

EMPLOYMENT RELATIONSHIPS

**EMPLOYMENT
RELATIONSHIPS**
**WORKERS, UNIONS AND
EMPLOYERS IN NEW ZEALAND**
EDITED BY ERLING RASMUSSEN



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Foreword

For almost a century, employment relations in New Zealand were dominated by the Industrial Conciliation and Arbitration Act 1894. In 1991, the new National government finally jettisoned that statutory framework, ushering in a new system of reduced union power and individualised employment agreements under the Employment Contracts Act (ECA). In 1999, the new Labour administration was equally swift to replace its predecessor's legislation with the Employment Relations Act 2000 (ERA), signalling a shift back to collectivism albeit not a complete return to the compulsory frameworks of the past.

The first edition of this book assessed the new legislation on arrival. Now, with Labour's regulatory regime in place for ten years and the return of National to power, the present edition considers issues, changes and trends under the ERA and canvasses some of the major issues associated with employment relations: public policy, trends in collective bargaining, employee representation, labour market adjustments, changes in employment law and movements in the employment institutions.

A range of viewpoints and diverse angles on current employment relations is again provided and readers will find that there has been considerable disagreement over some of the changes introduced in the new millennium. Many of the chapters that follow assume that the reader has a sound knowledge of New Zealand employment relations and a fair grasp of economic, social and labour market trends. As such, this book is not an introductory text and those interested in broader historical or current trends are recommended to consult other sources.

I have enjoyed working with the various authors and I am just sorry that more contributors could not be included. It is fair to say that I do not agree with some of the arguments put forward in these pages, but that is how it should be: real dialogue means that it is possible to 'agree to disagree'. As the various chapters show, New Zealand employment relations has been through some turbulent decades and, once again, it appears that there needs to be a search for some kind of broadly based consensus to overcome unresolved

issues. This book facilitates the presentation of different understandings and ‘solutions’ and I am grateful that the authors – all of them very busy people – have taken the time to commit their ideas to paper. Likewise, I hope that readers will enjoy the individual contributions and that the book will stimulate much debate.

Erling Rasmussen, December 2009

Introduction

ERLING RASMUSSEN

The Employment Relations Act (ERA) has now been in existence longer than its predecessor the Employment Contracts Act (ECA). As the new millennium has also been an era of major changes in employment relations regulations, practices and labour market outcomes, the decade of the ERA will become a significant part of New Zealand's employment relations history. It is also the first time in nearly three decades that radical, sweeping employment relations reforms are not high on the political agenda or being touted as a 'solution' to wider economic and social problems. The chapters in this book point to many of the important employment relations changes which have happened under the ERA as well as some of the changes which have come through associated pieces of legislation or been driven by employers, unions and employees as they adjust to various labour market pressures and opportunities.

The ERA has been a bit of an enigma. Its main aims in terms of building productive employment relationships and promoting collective bargaining have yet to be achieved but it has also ensured that its other aims – protection of individual choice, the promotion of mediation and reduction of judicial intervention – have been embedded. In many respects, the ERA period has continued several of the features associated with the ECA, including workplace bargaining, individualised arrangements, individual employment rights and an employer aversion to dealing with unions (see the chapters by Burton and by Foster and Rasmussen). Similar trends can be found in other OECD countries, though the speed and comprehensiveness of the changes are remarkable and, in particular, that they have continued under an Act seeking to promote collective bargaining. Furthermore, the strengthening of statutory minimum employment conditions – particularly the introduction of paid parental leave – will influence labour market outcomes for years to come as will the breakthrough in terms of mandatory employee representation (see the chapter by Lamm).

While the National Party's decision to keep the Employment Relations Act and make employment relations a less visible policy area constitutes an important public policy shift, it is unclear whether this heralds a new era after decades of profound disagreement over employment relations. As Margaret Wilson points out in her chapter, there appears to be a lack of consensus surrounding employment relations. The conflicting ideologies have been evident in the debates over changes to legislation, employment rights and conditions and, more importantly, they have generated contrasting approaches to 'improve' New Zealand employment relations (as witnessed in several of the chapters in this book). With conflicting ideologies at play and pressure to create sustainable, productive employment relationships, it will be interesting to see whether the current low public policy profile of employment relations will continue.

