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Introduction

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

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

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

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

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

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

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

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

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

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A Human Right to Collective Bargaining?

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Abstract

The human rights discourse provides a strong framework for argumentation, on both a moral and a legal ground. Yet, the political gulf between human rights and work rights has yet to be fully bridged, leaving two camps with similar aims struggling independently of one another. What hope is that in the New Zealand context this gulf might be bridged, and what can we learn from other jurisdictions' struggles to reify a human right to collective bargaining?

Keywords: employment law, human rights, collective bargaining, freedom of association

1. Introduction

The industrial relations framework and employment law framework in New Zealand has been subject to massive upheaval in the past 30 years. In 1983, New Zealand labour law included compulsory unionism, national awards, compulsory arbitration in many sectors and differing legal frameworks for the public and private sector. In less than a decade, the pendulum had swung far in the opposite direction toward a system based on enterprise bargaining and individual contracts with little scope for the exercise of collective rights. As union density fell, the workers' share of national income dropped, and productivity gains have foundered. The Employment Relations Act 2000 (ER') strengthened the framework for collective bargaining and union rights, but failed to rebuild unionism in a tangible sense. Legislative clawbacks since 2008 have chipped away at this scheme, little-by-little undermining collective (and individual) workers' rights.

Compared with this swinging pendulum, the one progression of human rights law and policy appears more orderly. While the *kind* of human rights promoted by governments is politically determined, governments are, by and large, obliged to realise rights *progressively*, making it more difficult to wind back protective measures instituted by a particular government.

This paper assesses the potential for protecting collective bargaining through its recognition as a human right. Part 2 reviews some of New Zealand's international obligations with regard to the right to freedom of association. Part 3 will outline New Zealand's human rights framework, the presumption of consistency, and the current New Zealand position on the right to collective bargaining. Part 4 will look at recent jurisprudence from Canada, Europe and the UK, which has interpreted that right to include a right to collective bargaining. Part 5 will look at how legal acceptance of a human right to collective bargaining may have influenced the passage of the Employment Relations (Film Production Work) Amendment Act 2010 (the so-called Hobbit law), and assess the scope for deepening that right.

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2. The right of freedom of association at international law

The 1948 Universal Declaration of Human Rights (UDHR) contains numerous connections to the world of work, including freedom from slavery, child labour and discrimination at work. Art 22(3) provides: “Everyone has the right to form and join trade unions for the protection of his interests”¹ and art 20(1) provides: “Everyone has the right to freedom of peaceful assembly and association”. Although collective bargaining itself is not included in the UDHR, commentators have remarked that “it seems clear that the framers intended that it be included as a prime aspect of freedom of association”.²

In 1966, two legal documents – the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Cultural and Social Rights (ICESCR) – gave effect to those rights. These were separated to account for the ideological difference of UN member states during the Cold War, with western capitalist democracies emphasising civil and political rights (CPR), and socialist countries favouring economic, social and cultural rights (ESCR). Both justified their political commitments with reference to the purported universality of their position.³

Both instruments contain obligations regarding the right to freedom of association. Art 22 of the ICCPR, substantially, restates the protections in the UDHR and recognises the primacy of ILO Convention C87 Concerning Freedom of Association and the Right to Organise in this area. No specific mention is made of collective bargaining or the right to strike. Art 22 reads:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The ICESCR is more expansive in relation to work rights. Art 6 requires state parties to recognise and facilitate the right to work, and art 7 is more prescriptive, requiring fair and equal

¹ Roth notes that the UDHR was adopted by the United Nations a few months after C87 was adopted by the ILO and art 22(4) was based on C87 in Paul Roth (2000) (New Zealand’s international treaty obligations and the ERA NZLS *Employment Law Conference* 23-24 November 2000 65)

² Roy J Adams “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008) 12. *Just Labour* 48, at 49.

³ For an interesting comparison of the two instruments see Margaret Bedggood “Economic Social and Cultural Rights: The International Background” and Karen Meikle “Economic, Social and Cultural Rights Protection in New Zealand- an overview” both in Margaret Bedggood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011). Meikle notes at 40 that New Zealand was not part of the ‘Western consensus’ attaching different importance to ESCR and CPR

remuneration, safe and healthy working conditions, equal promotional opportunities and reasonable restrictions on working hours. Art 8 takes a prescriptive approach to trade union rights, explicitly mentioning the ILO Conventions on freedom of association:

1. The States Parties to the present Covenant undertake to ensure:
 - a. The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - b. The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
 - c. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - d. The right to strike, provided that it is exercised in conformity with the laws of the particular country. ...
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

New Zealand has ratified both the ICCPR and the ICESCR, and has ratified the Optional Protocol to ICCPR, meaning non-compliance with ICCPR rights may allow direct complaints to the Human Rights Committee in the case of serious breaches. Before this action is available, applicants must (among other things) demonstrate they have exhausted all possible internal appeals procedures. New Zealand has signed the Optional Protocol for ICESCR (in 2008) but is yet to ratify it. While both ICCPR and ICESCR are binding on our legislature, there is no international legal complaints mechanism that may be triggered by non-compliance with the norms contained in ICESCR.

While the ICESCR rights regarding work may provide greater scope, the ICCPR requires more immediate implementation. The ICCPR is said to be “self-executing”,⁴ while the ICESCR requires state parties to take steps to “achieve progressively the full realisation” of rights, key to which is the avoidance of retrogression where possible. Opie notes this imposes an obligation not to take unjustifiable retrogressive measures – they must be determined by law, compatible with the nature of the right and promote the general welfare in a democratic society.⁵ According to Adams:⁶

The UN’s covenant oversight committees [the Human Rights Committee and the Committee on

⁵ Joss Opie “A case for including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43(3) VUWLR 471, at 474.

⁶ Adams, above n 2, at 51.

Economic, Social and Cultural Rights] have handed down decisions making it clear that both of the core covenants do, in fact, protect the right to bargain collectively as an inherent and inseparable aspect of freedom of association.... From the perspective of the international human rights community, collective bargaining is both an economic right and a civil right.

On ratification, the New Zealand government placed and has maintained identically worded reservations on art 22 of the ICCPR and art 8 of the ICESCR as follows:

The Government of New Zealand reserves the right not [to] apply article [8 or 22] to the extent that existing legislative measures, enacted to ensure effective trade union representation and encourage orderly industrial relations, may not be fully compatible with that article.

This does not constitute a blanket “opt out” of the rights, but only a restriction to “ensure effective trade union representation” or “to encourage orderly industrial relations”.⁷ Further, the reservation applied only to “existing legislative measures” in 1978. The changes to the employment law framework have removed these restrictions. As Gault J noted in *Eketone v Alliance Textiles (NZ) Ltd*⁸ with the passage of the Employment Contracts Act 1991 “there no longer appears disconformity between these international instruments and New Zealand’s domestic law”.

3. The New Zealand Human Rights Framework

3.1 The New Zealand Bill of Rights Act 1990

New Zealand’s dualist legal system requires legislation to give effect to international law and make it binding at a statutory level. This position is qualified by both statute and by common law.

The rights set out in the New Zealand Bill of Rights Act 1990 (BORA) are largely CPR drawn from the ICCPR, with one of the Act’s two objects being to affirm those obligations.⁹ Section 17 guarantees the right to freedom of association.

While the BORA is not supreme law, its effect on law making has been profound. The architect of the Act, Sir Geoffrey Palmer, suggests that it has been “a set of navigation lights for the whole of government to observe”.¹⁰ *MOT v NOT*¹¹ established the process for testing the consistency of existing enactments with the BORA. First, s5 states that those rights may be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, while s6 states that where possible meanings consistent with those rights “shall be preferred to any other meaning”. Then s4 must be taken into account, stating that no provision shall be “impliedly repealed or revoked, or to be in any way invalid or ineffective” and courts cannot decline to apply provisions by reason only of their inconsistency.

⁷ The reservation originally related to compulsory industry-based union membership for the purposes of award coverage and to restrictions on minimum union size. These were also expressed as reasons for the original non-ratification of ILO C87 and C98. See (6 April 1995) 49 NZPD.

⁸ *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783, 794-795 (CA).

⁹ Opie, above n 5, concisely traces the legislative history of the New Zealand Bill of Rights Act 1990 and the policy rationale for the exclusion of ESCR. He effectively rebuts many of the arguments against the inclusion of these rights.

¹⁰ Geoffrey Palmer “The Bill of Rights Fifteen Years on” (keynote speech presented to the Ministry of Justice Symposium on the New Zealand Bill of Rights Act 1990, Wellington, February 2006) at [38].

¹¹ *Ministry of Transport v Noort* [1992] 3 NZLR 260.

The rights set out in the BORA are justiciable. As Opie notes:¹²

As well as having jurisdiction to award damages for breach of those rights and other remedies such as declarations, the courts may indicate that an ordinary enactment is inconsistent with the [New Zealand Bill of Rights Act 1990]. Such an indication does not require Parliament to remedy the inconsistency or give rise to a right to relief, but may be seen as imposing an obligation (of a political or moral nature) on Parliament to reconsider the legislation in question and justify any decision not to rectify it.

Proceedings under the Human Rights Act 1993 (HRA) may also be brought before the Human Rights Review Tribunal (HRRT) alleging that a public act, omission or enactment is inconsistent with the [New Zealand Bill of Rights Act 1990]'s right to freedom from discrimination. If the HRRT finds an inconsistency, it may grant various remedies including damages (other than when the inconsistency arises as a result of an enactment). In the case of an enactment, the HRRT may only make a declaration of inconsistency. Such a declaration does not bind the Government, but the declaration must be reported to Parliament, along with advice on how the Government intends to respond to the declaration.

The right to freedom of association alone is little help in establishing a right to collective bargaining. Indeed, the Employment Contracts Act 1991 (ECA), passed soon after the BORA, effectively defined the right of freedom of association as the freedom *not* to associate, establishing that “[e]mployees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees collective employment interest”.¹³

The ECA influenced the way the right to freedom of association was understood, implicitly establishing an individualised right. Industry-wide bargaining was replaced with enterprise bargaining, radically increasing the workloads of trade unions while isolating workers on different sites from one another. The right to freedom of association and the possibility of establishing a right to collective bargaining have since dwelled in the shadow of this individual interpretation.

3.2 *The presumption of consistency*

In instances of ambiguity, the courts will seek to interpret legislation in a manner consistent with New Zealand's international obligations. As Richardson P observed in *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)*:¹⁴

The well settled approach of the Courts of New Zealand [is as] expressed, for example, in *Governor of Pitcairn and Associated Islands v Sutton* [1994] 2 ERNZ 492, 500; [1995] 1 NZLR 426, 433 (CA), as it happens an employment case: “Subject to any New Zealand legislation and consideration of any special local circumstances, the Courts of New Zealand will always seek to develop and interpret our laws in accordance with generally accepted international rules and to accord with New Zealand's international obligations”.

In the case of international human rights treaties this presumption may be even stronger. In *Kelly v Tranz Rail Ltd*, Chief Judge Goddard noted:¹⁵

In [*Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA)], the Court of Appeal made it clear that

¹² Opie, above n 5, 479-480.

¹³ Employment Contracts Act 1991, s 5.

¹⁴ *Tranz Rail Ltd v Rail & Maritime Transport Union (Inc)* [1999] 1 ERNZ 460 (CA) at [40].

¹⁵ *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 at 501.

such [international human rights] treaties are far more than mere window-dressing. On the contrary, instruments of ratification of international conventions are documents of great solemnity under which, typically, the Government acknowledges that it has considered the convention and “[h]ereby confirms and ratifies the same and undertakes faithfully to observe the provisions and stipulations therein contained” (New Zealand’s ILO Treaty Actions as shown in the International Labour Office Official Bulletin 1926-89 compiled in Ministry of Foreign Affairs and Trade, Wellington, June 1996). Of course, none of that can be said of conventions that have not been ratified, including Convention 87 of the International Labour Organisation being the well-known Convention concerning Freedom of Association and Protection of the Right to Organise and Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively. However, ...by becoming a member of the United Nations Organisation and its agency the International Labour Organisation, New Zealand has, as a matter of international law, accepted a number of fundamental principles including those embodied in the Charter of the United Nations, the Constitution of the International Labour Organisation and the Declaration of Philadelphia. These include freedom of association principles. There are, in addition, United Nations Organisation conventions that New Zealand has ratified and which seem to cover the same ground, albeit in somewhat different terms and in less detail than the International Labour Organisation conventions. I am, of course, referring to the International Covenant on Civil and Political Rights and more especially the International Covenant on Economic, Social and Cultural Rights. Both seem to contain, more or less directly, a guarantee of the right to strike as one of the fundamental freedoms, while recognising that it may be subject to limitations under national law as it is in New Zealand. ... The two conventions are plainly treaties establishing human rights norms, or obligations within the contemplation of *Tavita v Minister of Immigration*

Opie notes that the presumption of consistency does not appear to have been argued in relation to cases where ICESCR has been raised and that doing so may have affected the outcome.¹⁶

3.3 *The current position*

The case usually cited in support of the individualised right to freedom of association is *Eketone v Alliance Textiles (NZ) Ltd.*¹⁷ The facts are complex but revolve around a (successful) attempt by Alliance Textiles to compel its workers to sign a new collective contract by threatening lockouts and negotiating directly with the workers behind the union’s back.

The workers alleged that ‘undue influence’ in the ECA should be given a meaning consistent with Canadian jurisprudence (before the Employment Court) and rights under the ICCPR and ICESCR (before the Court of Appeal). On behalf of the full court, Gault J considered the BORA, art 22 ICCPR and art 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Court declined to uphold the worker’s complaint. In relation to freedom of association generally his Honour stated:¹⁸

[T]here is one other point arising from the judgements of the Employment Court which was argued and which warrants brief comments. It relates to the right of a person to choose whether or not to be represented by another person, group or organisation in negotiation for an employment contract. The rights to elect and pursue collective bargaining arise out of, but generally are not regarded as elements of, the freedom of association. *Colleymore v A-G* [1970] AC 538 (PC). This also is the view taken by the Supreme Court of Canada in *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987) 38 DLR

¹⁶ Opie, above n 5, at 513-516

¹⁷ *Eketone v Alliance Textiles (NZ) Ltd.*, above n 8. See for example, *Human Rights* (Brookers online) at BOR17.06: The right to freedom of association does not confer a right on the association to act collectively. Section 17 does not, for example, confer on a trade union the right to take industrial action: *Eketone v Alliance Textiles (NZ) Ltd.*

¹⁸ *Eketone*, at 795-796.

(4th) 161. Nevertheless, that right conferred by Part II of the Employment Contracts Act and that right should be fully accorded, bearing in mind ILO Convention No 98 concerning the right to organise and bargain collectively [Emphasis added].

Three important things should be noted about *Eketone*. First, Gault J's statement regarding collective bargaining and freedom of association is non-binding *obiter dictum* since the case was decided on other grounds.

Second, the question should be asked whether the cases he cites remain relevant and binding. Whether the decisions of the Privy Council in other jurisdictions are binding on the lower New Zealand courts is an interesting question. In *R v Chilton*¹⁹ the Court of Appeal suggested (also as *obiter dictum*) that the answer was unclear, limiting the decision's application.

Third, while *Colleymore v A-G* remains the law in Trinidad and Tobago and no right to collectively bargain arises directly from the constitution²⁰, the statutory framework is very different from that in New Zealand. In that case, the appellants were union members employed by an oil company. Bargaining had broken down and legislation required that trade disputes be referred to the Minister, who could either promote a settlement through the industrial court (within 21 days), or if after 28 days it was not referred to the court a strike or lockout could take place after a further 14 days' notice.

The appellants argued that this procedure undermines the constitutionally-protected right of freedom of association, that the right embraces a right to bargain collectively, and is, in turn, ineffective unless backed by the right to strike. The court responded that, while the freedom of bargain collectively had been abridged, this was not an abrogation of the freedom to associate. In support, it notes that ILO C87 defines "freedom of association" without reference to collective bargaining, that those rights proscribed in the Convention are left untouched, and that the constitutional protection of freedom of association remains unaffected.

It is remarkable that the Privy Council interpretation of the Trinidad and Tobago constitutional right to freedom of association could be so influential on New Zealand's employment law. Long before the ILO Declaration on Fundamental Principles and Rights at Work coupled the rights of freedom of association and collective bargaining, ILO jurisprudence had established the rights as interdependent. It was not, however, until more recent decisions in Canada and Europe (including the United Kingdom) that we have seen the tectonic reversals of these prior positions, placing the right of collective bargaining squarely within the right of freedom of association.

4. The Right to Freedom of Association in Canada and Europe

Gault J's suggestion that the right must be interpreted consistently with freedom of association, as internationally recognised, prompts further discussion. Decisions from other jurisdictions and at the international level have expanded on the right to freedom of association, and may provide fertile territory for recognising a right to collective bargaining within the New Zealand right to freedom of association.

¹⁹ *R v Chilton and Anor* [1 December 2005] (CA) CA333/04, at [112]-[113]. Prior to establishment of the Supreme Court on 1 January 2004: Thereafter they will be of persuasive value only.

²⁰ See Avril Rahim "National labour law profile: Trinidad and Tobago" (17 June 2011) International Labour Organization <www.ilo.org>.

4.1 Canadian Jurisprudence

Recent interpretations of the Canadian Charter right to freedom of association have included a right to collective bargaining. In the case of *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*²¹ (*BC Health Services*), an appeal was brought before the Supreme Court of Canada challenging the constitutionality of Part Two of the Health and Social Services Delivery Improvement Act SBC 2002.

Those provisions gave employers greater flexibility in organising relations with employees in ways that would not have been possible under the conditions established in existing collective agreements. It introduced changes in transfers, subcontracting, employment security, lay-offs and bumping rights. Section 10 also invalidated any part of a current or future collective agreement that was not in conformity with the new Act, and also any collective agreement aiming to amend these restrictions.

The legal issue faced by the Court was to determine whether the guarantee of freedom of association laid down in s2(d) of the Charter protected collective bargaining rights and, if so, to determine whether these rights had been violated by the approved law. In ruling on the first point, the court deviated from existing case law, recognising that previous grounds relied on to exclude collective bargaining rights from the guarantee to freedom of association could no longer be supported because this would be inconsistent with Canada's historical recognition of the importance of collective bargaining. Moreover, the Court stated that collective bargaining is an integral part of freedom of association in international law. This international law can be used in the interpretation of guarantees in the Charter.

The weight placed upon Canada's international obligations is important. The Court stated that the sources most important to the understanding of s2(d) of the Charter are the ICESCR, the ICCPR, and C87. Because Canada had ratified all three, the Court recognised that these documents reflected both international consensus and principles that Canada had committed itself to uphold. Adams has said that:²²

[BC Health Services] may be seen by history to be a turning point in the way that collective bargaining is conceived and evaluated in Canada. Although long counted as a human right by experts and advocates, in Canada... prior to the Supreme Court decision, it was neither treated by governments as human right nor regarded by the public as a human right... It was treated instead as, if not exactly an ordinary partisan issue, no more than a statutory right; one which political parties of the left might strengthen and expand and parties of the right might contract and fetter.

The reach of this interpretation was clarified in 2011 in *Ontario (Attorney General) v Fraser*.²³ While the majority of the Canadian Supreme Court upheld the precedent laid down in *BC Health Services*, the right to collective bargaining was framed in narrow terms – that s2(d) only requires that unions *be able* to participate in a meaningful workplace process with an employer, which includes the right to make representations to the employer and have them considered in good faith. Only where legislation “makes good faith resolution of workplace issues between employees

²¹ *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 S.C.R. 391.

²² Adams, above n 2, at 48.

²³ *Ontario (Attorney General) v Fraser* [2011] 2 SCR 3.

and their employer effectively impossible” will there be a violation of s2(d).²⁴

While the majority stated it is too soon to declare that *BC Health Services* is unworkable (as argued by Justice Rothstein in dissent) and that it would be inappropriate to reverse the case (because none of the parties or interveners sought this result), *Fraser* is a considerable retreat from the high water mark set in *BC Health Services*. What has followed has been some confusion, and subsequent cases have given *Fraser* only a very conservative and legalistic interpretation, concluding that the right turned on whether the parties “had the opportunity for a meaningful process of collective bargaining.”

Despite this subsequent partial retrenchment, Canadian jurisprudence has extended the content of the right of freedom of association to include access to collective bargaining.

4.2 European Court of Human Rights

More dramatic and far-reaching still is the 2008 case of *Demir and Baykara v Turkey*.²⁵ In that case, a Turkish trade union of municipal officials reached a collective agreement with a municipality. When the latter failed to fulfil its obligations under this agreement, the trade union initiated proceedings in the District Court. The Court ruled in favour of the union but was subsequently overturned by the Supreme Court. The Supreme Court denied the trade union’s right to engage in collective bargaining with a municipality.

The Audit Court, as a result of this decision, ordered the trade union members to repay additional income they had received under the now-defunct collective agreement. Mayors who had concluded collective agreements of this kind were prosecuted in both the criminal and civil courts for abuse of power.

A member of the trade union and its president brought the case before the European Court of Human Rights (ECtHR). After an initial ruling, finding a violation of art 11 of the European Convention on Human Rights, the case was referred to the Grand Chamber of the Court at the request of the government of the Turkish Republic, which claimed that the Court could not, even in matters of interpretation, put forward against it any international treaties other than the European Convention on Human Rights.

The Grand Chamber reversed earlier jurisprudence to hold that the right to collective bargaining is an essential element of the right to freedom of assembly and association in art 11 of the European Convention on Human Rights and Fundamental Freedoms.²⁶ Perhaps more significantly, the Court also embedded the ILO jurisprudence (for example decisions of the Committee on Freedom of Association) into that right by holding that national systems must be compatible with the requirements of the ILO (and of the European Social Charter).

Ewing and Hendy comment that:²⁷

It is impossible to exaggerate the importance of these developments and implausible to argue that

²⁴ *BC Health Services* Citation, above n 21, at [98].

²⁵ *Demir and Baykara v Turkey*, Application No 34503/97, 12 November 2008.

²⁶ Worded similarly to ss 16 and 17 of the New Zealand Bill of Rights Act 1990.

²⁷ K.D. Ewing and John Hendy QC “The dramatic implications of *Demir and Baykara*” (2010) 39(1) *Industrial Law Journal* 2 at 20 and 47.

somehow the decisions are wrong or that they will soon be re-examined and reversed. It is equally impossible to exaggerate the scale of the challenge they present for the common law and for judges schooled in the common law tradition. We now appear to have a comprehensive right to bargain and to strike, based on ILO and ESC standards. ...

From time to time, a decision is handed down by a court, which for different reasons, may be epoch-making, usually because of the great political consequences that flow in its wake. *Demir and Baykara v Turkey* may be one such case: it is a decision of one of the most important courts in the world, a decision that in principle will have direct implications for the law in at least the 47 countries of the Council of Europe in which some 800 million people live. Perhaps even more importantly, it is a decision in which social and economic rights have been fused permanently with civil and political rights, in a process that is potentially nothing less than a socialisation of civil and political rights. And perhaps even more importantly still, it is a decision in which human rights have achieved their superiority over economical irrationalism and ‘competitiveness’ in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.

The decision was reinforced by a second ECtHR case, *Enerji Yapi-Yol Sen v Turkey*, in which the court held that the right to strike was an essential part of the right to bargain collectively. While the right was not absolute, the impugned restriction – a prohibition on public sector trade unions taking industrial action – could not be upheld within a democratic society. Both *Demir and Baykara* and *Enerji Yapi-Yol Sen* have been debated in UK courts as part of the right of freedom of association.

In *Metrobus Ltd and Unite the Union*, the right to strike was raised to challenge the placing of disproportionately onerous obligations on unions running strike ballots prior to industrial action. The Court had little to say on the issue of collective bargaining as a human right but rejected the proposition that the ECtHR had established a right to strike.

However, as Ewing and Hendy argue, “...even if that general proposition is not accepted, a more restricted argument seems irrefutable: that if the right to collective bargaining is an essential element so must be any necessary element to its exercise”.²⁸

A similar issue was argued in *EDF Energy Powerlink Ltd v RMT*²⁹ where the applicant requested permission to have the issue heard at the Supreme Court. The Court refused, stating that such permission could not be granted on the basis of an “academic appeal.”

A January 2013 decision³⁰ from the UK Central Arbitration Committee Panel (CAC) went even further, using *Demir and Baykara* to amend the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). The Pharmacists’ Defence Association Union had submitted an application seeking recognition for collective bargaining by Boots Management Services Limited. The application was rejected by the employer on the grounds that they already had a formal and productive working relationship with another organisation, the Boots Pharmacists Association.

Schedule A1 of TURLCA established that an application to the CAC

is not admissible if the CAC is satisfied that there is already in force a collective agreement under which a union is recognized as entitled to conduct collective bargaining in respect of pay, hours and

²⁸ At 24.

²⁹ *EDF Energy Powerlink Ltd v RMT* [2009] EWHC 2852 (QB).

³⁰ *The Pharmacists’ Defence Association v Boots Management Services* Central Arbitration Committee TUR1/823/2012.

holiday on behalf of any workers falling within the relevant bargaining unit.

Accordingly, the Union was only granted the right to bargain over facilities for union officials or consultation machinery, which, they argued, failed to fulfil the scope of art 11.

