Rethinking the Legislative Architecture

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CLEW 50th Anniversary Seminar: *Is it time to reset our Employment Relations Systems?*

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Introduction

This seminar marks the 50th anniversary of what is now the Centre for Labour, Employment and Work and which was founded as the Industrial Relations Centre in 1970. By the time I arrived at the University in 1977 the Centre was already well-established under the leadership of Professor John Young. Over its history the Centre has played a leading role in commentating on and analysing the massive revolution in New Zealand's labour relations that, legislatively,[2] was first manifested in the 1970 amendments to the IC&A Act. Shortly thereafter the Industrial Relations Act 1973 initiated the first of the comprehensive changes to our labour law system which were to follow over the next half-century.

I became involved with the Centre shortly after my arrival at Victoria University in 1977 and had the great pleasure of working with many of its members over the following four decades. Those four decades, and particularly the first two, saw massive changes to the regulatory architecture of New Zealand's labour market. First the attempt to modernise the past in the Labour Relations Act 1987, next the attempt to destroy the past with the Employment Contracts Act 1991 and finally the attempt to reach an uneasy compromise with the Employment Relations Act 2000.

In a recent address Professor Margaret Wilson, the Minister of Labour in 2000, stated "it has always seemed to me that any regulatory framework must reflect the reality of the labour market as well as the ideology of the government of the day."[3] I am in full agreement with the first part of that statement, and indeed that is the theme of this paper. I am not so sure about the second, indeed I am far from convinced that labour law should reflect the ideology of the government of the day. If it is to do so the law regulating the most significant economic aspect of many people's lives becomes an unstable political football and that almost certainly will reflect views of the labour market that are at least a decade out of date.[4] Ideally labour law should provide a stable regulatory structure that is capable of delivering economic justice to New Zealand's working people and which is able to adjust to future changes in workplace and employment practices.

Our current labour law does not achieve these results. I will argue that the time has come for a fundamental rethink of the legislative architecture; a rethink that recognises developments in labour relations since the last century and which can respond to future changes in employment practices. While the Employment Relations Act ameliorated some features of its predecessor, the Employment Contracts Act, at heart it remained an Act that reflected and maintained the architecture and

[1] This paper is an expanded version of my presentation at the symposium and has benefited from hearing the papers and thoughts of other presenters and of the attendees generally.

[2] The usual symbolic starting point is of course the issuing of the nil general wage order on 17 June 1968.

[3] Margaret Wilson "Address for the 20th Anniversary of the Employment Relations Authority" (Auckland, 4 November 2020).

[4] Given the constant cries of "going back to the 70s" that follows any suggested reform, a decade out of date is probably generous.

neoliberal ideology of its predecessor. The Employment Contracts Act was an Act based on a narrow, and increasingly discredited, economic-ideological model that was hostile to workers and workers interests and which was designed to eliminate worker voice in the workplace. It was also an Act that was situated in a labour relations environment that was already vanishing and has now largely disappeared.

The changing world of labour relations

Discussing the detail of the changing world of labour relations over the last half-century is well beyond the scope of this paper. However, the key points can be set out quite quickly, albeit a little simplistically.

By 1990 the arbitration system that had delivered broadly acceptable working standards to New Zealand workers for the best part of the century was developing large cracks under the pressure of domestic and global economic changes. During the 1960s and 1970s the labour relations system had moved away from its original arbitration model to a new model founded on collective bargaining albeit within the traditional statutory framework. This model was relatively effective because a core group of strong unions were large enough to take effective industrial action with the settlements reached then channelled to the workforce generally through the national award system.[5] One characteristic of the period was the high level of industrial conflict as unions and workers attempted to protect living standards and a period of economic uncertainty and high inflation.

Regulatory activity from the 1960s to the late 1980s was primarily concerned with attempting to adjust the traditional regulatory structures to cope with these new realities. This attempt ended with the Employment Contracts Act 1991. Rather than reform the labour relations system that Act was intended to destroy it and to replace it with a neoliberal utopia where private capital reigned supreme, unions vanished into the dustbin of history and workers were commodities who provided their labour, when required, on terms dictated by the employer. The Employment Relations Act may have ameliorated some more extreme aspects of the Employment Contract Act, but its essence remains undisturbed and the transformation it brought about has not been significantly reversed over the two decades of the Employment Relations Act.

The 2021 workforce profile is significantly different from that of the 1980s. The manufacturing and processing industries which were the backbone for effective unionism have largely vanished [6]and private sector union density now hovers around 10 per cent. Employment remains largely individualised with terms and conditions dictated by employers' standard form contracts and unilateral policies rather than resulting from genuine negotiation. Jobs have become increasingly precarious.[7] Significantly the share of GDP captured by capital has increased and wages have not benefited from productivity gains.[8] The minimum wage has become a target rather than a safety net, inequality within New Zealand has become increasingly pronounced and in-work poverty is a major problem[9]

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[5] See Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011) at 30.

