CLEW 50th Anniversary seminar '*Is it time to reset our Employment Relations Systems?*'
14 April 2021

In her opening address to CLEW's 50th anniversary seminar, Professor Jane Bryson, Dean of the Wellington School of Business and Government at Te Herenga Waka – Victoria University of Wellington, paid tribute to the critical role that CLEW has paid since its establishment as a tri-partite forum on key issues for industrial relations and the extensive database of Collective Employment Contracts/ Agreements and awards which provides a unique record of changing employment and working conditions in New Zealand. She commented that the first paper produced by CLEW's predecessor, the Industrial Relations Centre (IRC) was by Noel Woods and it spoke of the need for reform in the then Industrial Relations, Arbitration and Conciliation system. How appropriate that 50 years later and 30 years since the introduction of the Employment Contracts Act, the last major overhaul of our IR systems, that this seminar asked the question '*Is it time to reset our Employment Relations Systems?.'*

The opening address from the Hon Michael Woods, Minister for Workplace Relations and Safety, also acknowledged the critical role the Centre plays as holder of records and forum for important discussions, debate and scholarship in Employment Relations. His address focused on the fundamental change that occurred in 1991 with the introduction of the Employment Contract Act that moved New Zealand to the most pure individualised forms of bargaining which resulted in the breakdown in institutions and the diminishment of unions. In answer to the question *is it time for a reset*? the Minister considers that the IR system needs to '*more fairly share the fruits of people's labours'*. The Minister also believes that safety is a big part of the story of reform and that the Government would pick up the legacy of Pike River and continue the reform that has been started. (a full report of the Minister's speech is available on the CLEW website).

In the second session of the seminar Professor Gordon Anderson from Victoria Law School presented a paper 'Rethinking the legislative architecture'. He looked back across legislation in the last 50 years and concluded that the Employment Contract Act 1991(ECA) was designed to destroy the previous system – which it comprehensively did – and the Employment Relations Act (ERA), a modified version of the 1991 Act, simply mitigated some of its worst features. Professor Anderson considers it not fit for purpose.

Session 2 - Rethinking the legislative architecture

Professor Anderson outlined what a new Act might look like. It needs to:

- focus on enabling workers to organise and speak with a collective voice;
- reverse the common law notions underpinning the Employment Contracts Act;
- give workers democratic space in the workplace (industrial democracy) enabling them to speak up – currently they cannot as seen in the fact that they are afraid to speak up in relation to Health and Safety concerns
- need to move away from arbitrary distinction between workers and contractors
- need to prepare for what the future of work will look like - cannot go back to the seventies.

Anderson expanded on these in his presentation and concluded that:

'*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.' (The full paper is available on CLEW's website)

Chief Judge Christina Inglis and employment lawyer Peter Cranney responded to the Anderson paper. The Chief Judge titled her paper '*Don't throw the (21 year old) baby out with the bathwater*' and focussed her discussion on the institutions rather than the substantive points of the Anderson paper. She argued that the ERA has had longevity but considers it has some underutilised potential. Unlike Anderson she believes it marked more of a significant shift. It emphasised specialist institutions and subsequent amendments reflected the view that the Act was not living up to what was intended. (The full paper is on the CLEW website)

Peter Cranney reiterated the Chief Judges comment that there needs to a be a consensus at to what the problems are if there is to be a programme of reform. He pointed out that only 10 percent of private sector employees are organised and of these, many have limited bargaining power. The labour market is distorted by excessive employer power and the outcomes of this include:

- Low wages
- Low productivity
- Issues for migrant groups

In 1991 the ECA abolished union rights along with the 40 hour week an 8 hour day (pulled out of a number of statutes). When these were reinstated it included '*unless agreed otherwise'*. This is no protection where there is no representation. This means that many factories and plants are operating 60 hours a week with no compensation for employees who work extended hours.

The introduction of FPAs is an attempt to fix some of this. Aspects of the past system– the effects of the ECA – have not been corrected by the ERA and continue to have impact. For example, s 31 refers to good faith but does not include 'to ensure workers have enough income, decent working conditions, etc…'. Section 32 includes no penalties for breaches. He believes that the ERA is written to be totally inaccessible and the ineffectiveness of the Act is embedded within it.

Session 3 - *'Collective bargaining and unions – still an effective tool for determining wages, hours and working provisions*?'

In the third session of the day, Professor David Peetz from Griffith University in Queensland presented a paper ***Collective bargaining and unions – still an effective tool for determining wages, hours and working provisions*?** Peetz's discussion centred on the concept of monopsony - a market with a single buyer of labour, a single buyer that controls the market and that unions and collective bargaining are a counter to power and monopsony and to '*the scourge of growing insecurity*'.

But Peetz commented that it is against the interest of employers to extend insecurity too far. '*The rise in casualisation reaches a limit because casualisation makes for low commitment by employees and it limits employers' ability to get workers to do what they want. That is, it limits control*.' Employers don't want everyone to be casual –they often move to contracting through a third party - independent contracting or labour hire. But there is a limit to how much this can be applied because above a certain limit, it becomes too hard to exercise control.

Peetz further discussed 'Agentic' monopsony - where agents or peripheral firms are responsible for competitive conditions with retention of control by a central capitalist entity and production undertaken within smaller entities – what Peetz calls 'peripheral capital'. These could be in the form of franchises, spinoffs, contractor firms, owner drivers, homeworkers, subcontractors and so on. *'Monopsony is changing from 'simple' monopsony, in which large firms do the hiring, to agentic*

monopsony, in which agents, or peripheral firms, are responsible for labour.' This has big implications for unions and bargaining. Peetz uses the term 'not-there employment' for this economic structure.

