential to create more tailored worker health standards or specific process requirements. It is essential that worker health, and in particular, work-stress-related depression and cardiovascular disease form part of the discussion about the reforms needed to New Zealand's labour laws.

V. Conclusion: The Role of Labour Law in Addressing the Problems

Work-stress-related depression and cardiovascular disease are significant problems for New Zealand workers, businesses and wider society. This paper has looked at New Zealand's current legal response to work-stress-related depression and cardiovascular disease, primarily in the ACA and HSWA. Obviously, stress is not confined to the hazards of the workplace and labour law has a wider role to play in ensuring the health of working people. Labour law has a significant impact on employment security, the manner by which people are engaged to perform work, the bargaining power of workers in setting terms and conditions, wage rates, and, consequently, the access of workers to secure housing and healthcare. These factors impact not only on the stress levels of workers but their ability to respond to them. Fully addressing the problems of worker depression and cardiovascular disease requires a wider response, tackling precarious and insecure work, low wages and the social consequences of economic deprivation. While this wider role is acknowledged, this paper argues that significant improvements that could be made in this area with simple reforms to the coverage of the ACC scheme (including better data collection), and a better suited set of enforcement tools and regulatory standards under the HSWA. These reforms would offer immediate and practical benefit to workers, while also equipping law makers with the data needed to formulate longer-term strategy.

⁸⁹ New Zealand Labour Party, Workplace Relations Policies (2017) available at: <http://www.labour.org.nz/workplacerelements>

Adopting a Health and Safety Framework for the Assessment and Remediation of Earthquake Prone Buildings

JOHN GODDARD*

Introduction

He Whakatauki: He Korowai Whakaruruhau

“He korowai āta raranga
He korowai whakaruruhau
Mō tātou katoa”

This *whakatauki* (proverb) features prominently in the Independent Taskforce’s Report on Workplace Health and Safety.¹ The korowai (cloak) was woven by Robin Hill who explained that:²

This korowai is made of pheasant feathers, both male and female birds, which speaks to me of the inclusion of all people. The taniko (woven border) is designed with a family in mind. The marriage of two people and their respective families join to make one pattern. Although people belong together in society we are all individuals so there are individual bundles of feathers throughout the korowai body.

The image, symbolism and cultural significance of the *korowai* embodies and embraces the requirements for best practice regarding workplace health and safety. The Independent Taskforce considered that “urgent sustainable step-change in harm prevention activity and a dramatic improvement in outcomes” are required to improve New Zealand’s poor health and safety performance.³

It considered that all of its identified pre-requisites need to be in place for a high-functioning workplace health and safety regulatory system, including: good workable law; (b) an effective primary regulatory agency; (c) strong visible leadership; (d) a robust level of capacity and capability; (e) genuine and effective worker participation; (f) incentives that are effective levers for good practice; (g) high quality data; and (h) a national culture that is more risk aware.⁴

Much has been written about the lessons to be learned from the Canterbury earthquakes. More than eight years after the first earthquake of 4 September 2010, it is timely, if not overdue, to reflect on whether the fatalities which resulted from the catastrophic collapse of the CTV and PGC buildings and other multiple building failures would be avoided or mitigated under the new workplace health and safety regime.

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¹ Independent Taskforce *The Report of the Independent Taskforce on Workplace Health and Safety: He Korowai Whakaruruhau* (Executive Report) (Independent Task Force reporting to the Minister of Labour, April 2013).

² Ibid.

³ At 3.

⁴ Ibid.

To appreciate the context behind the recent changes to health and safety in New Zealand, it is necessary, as a minimum, to have regard to the following materials: the Royal Commission on the Pike River Coal Mine Tragedy⁵, the Canterbury Earthquakes Royal Commission⁶, the Report of the Independent Taskforce⁷, WorkSafe New Zealand's Position Statement on Dealing with Earthquake Related Hazards⁸, Ministry of Business, Innovation and Employment's (MBIE) Investigation into the Performance of Statistics House in the 14 November 2016 Kaikōura Earthquake,⁹ the sentencing decision of *WorkSafe New Zealand v Rangiora Carpets Limited*¹⁰ and recent changes to the regulatory regime for managing earthquake prone buildings (the EPB Regime).

The key question for this paper is whether the revised and updated EPB Regime will prevent loss of life as occurred as a result of the CTV and PGC building failures and would have occurred in Statistics House but for the fortuitous timing of the Kaikōura earthquake.

First, the failures that led to the Pike River Coal Mining tragedy and the collapse of the CTV building will be compared to identify whether there have been any common features. Secondly, the Report of the Independent Taskforce will be reviewed. Thirdly, the recently updated EPB Regime will be reviewed. Finally, an assessment will be made as to the effectiveness of the EPB Regime as it currently operates and some suggestions will be made for addressing EPB issues from a health and safety perspective.

The Pike River Coal Mine Tragedy

The Pike River coal mine tragedy has come to symbolise the systemic failure of health and safety in New Zealand. On Friday, 19 November 2010, at 3.45pm, there was an explosion in the mine. Twenty-nine men died underground immediately after the explosion or shortly afterwards, either from the impact of the explosion or from the toxic atmosphere. Two workers, who were located in a stone drift, and removed from the workings of the mine, managed to escape.¹¹ Over the next nine days, the mine exploded three more times before it was sealed. No workers were rescued, and no bodies have been recovered.¹²

According to the Royal Commission on the Pike River Coal Mine tragedy, the cause of the 19 November explosion was the ignition of a substantial volume of methane gas.¹³ While it

⁵ Royal Commission on the Pike River Coal Mine Tragedy *Royal Commission on the Pike River Coal Mine Tragedy: Te Komihana a te Karauna mo te Parekura Ana Waro o te Awa o Pike* (Royal Commission on the Pike River Coal Mine Tragedy, October 2012).

⁶ Canterbury Earthquake Royal Commission *Final Report: Te Komihana Ruwhenua o Waitaha* (Canterbury Earthquake Royal Commission, November 2012).

⁷ Above n 1.

⁸ WorkSafe New Zealand "Position Statement on Dealing with Earthquake Related Hazards: Information for employers and owners of workplace buildings - Position Statement" (November 2016) WorkSafe New Zealand < www.WorkSafe.govt.nz >.

⁹ Ministry of Business, Innovation and Employment "Investigation into the Performance of Statistics House in the 14 November 2016 Kaikōura Earthquake" (MBIE, March 2017).

¹⁰ *WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587.

¹¹ Royal Commission on the Pike River Coal Mine Tragedy, above n 4, at 12.

¹² Ibid.

¹³ Royal Commission on the Pike River Coal Mine Tragedy, above n 4, at 23.

remains unclear exactly how such large quantities of methane gas accumulated and the identity of the ignition source, it seems highly likely that the accident and subsequent loss of life would have been prevented if proper health and safety processes had been followed.

According to the Royal Commission, the underlying causes of the tragedy included that:¹⁴ (1) it could fairly be described as a *process safety accident*, comprising an escape of methane gas, followed by an explosion. It occurred at a time when production was prioritised at the expense of health and safety; (2) at the time of the tragedy, the legal framework for health and safety in underground mining was deficient; (3) in the years leading up to the time of the accident, the oversight provided by the health and safety regulator was inadequate; (4) the search and rescue operations were compromised due to a lack of advance planning; and (5) the families of the miners would have benefitted from improved communication during the search, rescue and recovery phases.

There were multiple process failures, as outlined below:

A management culture which saw management of methane gas as “*more a nuisance and daily operational consideration than a significant problem or barrier to operations*”.¹⁵

The investigation of incident reports was haphazard. For example, in October 2010, a backlog of outstanding investigations was simply written off.¹⁶

A key health and safety requirement for underground mining is to effectively manage methane gas levels. One component of effective methane management is proper implementation of a ventilation management system. For Pike River, the ventilation management plan was deficient. For example, no one had dedicated responsibility for ventilation management.¹⁷

The ventilation shaft was relied on by Pike River as a second means of escape. In April 2010, a Department of Labour (DoL) inspector advised the company that the ventilation shaft was not a suitable means of egress. However, the DoL took no further action before the explosion occurred. This was because the DoL assumed that Pike River was a ‘best practice’ employer when this was not the case. These failures, and others, occurred due to DoL’s failure to resource and support the dwindling mining inspectorate.¹⁸

Placing the main fan underground was a ‘major error’ because the decision was not subject to an adequate assessment of risk, the main fan was not ‘explosion protected’ and it was not operational after the explosion.¹⁹

The backup fan, which was located at the top of the ventilation shaft, failed to start, as planned, after the explosion.²⁰

¹⁴ At 15.

¹⁵ At 18.

¹⁶ At 19.

¹⁷ Ibid.

¹⁸ At 23.

¹⁹ Ibid.

²⁰ Ibid.

Monitoring methane levels is an essential part of effective methane management. The Royal Commission found that the sensors were either not operational or were unreliable.²¹

Under mining regulations, electrical equipment must be located in a restricted zone to prevent the possibility of equipment igniting an explosion. The Pike River restricted zone was fixed without any risk assessment and only after equipment had already been installed.²²

The premature commencement of hydro mining resulted in high methane gas readings. As a result of these readings, hydro mining should have ceased.²³

Overall the Royal Commission stated that:²⁴

New Zealand has a poor overall health and safety record compared with other advanced countries. In relation to underground coal mining, New Zealand has had a tragedy every generation or so, after the lessons of previous tragedies have been forgotten. This time the lessons must be remembered. Legislative, structural and attitudinal change is needed if future tragedies are to be avoided. Government, industry and workers need to work together. That would be the best way to show respect for the 29 men who never returned home on 19 November 2010, and for their loved ones who continue to suffer.

The recommendations of the Royal Commission included: (1) to improve New Zealand's poor record in health and safety, a new Crown agent focussing solely on health and safety should be established;²⁵ (2) an effective regulatory framework for underground coal mining should be established urgently;²⁶ (3) regulators need to collaborate to ensure that health and safety is considered as early as possible and before permits are issued;²⁷ (4) the statutory responsibilities of directors for health and safety in the workplace should be reviewed to better reflect their governance responsibilities;²⁸ (5) directors should rigorously review and monitor the organisation's compliance with health and safety law and best practice²⁹; (6) the health and safety regulator should issue an approved code of practice to guide managers on health and safety risks, drawing on both their legal responsibilities and best practice. In the meantime, managers should consult the best practice guidance available;³⁰ and (7) worker participation in health and safety in underground coal mines should be improved through legislative and administrative changes.³¹

In other words, the Royal Commission advocated strongly for a significant mind shift regarding workplace health and safety. The elements required to deliver such a change include (1) a clear and coherent regulatory framework, (2) leadership provided by central government, (3)

²¹ At 20.

²² Ibid.

²³ Ibid.

²⁴ At 35.

²⁵ At 36.

²⁶ Ibid.

²⁷ At 37.

²⁸ Ibid.

²⁹ Ibid.

³⁰ At 38.

³¹ Ibid.

identification of health and safety risks at an early stage, (4) ongoing monitoring of those risks, (5) effective management of health and safety risks by mine management, (6) effective review of the management of health and safety risks by governance entities and (7) active worker participation regarding health and safety risks.

In other words, the *korowai whakaruruhau* requires a cloak which is carefully woven if workers and others are to be protected at work. The Pike River coal mine tragedy was a process failure. If proper processes had been followed, then the accident and the explosion and the loss of life could have been avoided.

The Royal Commission referred to 17 previous coal mining accidents, most of which resulted in loss of life.³² In total, since 1879, more than 200 miners have lost their lives in New Zealand coal mine tragedies. The recurrence of such tragedies was evidence of recurring themes including:³³ (a) an insufficient regulatory framework; (b) the health and safety regulator not properly conducting inspections or ensuring legislative compliance; (c) operators not identifying and managing hazards, including inadequate ventilation and gas management systems; (d) operators not providing miners with the proper training, equipment and oversight; and (e) miners not following safe practices.

In other words, a common theme of the previous 17 coal mining accidents is that there was no carefully woven cloak which would have protected coal miners at work in New Zealand. This context provides a useful framework for assessing the consequences of the collapse and total failure of the CTV building on 22 February 2011 from a health and safety perspective.

The CTV Building

On 22 February 2011, just three months after the Pike River coal mine tragedy, a 6.3 magnitude earthquake, with an epicentre less than 10 kilometres from the Christchurch CBD, struck at 12.51pm. It followed an earthquake of magnitude 7.1 which occurred on 4 September 2010 and a large number of powerful aftershocks. The shaking was particularly destructive due to the shallowness of the fault line and its proximity to the CBD.³⁴

Ground motions caused by the February earthquake were extremely high. For example, vertical accelerations were measured at 2.2g and horizontal accelerations near the epicentre were measured at 1.7g. These accelerations meant that the earthquake is seen as a one in 2,500-year event.³⁵ Buildings in New Zealand are not built to withstand shaking of this intensity although they are meant to preserve life.

One hundred and fifteen people were killed when the CTV building collapsed in the February earthquake. Profiles of these people are featured in the Royal Commission's report.³⁶ The

³² At 258 to 261.

³³ At 261.

³⁴ Ministry for Culture and Heritage "Christchurch earthquake kills 185" (April 2017) <<https://nzhistory.govt.nz/>>

³⁵ Canterbury Earthquake Royal Commission (Vol 1), above n 5, at 34.

³⁶ Ibid (Vol 6), at 5-37.

victims' places of work included Kings Education Language School, The Clinic medical centre, the Toyama College of Foreign Languages, CTV and Relationship Services.

The Royal Commission found that the collapse of the CTV building would have occurred within 10-20 seconds of the commencement of the February earthquake.³⁷ The collapse was sudden and catastrophic. After a period of twisting and shaking, all of the floors dropped vertically due to major weaknesses in the beam column joints and columns. This was described by eye witnesses as a 'pancake' effect. The north wall complex was left standing, the floors had become separated from it. The south sheer wall collapsed inwards on top of the floors which was probably the last part of the collapse sequence. Both the north and the south walls failed to perform their intended role.³⁸

The two key failures of the designer were: (1) to properly consider low tracking through the beam column joint zones. This failure led to joint zones which "*were easy to construct but lacked ductility and were brittle in character*"; and (2) failing to ensure that there were adequate connections between the floors and the north wall complex.³⁹ Retrofit works also failed due to their lack of ductility.

The Royal Commission found that these design defects were compounded by construction defects in that the builder failed to roughen the interface between the ends of the precast beams and the concrete in the columns.⁴⁰

The Royal Commission made a number of critical findings including that:

Mr Harding, who carried out the structural design of the building, was acting beyond his competence and did not seek assistance from his employer, Alan M Reay Consulting Engineer (ARCE). Specifically, Mr Harding was inexperienced in the use of the ETABS computer programme and that he had never designed a multi-storey building.⁴¹

Dr Reay failed to properly supervise Mr Harding's work and failed to implement a system for reviewing the design either by himself or by someone else who was qualified to carry out a review.⁴²

In the process of applying for a building permit around July and August 1986, a building consent officer, Mr Tapper, identified that there were design flaws in the structural drawings. These included the connections of the floors to the north wall complex. However, in September 1986, Dr Reay became involved in the process for issuing consent and it seems likely the Christchurch City Council (CCC) accepted that Mr Tapper's concerns lacked foundation. As a result, the CCC issued a building permit when it ought not to have done so.⁴³

³⁷ Ibid (Vol 6) at 307.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid at 302.

⁴² Ibid.

⁴³ Ibid at 303.

The defects in design were compounded by construction defects. The two main defects in construction works were that (1) there was no or insufficient roughening of construction joints between precast and in situ concrete and (2) a number of reinforcing bars in the precast beams were bent backwards instead of being embedded into the north wall complex as the design had intended.

These construction defects may not have been identified or addressed as a result of inadequate construction monitoring by both ARCE and the CCC.⁴⁴

In 1990, retrofitting works were carried out. This involved the insertion of drag bars between levels four to six in the north wall complex. When the drag bars were inserted, no building permit was obtained. Although the installation of the drag bars met relevant standards, overall, the connections between the floors and the north wall complex remained non-compliant for seismic actions in the east-west direction.⁴⁵

On 7 September 2010, when three CCC building officers carried out an inspection, there was no engineer present. Notwithstanding this omission, the officers decided that an existing green placard signalling that the building was safe to occupy was confirmed.⁴⁶

There were many opportunities to identify and address the defective design issues. If this had occurred, it is possible that at least some of the lives lost on 22 February 2011 could have been saved. From a health and safety perspective, the risk of catastrophic collapse in a major earthquake was not identified. The failure to identify the risks of use and occupancy of the CTV building meant that those risks could not be eliminated or minimised.

Once again, the protective cloak was not woven with sufficient care to protect people who had the misfortune to be in the CTV during the February earthquake. The process flaws between the design of the building and the earthquake in February 2011 echo the failings in the Pike River coal mine tragedy. The catastrophic collapse of the CTV building could also be described as a *process safety accident*.

The Report of the Independent Taskforce

The Taskforce identified that New Zealand's performance in workplace health and safety is poor by international standards. Although there were issues with the quality of the data, the Taskforce was extremely concerned at health and safety in this country. Each year, around 200,000 claims are made to ACC. While the majority of these claims are for medical fee expenses, in 2010, ACC accepted about 26,000 substantive entitlement claims for work-related harm.⁴⁷

The Taskforce concluded that there was no single factor responsible for the poor performance. Instead, the Taskforce identified:⁴⁸

⁴⁴ Ibid.

⁴⁵ Ibid at 304.

⁴⁶ Ibid at 305.

⁴⁷ Independent Task Force, above n1 at 12.

⁴⁸ Independent Task Force, above n1 (Executive Report) at 10.

Significant weaknesses across the full range of workplace health and safety system components, coupled with the absence of a single strong element or set of elements to drive major improvements or to raise expectations. The fundamental issue is systemic.

While the Taskforce identified problems with (1) confusing regulation, (2) a weak regulator, (3) poor worker engagement and (4) inadequate leadership, the Taskforce carefully considered New Zealand's risk-tolerant culture and stated:⁴⁹

Our national culture includes a 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 all affect behaviour from the board room to the shop floor. If recognition and support for health and safety are low or intermittent, workplaces are liable to develop, accept and defend low standards, dangerous practices and inadequate systems.

These comments certainly ring true if we reflect on the mining activities documented by the Pike River Royal Commission or the processes involved in the design and construction of the CTV building.

The Chair of the Taskforce considered that to address these cultural challenges would:⁵⁰

...require strong top-down and bottom-up leadership. It will also require a fundamental change to the prevailing 'she'll be right' culture in New Zealand. She most clearly is not all right. Businesses, workers, unions, industry organisations and the Government all have vital and shared roles to play in achieving this vision.

Wally Noble became a paraplegic in a workplace accident on a construction site when he fell 6.5 metres through a hole in the roof and landed on the penthouse below. He suffered serious injuries, including breaking his spine which resulted in him becoming a paraplegic and being confined to a wheelchair. He reflected that his accident could have been avoided and stated:⁵¹ "we have a responsibility to change the safety culture in the workplace. We need to inspire everyone at work to have the courage to speak up when things don't seem right."

Other submitters echoed these concerns around culture, leading the Taskforce to conclude that:⁵²

New Zealand's national culture includes a high level of tolerance for risk, and negative perceptions of health and safety. There appear to be a number of prevailing values and norms that are at odds with a safety-conscious, harm-preventive and compliance-based workplace health and safety system. 'It's only minor', 'it won't happen to me' and 'it's all part of the work we do' are some phrases that aptly capture this.

⁴⁹ At 12.

⁵⁰ Ibid (Full Report) at 5.

⁵¹ At 14-16.

⁵² At 31.

The Taskforce records the views of a company director regarding the connection between cultural change and strong leadership:⁵³

How do you create the right culture? “A commitment has to come from the top. It needs to be led primarily by the chief executive but the board directors must support and challenge the CEO too. “There needs to be greater awareness – and the Pike River tragedy has raised people’s awareness – and an acceptance of the importance of health and safety.

The Taskforce agreed and emphasised the critical nature of effective leadership:⁵⁴

One of the most important components of the workplace health and safety system is leadership – from the Government, government agencies, industry bodies, pan-industry bodies, professional associations, employers, managers, people in governance roles, unions, community based organisations, the medical profession, other professions, health and safety representatives and, of course, workers.

First and foremost, leadership needs to be strongly demonstrated from the top. The Government should provide strong leadership and act as an exemplar of good workplace health and safety practice.

These statements about creating and maintaining a safety culture in the workplace go to the heart of recent reforms in this area. To achieve a cultural shift requires a number of features to be present, including clear and effective regulation, a visible and strong regulator, effective management and governance structures, strong leadership (both top-down and bottom-up), a common vision for workplace safety, shared ownership of safety issues and effective processes to ensure worker participation.

To achieve real change, all key elements must be present along with a “broad-based step-change in approach and a seismic shift in attitude.”⁵⁵

The Taskforce made a number of recommendations and many of these have already been implemented. We now have much stronger health and safety legislation in the form of the Health and Safety at Work Act 2015 (HSWA). The HSWA contains specific provisions relating to: the primary duty of care of a Person Carrying out a Business or Undertaking (PCBU);⁵⁶ the due diligence duties of directors;⁵⁷ worker participation, including the roles of health and safety representatives and health and safety committees;⁵⁸ and overlapping duties where there is more than one PCBU present in a workplace.⁵⁹ Additionally, there is now a suite of at least 10 health and safety regulations which have been promulgated under the HSWA since 2015. There is a

⁵³ At 76.

⁵⁴ At 77.

⁵⁵ At 4.

⁵⁶ Health and Safety at Work Act 2015, sections 17 and 36.

⁵⁷ Section 44.

⁵⁸ Sections 58-67.

⁵⁹ Sections 32-34.

dedicated regulator (WorkSafe New Zealand) with strengthened powers of enforcement. Prosecutions under the HSWA are currently making their way through the courts. WorkSafe is providing leadership by making available to businesses guidance documents, fact sheets, position statements and other relevant information.⁶⁰

Central government deserves credit for implementing these initiatives. WorkSafe has a visible presence and continues to develop a large body of information and guidance to enable PCBUs, directors, workers, HSRs and Health and Safety Committees to contribute more effectively to workplace health and safety. In general terms, the *korowai* is increasingly becoming a *korowai whakaruruhau*.

It is necessary to consider whether, from a health and safety perspective, the new regime for EPBs provide adequate protection for PCBUs, managers, directors and workers against risks associated with unsafe structures.

The New Regime for Earthquake Prone Buildings

The Canterbury Earthquakes Royal Commission (CERC) noted that, under the system that operated at the time of the Canterbury earthquakes, it was left to each territorial authority to set its own policy for identifying and managing earthquake prone buildings and for reviewing its policy every five years.⁶¹ MBIE, as building regulator, produced guidance to assist local authorities to determine how it would manage its existing building stock.

MBIE considered that local authorities would implement policies that struck a balance between earthquake risks and other factors, taking into account economic and social considerations and the community interest in preserving heritage buildings.⁶² MBIE suggested that policies adopted by territorial authorities could adopt an active or passive approach.

Under an active approach for managing EPBs, territorial authorities identify all of the high risk buildings within its district and serve notice on the owners, requiring them, at their cost and within a specific timeframe, to provide more detailed seismic assessments and/or improve the performance of their buildings as appropriate.⁶³

Under a passive approach, a territorial authority waits for a building owner to apply for building consent where alterations to existing buildings are proposed. A territorial authority then requires seismic works to be completed as part of the alterations to the building.⁶⁴

The CERC found that, while all 67 territorial authorities had policies for managing EPBs, 43 had active policies, 12 had passive policies and 12 had hybrid policies containing active and passive elements.⁶⁵ Unsurprisingly, the CERC recommended that, while territorial authorities

⁶⁰ <www.worksafe.govt.nz>.

⁶¹ Building Act 2004, ss 131-132.

⁶² Department of Building and Housing. (2005). *Earthquake-Prone Building Provisions of the Building Act 2004: Policy Guidance for Territorial Authorities*. Wellington, New Zealand.

⁶³ Canterbury Earthquakes Royal Commission, above n 5 (Vol 4) at 200.

⁶⁴ Ibid.

⁶⁵ At 201.

should be permitted to set discretionary EPB policies, MBIE should provide further guidance on the factors to be considered, including the nature of a community's building stock, the expected economic impact, the numbers of passers-by for some buildings, levels of occupancy, and potential impact on key infrastructure in a time of disaster.⁶⁶

The new regime came into force on 1 July 2017 and has five key features: (1) Building (Earthquake-prone Buildings) Amendment Act 2016. This Act contains important provisions. It requires territorial authorities to adopt an active approach to identifying and managing EPBs and sets timeframes of between 2.5 and 15 years for building owners to improve the performance of EPBs. It also requires seismic upgrades to be completed when building owners carry out substantial alterations but does not define what constitutes a 'substantial alteration'. The Amendment Act commenced on 1 July 2017; (2) Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005; (3) an EPB methodology was released by MBIE in July 2017. The EPB methodology provides guidance to territorial authorities tasked with identifying EPBs; (4) Engineering Assessment Guidelines were finalised in August 2017. They provide guidance for initial seismic assessments (ISAs) and detailed seismic assessments (DSAs); and (5) a national EPB register.

Comment

There are some inherent weaknesses in the current regime for assessing EPBs. While there is a more consistent national approach, implementation of the policy is left to territorial authorities who are all able to adopt different approaches, have differing levels of institutional expertise, differing capabilities, and differing resources. These variations are compounded by the fact that neither the building regulator nor the health and safety regulator provide any independent oversight.

A further factor is that older buildings may comply with building standards at the time of construction but may, nonetheless, be brittle and struggle to withstand the force of a powerful earthquake.