[6] The shift in sector contributions to GDP over time is well illustrated at Stats NZ

[7] New Zealand Council of Trade Unions *Under Pressure: A Detailed Report into Insecure Work in New Zealand* (2013); Gail Pacheco and others *Understanding Insecure Work* (2016).

[8] Bill Rosenberg "A Brief History of Labour's Share of Income in New Zealand 1939-2016" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, 2017) 79.

[9] Alexander Plum, Gail Pacheco and Rod Hick *In-Work Poverty in New Zealand* (New Zealand Work Research Institute 2019).

Moreover, the medium to long-term outlook for the labour market is uncertain and not optimistic. Unregulated gig-work is expanding, AI is becoming increasingly influential not only in displacing employment, but in controlling employment relationships. While the longer term impact of climate change is still unclear it is hard to be optimistic.

To summarise, New Zealand's current labour law architecture reflects the fact that it was developed on the basis of an extremist ideology which was designed to destroy the pre-existing labour relations system, the core of which was the belief that labour relations should be a tripartite system balancing the interests of workers and capital and which ensured an income adequate to provide a reasonable standard of living and which respected the human dignity of workers.

What is needed is an Act for the future is an Act that reflects a contemporary and probable future reality but retains those core values that governed New Zealand labour law for most of its history. In the remainder of this paper I will advance some proposals as to how this may be achieved.[10]

Key arguments

The key arguments in this paper are:

First, that artificial legal constructs differentiating between different groups of workers should be removed so that the full gamut of statutory rights and protections apply to all workers, defined broadly as persons who are contractually required to personally perform work for another person.

Second, that the Employment Relations Act is an Act that reflects the labour market and labour relations of the 1970s and 1980s, not that of current New Zealand. A new act, centred on the labour market and labour relations systems of the mid-21st century, is required and must incorporate a significantly more effective worker voice, both individual and collective, in the formation and management of employment relationships.

Third, any new act must reverse the influence of common law notions of employment. The common law of employment has always been dominated by the property interests of those seeking to utilise labour and seen its function as providing a compliant, obedient and subordinate labour force for those property interests. That perspective rejects worker autonomy, any notion of bipartite industrial democracy and in any notion of "democratic space" in the workplace. These values were embedded in statutory law in 1991 and reinforced by judicial decisions through the 1990s.

In many cases the reforms I am advocating are already reflected in the objects of the Employment Relations Act. The problem is the failure of the substantive provisions of the Act to fully support those objects. For example, freedom of association is not supported by provisions guaranteeing genuine protection for workers wishing to choose union membership. The provisions relating to impasses on collective bargaining do not reflect the reality of contemporary union strength and hence do not promote collective bargaining. Finally, there is no effective mechanism for worker representation or voice within enterprises to promote joint management of employment relationships.

The broader picture

[10] My argument that labour law reflects an outdated concept of the labour market was echoed in David Peetz's presentation which demonstrated that the corporate and economic structures assumed by current labour law no longer exist.

Before moving onto the substantive aspects of the paper, which are addressed to reforming the Employment Relations Act, it should be stressed that these reforms are only one aspect of the reforms needed to deal with current and future problems arising out of current labour market settings.

Some examples will suffice to illustrate the nature of wider reforms.

First, a productive workplace requires trained workers. Training opportunities remain ad hoc, rarely focus on a broad upskilling of workers and are often set at a minimum skills level.[11]

Second, as has become clear during the Covid-19 pandemic, the social security -employment relationship needs to be re-thought and consideration given to new social insurance models to provide greater economic security for those in precarious employment.

Third, the role of Government as an exemplar has been largely unexplored as has the concept of social conditionality – that is the receipt of government funding should be conditional on respecting a minimum level of employment expectations, most obviously the minimum employment standards. Equally payment of the living wage and adequate and stable hours of work could be mandated through government procurement and contracting policies.

Finally, this paper does little more than touch upon the respective roles of the employment institutions and the problems of access to justice.[12] Access to justice is perhaps the most urgent problem facing workers today. It is a well-recognised problem but one that is extremely difficult to resolve.[13] But resolved it must be if workers are to have access to the institutions that protect their rights at work, which attempt to preserve their health and safety, and which minimise the ability of more exploitative employers to abuse their position. No matter how well the substantive law is written, the exercise loses much of its point if those it is intended to protect cannot take advantage of it.[14]

The one reform I would advocate is that the right of private enforcement should be significantly extended rather than enforcement being a monopoly of Labour Inspectors. In essence, an action for a penalty for breach of any of the relevant employment legislation should be able to be initiated privately.

Workers as the Foundation of Labour Law

The starting point for reform should be the principle that all working people are entitled to receive the benefits of statutory protections. The gateway to statutory rights and protections has traditionally been that of having the legal status of an employee. “Employee” is not statutory concept but instead relies on the worker being employed under a contract of service-a concept developed by the common law judiciary. The borderline between an employee and other forms of worker has long been problematic both for the courts and legislators.