The CAC concluded that the prohibition on an independent union seeking recognition under the statutory procedure for the right to collective bargaining was an infringement of art 11.³¹

A right merely to bargain collectively over facilities for trade union officials or consultation machinery cannot fulfil the scope of article 11 or be sufficient to preclude the exercise of the right to collective bargaining over the wider (legitimate) interests of the workers concerned. The Union must be permitted to be a striver for recognition under the statutory process where no other union has recognition rights (as those are properly understood in this context). The Panel therefore concludes that a literal interpretation of paragraph 35 interferes with the Union's rights under Article 11(1), for the reasons set out above.

Under s2 of the UK Human Rights Act 1998, the precedent in *Demir and Beykara* was used to justify a change in the wording of the Act to broaden its scope, allowing multiple unions to gain recognition for bargaining.

Discussion of these decisions in British courts, as well as the forceful position taken by the Canadian judiciary in interpreting Charter rights, implies there is growing applicability for the right to collective bargaining within New Zealand courts. While the establishment of the right to collective bargaining in the ECtHR may not be directly binding on New Zealand, it is still of significant persuasive value as an important decision from one of the most influential courts in the world. It provides a strong platform on which to assess the content of the right to freedom of association consistently with international interpretations.

Given these shifts in comparable jurisdictions, New Zealand's current position in relation to freedom of association appears increasingly out of step. Human rights are a constantly evolving field of law, and it may be time for a reappraisal of our law in light of these international developments.

5. Applying the Broader Right to Freedom of Association

We will now apply the evolving norm of the right to collective bargaining to a recent New Zealand context. The events which led to the passing of the Employment Relations (Film Production Work) Amendment Bill 2010 (the 'Hobbit amendment') are by now well-known.³² It is sufficient to note that on 28 October 2010, following talks with Warner Brothers, the government amended the ERA under urgency.

No regulatory impact statement was prepared for the Hobbit amendment and neither were public submissions heard as it went through all three readings consecutively under urgency.³³ The

³¹ At [77].

³² For Helen Kelly's detailed timeline see: Helen Kelly "The Hobbit Dispute" (12 April 2011) Scoop www.scoop.co.nz.

³³ It would be very interesting to see what a regulatory impact statement would have looked like. While the government has never released the relevant Crown Law opinion, a draft letter to Peter Jackson and Fran Walsh from Ministers Brownlee and Finlayson states "Having considered the possibility of amendments to the ERA or Commerce Act carefully, our view following extensive consultation with the Crown Law Office, is that, for the reasons set out below, it would not be appropriate to recommend such amendments. The letter contains a cogent statement of the reasons why the

changes excluded from the definition of employee: “a person engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer” or “a person engaged in film production work in any other capacity”³⁴ unless that person has a written employment agreement providing that they are, in fact, an employee.³⁵

Warner Brothers and the New Zealand Council of Trade Unions clashed in interpreting the effect of the changes. The former claimed that film workers were prohibited from bargaining collectively by the Commerce Act 1986 on price fixing grounds, while the latter thought the workers could negotiate standard terms because that Act did not apply.³⁶

Regardless of which interpretation would win in court, contractors miss out on several ancillary collective bargaining rights: They do not have a right to take industrial action in pursuit of a collective agreement or access to the various mechanisms intended to help the parties resolve their differences and come to an agreement. Individually, contractors are denied protections against unfair disadvantage and unjustified dismissal, minimum statutory terms and conditions (such as minimum wage rates) and several protections implied into employment contracts such as good faith and fair dealing.

The Hobbit amendment process and outcome highlight many of the worst excesses of our law-making process³⁷ and there is no guarantee that the s7 check by the Attorney-General would have had any further effect. A narrow interpretation of s17 of the BORA would hold that, regardless of the law, those workers could associate freely as they saw fit, and that it was not the role of the state to uphold any further protection.

A judicial application of s17 that took into account the precedents of *BC Health Services*, *Demir and Beykara* and the relevant ILO Jurisprudence could have gone one step further, undermining the *obiter dicta* of *Eketone*. In that instance, the role of the state would be to protect the rights of those workers to bargain collectively, regardless of the nature of their legal relationship. Further, such a decision would also imply a high water mark for legislators to respond to.

6. Conclusion

The current New Zealand position regarding the status of collective bargaining as articulated *Eketone* is increasingly isolated from the international mainstream. It may struggle to stand up in the face of a correctly argued case. While the international jurisprudence cited here is not without its critics but its importance ought not be underestimated. Establishing a human right to collective bargaining can provide a pathway to rebuilding union density and restoring workers' share of the national income to a level that better reflects their contribution to national productivity.

Employment law is fine as it is. The draft letter was released on 26 February 2013 under strong pressure from the Ombudsman.

³⁴ What is now s 6(1)(d) of the Employment Relations Act 2000.

³⁵ Pam Nuttall has teased out the interesting circularity of this definition given the requirement in s 6(3) that the court or Authority must take all relevant matters into account and is not to treat statements by the parties describing their relationship as determinative. See Pam Nuttall “‘...Where the Shadows lie’: Confusion, misunderstanding, and misinformation about workplace status” (2011) 36(3) NZJER 73.

³⁶ See, for example, Helen Kelly “The Hobbit Dispute” (2011) 36(3) NZJER 30 but note the situation may change with the passage of the Commerce (Cartels and Other Matters) Amendment Bill (341-2) currently before the House.

³⁷ See, for example, Margaret Wilson “Constitutional Implications of ‘The Hobbit’ Legislation” 2011 36(3) NZJER 90 at 97.

Can Collective Bargaining Deliver Decent Work?

SIMON MITCHELL^{*}

How do we set conditions of work?

The Employment Relations Act (ERA) 2000 establishes a framework whereby terms and conditions of employment are set by bargaining for collective agreements, or by negotiations for individual employment agreements.

The Act does not provide any provision for terms and conditions of employment to be determined, other than by the employees or their union and the employer, except in entirely exceptional circumstances. The Employment Relations Authority has the jurisdiction to fix the provisions of a collective agreement, where there have been breaches of good faith that were sufficiently serious, and sustained as to significantly undermine any bargaining (Section 50J).

Therefore, if decent work conditions are to be established, employees and employers rely on the provisions of the ERA to deliver them. There are important statutory protections that contain minimum conditions, being minimum wages, the Wages Protection Act 1983 and the Holidays Act 2003. However, provided conditions are equal to, or in excess of the statutory minimum, then it is a matter for the parties to determine their terms and conditions of work.

Without doubt, many unions and employers are able to bargain for terms and conditions of employment that are acceptable to each of them. In addition, individual employment agreements are largely entered into without dispute as to the conditions of the work.

The object of our Act

The Act has as an object at s3, to build productive employment relationships, but the Act also recognises the inherent inequality of power in employment relationships (Section 3(a)(ii)). Exactly how the inherent imbalance in equality of power is recognised by the Act is less than clear. While the Act contains provisions as to how collective bargaining should occur, it does not contain any provision as to what the terms and conditions of employment should look like, or any way to assess the decency of such terms.

It seems that when the legislation was drafted, it was considered that a genuine collective bargaining, based on the principles of good faith, including the duty to conclude a collective bargain (s33), in the absence of a good reason based on reasonable grounds, was sufficient to ensure that there would be decent terms of work achieved through collective bargaining. Certainly, the Act intended a shift change from the Employment Contracts Act (ECA) 1991.

Movements in wages

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It is appropriate in assessing whether collective bargaining works in New Zealand to consider the situation with wages and bargaining in Australia. Anecdotally, bargaining in New Zealand is starting to be influenced by bargaining trends in Australia, as New Zealand employers are beginning to face competition from Australian employers for skilled New Zealanders.

In May 2012, the average ordinary time wage in New Zealand was \$29.96 per hour, as compared to \$35.56 in Australia. The average hourly wage rose 2.91 per cent between June 2011 and June 2012 in New Zealand, and 3.5 per cent in Australia between May 2011 and May 2012. In Australia, as at May 2010, 58.6 per cent of employees had their wages set collectively, as compared to 18 per cent in New Zealand.

The objects of the ERA include promoting collective bargaining (s3(a)(iii)). The Act does not seem to be working if it is intended to promote collective bargaining, certainly when compared to Australia.

Anecdotally, many employees who leave New Zealand receive significantly higher wages when they arrived in Australia. From the writer's experience, skilled workers at ports, in the meat industry and probably a whole range of other industries can earn significantly higher wages in Australia. In addition, Australia offers significant superannuation benefits. There is a movement in ports in New Zealand for experienced wharfees to move to Australia. Australian meat companies send recruiters to wait outside meat works in New Zealand, with a view to attracting New Zealanders offshore.

Trends in bargaining

There are recent trends in New Zealand from the publicised industrial disputes that employers are using collective bargaining to reduce terms and conditions of work, rather than unions using industrial disputes to improve them. In the last 24 months, this has occurred at AFFCO New Zealand Limited, Canterbury Meat Packers at its meat processing plant and Manawatu, at Ports of Auckland Limited, and in other well publicised industrial disputes. Collective bargaining is not being used by employees and unions to achieve improvements in conditions of work. Instead, collective bargaining is being used by employers to reduce conditions.

In addition, there has been, in the writer's view, a more frequent use of lockouts to compel employees to accept new conditions of work.

Effects of lockout

It is difficult for an employee who lives from day to day to sustain a loss of work by way of a lockout for any period and, in particular, for a sustained period. In workplaces that are only partially unionised, such an employee has to face a lockout in the knowledge that other employees, who are not members of the union, some of whom may be on better terms and conditions of work, are continuing to complete work while they are locked out. In this type of scenario, it is difficult for unions to prevent an employer from reducing terms and conditions of employment, or to retain terms and conditions. Certainly in this type of environment, it is practically impossible to compel

improvements in terms and conditions.

The role of the Employment Court

In many of these disputes, the role of the Employment Court has become crucial. A willingness to protect terms and conditions of work by ensuring that collective bargaining takes place in an orderly manner, or is not undermined, has been fundamental in protecting employees from the actions of employers. Examples are the case of *NZPSA v Secretary for Justice*¹, where the employer state contended that collective bargaining had ended, or the injunction in *Ports of Auckland*² to prevent contracting out while bargaining continued. Other settlements of major industrial disputes have taken place with the Employment Court, providing considerable assistance by providing prompt hearings that focus the attention of the parties to concluding an agreement, rather than continuing in litigation.

Disputes under the radar

These disputes where the Court has played a critical role often remain under the radar. Examples, however, are a recent dispute between the *Flight Attendants Union and Air New Zealand*, and the *AFFCO* collective agreement entered into in May 2013. Negotiations for the *AFFCO* collective agreement were concluded during negotiations in a weekend. The Employment Court had heard evidence in the week before relating to whether lockout notices were lawful, which was due to continue on the Monday.

The willingness of the Court to provide urgent time for a full court hearing provided considerable assistance to the parties to that dispute. The Court providing urgent time in the *Maritime Union* dispute assisted in terms of the injunction issued in March 2012 but, in addition, by making substantial hearing time available, and then agreeing to move it when there has been progress in the bargaining has assisted significantly with the issues progressing between the parties. In *Air New Zealand*³, the Court was willing to grant special leave removing a matter to the Court, and to hear a challenge to actions of the employer on an urgent basis, and the matter settled in the days leading up to that Court hearing. Without doubt, this access to a specialist Court to assist with issues of collective bargaining has been of invaluable assistance to parties resolving collective agreements.

It is perhaps coupled by a lack of willingness by the Employment Relations Authority to recognise the need for urgent intervention in cases of this type, and a lack of willingness to refer them to the Employment Court. Notably, the application in *Air New Zealand* to have the matter brought to the Employment Court was the result of an application for special leave after the Authority had refused to remove the matter. A lack of immediate access to the Court for bargaining disputes can create delay.

¹ *New Zealand Public Service Association Inc v Secretary for Justice* [2010] NZEmpC 11.

² *Maritime Union of New Zealand Inc v Ports of Auckland* [2012] NZEmpC 54.

³ *PARSA & Ors v Air New Zealand and Anor* [2013] NZEmpC 122

Limits on contracting out

There is no doubt that there are employers in New Zealand who use the threat of contracting out work to compel employees to accept terms and conditions of employment that they would not accept without that threat.

The recent Employment Court decisions have also made it more difficult for employers to conduct bargaining under the threat of contracting out. This includes the Port dispute, where Judge Travis found in *Maritime Union of New Zealand Inc v Ports of Auckland Limited*:⁴

I find that there is a seriously arguable case that the actions of the defendant in allegedly threatening to and then deciding to contract out the work on which the union employees were engaged under the expired collective agreement whilst collective bargaining was on foot for a new collective agreement was likely to undermine and arguably has undermined the bargaining. It will also, arguably, undermine the bargaining in the future. It is therefore seriously arguable that those actions have breached s 32(1)(d)(iii) of the Act. This section provides that the duty of good faith in Section 4 of the Act requires that the union and an employer bargaining for a collective agreement to do a number of things.

This decision followed a view that there was not a breach of good faith to bargaining under threat of contracting out. This view had been expressed in *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey*⁵ in which the Chief Judge had found lawful a proposal to contract out, while there was bargaining on foot, in circumstances where discussions around contracting out were not part of that bargaining. Notably in that case, s32 which prohibits the undermining of bargaining, which was central to the *Ports of Auckland* case, was not referred to by counsel.

In addition, recent cases in which it is suggested that the Court may be willing to review its approach to redundancies may lead to consideration as to whether contracting out is the action of a fair and reasonable employer, given all of the circumstances. This may provide some protection to employees who are threatened with contracting out (see *Rittson-Thomas v Davidson*)⁶.

What is the role of employment law?

There is a legitimate question in whether the state has any role beyond setting minimum code to provide a mechanism for terms and conditions of employment to be set, in circumstances where parties are genuinely unable to reach agreement.

The Australia “solution”

In contrast with the New Zealand legislation, Australia’s Fair Work Act 2009 (FWA 2009) gives the judicial body, Fair Work Australia (FWA), the ability to make an order to terminate industrial action, and make a workplace determination in place of a negotiated agreement. The different

⁴ *Maritime Union of New Zealand*, above n 2, at [24].

⁵ *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey* [2012] 1 ERNZ

⁶ *Rittson-Thomas v Davidson* [2013] NZEmpC 36

processes in New Zealand and Australia are clearly demonstrated by the recent Qantas Airways Limited (Qantas) industrial dispute.

Qantas commenced bargaining with Transport Workers' Union of Australia (TWU) in May 2010 and with Australian Licensed Aircraft Engineers Association and Australian, and International Pilots Association in August 2010. Over the following 14 months, all three unions engaged in legal strike action relating to matters at issue in the bargaining. Qantas would later produce evidence that the strike action caused AUS\$70 million in damage.

In October 2011, Qantas gave notice of a lockout of all employees to be covered by the proposed enterprise agreements. On making the announcement, Qantas grounded its fleet worldwide. The Minister for Workplace Relations made an urgent application under s424 of the FWA 2009 for an order to terminate or suspend the industrial action. Section 424 reads:

424 FWA must suspend or terminate protected industry action – endearing life etc

Suspension or termination of protected industrial action

1. FWA must make an order suspending or terminating protected industrial action for a proposed enterprise agreement that:
 - a. is being engaged in; or
 - b. is threatened, impending or probable;

If FWA is satisfied that the protected industrial action has threatened, is threatening, or would threaten:

- c. to endanger the life, personal safety or health, or the welfare of the population or of part of it; or
- d. to cause significant damage to the Australian economy or an important part of it

Almost immediately, the FWA ordered the termination of all industrial action. The parties had 21 days to reach an agreement, but failed to do so. As a result, FWA gave directions to the parties to file proposed workplace determinations. Section 266 of the FWA 2009 sets out FWA's powers to make an industrial action related workplace determination:

266 When FWA must make an industrial action related workplace determination

Industrial action related workplace determination

1. If:
 - a. a termination of industrial action instrument has been made in relation to a proposed enterprise agreement; and
 - b. the post-industrial action negotiating period ends; and
 - c. the bargaining representatives for the agreement have not settled all of the matters that were at issue during bargaining for the agreement

FWA must make a determination (an ***industrial action related workplace determination***) as quickly as possible after the end of that period. Note: FWA must be constituted by a full bench to make an industrial action related workplace determination (see subsection 616(4)).

Termination of industrial action instrument

2. A **termination of industrial action instrument** in relation to a proposed enterprise agreement is:

- a. an order under sections 423 or 424 terminating protected industrial action for the agreement; or
- b. a declaration under section 431 terminating protected industrial action for the agreement

Post-industrial action negotiating period

- 3. the ***post-industrial action negotiating period*** is the period that:
 - a. starts on the day on which the termination of industrial action instrument is made; and
 - b. ends
 - i. 21 days after that day; or
 - ii. If FWA extends that period under subsection (4) – 42 days after that day

The FWA heard evidence and submission on the outstanding issues between the parties. In contrast with New Zealand's facilitation process, the FWA has arbitral powers to make a workplace determination that has the same effect as an enterprise agreement. The FWA is required to consider specific factors, including the merits of the case, the public interest, how productivity might be improved, and incentives to continue bargaining at a later time.

On 8 August 2013, the FWA issued workplace determination that concluded the matter between the parties. The workplace determination has a three-year term (backdated to 2011) and it will stand until the next enterprise agreement is negotiated between the parties in 2014.

Should there be standard setting in bargaining?

Standing back from these issues, legitimate questions arise as to whether collective bargaining is providing good terms and conditions for New Zealand employees. In addition, whether collective bargaining alone should be used as the basis for setting conditions of work. Should an employer, willing or in a position to lock out employees, be able to obtain better terms and conditions of employment than an employer that is not willing? Should employees who are willing to go on strike be able to compel better terms and conditions of employment than employees who are not so willing?

The Australian system, perhaps, provides the type of solution that may be appropriate to consider as the basis of establishing terms and conditions of employment in circumstances where unions and employers are unable to do so. There is much resistance in New Zealand to the suggestion of an external body such as the Employment Relations Authority taking such a role. However, such an approach is not inconsistent with commercial agreements such as leases that provide for market rates to determine rental levels during the course of a lease. New Zealand employers presumably find it acceptable to enter into significant long-term obligations in relation to property, but not enter into such arrangements in relation to people.

Until such time as these issues are addressed, it is difficult to see how New Zealand will provide decent work through collective bargaining, and how the objects of the Employment Relations Act will be met. Further, there are legitimate concerns as to whether the law is currently delivering decent outcomes.

The Demise of G.N. Hale and Son?

PETER CRANNEY*

A worker does have (or will often have) rights to continued employment, even if a business can be run more efficiently without him [or her].

The test is not whether the dismissal will increase efficiency, but rather whether it is fair and reasonable to dismiss in all of the circumstances. This will often include, of course, the circumstances of the worker.

The concept of a “genuine” redundancy dismissal is now itself largely redundant – what matters is not whether the dismissal was “genuine” but whether what was done was fair and reasonable in all of the circumstances.

One of the most famous pieces of modern employment law dicta is a sentence used by Cooke P (as he then was) in *G.N. Hale & Sons Limited v Wellington etc Caretakers and Cleaners Union*:¹ “A worker does not have a right to continued employment if the business can be run more efficiently without him”.

The sentence is no longer good law, and probably never was.

There are a large number of circumstances in which a worker is entitled to continued employment, even though the business can be run more efficiently without him or her. Whether a mere desire for greater “efficiency” (whatever that is) can justify the extreme step of dismissal depends and has always depended on all of the facts. There is no universal rule that an anticipation of hypothetical future increased “efficiency” is some kind of trump card, ousting all other considerations.

A more correct statement of the law is: “There is no over-riding employer right to dismiss a worker merely because a business can be run more efficiently without him. The test is what is fair and reasonable in all the circumstances, including those of the employee”.

The irony of the Cooke dicta is that when it is applied in practice, it has often caused or results in increased *inefficiency*. The damaging and destructive restructuring exercises that have plagued New Zealand life over the last quarter century have *Hale* as one of their principle foundations. Perceived increases in efficiency, more often than not, fail to materialise, and serious social consequences have flowed from the strange doctrine that future hypothetical efficiencies perceived by “change managers” are a desirable and appropriate basis to foist continual disruption in modern institutions.

As most practitioners and all employers know, employment is above all a human relationship. During the course of an employment relationship workers are sometimes efficient and sometimes inefficient. Further, some are more efficient than others. All have limitations, foibles, strengths and weaknesses. All eventually get older and many become less efficient as a result.

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¹ *G.N. Hale & Sons Limited v Wellington etc Caretakers and Cleaners Union* [1990] 2 NZILR 1079 at 1084.

Some workers, while young, have times of great “efficiency” and others spend two or three years settling in to work and have low levels of “efficiency”. All employers know these realities. Many of them do not elevate “efficiency” to the status of an all-encompassing value which prevails over all else. Efficiency is merely one value and exists alongside others: trust, tolerance, loyalty, moderation, security, fairness, stability and reasonableness.

By failing to deal with that reality, the Court of Appeal in *Hale*, whether it intended to or not, shifted employment law sharply in the wrong direction. The effect of the case was to replace or minimise the values of fairness and reasonableness in redundancy scenarios and to substitute a new test. The new test in practice required only that the redundancy was “genuine”. To meet the “genuine” test, an employer needed only to have a *subjective* belief in the anticipated increased efficiency that would arise from ending the worker’s employment. Even a hunch or an instinct was said to be enough.

By and large, New Zealand’s “restructuring” dismissal practices (particularly in the state sector) are based on the *Hale* doctrine. The doctrine requires (i) the creation of a hypothetically more “efficient” scenario usually in writing (ii) comment on this by the workers and (iii) dismissal of those thought to be disposable to achieve the more “efficient” scenario contemplated.

Recent cases suggest that the sun may well be setting on this approach. Before addressing those, a closer look at *Hale* is warranted.

The Case²

In the late 1980s, Graham Shrubshall was a cleaner at a small workplace in Petone, near Wellington.³ This was in the days prior to Part 6A of the Employment Relations Act 2000⁴, and there were no special protections for such workers. Mr Shrubshall’s job was to do the cleaning and wash the cups. The employer wanted to dismiss him and replace him with a cleaning contractor. It did so without any adequate consultation or consideration of alternatives. It offered to pay Mr Shrubshall \$2,000 in redundancy compensation.

Mr Shrubshall sued for unjustified dismissal. He sought reinstatement and lost wages. He won in the Labour Court, and the employer appealed to the Court of Appeal. The judgment of that Court is as important for the tone it adopted as for what it actually decided.

In uncompromising language, the Court of Appeal overturned the Employment Court’s decision. Not only did Cooke P state: “A worker does not have a right to continued employment if the business can be run more efficiently without him”,⁵ but all four of the other judges made similar statements.

² Some of the following paragraphs are adapted from a paper by the writer and Mr Hamish Kynaston of Buddle Findlay, written for the recent New Zealand Law Society Conference. The views expressed in this paper are the writer’s.

³ The writer should again declare an interest. He was involved in the dispute and knew Mr Shrubshall (the dismissed cleaner) as a result.

⁴ Recently considered by the Supreme Court in *Service and Food Workers Union v OCS Ltd* [2012] NZSC 8.

⁵ *Hale*, above n 1, at 1084.

The Court's position was that it should not enquire further so long as there were "genuine" commercial reasons for the dismissal⁶ (per Richardson P). If the employer "genuinely considers the employee is superfluous to the needs of the business it will to that extent be justified"⁷ (per Somers J). "The only question to be asked is whether the employer made the decision for genuine commercial reasons"⁸ (per Casey J). The phrase "the needs of the employer" imports a "subjective, not objective test"⁹ (per Bisson J).

All five judges obviously considered increased efficiency was the paramount consideration. The notion of substantive fairness – that is, a balancing of the employer's need for increased efficiency with other values such as job security – seems to have been far from the Court's mind.

The gist of all five judgments was that it was not for the worker to reason why. He was to accept the decision of the employer and not question it. It is hard to escape the conclusion that the Court of Appeal considered the **employer's** circumstances highly relevant and **Mr Shrubshall's** as scarcely worth mentioning. Mr Shrubshall is a ghostly figure in the case, somewhat indeterminate and not distinct or very visible (unlike Ms Tan and others in cases to be addressed below).

The harshness in the tone of the *Hale* dicta is one of the somewhat puzzling aspects of the case, despite being somewhat ameliorated by Cooke P later in the judgment. His Honour thought it may well be the case that the employer should have discussed the redeployment of Mr Shrubshall to a part-time position or offered him the cleaning contract. This possible failure on the part of the employer was said to be a potential breach of "procedural fairness". Even this approach seems harsh. The obligation alluded to was not substantive obligation to **offer** the part time position (or the cleaning contract) but merely to "discuss" that.

The case introduced the notion of a "genuine" redundancy, which seems to mean in practice a redundancy dismissal in which the dismissed employee cannot prove bad motive. The Court of Appeal did not contemplate a worker's right to question the "increased efficiency" basis for his or her proposed demise. These matters were the sole prerogative of the employer, who was even entitled to act on "instinct".

By the end of the case, the basis of modern redundancy law was established – a near absolute right to dismiss if the business can be run more "efficiently" without the employee (and no substantive right to question that conclusion); and an undefined but only "procedural" obligation to "discuss" alternatives to dismissal prior to dismissal occurring.