Collective bargaining and unions

The ERA was expected to create a major shift in employment relations, but many of the original expectations (both positive and negative) have not come to pass. In particular, the support of collective bargaining and unionism has coincided with an extraordinary decline in union density in the private sector. There have been some positive gains for unions – as highlighted in the chapter by Harré – but there have not been enough gains for the unions to enhance collective bargaining beyond the traditional strongholds. This 'unintended outcome' was already recognised in 2002–2003 (Waldegrave, Anderson and Wong 2003) and the Employment Relations Amendment Act 2004 was an attempt to facilitate the desired promotion of collective bargaining. It is now clear – see the chapters by Blumenfeld and by Caisley – that this legislative 'fine-tuning' has had limited effect (which was already predicted in the previous book on the ERA – see Wilson 2004).

The sharp decline in union density in the private sector has probably surprised many observers. Instead, collective bargaining has become a predominantly public sector phenomenon. As Blumenfeld shows in his chapter, density levels are now five times higher in the public sector than in the private sector. It must, therefore, be a real worry for unions that Blumenfeld also shows that there has been a decline in public sector union density and collective bargaining coverage. The rather steep decline recently in the public sector is difficult to explain but shows the barriers that unions are facing. Furthermore, there are signs that employers' negative attitude to collective bargaining has become more embedded (see the Foster and Rasmussen chapter) and that 'ghettoism' of private sector collective bargaining has become more entrenched. With many private sector workplaces being totally or to a

high degree de-unionised, this has become an even higher barrier for union recruitment campaigns (see Department of Labour 2009).

The chapters in this book indicate that there is considerable rethinking going on in the union movement in respect of unions' role and strategies. It was thought that union 'ownership' of collective employment agreements would constitute an important membership incentive (Deeks and Rasmussen 2002: 124). This obviously only works in already organised workplaces and unions have organised too few new workplaces. There was also the problem of 'passing on' where employers have passed on the union-negotiated improvements to non-union employees. While this may be a rational employer decision (as it saves on transaction costs and avoids diverse employment conditions), it was considered a major disincentive to join the union(s). Interestingly, Harré argues in her chapter that the strong focus on 'passing on' is a particular New Zealand phenomenon and that this provides a narrow view of bargaining which can have negative implications for building support and membership. Instead, Harré suggests that bargaining should be able to be extended to all employees in a workplace and the costs can then be shared if a majority of all employees vote in favour. Likewise, Helen Kelly argues that it is necessary to implement broader protection mechanisms and enhance employee participation rights. In particular, it is necessary to 'enable collective bargaining results achieved by unions to be available to all workers across industries, including those enterprises not directly involved in the bargaining'.

While the unions may argue that the ERA has been a modest act (Wilson 2004), they may be faced with a more hostile environment under the National-led government. In the previous book (Rasmussen 2004: 5), it was stressed that 'collective contracting' – collective contracts without traditional collective bargaining and unions (Dannin 1997, Gilson and Wager 1998) – had played a considerable role in the demise of unionism under the ECA. This was and still *is not* possible under the ERA. However, making 'collective contracting' a lawful option again is one of the National Party's election promises (see the chapter by Rasmussen and Anderson) and this could create havoc with unions' ability to recruit and bargain for their (potential) members. It would probably also herald a return to the open warfare between the government and the trade unions which characterised the 1990s.

Productive and sustainable employment relationships

The ERA's emphasis on 'productive employment relationships' was based on a concern over New Zealand's lacklustre labour productivity increases and economic growth which had been in evidence for several decades. It was also a reaction to the 1990s economic vision and in particular the ECA's focus on

individualised and contractual arrangements (Wilson 2001). The ERA was associated with a negative view of the ECA's ability to create the elusive high wage, high skill economy. There were only modest productivity increases in the 1990s and this happened upon the background of the social fabric of New Zealand being strained (Clark 2003). The modest productivity increases were associated with a lack of investment in infrastructure, in a skilled workforce and in the creation of new types of highly skilled jobs (Rasmussen 2009: 449–51).