[11] Adult literacy programmes are an example of general skills updating that provide not only tangible benefits for employers but also important personal benefits for employees.

[12] For example, AUT’s Work Research Institute and Victoria University’s Centre for Labour, Employment and Work, with the support of the Employment Relations Authority and the Employment Court, have held symposiums on this topic in 2018 and 2019.

[13] The Chief Judge of the Court has shown a particular interest in this topic: Christina Inglis “In Search of Simplicity in Employment Law and Practice: an Issue of Access to Justice” (paper presented to NZLS Employment Law Conference, 2020); Christina Inglis “Access to Justice–the Conversation Continues” (A Speech prepared for the ADLS, 5 November 2020).

[14] Access to justice was dealt with in some detail in the presentation and supporting paper from Chief Judge Inglis.

The width of the concept is subject to changing judicial attitudes and the judicial concept of employee has changed over time. This became particularly apparent in the 1990s when the Court of Appeal gave primacy to the stated intention of the parties, in practice of course the intention of the employer.[15] That decision effectively allowed contract contracting out of statutory protections. Interestingly, the Court was later avoided the full impact of this decision by some innovative slate of hand in categorising clearly exploited workers as "homeworkers" in an unexpectedly broad interpretation of that term.[16] Section 6 of the Act goes someway to broaden the test but does not resolve the boundary problem.

Because the employee/contractor boundary sets the tests for who is entitled to statutory protections, there are strong economic incentives for employers to avoid employment obligations by seeking a legal status other than that of employee. While this tactic may avoid liability for statutory minima, a second significant driver is to avoid workers having access to employment protection through the personal grievance process and to collective rights such as the right to join unions and to negotiate collectively.

This paper proposes that access to all statutory entitlements should depend on a person being a "worker", a term that should be clearly defined by statute. This approach has been adopted in United Kingdom legislation.[17] The following definition is widely in use in the United Kingdom.

> "an individual who has entered into or works under (or, where the employment has ceased, worked under) -
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> a contract of employment, or
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> any other contract, whether express or implied and (if it is express) whether oral or in writing, *whereby the individual undertakes to do or perform personally any work or services for another party to the contract* whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual (emphasis added).

It should be stressed that to be effective the rights available to workers need to be significantly wider than is the case in the United Kingdom where the rights of non-employee workers are limited. Non-employees have no right rights to sick leave, maternity/paternity leave and no protection against unfair dismissal. It will also be necessary to ensure that the definition of a "worker" is as fool proof as possible. It appears that employers such as Uber, if they lose a challenge, immediately rewrite the contract and argue that the case does not apply to the new contract.[18]

The key proposition is that any natural person contracted to personally perform work should enjoy the same rights as all other such persons. All New Zealand workers, not only those falling within the uncertain category of employees, would be entitled to all the rights existing under the Employment Relations Act including collective rights as well as the protections of Acts such as the Minimum Wage Act, Holidays Act, Wages Protection Act and similar statutes. There is little logic in having separate categories of working people, indeed the main point of current legal distinctions is to deliberately deprive some such persons of rights primarily for the benefit of the employing party.[19]

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[15] *TNT Worldwide Express (New Zealand) Ltd v Cunningham* [1993] 3 NZLR 681 (CA).

[16] *Cashman Central Regional Health Authority* (1996) ERNZ 156 (CA).

[17] On the interpretation of this term see *Uber BV and others v Aslam and others* [2021] UKSC 5 at [71].

[18] Ruth Dukes and Wolfgang Streeck, "Putting the Brakes on the Spread of Indecent Work". See also the comments in *Autoclenz Limited v Belcher* [2011] UKSC 41 that "armies of lawyers will simply place substitution clauses … in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship."

[19] The dangers of this approach were clearly illustrated by the proposed Screen Industry Workers Bill 2020.

Incorporating this definition into legislation is relatively straightforward. It is only necessary to replace the definition of an "employee" in s 6 the ER Act with that of a "worker". Other relevant legislation, for example the Holidays Act, Wages Protection Act and Minimum Wages Act, all refer back to the ER Act for their definition of an employee.[20] Any new legislation, such as that necessary to implement fair pay agreements, can use the same drafting technique.

Potential issues

The Introduction of a statutory definition of 'worker' does not restrict the ability of workers or employers to choose whether to base their relationship on a contract of employment or alternative contracting arrangement. The most significant advantage of the change would be the guarantee of statutory protections for all workers and the removal of incentives to artificially classify workers as employees in order to avoid/evade statutory obligations.

Contracting is, and would remain, a legitimate, and often beneficial employment option, that is likely to continue to be used in many of the situations where contracting is currently common. [21] However, most employers, as is the case presently, are likely to prefer the advantages provided by a contract of employment. These include the benefit of the various common-law implied terms such as the duty of employees to obey reasonable orders and the employee's obligation of fidelity as well as the more intangible benefits of a stable workforce. For most employers, and current employees, the legislative change would have little practical significance.