For example, the PGC Building collapsed following the February earthquake, killing 18 people, after both the east and west walls failed. The PGC building was built in 1966. It complied with the building standards of that time. However, a number of features of the design meant that the PGC building could not lawfully be constructed under the current Building Code and associated standards.⁶⁷

Following seismic works carried out in the 1990s, an engineer estimated the building's strength to be approximately 50 per cent of seismic design loading in the relevant standard.⁶⁸ The CTV building was assessed at between 40-55 per cent NBS. Yet, both of these buildings contained a number of design and construction flaws which rendered them susceptible to total building failure in the event of a major earthquake. Because they were originally compliant with

⁶⁶ At 211.

⁶⁷ Canterbury Earthquakes Royal Commission, above n 5, (Vol 2) at 41.

⁶⁸ At 24.

building regulation, and structural alterations did not trigger a reassessment of their critical structural weaknesses, the EPB regime under the 2004 Building Act was not engaged.

Following the Kaikōura earthquake, Statistics House, a six storey building located in the Centreport Harbour Quays business park, suffered a partial collapse of the first and second storeys.⁶⁹

The building was constructed in 2004 and 2005 when the Building Act 2004 was in force. Following the 2013 Seddon earthquake, the building owners engaged engineers to undertake a review against the recommendations of the Canterbury Earthquake Royal Commission. These seismic works had commenced but had not been concluded at the time of the Kaikōura earthquake.

According to MBIE, the building was unable to withstand the effect of the Kaikōura earthquake due to: (1) a highly flexible ductile frame which exacerbated the impact of the earthquake; (2) shortening of the pre-cast double-tee flooring units as a result of the spalling at the ends of the units; (3) amplification of ground shaking due to basin-edge effects in the Thorndon basin area; and (4) the long duration of the earthquake (about 120 seconds).⁷⁰

The concerning nature of this modern and presumably well designed and constructed building failing is that if the high end of our building stock presents life safety issues in a major earthquake, then where does it leave buildings constructed to a lower standard?

Another worrying consideration is that, while MBIE carried out a careful review of the building after it had partially failed, there does not appear to be any machinery for an independent panel of building experts to assess buildings when concerns have been raised by employers, workers and others, but before a building has failed to perform in a manner which would preserve life safety.

WorkSafe has a position statement on earthquake damaged buildings. There are two key 'takeouts' in the statement:⁷¹

In short, if you are doing what you're supposed to be doing under the Building Act, then we are not going to enforce to a higher standard in relation to your building's earthquake resilience under HSWA. If you're not doing what you should be doing under the Building Act, we expect the relevant local council to take action – not us.

If you're not doing what you're supposed to be doing under the Building Act and someone is seriously harmed following an earthquake you could face enforcement action under the HSWA.

On 4 October 2017, WorkSafe New Zealand successfully prosecuted a company for having an unsafe structure. In this case, the defendant, Rangiora Carpets Limited operated a business of supplying and installing floor coverings to domestic and retail markets, employing

⁶⁹ Ministry of Business, Innovation and Employment, above n 8, at 14.

⁷⁰ At 28.

⁷¹ WorkSafe New Zealand, above n 7.

approximately 16 staff. It operates out of a two-storey commercial building which includes a mezzanine area which is approximately 2.7 metres high and 74 metres wide.⁷²

The mezzanine was constructed without any building consent and, at the time of the accident, the mezzanine did not comply with the building code due to the lack of a balustrade. There was a false ceiling adjacent to the mezzanine.⁷³

The victim, in this case, while moving a box containing old paper work, pushed a box along the carpeted edge of the mezzanine. As she stood up, her foot slipped off the side of the mezzanine and she fell through the false ceiling to the floor approximately 2 ½ metres below.⁷⁴

According to the victim impact statement, she suffered a broken arm, broken right shoulder, broken right collarbone, fractures to the left side of her pelvis, and a laceration to her head. These injuries required her to spend eight days in hospital before being discharged and cared for by her husband who had to take time off work to look after her.⁷⁵

In its submissions for sentencing, WorkSafe noted that a proper hazard identification assessment would have picked up the risk created by the lack of a balustrade on the mezzanine floor and that addressing this risk would have been relatively easy and inexpensive.⁷⁶

The District Court ordered the defendant to pay \$20,000 in reparation to the victim, a total fine of \$157,500 and prosecution costs.⁷⁷

In media statement, WorkSafe General Manager Operations and Specialist Services, Brett Murray stated:⁷⁸

Falls from height always present a significant risk. Even a fall of less than three metres can result in serious injuries or death. Identifying the need for a barrier to protect workers on the mezzanine floor was imperative to avoiding this incident.

Under the current regime, health and safety issues relating to defective structures are treated as Building Act issues until something goes wrong. If something goes wrong, and harm occurs, then the issues become HSWA issues, capable of investigation and prosecution by WorkSafe. The effect of this approach is that WorkSafe is under no obligation to take any action until harm has actually been suffered. In other words, WorkSafe has no role in providing any sort of safety net regarding the hazards contained in defectively constructed buildings.

In this case, the territorial authority could have issued the company with a Notice to Fix but did not do so.⁷⁹ The territorial authority was in a position of influence and control in that it

⁷² *WorkSafe New Zealand v Rangiora Carpets Limited* [2017] NZDC 22587 at [6].

⁷³ *Ibid.*

⁷⁴ At [9].

⁷⁵ At [10]-[11].

⁷⁶ At [25].

⁷⁷ At [59].

⁷⁸ WorkSafe “Risk Present in All Work Spaces” (5 October 2017) WorkSafe New Zealand: Mahi Hauora Aotearoa <www.worksafe.govt.nz>.

⁷⁹ Building Act 2004, ss 163-168.

could have prevented the harm which occurred. Under s 17 of the Building Act 2004, all building work must comply with the Building Code even if a building consent is not required. But the experience from the Canterbury earthquakes suggests that there is no regime for building inspections where consent is not required. Compliance is left in the hands of a building owner. Potentially, WorkSafe could also have prosecuted the territorial authority for failing to prevent harm by requiring the mezzanine to comply with the Building Code.

While, generally, WorkSafe is showing strong leadership in relation to health and safety issues, providing relevant information to employers and workers and becoming involved in initiatives that are likely to have a positive impact on New Zealand's poor health and safety record, in the area of defective, non-compliant and unsafe structures, there appear to be gaps in WorkSafe's role which means that the responsibility falls on employers and workers to identify and remediate hazards with insufficient support or involvement from territorial authorities, the building regulator and the health and safety regulator.

Conclusion

There are a number of concerns with the new EPB regime from a health and safety perspective: first, while the policy for managing EPBs is now contained in the Building Act, it appears that territorial authorities have different approaches for managing EPBs. This is demonstrated through the inconsistent use of the national EPB register; second, even if EPBs are identified, the timeframes for addressing critical structural weaknesses mean that most of the health and safety risks are borne by employers and workers; third, there appears to be no or ineffective oversight of territorial authorities' implementation of their EPB obligations under the Building Act; fourth, buildings which have an NBS rating of more than 34 per cent may, nonetheless, pose significant life-safety risks. These buildings are not identified by territorial authorities and there are no requirements for seismic works to be carried out; fifth, NBS assessments focus on primary structural elements but secondary elements such as in-ceiling building services may have no impact on NBS assessments; sixth, there appears to be no process designated for the moderation of conflicting assessments by engineers; seventh, there needs to be much greater clarity regarding the roles of WorkSafe, the Department of Building and Housing within MBIE, territorial authorities, employers and workers; eighth, there needs to be one agency who takes the lead and co-ordinates the implementation nationally of the implementation of all EPB programmes, including the national EPB register; and finally, there should be a database for capturing the institutional knowledge and expertise contained in engineering reports so that territorial authorities are not left to reinvent the wheel whenever a new catastrophe strikes.

In order to make the regime more responsive and coherent, I strongly recommend that an independent panel of engineers should play a role in: peer reviewing, on a random basis, ISAs and DSAs carried out for EPB purposes; carrying out ISAs in circumstances where an employer or a health and safety committee raises concerns which are not addressed by a building owner; and carrying out random audits of EPB programmes being implemented by territorial authorities.

Construction industry participants should be able to make protected disclosures on an anonymous basis without suffering any adverse consequences so that authorities and agencies can identify buildings which present real risks to life-safety. There should be increased

recognition that territorial authorities and MBIE have overlapping duties with regard to health and safety risks posed by unsafe structures. WorkSafe should play a much more active role in monitoring health and safety risks posed by unsafe structures, especially where structures have not been identified as being earthquake-prone.

The WorkSafe Position statement should be urgently reviewed in light of the conclusions of the Pike River Royal Commission, the Canterbury Earthquake Royal Commission and the Report of the Independent Taskforce.

Currently, there is no *korowai whakaruruhau* for unsafe structures. A plethora of risks for people in their workplaces relating to unsafe structures have not even been identified, let alone addressed. Our *korowai* must be woven with much greater care if we are to improve our poor performance in workplace health and safety in this area. There is an acute lack of both top-down and bottom-up leadership. The current EPB regime seems set to fail to prevent loss of life and serious harm to employers, employees and other occupiers of buildings.

The key elements for delivering a culture of workplace safety with regard to buildings and other structures are not present and an urgent change in approach is required. In the words of the Independent Taskforce, 'she most clearly is not alright'.

Resolving Workplace “Bullying”

DAVID G BECK*

Introduction

This paper provides a brief definitional overview of the current law on what is popularly known as the problem of workplace bullying, and comments on how to avoid and/or resolve matters from a practising employment lawyer’s perspective confronted with finding an adversarial legal solution to what is often a breakdown in workplace communication.

Bullying is a term that, I think, is particularly unhelpful (with its stark connotation of abuser and victim). It is difficult to avoid the term, given its common usage and its evident descriptive force, but the breadth of behaviours it describes often makes the term unnecessarily inflammatory. Although, Dr John Clarke, author of *Working with Monsters, archly*, suggests that bullying is a more helpful definition to calling someone a *workplace psychopath*.¹

Although it could be deemed spin, when responding to a claim of bullying, framing the issue in less negative terms may produce a better resolution. I recommend a focus on the behaviors in dispute (which are often mutual) and the use of terms such as: *you have made an allegation of “unprofessional behavior” or that you have raised an allegation of “negative interaction”*. However, for this analysis I will adopt the in-vogue term bullying.

Definitional Issues

Unlike sexual or racial harassment, which are specifically prohibited under both employment and human rights legislation² (and ironically often involve some form of bullying), there is no precise legislative definition or specific statutory prohibition governing *workplace bullying* or a developed Employment Court legal test.³

The Employment Relations Act (ERA) does not define bullying or distinguish it from personal harassment. It is highly contextual (fact based) and is often subtle and insidiously undertaken. This is so, despite both bullying and harassment involving behaviour that is unwelcome or offensive and which is often causative of distress or detriment. Whilst the two concepts are similar and often overlap, it is vital to carefully distinguish between the two. Harassment may be a one-off incident, but a distinguishing feature of bullying is it manifests as a persistent behaviour pattern. Opportunities for widespread bullying or digital harassment are now evident with the negative use of social media.

There is also a well-developed myth that workplace bullying has been recently discovered by the media and workplace commentators. It would be safe to say that, in New Zealand at least, since the development of “constructive” dismissal as a concept to resolve an unwilling resignation,⁴ there have

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¹ John Clarke, *Working with Monsters* February 2002, Random House, Australia.

² See sections 108/109 Employment Relations Act 2000 and sections 62/63 Human Rights Act 1993.

³ Contrast this with Sweden for example where well-developed legislation governing bullying and workplace harassment exists. For a brief global comparison see Diana Ayling, “Defining Workplace Harassment: Who Is the Bully” (2002) Vol.1 No 1 NZJABR. 1.

⁴ See New Zealand Court of Appeal’s classic formulation of three categories of employer culpable constructive dismissal

been cases involving bullying or harassment for a significant period, but arguably not on a scale seen in the last decade. However, no research of any great depth is available to support this view.⁵

Bradbury and Hutchinson⁶ suggest that Australian public-sector employers appear more prone to workplace bullying, stemming from high levels of organisational change, political interference, shifting performance expectations and vague goal settings. Recent studies, including by the New Zealand Public Service Association (NZPSA) and the New Zealand State Services Commission, report high levels of workplace bullying being at issue.⁷ A recent Victoria University student research project, however, notes that few complaints in the public service are upheld and are generally categorised by Human Resources practitioners as performance management, relationship or behavioural issues. The latter study cites data from 12 public service departments, finding 72 per cent of formal bullying complaints (111) received between 2010 and 2016 were found to be unsubstantiated.⁸

Regardless, there is constant frenetic media attention on the issue and emotive language surrounding such. An example of this, seen in a newspaper piece of hyperbole describing potential bullies, guaranteed to strike fear into the heart of any employer and have employment lawyers salivating, was: *Bunny Boilers Heat up Workplace*.⁹

In less colourful terms, Einerson and McCarthy have suggested that:¹⁰

...all those repeated unreasonable and inappropriate actions and practices that are directed to one or more workers, which are unwanted by the victim, which may be done deliberately or unconsciously, but do cause humiliation, offence and distress, and that may interfere with job performance, and/or cause an unpleasant working environment.

In Sweden, pioneers of workplace harassment legal solutions, the National Board of Occupational Safety and Health neatly defines bullying as "...recurrent, reprehensible or distinctly negative actions which are directed against individual employees in an offensive manner and can result in those employees being placed outside the workplace community"¹¹ or to translate et Sverige: återkommande, varvid förkastliga eller negativt präglade handlingar som riktas mot enskilda arbetstagare på ett kränkande sätt och kan leda till att dessa placeras utanför arbetsgemenskapen.

In a New Zealand context and much cited 2005 case, *Evans v Gen-I Limited, the Employment Relations*

situations (resign or be dismissed, course of conduct with dominant purpose of coercing employee to resign or employer breach of duty leading to a resignation) in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 and *Auckland Electric Power Board v Auckland Local Authorities Officers Union* [1994] 1 ERNZ 168.

⁵ A Department of Labour Report, "*Personal Grievances conducted at the Department of Labour*", June 2007, surveying 31 mediators for disputes in on month (17 July-18 August 2006), detailed a category of 14.7 per cent of disputes in a miscellaneous category which included bullying. However, 15.3 per cent of cases were described as constructive dismissals which often include an element of harassment that has led to a dismissal.

⁶ Joanne Bradbury and Marie Hutchinson (2015), vol 2, no 1 "Workplace Bullying: Modelling Construct Validity in an Australian Public-Sector Workforce", *Journal of Empirical Studies*, 1-16,

⁷ NZ State Services Commission "Integrity and Conduct Survey 2013" (19 August 2014) <<http://www.ssc.govt.nz/integrity-and-conduct-survey-2013-report>>; G Plimmer, & CantalC (2016), "Bullying and Sexual Harassment in New Zealand Workplaces", Centre for Labour, Employment and Work, Wellington, New Zealand; Geoff Plimmer, Jessie Wilson, J, Jane Bryson, Stephen Blumenfeld, Noelle Donnelly, and Bill Ryan, (2013) "Workplace Dynamics in New Zealand Public Services", A survey prepared for NZ Public Service Association, Wellington.

⁸ Hamish Crimp, "Effective Prevention of Public Sector Bullying: Are we there yet?" *Victoria University Centre for Labour Employment and Work* (New Zealand, 4 September 2017) at 1

⁹ "*Bunny Boilers Heat up Workplace*" The Press, (Christchurch, November 19-20, 2005).

¹⁰ Evelyn M Field, "Bully Blocking", <<http://www.bullying.com.au/>>

¹¹ Diana Ayling "Defining Workplace Harassment: Who Is The Bully?" (2002) Vol.1 No 1 NZJABR. 1

Authority (Gen-I) adopted a very useful definition of bullying (see also *Isaac v Chief Executive of the Ministry of Social Development* and *Kneebone v Schizophrenia Fellowship Waikato Incorporated*) as:¹²

...something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress. The behaviour must be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.

Further in *Gen-I* the member cautioned that:¹³

All behaviour needs to be looked at in the social context in which it occurs and the motivation for the behaviour is also relevant. A vulnerable person may perceive criticism of his or her work as bullying, regardless of how the criticism is couched.

On the latter point, one must add that bullying must include some element of unreasonable or unjustified behaviour with the purpose of upsetting another person, which can take many forms. It does not include raising reasonable or justified concerns about work performance. As Thomas notes “[p]roblems arising from conflicting personalities or a poor management style, are different from a person intentionally misusing power to intimidate another.”¹⁴

As suggested above, definition is problematic – for example: has bullying got to be proven as intentional and confined to disputes between individuals, or can it also occur due to the perceived negative culture of an organisation that may value or practise a confrontational or robust management approach and, does the notion of “power imbalance” come into play?

The ERA member in *Kneebone* surmised on individual motivation that:¹⁵ “The common theme arising from the literature ... suggests a bully has a desire to exert control over others, usually demonstrates a complete lack of understanding for other people’s feelings and uses intimidating behavior.”

In addition to “vertical” or hierarchical bullying (which can occasionally work both ways with subordinates bullying managers), bullying by peers or “horizontal” bullying is not uncommon and the latter can prove significantly difficult to manage.

WorkSafe New Zealand/MBIE Guidelines-an Answer?’

In response to both emerging bullying claims and a focus upon health and safety, WorkSafe New Zealand (WorkSafe) via the Ministry of Business, Innovation and Employment (MBIE) issued guidelines, in 2014,¹⁶ drawing largely on similar material published by Safe Work Australia (SWA).¹⁷

¹² *Evans v Gen-I Limited*, NZERA Auckland AA 333/05, 29 August 2005; This definition was drawn from *Crime and Justice*, Vol 17 Chicago: University of Chicago Press 1993 and later adopted in *Isaac v Chief Executive of the Ministry of Social Development* NZERA Auckland AA200/08, 5 June 2008 and *Kneebone v Schizophrenia Fellowship Waikato Inc* NZERA Auckland AA31/07, 13 February 2007.

¹³ *Evans v Gen-I Limited*, NZERA Auckland AA 333/05, 29 August 2005.

¹⁴ Thomas, C, “*Workplace Bullying*” [2000] ELB 3, at 4.

¹⁵ *Kneebone v Schizophrenia Fellowship Waikato Inc* ERA Auckland AA31/07, 13 February 2007, at [7].

¹⁶ WorkSafe New Zealand and Ministry of Business Innovation and Employment: *Bullying-Preventing and responding to workplace bullying* (9 February 2014) <www.worksafe.govt.nz>.

¹⁷ Work Safe Australia, “*Guide for Preventing and Responding to Workplace Bullying and Dealing with Workplace Bullying – a worker’s guide*” (May 2016) Work SafeAustralia <www.wsa.gov.au>.

These guidelines are the first comprehensive attempt by a key government agency to comprehensively define the concept of what bullying entails (and what it is not). Although lengthy, they contain very useful practical advice on how employers and employees should resolve disputed matters at both the informal and formal level.

The question is, if this is a persuasive “*Bullying Bible*”, prepared in part by a key government enforcement agency, how does it sit with established legal authorities, and will WorkSafe use it for definitional purposes in any potential prosecution under the recently enacted Health and Safety at Work Act 2015 (HSE Act). To date, no such investigations/prosecutions have occurred.

Some brief searches of 2015/16 ERA decisions reveal that the Authority is sometimes using the WorkSafe guidelines as an aid, but not as a definitive legal test. Various approaches are used to assess the nature and extent of bullying/harassment situations. These range from comments that “bullying is difficult to define and prove” to use of a more prescriptive test or reference to “a useful definition in the WorkSafe 2014 best practice guidelines”¹⁸ or “[t]he actions or omission complained of are, the failure to provide a safe workplace and the adequacy of the investigation.”¹⁹ Further, one Authority member suggested that the ordinary meaning of the term bullying be used from a High Court defamation case²⁰, including three elements:²¹

- (1) *It involves unreasonable and persistent conduct by one person against another.*
- (2) *The conduct in question is unwarranted and harmful to the recipient.*
- (3) *The recipient of the conduct lacks the ability to defend him or herself, possibly because of their lower status or making in the workplace environment where the conduct takes place.*

A problem is that legal practitioners already perceive a divergence between established case law and the WorkSafe guidelines regarding whether the ‘intention’ of the perpetrator of bullying acts must be established, and the lack of specificity of what degree of harm bullying causes. There is also the inclusion of an ill-defined category of ‘institutional bullying’.²²

The WorkSafe guidelines, in making no explicit definitional reference to the motivation of the perpetrator, arguably, adopt a wider view than existing case law.

A different perspective is that the existing ‘disadvantage’ claim, s103(1)(b) ERA, allows an action where a single rather than repeated event causes the worker detriment, and the real inquiry is, then, an objective test of whether the employer’s actions in resolving matters are reasonable in all the circumstances.

Are conflicting views, however, overstating the matter? The WorkSafe guidelines framing of what bullying could be is arguably just a threshold approach to determine when an employer should potentially embark upon an investigation. WorkSafe usefully identify three elements:²³

¹⁸ *Beckingsale v Canterbury District Health Board* [2015] NZERA Christchurch 163, at [141] – [142].

¹⁹ *Ngahoro v Southland YMCA Education Limited* [2016] NZERA Christchurch 105, at [105].

²⁰ *Newton and Dunn v Leov and Leov* [2017] NZHC 2083, at [6].

²¹ *Lee v GR & S Dyson Limited* [2017] NZERA, Auckland 273, at [80].

²² Hornsby-Geluk and Webby, “Workplace Bullying – new guidelines”, NZLS CLE Ltd seminar booklet September 2014; Geoff Davenport, “Bullying and WorkSafe’s Guidelines – valuable but only part of the puzzle” [2017] 1 ELB 4.

²³ WorkSafe New Zealand and Ministry of Business, Innovation and Employment “Bullying — Preventing and responding to workplace bullying” (March 2017) < <https://worksafe.govt.nz/> >

- *repeated and unreasonable behaviour;*
- *directed towards a worker or a group of workers;*
- *that can lead to physical or psychological harm.*

One could, however, contend that using the phrase ‘*directed towards*’ implies a conscious and intentional act. Further, it is difficult to precisely define harm, as the degree of harm is highly contextual and must be carefully assessed, as ultimately, should the Court be involved, it becomes an evidential issue, ideally requiring expert medical opinion.

The WorkSafe guidelines do give useful clarity – stating that:²⁴

- A “reasonable person” standard is to be applied to whether the behavior is “unreasonable”.
- Repeated behaviour is behaviour that is persistent, even if it involves a range of actions over time.
- Institutional bullying (where a workplace practices, vision, culture, policies or procedures allow offensive or stress-causing behaviours to occur without concern for the consequence) is a potentially actionable form of bullying.
- Out of work behaviour (e.g. use of social media) can constitute bullying and, if so, will require investigation by an employer.
- Formal investigations into bullying claims should be undertaken by external, unbiased, qualified and knowledgeable investigators, rather than handled internally.

Potential for a Collective Approach

Aside from unions being key players in the prevention and management of workplace bullying and being used as ‘intermediaries’ in such disputes, ‘institutional bullying’ (rarely exposed, apart from a few case references to a “toxic” workplace),²⁵ opens space for both a potential WorkSafe investigation and potential for a collective response that unions may embrace as both an organising tool and/or legal strategy (given WorkSafe New Zealand has no exclusive jurisdiction on such prosecutions).

My observation is that New Zealand unions have, in the past, been curiously reluctant to link industrial and legal strategies. The recent care-workers’ pay equity settlement is a shining example of how such can be successfully approached via litigation whilst being allied to a strong collective campaign strategy.

An intriguing development will be whether company directors can be drawn into such disputes in terms of liability under Part 2 of the Health and Safety at Work Act 2015, if they are willfully blind or actively condone bullying management cultures. Are directors of companies that hold strong anti-

²⁴ Ibid

²⁵ In *Christopher Talbot v Coriglade Limited T/A Geeks on Wheels* [2016] NZERA Wellington 142 Member M Loftus opted for: “*The plain dictionary meaning of the word hostile is antagonistic or unfriendly.*”

union views capable of being deemed bullies?²⁶

Further, could such claims extend to the setting of unreasonable productivity targets, intrusive workplace surveillance practices or blurred boundaries between work and home life in an ever so called ‘connected’ workplace.

In summary, innovative litigation possibilities may have been unwittingly created to include potential class actions on bullying claims.

Legal Consequences

Organisations failing to provide an emotionally secure and safe working environment, or not properly investigating bullying claims (under employment and health and safety legislation)²⁷ are vulnerable to costly legal action from disgruntled employees. The statutes that could be invoked include:

- Employment Relations Act 2000
- Health and Safety at Work Act 2015
- Protected Disclosures Act 2000
- Human Rights Act 1993
- Harassment Act 1997
- Education Act 1989
- Privacy Act 1993 and
- Harmful Digital Communications Act 2015.

There is evidence that individual workers are using litigation to remedy employer inaction. The writer’s brief review of New Zealand employment decisions certainly identified a correlation between media interest in bullying, the publication of a popular *expose* book, the emergence of support websites/phone helplines²⁸ and the rise of litigation. Such litigation appears to have mushroomed from around 2002 when a well-publicised amendment to health and safety legislation broadened the definition of a workplace *hazard* to include “a situation where a person’s behavior may be an actual or potential cause or source of harm to the person or another person.”²⁹

Unfortunately, litigation usually follows an employee’s resignation (typically in the form of a constructive dismissal claim), and by this point matters are irretrievable. Prior to this, if left unattended, workplace bullying creates negative morale, it breeds destructive factionalism and, ultimately, it can lead to a less productive or dysfunctional workplace where, amongst other things, recruitment and retention are problematic. At worst, one commentator has suggested that bullying victims:³⁰

²⁶ For example, Sir Peter Talley, who made a 2014 Parliamentary committee submission to changes in Health and Safety legislation claiming they had been overly influenced by unions and his group of companies, has aggressively resisted collective bargaining and union entry to plants, see Hutching, G “Affco chief exits after short spell” *The Press*(Christchurch, 24 October 2017).