The second part of Peetz's presentation explored the options for collective bargaining and unions in the changing environment of work – the possibly alternatives to collective bargaining and what responses are needed for the platform economy.

He pointed out that New Zealand and Australia are unusual in their treatment of multi-employer bargaining. Most of OECD countries, while moving to some decentralisation, still recognise that industry/sectoral bargaining produces better outcomes than full decentralised systems such as ours. He cites the reasons for this:

- *It gives both labour and capital more options on how best to collectively organise;*
- *Reduces transaction costs;*
- *Reduces inequality; provides appropriate pay rates for those with otherwise little power; it facilitates co-ordination in response to changing circumstances; and*
- *It puts a brake on the race to the bottom.*

He commented that Fair Pay agreements are a concrete step towards industry bargaining with private sector potential. (See CLEW's website for full paper).

John Ryall, previously from E tu and Kerry Davies, national Secretary of the PSA responded to David Peetz's presentation.

Ryall outlined some of his experiences with 'monopsony employers' in the care work sector and with cleaning, catering and security companies. He commented that collective bargaining is an extremely torturous process and at a low ebb outside of public sector, particularly where a union is trying to establish a collective agreement with a small company. He argued that for collective bargaining and unions to remain effective we need to advocate for collective bargaining rights in small workplaces; we need a legal strategy to expand legal rights around minimum wage workers – where does work start? When does a wage start?- and that we need more community organisations and ethical employers to introduce a wider discussion about in-work poverty and the living wage in order to persuade elected representatives and large corporates to adopt policies that are more favourable to changes in the values that underpin our current employment relations system.

Ryall advocates for FWA as a way forward to enable the setting of standards - he agrees that we need a fundamental rethink and that FWA are one part of the way forward. (See CLEW's website for full paper)

Davies focused on the home support sector in her response to Peetz's arguments. Monopsony is the experience of home care support workers. NGO providers have in large part been replaced by large employers with sub-companies tendering for contracts. The sector is dominated by 4-5 large employers who operate under a regime where there is a need for a return on investment to a parent company. Another interesting factor is that monopsony not only exists with employer but also in terms of the funder (the Government) in support sector which makes for difficult workplace collective bargaining. Davies argued for a 'multi-layered approach' - to organise at sector level with the funder and with community organising to influence companies. But that needs a legal and political campaign – an approach of gaining public and worker support on the basis of the value of their work.

Davies commented that the recent amendment to equal pay legislation puts collective bargaining in place for seeking solutions. There is a systematic process in place to assess jobs and assign a fair pay rate which provides a mechanism when collective bargaining breaks down. Further, she is optimistic

about the future – but future work arrangements need to have scope for peripheral capital firms and to include all workers, contractors and casual workers. She said that collective bargaining legislation needs to be set up to allow everyone to participate. She also called on proper resourcing by the state in relation to any equal pay work – and the resourcing of employment institutions.

Judy Dell, the Principal Mediator in the Mediation Service commented briefly on the need to develop an interest-based bargaining approach so that the bargaining process can achieve a wider outcome beyond just terms and conditions. It provides an opportunity to have stronger collaborative relationships with an agreement on common goals around productivity. She concluded that interest-based problem solving ensures common goals are identified and helps to bring staff forward with change and ensures staff interests are taken into account and people feel they have more information and control of outcomes.

Session 4 - Panel discussion 'Employment relations and the changing work environment'

The concluding session was a panel discussion involving Rose Ryan (MBIE), Melissa Ansell-Bridges (NZCTU)and Paul Mackay (Business NZ).

Paul Mackay commented that he heard the need for change but that we needed to look to the future. He said that we all agree that we need is a 'high wage, high performing economy' but what is missing is employee engagement or genuine engagement from workers. He asked '*what can we do and what are we doing that we enable us to bring about genuine employee engagement?*' He called on the audience to '*look at what levers we can pull to help everyone achieve all that they want with an agreed goal*'. He concluded that the way forward was to '*focus on productive workplaces and using the levers'*.

Ansell-Bridges said that in relation to pay equity, abolition of zero hours contract etc – gains have been made but not shared by all and in particular contractors who she says are experiencing 'growing disenfranchisement'. Workers continue to sit outside of legislation and the Act –dependent contractors are in fact employees by default. A necessary first step, she said, is to have current legislation cover all workers – improve the mechanisms so that collective bargaining is accessible to all workers.

The final speaker of the day Rose Ryan , MBIE, asked the audience to think about the ER system in terms of the evidence and to ask a series of questions – how would we know that the system was or was not working? For whom? and how do we measure effectiveness? She recalled the work carried out by Dunlop on thinking about the ER system as a system – need to think about the actors and the state and their roles – legislator, employer and curator of parts of the system.

Ryan argued that we are not in a good position to answer yes or no as there is not enough evidence to test it (and the criteria are not agreed). She cautioned that there is simply not enough evidence. She argued that there is a tendency to focus on the economic outcomes and legal questions in relation to individual cases and grievances not collective aspects of the system and as a result, concerns were being driven out of economics and the law and not enough out of public policy and social science i.e. wellbeing. The more important question to ask she said is 'how does the ER system contribute to wellbeing for groups in society?'

She concluded that it is time to reset the ER system but that it is a policy question for government. '*at a time in when labour markets are in flux, we need agile forms of measures and data and we need a better framework for measuring this – with clarity as to what is being measured and clarity of criteria*'.