Under the *Hale* doctrine, whether the business could be run more efficiently without the employee was a matter entirely for the employer. The Court did not even consider the notion that a drive for efficiency may need to be balanced by moral, ethical, job security, fairness or other considerations.

Mr Shrubshall actually won his case when the matter was referred back to the Labour Court and he was awarded \$5,000 compensation.¹⁰ The Employment Court latched onto dicta from the

⁶ At 1086.

⁷ At 1087.

⁸ At 1088.

⁹ As above.

¹⁰ *Wellington Taranaki etc Cleaners etc IUOW v GN Hale and Son Ltd* [1990] 1 NZILR 752.

Court of Appeal judgment to the effect that the offer of compensation was a factor in the assessment of the dismissal. It considered the offer of \$2,000 was inadequate. It also latched onto the Court of Appeal's conclusion that the company should have discussed alternatives. These failings rendered the dismissal unjustified.

Nonetheless, the worker lost his job, and Court of Appeal's decision represented a sea change in New Zealand employment law. Just one year prior to the decision, the same Court had adopted a much softer tone. In *City Taxis Society v Otago Clerical Workers Union*,¹¹ the Court considered a redundancy dismissal would be justified if it was genuine and "unavoidable". Prior to *Hale*, an employer had to prove a redundancy dismissal was necessary, as opposed to merely desirable or convenient.

Hale established the proposition that any employee whose job could be done more efficiently by another, or by another arrangement such as contracting (that is, every single employee), could feasibly face redundancy dismissal.

After Hale and before the Employment Relations Act 2000

Hale was the beginning of a short but significant period of darkness in New Zealand employment law. The case was decided on by the Court of Appeal on 11 September 1990.

By May 1991, a new National government had passed into law the Employment Contracts Act 1991. This statute's effect was to collapse union membership virtually overnight, while increasing union workloads substantially. Collective bargaining began to collapse across New Zealand, and it has never recovered. In times of great pressure against organised workers, *Hale*-type dismissals became commonplace.

On 15 January 1992, the Employment Court issued *Paul v IHC*¹², a case which introduced the doctrine of "partial lockouts". *Paul* concerned a unilateral wage reduction imposed on low paid caregivers on 6 January 1992, imposed with a view to compel them to accept the reduction permanently. The Employment Court held this to be a lawful "lockout" despite that fact that full work was still required and the employer simply pocketed the moneys taken from the worker's wages.

This conduct also became widespread (especially against low paid workers) and greatly increased employer bargaining power in what little effective collective bargaining was left. The effect of *Paul* was to legalise unilateral reduction of wages, with a view to compel permanent acceptance of such reduction. This shameful chapter in New Zealand's history only came to an end on 17 June 1994, when the full Employment Court overturned *Paul* in *Witehira v Presbyterian Support Services*.¹³ The Court in *Witehira* was uncompromising and addressed the matter using the language of human rights.

As the 1990s progressed, the Employment Court became influenced by arguments based on human rights notions, and took an increasingly important role in protecting workers. One very important decision at the commencement of this process (decided between *Paul* and

¹¹ *City Taxis Society Ltd v Otago Clerical Workers Union* [1989] 3 NZILR 461 at 462.

¹² *Paul v New Zealand Society for the Intellectually Handicapped Inc* [1992] 1 ERNZ 65.

¹³ *Witehira v Presbyterian Support Services* [1994] 1 ERNZ 578.

Witehira) was *Service and Food Workers Union v Southern Pacific Hotel Corporation*,¹⁴ a case about right of access.

In a retrospectively amusing and ongoing skirmish between the Court of Appeal and the Employment Court, 1990s redundancy law was marked by a struggle on the part of the Courts to make sense of the consequences of *Hale*. The Court of Appeal, having held that the offer of compensation made in *Hale* was a factor going to justification, subsequently reversed itself on this point in *Aoraki Corporation Ltd v McGavin*¹⁵. The Court concluded that a failure to offer compensation was **not** a factor going to justification.

Then in *McKechnie Pacific (NZ) Ltd v Clemow*,¹⁶ the Court of Appeal considered a dismissal unjustified because an offer of redeployment was **not** made but should have been, only to reverse itself on this very point in *New Zealand Fasteners Stainless Ltd v Thwaites*¹⁷.

In *Thwaites*, the Court of Appeal criticised its previous position in *Clemow* as wrongly focussing on the **person** rather than the **position**, an approach that may be thought peculiar in light of the appropriate human rights nature of the matters at issue. The Court put this matter very bluntly: “.... the obligation to deal with the employee fairly [does not] extend beyond the job in which he or she is employed. The obligation is implied into the contract for that employment”.¹⁸

This reasoning may, respectfully, be considered to be flawed. It is true that fairness is required to a worker employed “in a position”, but the issue in *Clemow* was whether the fairness required to be applied to the worker “in a position” required the worker be redeployed to another position rather than be dismissed. There are many obvious examples that spring to mind.

The Court of Appeal then partially reversed itself again on this point in *Purchas v University of Canterbury*¹⁹, upholding a decision requiring the respondent to appoint the appellant to a position. What was missing from the 1990s redundancy cases was a principled basis for the decisions made. This confusion began with *Hale* in 1990 and continued in the other cases, and is only recently being resolved and corrected (but as yet only in the Employment Court).²⁰

Fair and reasonable treatment – Employment Relations Act 2000

Whether *Hale* was good law under the Labour Relations Act 1987 or the Employment Contracts Act 1991 is now, of course, an academic question. The more interesting question is whether it can be regarded as good law under the Employment Relations Act 2000 (ERA).

¹⁴ *Service Workers Union of Aoteroa Inc v Southern Pacific Hotel Corporation (New Zealand) Ltd* [1993] 2 ERNZ 513.

¹⁵ *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276.

¹⁶ *McKenzie Pacific (New Zealand) Ltd v Clemow* [1998] 3 ERNZ 245.

¹⁷ *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565.

¹⁸ At [25].

¹⁹ *University of Canterbury v Purchas* [1998] 3 ERNZ 925.

²⁰ Editors’ note: By the time this issue was published the decision in *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 was available upholding the Employment Court decision in that case.

The cases are beginning to establish that that in some circumstances an employee **is or may be** entitled to continued employment, notwithstanding that the business “can be run more efficiently without him” [or her].

The first issue is the language of the ERA. Unlike its predecessor statutes, the ERA (from 2004) actually defined the meaning of unjustified dismissal. Such a dismissal would be unjustified if what the employer did, and how the employer did it, were what a fair and reasonable employer would (or, after 1 April 2011, could) have done “**in all of the circumstances**” at the time of dismissal.

An illustration of the importance of the new wording will assist. A cleaner has six months to go until retirement after 40 years’ service. She is getting slower as part of the ordinary passage of time. But for that, her position would not be considered for disestablishment. Under *Hale*, she could be lawfully dismissed and replaced by a more “efficient” person (even one marginally more efficient).

An application of the new test may lead to a different result. **All of the circumstances** are relevant, not just a desire for increased efficiency. This includes the circumstances of the worker as well as those of the employer (as all fair and reasonable employers already know). The first redundancy post-2000 case to deal with *Hale* substantively was *Simpsons Farms Ltd v Aberhart*.²¹ The Court considered *Hale*²² and concluded: “I do not consider the recent statutory changes were intended to revisit long-standing principles about substantive justification for redundancy exemplified by judgements such as *Hale*”.²³

The Court considered the then-new s103A “echo[ed]” some of the statements in *Hale*, and that the new section was focussed only on procedure and not substance. *Hale* lived on. Judicial thinking has, however, shifted considerably since *Aberhart*. A number of cases can be referred to, the first being *Air New Zealand v V*.²⁴

V was not a redundancy case, but was a misconduct matter. The issue before the Court was whether, if an employee had committed serious misconduct, there was, nonetheless, a need to fairly consider whether dismissal should be imposed, or whether an employer’s right to dismiss was established by the serious misconduct itself.

The case required the Court focus closely on the words “in all of the circumstances”, contained in s103A. The Court stated: “In these words is the answer to [the employer’s] submission that once a finding of serious misconduct had been made, the Authority or Court can not review the employer’s decision to dismiss”.²⁵

Such an approach would be to “exclude” from s103A the very thing to which the section must apply, that is, “the decision to dismiss”.²⁶ A similar comment could also be made as a matter of statutory interpretation in redundancy cases. A second significant case was *Vice-Chancellor of Massey University v Wrigley*.²⁷

²¹ *Simpson Farms Ltd v Aberhart* [2006] ERNZ 825.

²² See [40], [41] and [67].

²³ At [67].

²⁴ *Air New Zealand v V* [2009] ERNZ 185.

²⁵ At [35].

²⁶ At [36].

²⁷ *Vice Chancellor of Massey University v Wrigley* [2011] NZEmpC 37.

Wrigley was a redundancy case, and concerned only the issue of whether and to what extent an employee facing a redundancy dismissal could have access to, and an opportunity to comment on, relevant information (as required by s4(1A)(c) of the ERA). The decision is a significant one for a number of reasons, but may be a notable example, in particular, of developing judicial attitudes to the *Hale* doctrine (or perhaps, on another analysis, is simply the ultimate conclusion arising from the dicta of Cooke J to the effect that Mr Shrubshall should have been offered discussions about alternatives to dismissal).

In *Wrigley*, the full Court view of s4(1A)(c) is expounded, highlighting the Court's view that one purpose of obliging employers to provide relevant information is to allow them to challenge and change the employer's decision. The Court stated (and many employees will agree): "Power does not confer insight and wisdom. Fully informed employees may have ideas of equal or greater merit than those of their employers".²⁸

This is the language of human equality. It appears to be a long way from the principle of extreme managerial prerogative, as it was expressed in the 1990s and *Hale*. In a further interlocutory judgment, *Edwards v Two Degrees Mobile Limited*,²⁹ Travis J then expressly questioned whether *Aberhart* remained good law in light of the obligation of the Authority and Court to consider "all of the circumstances", before considering whether an employer's actions were those of a fair and reasonable employer.

Travis J referred to the statutory changes and to "more recent decisions of the full Court". With the case law developing in this way – or at least the judicial comment – many could argue that *Hale* was increasingly becoming a marginally relevant case.

Since *Two Degrees Mobile*, the dismantling of the *Hale* doctrine has proceeded apace. The first and most significant case was *Rittson-Thomas T/A Totara Hills Farm v Davidson*³⁰.

Mr Davison was dismissed for redundancy. He alleged an ulterior and hidden motive, but failed in this allegation on the facts. The Court, however, did not stop there. The Court referred to *Hale* and to its previous comments about *Hale* in *Aberhart*. His Honour Chief Judge Colgan commented on his "somewhat crypti[c]" comments in *Aberhart*, and stated they should not be read as meaning that an employer need only persuade the Authority or Court that the decision to dismiss for redundancy was a "genuine" decision in the sense that it was not a "charade for other motives". More would be needed.

His Honour stated *Hale* was authority for the proposition that it is not for the Court to say: "... I would not have made the decision the employer did ...". His Honour considered the Court cannot impose or substitute its business judgment for that of the employer taken at the time, but **can** "determine whether what was done, and how it was done, were what a fair and reasonable employer would ... have done in all of the circumstances at the time".

The result is that the Court may enquire into the "merits" of a decision to determine whether the decision and how it was reached were fair and reasonable.

Hale had finally been corrected.

²⁸ At [56].

²⁹ *Edwards v Two Degrees Mobile Ltd* [2012] NZEmpC 111 at [7].

³⁰ *Rittson-Thomas T/A Totara Hills Farm v Davidson* [2013] NZEmpC 88.

On the facts, Mr Davidson had been offered only an opportunity to apply for a junior shepherd's position, and had not even been offered the position itself. He had received not an offer but an invitation to treat. This was not what a fair and reasonable employer would have done. Further, the employer had informed Mr Davidson he was being dismissed to effect a 10 per cent saving in the wages bill, but his dismissal would have saved only six per cent. This "threw into doubt" the genuineness and, therefore, the justification for the dismissal. These principles arising from these cases are becoming increasingly firmly established, as nails continue to hammer into the coffin of *Hale*. The established test is rapidly becoming not whether the business can be run more efficiently without the employee, but rather whether the dismissal was fair and reasonable in all the circumstances.

In *Brake v Grace Team Accounting Limited*³¹, Travis J firmly endorsed *Rittson*. The plaintiff Mr Brake, like Mr Davidson in *Rittson*, alleged bad motive (dismissal for health reasons) and failed in the allegation. However, the dismissal was nonetheless unjustified. The decision to dismiss was tainted by a financial miscalculation about the employer's true position, and by wrong information being provided to the employee. The defendant employer could not adequately explain to the Court why it had dismissed the worker. As a result, the employer failed to discharge the burden of proving the redundancy dismissal was justified. His Honour expressed his "complete agreement" with the Chief Judge's reasoning in *Rittson*.

In *Tan v Morningstar Institute of Education Ltd T/A Morningstar Preschool Ltd*³², the Court took a similar approach. Ms Tan looms large in the decision as a full human being, rather than the shadowy presence of Mr Shrubshall in the *Hale* judgement. In *Tan*, the directors of the childcare centre became concerned about its finances. Ms Tan was invited to a meeting and was excited because she thought she was to be given a wage increase to reflect what all agreed was her very good work. She was dismissed for redundancy.

Like the plaintiff in *Brake*, Ms Tan had been provided with incorrect information about the employer's financial position. She was misled to conclude that her redundancy was inevitable when it was not. Losses were claimed that had not in fact occurred. There was, then, evidence of the employment of others to undertake Ms Tan's role. For all of these reasons (and others), the dismissal and how it was done were not what a fair and reasonable employer would or could have done in all of the circumstances.

Conclusion

The cases have significant implications for those caught up in the old *Hale* rut. When these cases were referred to in a recent lawyers meeting in Auckland, some were heard to mutter that employers could get around them by not providing too much information when proposing dismissal so as not to be tripped up later. This, of course, misses the point and, indeed, would be an unlawful approach on multiple bases.

What is now required (and arguably always was) is no more and no less than fair and reasonable treatment. Most good employers know this, and have always put it into practice. Increased efficiency is only one factor in the mix. It is an everyday reality of life that fair

³¹ *Brake v Grace Team Accounting Ltd* [2013] NZEmpC 81.

³² *Tan v Morningstar Institute of Education Ltd t/a Morningstar Preschool* [2013] NZEmpC 82.

treatment can be costly or can add to costs. It is also an everyday reality of life that efficiency is not the be all and end all of human existence.

Hale is now history, but it is interesting to consider what could have occurred had the Court of Appeal fixed itself less exclusively on the idea of the claimed hypothetical projected efficiencies and adopted a more balanced approach, perhaps for example:

...examine[d] the reasons given for the termination and the other circumstances relating to the case and to render a decision as to whether the termination was justified” – Art 9 paragraph 1 ILO Convention 158 – Termination of Employment Convention 1982.

Perhaps, Mr Shrubshall should never have been dismissed after all. It could be even said that dismissing a cleaner when the cleaning still needed to be done and without full regard for his circumstances is not what a fair and reasonable employer should have done in all of the circumstances. The word “should” in the last paragraph is perhaps instructive. The focus on “would” or “could” over the years is perhaps misplaced. As many of us know, the real focus is not one what an employer **would** do or **could** do, but rather what the employer **should** do³³. Perhaps, Mr Shrubshall **should** not have been dismissed.

³³ A point made to the writer by Wellington mediator Mike Feely on numerous occasions.

Spill and Fill: a Fair Redundancy Process?¹

PHILLIPA WELLS*

Abstract

In a world of growing job insecurity and uncertainty, the sceptre of redundancy looms large on the horizon of many work places, both private and public. In some western jurisdictions, although not all, the definition of redundancy and some degree of legal protection for employees facing it are enshrined in statute. However, the power to decide on redundancies lies with employers. In an attempt to minimise legal scrutiny and public challenges to the process, employers adopt a “spill and fill” process whereby employees are spilled from their positions that are then open for those employees plus others to apply. Although the Australian courts acknowledge the fairness of this process and its “fit” with the definition of redundancy as attached to the position rather than the person, there is evidence of growing unease on the part of unions as to the impact of this process. This paper examines two recent cases where unions have gained agreement from employers to use an alternative means of determining redundancies.

Key Words: Spill and Fill; Redundancy; Unions; Australian case law on redundancy; NTEU; CSIRO; Curtin University of Technology

Introduction

The catchy term “spill and fill” is used to refer to a process whereby all or selected roles in an organisation are declared vacant, at which point the said employees are technically dismissed and invited to apply for new or revised positions created out of this process. There is no guarantee that those (ex) employees will be reappointed to those newly formed positions, either because they no longer satisfy the position description, they are not considered the best applicant and/or because there are fewer positions available (a common result of such restructuring). There are also legal fish hooks in this process for employees with suggestions that where they are not eligible for redundancy and do not apply for those new positions, they can be deemed to have resigned. Using recent examples by way of illustration, this paper explores the legal implications of this spill and fill process as it is practised in Australia, from the perspectives of both employees and employers. The objectives are to describe why this process is used and how parties view it in terms of redundancy and dismissal rights and protection.

The paper is constructed as follows. First, the nature of redundancy and its legal definition(s) are explored, with reference to the jurisdictions in which this concept is recognised. Then the Australian legal framework for redundancy and dismissal is outlined, particularly in reference to the limitations to its scope and application. This is followed by a description of the spill and fill concept and process, with specific reference to two recent examples of where Australian employers (both in the

¹ This is a revised version of a paper delivered to the New Zealand Labour Law Conference, November 2013, AUT University, Auckland, by Philippa Wells. The paper was originally entitled “Spill and Fill: Redundancy through Restructuring or Dismissal by Subterfuge?”

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public sector) sought to pursue this process. This discussion will refer to some of the arguments presented as justification by the employers involved, the points raised in opposition to this process and the ultimate resolution that emerged.

Redundancy – a short background

With the strong growth in western labour markets from the end of World War Two through to the 1970s, and full or near full employment, job security was of little concern to most workers in western economies. However, by the late 1970s, things had changed dramatically. With the emergence of a neo-liberal agenda in countries such as the UK, USA, Australia and New Zealand, employees suffered a loss of power in the employment relationship,² institutional constraints impacted on both the membership and effectiveness of unions (and collective action more generally), and governments responded to employer demands to regulate for flexibility in the employment market.³ All these developments dismantled much of the historical protections employees had enjoyed against the vagaries of the market. Now, the right to make decisions as to number and mix of employees was firmly in the hands of employers. Hence the interest in redundancy and its practice and process. It should be noted that, although the practice of making employees redundant is not new, it is probably only with the economic reforms of the latter part of the 20th century that it attracted much attention, either as an area of research interest,⁴ focussing often on the impact on workers or their communities of redundancy) or of significant concern for employees and their representative unions.

One possible definition is that offered by Sebardt: “[when the employer] finds that the need for the services provided by some or all employees is diminishing or ending”.⁵ She also makes a distinction between different rationale/reasons for redundancy – those for strategic reasons (future-proofing, changes to direction of focus) and those from financial difficulties. This broad concept tends to underpin the definitions that are applied over a variety of jurisdictions. In the UK, for example, the Employment Rights Act 1996, s139 includes situations where the business and/or the work previously carried out by employees cease, while the American Fair Labor Standards Act states:

an employee is dismissed by reason of redundancy if their dismissal is wholly or mainly attributable to the fact that their employer’s requirements for employees to carry out work of a particular kind have ceased or diminished or are expected to do so.

² Bob Hepple “Back to the future: Employment law under the coalition government” (2013) 42(3) *Industrial Law Journal* 203.

³ George Lafferty “In the wake of neo-liberalism: Deregulation, unionism and labour rights” (2010) 17(3) *Review of International Political Economy* 589.

⁴ With outputs from: Alison L Booth and Andrew McCulloch “Redundancy pay, unions and employment” (1999) 67(3) *The Manchester School* 346; Mike Donnelly and Dora Scholarios “Workers’ experiences of redundancy: Evidence from Scottish defence-dependent companies” (1998) 27(4) *Personnel Review* 325; David Leece “Redundancy, unemployment, and Self-employment” (1990) 11(4) *International Journal of Manpower* 35; Esther Stern “From ‘valid reason’ to ‘genuine redundancy’ redundancy selection: A question of (IM)balance?” (2012) 35(1) *Univ of NSWLJ* 70; Lea Waters “Experiential differences between voluntary and involuntary job redundancy on depression, job-search activity, affective employee outcomes and re-employment quality” (2007) 80(2) *Journal of Occupational and Organizational Psychology* 279.

⁵ Gabriella Sebardt “Avoiding pitfalls and realizing potentials: Researching redundancy regulation in Sweden, the United Kingdom and Japan” 2004 15(3) *IJHRM* 441 at 445.

New Zealand is somewhat unusual in not including a statutory definition in its Employment Relations Act 2000, this, despite calls to change the law,⁶ with parties to the relationship and courts relying instead on the repealed Labour Relations Act 1987, s184(5): A situation where...[a] worker's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by that worker is, or will become, superfluous to the needs of the employer.

In Australia, the jurisdiction that provides the focus for the discussion that follows, s389 of the Fair Work Act 2009 (Cth) defines redundancy as follows:

1. A person's dismissal was a case of genuine redundancy if:
 - a. the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
 - b. the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.
2. A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:
 - a. the employer's enterprise; or
 - b. the enterprise of an associated entity of the employer.

There are some critical points that demonstrate the scope and the limitations of this provision, particularly as it applies to spill and fill.

First, ss1(a) refers specifically to the notion that redundancy only occurs where the person's job does not need to be performed by anyone (see also s119 that provides for situations where redundancy pay is to be provided). *Prima facie*, this seems to imply that where a person is made redundant, the tasks that make up their job cannot be undertaken by a fellow or new employee, nor by any other person (such as a contractor). This position seems to be confirmed by the Fair Work Ombudsman in information on the relevant National Employment Standard (NES) when referring to eligibility to redundancy pay – specifically, where “[the employer] no longer require[s] the job to be done by the employee or anyone”. However, the following discussion indicates the position as not being that straightforward, comprehensive or clear.

First, this statutory provision draws on the definition of redundancy as applied in *The Queen v The Industrial Commission of South Australia*⁷ – specifically the notion that it is only deemed to be so if the employer no longer requires the work to be done by anyone. However, there is one difference: while Bray refers to “job or work”, ss1(a) refers only to “job”, a term that has been applied in such cases as *Dibb v Commissioner of Taxation*⁸ and *Quality Bakers of Australia Ltd v Goulding*,⁹ *Jones v Department of Energy and Minerals*,¹⁰ and *Foster's Group Limited v Wing*¹¹. This is crucial as it opens the door to the possibility that, although the job might disappear, the tasks that make up that job continue to be done, either by other employees or contractors and raises the question of how much of the job can be undertaken elsewhere and still be considered redundancy. In *Rosenfeld v*

⁶ Alan Geare, Fiona Edgar and Kelly Honey “The Employment Relations Act 2000: A brief overview and suggested changes” (2011) 36(2) NZJER 33.

⁷ *The Queen v The Industrial Commission of South Australia; Ex parte Adelaide Milk Supply Co-operative Limited and others* (1977) 44 SAIR 1202 at 1205 per Bray J.

⁸ *Dibb v Commissioner of Taxation* [2004] FCACF 126.

⁹ *Quality Bakers of Australia Ltd v Goulding* (1995) 60 IR 327.

¹⁰ *Jones v Department of Energy and Minerals*¹⁰ (1995) 60 IR 304.

¹¹ *Foster's Group Limited v Wing* [2005] VSCA 322.

United Petroleum Pty Ltd,¹² it was held by the Commission that a transfer of 90 per cent of an employee's duties to another did not constitute genuine redundancy, but in *Ulan Coal Mines Limited v Howarth and Ors*¹³ and *Kerkeris A. Hartrodt Australia Pty Ltd*¹⁴ and in guidelines,¹⁵ it was recognised as such if the work is distributed among other employees (as opposed, it would appear, to one or two).

Secondly, and relatedly, the emphasis is on the job becoming redundant rather than the individual who occupies that role (as expounded in the leading Termination, Change and Redundancy Case).¹⁶ The argument that is used to support this interpretation is that, where tasks are removed from a particular person's role and distributed to others, they are ultimately left with nothing to do. Hence, their role is duly redundant (although it could also be argued that this interpretation is disingenuous because, while the person is no longer employed (sometimes identified as retrenched in an attempt to make clear the distinction from redundancy), the work continues to be performed).

In light of this, it is informative to consider the outcome of *David James Miller v Central Gippsland Water Authority*.¹⁷ Miller was the General Manager Human Resources for the Authority when consultants (Change Alliance Pty Ltd) were engaged to undertake a review of operations. Although this review was for an initial three weeks, their role and duties expanded, in particular involving their undertaking and facilitating a change management process. They also recommended that the position of HR Manager be downgraded in a new corporate structure. Since the consultants were being retained and were carrying out some aspects of Miller's duties, the Authority declared him redundant. The Federal Court held it to be unlawful termination (so not redundancy) due in part to the process, the considerable time lapse between the "redundancy" and the finalisation of the new structure and the fact that parts of his role were subsequently allocated to newly engaged employees. This decision further throws into doubt the treatment of redundancy as connected to the role not the person. His job was clearly being done – by consultants – without any consultation or discussion with Miller as to his potential involvement. The Authority made the person (Miller) redundant because of this assumption by the consultants, a situation recognised by the Court in its finding.