²⁷ Section 6(a) and (d) Health and Safety in Employment Act 1992 defines broad duty that all employers must take all practical steps to provide and maintain for employees a safe working environment, and to ensure employees are not exposed to hazards whilst at work.

²⁸ Andrea Needham, *Workplace Bullying – The Costly Business Secret* (Penguin Books, New Zealand, 2003); phone-helpline 0800 ZERO BULLY and www.beyondbullying.co.nz.

²⁹ Ibid.

³⁰ Sigrid Hempelmann, *Workplace Bullying* [2003] 7 ELB, at 96.

...often are afflicted with enormous psychological and physical problems, such as high stress levels, anxiety and sleep disturbances. Ill health, especially gastro-intestinal diseases, severe tiredness and panic attacks are other and more serious consequences. One German study found that 75% of all recipients of workplace bullying have a post-traumatic stress disorder. Sometimes workplace bullying even leads to suicide...Further it is said that the longer the recipient must endure bullying conduct the worse the effects become.

Most studies focus upon the impact on individuals and definitional issues make exact quantification of the extent of the problem difficult to assess as much is self-reported. Whilst some may yawn and think bullying may be just the *new black*, it is also evident that, unlike issues such as recruitment and retention, skills assessment or absenteeism, the costs and extent of bullying are less measurable.

One commentator suggests that the dearth in human resource management research (outside psychological based studies) has not alerted senior managers to consider the issue of broader concern in terms of tangible productivity costs, and that there is a tendency not to research poor managerial performance. Further, most popular literature concentrates on victims rather than strategies managers can adopt to avoid bullying flourishing in their workplaces.³¹ It has usefully, perhaps, been suggested that turning the focus of research onto “the characteristics of bullies and bullying behavior...may provide better insight for policy-makers.”³²

Individual Employee Liability?

An employment relationship is defined in the ERA as principally between an employer and employee; and an employer is generally or ultimately vicariously liable for an employee's acts. However, Schofield suggests an employee may be jointly and severally liable with the employer.³³ Potential avenues for prosecuting individuals exist under health and safety legislation taking the approach that a bully is not engaging in all practical steps to keep co-workers safe or under s132(2) Employment Relations Act as an aiding and abetting action.

Resolution Strategies

Like all employment problems, a prophylactic approach is highly recommended. Creating a holistic climate where bullying cannot flourish is clearly *best practice* approach, which is generally linked to promotion of workplace ethics/values, such as respect, tolerance and empathy (and by implication not rewarding or tolerating bullying behavior or confusing it with *firm* management).

A ‘values’ approach should arguably work well in, for example, the Public Service/Health or Education sectors where promotion of such is already endemic. There are simple measures that the private sector can easily adopt. It may be as easy as ensuring that open communication or constructive criticism is valued rather than discouraged. Other measures to improve workplace culture include:

- Ongoing monitoring of a workplace climate; this is a key to identifying negative trends using appropriate surveys, focus groups or carefully facilitated discussions to gain feedback and crucially devise measures to get meaningful information on the performance of managers or

³¹ Dianna J Kelly, “Reviewing Workplace Bullying: Strengthening Approaches to Complex Phenomenon”, (2005) Journal of Occupational Health and Safety-Australia and New Zealand, 21 (6), 551-564.

³² Ibid.

³³ Simon Schofield “The Workplace Bully” [2015] 2 ELB 18.

just to determine whether a healthy and open climate exists and what makes it so.

- Placing a “training” premium on encouraging people to develop good interpersonal skills, ensuring managers have well-developed dispute resolution skills that are gained from both practical experience and training opportunities. Sit in with managers and watch how they resolve conflict, then debrief and deconstruct with them on what strategies worked and what failed.
- Do not neglect encouraging people to resolve interpersonal conflict and ensure training opportunities address communication issues, such as constructive criticism, assertiveness, negotiation skills and where appropriate, anger management.
- Pro-active training of both managers and staff on their rights and responsibilities
- Be aware that certain staff may be vulnerable and require additional assistance to cope with bullying – they may lack the skills to respond, due to previous negative workplace experiences or life events (remember bullying, be it domestic or school bullying, is common in the community).
- Be sceptical and inquisitive; avoid simply blaming victims as being too sensitive or, on the other end of the spectrum, unquestionably accepting victim complaints.
- Recognise that those subjected to complaints may also be vulnerable.
- Promote awareness of recognising and dealing with bullies.³⁴
- Make bullying (emphasise that it is unprofessional behavior) a specific disciplinary or misconduct issue in your employment agreement or code of conduct.³⁵
- Professionally, promote bullying as being a breach of ethical behavior or the expressed company values.
- Crucially, spend time on devising robust performance assessment and performance management systems that are *collaborative* as many alleged bullying cases stem from dissatisfaction with the limitations of assessment processes or performance management strategies.
- Ensure that, in any process, the provision of regular, constructive feedback and support and guidance precedes firmer management. Do not just leave feedback to an annual appraisal.
- For managers, place greater emphasis when recruiting or training on successful people management skills and subject managers to regular and safely conducted employee feedback measures (not just anonymous surveys).

³⁴ See for example Len Leritz, “Taking the Bull Out of The Bully”, in Ira G Asherman, *The Negotiation Source Book Second Edition* (2001) Human Resource Development Pr ,at 359-365.

³⁵ In New Zealand, education unions are insisting on such clauses, see for example Barnardos New Zealand/NZEI Te Riu Roa Collective Employment Agreement which at clause 10.0 specifies “*Harassment or Bullying by a staff member...will not be tolerated and appropriate action will be taken to remedy any complaint*”.

Zero Tolerance

There are significant problems with employers simply claiming they have a *Zero Tolerance* policy approach to bullying as such grandstanding is hard to define or contextualise, and it leads to all types of litigation problems – ranging from claims of lack of flexibility in penalties to employers making themselves a sitting target if they fail to apply zero tolerance in a consistent or “zealous” fashion. It is a lazy and thoughtless approach that ignores the need to tackle the behaviors that create bullying.

What Maketh The Bully?

Setting aside Dr John Clarke’s views on workplace psychopaths, little research has been done to understand why people engage in bullying behaviors.

Policy Suggestions

From a legal perspective, extreme caution needs to occur in devising an integrated policy on how complaints are handled and/or investigated; such should ideally include:

- A clear and precise definition of what bullying is – the WorkSafe NZ guideline is a great starting point but look wider; Ayling³⁶, adopting a European Union agency definition, suggests it should:
 - focus on unacceptable behaviour;
 - apply to a wide range of employees;
 - acknowledge health and safety as an issue;
 - impose a test of ‘reasonableness’; and
 - explain key terms.

Other measures should include:

- An identified respected/trusted and approachable contact person trained to assist and encourage people to resolve initial concerns (usually not someone from Human Resources).
- A referral or employee assistance service to give support and/or counselling options (ideally a service that is not just *victim focussed*).
- Emphasis upon early resolution by the provision of a neutral facilitator to, where appropriate, utilise conciliation strategies and to, in some cases, determine whether the root of a problem is properly described as bullying and if it has reached a threshold where further investigation is necessary.
- Openness to utilising an independent and neutral investigator should such be required. The investigator should ideally be practically experienced in the psychology of bullying issues and whilst, being a fact-finder (not a decision-maker), they should not be afraid of making suggested recommendations for resolution, including wider workplace culture observations.

³⁶ Diana Ayling “Defining Workplace Harassment: Who Is The Bully?” (2002) Vol.1 No 1 NZJABR. 1.

- The contractual facility to suspend a person, subject to serious accusations, and/or the flexibility to re-deploy either the accused or complainant (noting the latter should not generally be forced to re-locate).
- The opportunity for both accuser and accused to have input into an investigation report.
- A range of sanctions short of dismissal to deal with culpable bullies and flexible measures to resolve the aftermath of an investigation, such as transfers, conciliation, team-building, coaching, training opportunities and ongoing monitoring.

Is Mediation a Magic Bullet?

A cautionary word about the use of mediation – is it an appropriate tool to resolve bullying, per se, given it usually involves an abusive misuse of power? In general, I would not pressure an individual complainant to attend mediation before some work has been done to categorise how serious the issue is. Arguably, an employer can only encourage rather than mandate the use of mediation.

Mediation is often suggested as a tool to re-integrate someone back into a team after an allegation has been investigated, but a caution has to be that there is the potential for bullies to garner support from their acolytes and *gang up or mob* a bullying target during a ‘confidential’ mediation session, or to dump on that person their own stored up grievances, which may lack relevance or deflect from the ideal focus being on tackling the bully’s style of management or lack of communication skills or basic empathy.

The author, however, has observed a suitably skilled mediator or facilitator deployed to resolve a bullying issue, particularly where the victims are a collective group. In addition, as many bullies fail to have insight into the impact of their behaviour, a skilled mediator can assist in bringing the perpetrator around to the idea that something is amiss, or impressing upon the complainant that early resolution is possible. This process can be achieved in a confidential manner, preserving the dignity of all parties. Care is required if a perpetrator of abuse is unwilling to accept criticism (in denial) or combatively insists upon specific examples being laid out in an open fashion, or the complainant is unwilling to resolve matters.

Mediation works well if utilised early in a dispute, as trying to resolve factual disputes or formal investigation prior to mediation often hardens attitudes or encourages disputation over past events. Mediation is also useful after an investigation, if a finding is that work must be done on repairing workplace relationships. For a useful discussion on mediation as a problem resolution mechanism see Morris.³⁷

Problems can occur where a mediator or employer initially gathers information and perhaps conceals the identity of complainants or proceeds on hearsay. Ultimately, an alleged bully may be facing disciplinary proceedings, so it is essential that procedural fairness requirements are carefully adhered to.

Mediation or facilitation should be used sparingly as a useful precursor to a formal investigation but always get prior *buy in* from all parties, and ensure that the mediator is crystal clear about what

³⁷ Grant Morris, “Eclecticism vs. Purity Mediation Styles used in New Zealand Employment Disputes”, (2015) 33(2) *Conflict Resolution Quarterly* 203-227.

resolution techniques they will utilise (preferably get all parties to sign a prior agreement, including reporting provisions). Consider using practitioners of *Transformative Mediation*, as sometimes mediation is aimed primarily at *conflict settlement* rather than *conflict resolution*. Sadly, given the current adversarial nature of dispute resolution and the lack of skilled practitioners, other solutions should be considered. MBIE mediators tend to be overwhelmed with dispute resolution work and, correspondingly, wait time for mediation is a barrier to quick a resolution, and specialised private mediation can be costly.

Conducting an Investigation

Should the prophylactic approach fail, and you are faced with a complaint, it is essential to consider an initial investigation at the earliest opportunity to guide what intervention strategy is appropriate.

In a 2016 ERA case, *Anngow v Bed Bath & Beyond NZ Limited* that deemed the employer as having failed to properly investigate a complaint (and finding an unjustified action causing disadvantage), the Authority member, Peter van Keulen, outlines a very useful contextual and practical guidance on essential steps for an investigation, noting first that the statutory good faith duty "...requires more from an employer when investigating a serious complaint regarding bullying and harassment."³⁸

If a more formal investigation proceeds, and a complaint is not evidently frivolous or vexatious, I recommend a mutually agreed and suitably qualified external party, and there being agreed terms of reference on the scope of such an investigation. Often, it is a costly investment, but it will nearly always be worth it, and it best avoids litigation.

Managers investigating their peers or even those they supervise face the risk of claims for perceived and actual bias. From a complainant's perspective, an unbiased investigation is a signal that the complaint is being treated seriously and, if the concern is found groundless or amenable to another solution, it is generally more palatable if such an outcome is directed by a neutral party.

There was ongoing litigation where a large employer tried to impose three internal investigators that became the subject of separate and costly legal challenges and dragged out the complaint for over a year. The cost of litigation far outweighed the cost of engaging an experienced investigator at the outset and the subsequent damage to workplace relations was incalculable.

Findings

In terms of dealing with inconclusive outcomes or mixed findings, it never ceases to amaze how some employers, fearful of litigation, rather than call "a spade a spade", find instead that a person must address their *style* of communication, needs coaching or upskilling, but falls short of being defined as a bully or a perpetrator of unprofessional conduct. It is not, in my experience, unusual to find that bullying has occurred in cases where the perpetrator may be popular or has faithful acolytes and the complainant is not universally respected – caution is often required in such situations and a skilled neutral investigator may spot such trends.

A delightful non-sequitur was when an employer investigation, finding that no bullying had occurred, but the manager complained of, was directed to engage a professional coach to "...assist her with perceived non-emotive interactions with others." Unsurprisingly, in anticipation of the complainant's reaction, the employer also directed that the complainant be "...provided with professional anger management intervention."

³⁸ *Anngow v Bed Bath & Beyond NZ Limited* [2016] NZERA Christchurch 76, at [63] – [66].

Complainant's Obligations

In a commonsense approach, most legal authorities have generally found that a failure to adequately inform an employer of the existence of a problem or an identifiable hazard is fatal to a successful bullying or constructive dismissal claim, but this is not an absolute rule (see below), as ignoring explicit bullying where an employer has constructive knowledge of such may lead to liability.

The Employment Court has directed that “*the obligation on an employee [who has been subjected to workplace bullying] is to bring the concerns to the attention of the employer.*”³⁹ It is also not generally adequate to raise a bullying issue then resign before the employer has had time to investigate and attempt to resolve matters.⁴⁰

It is also vital that the behavior complained of is adequately described and placed in context – it is not enough for an employee to just say that they felt bullied by X. One example highlights a novel GP diagnosis that a patient was absent from work due to “workplace bullying”!

Most employees opt to pursue “constructive” dismissal and/or disadvantage claims alleging they had to resign because of ongoing bullying and/or their employer’s failure to resolve matters or that they were not provided with a safe work environment. It is, thus, crucial that once a complaint is brought to an employer’s attention, a careful and timely response happens to avoid workplace disruption and litigation.

Employer Obligations

Once aware of a potential bullying situation (and this includes cases where the employer ought reasonably to have been aware of the situation),⁴¹ an employer under health and safety legislation has a duty to take all reasonable and practical steps – akin to a tortious duty of taking reasonable care to prevent bullying and harassment.

The current approach of WorkSafe New Zealand to bullying is somewhat tentative, with an educative rather than prosecutorial attitude being adopted, but it has progressed somewhat from it being merely categorised as amongst *Psychosocial Issues*, including excessive hours and stress under the previous enforcement agency.⁴²

Again, unlike sexual harassment and the currently topical profile of the #MeToo awareness campaign, where active deterrent is encouraged or seen almost as a positive duty to prevent repetition,⁴³ case law has commented little yet on the employer’s duty to adopt initial preventative measures or actively

³⁹ See *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120 and *Harbord v Waste Management Limited* NZERA WA 30/05, 23 February 2005.

⁴⁰ See for example *Nicholl-Jones v The Loaded Hog Auckland Ltd Bar and Brewer*, NZERA AA 171/03, 9 June 2003.

⁴¹ Section 2A Health and Safety in Employment Act 1992.

⁴² *Ibid*, but note that the NZ Labour Department did not pursue any prosecutions for workplace bullying, but has done so for an issue of workplace stress (*Department of Labour v Naldor & Biddle (Nelson) Ltd* DC, Nelson CRN 04042500, 13 April 2005, Judge McKegg). See “Occupational Health Tools “Psychosocial Issues” <www.osh.govt.nz> Interestingly material prior to 2002, including “A Guide for Employers and Employees on Dealing with Violence at Work”, Occupational Health and Safety and Health Service, Department of Labour Wellington, January 1995, reprinted December 1997 which primarily had as a focus on external factors such as harassment from clients or customers.

⁴³ See section 117 of Employment Relations Act which details requirement to carry out an investigation and put in place steps to prevent repetition and see negative connotation placed upon employer’s failure to develop policies after a complaint was identified in *Mohi v Parts and Services Ltd* NZERA, AA175/05, 11 May 2005.

promote policies to discourage bullying.

By analogy, in the education sector (pre-school through to tertiary sector), awareness of bullying of students is widespread so the holistic approach to devising preventive strategies and monitoring effectiveness of such is not a foreign discipline with similar principles applying to protect students. However, a significant contextual factor in educational settings is also the potential for students or indeed parents/caregivers to bully educators.

Conclusion

Sadly, we are currently stuck with the term bullying and all its negative connotations. The challenge for all parties is to try and actively reframe the issue and focus upon tackling negative behaviours. This involves adopting sound preventative strategies and new ways of resolving complaints/conflict.

Creating a positive workplace culture and having clear dispute resolution processes is the obvious place to start. An adversarial legal process is the least useful resolution tool.

Finally, perhaps our cousins across the ditch have it right with terminology. The most colourful policy response is at Arup Australasia Engineering where they have a *No Dickheads* policy and the sage advice of Dale Paulson, a dry Aussie Human Resources researcher:⁴⁴ “Jerks generally cannot be rehabilitated...It is best not to hire them in the first place...The next best thing is not to promote them!”

⁴⁴ Fiona Smith “Show respect or be shown the door” *The Press* (Christchurch, June 28, 2008).

What if Voters Wanted a Less Flexible Labour Market?

SUSAN ROBSON*

Abstract

In the event of a public recognition of the connection between flexible labour markets, wage stagnation and high social inequality ratios, an option for redress in government policy is the re-collectivisation of employers and employees.

The implications for labour law traditions that emerged following the enactment of the Employment Contracts Act (ECA) 1991 (and that were reinforced by the operation of the Employment Relations Act (ERA) 2000) include dispute resolution mechanisms, currently (in New Zealand), fundamental to flexibility.

Analysis of the factors that influenced the transition from collectivist to individualist labour relations suggests a means by which this transition might be reverse engineered. Returning personal grievance resolution, the foundation of the ECA transition, to collectives will be crucial to the success of any reverse transition.

Introduction

The purpose of this paper is to describe the role of conflict resolution mechanisms in labour market flexibility¹ and to discuss how changes to those mechanisms could facilitate a more pluralist² approach to labour relations. Key to the success of the flexibility goal sought by the

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¹ The terms *labour market flexibility* and *freedom at work* were adopted by lobbyists for dismissal-at-will policies, perhaps because these terms concealed what the term could not: see Penelope Brook, *Freedom at Work, The Case for Reforming Labour Law in New Zealand*, (Oxford University Press, Auckland, 1990); For them, flexibility required the abolition of the award system of wage fixing, the exchange of collective for individual bargaining, and barriers of access to dispute resolution as the means of increasing labour productivity. An alternative characterisation of flexibility focussed on its *absolute freedom of action for management* and the ensuing loss of rights and protections for employees: see John Deeks, "New Tracks, Old Maps: Continuity and Change in New Zealand Labour Relations 1984–1990" (1990) 1 NZJIR 15 at 99–116; The freedoms for management changed approaches to work organisation, with increasing recourse to non-standard employment arrangements, such as part-time, fixed-term, temporary and casual work that facilitated both numerical and contractual flexibility for employers, an enhanced capacity to dispense with staff, and a diminished role for work-task capacity in employees in favour of attitudinal tropes like loyalty and commitment to the employer: Jane Bryson, *Administering Workplace Relationships: From IR to HR* in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 63; Flexibility for employees has meant that average working hours for New Zealanders have increased by 20 per cent since the 1970s, and recognition of overtime in penal rates has all but disappeared in the private sector: Stephen Blumentheld and Noelle Donnelly, *Collective Bargaining Across Four Decades: Lessons from CLEW's Collective Agreement Database*, in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017).

² The terms unitarism and pluralism describe ways of thinking about labour relations: unitarism relies on an acceptance of managerial authority and prerogatives and sees conflict as pathological; pluralism accepts the fact of difference between the sectoral groups that are stakeholders in the industrial system of a state, so conflict is accepted as inevitable. The characterisation of the ECA as "*abolishing the pre-existing pluralistic industrial relations system that provided for a high degree of joint regulation of working conditions and replaced it with*

newly elected National Government in 1990 was the structure of the dispute resolution system introduced by the Employment Contracts Act 1991 (ECA) and the way that system has operated since then.

The dispute resolution institutions established by the ECA, the Employment Tribunal and Employment Court, replaced the stakeholder dominated system of resolving individual claims (Grievance Committees) with the apparently neutral structure of the civil court system, perceived then as either an appropriate barrier to access to grievance resolution or as a mechanism to ensure an orderly transition from collectivist (pluralist) to individualist (unitarist) approaches to labour relations.³ The Tribunal (to which much of the Labour Court's jurisdiction was transferred) offered entry-level adjudication and mediation as alternative modes of resolution of choice for all disputes and grievances. It was quickly dominated by dismissal grievances, lawyers as representatives and arbitration as their choice of mode of resolution. Delayed resolution became endemic.

The policy decision to modify, rather than replace this system during the formulation of the Employment Relations Act 2000 (ERA), reinforced the ECA flexibility goal and undermined the ERA's (apparently different) aims. Left intact was the institutional structure, claim-type and personnel of the ECA. This had two major effects. It underscored the dependence of the flexibility goal on this triumvirate and ensured flexibility's domination of ERA policy, research and legislative amendment, successfully diverting policy attention from outcomes to process.

Discussion of the role of conflict resolution mechanisms will focus on two elements: workplace systems and the (state-funded) institutional system. A description of each will form a basis for policy suggestions for change. This paper anticipates, but does not discuss, changes to the role of the state, in terms of the following prescription:

Today, the challenges [for labour relations] come from globalisation and the increasing use of technology and artificial intelligence in the workplace. The growth of dependent and independent contractor arrangements to avoid the legal incidents attached to the employment contract is also likely to prove a greater challenge to devising a regulatory framework that reflects both the reality of the labour market and the rights of individual employees.

Reliance on the notion of flexibility or traditional collective bargaining techniques is unlikely to provide an adequate response to either of these challenges. It may be that the time has come for a fundamental rethinking of the values and principles that need to underlie a new regulatory framework. A return to the idea of a public interest as opposed to a sector interest to be incorporated into such a regulatory framework may be worth consideration.⁴

one of employer dominated, individualised, regulation of the employment relationship" illustrates the practical application of these terms: Gordon Anderson, *The Capability Approach and the Legal Regulation of Employment: A Comment on Deakin* (2009) 34(1): *New Zealand Journal of Employment Relations*, 27 at 31.

³ Employment-at-will lobbyists in 1990 opposed the maintenance of a special jurisdiction for labour claims, but Cabinet moderates led by the Minister of Labour, Hon W B Birch, regarded the co-option of incentives to collectivise – rights of grievance and informal claim processes – as key to undermining unions and shaping acceptance by potential union members of individual employment contracts: Susan Robson, *Policy, Operations and Outcomes in the New Zealand Employment Jurisdiction 1990-2008* (PhD, University of Otago, 2016).

⁴ Margaret Wilson, *The Politics of Workplace Reform: 40 Years of Change*, in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 59.

Workplace Remedy Systems after 1991

Union involvement in conflict resolution in workplaces diminished alongside union membership after 1991, disrupting a resolution culture that relied on an informed collective membership with early access to partial advice and assistance to resolve issues as they arose in regularised, accessible workplace remedy systems. When asked about workplace disputes a decade later, significant differences between employer and employee samples (2000 in each) in their reports of dispute incidence and outcomes⁵ suggested an absence of uniformity about, or common understanding of, remedy systems in workplaces, and differences between unionised and non-unionised employees.⁶ This was consistent with other data indicating that written procedures were more likely to be available in more unionised sectors, and unionised employees were more likely to be aware of them.⁷ Further research found that employees had difficulty visualising dispute resolution as a process, but larger employers maintained a process driven approach influenced by the ECA; employers viewed these processes as fair to both parties (with a few perceiving it as biased in favour of employees) whilst high levels of frustration were articulated by employees about the lack of clear resolution of disputes, delaying tactics and the difficulty of remaining in employment after raising a dispute.⁸ Employees were dissatisfied, generally, with dispute outcomes and employers believed the majority of disputes were settled amicably.⁹

By the end of the ECA era, the most common source of information for employees about problem resolution in the workplace was their employer (with significant reductions in confidence about its veracity arising from involvement in a dispute).¹⁰ For those whose source of information and support was their union, satisfaction rates with workplace remedy systems were significantly higher.¹¹ When ERA policy makers attempted to replicate this connection, by conferring on the Department of Labour (DoL) and the Mediation Service (MS) information provision roles, they failed to recognise the complexity of the relationship between information and satisfaction. Stakeholders consistently reported, of the ERA, that nothing had changed from the ECA regime.¹² Partiality of source of advice and assistance appears to explain the difference in satisfaction rates between collectivised and individualised employees. This suggests that mere provision (of information) is insufficient to establish

⁵ For example, the employee survey reported 273 disputes per 1000 employees and 20 per cent remaining in their jobs following resolution of a dispute, but the employers reported a dispute rate of 22 per 1000 and 44 per cent remaining in the job: ACNielsen Ltd for Department of Labour, *Survey of Employment Disputes and Disputes Resolution*, November 2000.

⁶ Ibid: 61 per cent of all employees and 79 per cent of union members who had experienced a problem were aware of written guidelines in the workplace for their resolution.

⁷ Waldegrave, Anderson, Wong, *Evaluation of the Short-Term Impacts of the Employment Relations Act 2000*, Department of Labour, November 2003.

⁸ UMR Research Ltd for Employment Relations Service, *The Process of Dispute Resolution – A qualitative study amongst employees and employers*, January 2002.

⁹ Comparison of employee satisfaction rates between the UMR 2002 survey and the Waldegrave (ERS) 2003 survey: UMR 57% dissatisfied with process and 49 per cent dissatisfied with outcome; ERS 65 per cent dissatisfied with actions taken by employer to resolve dispute.

¹⁰ UMR Research, above n 8.

¹¹ Waldgrave, et al, above n 7.