The most significant problems that would need resolution would appear to be:

- ensuring compatibility between the Commerce Act 1986 and labour law legislation.
- determining the extent to which the employer in a contracting relationship should be required to observe the same record keeping requirements relating to wages and holidays etc as apply to an employment relationship.
- determining whether the parties to a contracting arrangement should be able to provide alternative procedures for the resolution of relationship problems. A provision such as s 32 of the Employment Contracts Act could deal with this problem.

This paper does not deal with issues such as taxation liability for contractors and assumes that the current tax arrangements will remain in place. It is however noted that both the Tax Working Group and the Productivity Commission report did suggest changes to the current arrangements.[22]

An Act for 21st Century Labour Relations: Strengthening the Objects of the ER Act.

The objects of the Employment Relations Act recognise many of the issues relevant to contemporary labour relations but the body of the Act lacks sufficient substantive provisions to ensure that these objects are achieved. This is particularly so in the case of the following objects.

Object (a) sub-objects

[20] The Wages Protection Act still uses the term "worker" but it has the same meaning as employee in s6 of the ERA.

[21] For the sake of simplicity the term "employee" and "employment relationship" will be used to describe a person employed under a contract of service/employment; the term "contractor" or "contracting relationship" for all employment options other than that of an employment relationship.

[22] Tax Working Group, New Zealand *Future of Tax: Final Report Volume 1* (Tax Working Group, New Zealand, 2019) recommendations 54 and 58; New Zealand Productivity Commission *Technological Change and the Future of Work: Final Report* (2020) at 21.

(ii) …acknowledging and addressing the inherent inequality of power in employment relationships; and

(iii) … promoting collective bargaining.[23]

(iv)… protecting the integrity of individual choice.

Object (ab) to promote the effective enforcement of employment standards, in particular by conferring enforcement powers on Labour Inspectors, the Authority, and the court.[24]

Object (b) to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.

The key reforms required to implement these objectives include greater protection for freedom of association, support for collective determination of wages and conditions and joint management of the employment relationship. Broadly, the reforms suggested below are intended to promote union membership, and hence collective-bargaining, and to provide mechanisms to maximise the probability of terms and conditions being regulated through collective-bargaining.

Freedom of association and employer neutrality

Freedom of association, and in particular the practical ability to join a trade union, are critical to achieving the Act's objects, particularly promoting collective bargaining, but also ensuring that other mechanisms for worker voice are effective. As unions act as intermediaries between workers and their employer their role enhances worker rights and limits victimisation of workers attempting to assert their rights.

The right to join a union is a clear and unequivocal right accorded to workers by international conventions, principal specifically recognised by the objects of the Act. Arguably the provisions in the current Act fail to meet New Zealand's international obligations.

Electing union membership or non-membership should be a matter of free individual choice and, if one is to recognise the inherent inequality of power in employment relationships, it is not a matter that employers should have the power to influence. Allowing employers such an influence negates a basic individual right for the benefit of the employer and is contrary to the objects of the Act. In practice, free choice is not possible where employers are provided with the opportunity to influence that choice.

Part 3 of the Act as currently drafted not only fails to adequately protect freedom of association but allows employers to engage in concerted anti-union activities. In particular, the sole protection given to employees is that in s 11, a prohibition on "undue influence" in relation to union membership. That test sets a an artificially high barrier that it is extremely difficult for an individual worker to demonstrate. This barrier also ensures that there is no effective remedy to prevent anti-union activities by employers.[25] The current "undue influence" provisions are unworkable and should be repealed.

[23] Peter Cranney, a discussant for this paper, pointed out that s 30, the objects clause for the collective bargaining, largely focuses on process rather than effective promotion of collective bargaining.

[24] Strengthening object (ab) can be achieved by providing much greater freedom for private enforcement of the provisions in the ER Act and other protective legislation rather than allowing Labour Inspectors to have a monopoly in enforcing such matters.

[25] As a starting point s62A should be repealed or substantially reformed. The effect of that provision is to provide employers with a direct opportunity to interfere with an employee's choice of membership.

In order to protect individual choice and freedom of association it is proposed that the Act be amended to insert clear and enforceable provisions requiring employers to be union neutral in all interactions with their employees. The proposals below do not prevent employers expressing general views relating to union membership. Rather they restrict the expression of those views in situations designed to directly influence individual choice and to take advantage of the power disparity between employers and employees.

First, amend the requirement of s 14(1)(d) that "the society is independent of, and is constituted and operates at arm's length from, any employer" to state that employers are under a positive obligation not to seek to interfere or undermine this requirement.

Second, ensure that individual workers are able to make a free choice in relation to union membership in the absence of employer pressure by enacting a blanket ban on direct approaches to workers, whether individually or collectively, and whether directly or via agents, in the workplace or elsewhere including explicitly prohibiting tactics such as captive audience meetings.