Thirdly, there are specific limitations to employees' eligibility for redundancy under the NES and, consequently, to its provisions for support and compensation. The main exclusions include employees working for the specific employer for less than 12 months, a casual, apprentice, trainee or on a fixed-term contract or where the employer is small (with less than 15 employees), or where an industry-specific redundancy scheme applies (pursuant to a collective agreement or a modern award). This raises the possibility that, in the interests of cost, decisions made as to how redundancy measures are going to be applied will take such exclusions into account (such as, for example, routinely making excluded individuals redundant while retaining those able to claim payouts).

Fourthly, an employee cannot claim redundancy compensation where the basis for their termination is serious misconduct or where reasonable redeployment in the organisation is offered by the employer. In addition, the Fair Work Commission (FWC) has discretion to reduce the amount otherwise payable where the employer proves incapacity to pay (in which case there may be potential for employees to recover under the General Employee Entitlements and Redundancy Scheme (GEERS)) or where the employer locates acceptable employment elsewhere for that employee. Acceptability in such cases will take into account location, conditions (such as span of

¹² *Rosenfeld v United Petroleum Pty Ltd t/a United Petroleum* [2012] FWA 2445.

¹³ *Ulan Coal Mines Limited v Howarth and Ors* [2010] FWAFB 3488.

¹⁴ *Kerkeris A. Hartrodt Australia Pty Ltd* [2010] FWA 674.

¹⁵ See: Fair Work Ombudsman "Termination of employment fact sheet" (17 September 2010) <www.fairwork.gov.au

¹⁶ (1984) 8 IR 34.

¹⁷ *David James Miller v Central Gippsland Water Authority* [1997] FCA 1081.

hours, remuneration and conditions), as would reasonable redeployment. However, apart from that, the application of these provisos is largely subjective.

In summary, therefore, the redundancy situation under present law in Australia provides for employer-sourced compensation and support for most (eligible) employees with some recourse to a state fund should the employer be unable to provide such compensation to those employees made redundant. The right to make employees redundant is within the ambit of employer or management discretion. However, both the nature and process (the criteria and selection plus consultation and procedure) may be subject to scrutiny in the FWC to ensure it is a genuine redundancy. “Genuine” in this context implies also that the job is not to be undertaken by anyone else. Although the tasks that make up that job can be distributed amongst others, the way in which this is done may determine whether it is genuine redundancy or not.

It is appropriate now to turn to the particular issue of spill and fill processes being used as a means of pursuing a redundancy process. Description of this process and its implications, with particular reference to two recent examples of where it has been used, will constitute the discussion that follows.

Spill and Fill

As explained in the introduction, spill and fill is a colloquial term commonly used to describe the means whereby positions in an organisation are “spilled” then, once the new structure and positions are determined, vacant posts are “filled”, with employees from the spill given the opportunity to apply but (normally) with no guarantee of success. The new positions may differ from the old in terms of scope or qualifications, be fewer in number and/or be at different levels, involve different conditions or lines of responsibility/authority, and/or involve different working hours and/or at different locations. Those employees who are unsuccessful in obtaining one of the new positions are then deemed redundant. The spill and fill process has been accepted by the courts as a fair and equitable means of managing redundancy where a significant restructuring or refocussing of an organisation is sought, (provided the employer can demonstrate it was not designed or intended to target individuals or groups, is discriminatory and that adequate consultation and discussions with affected staff had taken place) – see for example *National Union of Workers v Qenos Pty Ltd*,¹⁸ *Roberts v University of New England*,¹⁹ *Finance Sector Union v Commonwealth Bank of Australia*,²⁰ *Lindsay v Department of Finance and Deregulation*,²¹ *Berice Anning v Batchelor Institute of Indigenous Tertiary Education*²² and *Unsworth v Tristar Steering and Suspension Australia Limited*²³ (where selection of individuals to take the “fill” positions on the basis of relatively large compensation packages otherwise payable was deemed acceptable). Note that, although these cases have been decided under various statutes, both Commonwealth and State/territorial, this did not lead to differences in the basis or rationale for decisions.

However, judicial recognition of spill and fill as a fair approach to redundancy does not negate some troublesome issues. Although some of these are also associated with other redundancy processes, there is probably something about spill and fill, particularly where it involves a lot of people, that

¹⁸ *National Union of Workers v Qenos Pty Ltd* [2001] FCA 178.

¹⁹ *Roberts v University of New England* [2009] FMCA 964.

²⁰ *Finance Sector Union v Commonwealth Bank of Australia* [1997] HREOCA 12.

²¹ *Lindsay v Department of Finance and Deregulation* [2011] FWA 4078.

²² *Berice Anning v Batchelor Institute of Indigenous Tertiary Education* [2007] NTADComm 1.

²³ *Unsworth v Tristar Steering and Suspension Australia Limited* [2008] FCA 1224.

magnifies the implications. For employers, there is first is the potentially unwelcome publicity it attracts. Words like unemployment, body-blow, fight, job cuts, brutish and culls are commonly used in the media to report on such proposals, all implying heartlessness, inequality of power and significant ongoing financial and social implications for those affected. Secondly are the difficulties in reconciling two potentially contradictory objectives: cost control and performance. Where the main driver for spill and fill is the first of these, the employer runs the risk of reducing the organisation's ability to perform – either through the loss of organisational knowledge (particularly where those at higher levels are spilled), or via the reduction in numbers of staff in an area or overall. If it is the second, targeting poorer performers may effectively be reflected in a marked preference for younger, single and/or specific gender workforce – that, in turn, has the potential to attract accusations of discrimination. There is also, of course, the likelihood that the proposal will be scrutinised closely – if not in the courts then certainly in the media – and challenged, particularly where the relevant union identifies something in the proposal that is contrary to the words, focus or spirit of a relevant agreement or to law.

For employees and their union, the first implication is the uncertainty this approach engenders. Regardless of the degree of consultation with affected or potentially affected individuals and the relevant unions, and the publication of criteria, no one can be certain that they will be successful in their application for the new positions. This raises issues around morale, stability and relationships, both between peers and across levels. For example, where a “cascading” approach is used – involving high levels spilled and filled prior to others lower down in the organisation (as in *Finance Sector Union v Commonwealth Bank of Australia*) – it potentially raises unease and concern as to the impact of past history. For example, an employee may have been moved as a consequence of a difficult relationship with a manager and now may be faced with the prospect of having his or her career options decided again by that same manager.

Secondly, a spill and fill process can have implications for the rights of employees under other law or an award or agreement. One of the two grounds for action in *Finance Sector Union v Commonwealth Bank of Australia* was that anyone on extended leave (including maternity leave) were not eligible to apply for redundancy (called retrenchment here) although they could apply for one of the new positions (although unlikely to be able to comply with the conditions attached, particularly that requiring assumption of duties within four weeks, and faced difficulties in obtaining important information relevant to them). Their only real option was to return to work in accordance with the provisions of the relevant award, although at that stage it was unclear as to what that would entail. This was recognised by the Human Rights and Equal Opportunity Commission so:²⁴

The failure to permit expressions of interest in retrenchment denied [these] women the potential opportunity to leave the Bank before the CIP (Continuous Improvement Program) ushered in a ‘new’ Bank which would not necessarily have comparable positions available by the time they were due to return from extended leave. [These] women were hence faced with the very real threat that they would be returning to a poor choice of employment in a Bank for which they no longer wished to work.

The exclusion from the redundancy process for this group also closed down access to generous compensation, support, bank loans and other ongoing benefits that were part of the package. The FSU claimed this to be contrary to the Sex Discrimination Act 1984 (Cth); the bank argued (unsuccessfully) that it was not: for a person to be retrenched they must occupy a position made redundant. Since the relevant award provided for six weeks compulsory maternity leave, women on such leave could not be said to occupy any position, let alone one targeted for redundancy.

²⁴ *Finance Sector Union v Commonwealth Bank of Australia*, above n 20, at 7.4, per Wilson and Dean.

Thirdly, there may be suspicions that there may be an ulterior motive behind the selection of a spill and fill approach to redundancy, and that individuals will be made redundant in accordance with this motive: to remove an individual (without appropriate grounds or process of dismissal) or group from the organisation (for example, union members or activists), reduce the average status of employees or demote some, or to remove those with lower qualifications who, nevertheless, are perfectly capable of fulfilling the role. Such allegations were made (unsuccessfully) in *National Union of Workers v Qenos Pty Ltd*²⁵ (those targeted were members of an industrial association that had recently voted to take protected industrial action). However, unless such suspicions clearly translate to “adverse action” (under s340 Fair Work Act 2009) or dismissal on a prohibited ground (including discrimination), the courts and FWC show little inclination to second-guess the employer. In one of the few instances (*Lindsay v Department of Finance and Deregulation*²⁶) where the Commission found against the employer on allegations of other purpose (and in this instance it was process rather than the decision to spill and fill that was the issue), the spill of Lindsay’s position without offer of redeployment into the vacancy that was thereby created (albeit at a lower level) was deemed to be unfair dismissal.

There is also some concern around the approach that is being used in some recent situations that would appear to make it harder for employees to either challenge the process or to be confident as to the fairness of its outcome. By way of illustration, the next part of this paper describes two recent disputes/issues around spill and fill as applied in Australia, and the current/recent approaches that have been used in its implementation. The first involves Curtin University in Western Australia (in 2012-13) and the second the CSIRO (in 2010).

Curtin University

In 2012, Curtin University and the National Tertiary Education Industry Union (NTEU) finalised the first new enterprise agreement for the sector for 2012-16. Within nine months of this achievement, they were in dispute over Curtin’s decision to spill and fill its academic staff, initially in four areas of Psychology, Built Environment, Science and Accounting, but potentially with an extension of this process to other areas of the University, possibly all. The University justified this decision on the need to reshape the academic workforce to meet the challenges of the future – to be “agile” and to boost its research performance and profile.²⁷ This agility, reportedly, included the creation of teaching focussed as well as research focussed and balanced positions. Existing staff members would be invited to apply for these new positions in accordance with their performance, record and interests. Appointment decisions would be on merit and fit.

Reaction to this proposal was swift. Criticisms in the media included the following. First, it was claimed that the expectations for the positions at different levels (particularly those involving or focussed on research) were unrealistic. Reportedly, someone applying for an entry level teaching and research position at Level B (the second level of appointment for academics in Australian universities) would, in addition to having a PhD, be expected to have an “established record of research outputs” in top journals (A and B) and “evidence of an established national reputation and growing international profile”.²⁸ A senior (unnamed) staff member was quoted as saying “there is a

²⁵ *National Union of Workers v Qenos Pty Ltd*, above n 18.

²⁶ *Lindsay v Department of Finance and Deregulation*, above n 21.

²⁷ Catriona Menzies-Pike “Curtin Uni Spills Academic Jobs” (26 June 2013) New Matilda <www.newmatilda.com>.

²⁸ As above.

real fear...that this will lead to staff being demoted, with the resultant financial cost and public humiliation, or being shamed into resigning”.²⁹

Secondly, there were concerns that a significant reduction in numbers of positions available would undermine wages and conditions and “gravely diminish Curtin’s capacity to operate as a university”³⁰ (Scott Ludlam, Green Party Senator), while the third main concern was that the action was inconsistent with the terms and intent of the collective agreement – which states “that all staff must act with integrity, respect, fairness and care”³¹ (Tony Snow, NTEU Curtin Branch President). Thirdly, with estimates of around 45 staff members going from just the four schools identified in the first round, there was real potential for high levels of stress, worry and financial cost to impact on staff morale.³²

Other implications were also identified, these largely arising from the fact that no individuals were to be declared redundant until after the positions were filled. First was a lack of opportunities for staff to know prior to applying for new positions whether their skill and discipline mix were still desired, and to understand the rationale for the change. For example, although the criteria for consideration for different levels were published, there was no indication as to whether an outcome of the process would be a change in the way courses were offered or the range/mix of such courses, whether the duties normally allocated to senior staff would be assigned to those at lower levels or whether the process would involve the dissolution or restructuring of particular schools or departments.

Secondly, the exercise had the potential to affect a broader group of staff than could objectively be justified. Many of the “core” activities in relation to teaching and research remained to be done. Declaring a blanket spill ignored this reality and had the implication that it was not the jobs but the individuals that had no place in the new structure – an implication contrary to the tenor of redundancy law.

NTEU notified a formal dispute and after negotiations (and with the assistance of the FWC)³³ reached agreement with the University whereby it abandoned the spill and fill process in favour of a more targeted, specific and fairer “Academic Reshaping” exercise. The implications of this shift were as follows. First, Curtin agreed to an improved consultation process before any decisions, and the dissemination of a detailed rationale for change. The principle aim here was to reduce conflict, engender confidence and give staff an informed choice on whether they should seek to remain under the new regime. Secondly, the University agreed to take all reasonable steps to prevent job losses and not to advertise externally for applications to newly created positions until departmental restructuring was complete and all reasonable efforts at redeployment had been made. As part of this, it undertook to ensure the dissemination and application of fair and objective position criteria for the different roles and levels. Staff without PhDs would not be excluded from low-level (A) teaching focussed positions for that reason alone (therefore, addressing the concern they would automatically be excluded even if they had been effective in that role up to the present) but could be from higher level positions.

²⁹ As above.

³⁰ As above.

³¹ Carmel Shute “Outrage at Curtin University plan to spill all academic positions” (24 June 2013) National Tertiary Education Union <www.nteu.org.au>.

³² As above.

³³ National Tertiary Education Industry Union “Academic Reshaping Fact Sheet” (14 October 2013) <www.nteu.org.au>.

This is not the end of this story. As recently reported, the impact even of this modified process is proving hard for employees at Curtin. The NTEU Curtin University Branch President is predicting the loss of over 130 academic jobs (with the implication that those in teaching focussed positions would bear the cost of increased research output from their colleagues via significant increases in workload, and around 75 per cent have their career prospects shut down due to their lacking a PhD). In addition, it is estimated that around 100 professional/general positions would also disappear.

Commonwealth Science and Industrial Research Organisation (CSIRO)

In May 2010, CSIRO staff in the Information Management and Technology area were informed by management that as the budget had been frozen and costs had increased, there would be a significant number of redundancies and that these would be handled via a spill and fill process. The staff association at CSIRO reported rumours that had been circulating for some time that a major restructure and redundancy process was planned. Concerns were that around 15 per cent of employees in this area (or 40-50 individuals) were potentially subject to redundancy.³⁴ The Community and Public Sector Union³⁵ suggested that the likely outcome of the process was a declassified structure – essentially meaning that instead of positions at CSOF levels 4 and 5, they were more likely to be filled at CSOF 2, with implications not only for the employees and their careers but also for the ability of the organisation to provide quality outcomes. In addition, it is arguable that, in a drive to economic efficiency the organisation would sacrifice effectiveness, demand impossible levels of accountability for individuals, impose high and unachievable workloads and thereby drive them to resign.

The process resulted in 35 staff being made redundant between 27 October 2010 and 30 June 2011, with another four redeployed elsewhere in the organisation. All four later left as a result of another redundancy process. Although the Union was unable to prevent this process, it took steps through the enterprise bargaining process to address what it described as the “brutish” process which allowed management to make easy culls at any time and force workers “constantly” to reapply for their jobs.³⁶ Further, it was reported that HR managers were telling people that if they failed to apply for one of the “spilled” positions they had effectively resigned, with implications for their legal and workplace-based rights to compensation and support.³⁷

The outcome of the negotiations and new agreement was, to abolish this spill and fill process, an outcome similar to that achieved with the Curtin dispute (albeit via a different process). CSIRO instead agreed to adopt what was considered a fairer approach involving an initial step of skill and capability matching (voluntary redundancy substitution) to drive redeployment where possible, improved communication, consultation and information and an improvement in the process of identification of redundancies (targeted rather than wholesale).³⁸

It is worth noting that, in subsequent announcements of redundancies (and non-renewal of contracts) for CSIRO staff (in 2012 and 2013), there was no mention of a spill and fill process.³⁹ Instead, those

³⁴ Renai LeMay “CSIRO IT staff face job cuts” (24 May 2010) Delimiter <www.delimiter.com.au>.

³⁵ Community and Public Sector Union “CSIRO information management and technology cuts – bad news all round” (2010) <www.cpsu.org.au>.

³⁶ The Australian “CSIRO Pay standoff over” (28 April 2011) <www.theaustralian.com.au>.

³⁷ CSIRO Staff Association “Kill the Spill and Fill” (2010) <www.cpsu-csiro.org.au>.

³⁸ CSIRO Staff Association “Improved redundancy rights making a difference” (26 July 2013) <www.cpsu.csiro.org.au>.

³⁹ ABC News “CSIRO to cut up to 600 jobs under hiring freeze” (8 November 2013) <www.abc.net.au>; Byron Connolly “Updated: CSIRO job cuts ‘baffling’ says union boss” (29 November 2012) <www.cio.com.au>.

identified as under threat included non-permanent, non-core (administration, management and support) and staff involved in “non-priority” or non-funded projects and positions. This implies that strategic and targeted redundancies remains the preferred approach but, again, it seems clear that adoption of this approach has not improved the attitude of the employees nor of the Union to redundancy in this context or the process. The consistent message conveyed in the media⁴⁰ is such moves in the interests of cost cutting damage the ability of the organisation to perform.

Review

These two examples reveal much about the spill and fill process and the way it is viewed by the parties concerned. Despite it being generally viewed by employers and the courts as an objectively fair way of managing redundancies in an organisation facing full or partial restructuring, some unions and others have the view that such a process, if not managed well, can be extremely difficult for an employee who may be forced to accept either unemployment or effective demotion (in itself an issue as it can lead such a person to resign). More generally, unions often see it as a blunt instrument to achieve something relatively simple, promoting divisiveness, uncertainty and reducing the opportunities for affected individuals to maintain their positions or assume new ones in the same organisation. There is also some concern around whether the newly designed positions are sufficiently different to the old, either in scope or expectation, as to make the current employees genuinely redundant or merely insecure.

The cases discussed above also suggest that the organisational culture and history may impact on strategies that are employed by unions in attempts to rein in their use. In this context, it is noticeable that in the university context, where job security has historically been high, the Union negotiated a settlement with Curtin that would minimise the impact of the process and provide some assurance of stability and career progression to those affected (it is also likely that the choice of this strategy had much to do with timing: there was already an enterprise agreement in place with over three years left to run). However, later experience also suggests that there is a more fundamental concern with redundancy in this context more generally, not just with the spill and fill process. Fundamentally, redundancy in this sector reiterates just how uncertainty and insecurity is shaping the employment relationship. The situation was somewhat different for the employees at the CSIRO where a history of instability, job uncertainty and non-consultation drove the Union to campaign successfully for a cessation to the spill and fill approach but not to the redundancy process.

Finally, to answer the question posed as the title to this paper, spill and fill is very clearly used as a means of achieving restructuring via redundancies. Whether it is perceived as fair is uncertain. It is also very clear that employers in Australia need to plan the process very clearly and be able to offer appropriate rationale for carrying it out: the unions are prepared to scrutinise both very carefully to ensure it is appropriate both in form and process. Provided this planning and process is carefully done, the courts and FWC are unwilling to revisit the decision. In addition, although there is some suspicion that it can and is used to dismiss, or force individuals to resign, there is not much evidence of this happening – or at least that the courts are willing to entertain.

⁴⁰ Connolly, as above.

Don't Forget the Workers!

ANTHONY DRAKE*

Part 6A issues in business restructuring

As staff are often a company's most valuable asset, it is important to consider them when selling either the shares or assets and business of a company. This does not just mean considering the effect of the transaction on the employees, but considering issues such as:

- a. how employees fit into the proposed transaction
- b. what is the best structure to adopt
- c. will the employees transfer to the new employer if the business is sold, and if so, on what terms and conditions
- d. how will employees' accrued entitlements be treated— will these be paid out or transferred?

Sale and purchase transactions are implicitly affected by redundancy issues. Notwithstanding, the nature of the transaction, liability or potential liability for redundancies must be taken into account. The general principle in a share transaction is that the sale and purchase does not result in a change in the employer and, accordingly, the transaction itself does not result in any redundancies.

In a sale and purchase of assets and business, there is a change of employer. A change of employer results in employees' employment agreements with the original employer being terminated and they become redundant to the needs of the original (vendor) employer. In such sale transactions redundancies either:

- a. arise from the failure/refusal of employees to transfer to the new employer
- b. arise notwithstanding the employees have transferred to the new employer (technical redundancies).

The liability in respect of the first type is relatively uncomplicated; entitlement to redundancy compensation is usually set out in the employment agreement between the parties. If there is no formula set, or entitlement under the contract, then there is no entitlement to compensation.

Liability in respect of the second type is more complicated and as a starting point, employers should ensure that all employment agreements contain a technical redundancy provision that covers this situation.

Employment Relations Act 2000

The Employment Relations Act 2000 is the principle statute, which governs employment relations in New Zealand. The sale of all or part of a business and assets is considered a 'restructuring' under Part 6A of the Act. Part 6A sets out the provisions that are intended to protect affected employees where the employer proposes to sell all or part of its business so that the affected employees' work will be performed for the new employer.

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A subsequent contracting situation can also arise. This is where one employer provides services to another business under a contract for services, and this contract is transferred to another employer when the contract for services comes up for tender. The original employer, which we call the 'outgoing employer', will need to make any staff that are now surplus to their requirements redundant.

Background to Part 6A

Part 6A was first introduced into the New Zealand employment law landscape with the Employment Relations Amendment Bill 2004. The Bill, in its original form, was intended by both the Labour government and the Service and Food Workers Union ('SFWU') to address what they saw as a number of undesirable social consequences of business transfer situations. The SFWU were concerned that in subsequent subcontracting situations, which happened frequently in the commercial cleaning and food catering industries, the various service providers were competing only in respect of wages. This resulted in downward pressure on the wages of the employees, which became known colloquially as the 'race to the bottom'.

The Labour government's first attempt at continuity of employment legislation did not last long. The Employment Court in *Gibbs v Crest Commercial Cleaning Limited*¹ held that the provisions of Part 6A did not apply to subsequent contracting situations. The government remedied this by amending the legislation in 2006 with the Employment Relations Amendment Bill (No 2) 2006.

Essentially, Part 6A is designed to provide specified categories of employees, which parliament considered 'vulnerable', with protection and continuity of employment in business transfer situations. Parliament sought to achieve this by requiring the workers to transfer with the business activity that was being transferred. The incoming employer would be prohibited from negatively changing their terms and conditions. As a result, a transferring employee is entitled to transfer on the same terms and conditions they enjoyed immediately prior to the transfer. The transferring employees also retain their accrued annual leave and holiday entitlements, which must be recognised by the incoming employer. This was to remedy the situation where a transfer occurred in the month leading up to Christmas and employees were left without enough leave to spend Christmas with their families.

Operation of Part 6A

Part 6A preserves continuity of employment for specified categories of employees. The way this works in practice is that the employee must first be considered eligible to transfer. In order to be considered eligible to transfer, the employee must come within one of the specified categories in Schedule 1A and also be performing the work that it is the subject of the subsequent contracting (s 69F). Where the lost contract represents only part of the employer's business, only those employees engaged in the work that is transferring are entitled to transfer. This may be difficult to determine in some cases where the outgoing employer's business is structured in a way where every employee works on every contract, in which case the outgoing employer will need to conduct some form of selection process.

¹ *Gibbs v Crest Commercial Cleaning Limited* [2005] 1 ERNZ 339.

Determining eligibility within Schedule 1A is a more difficult question. Schedule 1A sets out the specified categories of employees that are protected under Part 6A. These include, most commonly, cleaning services, food catering services, and orderly services. One might assume that this is a reasonably easy test to satisfy. However, as we will discuss shortly, the Employment Court has had some difficulty in defining these categories.

Once an employee is eligible to transfer they must give notice to their employer of their election to transfer (s 69G and s 69I). They will then transfer on the date the contract concludes. By virtue of section 69I(2)(b), the new employer must employ the transferring employees on the same terms and conditions they enjoyed immediately prior to transfer. They must also recognise the transferring employees' accrued holiday pay and leave entitlements (s 69J(1)). Section 69J(2)(a)(ii) expressly prohibits the outgoing employer from paying these entitlements to the transferring employees upon transfer.

The intention of the legislation is that the incoming employer, by winning a contract, will be increasing their business and is, therefore, able to take on these transferring employees to continue doing the new work. This may not always be the case as businesses may tender for work in order to increase utilisation and productivity of existing staff. However, under Part 6A this is not a possibility.

Section 69N recognises this issue and confers a right for transferring employees to bargain for redundancy entitlements if they are surplus to the incoming employer's needs and, subsequently, made redundant. The entitlement to bargain for redundancy is subject to the provisions in the transferring employees' employment agreement. If the relevant employment agreements provide for redundancy, the incoming employer would be liable for those payments. On the other hand, where the employment agreement is silent on this point, the transferring employees may bargain for redundancy entitlements.

The Supreme Court decision in *Service & Food Workers' Union v OCS Ltd*² held that the term 'redundancy entitlements' was broader than the concept of redundancy payments. It held that, given in s69B, the Act defines redundancy entitlements as including redundancy compensation, if an employment agreement only excludes a right to redundancy compensation, the employees are entitled to bargain for other forms of redundancy entitlements, such as retraining or outplacement support.