¹² Waldgrave, et al, above n 7; this was also the view of Andrew Caisley, The law moves in mysterious ways, and Ian McAndrew, Julie Morton and Alan Geare, *The Employment Institutions*, both in Rasmussen (ed) *Employment Relationships: New Zealand's Employment Relations Act*, (Auckland University Press, Auckland, 2004) 60, 99.

confidence in remedy systems if it does not incorporate partiality.¹³ Partiality, in turn, appears to be dependent on a relationship of trust and confidence between seeker and provider.¹⁴

Policy for Workplace Systems

Policy about the workplace, a major challenge to unitarism, given its potential to confront the hegemony of human resources management, requires a commitment to raise rates of collectivisation or a willingness to impose regulatory requirements of information provision, employee representation, and remedy systems, if the need for ready access to partial advice and assistance for the resolution of workplace problems as they occur is to be met:

While union involvement may be the most effective mechanism of voice, alternative mechanisms, such as mandatory elected workplace delegates and representative committees, also allow for the expression of worker voice and provide a possible catalyst for union involvement. What must be enshrined into law, however, is that effective participative and representational structures within employing entities are a matter of right, a condition of employing labour, and not a matter of employer benevolence.¹⁵

The increased collectivisation option would require changes to the current rules of access for union officials and clarification of employer obligations of neutrality towards collectivised employees and their representatives. This option has the advantage of strengthening an information and remedy system that already exists in some sectors (e.g teaching and nursing in the public sector). Its major disadvantage lies in the likely opposition of employers with negative views of unions: in the research about disputing in the workplace, employers of unionised employees (large employers) had a more positive view of union involvement in disputes than non-unionised business employers.¹⁶

The regulatory option would require employee protections and training provision for elected workplace representatives, and their active enforcement, particularly during beginning phases. This option caters for those employers actively resistant to the idea of union involvement in their workplaces whilst establishing a transition phase for potentially higher rates of union density, but poses problems for small businesses that would more easily be overcome by reliance on the collectivisation option.

These options are not mutually exclusive. The regulatory option's capacity to facilitate increased collectivisation rates suggests its use as a transitional, or fortifying strategy.

¹³ The provision of professional, accurate and partial information to parties which reflects and advocates their particular interests.

¹⁴ Phillip de Wattignar to Department of Labour: *Response to Green Paper on the Improvements to the Employment Relationship Problem Resolution System*, (undated, c 2008).

¹⁵ Gordon Anderson, *Competing Visions and the Transformation of NZ Labour Law* in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 207.

¹⁶ UMR Research, above n 8.

Institutional Resolution System after 1991

The domination of the employment jurisdiction by employer association and union advocates changed with the extension of grievance rights to all employees, when it began to host two different advocacy cultures, individualist (lawyers and employment advocates) and collectivist. Their differences are reflected in workplace resolution rates and institutional functioning. Higher rates of disputing and resolving in-house by the collectivised results in less need for institutional dispute resolution. The opposite occurs for those reliant on individual representatives: lower rates of in-house disputing and resolving, longer duration and more costly disputes and greater need for institutional intervention.¹⁷

The explicit intentions of both statutes for the institutions – low-level informal resolution – represented attempts to replicate the tropes of collective advocacy. However, the absence of statutory guidance on dismissal grievances¹⁸ and diminishing stakeholder involvement in their consideration shifted the focus away from the workplace into the courtroom, so that grievance resolution became more obviously rooted in the common law than prior to the ECA. The result was a judicial development of the principles of justification for dismissal that morphed into a preference for issues of process over those of substance, and the dominance of compensation as remedy for breach. Because justification demanded an exclusive focus on the circumstances of the individuals engaged by the grievance it invited further (similar but apparently different) claims and more refinement. Employers with the resources to do so developed their own rules and practices to guarantee compliance with process requirements, only to find that no matter how carefully crafted the rules, they nevertheless remained the subject of intense legal and judicial examination. The cost of a contested dismissal is in this examination. Mediated or private settlements are incentivised if the compensation sought or accepted is lower than this cost. In turn, confidential (mediated or private) resolution of contested dismissals have shielded from the public gaze the implications of simple repetition over a long period, a problem for researchers¹⁹ and thus for those sectors of the population negatively affected by the status quo. This phenomenon, attributed as an explanation for both the sexual abuse by clergy of children within the Roman Catholic Church and the 2015 Baltimore riots,²⁰ has had two effects: it strengthened

¹⁷ Susan Robson, *Policy, Operations and Outcomes in the New Zealand Employment Jurisdiction 1990-2008* (PhD, University of Otago, 2016).

¹⁸ The Employment Contracts Act 1991, Part III Personal Grievances (ss 26-42) defines unjustifiable dismissal as one of 5 types of personal grievance in s 27(1)(a) but is thereafter silent about the basis for such a claim. By contrast, grievances based on discrimination (s 28), sexual harassment (ss 29, 35, 36) and duress (s 30) attract detailed statutory grounds for claims.

¹⁹ Caroline Morris, *An Investigation into Gender Bias in the Employment Institutions* (1996) 21(1) *New Zealand Journal of Industrial Relations*, 67, noted the problem for her research in the confidentiality of mediated settlements meant that a considerable proportion of all matters brought before the employment institutions were unavailable for research scrutiny; Bernard Walker and R T Hamilton, *Grievance Processes: Research, Rhetoric and Directions for New Zealand*, (2009) 34(3), *New Zealand Journal of Employment Relations*, 43 note that 'private' justice inhibits the task of evaluating issues of justice and equity in the New Zealand context.

²⁰ Tom McCarthy (dir) *Spotlight*, Universal Studios, 2015, portrayed the repetitious confidential settlement of abuse complaints within the Roman Catholic Church in Boston, United States of America as contributing to the failure to address and stop the abuse; Matt Taibbi, *Why Baltimore Blew Up*, *Rolling Stone*, 26 May 2015: "A bad thing happens, but somehow nobody is guilty of anything – money just changes hands. ... The game is set up so the only real end for the victim of police abuse to pursue is a check from the government... For all the hundreds of millions of dollars paid out by cities to abuse victims, very little is actually done to discipline rogue police officers.... The problem – of police almost never facing consequences – was the obvious subtext of the Baltimore riots."

perceptions that employee rights were appropriately addressed and upheld; and has been the means by which practices that affected collective interests could be ignored.²¹

Separated resolution modes (adjudication and mediation) have been a feature of both eras. Similarity of outcome from reliance on mediation, settlements involving money transfers, suggests that separate modes function as negotiation-persuasive. The trend during the ECA era, increased reliance on mediation followed by rising rates of private settlement, has been reflected in the ERA period. Mediation appears to perform, in terms of establishing precedent or guides to settlement, the same function as adjudicative modes are said to have, but by different means. Mediation models the behavioural tropes that facilitate resolution, whilst adjudication establishes precedent for legal issues. The ubiquity of grievance claims meant there was less need for a focus on legal issues than behavioural modelling. By this means, collective advocacy's preferred resolution mode and reliance on negotiation skills came to influence the behaviour of individualised advocates, but not their expectations of institutional resolution: separate modes also minimise the impact of risk assessment deferral that affects individualised grievants, and was a cause of the delays that beset the Tribunal; deferral preserves the (advocate's) business opportunity of asserting or resisting a claim; mediation reduces the business risk in the presence of incentives to settle to avoid further advocacy costs and the absence (at lawyer insistence) of constraints like the power of adjudication in mediation; reliance on the cost of representation is incentivised as the means of achieving or denying mediated outcomes.²²

The Employment Court (EC) judiciary was divided by status and attitudes to adversarialism from mediators and members of the Tribunal and Authority, and this difference was maintained over both eras. Whilst the Tribunal membership generally welcomed the policy changes of the ERA (and were keen to ensure they were implemented), the judiciary was more closely associated with the views of the legal profession who opposed them. The EC's approaches to process issues following the Authority's establishment²³ and the loss of its powers of review over entry-level adjudication²⁴ sent an unequivocal message that the (ECA) status quo on process should be maintained for the ERA, notwithstanding clear statutory provision to the contrary. This appears to have influenced lawyers associated with undermining mediator and Authority member confidence and commitment to the then new regime.²⁵

The position was exacerbated by the DoL's failure to recognise that the success of ERA policy initiatives to transfer control of proceedings from advocate to mediator/member was likely to depend on the experience and authority of initial appointments to those roles. The DoL's priority was a more compliant resolution workforce. Its decision to engage mediators with mixed or limited experience of the employment jurisdiction meant that the MS was variably equipped to withstand the demands of adversarial advocacy, and ill-equipped to adopt a consistent approach to decision-making in the face of mediation failure. Mediator

²¹ Robson, above n 17.

²² Ibid.

²³ *David v A.E Tilley* [2001] ERNZ, 93; *David v Employment Relations Authority* [2001] ERNZ, 354; *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186; *Munro v Village Care New Plymouth Ltd* [2004] 2 ERNZ 40.

²⁴ *Keys v Flight Centre* [2005] ERNZ 471; *Oldco PTI (NZ) v Houston* [2006] ERNZ 221; *Employment Relations Authority v Rawlings* [2008] ERNZ 26.

²⁵ Robson, above n 17.

use of powers to utilise the statutorily mandated range of mediation styles, therefore, atrophied. Lawyer preferences for the shuttle style of the ECA prevailed.²⁶

Lawyer reaction to the use of the s 150 arbitral power in mediation formed the basis of DoL's fears that it would undermine the policy desire for informality and flexibility of mediation style by incentivising resort to legalist or formalist demands for rules of process. The DoL took the view that arbitral modes of problem resolution attracted those demands. It now appears that resolution mode is irrelevant. The demand for rules of process (or the use of a resolution model that can be defined in terms of rules of process) appears to be an incident of the provision of institutional resolution to which lawyers have rights of representation. This means that resolution models, dependent on flexibility or informality of process that do not meet lawyer requirements of process, are more likely to change to meet lawyer expectations, than lawyer expectations alter to accommodate informality.²⁷

For these reasons, the connection between selection of dispute resolution system and success in meeting employment policy objectives appears to be dependent on choice of institutional structure and the type of advocacy culture it attracts. The greater labour market flexibility sought by the ECA was achieved in part as the result of its alignment with conflict resolution mechanisms modelled on the civil court structure and the legal profession. The ERA's failure to associate advocacy cultures and the institutions to which they were aligned with employment policy objectives, and its reliance on institutional neutrals as a substitute for a return to collectivist and protectionist approaches to labour issues ensured its core policy goal, a rise of mended over ended employment relationships, never occurred.²⁸

Policy for an institutional resolution structure

From 1973 to 1991, Grievance Committees, consisting of stakeholder representatives, determined individual disputes. Access to this form of institutional resolution was restricted to union members. A policy choice for facilitating higher rates of union membership is, therefore, a return to restricted access to institutional resolution, but this is impracticable in the current labour environment. However, it is possible to conceive a resolution system based on collective resolution values and practices and managed by stakeholder representatives (the state, employers, employees and dependent contractors). There would be a different role or focus for institutional mediation, a diminished or extinguished need for separate institutional low-level adjudication, and retention of the Employment Court. Such a system would likely retain the MS but tweak its current powers, practices, data collection obligations and claim outcomes:

Mediation powers

Existing powers to mediate could be augmented by an institutional power to offer advocacy or negotiation services from relevant unions and employer associations to individualised employers, employees and dependent contractors, if negotiation of an outcome was sought by

²⁶ Ibid, see also Employment Relations Act 2000, s148A(2): This amendment in 2016 was necessary to protect employees from negotiating away during mediation statutory entitlements like holiday pay and the minimum wage, thus underlining the problem of mediator failure to attend to substantive (as distinct from process) issues during mediation. This problem was also highlighted in *8i Corporation v Marino* [2017] NZEmpC 69.

²⁷ Ibid.

²⁸ Ibid.

the parties, or appeared to facilitate a faster or more efficient process than mediation. Incorporation of collective representatives in service provision might furthermore augment MS powers (currently vested in the Authority) to facilitate collective bargaining.

Mediation practices

Arbitration under s 150 ERA is rarely sought by parties to mediation, nor is it offered. Changes to the power to arbitrate would result in parties understanding at the outset of institutional resolution that a mediator could decide the matters at issue in the event of a failure to settle. Dissatisfaction with an arbitrated outcome, regardless of the collective status of the dissatisfied party, would be the subject of consideration by collective representatives who would decide whether the outcome should be further negotiated or referred to the EC.

Mediation personnel

The current practice of recruiting mediators who are not required to have workplace resolution qualifications and/or experience would cease, in favour of those who do. If the MS is to be managed by workplace stakeholders, the resolution workforce would likely come from within those ranks, having the connections or relationships of trust (skin in the game) necessary for establishing the authority or status that resolving workplace problems require.

Data Collection

Current confidentiality practices have rendered the substance of mediation claims opaque to outsiders. An anonymised data collection system that itemised the employment issues and practices subject to mediation and the mediated outcome would establish a source of information for collective bargaining purposes and for labour relations research. Information about dispute triggers and its analysis would then inform collective bargaining strategies and advocacy education/training, given the likelihood of workplace systems as a subject of collective agreements.

Claim outcomes

Claim type and numbers will reflect the efficacy of workplace systems. The policy hope will be for a reduction of claims, increased variation of claim substance, group claims (where practices affecting more than one employee can be the subject of negotiation and mediation) and the probable formation of compensation tables for dismissal grievances.

Representation

Individualised representatives could have rights of appearance before the EC but not at the MS. Grievants could retain the right to seek advice and private resolution assistance from their representatives of choice, but if they require MS assistance they will be dependent on the services offered there.

Employment Court

The strategic interests of collectives in litigation outcomes could establish a basis for ceding to them exclusive responsibility for deciding which issues require litigation and which can be resolved by other means. This would result in individuals having conditional access to the

EC, so it would likely become a source of litigation in itself. An alternative approach would retain the current jurisdiction over individual and collective claims, conditional upon prior mediation, but with automatic rights of joinder or audience in respect of individual claims for collectives who regard their memberships as potentially affected by the matters at issue.

Conclusion

Notwithstanding the major focus in this paper on the institutions, it can be argued that the greater changes demanded by pluralism will be required of the workplace. Workplace remedy systems or their absence either diminish or facilitate the need for institutions in the resolution of individual disputes, so the closer policy attention is paid to that aspect of conflict management, the less the need for complex institutional provision.

Much of the description of institutional functioning centred on the demands and consequences of legal method. It raises the issue whether entry-level resolution should host competing advocacy cultures. A collectivist advocacy culture aligns more closely with pluralist values. It reduces the legal method's need for the Authority and establishes the MS as a more appropriate recipient of Authority funding.²⁹

The relatively minor changes required of the MS and the EC, thus, reflect the fact that statutory recognition of the advantages of collective approaches to resolution already exists. The suggested restriction of representative access to the MS to collectives may, therefore, liberate it to function as envisaged in 2000, particularly if changes to workplace systems reduce the number of individual disputes requiring institutional assistance.

²⁹ Institutional separation of mediation (MS) and adjudication (Authority) results in differences of cost to the state. Notwithstanding that there is no difference in the problems they resolve, or in their remedies (compensation and costs) they produce different outcomes. The Authority's membership constitutes 40-50 per cent of the number of mediators but it investigates between 9 and 15% of the annual number of problems mediated by the MS. In 2007, the Authority made 182 compensation and 148 costs orders (from 847 grievance determinations) totalling \$1.836m. The cost to the public purse of achieving these money transfers totalled \$6.03m: Robson, above n 17.

Labour Law and the Labour Market: A Case Study of Malaysia

JONATHAN SALE*

Introduction

According to the International Labour Organization (ILO):¹ "...global economic integration has caused many countries and sectors to face major challenges of...continuing high levels of unemployment and poverty...and the growth of both unprotected work and the informal economy..."

But the level of unemployment and size of informal sectors vary across countries over time. For instance, the unemployment rate is around three per cent² and non-agricultural employment in the informal sector is about 11 per cent³ in Malaysia. On the other hand, the unemployment rate is close to six per cent⁴ while the "informal sector employs between 61% and 70% of the total labour force"⁵ in neighbouring Indonesia.

By and large, labour laws developed in "both the common and civilian law systems" in the twentieth century.⁶ In the case of Malaysia, might the outcomes described in the preceding paragraph, among others, be explained through the ways its labour law and regulation have been framed and/or revised over time? Generally, is there a close relationship between the country's labour law and economy or variety of capitalism? Specifically, does its labour law contribute to labour market formation,⁷ including relatively low levels of unemployment overall, and employment in the informal sector in particular? Owing to its pre-colonial, colonial and post-colonial histories, might the ways by which Malaysia's labour law and regulation have been framed and/or revised show legal pluralism, exogenous (e.g., common law and civil law) and endogenous (e.g., "ethnic distribution"⁸) origins?

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¹ *International Labour Organization Declaration on Social Justice for a Fair Globalization* General Conference, 97th Sess (2008) 5 <www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf>.

² Yves Boquet *The Philippine Archipelago* (Springer International Publishing AG, Cham (Switzerland), 2017) at 204. See Table 8.3 Unemployment in Southeast Asian countries, 2005–2014.

³ Department of Statistics Malaysia, Official Portal "Informal Sector Work Force Survey Report, Malaysia, 2015" (29 July 2016)

<www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=158&bul_id=UUFsUEJnNGFhcDE1TndNUIg4OEZCQT09&menu_id=U3VPMldoYUxzVzFaYmNkWXZteGduZz09>.

⁴ Boquet, above n 2.

⁵ Alexander Rothenberg, Arya Gaduh, Nicholas Burger, Charina Chazali, Indrasari Tjandraningsih, Rini Radikun, Cole Sutera and Sarah Weiland "Rethinking Indonesia's Informal Sector" (2016) 80 *World Development* 96 at 96 <<http://dx.doi.org/10.1016/j.worlddev.2015.11.005>>.

⁶ Thomas Kohler "Comparative Labor Law: Some Reflections on the Way Ahead" (2003) 25(1) *Comparative Labor Law & Policy Journal* 87 at 90-91.

⁷ See Sean Cooney and Richard Mitchell "What is labour law doing in East Asia?" in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds) *Law and Labour Market Regulation in East Asia* (Routledge, London, 2002) 246 at 259.

⁸ Anil Verma, Thomas Kochan and Russel Lansbury "Lessons from the Asian experience: A summary" in Anil Verma, Thomas Kochan and Russel Lansbury (eds) *Employment Relations in the Growing Asian Economies* (Routledge, London, 1995) 336 at 345.

This paper aims to provide some plausible answers to these questions through systems analysis and case study of labour law and regulation in Malaysia and their links to the economy, including the variety or varieties of capitalism, labour market formation and outcomes.

The paper is divided into six parts. The first section reviews some relevant literature and develops a systems framework for the case study. In the second section, the history and development of Malaysian labour law is briefly traced and some key provisions of the Employment Act are discussed. From this historical account, the third section teases out aspects of the context and political economy of the country's labour law. The fourth section delves into varieties of capitalism. Outcomes in terms of employment and gross domestic product are tackled in the fifth section. In the last section, the paper concludes with an examination of the links among labour law and regulation, varieties of capitalism, labour market formation, and work creation, as well as some implications and challenges.

1. Literature review and framework for case study

There is a body of literature that seems to view *laws as dichotomous variables*. It tends to recognise a bifurcation between the two Western legal traditions of civil law and common law in terms of mode of legal thinking or reasoning (deductive or inductive), sources of law (legislature or judiciary) and main actors (professors or judges).⁹ It argues that laws are transplanted via colonisation and, therefore, legal origins are key to understanding varieties of capitalism; such that civil law, which favours allocations desired by the state, is likely to correspond to coordinated market economies that involve strategic interaction among actors, while common law, which supports private market outcomes, is apt to be compatible to liberal market economies that are driven by competitive markets.¹⁰ It points out that the distinctions between coordinated market economies and liberal market economies more or less match the distinctions between civil law and common law.¹¹

On the other hand, another body of literature seems to view *laws as continuous variables*. For instance, Kohler (1998) juxtaposes “state-help” and “self-help” aspects of labour law.¹² “State-help” conditions pertain to individual labour laws (protecting individual workers, “the weaker party in the employment relationship”) while “self-help” terms refer to collective labour laws (involving organised workers and “collective bargaining”).¹³ Across the common law-civil law continuum of labour law systems, he distinguishes between the American common law-labour law model that has strong “self-help” features and the German civil law-labour law type

⁹ Martin Vranken *Western Legal Traditions: A Comparison of Civil Law & Common Law* (The Federation Press, Sydney, 2015) at 12-14, 27-28.

¹⁰ Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer “The Economic Consequences of Legal Origins” (2007) <http://ccl.yale.edu/sites/default/files/files/Shleifer_Economic_Consequences_nov.pdf>; and Peter Hall and David Soskice “An Introduction to Varieties of Capitalism” (2001) <<http://www.people.fas.harvard.edu/~phall/VofCIntro.pdf>>

¹¹ Simon Deakin “The Evidence-Based Case for Labour Regulation” (paper presented to Regulating Decent Work Conference, Geneva, 8 July 2009) <http://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper_pl1a.pdf>

¹² Thomas Kohler “The disintegration of labor law: some notes for a comparative study of legal transformation” (1998) 73(5) *Notre Dame Law Review* 1311 at 1318-1319, 1324; and Jonathan Sale “Harmonisation of ASEAN labour laws for employment growth: The Philippines and Malaysia as case studies” (PhD Thesis, The University of Newcastle, ongoing) at ch 4.

¹³ *Ibid.*

with its robust “state-help” characteristics.¹⁴

Within common law-labour law systems, Whelan (1982) differentiates the United Kingdom’s quite thorough regulations concerning individual labour law and essentially laissez-faire, voluntarist approach to collective labour law from the American style that is somewhat sparse in terms of federal individual labour laws but fairly detailed as to auxiliary rules in collective labour law.¹⁵

Duve (2014) explains entanglements in legal history and frames the problem in this manner: how to “stop projecting...categories and concepts on to realities different from the ones these categories and concepts have emerged from?”¹⁶ He bemoans the excessive focus on Western models (Eurocentrism) and posits that “...entangled situations do not offer the luxury of a single point of departure.”¹⁷ He defines “entangled legal histories” as “complex intertwined networks, with no beginning and no end, and a difficulty to fix their own point of departure”.¹⁸ Palmer (2007) posits the significance of the “factual approach” to mixed legal systems which means verifying their “existence factually.”¹⁹ A mixed legal system involves “two or more legal traditions, or parts thereof, operating within a single system.”²⁰ “Mixed systems and legal pluralism are closely associated with... colonial rule.”²¹ Is this the “norm rather than exception”?²² Is this the “general pattern of legal development rather than historical accident”?²³

In this sense, laws and their origins, as well as varieties of capitalism, are variables occupying loci or points along a continuum. At one end of the continuum might be civil law systems that have coordinated market economies while at the opposite end could be common law systems that are liberal market economies. In between these types are likely to be a whole gamut of systems that are endogenous in their origins, hybrids (having both common law and civil law roots)²⁴, Asian market economies (entailing networks and personal relationships²⁵ and involving identification and solidarity among actors²⁶) and trichotomies having “indigenous

¹⁴ Ibid.

¹⁵ Christopher Whelan “On Uses and Misuses of Comparative Labour Law: A Case Study” (1982) 45(3) *The Modern Law Review* 285 at 297-300; and Sale, above n 12.

¹⁶ Thomas Duve “Entanglements in Legal History. Introductory Remarks” in Thomas Duve (ed) *Entanglements in Legal History: Conceptual Approaches, Global Perspectives on Legal History* (Max Planck Institute for European Legal History Open Access Publication, Frankfurt am Main, <http://dx.doi.org/10.12946/gplh1>; Max Planck Institute for European Legal History Research Paper Series No. 2014-08, 2014) 3 at 7 <<https://ssrn.com/abstract=2532916>>.

¹⁷ Ibid 6-7.

¹⁸ Ibid 3, 6, 8.

¹⁹ Vernon Valentine Palmer “Mixed Legal Systems... and the Myth of Pure Laws” (2007) 67(4) *Louisiana Law Review* 1205 at 1206-1207.

²⁰ Ibid 1206-1207.

²¹ Ibid 1216.

²² Ibid 1218.

²³ Ibid.

²⁴ See Pacifico Agabin *Mestizo: The Story of the Philippine Legal System* (University of the Philippines College of Law, Quezon City (Philippines), 2011) at 1.

²⁵ See Nick Wailes, Jim Kitay and Russell Lansbury “Varieties of Capitalism, Corporate Governance and Employment Relations Under Globalisation” in Shelley Marshall, Richard Mitchell and Ian Ramsay (eds) *Varieties of Capitalism, Corporate Governance and Employees* (Melbourne University Press, Carlton (VIC), 2008) 19 at 33.

²⁶ See Nobuyuki Yasuda “Law and Development from the Southeast Asian Perspective: Methodology, History and Paradigm Change” in Christoph Antons (ed) *Law and Development in East and Southeast Asia* (RoutledgeCurzon, London, 2003) 19 at 22, 37.

law,” “imported law” and “development law” elements (including their “operational concepts” “community,” “market” and “command,” respectively).²⁷ After all, the “legal” and “non-legal” spheres are not “entirely discrete ontological” spaces.²⁸ Their boundaries, if any, are permeable.