Effective remedies would be required to prevent violations of the neutrality principle including access to injunctions and compliance orders. Ideally any conduct that is likely to have the effect of placing any pressure on a worker in relation to membership should be prohibited.

The Act also fails to adequately protect active union members. While section 107 now explicitly covers membership of a union, the participation of a member in the activities of that union and legitimate action taken to support members of any other union are not covered. The use of the term "means" in that section should be replaced by "includes", the term used prior to 2000 and which provides greater flexibility for the courts in applying the section.[26]

One option for situations where there is an existing collective agreement is to introduce the "opt-out" procedure that has been suggested by Professor Mark Harcourt and colleagues.[27] However, wider reforms needed to ensure that employers do not interfere with union organising campaigns or the like in situations where there is no current collective agreement.

Collective determination of terms and conditions of employment

As is well known New Zealand is experiencing unprecedented levels of in-work poverty and the percentage of GDP received by labour has been falling.[28]. There are a number of causes for this, but one is the very low levels of union membership and collective bargaining in the private sector. Research generally recognises that wages and conditions are likely to be enhanced when determined collectively.[29] Moreover, the greater the reach of collective determination the more the terms and conditions set industry standards. It is suggested that the current proposals for Fair Pay Agreements[30] would be both less necessary and more effective if collective bargaining extends to a greater proportion of private sector employment.

In summary the following reforms are likely to prove effective.

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[26] See *Tranz Rail Ltd v Rail and Maritime Transport Union (Inc)* (1999)1 ERNZ 460 (CA) where the Court was able to use the open list to include participation in a lawful strike (now covered in s 107(1)(ba).

[27] Mark Harcourt and others "Boosting Union Membership: Reconciling Liberal and Social Democratic Conceptions of Freedom of Association via a Union Default" (2020) Preprint Industrial Law Journal.

[28] Rosenberg, above n 6.

[29] Ref needed

[30] Fair Pay Agreement Working Group *Fair Pay Agreements: Supporting Workers and Firms to Drive Productivity Growth and Share the Benefits* (2018).

First, the definition of an "employer" should be extended to capture economic groupings rather than the immediate legal employer. Often a limited liability company that is largely controlled by other companies in the group or through contractual relationships. For example, s6 of the Companies Act recognises the notion of subsidiary companies and the wider-reaching concept of associated companies is also well-recognised. Consideration might be given to introducing a test such as that being proposed in relation to migrant labour exploitation: amended slightly, an employer for the purpose of collective bargaining could include "any third parties with significant control or influence over an employer in relation to the terms and conditions of employment offered by an employer."

Second, the provisions relating to facilitating bargaining and determining collective agreements should be strengthened. While the current facilitation process seems to work reasonably well it does not allow for an arbitrated resolution. Facilitation could be strengthened by augmenting the Authority's power to make recommendations so that the Authority may order that at least some aspects of a recommendation may become binding 30 days after the issue of a recommendation unless the parties agree to some other resolution. Such a provision would be something of a half-way house but may be effective in increasing the pressure to settle or providing a resolution. The proposal gives the Authority a discretion in the matter and does not mandate a directed settlement. Determination should also be more readily available where employer prevarication tactics-bargaining to exhaustion- are used to undermine union membership and delay bargaining.

The reasoning behind this proposal is that the objects of the Employment Relations Act to the effect that collective bargaining is the preferred method of determining terms and conditions of employment are not reflected in the Act's substance. Workers should have effective rights to obtain collective agreements taking into account the current realities of labour markets where industrial action may be ineffective in breaking impasses in bargaining.

Management of employment relationships

The addition of s18A to the Act allowing delegates within workplaces, marks a useful beginning to legitimise union presence within workplaces. It is suggested that this initiative should be expanded to encompass at least the following:

If it is accepted that employment relationships should be strongly grounded in a pluralist philosophy it is essential that workers, whether or not union members, should have an effective voice in their workplace and that access to the mechanisms for promoting voice are controlled by workers, not their employer. Unions may find such alternative pathways unpalatable, but it is suggested that given current membership levels alternative voice mechanisms are needed but also that the existence of such mechanisms might provide an entry point for union representation. The powers, rights and protections for both delegates and committees should be defined in the Act and it would also need to be clear that unions are entitled to be involved in and lead such initiatives.

One possibility is that the current duty of good faith should be extended by adding:

> "to facilitate the promotion of productive employment relationships by:
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> a. Entitling all employees to elect a workplace delegate to represent their views to the employer, and,
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> b. Enabling all employees to choose to establish workplace representative committees.

This could be supported by a schedule to the Act specifying a default template for the establishment of a workplace committee possibly based on the model originally proposed for the HSWA

The current law could also be strengthened by making it clear that union officials exercising access rights for purposes related to the employment of a union's members should include access to all material necessary to monitoring or ensuring compliance with their members employment terms and conditions and also the right to have access to management to discuss such issues. Similar rights should be accorded to union delegates.