Commercial reality

It appears that parliament intended to protect employees but did not consider how this legislation would work when two competing employers are involved. Parliament did not address the commercial reality of the situation and, therefore, many of the provisions are lacking the specificity needed to address these issues. For example, the incoming employer must recognise the holiday and leave entitlements of the transferring employees and the outgoing employer is expressly prohibited from paying these entitlements to the employees. However, the Act does not address which of these two employers must pay for these entitlements. The Supreme Court is currently considering this very question, which we will discuss in more detail later.

² *Service & Food Workers' Union v OCS Ltd* [2012] NZSC 69.

To aid the operation of Part 6A in business transfers, parliament adopted sub-part 2 of Part 6A which includes a disclosure regime which allows tenderers to request information about the employment-related entitlements of employees who might transfer prior to tendering for the work; the obvious implication being that the tenderer (potential incoming employer) was in the best position to factor those costs into its tender. The High Court, on the other hand, commented in the *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited & Anor*³ (*LSG v Pacific*) case that the disclosure of transfer information prior to tender was unable to give any meaningful estimate of the transfer costs and, therefore, does not indicate parliament's intention to have the incoming employer pay for those entitlements. Again, this is subject to appeal to the Supreme Court.

Eligibility to transfer

The most hotly contested and debated subject within Part 6A is that of the eligibility of employees to transfer. As you would expect, employees want to ensure they come within Part 6A so that they benefit from continuity of employment and are able to keep their jobs. Defining the work which the contract services relate to is, generally, a straightforward task. However, this is inextricably linked to the definition of the services provided, such as cleaning services and food catering services. Therefore, the definition and breadth of those categories is subject to some debate.

The categories of services that have been considered by the Employment Court are the cleaning services and the food catering services. There has been a trilogy of cases; starting with Judge Travis' decision in *Matsuoka v LSG Sky Chefs New Zealand Limited*⁴ ('*Matsuoka*'), continuing with Judge Inglis' decision in *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd*⁵ (*Lend Lease*), and finally being considered in another of Judge Travis' decisions, in *Tan v LSG Sky Chefs New Zealand Limited*⁶ (*Tan*). We will examine each of these cases to shed some light on how the Court has interpreted the scope of the categories of services.

Matsuoka v LSG Sky Chefs New Zealand Limited

The scope of Schedule 1A and, in particular, 'food catering services' was first considered in the *Matsuoka* decision.

By way of background, Mr John Matsuoka was employed by PRI Flight Catering Limited trading as Pacific Flight Catering (Pacific). Pacific lost its contract to provide food catering services to Singapore Airlines to LSG Sky Chefs New Zealand Limited (LSG). Pacific considered Mr Matsuoka was eligible to transfer and he elected to transfer to the incoming employer. LSG, after reviewing his duties, took the view that he was not eligible to transfer under Part 6A as he was not a *vulnerable* employee and did not fall within Schedule 1A.

Mr Matsuoka's duties included work as a ground steward for a maximum two hours a day during which his duties included placing all necessary equipment, such as cutlery and glasses on the metal carts containing the food, loading and driving the trucks, unloading carts and off-loading empty carts and returning them to the base. Outside these two hours, Mr Matsuoka spent two-three hours per day arranging stock, water, beverages, and dry ice for the airlines. The rest of his time was spent

³ *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited & Anor* [2012] NZHC 2810.

⁴ *Matsuoka v LSG Sky Chefs New Zealand Limited* [2011] NZEmpC 44.

⁵ *Lend Lease Infrastructure Services (NZ) Ltd v Recreational Services Ltd* [2012] NZEmpC 86.

⁶ *Tan v LSG Sky Chefs New Zealand Limited* [2013] NZEmpC 35.

arranging trucks and running messages. Essentially, he was described as a ‘jack-of- all-trades’ as he did whatever work that was required on the day. Mr Matsuoka also had management responsibilities, and his pay rate was such that he would not traditionally be considered a *vulnerable* employee.

The Employment Court determined that Mr Matsuoka came within Schedule 1A and was eligible to transfer. It found that, although Mr Matsuoka may not be considered vulnerable due to his level of salary (\$42 p/h), the word “vulnerable” does not appear anywhere in Part 6A. To use criteria of vulnerability would be to restrict parliamentary intention, which was to protect specified categories of workers and not those who qualify under a subjective test of vulnerability. Mr Matsuoka spent a maximum of one hour per day on the Singapore Airlines catering functions. However, the Employment Court decided that this was sufficient to bring him within the statutory protections. The Employment Court held that we should consider “all the services necessary to get the food and drink to those passengers in a form in which they would be able to consume it”.

In considering “all the services necessary”, the Employment Court adopted a *de minimis* approach to the situation whereby an employee involved in any amount of the necessary services would qualify as a specified employee entitled to the protections of Part 6A. The Employment Court also found that, although the Act provides for situations where an employee can transfer with only part of the work, thereby having two employers and working for both, this was not practical and could not result in an employee working part-time for two employers as opposed to full-time for one employer. This is because an employee is entitled to be employed on the same terms and conditions as they enjoyed immediately prior to transfer, which includes the status as a full-time employee.

Pacific’s business was organised so that every employee worked on every airline and, therefore, it was impossible to say which employees worked only for Singapore Airlines, i.e. the contract that was lost. Therefore, as Singapore Airlines represented 40 per cent of Pacific’s business, 40 per cent of the workforce was entitled to transfer. Pacific, then, undertook a selection process to determine which of its employees would be given the opportunity to transfer. This approach was upheld by the High Court in the case of *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited*⁷.

The *Matsuoka* decision represents one approach the Employment Court has taken to the eligibility of transferring employees. This approach is, essentially, if an employee performs food catering services as part of their job, no matter how small a part, they will be considered to provide food catering services and are therefore eligible to transfer under Part 6A.

Lend Lease Infrastructure Services (NZ) v Recreational Services Limited

The second decision we are considering is Judge Inglis’ decision in *Lend Lease Infrastructure Services (NZ) v Recreational Services Limited*. This case concerned the scope of cleaning services under Schedule 1A.

Lend Lease employed cleaners or, for want of a better word, ‘horticulture specialists’ to clean and maintain public spaces and parks for Auckland Council. Their duties involved, among other things, graffiti removal, cleaning sumps and cess pits, loose litter collection, water blasting to remove moss and dirt, barbeque cleaning, and sweeping paths. Other duties involved the ‘cleaning of playgrounds’ and the removal of tree branches, vegetation, and tipped rubbish. The question that arose was whether some or all of these duties could be considered as cleaning services under Schedule 1A. It

⁷ *LSG Sky Chefs New Zealand Limited v Pacific Flight Catering Limited* [2013] NZHC 43.

was contended that, at the very least, cleaning graffiti off structures and water blasting them amounted to cleaning services.

The Employment Court took the contrary view. It held that the employees were not engaged in cleaning services and, therefore, not eligible to transfer under Part 6A. It found that cleaning services are what we would generally consider office cleaning and conjures up images of working inside not outside. With respect, that seems to be a difficult distinction to make, because if parliament intended Schedule A to only cover indoor cleaning it would have limited its language to something such as commercial cleaning services and not broader cleaning services.

The Employment Court also found that the specified service must arise other than incidentally to the work performed. In these circumstances, the cleaning of parks was incidental to the main function of these employees, which was to maintain and beautify the public buildings and gardens.

The Employment Court seems to have been persuaded by a floodgates' argument, whereby it was considered that if the Court adopted this reasoning it would allow dental hygienists who, incidentally, clean the equipment that they use to be covered under Part 6A. With respect, this concern seems unfounded as a distinction could be made between cleaning services arising incidentally, and when they are a core function of the job. In *Lend Lease*, cleaning of the parks was a specific employee KPI (key performance indicator). Therefore, it could be suggested that cleaning arose other than incidentally to their work.

However, the Employment Court judgment stands for the proposition that the provision of such services must arise other than incidentally in the total work balance and can be considered to impose a threshold requirement of "more cleaning services than not". The Court appears to have expressed itself in such a way that an employee must provide more cleaning services than not in order to qualify under Part 6A. This would suggest a threshold requirement of 51 per cent and above in order to qualify under Part 6A.

This is difficult to reconcile with the *Matsuoka* decision, which essentially held that any amount is good enough and we can apply a *de minimis* threshold. While the *de minimis* threshold is similar to the incidental test in *Lend Lease*, the threshold requirement in *Lend Lease* is a new test altogether and cannot be considered an extension of *Matsuoka*.

Pittard v ERS New Zealand Ltd t/a Transpacific Industrial Solutions

In *Pittard v ERS New Zealand Ltd*⁸ the Employment Relations Authority had no difficulty in accepting that cleaning graffiti off bus shelters was cleaning services, albeit an outside activity.

We can contrast this with the Employment Court's approach in *Lend Lease*, where the Court took a narrow view.

Tan v LSG Sky Chefs New Zealand Limited

The final case dealing with the issue of eligibility is that of *Tan v LSG Sky Chefs New Zealand Limited*. This was another decision of Judge Travis in the Employment Court.

⁸ *Pittard v ERS New Zealand Ltd* ERA Wellington WA147/09, 5 October 2009.

This case also arose out of the transfer of the Singapore Airlines contract from Pacific to LSG. Mr William Tan was an equipment store supervisor at Pacific. His duties included ordering in stock for the food catering business, such as napkins, plates, cutlery, condiments, ice, and alcohol. It is safe to say that without these items the food catering services business could not operate.

When Mr Tan presented himself at LSG for transfer, they again did not consider him eligible to transfer under Part 6A. The Employment Court found that Mr Tan was not eligible to transfer. It determined that Mr Tan's duties were not proximate enough to the actual provision of food services. This was an interesting decision as Judge Travis, who had decided in favour of Mr Matsuoka, now had an opportunity to reconsider his decision under similar circumstances. Judge Travis notes in his judgment that he had been waiting for the *Lend Lease* judgment to be given and that, in his view, it had changed the law since *Matsuoka*, which, in conjunction with the Supreme Court decision in *OCS* allowed him to take a different view in the *Tan* case.

The Employment Court considered the obiter comments of the Supreme Court in the *OCS* decision regarding vulnerability and has relied on these to strictly interpret the test in *Matsuoka*. There is difficulty with this approach. The Employment Court noted that there was, at the Supreme Court level, little difference between obiter and ratio and could, therefore, consider the comments made regarding vulnerability. With respect, this approach seems unsound in that obiter comments should be given their correct weighting, even at a Supreme Court level, and introducing elements of vulnerability into the test for eligibility under Schedule 1A appears contrary to parliament's intention and the Judge's own comments in *Matsuoka*.

Regardless, the *Tan* decision can be seen as providing a third test for determining the eligibility of employees to transfer. This test considers a proximity relationship between the employee and the actual provision of food services. The difficulty with this decision is that parliament chose not to limit food catering services to food services or those proximate enough to food services; it chose to express itself in terms of food catering services. The Employment Court considered that if Mr Tan was allowed to transfer, it would again open the floodgates for all support staff in a food catering services business to transfer. This would include accounts and HR managers, which is clearly not the intention of Part 6A.

Enter the Court of Appeal

Leave was sought from the Court of Appeal to appeal the Employment Court's decision in *Tan*.⁹

The Court of Appeal, in declining leave to appeal, held that the Court's role, in determining questions of eligibility under Part 6A, is to apply the statutory definition to a set of facts. This will necessarily result in a factual finding that is not amenable to appeal as a question of law. Further, the fact-specific nature of these cases makes it difficult to set out a definitive test for determining eligibility. The Court of Appeal held that the outcomes of *Matsuoka* and *Tan* were different because the facts were different:¹⁰ Mr Matsuoka delivered food directly to the airline, whereas Mr Tan did not.

This has left the Employment Court to determine eligibility on a case-by-case basis.

⁹ *Tan v LSG Sky Chefs New Zealand Limited* [2013] NZCA 399.

¹⁰ At [14].

Hypothetical Contracting Out test

The three Employment Court decisions have left the law surrounding eligibility unclear. The Court of Appeal has suggested case-by-case analysis is the only way to deal with the situation.

While moving into the realm of conjecture, one potential approach that avoids this situation is what could be considered the Hypothetical Contracting Out test. This involves postulating a hypothetical business that carries on the specified business activity (for example food catering services) as well as another business activity that does not fall within Schedule 1A.

Now consider who in the business would be made redundant if the food catering services side of the business were contracted out. Under this approach, it would be only those employees engaged in “all the services necessary” to operate a food catering services business that would be made redundant. This approach would not allow HR, secretarial, and payroll staff to transfer as they would not be made redundant as a result of the loss of the work. It may be that some support staff are made redundant as a result of the reduction in workforce following the transfer (provided food catering services was a significant part of its business). However, this is one step removed from the work lost as a result of contracting out.

This approach conforms with the objects of Part 6A, as it was originally designed to protect those employees who would be made redundant as a result of contracting out.

Looking into the future

On 26 April 2013, parliament introduced the Employment Relations Amendment Bill 2013. This Bill provides some changes to the Employment Relations Act 2000; not least among them are changes to Part 6A. The amendments propose to put stricter timeframes around the election to transfer to give all parties some clarity. Under the proposed amendment, affected employees will have five working days from receiving a notice of the right to make an election to transfer to decide.

Parliament is also trying to address potential issues around the provision of information in transfer situations. The new amendment requires the outgoing employer to provide information, such as employment agreements, wage and holiday records, personnel files that include performance, and disciplinary and grievance information. The amendment also attempts to deal with the question of who should pay for an employee's entitlements in a transfer situation. It does this by providing a default formula if the employers cannot agree as to how to apportion the liability. There is, currently, no suggested default formula so much will depend on the substance of the formula. However, the current default position is that expressed by the Court of Appeal under which the outgoing employer is not liable for pre-transfer accrued entitlements. This section will need to expressly overrule the Court of Appeal decision to stop it from applying.

Another change has attempted to deal with the ‘poison challis’ situation. This is where the outgoing employer increases wages and terms and conditions prior to transfer in order to make the contract uneconomical for the incoming employer. Parliament has attempted to remedy this situation by creating an implied warranty whereby the outgoing employer warrants that it has not changed the terms and conditions, or the work done by the employees, without good reason. It will be interesting

to see how the Courts define “without good reason” as this is not currently provided for in the amendment.

It is worth noting that there are no proposed changes to criteria for eligibility. However, removing s237A has been suggested. This has been suggested in recognition of the difficulty the Governor-General has in determining whether new categories of specified employees should be added to Schedule 1A. It has been decided that this responsibility should be left to parliament. Section 237A has never been used, but the significance of removing this section is that the Supreme Court in *OCS* relied on this section to justify its comments about vulnerability. These comments obviously will no longer apply if the section is removed.

An exemption has been introduced for small and medium enterprises (SME); that is, businesses with less than 20 staff. These employers and their employees will no longer be covered by Part 6A. Given that 90 per cent of businesses in New Zealand are SMEs, there is a question about whether this effectively waters down the protection provided by Part 6A.

Further consideration needs to be had to the possibility that employers will attempt to structure their businesses in such a way that they fit within this exemption and have less than 20 staff. Parliament has seen this issue and tried to address it by considering, for the exemption, a company's subsidiaries, subcontractors and franchises. However, there are many creative ways to potentially get around this provision.

The question remains as to what this all means. Are these amendments useful and do they take Part 6A any further towards its objective of providing protection for specified categories of employees? The majority of the proposed amendments deal with issues between the two employers in a transfer situation and do not help the employees very much. However, by the same token, the amendments' attempt to minimise the possibility of the employers fighting a commercial battle with the employees caught in the middle.

The SME exemption has the most potential to affect employees subject to Part 6A. Given the large numbers of businesses who would fall within the exemption, does this effectively erode the protections of Part 6A? One could consider that this is not as important as it first appears. For example, in the airline food catering industry, there are only two companies involved. There are such high start-up costs involved that only big companies can survive. Many of the other industries covered by Schedule 1A are dominated by big players as well.

Tricky issues

There are a number of other tricky issues that still need to be resolved by the Courts in order to make Part 6A truly effective. There is the issue of who should pay for the employment-related entitlements of the transferring employees and the subcontractor conundrum.

Who should pay? – Pacific Flight Catering Limited & Anor v LSG Sky Chefs New Zealand Limited

We already know that the incoming employer must recognise the leave entitlements of the transferring employees and that the outgoing employer is prohibited from paying these out. The legislation does not deal with how the liabilities should be apportioned between the outgoing and

incoming employer. This is a rather contentious issue as the value of these entitlements can be in the hundreds of thousands of dollars. As you can imagine, both the incoming and outgoing employers are interested in avoiding the liability for these entitlements.

If the incoming employer were held to be liable for these entitlements, the outgoing employer would receive a windfall as they originally built the entitlements into their business costs and now do not have to pay them out. This would result in a much needed cash injection into the business. On the other hand, if the outgoing employer is liable for the transferring employees' entitlements, the incoming employer would receive a windfall. This would be because they would be receiving a cash injection into their business when they had covered these expenses under their tender bid. This could also negatively impact on the outgoing employer's financial viability as it is likely they have just lost a major contract and may be in financial trouble as a result. Paying out such a large amount could financially cripple an employer.

It is arguable that parliament intended the incoming employer to bear the costs of these entitlements as it has included a disclosure regime under sub-Part 2 of Part 6A. The disclosure regime under sub-part 2 provides the incoming employer with the opportunity to request entitlement details about the transferring employees in aggregate form and they could, therefore, be able to incorporate these costs into the tender. This creates an incentive for the tenderer to be diligent. The High Court differs on this point.

The question of who pays for employee entitlements has been addressed by the High Court and the Court of Appeal. LSG is currently requesting leave to appeal to the Supreme Court on this issue. The High Court held that it was the outgoing employer who was liable for these entitlements. It found that the common law action of money paid to the use of another under compulsion of law allowed the incoming employer to be liable to the transferring employees for their respective entitlements. However, the primary liability rested with the outgoing employer and the incoming employer was, therefore, entitled to recover the amount of any payments from the outgoing employer. This liability only arises when payment is made to the transferring employees by the incoming employer. Therefore, reimbursement by the outgoing employer will necessarily occur over a number of months and potentially years as employees slowly use up their entitlements such as annual leave.

One obvious issue with this position is that if the outgoing employer could become insolvent and is put into liquidation, the liability has not yet crystallised and cannot, therefore, be recovered in liquidation proceedings by the incoming employer. This would put the incoming employer out of pocket as they would have to bear the full value of any outstanding costs.

The High Court also commented that the disclosure regime under sub-part 2 did not evidence any intention of parliament to have the incoming employer deal with the entitlement costs. This was because the information disclosed under sub-part 2 could not give any meaningful indication of cost. The Court of Appeal differed in its opinion of who should be responsible for accrued leave entitlements.¹¹ The Court of Appeal determined that LSG was liable for the full cost of the accrued leave entitlements as the fourth element of the cause of action (money paid to the use of another under compulsion of law) had not been made out, viz, Pacific was not directly liable to the employees for accrued leave entitlements. LSG could not, therefore, have paid Pacific's debt.

In coming to this conclusion, the Court of Appeal considered that there can be no contractual basis for a claim against the outgoing employer as the effect of sections 69I(2)(a), 69M(2), and 69J(1) was

¹¹ *Pacific Flight Catering Limited & Anor v LSG Sky Chefs New Zealand Limited* [2013] NZCA 386.

that an employee is treated as having always been an employee of the new employer. Therefore, any employment agreement between the transferring employees and the outgoing employer is terminated.

The Court of Appeal also held that Part 6A places responsibility on the new employer to meet the cost of accrued leave entitlements of the transferring employees. The Court noted that there appeared to be a lacuna in the legislation in this regard, although the undesirable consequences that may result are an issue for parliament to deal with.¹²

The subcontractor conundrum

Another tricky issue with Part 6A relates to the involvement of subcontractors in the contractual process for the specified categories of services. Part 6A by virtue of section 69B defines the services provided under Schedule 1A in the subsequent contracting situation as including any and all services that have been subcontracted to another provider. A simple example of this is where a food catering business subcontracts the actual preparation of the meals to another entity and only carries out the transportation and service functions. So far, there are no issues with the proposition that subcontractors are eligible to transfer.

However, the situation becomes more complicated when there are multiple subcontracting parties. Let us take a situation where an airline has contracted out its food catering services. Party A wins the contract to provide food catering services. Party A subcontracts the food catering services contract to Party B. Party B, subsequently, subcontracts the food catering services contract to Party C. Party C then subcontracts part of the food catering services contract to Party D. Along comes Party E who successfully tenders for the work, winning the contract from Party A to provide food catering services direct to the airline. The question is whether employees from Party A, Party B, Party C, and Party D are all eligible to transfer to the new Party E. Currently, on the face of it: the answer to this question is yes, they are all eligible to transfer to Party E.

The situation becomes even more complicated when Party E subcontracts part of its business to Party F. The question now becomes whether employees from anywhere among the parties A, B, C, and D are eligible to transfer across to Party E and down to subcontractor F whereby those employees doing the work could follow that work up and down the chain of subcontracting. Again on the face of it, the answer would be yes. Where this runs into difficulty is that Party F, which provides services to Party E, may have nothing to do with the airline contract and may not even be aware that Party E is tendering for the work. If Party E is successful, Party F may be required to take on staff where it never contemplated being involved in a Part 6A transfer situation.

This situation seems extremely complicated and unfair to those parties who are not involved in the provision of services that relate to Part 6A, yet may still be forced to take on transferring employees. Contextualising this situation, take the example where Party A provides food catering services to an airline. They subcontract their bread making responsibilities for the bread rolls to Top Bread Limited. The contract for catering services transfers to Party B, and Party B uses, for its bread making services, Shorter Rise Breads Limited. Are the bread makers from Top Bread Limited entitled to transfer to Shorter Rise Breads Limited? Hopefully, you can see by now that this extension can lead to illogical consequences.

¹² The Author notes that the Supreme Court has granted leave to appeal the decision from the Court of Appeal. The appeal is scheduled to be heard in June 2014.

One way to potentially deal with this situation is to examine the definition of the specified categories of work under Schedule 1A. By doing this, we could suggest that the service in which the bread makers work is not food catering services, although it does compliment and form part of the overall food catering services. By arguing that bread making is not food catering services, it, therefore, falls outside the definition of food catering services as part of Schedule 1A and stops the transferring employees from transferring to another bread maker. This approach, however, may not work in all situations as all of these contractors may legitimately be involved in food catering services. Therefore, the question to be asked is how far up and down the chain, in terms of subcontracting parties, do the rights and protections of Part 6A apply. The legislation, while well intentioned, was never meant to provide logically inconsistent outcomes.

MBIE investigations: Duty owed to workers by Employers, Lawyers and Inspectors

Do we need to regulate to protect the interests of workers?

GREG LLOYD*

Introduction

An investigation by the Ministry of Business Innovation & Employment (MBIE) following a serious harm incident in the workplace gives rise to a number of issues, not least of which is the possibility that any duty holder under the Health & Safety in Employment Act 1992 (HSE Act) could be subject to prosecution¹. Depending on the scale and complexity of a MBIE investigation, there will be a vast array of issues to consider. This paper does not provide authoritative analysis of all the potential issues involved. Rather it will look at one particular issue; that is the role played by lawyers providing regulated services to employers. It will focus, in particular, on the situation where the same lawyer provides legal services to both the employer and employees in relation to the same matter and ask the question “does this give rise to a fundamental conflict of interest for the lawyer involved?” Do we need specific regulation to ensure the rights of workers are properly protected during a MBIE investigation or are existing protections adequate?

It is important to note that it is not my intention to vilify lawyers who provide such services or suggest their actions are necessarily negligent, reckless or otherwise amount to professional misconduct. My intention is to raise an issue that has, to date, not been properly addressed. It appears that it has generally been accepted that an employer is entitled to instruct a lawyer to act for it during a MBIE investigation and part of that legitimate representation is to provide legal services to employees, such as advice and representation during official interviews. It is my contention that this is not done for the benefit of the affected employees but is done for the benefit of the fee paying employer. In other words, the interests of employees are treated as being the same as those of the employer or worse, treated as subservient to those of the employer. In any event, there is an inherent conflict of interest between the interests of two statutory duty holders in relation to the same matter, which should preclude any lawyer offering legal services to both employer and employees.

So, what is the problem?

The problem is that, in attempting to protect the interests of employers and minimise their chances of prosecution, the legitimate interests of workers are sometimes ignored or treated as being an extension of the employer’s interests. In doing so, it is arguable that employers are failing in their duty of good faith owed to employees and the MBIE investigation is, at the very least, made more difficult because of improper interference by the employer and its lawyer. Lawyers, acting

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NB: Greg Lloyd was unable to attend the conference to deliver this paper. He kindly continued to make it available to conference delegates and through publication in this issue of the Journal.

¹ This paper is concerned with only two duty holders (the employer and employees)

for the employer, are arguably failing in their responsibilities under the Lawyers & Conveyancers Act 2006 (L&C Act) and the Conduct & Client Care Rules 2008.

Two examples are cited to highlight the problem. The first concerns events that took place in the immediate aftermath of the Pike River tragedy. The second concerns the advice and strategies lawyers offer to employers when facing the prospect of an investigation by MBIE.