In this case study, “documents and records” are examined and the “actual” “words and language” used in them are expressed where possible for “adherence to evidence” and writers’ “meanings”, which means themes/subthemes are developed “from the ‘bottom-up’” via “inductive data analysis”.²⁹ Systems analysis is also used to arrive at an understanding of inputs to, processes and outputs/outcomes of the system, as well as the relationship of outputs/outcomes to inputs and that of the system to its larger environment/context (Figure 1). Labour law “constitutes a *system*” with its “vocabulary”, “concepts”, “rules”, “categories”, and “techniques” that are “linked to a view of the social order”.³⁰ Relatedly, labour law systems “...reproduce ‘their own elements, structures, processes and boundaries...’ and “...construct their own environment, and define their own identity.”³¹

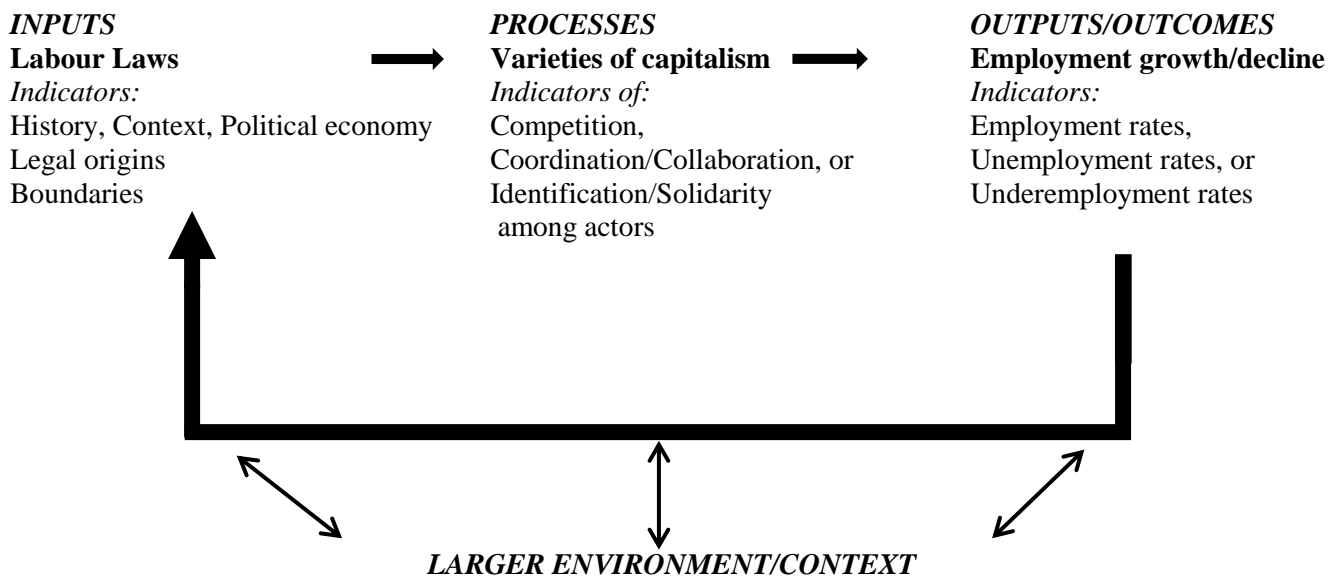


Figure 1: Systems Analysis³²

This research *explores* the relationship between labour laws (as indicated by their history, context and political economy [as laws are products of human interaction³³], legal origins, and boundaries) and employment growth or decline (as indicated by employment, unemployment or underemployment rates), through the case of Malaysia.³⁴ Varieties of capitalism (as indicated by modes of competition, coordination/collaboration, or identification/solidarity

²⁷ Ibid 19, 20, 22-4, 42.

²⁸ Pierre Legrand “European Legal Systems are not converging” (1996) 45(1) *The International and Comparative Law Quarterly* 52 at 58.

²⁹ See John Creswell *Qualitative Inquiry & Research Design: Choosing Among Five Approaches* (SAGE Publications, Inc., California, 2007) at 38, 39, 73-76, 121; and see also Robert Yin *Qualitative Research from Start to Finish* (Guilford Press, New York, 2011) at 15, 16-17, 18, 20, 21.

³⁰ See Vranken, above n 9, at 9. Vranken cites David, R and Brierley, J.

³¹ See Cooney and Mitchell, above n 7, at 249. Cooney and Mitchell cite Gunther Teubner.

³² Sale, above n 12, at ch 1.

³³ See Curtis Milhaupt and Katharina Pistor *Law and Capitalism* (The University of Chicago Press, Chicago, 2008) at 6-8.

³⁴ Sale, above n 12, at ch 1.

among actors in Malaysia) are intervening processes.³⁵ There are likely to be supranational elements in the larger environment or context which might be influencing, and/or be influenced by, the labour law system.³⁶ In Malaysia, what has or have been the approach or approaches over time? What has or have been the impact or impacts on work creation?

2. History and Development of Labour Law: A Brief Discussion

“From very early in the Christian era there were trading ships plying between India and China, some of which touched at river mouths in the Malay Peninsula.”³⁷ These traders’ reports indicated “ample evidence of the existence of Malay Kingdoms in the north, notably in Kedah and Singgora and Ligor from a very early date” before “the 15th century”.³⁸ Indeed, significant interactions among these peoples had been going on even prior to Malaysia’s colonisation. Therefore, it does not come as a surprise, for instance, that the “history of English law” in Malaysia “was one of accommodating the law to fit local circumstances and the so-called ‘Mahometans, Hindoos, and Buddhists’, which loosely connoted the Malay, Indian and Chinese populations, their religious communities and customs.”³⁹ This suggests that plurality in Malaysia’s legal system is linked to ethnic diversity within that system. And the “ethnic distribution in Malaysian society...has influenced industrialization and human resource development strategies.”⁴⁰ The state’s role has been pervasive in this distribution. Moreover, there are “state-help” and “self-help” provisions in Malaysian labour law. Colonised/controlled initially through Malacca (“the Malay Empire which had united the whole of the Peninsula and the East Sumatran Kingdoms under a single overlord”) by the Portuguese (in 1511), the Dutch (in 1641) and later the British (first in 1795, next in 1808 and then in 1825), though the British took control of Penang early on as well under the “Straits Settlements”, the “Federation of Malaya” in 1956 was promised formal independence by “August 1957”.⁴¹ These foreign influences are discernible in the country’s labour law. But the Malaysian state’s involvement has been ubiquitous, functioning in ways that have tended to favour managerial prerogatives. While these might suggest “entangled legal histories”,⁴² there is legal endemism as well in the form of labour rules having endogenous origins. And there has been a range of market economies – Asian (implying networks and personal relationships),⁴³ coordinated (involving strategic interaction of actors) and liberal (entailing market competition).⁴⁴

³⁵ Ibid.

³⁶ Ibid.

³⁷ M.C. ff Sheppard *Historic Malaya: An Outline History* (Malayan Historical Society, n.d.) at 2.

³⁸ Ibid 2-3.

³⁹ Stephanie Po-yin Chung “Understanding ‘Chinese customs’: *Sinchew* rulings in the Straits Settlements, 1830s – 1870s” in Shaunnagh Dorsett and John McLaren (eds) *Legal Histories of the British Empire: Laws, engagements and legacies* (Routledge, London, 2014) 141 at 142.

⁴⁰ Verma, Kochan and Lansbury, above n 8.

⁴¹ Sheppard, above n 37, at 6-16. In page 15 Sheppard notes that “the Federation of Malaya Agreement was signed in Kuala Lumpur on 21st January 1948, and came into force on 1st February of that year.” The “Federation of Malaya” is to be distinguished from the much earlier “Federated Malay States” that consisted of Perak, Selangor, Negri Sembilan, and Pahang (see Sheppard, pages 14-15).

⁴² See Duve, above n 16.

⁴³ See Wailes, Kitay and Lansbury, above n 25.

⁴⁴ Ibid 32; and see also Hall and Soskice, above n 10.

2.1. Pre-1940s up to 1980

The British had implemented “divide and rule policies” and relied on “Chinese and Indian labour” in the course of “the colonial period.”⁴⁵ Crinis and Parasuraman (2016) explain that the:⁴⁶ “Chinese, Indian and Malay communities were corralled in certain sectors of the economy...The Malays remained in the subsistence economy, and the Chinese and Indian population were employed in tin mining and rubber plantations, respectively.”

According to Ayadurai (1993), labour legislation in Malaysia:⁴⁷

...was first enacted over 120 years ago to regulate the employment of immigrant Chinese and Indian labour in the mines and on the plantations. It was not until 1940 that laws were introduced to regulate trade unions and trade disputes. By this time the immigrant labour force had formed the first trade unions.

In 1948, the British colonial government declared a “State of Emergency” in Malaya following the Malayan Communist Party’s reversion to armed struggle to attain political aims.⁴⁸ This paved the way for the compulsory registration of trade unions.⁴⁹ Those unregistered were outlawed.⁵⁰ This also effectively broke communist control over the labour movement, crippling the latter in the process.⁵¹

In 1950, the Malayan Trades Union Congress was established.⁵² Five years later, the Employment Act was enacted, but its implementation was held in abeyance until 1957 when Malaya gained independence from the British.⁵³ “Since independence..., Malaysia” had “been ruled by Barisan National, an inter-ethnic coalition dominated by the United Malays National Organisation (UMNO)”,⁵⁴ until the May 2018 general election in which this ruling coalition lost the majority of seats in the parliament.

⁴⁵ Vicki Crinis and Balakrishnan Parasuraman “Employment Relations and the state in Malaysia” (2016) 58(2) *The Journal of Industrial Relations* 215 at 217.

⁴⁶ *Ibid.*

⁴⁷ Dunston Ayadurai “Malaysia” in Stephen Deery and Richard Mitchell (eds) *Labour Law and Industrial Relations in Asia: Eight Country Studies* (Longman Cheshire, Melbourne, 1993) 61 at 63. Compare The Labour Code, 1912 of the Federated Malay States (Enactment No. 6 of 1912, as amended) in Federated Malay States and A.B. Voules “The laws of the Federated Malay States 1877-1920” Vol. II (1921) California Digital Library <<https://archive.org/details/cdl?and%5B%5D=laws+of+the+federated+malay+states&sin=&sort=titleSorter>> 332-401. The Labour Code, 1912 contained eleven Parts, including Part II on Provisions Relating to Immigration, Part III on General Provisions Relating to Labour, Part IV on Provisions Relating to Special Classes of Labour, Part V on Provisions Relating to Priority of Wages and the Truck System, Part VI on Provisions Relating to Assisted Migration, Part VII on Special Provisions Relating to Labourers Employed in Mines, Part VIII on Provisions Relating to the Health of Assistants and Labourers, Part IX on Provisions Relating to Places Unfit for the Employment of Labour, Part X on Special Offences, and Part XI on Provisions Relating to Procedure, Actions and Rules.

⁴⁸ Ayadurai, above n 47, at 92.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Crinis and Parasuraman, above n 45, at 217.

“At the time of independence, the non-Malay Chinese owned most of the country’s economic assets and the numbers of non-Malays almost outnumbered the Malays...” and these “...ethnic divisions shaped the politics of industrial relations in Malaysia.”⁵⁵

Thereafter, the Trade Unions Act was passed in 1959.⁵⁶ This legitimised unions, but required registration of unions and regulation of their affairs.⁵⁷ Then, the “Great Railway Strike” occurred in Malaya which resulted “in railway workers being recognised as government employees.”⁵⁸

Malaysia was formed in 1963, consisting of Malaya, Sabah, Sarawak, as well as Singapore.⁵⁹ But in 1965, Singapore seceded from Malaysia.⁶⁰ In 1967, the Industrial Relations Act became law, “entrenching the system of compulsory arbitration first introduced under emergency legislation in 1965, and establishing the Industrial Court to arbitrate disputes.”⁶¹

In 1969, racial riots took place in Kuala Lumpur “after the results of the general election” showed “that the opposition parties together polled more votes but won fewer seats than the ruling coalition party.”⁶² “Chinese-dominated parties won a considerable number of seats in the parliament...” while the “...government invoked the Internal Security Act,” which was “a relic of colonial times...”⁶³

Two years later, the New Economic Policy was launched – aimed at eradicating poverty and restructuring society in 20 years, it has helped improve the lot of the disadvantaged Malays.⁶⁴ “The State...set employment quotas for Malays under the New Economic Policy (NEP)” that firms must meet “to qualify for import protection, tax holidays and direct state investment.”⁶⁵ “Malays were given preferential treatment in business, employment and education to allow them to ‘catch-up’ to the non-Malay population, but especially to the Chinese.”⁶⁶ The 1971 NEP was also a way “to manage racial tensions.”⁶⁷ In the same year, the Employment Act, Trade Unions Act and Industrial Relations Act were substantially amended.⁶⁸ A further revision was made to the Industrial Relations Act in 1976.⁶⁹

In 1978, the Malaysian Employers’ Federation was established.⁷⁰ The following year, the “Airlines Employees’ Union dispute over terms and conditions of employment with the national carrier, Malaysian Airlines System”, resulted in “unionists being interned under the Internal Security Act and the union...being deregistered and subsequently replaced by an

⁵⁵ Ibid.

⁵⁶ Ayadurai, above n 47, at 93.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Crinis and Parasuraman, above n 45, at 217.

⁶⁴ Ayadurai, above n 47, at 62-63, 93.

⁶⁵ Verma, Kochan and Lansbury, above n 8.

⁶⁶ Crinis and Parasuraman, above n 45, at 217.

⁶⁷ Ibid.

⁶⁸ Ayadurai, above n 47, at 93.

⁶⁹ Ibid.

⁷⁰ Ibid.

enterprise union.”⁷¹ The Employment Act, Trade Unions Act and Industrial Relations Act were again substantially amended in 1980.⁷²

2.2. 1980s to present

The Private Employment Agencies Act (Act 246) became law in 1981,⁷³ to regulate private employment agencies that supply workers to employers. Thereafter, the tripartite “National Labour Advisory Council (NLAC)” was reconstituted in 1983.⁷⁴ The government announced in 1986 its intention to create “a National Labour Policy” based on “industrial harmony”.⁷⁵ Four years later, the “Malayan Communist Party” renounced its armed struggle and surrendered, formally ending the insurgency in 1990.⁷⁶ That same year, the “National Economic Consultative Council” was appointed to help the government shape a “National Development Policy” to replace the NEP⁷⁷ although still anchored to its underlying philosophy of societal reordering.

Thus, in the 1990s, the “government’s emphasis shifted...towards the development” of “a high-value economy, through a strategy known as Vision 2020, which emphasised the importance of a knowledge economy built on education and industrial upgrading in the domestic sector as well” as “the export sector.”⁷⁸

From the mid-1990s, however, the courts exhibited a measure of “judicial activism” in deciding some labour cases in favour of employees, though these were “largely restricted to the field of the law of personal employment where the courts” seemed “more willing to step in” to moderate employer discretion.⁷⁹ Still, these decisions had the effect of expanding somewhat “the scope of judicial review” and were significant in that sense, too.⁸⁰ But the courts could not make broader changes, particularly as to collective labour law considering “the strong and clear legislative intention to restrict trade union power.”⁸¹

The legislative intention to weaken unions continued as changes were made in 2010 to the Trade Unions Act, Employment Act and Industrial Relations Act to permit “greater use of contract labour”, which was later “strengthened” by further amendments “to the Employment Act” in 2012.⁸² These changes had the effect of enhancing employer discretion⁸³ “to substitute contract workers, many of them temporary labour migrants, for core workers or to change the

⁷¹ Ibid 93-94.

⁷² Ibid 94.

⁷³ See Crinis and Parasuraman, above n 45, at 218.

⁷⁴ Ayadurai, above n 47, at 94.

⁷⁵ Ibid; and see Peter Wad “Enterprise Unions: Panacea for Industrial Harmony in Malaysia?” (1997) 12 *Copenhagen Journal of Asian Studies* 89 at 90 <<https://rauli.cbs.dk/index.php/cjas/article/view/2177/2172>>.

⁷⁶ Ayadurai, above n 47, at 94.

⁷⁷ Ibid.

⁷⁸ Crinis and Parasuraman, above n 45, at 218.

⁷⁹ Suhanah Sharifah Syed Ahmad “Law and labour market regulation in Malaysia” in Sean Cooney, Tim Lindsey, Richard Mitchell and Ying Zhu (eds) *Law and Labour Market Regulation in East Asia* (Routledge, London, 2002) 55 at 83, 84.

⁸⁰ Ibid.

⁸¹ Ibid 84.

⁸² Crinis and Parasuraman, above n 45, at 219.

⁸³ See Chris Howell “Trajectories of Neoliberal Transformation: European Industrial Relations since the 1970s” (Lecture, Newcastle Business School, The University of Newcastle, Australia, 29 September 2017). According to Howell, employer discretion means “freedom to hire and fire”, “freedom to assign workers to tasks” and “freedom to set the amount, type and distribution of wages.”

status of core to contract workers.”⁸⁴ Whether this expansionary logic of employer discretion will intensify or abate following the results of the 2018 general election that put in place a new government led by the Pakatan Harapan remains to be seen. Indeed, before its rise to power, the nascent ruling coalition’s campaign hinged on a raft of reforms which was aimed at putting some distance between itself and its predecessor.

2.2.1. *Some Key Provisions of the Employment Act*

Based on the foregoing brief historical account, the oldest labour legislation in Malaysia that became effective upon the country’s independence is the Employment Act as amended. This section looks into some of its key provisions. While the British common law has strongly influenced the legal system of Malaysia, and the Employment Act was enacted during British rule, i.e., prior to independence, a closer look suggests many civilian law elements exist as well, owing possibly to the Portuguese and the Dutch influences (which seeming link requires deeper study). The Employment Act itself contains robust “state-help” rules⁸⁵ that articulate more “principles” and “rights” than “remedies” and, thus, tend to correspond to provisions of “The Labour Code, 1912” enacted then by the Federated Malay States of Perak, Selangor, Negri Sembilan, and Pahang.⁸⁶ They are quite detailed and specific, apparently employing “deductive”⁸⁷ reasoning as they begin with concepts (Part I) before going into particular situations (Part II, et seq.). For instance, the Employment Act defines “contract of service”, “contractor”, “employee”, “employer”, “domestic servant”, and “apprenticeship contract”.

More “principles” and “rights” are detailed in subsequent “prescriptive”⁸⁸ rules regarding contract of service and termination thereof, payment of and deductions from wages, contractors and principals, employment of women, domestic servants, rest days and hours of work, termination, lay-off and retirement benefits, employment of foreign employees, among others. In the civil law tradition, too, the Employment Act seems to recognise “administrative action” as “inherent power”⁸⁹ given its very specific rules on inspection, complaints and inquiries, general penalty, and regulations, and appears to require “statutory grant of power” for “judicial action”⁹⁰ considering aspects of its rules of procedure. However, “the open-ended, discretionary nature of”⁹¹ the legislation can be seen, too, in the provisions on regulation which suggest that it is developmentalist. At the same time, the complaints/inquiries provisions and

⁸⁴ Crinis and Parasuraman, above n 45, at 219.

⁸⁵ See Kohler, above n 12.

⁸⁶ See Legrand, above n 28, at 64-74; see also Denis Baranger “Boundaries of Public Law” (Miegunyah Distinguished Visiting Fellowship Public Lecture, Melbourne Law School, The University of Melbourne, Australia, 26 July 2017) <<http://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/2017-miegunyah-distinguished-visiting-fellowship-public-lecture-26.7.17>>; and see also The Labour Code, 1912, above n 47. Notably, Part I, Chapter I of The Labour Code, 1912 had stated explicitly “Saving of Netherlands Indian Labourers’ Protection Enactments, 1909”, which is evidence of Dutch influence on labour law. See also J.R. Innes “Some Notes on the Constitution and Legislation of the Federated Malay States” (1916) 16(1) *Journal of the Society of Comparative Legislation* 24 at 25, 27 <<https://www.jstor.org/stable/752660>>. Innes also points out in page 27 that the “local Labour Code” was a good example “of codification... found suitable to local requirements” which was not a mere transplant from India.

⁸⁷ See Legrand, above n 28, at 64.

⁸⁸ *Ibid* 68.

⁸⁹ *Ibid* 52, 75.

⁹⁰ *Ibid*.

⁹¹ See Christoph Antons “Law reform in the ‘developmental states’ of East and Southeast Asia: from the Asian Crisis to September 11, 2001 and beyond” in Christoph Antons and Volkmar Gessner (eds) *Globalisation and Resistance: Law Reform in Asia since the Crisis* (Hart Publishing, Oxford, 2007) 81 at 81, 90.

rules of procedure in the statute are in the nature of “remedies”⁹² that allow for redress of “wrong”;⁹³ albeit they constitute little evidence of common law features.

3. Context and Political Economy of Labour Laws

3.1. State regulation through labour rights

The Employment Act makes use of the *lingua franca* of principles and rights. For instance, there is also a provision that seems to set forth an equality of rights between employers and employees in the matter of terminating a contract of service:⁹⁴

Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given..., without waiting for the expiry of that notice, by paying to the other party an indemnity of a sum equal to the amount of wages which would have accrued to the employee during the term of such notice or during the unexpired term of such notice. Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service.

But in the next breath, it appears “to regulate – and repress – labor”.⁹⁵ The following provision indicates that the employer may, upon grounds of misconduct, after inquiry dismiss *sans notice* the employee:⁹⁶

An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry

-
- (a) dismiss without notice the employee;
- (b) downgrade the employee; or
- (c) impose any other lesser punishment as he deems just and fit, and where a punishment of suspension without wages is imposed, it shall not exceed a period of two weeks. For the purposes of an inquiry...the employer may suspend the employee from work for a period not exceeding two weeks but shall pay him not less than half his wages for such period: Provided that if the inquiry does not disclose any misconduct on the part of the employee the employer shall forthwith restore to the employee the full amount of wages so withheld.

And in the matter of terminating employment by reason of redundancy, which is beyond the control of the employee, the employer seems to have a very wide discretion. The following

⁹² See Baranger, above n 86.

⁹³ See Legrand, above n 28, at 71.

⁹⁴ Employment Act 1955, Part II

<<http://www.ilo.org/dyn/travail/docs/1496/Employment%20Act%201955.pdf>>.

⁹⁵ See Stanley Aronowitz *The Death and Life of American Labor: Toward a New Workers' Movement* (Verso, London, 2014) at 54. Aronowitz cites Karl Polanyi.

⁹⁶ Employment Act 1955, Part II

<<http://www.ilo.org/dyn/travail/docs/1496/Employment%20Act%201955.pdf>>.

provision appears to indicate the only limitation, i.e., that foreign employees, *if any*, be “let go” first before local employees:⁹⁷

Where an employer is required to reduce his workforce by reason of redundancy necessitating the retrenchment of any number of employees, the employer shall not terminate the services of a local employee unless he has first terminated the services of all foreign employees employed by him in a capacity similar to that of the local employee.

Thus, Malaysian “employers continue to exercise their traditional, legally entrenched, prerogatives, in particular the right to retrench or dismiss”⁹⁸ through labour law.

In this sense, labour law is a regulatory tool to achieve workplace harmony or at least a semblance of it. As noted by Aronowitz in relation to American labour law:⁹⁹ “Labor law is, in brief, an invocation to class collaboration, or at least class peace. It has above all a regulatory function, which is hidden under its apparent declaration of the rights of labor.”

Under the Employment Act, labour regulation uses the language of labour rights.

3.2. *“Sporadic” and “peripheral” role of common law*

“Industrial relations in Malaysia are characterised by tight government supervision.”¹⁰⁰ “Individual employer-employee relations are regulated by the” Employment Act.¹⁰¹ “Collective relationships are governed by the” Industrial Relations Act.¹⁰² “The labour laws of the post-colonial era have served the purpose of giving effect to government objectives of industrialisation and social re-structuring.”¹⁰³ The “system is largely the creation of the legislative process” and “owes little to common law...”¹⁰⁴ Albeit, the courts have apparently played “an important role in softening the effect of repressive legislation through statutory interpretation and the application of principles of justice and equity” as may be gleaned from the “rise in judicial activism in labour cases” from the mid-1990s.¹⁰⁵ But these have been largely “sporadic” and “peripheral”, to borrow the metaphor of Baranger (2017) in his discourse on public law (in common law jurisdictions).¹⁰⁶ These have been “sporadic” because judicial review of government and/or employer actions happens only when a labour case reaches the courts which is not very frequent; these have been “peripheral” because “common law fastens, not upon principles, but upon remedies”,¹⁰⁷ and they have been mainly limited “to the field of the law of personal employment”¹⁰⁸ or the Employment Act.

3.3. *Labour law as public law/development law and expansion of employer discretion*

⁹⁷ Ibid Part XIIB.

⁹⁸ Ahmad, above n 79, at 82.

⁹⁹ Aronowitz, above n 95.

¹⁰⁰ Ayadurai, above n 47, at 90.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ahmad, above n 79, at 85.

¹⁰⁴ Ayadurai, above n 47, at 90.

¹⁰⁵ Ahmad, above n 79, at 82, 83.

¹⁰⁶ See Baranger, above n 86.

¹⁰⁷ Ibid.

¹⁰⁸ Ahmad, above n 79, at 83, 84.

Malaysian labour law is public law in that it is being used by the government to regulate the relations of capital and labour, though favouring the former over the latter, to achieve state objectives. Its “external boundaries” are determined through a “process of differentiation from private law”¹⁰⁹, e.g., the Civil Law Act 1956 which is the civil law administered in Malaysia.¹¹⁰ For example, the Civil Law Act “regulates the relations between...private persons”¹¹¹ while the Employment Act’s special rules govern individual employment relations based on “requirements of the public interest”¹¹², i.e., attainment of state objectives of “industrialisation and social re-structuring.”¹¹³ Labour law is also development law as it provides “administrative guidance” via “bureaucratic competence” to attain the state’s developmental goals.¹¹⁴ The “internal boundaries”¹¹⁵ of Malaysian labour law are individual employer-employee relations under the Employment Act (“state-help”¹¹⁶ rules) and collective labour relations under the Industrial Relations Act (“self-help”¹¹⁷ rules).

As Crinis and Parasuraman point out:¹¹⁸

In practice, the system operates as a combination of state-employer bipartism in the policy arena and management unilateralism at the workplace...Close ties between industry and government have stifled the capacity of workers to organise into effective trade unions...there is little likelihood of detection of employer’s failure to comply with regulatory requirements...

“The industrial relations strategy in Malaysia is to focus on cost containment to facilitate the competitive strategy of low cost exports, and on the need to attract foreign investment.”¹¹⁹ “The repressive labour and industrial laws inherited from the colonial period and enhanced by successive post-independence Malaysian governments are still largely in force...”¹²⁰ In short, “state-help” and “self-help” rules created by the state through the legislative process, though many, function in ways that expand employer discretion.