Institutions and Processes

It is beyond the scope of this paper to give consideration to the institutions and processes in the Employment Relations Act for the settlement of employment relationship problems and for the enforcement of the penalty provisions in the Act. Margaret Wilson made a number of suggestions in this respect in the paper referred to earlier.[31] I can agree with some of the suggestions in that paper but I definitely disagree with any suggestion that the Employment Court should be a division of the District Court. Since the juridification of the Employment Court from the 1970s onwards the Court has shown the virtues of a specialist labour court that with an ingrained understanding of how labour relations work and which seeks to develop the law in a way that recognises those realities. Over the last decade or so it also seems that the Court of Appeal, as it did before the mid-1980s, also respect that expertise.

Respecting and Protecting the Personal Dignity and Personal Life of Employees

One of the most unfortunate aspects of contemporary employment law is its inherent acceptance of the common law's view of employees originally founded in the law of medieval serfdom and still incorporating the values of nineteenth century law of master and servant. It contains only the most minimal acknowledgement of the fact that the contract of employment is intended to provide mutual benefits The law regards the employee not as a citizen in a democratic country but as a worker subordinate to their 'master' and employed only for the master's purposes. The common law values inherent in the implied terms of fidelity and mutual trust and confidence, and the current 'justification' test for dismissal, have seen the courts increasingly expanding the range of controls over and surveillance of workers both within and outside work. This view of the common law essentially mirrors the economic view of workers as commodities able to be totally controlled for the employer's benefit and as a cost to be reduced to the maximum extent possible. If workers are to be seen as citizens in a pluralist democratic society who make major emotional and financial investments in their employment and who are social beings having legitimate social, political and family responsibilities those values need to be made explicit in the Employment Relations Act and to permeate the legislation.

An Expanded Vision of Good Faith

The statutory concept of good faith is now well-established in New Zealand's labour law and in the two decades since its enactment its statutory articulation appears to have gained broad political acceptance and it must be regarded as a focal point for any analysis of labour law. But can good faith play an increasingly important role at the centre of labour law? In 2019 Chief Judge Inglis presented a paper "Defining Good Faith (and Mona Lisa's smile)" at the Law@Work Conference.[32] In that paper Her Honour noted that "Some commentators have suggested that an overly cautious approach has been taken to the application of good-faith and that Parliament's vision for the concept has yet to be fully realised."

[31] Wilson, above n 2.

[32] Christina Inglis "Defining Good Faith (and Mona Lisa's Smile)" (paper presented to Law@Work, 2019).

I would argue that good faith has the potential to be a transformative influence in the re-articulation of the underlying principles of New Zealand labour law and in particular individual labour law.[33]

In particular, good faith could develop to provide an effective counter to the increasing use of the common law implied terms and express contractual terms to increasingly intrude into the life of employees at work and in the private sphere? Good faith remains something of a 'sleeper' concept in labour law but is potentially a major game changer that is ripe for judicial development in appropriate cases. It is not unusual for legal concepts to lie dormant for some time until their full potential is realised. Changes in common law systems tend to be incremental, but that once the potential of a concept has been recognised the development and expansion of that concept can be quite rapid.

Good faith has the additional advantage that it was clearly intended by Parliament to play a significant role in reshaping employment law. During the first reading of the Employment Relations Bill the then Minister of Labour, Hon Margaret Wilson, said "this Bill lays a new path for industrial relations."[34] and the Explanatory Note to the Bill states: "The principle of good faith underpins the Bill, both generally and specifically.'" Good faith was clearly intended to be the 'oil' of the new legislation and intended to signal a new approach to employment and industrial relations to displace the neoliberal ethos that had underpinned the Employment Contracts Act.

The ethos of the Employment Relations Act is built on the foundations set out in s 3, the object section of the Act. The principal object is "to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship". The section goes on to set out the means to be achieve this. For current purposes the key drivers are:

> "(i) by recognising that employment relationships must be built…on a legislative requirement for good-faith behaviour, and
>
> (ii) by acknowledging and addressing the inherent inequality of power in employment relations."

It is worth emphasising some key points of these objects. The first is that the Act speaks of "employment relationships", not employment contracts. The change of emphasis from contract to relationship was no doubt a reaction to the black letter contractual approach adopted by the Court of Appeal during the 1990s.

However, this change in emphasis is found not only in New Zealand but also in the United Kingdom where the courts have increasingly recognised that employment relationships are not purely contractual and must be seen in the context that statutory law is increasingly influential in defining the employment relationship. It is no longer feasible to consider employment as purely, or even predominantly, a contractual relationship with statutory add-ons. In *Gisdya Cyf v Barratt*[35] Lord Kerr, for the Court, commented that "the need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights is fundamental." In this paragraph Lord Kerr referred to the statement of Lord Hoffman in *Johnson v Unisys Ltd*[36] that "… over the last 30 years or so, the nature of the contract of employment has been transformed.