Pike River

In the days following the Pike River explosion, there was, as one can imagine, a lot of activity in and around Greymouth. The police and MBIE (or the Department of Labour as they were at the time) were on the scene immediately, and began developing what proved to be a well-executed joint investigation process. That process included undertaking extensive interviews with all employees.

Pike River Coal Ltd was also busy. It had, among other things, engaged public relations experts and a law firm to represent its interests. The company and its senior management were (rightly) concerned that they would be held criminally responsible for the deaths. As to be expected that was a significant focus of the police and MBIE investigation. It was appropriate that the company should engage lawyers to assist. It was the form in which assistance took that is of concern. Among other things the company:

- Attempted to set up a parallel investigation in which all employees would be interviewed by the company before they were interviewed by the police and MBIE².
- Instructed employees that, before attending interviews with the police and MBIE, they were to report to the company's office. There they were encouraged to take advantage of the company's offer of free legal representation by lawyers engaged to act for the company.
- Had its lawyers presenting themselves at the police station and asserting a right, on behalf of the company, to be present during the police/MBIE interviews of employees.
- Had its lawyers approaching employees as they entered the police station and offering to represent them during the interviews.
- First demanded, and then requested, copies of the audio and visual recordings of the employee interviews.

The company asserted that it was motivated by a desire to protect the rights and interests of the employees as well as those of the employer. It was not. The company was interested in protecting its own interests and it did so by attempting to influence and control what employees said in their interviews. In the case of Pike River, it was patently obvious that the interests of employees were very much in conflict with the interests of the employer.

Lawyers' servicers to employers

Lawyers offer a range of services to employers facing investigation by MBIE following serious harm incidents in the workplace. Such services may concern compliance with the HSE Act and the Employment Relations Act 2000 (ERA) as well advice on strategies for minimising the likelihood

² Employees were warned that failure to attend interviews may be treated a misconduct by refusing to follow a reasonable and lawful instruction

of prosecution or other enforcement action. There is nothing inherently wrong with this, provided it does not impinge upon other interests, such as the rights of workers to enjoy a safe and healthy workplace and the interests of workers who may themselves be subject to a MBIE investigation. Nor should it give rise to a conflict of interest for the lawyers involved. The following are examples of the sort of advice lawyers offer to employers facing a MBIE investigation³:

- Immediately contact a lawyer
- Manage the response by, among other things, ensuring employees are properly prepared to ensure that they do not say anything that could incriminate the employer
- Ensure employer's lawyers are present during MBIE interviews with employees

There are obvious similarities between this generic advice and the approach adopted by Pike River Coal Ltd and its lawyers. In both cases the objective is to protect the interests of employers by controlling and manipulating the actions of employees.

Before looking at the role of lawyers, it is necessary to briefly touch on the obligations MBIE and the employer.

MBIE obligations to employees

Following the Pike River incident referred to above, the NZ Council of Trade Unions, and NZ Amalgamated Engineering Printing & Manufacturing Union Inc. made a formal complaint to the Office of the Ombudsman. The complaint centred on the employer's efforts to have its lawyers represent employees being interviewed by the police and MBIE. The union argued that it was fundamentally wrong for state agencies to allow employees to be placed in such a situation without professional and independent advice. The Ombudsman rejected the complaint on the basis that it only had jurisdiction to look at the conduct of MBIE. In that respect, MBIE inspectors have no control over who an interviewee chooses to have represent them or be present during the interview. While it may be undesirable to have the employer representative present during the interview, the Ombudsman reasoned that it is a decision for the interviewee alone. The Ombudsman did not comment on the professional obligations of the lawyers involved. Nor did she comment on the actions of the employer.

It is certainly the view of the union that, to place such a burden on an employee, particularly in circumstances such as those of the Pike River tragedy, is manifestly unreasonable and unfair. This is especially so when it is unlikely that affected employees will have been provided with sufficient information to make an informed decision and are likely to be labouring under the misapprehension that their employer and the employer's lawyer are acting in their best interests.

Employer obligation to employees

It is arguable that the actions of employers outlined above are inconsistent with their good faith obligations under the ERA. Section 4 of the ERA sets out the general good faith obligations owed in the employment relationship. The good faith relationship is wider than the implied mutual obligation of trust and confidence. It requires the parties to be responsive and communicative and to not do anything that is, or is likely to be misleading and deceiving. Engaging a lawyer to represent its interests and then offering that same lawyer's services to the employee is misleading

³ This is representative of the advice offered to employers in seminars and other forums

and deceiving. It is misleading and deceiving because the true motivation of the employer is not the protection of the employee's interests but the protection of its own interest.

Consideration also has to be given to the inherent inequality in power in the employment relationship. There is little doubt that without independent advice, an employee is likely to feel considerable pressure to acquiesce to an employer's demand that their representative be present during a MBIE interview. That is not consent freely given.

The lawyer – is there a conflict of interest?

The issue for lawyers providing services to employers facing a MBIE investigation is, among other things, whether or not there exists a conflict of interest. Section 4 of the L&C Act sets out the fundamental obligations of lawyers and includes the obligation to be independent in providing regulated services to his or her client.

Regulated services means, in relation to lawyers, legal services (s4). Legal services are services that a person provides by carrying out legal work (s4) for any other person, and legal work includes advice in relation to any legal or equitable rights or obligations. In the context of a MBIE investigation in which an employer engages a lawyer to represent its interests, a solicitor-client relationship is formed, the lawyer will provide regulated services and these fundamental obligations will apply. The solicitor-client relationship is a fiduciary relationship.

The relationship between lawyer and client automatically gives rise to a fiduciary relationship. The existence of such a relationship imposes onerous duties on a lawyer. This reflects an assumption that the features giving rise to a fiduciary relationship will almost invariably exist between lawyer and client. Those features include an imbalance of power, the vulnerability of one party, a relationship of trust and confidence, and an assumption by one party of a duty to act in the other's interests. The obligations imposed by the fiduciary relationship are heavy and have been stated as duties to:

- Avoid conflicts of interest between client and self, former client or existing clients;
- Not make a personal gain (or other fees) from the relationship;
- Disclose all matters that are material to the client to the client;
- Maintain all information disclosed or gained in the course of the relationship as confidential;
- Account for all money held on the client's behalf.⁴

So, once instructed to represent the employer's interests, a solicitor-client relationship is formed, regulated services are provided and a fiduciary duty is owed to the client by the lawyer. But what about when the service provided to the employer includes the provision of legal services to employees, such as when the lawyer represents the employee during a MBIE or police interview. Has a solicitor-client relationship formed between the lawyer and employee? What obligations are now owed to the employee?

While an employee in this situation is unlikely to be footing the bill, there is, nevertheless, a

⁴ D Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 171

solicitor-client relationship⁵. There must, surely, be a fundamental conflict of interest because the lawyer is acting for two duty holders in relation to the same matter where there is a risk those duties may come into conflict.

The lawyer cannot fully discharge his or her obligations to both the employer and employee. For example, the duty of confidentiality owed to each must necessarily conflict with the disclosure obligations owed to each. The lawyer has an obligation to disclose all relevant information to the employer, but has a corresponding obligation to keep all information relevant to the employee confidential. In the context of a MBIE investigation, a lawyer providing regulated services to both employer and employee will be in possession of information that fits both categories.

Even if it could be argued that there is no solicitor-client relationship between the lawyer and employee, there must be a relationship of trust and confidence such that the lawyer owes a fiduciary duty to the employee. That will give rise to broadly the same obligations owed under the solicitor-client relationship. There will be a significant imbalance of power between the employee and lawyer⁶, the employee, who is unlikely to have any significant understanding of what is involved in a MBIE investigation, will be extremely vulnerable and place considerable trust and confidence in the lawyer. The employee, if offered legal representation, will be entitled to assume that the lawyer providing that representation is acting in their best interests. And in the Pike River example, employees were expressly told that the provision of free legal representation was for their benefit.

It is important to note that at Pike River, and in relation to the generic advice offered to employers, employees are not advised of the existence of a conflict of interest. In *Farrington v Rowe McBride & Partners*,⁷ Richardson J stated:

A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtain their informed consent to his so acting.

Imagine this hypothetical but entirely plausible situation. An employer engages a lawyer to act for them during a MBIE investigation following a serious harm incident. The employer, then, offers an employee who is to be interviewed by MBIE free legal representation by the same lawyer. During the lawyer's discussions with the employee, the employee discloses to the lawyer that he was responsible for the serious harm incident. The lawyer is now in possession of information that can incriminate the employee but exonerate the employer. What does the lawyer do? He or she cannot discharge their duty under rule 7 of the Conduct and Client Care Rules without falling foul of rule 8⁸.

It is possible to conceive of other scenarios which should be avoided. For example, a lawyer who represented an employee during a MBIE interview may, should a defended hearing follow, find him or herself cross examining that same employee who is now a witness against the employer. Employees are not pawns to be moved and manipulated and, if necessary, sacrificed in the interests of protecting the employer. Employees have their own interests that deserve protection. Those

⁵ The definition of 'client' in Butterworths New Zealand Law Dictionary (5th Edition, 2002) is "A person who consults a solicitor".

⁶ This is especially so, given the inherent power imbalance in the employer-employee relationship

⁷ *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 90.

⁸ Rule 7 requires that a lawyer must disclose to a client all information relevant to the matter. Rule 8 requires a lawyer to protect and hold in strict confidence all information concerning a client.

interests cannot be protected by a person who is acting for and being paid by another duty holder whose interests may conflict with those of the employee.

It may be argued that the interests of both the employer and employee can be protected because should a conflict arise, the lawyer involved can cease acting for one or both of the parties. Such an approach is untenable because the potential for a conflict of interest arises from the very outset by virtue of the fact that the employer and employee have different and potentially conflicting interests. In other words, it is the statutory obligations that give rise to the conflict, not the specific circumstances of a case. In any event rule 6.1, despite limited exceptions, provides a strong presumption against entering into any arrangements in which there is more than a negligible chance of a conflict of interest arising⁹. Because the employer and employee are separate duty holders under the HSE Act, the risk of a conflict is considerably greater than negligible.

Subject to the overriding obligations to the Court, lawyers have an obligation to ply their trade solely for the benefit of their client. Rule 5.2 of the Conduct and Client Care Rules provides: “The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client”. Rule 5.3 provides: “A lawyer must at all times exercise independent professional judgement on a client’s behalf. A lawyer must give objective advice to the client based on the lawyer’s understanding of the law”.

Providing regulated services to both an employer and employees falls foul of these rules. This can be illustrated by another example. In the event of a serious harm incident, MBIE will investigate whether or not an employee has complied with s19 of the HSE Act to take all practicable steps to ensure no action or inaction causes harm to another person. There is a very real likelihood that any defence to such an allegation will involve some blame being laid at the feet of the employer. “I did not receive the necessary training to operate that machine” is a common complaint by workers and gives rise to an allegation that the employer has failed to comply with its statutory obligations.

To comply with his or her professional obligations, a lawyer must use his or her professional judgment to advise one client that a possible defence may lie in blaming another client. That is a conflict that cannot be managed. It **must** be avoided.

...a solicitor may have a duty on one side and a duty on another...If he puts himself in that position it does not lie in his mouth to say to the client “I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side”.¹⁰

What can be done?

There is, of course, a very simple solution to this problem. If an employer genuinely wants to offer its employees legal representation following a workplace death or serious harm incident, it should make sure that representation is entirely independent. When an employer refuses to do so and insists on having the same lawyer provide representation to employees, their true motivation is revealed. Lawyers should not allow themselves to be placed in the situation in the first place. If a client asks the lawyer to provide representation to employees in relation to the same MBIE investigation the

⁹ Rule 6.1: A lawyer must not act for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more clients.

¹⁰ *Moody v Cox & Hyatt* [1917] 2 Ch 71 at 781 per Lord Cozens-Hardy MR.

lawyer should refuse.

Conclusion

Workers deserve better. If they do not have the benefit of union representation, they are often placed in an extremely vulnerable position. They may face questioning from their employer, their employer's lawyer, an inspector and/or police. It is unlikely that they will have an in-depth understanding of the various rights and obligations under the HSE Act, and will simply do what they are told without knowing whether the instruction is given for their benefit or the benefit of their employer.

It is this vulnerability that needs to be addressed, so is there a need to regulate to protect the interests of employees during a MBIE investigation? In relation to MBIE, there needs to be regulations in place preventing an employer, whether through a lawyer or otherwise, from being present during an interview with an employee. That decision cannot be left to employees themselves to make without any advice or support. It would not be difficult to develop regulations which regulate the way an inspector conducts an investigation. This would include a prohibition on employers (or their representatives) being present during interviews with employees under any circumstances. If an employee does have representation, a declaration by the representative that they are not acting for any other actual or potential duty holder involved in the same matter would suffice.

In relation to employers, the good faith provisions of the ERA should be adequate. However, given the matter is untested, a case may need to be taken to test the extent to which statutory good faith obligations offer protection to employees in these circumstances.

It is my view that the Lawyers Conduct and Client Care Rules, if applied properly, are sufficient to address the issue of a conflict of interest for lawyers. That is because the rules are such that, if applied properly, no lawyer would allow themselves to be put in the position of providing regulated services to two duty holders under the HSE Act in relation to the same matter. They would refuse any request by an employer to provide regulated services to any employee in relation to the same matter. It may be that a complaint to the Law Society will be necessary to allow proper consideration of and direction on how the L&C Act and rules should be applied in the context of a MBIE investigation.

Gender Implications of the Right to Request Flexible Working Arrangements: Raising Pigs and Children in New Zealand¹

ANNICK MASSELOT*

New Zealand prides itself on being a global leader in gender equality, based on being the first country to have allowed women to vote and on having had and currently having women in high public positions, such as the Governor-General, Prime Minister and Chief Justice. New Zealand also frequently scores high on various international gender equality indexes and reports.² In addition, a number indicator suggests that, overall, there is compatibility between work and family life in New Zealand. Female participation in the labour market is one of the highest in the Organisation for Economic Co-operation and Development (OECD).³ Women's employment rates have increased steadily over the years in New Zealand. In 1976, only 40 per cent of mothers were in employment, while, in 2006, it was 66 per cent.⁴ Women's labour force participation in New Zealand currently sits at 62.3 per cent.⁵ Unlike many other OECD countries, New Zealand does not struggle with low fertility rates which, at replacement level,⁶ are "...second to none of the industrialised countries".⁷

Despite those select achievements, women in New Zealand are still underpaid, under-represented in positions of power or economic standing, and over-represented in atypical and precarious employment.⁸ Women's labour force participation is still lower than that of men's with 12 percentage points difference in 2011.⁹ One of the main causes is the fact that women are still responsible for the majority of the unpaid work in the household and, in particular, they remain the main caregiver for children, the elderly and the disabled. While women's participation in paid employment has increased drastically over the past decades, men have not changed their work-to-care ratio enough to fill the gap. Not surprisingly, women appear to be struggling with work-life conflicts¹⁰ more often than men.

¹ This title is inspired by I. Moebius and E. Szyszczack "Of raising pigs and children" (1998) 18 Yearbook of European Law 125-156.

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² World Economic Forum "Global Gender Gap Report 2013" 2013 <www3.weforum.org>.

³ Reports on the rate of women in the NZ labour force varies from 62.5 per cent in the Statistics New Zealand "Household Labour Force Survey" June 2013 <www.stats.govt.nz> to 72 per cent in the World Economic Forum Report, above at 49. See Department of Labour "Labour force participation in New Zealand: Recent trends, future scenarios and the impact on economic growth" 2010 <www.dol.govt.nz>.

⁴ Families Commission "Families and Whanau Status Report 2013" (2013) <www.familiescommission.org.nz> at 63.

⁵ Statistics New Zealand "Survey of Working Life: March 2008 Quarter Hot Off The Press" 11 December 2008 <www.stats.govt.nz>.

⁶ New Zealand women give birth to 2.1 children on average (Families Commission, above n 4, at 58). Counter-intuitively, high fertility rates are found in countries that have high female employment rates.

⁷ Families Commission, above n 4, at 14.

⁸ Ministry of Women's Affairs "Briefing to the Incoming Minister of Women's Affairs" November 2008 <www.mwa.govt.nz>.

⁹ Families Commission, above n 4, at 62.

¹⁰ There are two types of conflicts. When paid work interferes with family life, it can be referred to as work-to-family conflict. By contrast, when family obligations and responsibilities interfere with employment it is referred to as the family-to-work conflict. This article is concerned with questions regarding employment flexibility, which are, therefore, connected with work-to-family conflicts.

As a growing number of women undertake paid employment, and still continue to do most of the unpaid care as part of raising children,¹¹ issues around reconciling work and family life have enjoyed a great increase in scholarly attention recently in New Zealand.¹² The study of work-life balance started from a gender perspective. However, the issue of work-life balance is evolving in New Zealand, where concerns relating to women in the workforce appear to be ebbing. The concept of flexible work has come to the forefront of New Zealand employment law, not merely as a way to solve work-family conflict but as a tool for employers to adapt quickly and more adequately to the globalised market competition.

In the 1980s, the New Zealand labour market underwent change to become “...particularly fluid and flexible”.¹³ In this context, work-life balance, as a subject in legislation, can be traced back to the Equal Opportunities Trust’s first Work and Life awards in 1999. It was, then, added to the Labour Party’s policy mandate in 2002.¹⁴ In 2003, the government, led by the Labour Party, initiated work-life balance projects underpinned by a decontextualisation of the employer/employee relationship and a gradual deconstruction of the traditional public/private dichotomy.¹⁵ Employers and employees were treated as individuals who have to negotiate their own unique relationship on a case-by-case basis, ignoring the social milieu and environment that actively shape the terms of employment choices. This presumption of endless choice continues to prevail in today’s society (and employment law), although the reality of the labour market (in particular for women) presents only a restricted set of options.¹⁶ This, therefore, puts added pressure on mothers or employees with care responsibilities. It means that for employees with caregiving obligations, it can be difficult and challenging to remain or to thrive in the paid labour market. Because of women’s growing responsibilities in the labour force, unpaid care work in the private sphere has also become more difficult to be navigated sufficiently by individuals. The reconciliation of employment and private care work is, therefore, in need of legal intervention and guidance.¹⁷

An adequate regime of reconciliation between work and family life (or work-life balance)¹⁸ must include provisions relating to ‘leave’ and ‘time’ as well as a strategy on care.¹⁹ ‘Time’ provisions in New Zealand are covered by the right to request flexible working arrangements.²⁰ It is complemented by a number of legal provisions designed to help parents balance paid work and

¹¹ Equality and Human Rights Commission “Working Better: Fathers, Family and Work - Contemporary Perspectives” 20 October 2009 <www.equalityhumanrights.com>.

¹² See for instance E. Anne Bardoel, Helen De Cieri and Clarice Santos “A Review of Work—life Research in Australia and New Zealand” (2008) 46(3) *Asia Pacific Journal of Human Resources* 316; Annick Masselot “The Rights and Realities of Balancing Work and Family Life in NZ” in Nicole Busby and Grace James (ed) *Families, Care-Giving and Paid Work* (Edward Elgar, Cheltenham, UK, 2011) 72.

¹³ Masselot, as above, at 72.

¹⁴ At 75.

¹⁵ On the public/private divide, see: Eugenia Caracciolo di Torella and Annick Masselot *Reconciling Work and Family Life in EU Law and Policy* (Palgrave Macmillan, New York, 2010).

¹⁶ Ruth McManus “Work-Life Balance: A Case of Technical Disempowerment?” (2009) 16(1) *Social Politics: International Studies in Gender, State and Society* 111 at 125.

¹⁷ Masselot, above n 12.

¹⁸ For a discussion on these concepts see further below at n 35.

¹⁹ See generally Caracciolo di Torella, E. and Masselot, A. (2010), *Reconciling Work and Family Life in EU Law and Policy*. New York: Palgrave Macmillan; Janet Gornick and Marcia Meyers “Institutions that Support Gender Equality in Parenthood and Employment” in Janet Gornick and Marcia Meyers (eds.) *Gender Equality, Transforming Family Divisions of Labor* (Verso, London, 2010) 3.

²⁰ Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000.

family responsibilities, including 'leave' provisions which grant time off to parents to spend time with their children. In New Zealand, the Parental Leave and Employment Protection Act 1987, and the Employment Relations (Breaks, Infant Feeding, and other matters) Amendment Act 2008 enable parents to take time off work following the birth or the adoption of a child. Both 'leave' and 'time' are part of the employment law provisions designed to enable workers to care for their children or other dependants while remaining in paid employment. Finally, the care strategy is a form of social welfare which enables individuals who have care responsibilities to enter and remain in the labour market.²¹ It includes the Working for Families Scheme Package 2004, together with government subsidies for pre-school and out-of-school care.²²

The New Zealand work-life balance projects have developed under unique motivations, not specifically targeted at women's or families' well-being. The stated goal of the projects was not primarily to enhance or improve women's participation in the workforce or to facilitate better coordination of family and work life specifically, but instead the goals of the programme were broad and unspecific. The project aimed to help people "...to participate more often, or more effectively, in activities that are important to them" and to make organisations prioritise their employee's work-life balance by creating "...more productive, sustainable employment relationships and workplaces".²³ The potential to be a great advantage to working women was never a stated goal; instead it became a welcome side-effect of the legislation. Flexibility became the key to attract and retain skilled workers into the New Zealand labour market. It also was seen as a way to contribute to sustainable workplace management in the context of climate change. A general and gender-neutral approach was adopted to guarantee all employees, regardless of their care responsibilities, some form of work-life balance. This non-gendered approach to work-life balance and workplace flexibility is embodied in the Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. Under Part 6AA, employees with care responsibilities are entitled to make a formal statutory request to their employers to have their work hours altered in a way that will best enable them to reconcile their unpaid care work with their paid employment obligations. The request must be seriously considered by employers in a timely fashion (within three months of the reception of the request). A majority of employees with care responsibilities are women, which means that Part 6AA bears great significance for female employment rights, as it is a provision that arguably enables women to enter and remain in the workforce.

Originally modelled on a similar UK provision,²⁴ which exclusively addressed the need of parents of young and disabled children, the New Zealand 2007 Amendment Act was, however, designed to facilitate the needs of employees with their more general care obligations. This amendment has represented a significant development for the right to care²⁵ and constituted a world premiere in relation to valuing unpaid care work. As such, the New Zealand 2007 Amendment Act is a point of reference for development of similar legislation in the world.

²¹ Jane Lewis "Childcare Policies and the Politics of Choice" (2008) 79(4) Political Quarterly 499.

²² This includes the government funding for up to 20 hours per weeks for children aged 3-5 to attend early childhood education.

²³ Department of Labour "Work-Life Balance in New Zealand: A Snapshot of Employee and Employer Attitudes and Experiences" July 2008 <www.dol.govt.nz>.

²⁴ Employment Relations Amendment (Flexible Working Agreements) Act 2007, which added part 6AA to the Employment Relations Act 2000. See also Jodie Levin-Epstein "How to Exercise Flexible Work: Take Steps with a 'Soft Touch' Law" (2005) Centre for Law and Social Policy - Work Life Balance Brief No 3.; Ariane Hegewisch (2009), "Flexible working policies: a comparative review" (2009) Institute for Women's Policy Research, Equality and Human Rights Commission.

²⁵ See Nicole Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, Oxford, 2011).

In 2012, the 2007 Flexible Working Arrangements Act was reviewed pursuant to section 69AAL of the Employment Relations Act 2000. Following the 2012 review, the government proposed a number of amendments to the 2000 Employment Relations Act,²⁶ including some change to the flexible working arrangements provisions. Under the terms of the proposed amendment, the purpose of the legislation is considerably broadened to the point that the objective of flexible working arrangements arguably moved away significantly from the original intention to facilitate a better reconciliation between family and work commitments. The Employment Relations Amendment Bill 2013 (hereafter the 2013 Bill), currently under consideration by the Transport and Industrial Relations Select Committee, proposes further amendments to Part 6AA.

This paper aims to assess critically the impact of the New Zealand flexible working arrangement law in contributing to achieving reconciliation between work and family life from a gender perspective. In order to consider the impact of the law in a meaningful way, the paper takes a socio-legal approach. In the first part, the paper reviews the law facilitating flexible working arrangements and its recent proposed amendments. Part 2 considers the gender neutrality of legislation relating to work life balance. Against this backdrop, Part 3 provides a critical analysis of the right to request flexible working arrangements. It is argued that the use of gender neutral legislation has implications for the disparate values of production and reproduction in New Zealand. Finally, the gender dimension of the concept of flexibility is explored in Part 4.

1. The key changes of the Employment Relations Amendment Bill 2013

The Employment Relations Amendment (Flexible Working Agreements) Act 2007 introduced the right of employees with caregiving commitments to request flexible working arrangements from their employers under Part 6AA of the Employment Relations Act 2000. As mentioned above, the statute has been under review and a 2013 Bill is proposing a number of amendments to the right to request flexible working arrangements. The main legislative amendment relates to the link between flexible working arrangements and caregiving obligations.

Under the 2013 Bill, the object of Part 6AA is fundamentally changed; therefore, section 69AA(a)²⁷ of the 2007 Act is fully replaced by a new section which aims to extend the statutory right to all employees, not just those with care responsibilities.