3.4. Individualisation, de-collectivisation and decentralisation of employment relations through state regulation

“Malaysian employers prefer to deal with employees on an individual rather than collective basis and they are supported in this strategy by the state”¹²¹ through labour law, too. Thus, the union density in Malaysia “is still very low” at “less than 10 per cent of the workforce.”¹²² “The change”, pursuant to the “Look East Policy”, in 1983 “from an industrial to an enterprise

¹⁰⁹ See Baranger, above n 86.

¹¹⁰ See Civil Law Act 1956 (Act 67)

<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%2067.pdf>.

¹¹¹ See Baranger, above n 86.

¹¹² Ibid.

¹¹³ See Ahmad, above n 79, at 85.

¹¹⁴ See Antons, above n 91, at 90.

¹¹⁵ See Baranger, above n 86.

¹¹⁶ See Kohler, above n 12.

¹¹⁷ Ibid.

¹¹⁸ Crinis and Parasuraman, above n 45, at 218.

¹¹⁹ Verma, Kochan and Lansbury, above n 8, at 346.

¹²⁰ Ahmad, above n 79, at 81.

¹²¹ Ibid.

¹²² Ibid; and see also Dzuzalani Eden “Transformasi Kesatuan Sekerja Dalam Pembangunan Negara” (paper presented to Konvensyen Kesatuan Sekerja, Riverside Majestic, Kuching, 30 April 2015)

<https://ir.unimas.my/10295/>.

model fragmented the already weak national unions” that contracted further “with the new emphasis on enterprise (in-house) unions.”¹²³ The amendments to the Trade Unions Act, Employment Act and Industrial Relations Act in 2010, and to the Employment Act in 2012, contributed as well to the individualisation, de-collectivisation and decentralisation of employment relations in Malaysia. There has been “greater recourse to individual bargaining between employee and employer or unilateral employer decision-making” (individualisation), “a shrinking in the collective organisation and capacity” of employees (de-collectivisation) and “a shift from higher levels of collective bargaining to lower ones, closer to the firm or workplace” (decentralisation).¹²⁴ What is peculiar, however, with this “neoliberal trajectory” in Malaysia is there has been *no concomitant deregulation*, i.e., “greater reliance upon market mechanisms in the organization of the labor market.”¹²⁵ On the contrary, there has always been state regulation through labour law as public law and development law, i.e., labour law as having a strong “regulatory function, which is hidden under its apparent declaration of the rights of labor.”¹²⁶

3.5. *Work creation, ethnicity and trichotomy*

The 1971 NEP has been a key “work creation programme” introduced by the Malaysian government “to encourage new employment opportunities”¹²⁷ especially for Malays. This work or labour rule aimed at reordering societal structure has endogenous origins. As aptly explained by Milner (2008):¹²⁸

When we look at transformations in detail, some have been intended, some not. Seeking a specific economic or political advantage, for instance, can entail top-down ideological leadership – a frequently encountered theme in ‘Malay’ societies – that radically and unintentionally transforms the social order. Some strategies employed by Archipelago sultanates and later by colonial regimes turned out to be cases of this, virtually creating or legitimizing new and rival elites. A modern example is the unpredicted rise in 1970s Malaysia of a powerful and radical Islamic movement that followed the implementation of programmes designed to address ‘Malay’ economic disadvantage. But there are also clear instances of deliberate, top-down implementation of social change – some dating back to the kingdom of Melaka and earlier.

The kingdom of Melaka (Malacca) had been well-known even before the Portuguese invasion.¹²⁹ Malaysia’s NEP, together with its labour laws as exemplified by the Employment Act, make up the trichotomy of indigenous law, imported law and development law.¹³⁰ As noted, the NEP is an endogenous development. The Employment Act is imported law in that it has both civil law and common law elements, though, seemingly, there is more of the former than the latter. At the same time, the Employment Act is development law as explained above.

¹²³ Crinis and Parasuraman, above n 45, at 218.

¹²⁴ See Howell, above n 83.

¹²⁵ Ibid.

¹²⁶ See Aronowitz, above n 95.

¹²⁷ See Michael Jackson and Victor Hanby *Work Creation: International Experiences* (Saxon House, Farnborough (Eng), 1979) at 6.

¹²⁸ Anthony Milner *The Malays* (Wiley-Blackwell, West Sussex (UK), 2008) at 15.

¹²⁹ See Sheppard, above n 37, at 4-8.

¹³⁰ See Yasuda, above n 26, at 19, 20, 22-4, 42.

The confluence of work creation, ethnicity and trichotomy has been realised largely through state regulation.

The extensive role of the state can be clearly discerned, too, from the varieties of capitalism extant in Malaysia.

4. Varieties of Capitalism

Malaysia has embarked on mixed approaches to industrialisation, often led or driven by the state.

4.1. Coordinated market economy through ISI

Initially, the country's import substitution industrialisation (ISI) was market-led.¹³¹ From "...1957 to 1970..." the state was involved "in the development of infrastructure and the rural sector...while" the private sector took care of "industrialization" with the "state" facilitating "the creation of a favourable climate for foreign investment in import substitution industries..."¹³²

The World Bank also influenced this policy approach, which had mixed results.¹³³ "On the one hand, by 1969, the economy was growing at above 5 per cent per annum...On the other hand, ethnic Malay participation in this economic growth was limited."¹³⁴

In 1971, state-led ISI was commenced with the NEP which was "promulgated in response to Malay nationalism."¹³⁵ "Its first objective was to restructure society to increase the economic standing of Malays by bringing them into the modern economy."¹³⁶ Kuruvilla and Arudsothy (1995) indicate that the NEP:¹³⁷

...was designed to increase the ethnic distribution of the workforce in proportion to the ethnic distribution of the population, and to increase *bhumiputra* (sons of the soil, i.e. Malay) share of corporate ownership from 2.4 per cent in 1970 to 30 per cent by 1990. The strategy emphasized redistribution via growth in output and employment. In operational terms, an employment quota of 30 per cent for Malays was a prerequisite to qualify firms for import protection and tax holidays. Government contracts were reserved for Malay-owned firms, and all firms had to keep aside 30 per cent of shares of Malays.

Thus, "the Malaysian state exerted increasing control over the private sector via both *regulation* and *direct investment* in furtherance of NEP goals."¹³⁸ "Consequently, private sector investment fell" and the "shortfall" as well as "the utilization of government funds to buy shares

¹³¹ Sarosh Kuruvilla and Ponniah Arudsothy "Economic development strategy, government labour policy and firm-level industrial relations practices in Malaysia" in Anil Verma, Thomas Kochan and Russel Lansbury (eds) *Employment Relations in the Growing Asian Economies* (Routledge, London, 1995) 158 at 159-161.

¹³² *Ibid* 159-160.

¹³³ *Ibid* 161.

¹³⁴ *Ibid*.

¹³⁵ *Ibid*.

¹³⁶ Crinis and Parasuraman, above n 45, at 217.

¹³⁷ Kuruvilla and Arudsothy, above n 131, at 161.

¹³⁸ *Ibid* 162.

(undersubscribed by the Malay business community for which they were reserved) resulted in a major resource crunch that led to increased borrowing from international banks.”¹³⁹ This influenced the transition to export-oriented industrialization (EOI).¹⁴⁰

4.2. *Liberal market economy via EOI*

According to Kuruvilla and Arudsothy:¹⁴¹

The resource crunch drove the government to articulate a mixed policy. On the one hand, the government launched a massive campaign to encourage private and foreign investment during the 1977-80 period...On the other hand, the state also increased its involvement in the development of heavy import substitution industries.

As already noted, there was really no deregulation or total “freedom of the market from government regulation, that is, laissez-faire economics”.¹⁴² “The outpouring of government revenues...combined with the recessions of 1982 and 1985, and the draining of revenues by the heavy industrialization programme drove Malaysia’s external debt to unprecedented levels.”¹⁴³ In order “to meet its interest payments on foreign debts, the state re-emphasized export-oriented industries, simplifying bureaucratic controls, increasing investment allowances and incentives, and reducing corporate and development taxes”.¹⁴⁴

This “EOI strategy has made Malaysia dependent on low-cost labour-intensive foreign-dominated manufacturing for export to meet interest payments, and for continued industrial growth.”¹⁴⁵ This also “forced the government to enact policies that kept costs low to preserve Malaysia’s competitive advantage of cheap and disciplined labour in order to continue to attract foreign investment.”¹⁴⁶ The “state also increased its involvement in the industrial relations sphere to a considerable extent, moving from controlled pluralism to greater state control.”¹⁴⁷

Commenting on Malaysia’s economic transformation, Bhopal and Todd (2000) note that:¹⁴⁸

Within the two decades following 1976 the Malaysian economy transformed from an agricultural to a predominantly manufacturing one. By 1996, manufacturing accounted for 80.6 per cent of commodity exports, contributed 34.3 per cent of gross domestic product (GDP) and employed 25.5 per cent of the workforce. However, development has occurred on a narrow, primarily electronics, base...

¹³⁹ Ibid 162-163.

¹⁴⁰ Ibid 163-166.

¹⁴¹ Ibid 163.

¹⁴² See Aronowitz, above n 95, at 53.

¹⁴³ Kuruvilla and Arudsothy, above n 131, at 164.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid 166.

¹⁴⁶ Ibid 168.

¹⁴⁷ Ibid.

¹⁴⁸ Mhinder Bhopal and Patricia Todd “Multinational Corporations and Trade Union Development in Malaysia” in Chris Rowley and John Benson (eds) *Globalization and Labour in the Asia Pacific Region* (Frank Cass, London, 2000) 193 at 193.

“The proportion of Malays, Chinese and Indians in the labour movement has reflected the changing political economy of Malaysia.”¹⁴⁹ “This economic development has expanded the Malay waged class such that Malays comprise the majority of trade union members.”¹⁵⁰ Then, the Asian financial crisis struck.

4.3. *Asian market economy as typified by work in informal economy*

“Malaysia’s economic crisis started in July 1997...Economic growth rate declined.”¹⁵¹ It raised inflation, unemployment and poverty rates.¹⁵² Thus, informal sector activities – “petty trading, carpentry, direct selling and home-based production” – grew.¹⁵³

“This growth”, according to Shahadan (2007), was:¹⁵⁴

...illustrated in the expansion of communities of informal street traders (hawkers), as well as in the surge of home-based production and a small number of increasingly formalized ventures located at fixed business premises such as small-scale manufacturers. The slow expansion rate posted by the formal economy reduced labor absorption of new work seekers. During the crisis, many were forced to seek employment in the informal sector...out of necessity rather than choice.

Work in the informal economy entails networks and personal relationships¹⁵⁵ and involves identification and solidarity among actors,¹⁵⁶ which are elements of a “third variety of capitalism” as defined by Wailes, Kitay and Lansbury (2008).¹⁵⁷ As Shahadan explains:¹⁵⁸

...new entrants who participate in informal sector activities due to an economic crisis continue to engage in these activities even after the crisis. This is a reflection of the continuous demand for informal businesses which provide cheaper goods and services. As the country’s economy improves, the participants receive higher income from the informal sector compared to their previous jobs before the crisis. This motivates them to remain in the sector.

Income from work in the informal economy is hardly taxed directly. “Own account workers” had “the highest proportion of employment in the informal sector in non-agricultural sector” at “55.1 per cent in 2015, down 7.1 percentage points compared to 2013.”¹⁵⁹

¹⁴⁹ Ibid 194.

¹⁵⁰ Ibid.

¹⁵¹ Faridah Shahadan “Impacts of the Malaysian Economic Crisis on the Livelihood of Informal Sector Participants” (2007) 27(1&2) Philippine Journal of Labor and Industrial Relations 56 at 56.

¹⁵² Ibid.

¹⁵³ Ibid 57, 75.

¹⁵⁴ Ibid 75.

¹⁵⁵ See Wailes, Kitay and Lansbury, above n 25, at 33.

¹⁵⁶ See Yasuda, above n 26, 22, at 37.

¹⁵⁷ Wailes, Kitay and Lansbury, above n 25, at 33.

¹⁵⁸ Shahadan, above n 151, at 76.

¹⁵⁹ Department of Statistics Malaysia, above n 3.

5. Employment and GDP

During the transition to EOI in the 1980s, “job security” was “not well entrenched in Malaysia.”¹⁶⁰ “The dominant strategy” was “to downsize the core labour force” in times of “economic downturns.”¹⁶¹ “Continuous improvement of production technologies...resulted in workforce reductions.”¹⁶² “Other labour shedding methods” included “retrenchment, re-contracting, contracting out, temporary shutdowns and use of temporary or casual employment.”¹⁶³ Contracting out or outsourcing arrangements came about notwithstanding Act 246 (1981). These are reflected in Figure 2 which shows that unemployment started to go up in 1982 and reached a peak of 7.4 per cent in 1986, and hovered between 7.3 per cent and 7.2 per cent in 1987 and 1988, respectively. The unemployment rate began to go down in 1989 after government’s announcement about the National Labour Policy and appointment of the National Economic Consultative Council¹⁶⁴ in line with the NEP’s philosophical underpinning of societal reordering. The unemployment rate started to increase again, from its lowest point of 2.4 per cent in 1997, during the Asian financial crisis. The global financial crisis also saw the rise in unemployment to a peak level (since 1995) of 3.7 per cent in 2009.

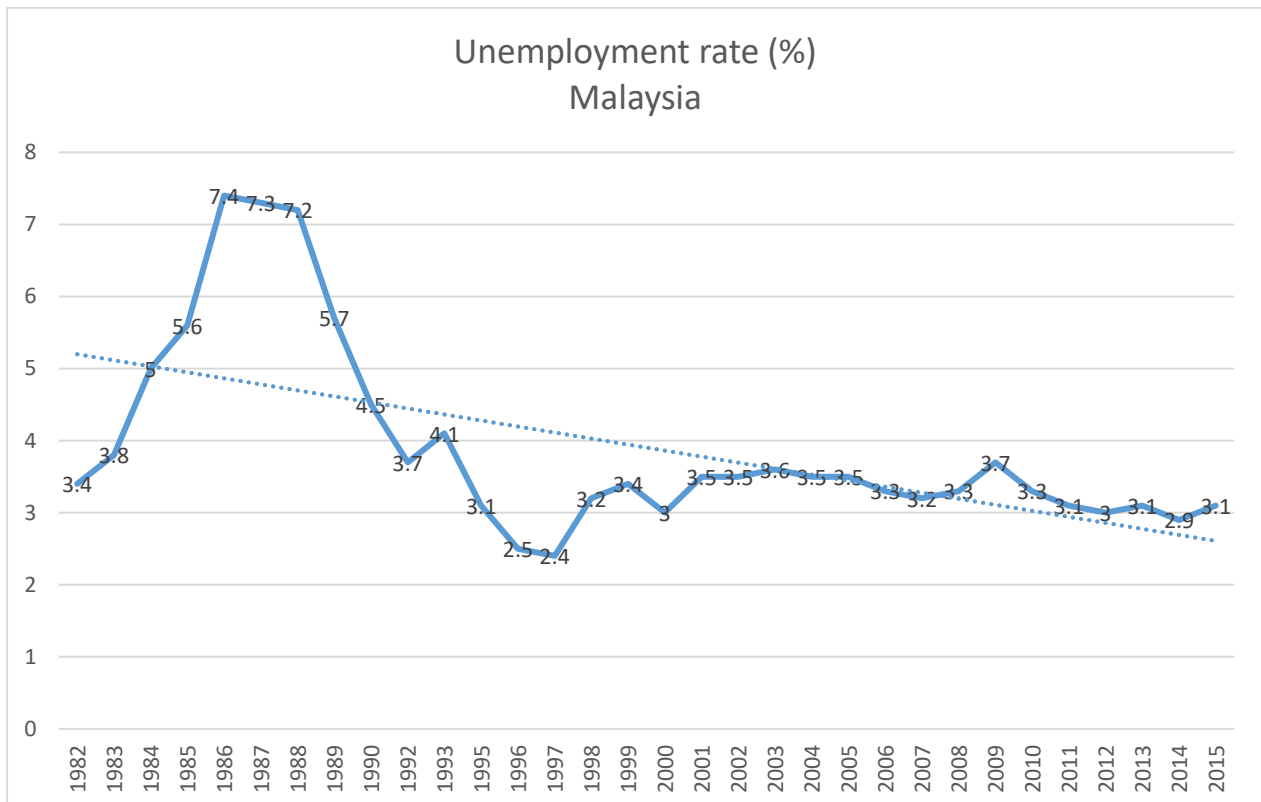


Figure 2: Unemployment rate in Malaysia
Source: Department of Statistics Malaysia¹⁶⁵

¹⁶⁰ Verma, Kochan and Lansbury, above n 8, at 346.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ See Ayadurai, above n 47, at 94.

¹⁶⁵ The line graph and trend line are based on data obtained from the Department of Statistics Malaysia, Official Portal
<https://www.dosm.gov.my/v1/index.php?r=column/ctimeseries&menu_id=NHJlaGc2Rlg4ZXlGTjh1SU1kaWY5UT09>.

While the policies discussed above have “resulted in increasing the economic participation of Malays”, i.e., “Malay share of *total* manufacturing employment increased to 32 per cent, while Malays in managerial positions rose to 17 per cent, and Malay share ownership increased to about 8 per cent...,” they did not meet “Malay nationalist expectations...”¹⁶⁶

Crinis and Parasuraman maintain that the shift:¹⁶⁷

...from import substitution to export-oriented production...generated employment for the large numbers of workers in the manufacturing and construction sectors and on palm oil estates. Although these jobs solved Malaysia’s unemployment problem, they did not meet the promises of the government to provide Malays with quality employment and a fair share of capital accumulation.

That is also why the strategy Vision 2020 has been adopted.¹⁶⁸ But instead of “...displacing labour-intensive manufacturing, this push towards higher-end production” has been “pursued in parallel, meeting demand for low-paid employment in low-end labour intensive industries” via “the importation of labour migrants and continuing to maintain social order through state repression.”¹⁶⁹ Overall, “foreign workers...have no legislative protections for the governance of their employment” and their “working conditions and wages are much lower than” those of “Malaysian workers.”¹⁷⁰

These notwithstanding, the trend line in Figure 2 suggests a general decline in unemployment which stood at 3.1 per cent by 2015. This is very close to Sir William Beveridge’s (1944) full employment definition of 3 per cent.¹⁷¹ And it is worth noting that services and industry have expanded over time. Table 1 shows the employment and GDP structures in Malaysia. While the services sector has the highest proportions in terms of employment and GDP, the industry sector has sizeable shares as well.

Malaysia	Agriculture (%)	Industry (%)	Services (%)
Employment	13	36	51
GDP	11	41	48

Table 1: Employment and GDP structures in Malaysia, 2010.

Source: Boquet (2017)¹⁷²

Changes to the Private Employment Agencies Act have been reported recently.¹⁷³ Notably, too, the Pakatan Harapan promised during the election campaign to achieve Vision 2020 along with controlling/reducing inflow of foreign workers, creating quality employment, increasing minimum wage, enhancing worker rights (including unionisation and collective bargaining),

¹⁶⁶ Kuruvilla and Arudsothy, above n 131, at 162.

¹⁶⁷ Crinis and Parasuraman, above n 45, at 218.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Verma, Kochan and Lansbury, above n 8, at 346.

¹⁷¹ William Beveridge *Full Employment in a Free Society: A Summary* (The New Statesman and Nation and Reynolds News, London, 1944) at 12

<https://library.lse.ac.uk/archives/beveridge/9A_79_Full_employment_in_a_free_society.pdf>.

¹⁷² Boquet, above n 2. See Table 8.2 Employment structure and GDP structure in selected Asian countries.

¹⁷³ “Government to enforce Private Employment Agencies (Amendment) Act 2017” *Malay Mail* (online ed, Kuala Lumpur, Malaysia, 6 January 2018).

and setting up an Equal Employment Opportunity Commission.¹⁷⁴ If the new government is able to follow through, these could bring about a paradigm shift in state regulation towards worker rights and voice. Of late, however, there have been proposals from the new government's advisers to review the "affirmative action measures" in the NEP,¹⁷⁵ the basic principles of which have been maintained in Vision 2020.¹⁷⁶ The proposed review purportedly aims to stimulate competitiveness.¹⁷⁷ Such review must remain consistent though with Malaysia's Federal Constitution that prescribes "reservation of quotas" for the Malays "to safeguard" their "special position".¹⁷⁸

Conclusion

Malaysian labour laws and varieties of capitalism are not necessarily "dichotomous variables that fill separate ontological vacuums."¹⁷⁹ While this exploratory research suggests that "entangled legal histories"¹⁸⁰ exist, there is also endogeneity that is largely state-led or -driven. The "trichotomy" of "indigenous law", "imported law" and "development law"¹⁸¹ is extant in the country's labour law system. The NEP might be deemed an aspect of "indigenous law", a "modern example"¹⁸² which has pre-colonial antecedents. It developed endogenously, persists over time and seems unique to Malaysia (legal endemism).¹⁸³ Being part of "top-down implementation of social change",¹⁸⁴ in many ways it involves "state help"¹⁸⁵ regulation. The imported traits of Malaysian labour law, as exemplified by the "state-help"¹⁸⁶ rules in the Employment Act, seem to have more civil law than common law elements. But the Employment Act is also developmentalist.

Facets of Asian, coordinated and liberal market economies have been present. The Asian style involving identity, solidarity and communitarianism is recognisable through work in the informal economy. Workers tend to "seek employment in the informal sector... 'out of necessity rather than choice'" via "home-based production," among others.¹⁸⁷ The coordinated approach is demonstrated by import substitution industrialisation while the liberal strategy is represented by export oriented industrialisation.

¹⁷⁴ "Buku Harapan Rebuilding our Nation Fulfilling our Hopes" <http://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf> at 11, 14, 69, 75, 76, 77, 78, 92, 112, 133, 134, 136, 137.

¹⁷⁵ C.K. Tan "Mahathir advisers propose review of Malay privileges to spur economy" *Nikkei Asian Review* (online ed, Japan, 20 August 2018).

¹⁷⁶ See Economic Planning Unit, Prime Minister's Department, Malaysia "Vision 2020, 1991-2020" <<http://www.epu.gov.my/en/development-policies/vision-2020>>.

¹⁷⁷ Tan, above n 175.

¹⁷⁸ Federal Constitution of Malaysia, Part XII <<http://www.wipo.int/edocs/lexdocs/laws/en/my/my063en.pdf>>.

¹⁷⁹ See Sale, above n 12, at ch 3; and see also Jonathan Sale "Exploring the possibility of harmonising ASEAN labour laws for employment growth through evidence-based mixed methods" (paper presented to Symposium on Evidence-Based Law and Practice, The University of Newcastle, 22 May 2017).

¹⁸⁰ See Duve, above n 16.

¹⁸¹ See Yasuda, above n 26, at 19, 20, 22-4, 42.

¹⁸² See Milner, above n 128.

¹⁸³ Sale, above n 12, at ch 2, 3.

¹⁸⁴ See Milner, above n 128.

¹⁸⁵ See Kohler, above n 12.

¹⁸⁶ Ibid.

¹⁸⁷ Shahadan, above n 151, at 57, 75.

These suggest as well that the Malaysian system's legal/economic pluralism and unemployment situation have a relationship which is influenced "by extensive State control guaranteeing a high level of managerial prerogative within the workplace".¹⁸⁸ The election win of the Pakatan Harapan might bear some repercussions to this in the light of its campaign promises. Will labour regulations swing in the opposite direction this time favouring worker rights and voice? While such a paradigm shift remains uncertain, still labour law changes by the State seem to be among the significant "external influences" to "labour market organisation"¹⁸⁹ and work creation in the case of Malaysia. To that extent, change and continuity can be plausibly anticipated.

In order to gain a more holistic perspective about the "internal boundaries"¹⁹⁰ of Malaysian labour laws, however, a closer look at the "self-help"¹⁹¹ rules in the Trade Unions Act and Industrial Relations Act, including their outcomes, is proper. Underemployment rates over time need to be examined, too. Moreover, Malaysian labour laws' epistemological assumptions, mode of legal thinking, sources, purpose, scope, organisation, function, residual law-making and enforcement are among the expanses demanding deeper study.

¹⁸⁸ See Patricia Todd and David Peetz "Malaysian Industrial Relations at Century's Turn: Vision 2020 or a Spectre of the Past?" (paper presented to Conference on Research on work, employment and Industrial Relations 2000, Association of Industrial Relations Academics Australia & New Zealand (AIRAANZ)) <<https://research-repository.griffith.edu.au/bitstream/handle/10072/1136/13951.pdf>>.

¹⁸⁹ See David Marsden *The End of Economic Man? Custom and Competition in Labour Markets* (Wheatsheaf Books Ltd, Great Britain, 1986) at 2-5.

¹⁹⁰ See Baranger, above n 86.

¹⁹¹ See Kohler, above n 12.

Transition of a Contract of Employment: from the *Locatio Conductio* to the *Relational Contract*

GYÖRGY KISS*

Abstract

This article presents the correlation between the economic background of a given era and legal regulation of labour. It aspires to answer the question: what legal construction most suits a current global economy. The author shows the effect of *locatio conductio* on the employment contract of today and offers three possible scenarios regarding future labour law. One such scenario is the maintenance of the current, traditional concept that strives to secure a balance between security of the employee and flexibility of employment. The second scenario entails possibilities provided by the so-called gig economy; it deconstructs almost all limitations provided by labour law and, at the same time, annuls the structure of labour law as it is today. The third scenario proposes an adaptation of a specific interpretation of long-term contract – relational contract – to labour law.