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[33] Similar arguments were also advanced in Gordon Anderson "Realising Parliament's Vision for Good Faith" 2020 ELB 117.

[34] (16 March 2000) 582 NZPD 416.

[35] *Gisdya Cyf v Barratt* [2010] UKSC 1 at [39]

[36] *Johnson v Unisys Ltd* [2001] UKHL 13 at [35]

Of course, the notion of labour law as statute law is hardly a novelty in New Zealand. Prior to 1990, while employment relationships were created by agreement, the essentials of the relationship were prescribed in statutory based awards and administered through joint management-union structures. The contractual vision of employment, and especially its neoliberal embodiment, might properly be seen as a decade-long exception in labour law during which an already strongly established good-faith tradition in labour law went into hibernation.[37] The statutory good faith obligation might properly be seen as restoring and expanding the pre-1991 position for a new era.

However, the environment of 2000 has again shifted and a further re-evaluation to reflects and recognises the changing dynamic in labour law is needed.

A key object of the ER Act was the need for employment relationships to be conducted in a manner that addresses the "inherent inequality of power in employment relationships". Parliament's detailed articulation of the substance of good faith in s4 of the Act makes it clear that it intended a broad and responsive relationship in which the parties must mutually be "active and constructive in establishing and maintaining a productive relationship in which the parties are, amongst other things, responsive and communicative[38]

Good faith as the pivot of labour law

In an era of individualised employment and inequality of power an essential role of the law is to set the parameters or boundaries with which an employment relationship must be conducted. For employees this boundary is largely set by the implied term of fidelity, supported by mutual trust and confidence and increasingly the statutory obligation of good faith.

There is, however, no similar limit to an employer's behaviours or an employer's power to control the work-non work interface. The obligation of good faith, if modified and effectively developed might fulfil this role.

I would argue that the duty of good faith was intended by Parliament to significantly reset the law of employment relationships so that the relationship is no longer pivots on the "subordination" principle of the common law but on mutual good faith. It is a recognition that employment is not only a relational agreement but one in which the inequality of the relationship is expressly recognised. It involves a recognition that an employment relationship must properly be approached as one of mutuality, one that the parties enter into with separate interests but for their mutual benefit. It is not a relationship in which the employee is a commodity to be used to maximise the employer's economic benefit and in which the employee's interests must be subordinated to the employer's.

Such an approach has implications for the two core common law levers that reinforce employee subordination; the duty to obey lawful orders and the duty of fidelity. Rather than attempt to balance these open-ended obligations the courts have increasingly expanded them to reinforce the employee's subordination by encompassing increasingly vague notions of harming or undermining

[37] Gordon Anderson "Good Faith in the Individual Employment Relationship in New Zealand" (2011) 32 Comp Lab L & Pol'y J 685.

[38] It is worth recalling that the 2004 formulation of the duty of good faith was a very clear rebuke to the attempts of the Court of Appeal to read down the original enactment. In*Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at [38] it had commented that "We do not see those obligations as differing significantly from those referred to in the judgement of this Court in *Aoraki Corporation Limited v McGavin*." Perhaps even more pertinently, the wording of the 2004 amendment directly contradicts a statement of the Court of Appeal in *Auckland City Council v New Zealand Public Service Assn Inc* [2003] CA 112/03 at [25] that "any general requirement of 'energetic and positive displaying of good-faith behaviour' goes too far.

"the trust and confidence" that an employer should have in its employees. I have commented elsewhere that "the common law expects a very high standard of conduct from employees…[but] in the case of employers the law has been somewhat more flexible."[39] I have also argued,[40] that the minimum change employees might expect as a result of the duty of good faith is the acceptance by the courts that employers must act, at a minimum, in accordance with contemporary standards of good management practice and that the Authority and the court should insist on much higher standards of management competence in dealing with the negative consequences of the contemporary workplace – managing excessive workloads, the psychological and physical consequences of stress and workplace bullying at the consequences of insecure employment.

The right to a private life and personal dignity

The tensions of the scope of an employment relationship are increasingly reflected in the increasing assertion by employers that management prerogative and the employee's obligation of fidelity justify increasingly invasive intrusions into the private lives of employees. As monitoring technology and AI capabilities develop increased monitoring of employees has become increasingly intrusive. It now extends into their work life, whether at the employer's place of business or in their own homes in greater depth and increasingly into their non-work activities including personal health, presence on social media and other public activities.[41]

If asked most employees would almost certainly agree with the proposition that their obligation to the employer is to provide labour for their employer during the period for which they are paid and/or expected to be at work. They would probably also agree that they should not actively undermine their employer's business. It is doubtful, however, that most employees would accept that they should be uncritical of their employer [42] and that they should be required to censor their everyday communications on social media such as Twitter and Facebook for their employer's benefit.