The period within which an employer must deal with a request for a variation under section 69AA(b) is reduced from three to one month. Therefore, the time for an employer to consider the request is considerably reduced.

Sections 69AAB and 69AAD of the 2007 Act provided limitations relating to when an employee could make a request for flexible working arrangements. In particular, under Section 69AAB of the 2007 Act, an employee could make a request only once s/he had been employed by the employer for at least six months. In addition, Section 69AAD provided that an employee was "...not entitled to make another request under this Part to his or her employer earlier than 12 months after the date on which the previous request was made". These Sections are being replaced by the 2013 Bill as the limitations imposed by the old Sections 69AAB and

²⁶ The Employment Relations Amendment Bill 2013 is due to be adopted by parliament early 2014.

²⁷ Under the 2007 Act, Section 69AA(a) states that the object of this Part is to provide "...certain employees with a statutory right to request a variation of their working arrangements if they have the care of any person".

69AAD on when an employee can make a request are to be lifted. Under the new section, such a request can be made at any time and as often as needed. This change will enable all employees to request flexible working arrangements right from the beginning of their employment.

Section 69AAC of the 2007 Act sets out relatively complex requirements relating to the request, including that the employee must make his or her request in writing. Section 69AAC(d), in particular, required the employee to explain how, in his or her view, the variations of the contract of employment would enable the employee to provide better care for the person concerned. This Section is repealed under the 2013 Bill because the flexible working arrangement is no longer connected to the need to care. Therefore, such provision is no longer required and the procedure for requesting flexible working arrangements is simplified. In addition, Section 69AAD is repealed under the 2013 Bill as no limitations on the number or timing of requests apply anymore. Employees are, thus, able to make applications for flexible working arrangements at any time during and prior to their employment.

The requesting employees' rights appear, therefore, somewhat strengthened under the 2013 Bill, as a number of the regulatory processes surrounding the requests for flexible working arrangements have been made more employee-friendly. However, at the same time, the amendments made under the 2013 Bill completely obliterate the caregiving focus of the legislation.

The Cabinet Minutes reveal that the amendments to Part 6AA were introduced on the basis of the findings of the legislative review.²⁸ Under the review, flexible working arrangements were understood to enable a better facilitation of work-life balance for all employees in New Zealand, and not just for employees with care responsibilities.²⁹ As a result, the 2013 Bill proposes that Part 6AA is amended by extending eligibility from those employees with care responsibilities to all employees. As such, the 2013 Bill has been introduced as a

...welcome extension, enabling those who engage in (for example) community activities, charitable volunteering, coaching children, or training and competing in weekend sports to seek some flexibility in their working arrangements.³⁰

The 2013 Bill entirely removes any gender or care dimension from Part 6AA, extending the rights to request flexible working arrangements to all employees,³¹ and instead acknowledges the importance of flexible working arrangements to optimise the labour market participation of groups that would otherwise be unable to participate. The purpose of the right to request flexible working arrangements is, therefore, shifted from reconciliation between work and care focus to a strong and overpowering profit optimisation focus. The unintended gender equality component of the original legislation is lost. The removal of the care criteria from the right to request flexible working arrangements also renders invisible the caregiving provided by men and women. Care is no longer valued (not even symbolically) and this entrenches the idea that production and reproduction are disconnected in New Zealand society.

²⁸ Department of Labour "Review of Flexible Working Arrangements in New Zealand Workplaces" 2011 <www.dol.govt.nz>.

²⁹ Office of Minister of Labour, Economic Growth and Infrastructure Committee "Further Decisions on the Employment Relations Amendment Bill" (2012) CAB Min 38/8.

³⁰ Employment Relations Amendment Bill 2013 (105-2) (select committee report).

³¹ New Zealand Government (2013), Employment Relations Amendment Bill 2013 (105-1) (explanatory note).

2. Gender-neutrality in work-life balance legislation – friend or foe?

Unsurprisingly, both the Statute and the 2013 Bill amending the rights to request flexible working arrangements are drafted in gender neutral terms. Indeed, New Zealand work-life balance has uniquely been promoted and treated as a gender-neutral issue by both the Department of Labour and the Get a Life Campaign of the New Zealand Council of Trade Unions. The legislation is moving towards equalising the circumstances of women and men in employment law. The Cabinet Minutes regarding the Bill further reveal that the amendments are seen as a reflection of changes in modern lifestyles and are intended to boost productivity of employees by helping them to better reconcile work with their family life, regardless of gender.³²

Work-life balance is, thus, framed as being not about family and care issues specifically,³³ but as a more general concern for all working New Zealanders. As early as 2003, Honourable M. Wilson made it clear that the government did not see work-life balance as a project targeted at women:

Is it just for families? No. It's about balancing all aspects of life and may have nothing to do with family responsibilities. When work is impacting on life to the extent that it feels there is no flexibility or little choice, then it's an issue, irrespective of age, gender or culture.³⁴

I have argued elsewhere³⁵ that there is a difference between the right to reconcile work and family life (the *need* to spend less time in the workplace in order to take care of one's family) and the right to work-life balance (the *desire* to limit the involvement in paid activities in order to pursue other interests, such as further education, with the overall aim of contributing to individuals' wellbeing). New Zealand has firmly adopted a regime of work-life balance rather than reconciliation between work and family life. The concept is focussed on limiting the conflict between work and life as a whole, including the ability for employees to access leisure activities.

The non-gendered approach to work-life balance by the New Zealand government has been fuelled and supported by survey results which suggest that the issue of balance does not have a gender dimension. In 2008, the New Zealand Department of Labour undertook a work-life balance survey³⁶ which found that, overall, there were no significant gender, age or ethnic differences in the way people rated their current work-life balance. By contrast, a few years earlier in the 2005 survey³⁷, women were found to be more likely than men to report better work-life balance. As a result of the evolution of perception, work-life balance legislation increasingly aims to treat women and men equally, as illustrated by the provisions of the 2007 Act and also the 2013 Bill. This trend can also be exemplified by other legislation with a gender dimension such as the Parental Leave Act 1987 and the Working for Family package 2004.

The Parental Leave and Employment Protection Act 1987

³² Office of Minister of Labour, above n 29.

³³ Masselot, above n 12, at 73.

³⁴ Hon Margaret Wilson "Integrated Work-Life Policy Development Programme" Office of the Minister of Labour, Steering Group for Work-Life Balance Policy Development, 2003.

³⁵ Caracciolo di Torella and Masselot, above n 15.

³⁶ Department of Labour, above n 23.

³⁷ Lindy Fursman "Work-Life Balance in New Zealand" (2006) Department of Labour <www.dol.govt.nz>.

The Parental Leave Act gives parents the right to time off paid employment in order to take care of young children. The right to take parental leave under New Zealand law is open to either parent, male or female. The criteria for eligibility under the Act are, however, quite restrictive,³⁸ especially for women in precarious employment. The Act is worded in gender-neutral terms but is *de facto* addressed to women. Under section 71A the partner of the mother is able to benefit from the allowance under the Act, but the requirements for the partner to be eligible for the payments and time off work have to be fulfilled by the mother. The partner's employment status pre-birth is irrelevant for the purposes of the section; only the mother's employment status pre-birth is considered. The Act, therefore, clearly assumes that it will be the mother who will be providing care for the child.

The pay guaranteed under the legislation is low and inferior to the minimum wage income. This prejudices against the male partner's wage being sacrificed, as it is typically higher than that of the female partner due to the existence of a persistent gender pay gap in New Zealand. Therefore, although the provisions of the Parental Leave Act aim for gender-neutral terms, it does not achieve any gender neutrality, mainly because it fails to adequately address the gender imbalance that circumstantially surrounds its provisions. In addition, the fact that maternity leave payment is lower than the minimum wage infers that production is more valued than reproduction.

This is reinforced by the fact that the costs of the entitlements under the Act are carried by the government and the employee, excluding any direct financial burden on the employer. Production appears to be prioritised and unconnected to reproduction. Employers are assumed not to benefit from reproductive activities. This also entrenches the idea that the parental leave is an "employer-friendly" provision.

Working for Families Scheme

The Working for Families Scheme is a 2004 government initiative to tackle issues around child poverty and to support families financially in accordance with the number of family members and the income of the family. The scheme does this by providing families with children with a minimum income through a governmental allowance. In other words, the scheme offers tax advantages for a broad scope of families.

The scheme is drafted in gender-neutral terms; however, it arguably has strong gender implications. As an unforeseen consequence, the scheme appears to support patriarchal family structures and entrenches individuals into traditional gender roles. Payment under the scheme is based on a minimum income as well as the number of children. In families with two adults, it is likely that one income or one and a half incomes would qualify for the benefits. Two full incomes often result in going above the threshold, disqualifying the family from benefiting from the tax relief. As a result, the mother in the family can either seek employment while outsourcing the care of their own children at a cost, or she can be supported by the government to stay at home and do it herself. This scheme effectively encourages women who live in a partnership out of paid employment, because it is usually women who earn less as a result of the existing gender pay gap.³⁹

³⁸ Employees are eligible for parental leave if they have worked for the same employer for an average of at least 10 hours a week, and at least one hour in every week or 40 hours in every month, in the six or 12 months immediately before the baby's expected due date (or the date the employee has started caring for an adopted child). There are different entitlements available to employees depending on whether they meet the six or 12-month criteria.

³⁹ Masselot, above n 12, at 81.

At the same time, single parents (who are most often mothers) are still required to engage in paid employment in order to benefit from the scheme. The policy, therefore, rewards the two parent family who embrace traditional gender roles by enabling one non-earning partner (usually the woman) to stay at home and look after the children, whilst making a moral judgment about single parents (usually single mothers), who are chastised as being bad mothers and/or citizens who “do nothing”, living on the Domestic Purposes Benefit. Thus, the value of caring for children appears to be higher when it is undertaken by women living as part of a couple, as opposed to single parents.

In addition, despite its apparent gender neutrality, the scheme supports a gendered agenda. The legislation’s terminology stays away from terms such as ‘family life’ and instead makes references to ‘personal’ and ‘leisure’ time. This effectively removes all connotations of traditionalism from the context.⁴⁰ The legislative wording, thus, suggests that a gender issue does not exist, and the neutral wording supports an impression that the legislation supports equality goals. The legislation refers to family as a unit and does not point to fathers or mothers to avoid gender issues. This non-gendered wording fails to acknowledge that women do carry the bulk of the unpaid care work. The legislation addresses male and female employees with equal terms in the abstract, while failing to acknowledge that, in reality, there is no equality as a starting point between the two genders.

Finally, as the intention of the scheme is to keep parents in employment, this means that the scheme does not appear to promote the interests of families, women or children, but rather of employers and the labour market. It is another example of employer friendly work-life related legislation. Thus, work-life balance law in New Zealand does very little to benefit parenthood or care in general. Foremost, the existing legislation appears to accommodate business, employment and labour market needs.

3. Gender “neutrality” of the right to request Flexible Working Arrangements legislation – the importance of the concept of care

In line with the rest of New Zealand legislation on work-life balance, the provisions outlining the rights to request flexible working arrangements are drafted in gender-neutral terms. The eligibility to request flexible working arrangements in the 2007 Act refers to the need to meet care obligations and not to the gender of the caregiver. The idea of providing mechanisms designed to accommodate employees’ dual burden of work and care commitment is, however, highly gendered in reality. Rearing and caring for children are mostly done by women in most countries, including in New Zealand.⁴¹ Nevertheless, there are growing numbers of fathers who do care for their children and sons who do care for their elderly/dependent parents.⁴² In addition, increased divorce rates mean that more fathers are forced to care for their children as well as working in paid employment. Spousal care has been reported, overall, to be more gender neutral than other forms of care.⁴³ The gender neutral dimension of the legislation caters for this growing population as well as arguably allowing for societal evolution of gender norms.

⁴⁰ Maria Stratigaki “The Cooperation of Gender Concepts in EU Policies: The Case of Reconciliation of Work and Family” (2004) 11(1) Social Politics 30 at 49.

⁴¹ World Economic Forum, above n 2.

⁴² Lindy Fursman and Paul Callister “Men’s Participation in Unpaid Care” (2009) Department of Labour <www.dol.govt.nz>.

⁴³ Louise Ackers and others “The Gender Dimension of Geographic Labour Mobility in the European Union.” Report prepared for Directorate C Citizens’ Rights and Constitutional Affairs (European Parliament), January 2009.

The motivation of the legislator for removing the care criteria for eligibility to request flexible working arrangements, in fact, reflects the fundamental distinction which exists in New Zealand between production and reproduction. The processes and values of production (a commercial activity deemed to belong to the public sphere) and reproduction (a private endeavour not valued in the public sphere) are disconnected from one another. This is further illustrated in the fact that employers are not required to contribute to maternity or parental leave pay. Reproduction in New Zealand is partly paid by the State, mainly through the Working for Families Scheme, Parental Leave legislation, subsidised childcare arrangements and the (female) employee. In this context, enlarging the right to request flexible working arrangements to all employees contributes to “pacifying” child-free (or care-free) employees who consider that care-related rights are additional privileges provided mostly to women. There are some (child-free and care-free) individuals who claim that having children is a life choice, comparable to choosing to have a pet or akin to gardening. Indeed, the removal of care from the eligibility criteria for requesting flexible working arrangements in the 2013 Bill has been supported by the 2012 survey, which suggests that the gender dimension of the flexible working arrangements requests is negligible. Overall, only 55.6 per cent of all requests for flexible working arrangements in their current jobs reported by employees related to care responsibilities.⁴⁴ Therefore, while a small majority of requests related to caring, a significant proportion of requests were made for other reasons. In addition, the survey found that overall 73.6 per cent of employers and 75.2 per cent of employees said that the legal right to request flexible working arrangements should be available to all employees.⁴⁵ In addition to this, the Cabinet Minutes reveal that another motivation behind the legislation is to increase the productivity of all workers, rather than just increasing the productivity of employees with care obligations through flexible working arrangements.⁴⁶ Therefore, the increase of the overall productivity of employees, regardless of their gender or family commitments, has become a focal point for the amendments.

Arguably, these views completely fail to recognise the fact that society benefits when parents invest heavily into caring and nurturing their children and helping them to become the next generation of active, responsible and well-adjusted citizens, workers and tax payers. All members of society benefit from the “production” of such individuals. However, such production is carried largely by parents, and especially by mothers who are not compensated for their work. In addition, caregivers can never withhold the fruit of their labour. On that basis, it is arguable that a large portion of society, including employers, is “free-riding” on the unpaid work of some individuals who are mostly women.

Moreover, the neoliberal system encourages and values the individual’s autonomy, which, in turn, is valued above all in society. Care need and care-related obligations are relegated to the private sphere and are provided little or no accounting values. This approach ignores the fact that all human beings are in need of care at least in their infancy and more often these days, later in life with the increasing life expectancy. In addition, no one is ever guaranteed to remain free from accident, illness or general tribulation in life. The autonomous approach also ignores the fact that those who consider themselves “autonomous” (those who have a job and are “productive” from an accounting point of view), in fact, rely heavily on other individuals to provide care work which autonomous individuals need. This very often includes relying on one’s wife or partner; it can also take the form of outsourcing house cleaning, childcare or elderly care

⁴⁴ Department of Labour, above n 28.

⁴⁵ As above.

⁴⁶ Office of Minister of Labour, above n 29.

(increasingly these days also relying on global help).⁴⁷ In turn, this means that often those whom we consider to be the most autonomous in life are, in fact, the most reliant on care work done by other individuals.⁴⁸ This further underscores the fact that there is, in New Zealand, a disconnection between production, which is valued, and reproduction, which is not.

4. The complexity of the flexibility concept

The concept of flexibility is central to the right to request flexible working arrangements. Over the past few decades, many forms of flexible working arrangements have been introduced, sometimes with a view to resolving work-family conflict and enhancing work-life balance.⁴⁹ These include, in particular, part-time work, fixed-term contracts, temporary agency work, work with flexible hours, tele-working and home working, and more recently the “zero-hour work”.⁵⁰ Flexibility is an ambiguous concept which can potentially impact positively but also negatively on work-family conflicts.⁵¹ Indeed, the concept of work flexibility can be interpreted as a tool for employers to adapt quickly to the globalised market competition or as an instrument to enhance the reconciliation between work and family life or contribute to general work-life balance. While a number of researchers have pointed out how flexibility can help to resolve work life conflicts,⁵² others have highlighted that employers can benefit greatly from this concept at the expense of employees.⁵³ On the one hand, when flexibility is used as a tool for employers to enhance business in an increasingly globalised economic competition, it has been argued that it leads to less predictability and discretion, and an increase in irregularity of work hours, which, in turn, leads to lower income and higher insecurity for workers.⁵⁴ Consequently, this leads to increased work-life conflicts for employees. On the other hand, in the context of the increasing female employment rate and the overall evolution of gender norms, certain forms of “family-friendly” flexible arrangements are seen as helping women integrate into the employment market by reducing their work-family conflicts.

These findings are consistent with some New Zealand research which suggests that there are great benefits in making flexible working arrangements available to men and women equally with a view to resolving some work-family conflicts. A survey recently conducted in the context of the Canterbury rebuild suggests that in order to accommodate changing family patterns, where

⁴⁷ Evelyn Nakano Glenn *Forced to Care: Coercion and Caregiving in America* (Harvard University Press, Harvard, 2010); Evelyn Nakano Glenn (2009) “Le travail forcé: citoyenneté, obligation statutaire et assignation des femmes au *care*” in Pascale Molinier, Sandra Laugier and Patricia Paperman (eds.) *Qu’est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages, Paris, 2011) 113.

⁴⁸ Joan Tronto “Care démocratique et démocratie du care” in Pascale Molinier, Sandra Laugier and Patricia Paperman (eds.) *Qu’est-ce que le Care? Souci des autres, sensibilité, responsabilité* (Payot et Rivages, Paris, 2011) 35.

⁴⁹ Janneke Plantenga and Chantal Remery “Reconciliation of Work and Private Life: A Comparative Review of Thirty European Countries” (September 2005).

⁵⁰ Hugh Collins “The Right to Flexibility” in Joanne Conaghan and Kerry Rittich (eds.) *Labour Law, Work, and Family* (Oxford University Press, Oxford, 2005) 99.

⁵¹ See generally Caracciolo di Torella and Masselot, above n 15.

⁵² Susan Yeandle *Women’s Working Lives* (Tavistock, London, 1984); Ivana La Valle and others *Happy Families? A typical Work and its Influence on Family Life* (Policy Press and Joseph Rowntree Foundation, Bristol, 2002); Jill Rubery and Roger Tarling “Britain” in Jill Rubery (ed.) *Women and Recession* (Routledge, London, 1988).

⁵³ Anneke Goodswaard and Matthieu de Nanteuil “Flexibility and Working Conditions: A Qualitative and Comparative Study in Seven EU Member States” (2000) European Foundation for the Improvement of Living and Working Conditions <www.eurofound.europa.eu>.

⁵⁴ Dirk Hofäcker and Stefanie König “Flexibility and Work-life conflict in time of crisis: a gender Perspective” (2013) 33(9) *International Journal of Sociology and Social Policy* 613.

both parents are in paid employment, there needs to be more flexibility of employment for both women and men, and not just for women.⁵⁵ Moreover, flexibility is very high on the New Zealand agenda: 70 per cent of employers report having some or all of their employees working flexibly.⁵⁶ Among current employees, 43 per cent reported that they have made a request for flexible working arrangement (not necessarily based on the statutory rights) to their employer and a large majority of these requests were approved.⁵⁷ Women are more likely to report that their jobs had a lot of flexibility and less likely to say they had no flexibility.⁵⁸ However, given that a majority of women are in part-time employment and precarious work, it raises the fundamental question of the understanding and the meaning of the concept of flexibility.

The concept of flexibility is not merely a tool that can alternatively benefit employers or employees, but is also a concept that impacts differently on men's and women's ability to solve work-life conflicts. In the context of the European Union, the work of Hofäcker and König is particularly useful to shed light on the gender impact of the concept of flexibility, which arguably impacts on men and women similarly and also differently.⁵⁹

The number of working hours does impact on employees' work-life balance. When flexibility is concerned with the *volume of work*, too many hours of work leave little time for family life and, therefore, long working hours conflict directly with the ability to resolve work-family conflicts.⁶⁰ A number of studies have demonstrated, in particular, that working overtime impacts negatively on individuals' perception of their work-life balance.⁶¹ The negative impact of overtime is more important when imposed by the employer⁶² than when it results from personal choice.⁶³ In the New Zealand context, this has been well documented by Fursman.⁶⁴ Moreover, Fursman and Zodgekar have argued that flexible working arrangements could mean that work encroached on family time, particularly where employees work from home.⁶⁵ Additionally, working flexibly can lead to feelings of guilt and induce people who are highly committed to their employment to do extra hours voluntarily. Employees working flexibly are likely to miss family events and feel guilty when taking time off to look after sick children, as if they let down their employer or colleagues. Those employees are likely to work harder than they otherwise would have to compensate for the perception that they are creating difficulties for their employers or colleagues. This is influenced by both the culture of workplaces and the broader cultural message

⁵⁵ Ministry of Women's Affairs "Building Back Better - Utilising Women's Labour in the Canterbury Rebuild" (2013) <www.mwa.govt.nz>.

⁵⁶ Department of Labour, above n 28.

⁵⁷ As above.

⁵⁸ Lindy Fursman and Nita Zodgekar "Flexible Work Arrangements: New Zealand Families and Their Experiences with Flexible Work" (2009) 81 Family Matters 25.

⁵⁹ Hofäcker and König, above n 54.

⁶⁰ Jerry Jacobs and Kathleen Gerson *The Time Divide: Work, Family and Gender Inequalities* (Harvard University Press, Cambridge, 2004).

⁶¹ Agnes Parent-Thirion and others "Fifth European Working Conditions Survey – Overview Report" (12 April 2012) European Foundation for the Improvement of Living Standards and Working Conditions <www.eurofound.europa.eu>; Monique Van der Hulst and Sabine Geurts "Associations between overtime and psychological health in high and low reward jobs" (2001) 15(3) Work & Stress 227.

⁶² Philip Tucker and Celia Rutherford "Moderators of the relationship between long work hours and health" (2005) 10(4) Journal of Occupational and Health Psychology 465.

⁶³ Gayle Porter "Work, work ethic and work excess" (2004) 17(5) Journal of Organizational Change and Management 424

⁶⁴ Lindy Fursman "Working Long Hours in New Zealand: A Profile of Long Hours Workers Using Data from the 2006 Census" (March 2008) Department of Labour <www.dol.govt.nz>.

⁶⁵ Fursman and Zodgekar, above n 58, at 51.

of being “a good worker”, where time off is frowned upon.⁶⁶ Such a workplace culture is particularly beneficial to employers.

However, as argued by Hofäcker and König, work-life balance of both men and women appears to be negatively impacted upon by the irregularity and unpredictability of working hours, regardless of the number of working hours.⁶⁷ Thus, the worker’s level of control over the working hours is important in mitigating work-family conflict.⁶⁸ Hofäcker and König further demonstrate that the importance of autonomy on choosing one’s working time is used differently by each gender.

On the one hand, Hofäcker and König convincingly argue that women use this control to achieve better work-life balance. Women tend to do so by requesting to work part-time or to job-share. This is overwhelmingly confirmed in the New Zealand context, where women are more likely than men to have access to arrangements that involve a reduction in hours and income. Women are more likely to report access to part-time work (68 per cent of women and only 44 per cent of men), and job-sharing (48 per cent of women against only 34 per cent of men).⁶⁹ Research by the Ministry of Women’s Affairs reveals that nearly three quarters (72.4 per cent) of part-time employees are women,⁷⁰ while only 42 per cent of full-time employees are women.⁷¹ These findings are backed up by the Families Commission, which found that 32 per cent of New Zealand women who were in paid employment reported that they worked 20 or fewer hours per week, compared with just 2 per cent of men working as little.⁷² The research further revealed that women were more likely to agree with statements that involved putting family needs before personal or work responsibilities.⁷³

On the other hand, Hofäcker and König’s study shows that men use flexible arrangements to increase their work commitments. In particular, men tend to make use of flexi-breaks and work from home. This results in increasing work-family conflicts for men. Here again, New Zealand’s research provides convincing evidence confirming the gender dimension of the concept of flexibility. Men and women differ in what they report as being generally available to them at their workplace in terms of flexibility. Men are considerably more likely to have access to flexible breaks (71 per cent of men against only 64 per cent of women).⁷⁴ Men are also more likely to regularly work from another location, including home (28 per cent of men against only 20 per cent of women).⁷⁵ Consistent with the finding that men are more likely than women to have flexible hours, fathers with a child or children under 14 years living in the household are reported also to be more likely to have flexible hours than mothers with a child under 14 years in the household.⁷⁶

Thus, New Zealand data points toward two trends. On one level, and in accordance with Hofäcker and König’s study, flexibility is not a gender-free concept. Flexibility contributes to

⁶⁶ As above.

⁶⁷ Hofäcker and König, above n 54.

⁶⁸ As above.

⁶⁹ Department of Labour, above n 23.

⁷⁰ Ministry of Women’s Affairs “Mothers’ Labour Force Participation” (December 2009) <www.mwa.govt.nz>.

⁷¹ Department of Labour “Review of Part 6AA: Flexible Working Arrangements” (2011) <www.dol.govt.nz>.