I. The evolution of the structure of traditional employment relationship

The purpose of this study is to analyse the connection between the changing economic requirements and the legal form of work done for others. The main question is: when is the connection between the law and the economy regarded as adequate and inadequate? The impact of the economy is extremely complex. Ultimately, the advancement of the economy determines the societal evaluation of work. For this reason, it is important to explore the philosophical and the political evaluation of work in the different ages. It seems necessary to give a short historical overview, although this method might be questionable. Some authors believe that labour law is a relatively young area of the law system, with new dogmatic basis; therefore, it is unnecessary to find its roots in the long history or, at most, it is sufficient to refer to its historical preliminaries with due criticism. This argument is in connection with the efforts concerning the autonomy of labour law.¹ However, the history of labour law justifies that labour law has not surpassed its ancient heritage – at least in a legal dogmatic sense. A good example of this is the appearance of a *locatio conductio* between jurisprudence and legislation in the 18th to 19th centuries. Another question is: in what age was the *locatio conductio* in line with the social and economic requirements?²

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¹ The dispute on the autonomy of labour law became more pronounced in German law after the creation of the BGB. See about the two opposite approaches Heinz Potthoff “Probleme des Arbeitsrechts” (Diederichs, Jena, 1912). Sinzheimer emphasised: “*Das Arbeitsrecht umfaßt ein sachliches und persönliches Element. Das sachliche Element ist die abhängige Arbeit. Das persönliche Element bilden die Arbeitnehmer.*” Hugo Sinzheimer “Grundzüge des Arbeitsrechts” (Jena, Fischer, 1927) 7-9. “Über Grundgedanken und die Möglichkeit eines Einheitsarbeitsrechts in Deutschland” [in *Arbeitsrecht und Rechtssoziologie*]. (1922 Frankfurt am Main, 1976 Europa Verlag)

² See the critique of pandectistic Paul Oertmann “Volkswirtschaftslehre des Corpus Juris Civilis” (Berlin, Prager, 1891) 75-79.

a. *Evaluation of work in ancient Greece*

The first area of this research is ancient Greece. First of all, it is to be emphasised that what we call ancient Greece was hardly a uniform structure, either politically or philosophically. It is sufficient to refer to the significant difference between Athens and Sparta. The notion of ‘work’ was synonymous with ‘slave-labour’, and the economic system was built on this form of working.³ However, it is necessary to analyse the activity of free persons and their attitude to work. In this respect, Hesiod’s paper ‘Works and Days’ is remarkable.⁴ Catharina Lies and Hugo Soly remark that this work “was not merely a condemnation of idleness, but also and especially a relentless encouragement of diligence”.⁵ Hesiod recognised that a society, and above all, an economy cannot be based on looting and pillaging. Nevertheless, the evaluation of the so-called ‘hard-work’ was not clearly positive. In the early periods, the significant majority of Athenians preferred to live a so-called contemplative life. At that time, farmers and artificers worked as self-supporters, or for direct barter trade. It was a so-called non-market economy, but some kind of competition between free persons was taking shape. Later, the activities of farmers, smiths and artificers were appreciated by society, however, traders did not enjoy such appreciation even though the economy of city-states would have collapsed without the trade sector, which contributed significantly to the development of law. Despite the increasing value of work, there was another factor hindering the evaluation of work, namely the political structure of city-states. While in Athens the most appreciated activity was participation in political life, in Sparta, military activity was considered most important. Both of these societies were deeply divided. The all-time elite stood above the average free persons, and the ‘oligarchic perspective’ established their inequality and immunity in Athens.⁶ The situation was similar regarding soldiers in Sparta.

Nevertheless, as far as the legal framework is concerned, contracts forms, on which the contractual system of Rome was based, were in place.⁷ While it is not possible to find a concrete, denominated contract, it is provable that, under this contract, the work was done by a free person, and paid for by the other party paid. It can be stated that this contract is likely to have been similar to a rental deal.⁸

b. *Inheritance of *locatio conductio operarum**

The dispute of unity versus diversity of the *locatio conductio* allows several conclusions to be drawn. It is important that the separated expressions (*rei*, *operarum*, and *operis*) were unknown.⁹ However, Mayer-Maly stated that the *locatio conductio* is a complex legal concept; it is far more than a terminological unit.¹⁰ Many authors stand for the position that the *locatio*

³ ‘Work as we know it is a modern invention’. See Catharina Lies and Hugo Soly “Worthy efforts: attitudes to work and workers in pre-industrial Europe” (Leiden – Boston, Brill, 2012) 13; (Referring André Gorz “Critique of economic Reason”, eng. transl. (London – New York, Verso, 1989) 14.

⁴ Hesiod: Works and Days, Trans. Martin, Litchfield West (Oxford, Oxford University Press, 1978)

⁵ Catharina Lies and Hugo Soly above n3, at 20.

⁶ Christian Meier “Griechische Arbeitsauffassungen in archaischer und klassiker Zeit. Praxis, Ideologie, Philosophie. Weitere Zusammenhang” [in Manfred Bierwisch ed. Die Rolle der Arbeit in verschiedenen Epochen und Kulturen (Berlin, Akademie Verlag, 2003) 19-76.

⁷ Herbert Applebaum “The concept of work, Ancient, Medieval and Modern” (New York, State University of New York Press, 1992), particularly 75.

⁸ See earlier Julius Georg Lautner: “Altbabylonische Personenmiete und Erntearbeitsverträge” (Leiden, Brill, 1936) 3. Lautner used the “Selbstvermietung” phrase.

⁹ See Fritz Schulz “Classical Roman law” (Oxford, University Press Oxford, 1951) 543.

¹⁰ Against the so-called “Einheitsfunktion” see Theo Mayer-Maly „Locatio Conductio” (Wien – München, Verlag Herold, 1956) 19.

conductio is both unified and fragmented.¹¹ Pókecz highlighted that it had been a false approach to focus on the unity or diversity of the *locatio conductio*. More importantly, it deals with any process when additional value is created by work.¹²

However, it is highlighted that the Roman economy cannot be interpreted the way we do nowadays. Schulz stated that slave labour was more important than the labour of free persons.¹³ According to Oertmann's analysis, the economic situation can be interpreted as goods produced by the slave were used by others for their own benefit. Consequently, this cannot be regarded as an overall benefit to society as a whole. The economy consisted of the isolated activities of individual people.¹⁴ From that, Schulz draws the conclusion that "classical law of hire was in harmony with these social and economical facts."¹⁵ Thus, the *locatio conductio* survived as long as the fabric of the society was changing in response to the influence of economic development. This change meant the decline of the classical contractual Roman law. Contract law did not continuously allow for the absence of abstraction. In later times, various legal transactions were probably used as legal expressions of work. Thus, we can refer to the *stipulatio* or *mancipatio* and the *iusiurandum liberti*.¹⁶

c. The status-relationships in the feudalistic society

At first sight, the significant features of the feudalistic society were the so-called status-relationships, instead of contracts. These relationships were weaved into all areas of life.¹⁷ The status relationship determined, in particular, the relationship between the liege and the serf. It is no accident that agriculture was generally a most valued activity in the Middle Ages "as the greatest wealth-producing" sector. The legal status of the person was not obtained on a contractual basis; they were born into this status. In the status relationship, reverse allocation was applied. The serf received no remuneration for their work, but was obliged to work for the land they used.¹⁸

Later, urban communities strengthened and, for this reason, society became polarised and the diversification of work began. Many kinds of work was based on contract, and the first elements of collective labour law, e.g. in mining, started to take shape. Nevertheless, the primitive labour-market was under rigid control.¹⁹ This control was either internal or external. Internal control was present in the organisation and operation of guilds. "The monopolistic logic behind the guild system thus dictated the type of vocational training which was provided in the form of strictly disciplined apprenticeship."²⁰ The monopolistic logic covered the market too. The strict regulation of apprenticeships and the artificial exclusion of market competition were the biggest barriers to development. External control was partially connected to the

¹¹ Armando Torrent "The controversy on the trichotomy 'res, operae, opus' and the origin of the 'locatio conductio'. *Revista Internacional de Derecho Romano*, (2012) 10, 396.; Vincenzo Arangio-Ruiz 'Istituzioni di diritto romano' (Napoli, Jovene, 1984) 235-240.

¹² Attila Pókecz Kovács "A munkavégzésre irányuló szerződések tipológiája a római jogban" (The typology of the so-called works contract in the roman law) *Tudományos Dialóg* 2000 22-25.

¹³ Schulz, Fritz above n9, at 544.

¹⁴ Paul Oertmann above n2, at 78-79.

¹⁵ Schulz, Fritz above n9, at 545.

¹⁶ Francesco de Robertis "I rapporto di lavoro nel diritto romano" (Roma, Zanichelli, 1967) 223.

¹⁷ See Herbert Summer Maine "Ancient law, its connections with the early history of society and its relation to modern ideas" (London, John Murray, 1908)

¹⁸ Werner Ogris "Geschichte des Arbeitsrechts vom Mittelalter bis in den 19. Jahrhundert" *Recht der Arbeit* (1967) 4, 86-289.

¹⁹ Bruno Veneziani "The evolution of the contract of employment" [in Bob Hepple (ed.) *The making of labour law in Europe*] (London – New York, Mansell, 1986) 32-33.

²⁰ Bruno Veneziani above n19, at 38.

guild's relationships. Many medieval cities governed the prices and wages against market requirements.²¹ These orders, rules and different 'work-books' meant a rigid restriction on the employee's freedom of contract – if it is possible to talk about contract and freedom in today's sense at all.

At all events, the contract became increasingly important in the determination of the legal status of domestic and agricultural servants.²² The status of domestic servants and agricultural servants show a duality. On the one hand, the *de facto* status is highlighted, namely: direct dependency, strict subordination and the unquestioned obedience. On the other hand, their work was based on 'contracts'. These contracts were concluded verbally. The servant did not contract their services for a certain work/job, but leased their own labour. In this sense, this contract was similar to the *locatio conductio operarum*.

It can be concluded that the different legal forms were in line with the social and economic circumstances and requirements. The *locatio conductio operarum* was a typical contract between free persons, but the *de facto* status of the *locator* did not differ much from the situation of the slave.²³ Later, the appearance of new contracts (*stipulatio, mancipatio, etc.*) reflected the need for changes, but it did not lead to a breakthrough. Obviously, these developments cannot be evaluated in a uniform way across different periods of the Middle Ages. But the so-called 'status' was an arrangement determined by society, not by a contractual relationship. At this point we should refer, again, to the famous sentence by Maine: "we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract."²⁴

II. The first breakpoint; the industrial revolution and the "mass-production economy" – the development of traditional structure of employment relationship

a. From status to contract

Status to contract meant the freedom of contract, or in other words, the principle of *laissez faire, laissez passer*. This principle "can be taken as the programme of economic liberalism."²⁵ Another famous sentence of this era is the following: "*Qui dit contractuel, dit juste*".²⁶ This was the period when the so-called free market emerged, inducing fundamental change in the economy. Development into a market economy was in progress. The guilds were banned²⁷ and, as a main principle, a contract was concluded between free and equal persons. The subordinated working person, previously in a 'status relation', gained a new legal position. They were no longer a 'servant', but a free employee.

²¹ Bruno Veneziani above n19, at 35; Catharina Lies and Hugo Soly above n3, at 222-276.

²² See James Rogers "Six centuries of work and wages; The history of English labour" (London, Sweet & Maxwell, 1894), 467-492.; Wilhelm Ebel, "Quellen und Geschichte des deutschen Arbeitsrechts" (Berlin, Duncker & Humblot, 1964); Henri Pirenne "A középkori gazdaság és társadalom története" (History of medieval economic and society) (Budapest, Gondolat, 1983)

²³ See a *se locare* and *operas suas locare* expressions.

²⁴ Henry Sumner Maine above n17

²⁵ "*Laissez faire, laissez aller, le monde va de lui-même*" See Thilo Ramm "*Laissez-faire* and state protection of workers" [in Bob Hepple (ed.), *The making of labour law in Europe*, (London – New York, Mansell, 1986) 72.

²⁶ See Louise Rolland «Qui dit contractuel, dit juste» (Fouillée) ...en trois petits bonds, à reculons" IXe Congrès de l'Association internationale de méthodologie juridique (Tunis, nov. 2005) Les principes généraux de droit.

²⁷ See Loi de Chapelier in France

However, in this context, it is necessary to interpret the notions of ‘equality’ and ‘freedom’. At this point it is worthwhile to refer to the Havighurst’s argument²⁸ regarding equality, he questions if the use of this word is appropriate. Equality may be interpreted in two ways, namely: ‘equality for the strong’ and ‘equality for the weak’. In his opinion:²⁹ “...contract in its wild anarchic state contributes to equality for the strong. When it is domesticated and subjected to law, it still shows traits that make for this kind of equality.”

As far as ‘freedom’ at that time is concerned, it meant the free decision to conclude and terminate a contract. The employee had little say in the determination of the content of the contract. For this reason:³⁰

...the history of the idea of the “contract of employment” can be seen as the history of a false aspiration. The promise of freedom of contract in the employment relationship was never fully achieved. The freedom of the worker in the labour market was impeded by his social condition – that is, by the status.

In this context, it is helpful to highlight Friedmann’s remark, that the law should not be sitting with folded arms and tolerate that the contract be a disguised form of the status.³¹

*b. The continued existence of **locatio conductio** in the legislation*

The principle of freedom of contract and the assumption of equality were important because these principles appeared at the level of legislation. The French Civil Code implemented these principles. The principle itself was new but the legal form remained unchanged as rent, *louage*. Veneziani draws attention to an important contradiction. In its original form, it was prohibited to apply the *locatio conductio* to life and living persons.³² But the construction of the rent was, nevertheless, implemented in the French Civil Code.³³ The substance of this solution was ‘*le contrat de louage de services*’. See Pothier’s statement: “*Contrat de louage de services ‘consensuel, synallagmatique et commutatif’ ...*”³⁴ A similar solution is found in German law, too. In this context, the approach of the pandectists is remarkable. Windscheid’s famous sentences reflect the essence of the solution: “*Die Mieth, welche den Gebrauch einer Sache zum Gegenstand hat, heißt Sachmieth; die Mieth welche den Gebrauch einer Arbeitskraft zum Gegenstand hat, heißt Dienstmieth.*”³⁵

The regulation based on the lease-theory received heavy criticism. Oertmann emphasised that an entirely new legal system, based on new principles, should have been established. Instead of this, the law took over, without criticism, the *locatio conductio*, which had been designed for a totally different social and economic environment.³⁶ It can be argued that no other

²⁸ Harold Havighurst “The nature of private contract” (Evanston, Illinois, Northwestern University Press, 1961)

²⁹ Harold Havighurst above n28, at 128-129.

³⁰ Bruno Veneziani above n19, at 70.

³¹ Wolfgang Friedmann “Law in the changing society” (London, Stewens & Sons, 1971) 122.

³² Bruno Veneziani above n19 at 41

³³ See Henry Guillaume Camerlynck “Traité de droit du travail” (Paris, Dalloz, 1968) 9-26.; Robert-Joseph Pothier “Traité des obligations” (Paris, Dalloz, 2011)

³⁴ Robert-Joseph Pothier above n33, Cit: Henry Guillaume Camerlynck above n33, at 2-12.

³⁵ Bernhard Windscheid – Theodor Kipp “Lehrbuch des Pandektenrechts” 9. Aufl. (Frankfurt, 1906, Band 2) § 399. About the pandectistic see Georg Friedrich Puchta “Lehrbuch der Pandekten” (Leipzig, Verlag von Ambrosius Barth, 1838) 630; Eduard Hölder “Pandekten – Allgemeine Lehren, mit Rücksicht auf den Civilgesetzentwurf” (Freiburg, Akademische Verlagsbuchhandlung, 1891) 404.

³⁶ Paul Oertmann, above n2, at 79.

contractual construction was available. Nevertheless, in connection with the draft of *Bürgerliches Gesetzbuch* (BGB), Gierke emphasised that the contract of employment was not a simple exchange contract. In his view, the contract of employment's substance is its 'personality and community' (*personenrechtliches Gemeinschaftsverhältnis*) character³⁷ under BGB § 611 "Durch den Dienstvertrag wird derjenige, welcher Dienste zusagt, zur Leistung der versprochenen Dienste, der andere Teil zur Gewährung der vereinbarten Vergütung verpflichtet. Gegenstand des Dienstvertrags können Dienste jeder Art sein." The basic question is the following: does the regulation of *Dienstvertrag* in itself represent a significant difference compared to '*Dienstmiete*'? Probably not. For this reason, it was necessary to regulate a particular kind of *Dienst*, namely the *Arbeitsvertrag*. BGB § 611a introduces additional elements to the *Dienstvertrag* that allow the regulation to be brought closer to reality.³⁸

c. *The subordination as **differentia specifica** of employment relationship*

The most important expressions in this text are '*weisungsgebundene, fremdbestimmte Arbeit*', '*persönliche Abhängigkeit*' and '*Weisungsrecht*'. Previously, it was quite an effort to justify why there was no subordination in certain types of work performed for other persons; while this was self-evident in employment relationship,³⁹ the task was far from simple. With the appearance and recognition of *Dienstvertrag*, it should have been reasonable to emphasise the equality of parties. However, all authors sought to justify the subordination of the employee, in various approaches. Despite the fact that the theory of economic and personal dependence had later been dismissed, Veneziani pointed out that freedom of employees – within the framework of contractual freedom – was not to become a reality on the labour market due to their social status.⁴⁰ Richardi has a noteworthy approach regarding the justification of subordination. He stated that the reason behind dependent work must be found in factors within law, and it is nothing else but the abstract definition of service. Whereas in the service contract and in the contract of assignment, the person rendering the service undertakes an obligation to perform a service which is limited by legal transaction. Under these obligations, the recipient of the service (customer, agent) does not have the option to obtain a ruling position over the person providing the service in the course of performance.⁴¹ Before going into the analysis of the consequences of an abstract definition of service in the contract, it is necessary to highlight that labour law is fundamentally the law of those who generally do not have the opportunity or skills to participate in the legal transaction as an independent party.

d. *The special features of the contract of employment*

The 'abstract definition of service in the contract' means that the contract of employment (*Arbeitsvertrag, contrat du travail*) is a so-called incomplete contract. The term of 'incomplete

³⁷ Otto Gierke "Der Entwurf eines Bürgerlichen Gesetzbuches und das deutsche Recht" (Leipzig, 1889) 245-246.

³⁸ BGB § 611a: "Durch den Arbeitsvertrag wird der Arbeitnehmer im Dienste eines anderen zur Leistung weisungsgebundener, fremdbestimmter Arbeit in persönlicher Abhängigkeit verpflichtet. Das Weisungsrecht kann Inhalt, Durchführung, Zeit und Ort der Tätigkeit betreffen. Weisungsgebunden ist, wer nicht im Wesentlichen frei seine Tätigkeit gestalten und seine Arbeitszeit bestimmen kann. Der Grad der persönlichen Abhängigkeit hängt dabei auch von der Eigenart der jeweiligen Tätigkeit ab."

³⁹ Richardi referred to the dependence of individual employees as the premise of labour law. "Die Abhängigkeit des einzelnen Arbeitnehmers ist der Grundtatbestand des Arbeitsrechts." Reinhard Richardi "Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses" (München, Beck, 1968) 1.

⁴⁰ Bruno Veneziani above n19, at 31-72.

⁴¹ See above n 38 about the *fremdbestimmte Arbeit*.

contract' does not originate in labour law⁴², but its interpretation, with regards to the evaluation of contract of employment as a long-term contract and as a 'relational contract', is very important. At this point, it is necessary to clarify that subordination and the incomplete character of the contract of employment together make the employee's protection necessary.

Added to this is the long-term nature of employment relationship. In other words, a correlation is detectable between an incomplete contract, legal subordination of an employee and long-term character of an employment relationship. Originally, the employment relationship was established for an indefinite period, with the purpose of providing full time. Thus, the contract of employment is interpretable as a manifestation of the long term contract, though the long-term character of employment relationship has a specific feature. As a starting point, we use Freedland's⁴³ standpoint on the nature of employment relationship whereby the employment relationship is a long-term legal one with multiple time levels, irrespective of whether it was established for an indefinite or fixed period. This, at the same time, determines the mutuality of rights and obligations. The first tier of the contract of employment is a kind of base tier, part of every contract established with the purpose of performing work, and relates to the present. This means that one party is obliged to perform certain work, while the other party is obliged to pay compensation for this work. It is apparent that this is not only part of the contract of employment, but also of business contracts, assignments, brokership, etc. However, Freedland emphasises that the contract of employment has an inherent promise for continued work and continued provision of work. Eventually, this mutual promise provides the stability of the employment relationship, which can be, in certain cases, crucial to the employer as well, but it is obviously the fundamental, vital interest of the employee.⁴⁴ Accordingly, the employment relationship has a so-called two-tiered structure; the essence of this is the employer's implicit promise for continued provision of work, which is manifested in legislation as an obligation for the provision of work.

What are the consequences of a long-term employment relationship in general? The long-term nature described above enforces certain characteristics in the dynamics of the legal relationship. In this respect, the most important element is the problem of foreseeability. Naturally, in this context, it is not the liability for damages, reasonably unforeseeable at the time of conclusion of the contract, which brings predictability into the focus, but the justification of altering the contract's future content.⁴⁵ The documents referred to primarily do not analyse predictability in respect of long-term contracts; and because liability is involved in this institution, predictability has a different interpretation here than in case of long-term contracts where the focus is not on liability for damages,⁴⁶ but on the assessment of circumstances that might facilitate the alteration of the content of the legal relationship, within certain limits.

⁴² Jean Tirole "Incomplete contracts: where do we stand?", *Econometrica* (1999) 4, 741-781.; Oliver Hart and John Moore "Incomplete contracts and ownership: Some new thoughts" <<https://scholar.harvard.edu/files/hart/files/incompletecontractsandownershippaer.pdf>> >.

⁴³ Mark Freedland „The contract of employment” (Oxford, Clarendon Press, 1976).

⁴⁴ *Ibid.*, at 19-21.

⁴⁵ The problems of predictability, in fact, did not arise in the relation to the contract and the legal relationship – that is, not in respect of the alterability of this legal relationship. Instead, predictability came into the forefront in the relation of unforeseeable events and damages occurring during contract performance. See: Convention on Contracts for the International Sale of Goods Section 74; The Principles of European Contract Law Article 9:503; UNIDROIT Principles Article 7.4.4.; Draft common Frame Reference III Section 7 III. – 3:703, and also CESL Art. 159-165.

⁴⁶ Just a few examples from the abundant literature on liability and foreseeability: Franco Ferrari "Comparative ruminations on the foreseeability of damages in contract law" *Louisiana Law Review*, (1992-1993) 4 1257-1269.; Ole Lando "Foreseeability and remoteness of damages in contract in the DCFR" *European Review of Private Law* (2009) 619-639.; Jeffrey M. Perloff "Breach of contract and foreseeability doctrine of Hadley & Baxendale" 10

The next question is, what are the consequences arising from the contractual content of the employment relationship? The essence of the problem is whether, in such circumstances, it is possible— or maybe more importantly, whether it is necessary at all – to define contractual content in a precise and detailed way. The idea of the incomplete contract primarily aims to prevent expenses which are unforeseeable at the time of performance. Periodic review is an essential feature of such contracts. This is when the parties must reconsider the mutual benefits deriving from the legal relationship.⁴⁷ Thus, long-term, incomplete contracts need periodic review (re-negotiation), also, because this ensures the safe sustainability of this type of legal relationships and, at the same time, the security of the parties' status.⁴⁸ Regarding the labour law aspects of incomplete contracts, it has been highlighted that there is an increasing number of professions or work types where advance predictability – as a requirement – is simply not feasible, it does not operate. Such unpredictability, along with pre-design, particularly based on it, has had and may still have diverse consequences even today. One such consequence is providing the opportunity of unilateral alteration of conditions of employment relationship by the employer.

III. The second breakpoint; the heterogeneity of work versus homogeneity of labour law

a. The tensions of traditional approach of employment relationship

The long-term character of an employment relationship and subordination of employee had an unexpected effect also. The regulation was based on the traditional characters of labour law, but employment had become more diverse in the meantime. The consequence of this was that many people sought the solution outside labour law.⁴⁹ The reasons of this trend were analysed in detail. It was clear that the macro-economic changes were not conducive to the traditional form of employment. The requirement of a change in labour law is formulated in the 'Lisbon Strategy' (LiS).⁵⁰ The document highlighted that the European Union (EU) "is confronted with a quantum shift resulting from globalisation and the challenges of a new knowledge-driven economy"⁵¹. The LiS evaluated the EU's strengths and weaknesses, and formulated the need to create "more and better jobs for Europe"⁵² and urged to begin discussions on an active employment policy.

The content of the Green Paper based on the LiS, and its purpose⁵³ "...is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs.

Journal of Legal Studies (1981) 39-64.; Edwin Peel "The Law of Contract" (13th Edition) (Sweet & Maxwell, London 2011) 3.

⁴⁷ Jean Tirole above n 42, at 741-781.

⁴⁸ Douglas Bernheim and Michael Whinston "Incomplete contracts and strategic ambiguity" (1999) *The American Economic Review* 9, 902.

⁴⁹ See the title of the conference in Zell am See (1987): *Flucht aus dem Arbeitsrecht* (Escape from the labour law). Summary of the conference see: Klaus Firley "Flucht aus dem Arbeitsrecht" (1987) *Das Recht der Arbeit*, 4-5, 271-289, 411-422.

⁵⁰ Lisbon European Council 23 and 24 March 2000 Presidency Conclusion.

⁵¹ LiS The new challenge, point 1.

⁵² *Ibid.* The way forward, point 5.

⁵³ Green Paper – Modernising labour law to meet the challenges of the 21st century; COM (2006) 3.

”The Green Paper stated that European labour markets face the challenge of “combining greater flexibility with the need to maximize security for all”⁵⁴. For this reason the Green Paper, amongst others, encourages the identifying the key challenges that have not yet yielded an adequate response. It also mirrors the clear gap between legal and contractual framework and the realities of the world of work. The paper seeks to encourage discussion on how different types of contractual relations, this, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions, assisting life-long learning and fostering the creativity of the whole workforce.