The right to a private life and to freedom of expression involve a diversion into human rights law that is beyond the scope of this paper other than to note the failure of human rights law to recognise that "over powerful citizens", usually in the guise of large state-incorporated corporations, pose at least as serious a threat to human rights as the state.[43] Without a significant change in approach to such rights by the employment institutions a more balanced and robust approach to the work-private life boundary seems unlikely. The right to privacy and to a private life has not been fully accepted in New Zealand, although this is changing.

Freedom of expression does have a widespread acceptance in New Zealand but is seen as a right that requires protection against the state rather than private actors. It is, however, strongly arguable that good faith incorporates the notion that employees have the right to exercise their freedom of expression unless there are strong reasons to the contrary. Unfortunately, that is not the case. The

[39] Gordon Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38 VUWLR 417 at 432.
[40] See Anderson, above n 9, at 432 and Gordon Anderson and Jane Bryson "Developing the Statutory Obligation of Good faith in Employment Law: What Might Human Resource Management Contribute?" (2007) 37 VUWLR 487.
[41] See generally the reports issued by the TUC: *Dignity at Work and the AI Revolution: A TUC Manifesto* (2021); Robin Allen and Dee Masters *Technology Managing People – The Legal Implications* (Trades Union Congress 2021); *Technology Managing People – The Worker Experience* (Trades Union Congress 2021).
[42] To slightly misuse Atreus in Seneca's Thyestes "magnum hoc regni bonum est, quod facta domini cogitur populus sui tam ferre quam laudare."(here's the great thing about autocracy: the people are not only forced to endure the actions of their master, they have to praise them too).
[43] Joe Atkinson "Workplace Monitoring and the Right to Private Life at Work" (2018) 81 MLR 515; Joe Atkinson "Implied Terms and Human Rights in the Contract of Employment" (2019) 48 ILJ 515.

courts increasingly allow the duty of fidelity to be used to permit employers to intrude into the private lives of their employers on the vague, and largely unsupported, assertion that some such actions undermine the employer in some intangible way.[44] The courts are increasingly allowing employers to discipline employees not only for their views on their employment but also their political and social viewpoints. Views or opinions that were relatively commonplace when expressed in a social setting now place an employee at the risk of dismissal if these are expressed on social media. Even a probably half considered "like" on Facebook can result in dismissal. The democratic space for workers both within the workplace, and as citizens in a democratic society, is being increasing constrained by employers.

The statutory duty of good faith provides an opportunity for rethinking some fundamental beliefs that underpin employment law, most notably the belief that property rights trump human rights and that employment law should remain anchored in mediaeval views of fidelity and subordination or, in the United States context, the law of slavery.[45] It may be that this will require a particular New Zealand approach to the employment relationship.[46]

I would propose that several key reforms are necessary to adapt the duty of good faith to the contemporary and future world of work.

First, a key provision to make it clear that employment relationships must respect and protect the dignity of workers and recognise their right to personal and family life including the right to participate in society as citizens.

Second, the Authority or Court should be given the power to invalidate clauses in employment agreements, or the application of similar clauses via employer policies, that constitute an unreasonable intrusion on the employee's privacy, including privacy at work, or which constitute an unreasonable intrusion on the employee's personal dignity, personal life, or rights as a citizen.[47]

Third, the test of "justification", both in relation to the matters above and for the actions of an employer in a personal grievance claim, should be a neutral test: ie the standard of a "fair and reasonable person, balancing the interests of both the employer and employee …"

Conclusion

New Zealand needs to rewrite its labour law based on a set of principles that reflect the mid-21st century and which will be sufficiently endurable and flexible to regulate a labour market that is in a state of flux and which is likely to change rapidly in the coming decades. We require a law that is able to regulate the next Uber, not respond to the previous one. The new law needs to recognise not only the need for a productive labour market for business but also a labour relations citizenship which accepts workers as full participants in that system and who are entitled to have an effective voice to do influence it.

[44] See for example the comments in *Hook v Stream Group NZ Limited* [2013] NZEmpC 188.
[45] JS Nelson "Management Culture and Surveillance" 43 Seattle University Law Review 629.
[46] Alice Anderson "Poipoia te Kākano Kia Puawai" (2020) 943 Law Talk 10; Ani Bennett and Shelley Kopu "Applying the Duty of Good Faith in Practice, in a way Consistent with Te Ao Māori, Treaty and Employment Law Obligations" 2020 ELB 114.
[47] One such formulation (from the Bill of Rights Act) might be that "an employee's personal rights and freedoms may be only subject only to such reasonable limits as can be demonstrably justified to be required by the employer for genuine and reasonable business reasons and which are consistent with the employee's rights and freedoms in a free and democratic society."

CLEW has played a leading role in debates over the architecture of labour relations and labour law for half a century. I look forward to seeing it continue this important role over the coming years.