⁷² Families Commission “Give and Take: Families’ Perceptions and Experiences of Flexible Work in New Zealand” (1 September 2008) <www.familiescommission.org.nz>.

⁷³ As above.

⁷⁴ Department of Labour, above n 23.

⁷⁵ As above.

⁷⁶ Department of Labour, above n 71.

societal gender structures. As flexible working arrangements are used differently by men and women, it also reflects traditional gender roles and entrenches gender-segregated labour market structures. On another level, the types of flexible working arrangements which are made available by employers appear to greatly differ depending on whether the employees are male or female.

Conclusion

This article has argued that flexible working arrangements are neither automatically family friendly, nor are they gender neutral. Legislation which relies on gender-neutral terms does not necessarily achieve gender equality, and on the contrary, such legislation can even create or entrench disadvantages relevant to sex as well as remaining blind to the reality of gender roles. At the same time, however, it should be pointed out that gender-neutral legislation does provide opportunities for an evolution of traditional gender roles. There is, therefore, a need to consider the right balance between gender-neutral terms and the reality of gender positions in society. The right to request flexible working arrangements and the 2013 proposed amendments to this provision show that (unpaid) care work, which is not valued from an accounting point of view, is now no more valued from a symbolic standpoint. Although care work disproportionately falls to women, legislation addressing work-life balance does not take into account women's social reality. Gender-neutral legislation dealing with work-life balance and work-care balance does often negatively impact on women disproportionately, if it is not specifically directed at women.⁷⁷ If policy favours gender-neutral terms in legislation as a way to encourage the evolution of gender roles, such legislation could be accompanied by provisions helping men to better share domestic and caring tasks. Promoting gender equality in the workforce is a complicated undertaking as it has to address two feminist concerns of valuing unpaid work while at the same time contributing to a more equal share between men and women.⁷⁸ The provisions amending Part 6AA in the 2013 Bill pretend that gender differences do not exist by treating both men and women as if they carried the care burden equally. Therefore, the proposed legislation does not adequately address either issue and it is likely to worsen women's employment rights in New Zealand.

In addition, *prima facie* gender-neutral concepts such as flexibility are being revealed to have, in fact, a strong gender dimension, which ultimately has the power to shape and entrench gender structures. The emphasis of the concept of flexibility in New Zealand employment law not only reveals that work-life balance is primarily a tool which assists employers to adapt to global competition; it is also a gender-charged concept. The gender dimension of the flexibility concept contributes to the entrenching of traditional gender roles and segregated labour markets. Ultimately, the use of flexibility reinforces the conclusion that in New Zealand, production and reproduction are disconnected. Thus, raising pigs is more valuable and valued than raising children.

⁷⁷ Charlotte O'Brien "Confronting the Care Penalty: The Case for Extending Reasonable Adjustment Rights Along the Disability/care Continuum" (2012) 34(1) Journal of Social Welfare and Family Law 5 at 12 – 13.

⁷⁸ Stratigaki, above n 40, at 38.

Regulating for Decent Work in Burma

Ross Wilson*

After 50 years of suppression of fundamental labour rights in Burma, and under pressure from the international trade union movement through the International Labour Organisation (ILO), the new elected Myanmar government has legislated two new laws; the Labour Organisation Law and the Settlement of Labour Disputes Law, which came into effect in March 2012. These laws introduce freedom of association rights, including the right to organise, to bargain collectively, and to take strike action. More than 750 new unions have been registered.

The paper will review the progress and issues in regulating for decent work in Burma during the first 18 months of the new laws.

Not long after I began work with the ILO in Yangon in June 2012, a maintenance mechanic from a factory came to see me with a grievance. I frequently had groups of workers from all parts of the country coming for advice and assistance. Most people in Burma regard the ILO, which has been active on forced labour issues for more than 10 years, as an organisation which helps workers. The maintenance mechanic, who I will call Ko Than, was concerned about the amount of pay which had been deducted for a few days he was off work sick. After struggling to work for nine days while he was sick, he had to take three days off. When I inquired into his conditions of employment, I discovered that his pay was made up of:

Base pay per day = 1,110 MK = \$1.37 per month \$30.82

Monthly attendance bonus = 18,000MK = \$22.44

Monthly punctuality bonus = 18,000MK = \$22.44

Monthly try-hard bonus = 17,000MK = \$21.97

54,100MK = \$97.67

Unfortunately for Ko Than, the employer's (unilaterally decided) conditions resulted in bonus deductions for sick leave; 25 per cent for one day, 50 per cent for two days, and 100 per cent for three or more days. So Ko Than's three-day illness absence resulted in his monthly pay being slashed from \$97.67 to \$30.82.

Of course, I reacted with outrage at this injustice, only to be told quietly by my Burmese assistant that these are standard provisions in most factories. This is the result of 50 years of brutal suppression of worker rights, which has allowed employers to impose such conditions. Pay deductions for going to the toilet is another example.

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The Republic of the Union of Myanmar is in a process of transition to democracy under a multiparty system (as outlined in the 2008 constitution)¹. It has seen a succession of ruling juntas since 1962 when the military took control after a period of democratic government following independence from British colonial rule in 1948.

Myanmar in 2013 is a long way from achieving “decent work” for its citizens in accordance with the ILO Decent Work Agenda which requires:

- Job creation and skill development
- Guaranteed rights at work
- Extending social protection
- Promoting social dialogue

The labour force in Myanmar was estimated² at 32.5m in 2011, with 70 per cent occupied in agriculture and related activities, 23 per cent in the services sector and seven per cent in industry. According to Myanmar’s official statistical yearbook for 2009, the total employed population in the country was 15.83m people (the estimate is based on a 1990 labour force survey) with a distribution as follows: agriculture – 56.47 per cent, industry including mining, manufacturing, and electricity, gas and water – 12.49 per cent; construction – 2.64 per cent, and services including logistics, financial institutions, trade, hotels, restaurants and social services – 28.4 per cent. The unemployment rate is estimated at 5.5 per cent. Myanmar has a youthful population, with the 15-28 working cohort of 13 million accounting for almost 40 per cent of the working age population. The under working age cohort is 25 per cent of the working age population. The labour market participation rate is estimated³ to be 66.16 per cent (male 82.49 per cent and female 50.11 per cent).

Labour productivity is on average 70 per cent lower than Asian benchmark countries, largely as a result of the large and growing share of agriculture in GDP. Myanmar has the potential to create 10 million non-agricultural jobs and lift 18 million people out of poverty by 2030, provided it can double labour productivity. To achieve that will require a massive investment in education and the development of skills for the expansion of manufacturing, infrastructure, tourism, financial services, energy/mining and telecom, an active programme of adoption and implementation of ILO labour standards, the development of social protection mechanisms, and active social dialogue.

The past 18 months have seen the birth of a union movement in Myanmar. A Labour Organisation Law⁴, purporting to comply with ILO Convention 87⁵, was passed and came into effect in March 2012. This permits workers to organise and register “labour organisations” (unions), initially, at enterprise level but also allowing the development of unions at township, state and national level. A counterpart Settlement of Labour Disputes Law⁶ provides dispute resolution processes and institutions. More than 750 labour organisations have now been registered under the Labour Organisation Law, mostly small unions at enterprise level and concentrated in the agricultural, manufacturing and transport sectors, and with an estimated total membership of close to 200,000 workers.

¹ Myanmar “Constitution of the Republic of the Union of Myanmar” (2008) <www.burmalibrary.org>.

² Myanmar Ministry of Labour “Handbook on Human Resources; Development indicators 2009” Ministry of Labour Nay Pyi Taw 2011.

³ As above.

⁴ Refer Ministry of Labour Myanmar <www.mol.gov.mm/en/regulations/>.

⁵ See critique of Law in International Trade Union Confederation submission to the ILO Committee of Experts.

⁶ Refer Ministry of Labour Myanmar, above n 4.

Given the history of oppression and the continuing hostility from many employers, this is a remarkable achievement, and reflects the determination of workers to exercise their new rights to associate, organise and negotiate. Many of them are young factory workers struggling to improve their wages and conditions of employment which, for many, are at exploitative levels.

I was charged with developing a project to promote and support the new freedom of association rights, which included an awareness raising campaign with education and advice for workers, government officials and employers. However, the core of the programme has been bi-partite training workshops for the leaders of the new unions and their employers.

The new union leaders have taken up the opportunity to learn with enthusiasm; the first major workshop in July last year attended by almost 300 people. To date, more than 2,000 people have attended ILO workshops, with the two key leaders from each union being provided with the opportunity to attend the two day basic training workshop.

The new leaders took their first real steps as a national movement when they came together at the Labour Organisation Leaders' Forum in Yangon at the end of April 2013, organised by the ILO FOA Project and the Friedrich Ebert Foundation (FES). More than 363 registered unions were represented, along with more than 100 related organisations, at this historic event; the largest conference of elected worker representatives in more than 50 years.

Not surprisingly, there was some suspicion about hidden agendas, and tension around the process for election of the Worker Delegate to the 2013 International Labour Conference. A substantial portion of the plenary sessions were spent debating and deciding the rules to govern the election of the Worker Delegate. It was, at times, a bruising debate, but the conference delegates became increasingly confident in the process of democratic decision making. Five of the six key rules for the election process were agreed by consensus with the issue of whether candidates had to be an existing member of a registered labour organisation going to a secret ballot of accredited delegates from registered labour organisations.

The ballot itself, conducted in the conference hall, was a moving process with many delegates participating in such a democratic vote for the first time in their lives. They decided decisively (220 to 101) that only members of registered labour organisations would be eligible to stand. A further secret ballot was held the following day to elect the Worker Delegate to the 2013 International Labour Conference.

In working together to make these key decisions by democratic process, the new union leaders of Myanmar took their first steps as a national movement. This was, undoubtedly, the most valuable outcome of the conference. There is a long way to go in building a national union movement, but the 2013 Forum delegates can feel proud that they agreed the ground rules for, and participated in, a democratic decision making process.

But 750 enterprise unions, even working together in a national movement, will not provide the workers of Myanmar with the collective strength they need to shift the political economy of Myanmar to a focus on Decent Work objectives. The ILO education workshops have encouraged new union leaders to think critically and strategically about how they might help to build a union movement which will do that. Overwhelmingly, the feedback has been that they want recognition and respect from their employers for their role as the voice and negotiators for the workers they represent, and they are keen to learn new knowledge and skills. The keen interest in the April Forum

workshops on organising skills, collective bargaining and workplace health and safety was an example of this.

There is also developing understanding among union leaders and employers of a development model which builds constructive dialogue, including collective bargaining, at enterprise, industry and national level between the new unions, business and (where appropriate) government. This would be a model for building value, profitability and workers' incomes as a common objective, with union participation in industry development programmes, which are benchmarked to labour standards, skill development and skill-based pay systems.

Some tentative progress has been made with a Decent Work Agenda. In October 2012, an agreement was reached between the government of Myanmar and representatives of social partners at a meeting in Nay Pyi Taw on an agenda called "Decent Work – a tool for Economic Development and Poverty Reduction". This agenda identified seven key policy areas; the elimination of forced labour by 2015, the successful introduction of freedom of association and social dialogue, enhanced employment opportunities (particularly for youth), labour legislation and labour market governance, socially responsible enterprise development, labour migration, and the employment dimension of trade and development. An eighth policy area, social security and the social protection floor was subsequently added by agreement. The ILO Liaison Office in Myanmar reported to the ILO Governing Body at its 319th Session 16-31 October 2013 on progress on the implementation of this agenda, and noted considerable macro risk to the agenda, including internal governance/politics associated with constitutional reform, peacebuilding in the context of ethnic communities and their associated armed groups, and social unrest in the context of widespread poverty and uneven distribution of wealth exacerbated by the rise of nationalism and associated religious intolerance⁷.

The ILO Liaison Office Report noted⁸ and active legislative programme has included further new labour laws in the past year; a Minimum Wage Law, an Occupational Safety and Health Law, and Employment and Skills Training Act and a Social Security Law. The government has also ratified ILO Convention 182 on the Elimination of the Worst Forms of Forced Labour, and the government and social partners have, with support from the ILO, engaged in a number of social dialogue workshops on the new laws and their implementation. The government has also had a strong focus on developing skills training (often through partnerships with tertiary institutions from other countries in the region).

However, there is a real risk that the new industrial relations system in Myanmar will drift towards a conflict model. The new Labour Organisation Law was greeted with a wave of strikes in the industrial estates around Yangon in 2012, and began to increase again earlier this year as factory workers, frustrated with their poor wages and working conditions and the lack of respect from their employers, exercised their right to strike.

At present, most employers have been ignoring the new law and many of them have been actively hostile with large number of workers being dismissed for labour organisation activity. The law has been found to be weak in providing legal protection against this sort of discrimination and, in particular, has no effective penalties against employers who have directly challenged the authority of the Arbitration Council by refusing to comply with its orders reinstating workers who have been unlawfully dismissed. Union leaders also complain that employers do not give them the recognition that the law requires and few genuinely engage in collective bargaining.

⁷ Refer Report to the ILO Governing Body by the ILO Liaison Office in Myanmar "Update on the implementation of technical cooperation activities in Myanmar" (3 October 2013) ILO <www.ilo.org>.

⁸ As above.

Not surprisingly, workers are becoming increasingly frustrated and angry. The risks have been highlighted by cases like the Taw Win Timber products case where the employer's refusal to comply with reinstatement orders provoked consequential action by workers and the arrest of young union leaders.

Despite the urgent need to strengthen the legal protection for workers and to introduce an enforceable good faith requirement to ensure that collective bargaining can get some traction, the government has so far taken no action to amend the laws. In doing so, it is effectively endorsing the status quo, which is likely to move industrial relations towards the conflict model we have seen in other countries like Cambodia.

Myanmar workers deserve, and want better than that. But it will require a deliberate strategy, actively supported by employers, workers, and their organisations, working with government to build a modern industrial relations system based on democratic industry/sector structures, which will lift the skills and pay of workers as an integral part of industry development.

To do that will be a major challenge. The ILO core labour standards, as a minimum, should be implemented in practice as well as in law, and the ILO tripartite supervisory processes will continue to address that. The ILO will also be expanding its current Freedom of Association Project education and training work to support the development of social dialogue, including collective bargaining. But employer and worker organisations, both locally and internationally, will need to work together to ensure that local employers and workers are provided with the opportunity to understand and build a modern industrial relations model. And the reality is that the current laws will need to be amended to actively support the formation of strong, democratic, well-resourced industry unions.

The experience of the past 18 months has shown that Myanmar workers are keen to learn about international labour rights, and how they can assist workers to be involved, through democratic industry based unions, in the development of their country. The April Leaders Forum demonstrated that they want to, and can, debate and decide difficult issues democratically.

The farmers' unions being mainly self-employed small farmers have particular issues, such as land security and modernising their farming practices, but it is important that greater understanding and unity is built between them and industrial unions.

A process of democratic discussion is needed so that workers and their leaders can decide the model of industrial relations they prefer. And organisations like the Agriculture and Farmers Federation of Myanmar (AFFM), the Federation of Trade Unions of Myanmar (FTUM), the 88 Generation, the Labour Rights Defenders and Promoters Network (LRDP) and Action Labour Rights (ALR) locally, and the ITUC and Global Union Federations internationally, can play a key role in jointly supporting such an initiative. The discussion should include a consideration of whether the government and employers will support law change and build the respect for both the law and unions necessary for the development of a social dialogue model.

The choices are clear enough. On the current trajectory in Myanmar, the conflict model may win by default. Workers and employers should be given the information and the support from government and social partners so they can make democratic choices for a better future.

**Dinner Speech:
The Second New Zealand Labour Law Society Conference
22 November 2013**

**GRAEME COLGAN
Chief Judge of the New Zealand Employment Court**

I recall agreeing readily to speak to this dinner out of an enormous sense of relief that I had not been asked to write a paper and present it at the Conference. Over the last few weeks I have come to regret that hasty response to Pam Nuttall's blandishments. Until literally very recently, I have been completely stumped to know what to talk about. Coming from someone who expresses himself in words constantly and, many would say, over-fulsomely, that is a particularly frightening admission. It was clear that I would not be able to add to, or improve upon, the papers that we have heard today about decent work. I resisted the urge to speak about indecent work, if that is the corollary of decent work which I suspect it isn't.

Employment law is not the stuff of fascinating stories, at least those that a Judge can tell, or laugh-a-minute repartee. It finally dawned on me that I could coin a neologism and speak, for not very long you will be relieved to hear, on a topic that might span the diverse audience that you are.

My new phrase is "legal creep". Legal creep is not the name of your opponent's representative in a recent case in the Employment Relations Authority which you have lost. Legal creep is more the first cousin of Fiscal Creep, who is of course a half-sibling of Fiscal Drag. Delighted with the neologism, I thought I should just check whether I really have had a stroke of genius. A Google search disappointed me. The Law Society Gazette (of the UK) of 18 October 2013 contains a headline: "LEGAL CREEP THREATENS TO PARALYSE MILITARY, SAYS THINK TANK". Apparently, the Ministry of Defence in the UK is about to be paralysed by a sustained legal assault which could have catastrophic consequences for the safety of the nation. The costs of litigation against the British armed forces are now said to have risen out of all proportion with 5,827 claims being brought against the Ministry of Defence in the last financial year, with an average payout of £70,000 to the 205 people who made successful claims. If only 205 claims out of 5,827 represent "legal creep", then it must be proceeding at a snail-like pace. And, Professor Ewing, you will be interested to know this: The report of the Think Tank which is called Policy Exchange, says that the main weapons used in legal challenges to UK military operations are the European Convention on Human Rights in the 1998 Human Rights Act.

Our legal creep is, I fear, somewhat more rapid although I cannot claim that civilisation as we know it is under immediate threat, as appears to be the claim in the United Kingdom. And I haven't noticed a plethora of awards equivalent to £70,000 Stg, but levels of compensation is not the subject of this address.

Legal creep is the inexorable advance of legalism to colonise new territories including, especially, those from which they have been previously evicted which is where I come back to employment relations in New Zealand. You will note that I have deliberately used the phrase "legal creep" and not "lawyer creep". However much some may like to associate the

words “lawyer” and “creep”, I hope to persuade you that our problem is legal, but not lawyer, creep. Hence, I will refer to those who indulge in legal creep as “legalists”, not as lawyers.

Employment or labour or industrial relations (the names have changed over the last century) and the adversarial legal system, have not ever been entirely sympathetic bedfellows ever since 1894 and in respect of the common law, even before that. But if we have statutory employment law, or even common law, rules prescribing and enforcing employment practices, it is inevitable that these are a part of our legal system. If we are to regulate for decent work as has been advocated today, this will remain and will probably need to be embedded in law. Attempts have been made, with varying degrees of success, to exclude the law that legalists bring with them to disputes by excluding the lawyers. That is, however these days, simply unrealistic, even if only at the point of trying to define who to exclude and what constitutes being a lawyer. Other associated questions include the perennial and vexed one of where specialist courts and tribunals end and general courts assume appellate roles.

I understand that Professor Margaret Wilson, who is of course with us today, albeit in her former incarnation as Minister of Labour, flirted with the idea of excluding lawyers from mediation and even perhaps from the Employment Relations Authority. Even if, however, she had been able to ignore what would no doubt have been howls of protest, boundary drawing was always going to be problematic. Would you exclude the senior, skilful, but defrocked lawyer who is not a “lawyer” and might best be described as a former lawyer? By the same token, would you exclude the senior manager of a large public body employer (in the same city coincidentally as the defrocked lawyer) who is also a qualified and skilled lawyer although manages the employer’s human resources and its legal compliance obligations overall?

I am confident that many amongst us, including the Chief Mediator Judith Scott, would confirm that good lawyers are often an asset to everyone in mediations or Authority investigations while bad legalistic advocates, who are not lawyers, are a hindrance. As I have said, the target of my criticism is legal creep, not lawyer creep.

Now comes my personal confession. The results of legal creep are alluring and even seductive to lawyers. We don’t need to worry about inconvenient issues of credibility of witnesses, inconvenient contradictory facts, inadequate proof of issues, and all of the other imperfections we see in the presentation of cases. Legal creep allows us the chance to develop the law rather than simply apply it and, before you know it, you are a secret admirer and supporter of legal creep even if you do not usually confess this.

What this legal creep free-for-all has seen developed, however, is the intensive involvement of legalists and/or legalism in many industrial disputes from the get go. Legalism now frequently rears its head at the first hint of a problem, often whilst the employment relationship is still on foot. Particularly in the case of insured employers, insurance policies require advice about, and subsequently control of, the problem by the insurers (and therefore their lawyers) and it is not unusual to see lawyers taking over problems that are, at least in part, outside their fields of expertise, writing letters, arranging and attending meetings, and making and conveying important decisions. This is perhaps most marked in the education sector which school boards of trustees are frequently insured and what should be decisions on professional educational issues, or at least decisions taken about them with professional educational input, are being decided by reference to legal principles alone. Legal creep has

crept into classrooms, into hospitals, and to a host of workplaces where professionals are employed but their professional employment standards are subsumed by legalism.

Legalists prepare and present mediation statements that they read to mediators. They take legalistic points about the admissibility of evidence in the Employment Relations Authority and then seek to take those on appeal and consequentially proceedings in the Authority in the meantime. But, as I pointed out, it is not only lawyers who do so and many lawyers conscientiously refrain from doing so.

There are some, fortunately not too many as yet, cases that are still at an interlocutory skirmishing stage years after the employment relationship has ended, with requests for forensic analysis of computers, claims to and against such public officials as the Ombudsman and the Privacy Commissioner, and arguments over the relevance of literally thousands of documents. One could be excused for wondering where the employment issue is in all this.

Applications for security for costs are flavour of the month or, perhaps more accurately, now flavour of the year or decade. Despite signalling clearly that these will only be granted rarely and in exceptional circumstances, such applications are becoming increasingly frequent, especially in Auckland.

Believe it or not, in the last year I have been engaged in more cases of blackmail than I ever was in my former life as a lawyer practising criminal law. I think I have had to examine and make decisions on the criminal law of blackmail in three cases in the last year. These were all on procedural issues involving confidentiality in mediation or other similar processes with litigants attempting to lift the veil of confidentiality on the grounds that they were blackmailed in mediation which should, on public policy grounds, allow them to tell the Court what happened. Having heard those allegations of blackmail, they seem to me to be of conduct a good deal more benign than some of the metaphorical arm twisting and head banging that go on in collective bargaining, or at least used to. But my point is that frequent resort to the criminal law of blackmail is a good example of legal creep. With one or two exceptions, it is rare these days to see unions taking personal grievances on behalf of single members, at least to Employment Court level. It is even rarer to find a non-lawyer union secretary conducting litigation in the Employment Court although there are exceptions. I know of one official of a small union who keeps the Authority and the Court in business, albeit relying on legalism in large part. Just last week this union secretary ran a complex estoppel argument before me despite, I suspect, the case turning on what will be much more old-fashioned principles as collective agreement interpretation and custom and practice.

What I see is my Court's lists being clogged with such matters, the avuncular response to which could in many cases be "So what?", or "What is the end game here?" These are in some cases interesting questions for lawyers and academics but how they assist parties to resolve their problems is difficult to understand.

Have we reached the point where there should be imposed on parties to litigation limits on times and, therefore, resources expended on cases as is not uncommon in other courts? Limiting the time in which parties have to make submissions may focus minds away from legalism. And are we ready for more radical solutions such as banning parties'

representatives from mediation altogether and banning practising lawyers from the Mediation Service and the Employment Relations Authority?

I suspect that both of those institutions depend upon representatives, including lawyers and other legalists, to actually participate. If they are not able to, the Employment Relations Authority at least would have to be much better resourced by Government to actually undertake investigations itself rather than to rely on parties' representatives to prepare cases for presentation to it, which bear a strong resemblance to adversarial litigation in court. Any such radical suggestion would, of course, be met with howls of protest and not simply by affected lawyers. There are important arguments of rights to advice and representation, equality of arms, and the like. On the other hand, it is worth remembering that people involved in proceedings in the Tenancy Tribunal and the Disputes Tribunal deal with those institutions largely without legal representation. Perhaps the answer lies in a less crude methodology than requiring all cases irrespective of simplicity or complexity, irrespective of amounts at stake, and the like, to begin life in mediation and then to be reborn in the Employment Relations Authority before a second coming in the Court. There are many cases in which it will be entirely appropriate that lawyers are involved from the outset, so perhaps these should start life at least in the Employment Court where many of them are destined to end up anyway.

So, how does this all relate to decent work? Can those of us at the problem solving end promote, or at least support, decent work by having decent problem resolution mechanisms? There is no doubt that we should, and I think we can, do so. If we don't recognise and turn back, or at least curb, legal creep, there is a real risk to decent employment problem resolution. That risk is the prohibitive cost of it.

A dangerous consequence of legal creep is the cost associated with it and, in turn, the increasing inability of people to engage in the dispute resolution process and either their reluctance to try to find alternative ways of resolving their employment relationship problems or resorting to self-help revenge. So there is a very real and compelling incentive to curb legal creep because, if uncurbed, it will kill off by attrition tribunals and courts and even informal mediatory processes of dispute resolution.

Having decent work will not mean that employment problems will disappear. Indeed, they may increase as those currently without a voice, get one. But not being able to afford to address those problems decently, will itself put decent work at risk.