It is worth highlighting two elements in the latter quotation. One is ‘different types of contractual relations’ (*unterschiedliche Arten vertraglicher Beziehungen*), the other one is ‘labour market transitions’ (*Übergänge auf dem Arbeitsmarkt*). In this context, the Green Paper analysed the situation of labour law. It is emphasised that the original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship.⁵⁵ This evaluation of the document is correct. Labour law centered on the statement of the employee’s legal status, and built up its legal system from the traditional concept of an employee. This system consists of three elements, namely: the typical content of the contract of employment is establishing an employment relationship for an indefinite period; the exclusive causa of employment relationship is the contract of employment⁵⁶; and finally, the parties in the employment contract/relationship are one employer and one employee. Under the Green Paper, the “rapid technological progress, increased competition stemming from globalisation, changing consumer demand and significant growth of the services sector have shown the need for increased flexibility”.⁵⁷

b. New labour market policies – unilateral altering’s power of employer

The argument of the Green Paper is not without antecedents. The attempt to create a new labour-market policy has already begun; for example the Danish model of ‘flexicurity’,⁵⁸ the Biagi-reform in Italy,⁵⁹ and the Spanish labour law reform.⁶⁰ These solutions have many common features but, most important, for our topic, is the opportunity to modify the working conditions of the employment relationship, found particularly in the new Spanish regulation.⁶¹ These regulations are important from a certain respect. Namely, while the strengthening of the employer’s power to change the relationship did not have a legal basis, these rules were in favour and supported the efforts of the employer.

⁵⁴ Ibid. at 3.

⁵⁵ Ibid. at 5.

⁵⁶ The significant difference between employee and worker (*Arbeitnehmer und arbeitnehmerähnliche Personen*) see Guy Davidov “Who is a worker? (2005) *Industrial Law Journal*, 3, 57-71.; Nicole Neuvians, “Die arbeitnehmerähnliche Person” (Berlin, Duncker & Humblot, 2002)

⁵⁷ Green Paper above n53 at 5.

⁵⁸ See Kongshøj Madsen “The Danish modes of ‘flexicurity’ – A paradise with some snakes” Conference Paper was presented at the Annecy Conference on the Future of Work and Social Protection arranged by ILO and the French Government on 16-18 January 2002 in Lyon

⁵⁹ Michele Tiraboschi “The reform of the Italian labour market over the past ten years: a process of liberalization?” (2008) *Comparative Labor Law & Policy Journal*, 427-458.

⁶⁰ Federico Durán López “Spain’s post-reform labour market legal framework, SEFO Spanish Economic and Financial Outlook, 2015, May.; Javier Gómez Aballeira “The Spanish Labour Reform and the Courts: Employment Adjustment and the Search for Legal Certainty” (2012) *Spanish Labour and Employment Relations Journal*, 41-45.

⁶¹ Giménez, Daniel Toscani “La modificación unilateral de condiciones e trabajo por el empresario – Comentarios a la Ley 3/2012, de 7 de julio” (*El Derecho*, Madrid, 2014); Manuel Lague Perra and Anna Ginés “Modification of working conditions in Spain” (2014) *IUSLabor*, 3

What were the options available to employers? Comparative analyses confirm that the ability to alter the content of the employment relationship in the process of performance has become increasingly important. In this context, it is necessary to highlight that the sources of labour law are of diverse legal nature. These sources can generally be classified into legislative and contractual components. The complexity of the sources of labour law is highlighted by Adomeit, who also analysed the source system of law in terms of altering the content of the employment relationship. Employment relationships differ from other legal relationships because their content is determined and affected by various factors (*Bestimmungsgründe*).⁶² As far as contractual sources are concerned, the content of the contract of employment fundamentally determines the employer's possibility and power to alter. This is important to highlight, especially in today's unpredictable economic environment, because, behind the desire for unilateral, or quasi-unilateral changes to the employment relationship, there are the employer's economic interests. When the parties regulate the working conditions in the contract of employment in detail, these conditions can only be modified by an amendment of the contract. However, this is where the concept of the above mentioned incomplete contract comes into the picture. The contract of employment as an incomplete contract may entitle the employer or, for example, the collective agreement, to regulate the employer's power to change.

Thus, it is possible to change the working conditions without changing the employment contract. Such a distinction can be found in French labour law. Nevertheless, it can be stated that the contract needs to be amended in case of all events that can lead to changes in the essential content elements of the employment relationship.⁶³ The distinction between the content of the contract of employment and the employment relationship can also be observed in English labour law. The content of the employment relationship is fundamentally determined by two factors: the express terms laid down in the contract of employment, and the implied terms traditionally attached to it. The elements determining the content of the employment relationship are not included in the contract of employment but generally in the collective agreement. Naturally, the terms of the contract of employment are mutually binding by the parties, but the 'vital part of the contract'; more precisely the dynamics of the employment relationship is not provided for in this contract. Accordingly, the English employment relationship is referred to as an incomplete contract for a number of reasons.⁶⁴ The incomplete contract provides abundant room for the employer to exercise certain 'privileges'. A number of experts support the principle of managerial prerogative from the employer's perspective, with the argument that every long-term investment comes with risks. These investments are implemented through specific legal transactions; such is the contract of employment and its legal effect, the employment relationship. In this context, the following argumentation may apply to employment relationship as well. In case the content of a legal transaction that establishes a longer-term investment does not cover every detail, deriving from privileges based on property/ownership the investor has the right to unilateral altering, therefore the effectiveness of the business is guaranteed from the start.⁶⁵

The problem of changing working conditions (*Gestaltungsrecht*) is a focal area of German labour jurisprudence.⁶⁶ The employer's power to change is associated with the long-term

⁶² Klaus Adomeit "Rechtsquellenfragen im Arbeitsrecht" (München, C. H. Beck'sche, 1969) 5.

⁶³ These elements are mainly outside the employer's unilateral decision power concerning how work is performed. For further details see Paul-Henry Antonmattey "Les clauses du contrat du travail" (Rueil-Malmaison, Liaisons, 2009)

⁶⁴ Ann Pankhurst "Work effort under the incomplete contract of employment" (Cambridge, New Hall, 1988) 5-8.

⁶⁵ Oliver Hart, and John Moore above n 42

⁶⁶ Eduard Bötticher "Gestaltungsrecht und Unterwerfung im Privatrecht" (Berlin, Walter de Gruyter & Co., 1964); Ulrich Preis "Grundfragen der Vertragsgestaltung im Arbeitsrecht" (Neuwied, Luchterhand, 1993) 37-50, 51-85.;

character of the employment relationship and, consequently, with the uncertainty of the contractual promise (*Umbestimmtheit*).⁶⁷ But, the question is whether the employer's general right to conduct (*allgemeines Weisungsrecht*) could serve as a base for the employer's so-called extended right to discretion (*erweitertes Weisungsrecht*). The majority position in German literature assumes that the employer's general right to conduct could be extended through individual contracts. This would be allowed via a clause called *Versetzungsklausel* (*Versetzungsvorbehalt*) which would permit the employer to change the nature of the employee's job activities as well as their place of work. This would help to avoid frequent amendments to the contract of employment when there are changes in circumstances requiring significant modification in performance, and these changes only become evident after the conclusion of the contract. The subject of this, ultimately agreement-based, right to conduct reaches beyond an employee's obligation to contract performance, as it would also allow changes outside the contract, not specified in advance.⁶⁸ Mentzel refers to the fact that German law enforcement developed the limits of such right to conduct relatively early, stating that, although a general right to conduct might not exceed the contract, its extension by the contract of employment or by a collective agreement was permitted.⁶⁹ Recent legislation has also recognised this possibility, emphasising that the change, apart from being agreement-based, must be objectively grounded.⁷⁰

IV. A new approach to the long-terms contracts

a. Theory of relational contract

Contracts can be grouped into two general categories: short-term and long-term contracts.⁷¹ Many refer to the former as 'discrete transactions'.⁷² According to the evaluation by Macneil, such contracts are characterised by two general features: they are short and limited in scope.⁷³ The following are, not exclusively, the features of these exchange-type contracts. The transactional type generally involves fewer parties and able to be monetised in terms of its contents; from an economic perspective, it is a contract of exchange. The elapsed time between performance and then conclusion of the contract is short; contract performance generally does not require continuity. The contents of the agreement are clear; it is designed and worded for the present. The actual contents of the contract is complete, its design is also complex. The substance of the contract is the act of the exchange itself; its temporal dimension is 'presentation of the future'.⁷⁴ Consequently, the parties are fully bound to the plan, i.e. to the contents of the contracts concluded.

Walter Böttner "Das Direktionsrecht des Arbeitgebers" (Marburg, Elwert, 1971) Alfred Böker "Das Weisungsrecht des Arbeitgebers" (Frankfurt a. Main, Athäneum, 1971); Rolf Birk (Die arbeitsrechtliche Leitungsmacht (Köln, Carl Heymanns, 1973) 23-79.

⁶⁷ Thomas Mentzel "Die Änderung von Arbeitsbedingungen kraft Direktionsrecht oder im Wege voran konsentierter Änderungsverträge" (Hamburg, Verlag Dr. Kovač, 2003) 3-4

⁶⁸ Thomas, Mentzel above n 67, at 91-92.

⁶⁹ Ibid. at 163-180.

⁷⁰ See § 315 BGB „Bestimmung der Leistung durch eine Partei“;

⁷¹ Morten Hviid "Long-term contracts and relational contracts" Encyclopaedia, encyclo.findlaw.com/4200book, 46-47., Ian Roderick Macneil "The many futures of contracts" (1973-1974) Southern California Law Review, 691-816; "Essays on the nature of contract" (1978-1979) North Carolina Central Law Journal 159-200.

⁷² Ian Roderick Macneil "The many futures of contracts" above n 71, at 693.

⁷³ Ibid, at 720.

⁷⁴ Macneil's theory is that the term "presentation" plays an important role in the classification of contracts. "Presentation" is only a manner in which a person perceives the future's effect on the present; but it depends upon events outside the individual psyche, events viewed as determining the future. Presentation is, thus, a recognition that the course of the future is bound by present events, and, by those events, the future has, for many

In contrast, a so called 'relational contract' is not simply a contract of exchange. Further to the economic effects of the contract, there are other factors not of an economic but basically of social nature. A large part of these contracts cannot be, or is difficult to monetise. Relational contracts are long-term, and do not terminate when one or two obligations are met. Macneil highlights that individuals entering into such relations so do gradually, in some cases, starting with their birth and the contract ends with their death. The substance of relational contracts is continuous planning. While transactional contracts have the nature of 'presentation of the future', the relational contracts is "futurizing of the present".⁷⁵

However, is every long-term contract is also a relational contract? The dilemma of long-term contracts, according to Baird, is the "need to fix responsibilities at the outset and the need to readjust them over time permeates the long-term contractual relationship"⁷⁶. The first one means loyalty to the contractual obligation, while the second means the flexible adjustment of the contract to the circumstances that have changed or will change in the future.⁷⁷ Hviid emphasises that this 'tension' is observed both in cases of long-term and relational contracts. According to this, there would be two contract types, "although closely related, neither is a subset of the other."⁷⁸ Goetz and Scott emphasise that relational contracts "encompass most generic agency relationships, including distributorships, franchises, joint ventures, and employment contracts."⁷⁹ At the same time, the author draws attention to the fact that the concepts of simple long-term contract and relational contract are often intermixed. Their standpoint is that classic contingent contracts need to be distinguished from and relational contracts.⁸⁰

However, the contract of employment does not paint a sophisticated picture While the contract of employment can, without a doubt, be evaluated as an incomplete contract, the following statement is true for the contract of employment: "relational contracts also require more creative control mechanisms than conventional contingent contracts do."⁸¹ The authors of this paper have detected an important difference between the 'traditional' relational contract and the contract of employment. The parties of a relational contract want to maintain this relationship and, because of the invested financial and intellectual property, they seek to avoid ceasing the contract. In other words, the parties have become a so-called 'forced-community'. This does not apply to the contract of employment.

b. Contract of employment as a relational contract

Bird clearly states that "employment is a relational contract",⁸² however, the emphasis that "employment relations immediately transcend wage-for-services exchanges and develop into complex whole person relationships based upon trust, commitment, and shared solidarity"⁸³ Reveals that the interpretation is also multifaceted. He is of the opinion that "one-third of employees work without a contract referencing discharge laws; work norms influence virtually

purposes, been brought effectively into the present.' Ian Roderick Macneil "Restatement (second) of contracts and presentation" (1974) Virginia Law Review, 589.

⁷⁵ See Ian Roderick Macneil "The many futures of contracts" above n 71, at 738-740.

⁷⁶ Douglas Baird "Self-interest and cooperation in long-term contracts" (1990) The Journal of Legal Studies 586.

⁷⁷ Ibid. at 586.

⁷⁸ Morten Hviid above n 71, at 46.

⁷⁹ Charles J. Goetz and Robert E. Scott "Principles of relational contract" (1981) Virginia Law Review 1091.

⁸⁰ Similar Morten Hviid above n 71, at 46

⁸¹ Charles J. Goetz and Robert E. Scott above n 79, at 1093.

⁸² Robert C. Bird "Employment as relational contract" (2005) U. Pa. Journal of Labour and Employment Law 215.

⁸³ Ibid. at 209.

all employees present in a workplace”.⁸⁴ He describes in detail the similarities between the contract of employment and the relational contract, but points out a significant difference: the subordination of the employee. Nevertheless, his conclusion is as follows:

Relational contracts represent the dominant bargain between employer and employee. An enforceable relational contract, based upon well-established sources of culture, credo, and expectation, is an accurate representation of what the parties intend in the employment context.⁸⁵

In the English literature, this connection was addressed by Brodie.⁸⁶ He points out that the employment relationship has multiple forms, and more than one of these, such as certain atypical forms of employment, allow the employer to bypass basic employee protection rights. Concerning the traditional contract of employment, it is doubtless that

the implied term of mutual trust and confidence is much more wide ranging but, in all probability, would not extend to requiring an alteration of the parties’ obligations in the light of radically changed circumstances’⁸⁷

Apparently, Brodie refers here to unilateral changes, to which the employee is not obliged to consent, however. It is important to note that, further on, the duty of trust and confidence could not be used to render the original content of the contract meaningless.⁸⁸

Undoubtedly, Macneil’s criteria are clear in his own system. At the same time, the content of the contract of employment has evolved in a different direction from that of the values represented by Macneil’s theory of contract.⁸⁹ Consequently, the adaptation of the criteria of relational contract to the contract of employment is doubtful. Brodie draws attention to the fact that the commercial contract and the employment contract exist in two different areas. The employee is not in a competitive position in their own environment, they are unable to easily convert a contractual partner, i.e. their possibility to conclude a new contract is minimal.

V. Limits of unilateral changing of the content of employment relationship – regulatory environment

An essential purpose of labour law regulation is safeguarding the employee’s legal status, referred to as status protection. Due to expected problems arising from the long-term nature of the employment relationship and the dominant position of the employer, the contract of employment – in the majority of cases – contains predefined conditions.⁹⁰ However, if these conditions evolved as a result of implied terms, they might allow the employee abundant opportunity for changes.⁹¹ Therefore, the contract of employment can easily show the features

⁸⁴ Ibid. at 215.

⁸⁵ Robert C. Bird above n 82, at 206.

⁸⁶ Douglas Brodie “How relational is the employment contract?”(2011) *Industrial Law Journal* 236.

⁸⁷ Ibid. at 238.

⁸⁸ Ibid. at 236.

⁸⁹ In this context see *State of South Australia v McDonald* [2009] SASC 219. The following argument can be found in this decision: “The development of the implied term can be seen as consistent with the contemporary view of the employment relationship as involving elements of common interest and partnership, rather than of conflict and subordination”.

⁹⁰ Martin Henssler and Wilhelm Moll “AGB-kontrolle vorformulierter Arbeitsbedingungen” (München, C. H. Beck’sche, 2011); Jens Suckow (et al) “Der vorformulierte Arbeitsvertrag” (Köln, Luchterhand, 2011)

⁹¹ Ian Smith and Nicolaus Randall “Contract actions in modern employment law: Developments and issues” (London, Butterworths, 2002) 29-96.; Catherine Barnard “Reconsidering the mechanism to regulate working conditions in the light of diversified and individualised employees and the declining labour unions”

of the general conditions of contract. Accordingly, the content elements of the contract of employment must be flexible and adaptable. As a consequence, a general condition applicable to the contract of employment may include an employer's unilateral right to contract changes, and reference to the collective agreement (or work council's agreement).

When altering the content of the employment relationship, the crucial factor is content control, which has multiple levels. The first immanent level lies within the contract itself; this derives from the fact that the basis of entitlement to unilateral altering power is also rooted in the contract. Content control of the contract is fundamental at this level.⁹²

The second level of control should be provided by labour law regulation. The requirement of equitable assessment has relevance in this respect. Section 315 of BGB applies to the modification of the content of the employment relationship as well as to control of this modification. If the employer's altering power derives from the contract of employment, while referring to the reservation by Birk on contractual entitlement,⁹³ we do not refer to control of the content but of equitable assessment.⁹⁴

The next phase of the regulatory environment is connecting the alteration of the content of the employment relationship and termination of the employment relationship. In this respect, the regulation of so-called *Änderungskündigung* is remarkable.⁹⁵ The precise determination of the condition of termination by the employer can create a balance between the altering power of employment and the protection of the employee.

VI. Conclusion

a. Contract of employment as a relational contract – prerequisites

Despite the fact that – in a contract of employment – the parties are not reunited community interests as in the case of a relational contract, it may also become necessary to maintain the employment relationship in changing circumstances. This can be ensured by the employer's unilateral, or more precisely 'quasi' unilateral, power to alter.

Labour law regulation should be based on the principle of the contract. Consequently, unless otherwise provided in the labour regulation, the principle of civil law and provisions of the

http://www.jil.go.jp/english/events/documents/ells04_barnard1.pdf, 51-58.; Hugh Collins "Regulating the employment relation for competitiveness" (2001) *Industrial Law Journal* 17-47.; Wolfgang Grobecker "Implied terms und Treu und Glauben" (Berlin, Duncker & Humblot, 1999) 231-256.

⁹² See as comparison Dorothea König "Die Inhaltskontrolle von Arbeitsverträgen in Deutschland, England und Frankreich" (Freiburg, Rombach, 2010), and further Loraine Watson "Employees and the Unfair Contract Terms Act" *Industrial Law Journal*, (1995) 4, 323-336.; Mark Freedland, "The personal employment contract" Oxford, Oxford University Press, 2003) 190-192.

⁹³ In any case, it is worth considering Birk's remark asserting that the altering and concretising power of the employer had been fundamentally adopted on the basis of unwritten law and judicature – also as a consequence of legal history experience. Rolf Birk above n 66-n 77.

⁹⁴ Rolf Birk above n 66, at 55-56.; Gerrick von Hoyningen-Huene "Die Billigkeit im Arbeitsrecht" (München, C.H. Beck, 1978) 47-85, 128-172.; Hugh Collins – Keith D. Ewing – Aileen McColgan "Labour Law" (Cambridge, Cambridge University Press, 2012) 765-799.; In connection with control of discretion, see the reasonable test Douglas Brodie "The contract of employment" (Edinburgh, W. Green & Son Ltd., 2008) 87-91.

⁹⁵ See Franz X. Wallner „Die Änderungskündigung" (München, C.H.Beck, 2005); Jens Jüttner "Der Vorrang der Änderungskündigung vor Beendigungskündigung" (Baden-Baden, Nomos, 2010); Günther Löschnigg (Hrsg) "Die Kündigung aus wirtschaftlichen Gründen und ihre Beschränkungen im internationalen Vergleich" (Wien, OGB Verlag, 2008)

Civil Codes are to be applied. This problem has been raised mainly in continental law. Nevertheless, the application of the rules of civil law does not depend on whether or not there is codified legislation. However, this solution has strict conditions. In this context, a good example is the German draft on contract of employment.⁹⁶

An employer's entitlement to unilaterally alter the content of employment relationship should be based on the contract of employment or collective agreement. As far as the entitlement of the employer is concerned, this would be better regulated in the collective agreement, because it is only in this way that balance between the parties can be assumed. However, this solution requires clarification of the relationship between contract of employment and collective agreement. In this respect, it is important that the collective agreement has a more significant role.⁹⁷

Control of the contract of employment and of the collective agreement is needed especially in cases when, upon entitlement by contract, one of the parties can alter the content of the legal relationship. This control is equally applicable to the employment contract and the collective agreement. The control has to designate the content and the limitation of the contractual entitlement on the basis of regulation of the general conditions.

Special protection is necessary against dismissal for economic reasons. It is safe to say that dismissal for economic reasons within EU Member States is generally considered an ultima ratio option, preceded by appropriate measures. Naturally, this applies to dismissal due to changes in the employer's economic circumstances, and is shown in a number of cases of facts, institutions and procedures in each state. In this respect, in French labour law it is worth noting how the altering of content of the employment relationship due to economic reasons (*modification du contrat de travail pour motif économique*) is connected to termination, due to the same *licenciement pour motif économique*)⁹⁸, which could refer to the principles of unfair labour practice as it is known in English law, in particular, the institutions of prohibition of unfair dismissal and the right to justified dismissal.⁹⁹ Finally, the German system for protection of dismissal needs to be mentioned here which, apart from *Änderungskündigung* mentioned above, introduced multiple restrictions to protect the employee.¹⁰⁰

The role of collective labour law should be strengthened. A function of collective labour law is to establish a balance between the parties. The labour law cannot be imagined without the correlative unit of individual and collective labour law. The collective part of labour law plays an important role in the development of the EU labour law, although their impact in Central European countries is still low in our days.

b. Possible versions of future labour law

⁹⁶ See, Diskussionsentwurf eines Arbeitsvertragsgesetzes (ArbVG) 2. Fassung – Stand: August 2006. Bertelsmann Stiftung; The Section 1 of this draft stated the following: “Das Arbeitsverhältnis wird durch Vertrag begründet. Soweit dieses Gesetz nichts anderes bestimmt, gelten die Bestimmungen des Bürgerlichen Gesetzbuches. (Unless otherwise provided in this Act, the provisions of the Civil Code shall apply.) Martin Henssler, and Ulrich Preis “Entwurf eines Arbeitsvertragsgesetzes” (München, Beck, 2015)

⁹⁷ About the voluntary/contractual sources see Simon Deakin and Gillian S. Morris “Labour Law” London, Butterworths, 1989), 75-80.

⁹⁸ Jean Pélissier – Alain Supiot, – Antoine Jeammaud “Droit du travail” (Paris, Dalloz, 2006) 461-468.; Françoise Favennec-Héry “Modification du contrat de travail: le glissement de l’objectif vers le subjectif” (2003) *Revue de jurisprudence sociale*, 6, 459–465.

⁹⁹ Hugh Collins – Keith D. Ewing – Aileen McColgan above n 94, at 800-854.

¹⁰⁰ See Gerrick von Hoyningen-Huene „Kündigungsschutzgesetz” München C.H. Beck, 1992); Ulrich Preis “Prinzipien des Kündigungsrechts bei Arbeitsverhältnissen” (München, C.H. Beck, 1993)

In summary, the following may be laid down. The labour reforms so far have been implemented under the influence of state intervention. The legislator generally took into account the lawfulness of the contract law, however, flexibility aspirations favoured the ‘equality of the strong’.¹⁰¹ Furthermore, the success of reforms always depends on the state of the economy. For these reasons it should be asked: does the current legal construction of labour law meet the economic requirements? There are several signs that it does not.

One possible road to take is to keep the current system, to limit the content of traditional *locatio conductio* within the framework of strict social restrictions. It is apparent that, despite all efforts, this version pushes the boundaries of traditional labour law; controlled flexibility approach and various active labour market policy measures have not rendered results.

Another possible road leads to total freedom of employment and provision of employment.¹⁰² This version almost completely annuls the current system of labour law. Its reality is, indeed, evident with regard to the emergence and spreading of new methods of employment as well as provision of employment. This started with the appearance of the so-called *crowdsourcing* where certain groups of employees saw a chance for themselves to become a factor to regulate economic movements or at least a chance to participate more actively in processes concerning them.¹⁰³ Visibly, the legal practice tries to manage employment by digital platforms within the framework of traditional labour law institutions.¹⁰⁴ It remains to be seen how successful this approach is.

The third road is the adaptation of the *relational contract* to employment contract. The interpretation of contract of employment as a relational contract has received many criticisms. Nevertheless, this interpretation and implementation to the praxis is not necessarily to be rejected. This idea is based on the contract itself.¹⁰⁵ This contract, however, is a lot more than a mere agreement of exchange. In this context, the legislation only creates conditions and protects against abuses.

¹⁰¹ See Harold Havighurst above n 28 at 127-129.

¹⁰² One of the symptoms is the employment by the digital platform. See Jeremias Prassl and Martin Risak “Uber, TaskRabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork” (2017) *Comparative Labor Law & Policy Journal* 3. 619-652; Miriam A. Cherry “Beyond Misclassification: The Digital Transformation of Work” (2016) *Comparative Labor Law & Policy Journal* 10 577-603; Valerio de Stefano “Introduction: Crowdsourcing, The Gig Economy, And the Law” (2017) *Comparative Labor Law & Policy Journal* 10, 461-470.

¹⁰³ See Prassl, Jeremias – Risak, Martin: Uber, TaskRabbit, & Co: Platform as Employers? Rethinking the Legal Analysis of Crowdwork. *Comparative Labour Law & Policy Journal*, 2016/3. 619.

¹⁰⁴ See C-437/15. *Asociación Profesional Elite Taxi v. Uber System Spain SL*, 48.

¹⁰⁵ In this context see Ian Roderick Macneil “The new social contract” (Yale University Press, New Haven and London, 1979)