This new vision of improving productivity and economic growth has coincided – some would say has been driven – by a tight labour market in the new millennium. Low unemployment and systemic skill shortages across the economy have ‘encouraged’ employers to reconsider their employment relations approaches. This has resulted in significant improvements in wages and employment conditions, a greater emphasis on employee-driven flexibility and staff retention, and considerably larger investments in training and education efforts. These employer initiatives have been buttressed by a range of economic, social and employment policies. The government has influenced employment relations across the public sector, though with significant changes to bargaining processes and outcomes for employees in the health and education sector.

Besides these changes, there have been three notable government efforts. First, the attempt to create quality employment relationships through supporting workplace partnerships has prompted a number of initiatives (see the chapter by Haworth). There has been support given to workplace change processes, including an information campaign regarding ‘drivers’ of highly productive workplaces. Second, mandatory employee representation has appeared for the first time in New Zealand. As Lamm points out in her chapter, this is a significant breakthrough and it has been part of a general effort to make occupational health and safety regulation more comprehensive and effective. Third, there have been deliberate interventions to create a more comprehensive ‘minimum code’ of statutory employment minima. This has enhanced the importance of individual employee rights, which started in the 1990s, and it has created a considerable shift in employment conditions for many employees. The introduction of paid parental leave and a mandatory option to seek working time flexibility has also acknowledged the changed workforce demographics.

While there has been a lot of activity and public policy has shifted, there has yet to be an impact on productivity levels. As Haworth writes in his chapter: ‘. . . neither neo-liberal experiments in employment relations between 1990 and 1999, nor a social democratic alternative between 1999 and 2008, have markedly improved productivity performance in New Zealand.’ It also

appears that collective bargaining has played and will play a rather modest role in supporting productive employment relationships. Besides the low union density in the private sector, the National-led government has clearly signalled that public sector costs and employment levels need to be reduced.

For employees on individual employment agreements, there is no longer a tight labour market to ‘encourage’ employers to lift their investment in staff and staff training and education. As New Zealand emerges from the economic downturn, it will be interesting to see whether the issues of skill shortages, ‘brain drain’ and voluntary staff turnover will return to the media headlines. Currently, there are few signs of a distinct break with a ‘low skill equilibrium’ (as discussed by McLaughlin in his chapter). A similar argument – partly based on analyses by Dalziel (2002) – can be found in the Haworth chapter. However, there are also signs that most parties – including the National-led government (see the chapter by Burton) – understand the necessity to invest in infrastructure and human capabilities. The disagreement starts when more specific analysis and actual implementation are called for; this is illustrated by the difference between Department of Labour and Treasury when it comes to the key drivers of productivity (see Table 2 in the Haworth chapter). It is also unclear whether employment relations will feature prominently in future attempts to improve labour productivity growth and, if so, how employment relations changes are envisaged to support sustainable productivity growth. This questions the viability of the current low profile of employment relations and places productivity as a core employment relations issue in the immediate future as discussed in the chapters by McLaughlin, by Haworth and by Rasmussen and Anderson.

Employment institutions and legal precedent

The ECA facilitated a major growth phase for employment law with personal grievance cases and shifting legal precedent being major features of employment relations in the 1990s. This was partly associated with an emphasis on contractual arrangements, employer-driven changes of employment arrangements, a personal grievance right for all employees and a non-prescriptive legislative framework (Rasmussen 2009). It was an explicit aim of the ERA to ‘reduce the need for judicial intervention’. This has happened to a large degree and the long waiting time of the employment institutions in the 1990s has been less of an issue in the new millennium. One explanatory factor has been the success of another of the ERA’s objectives: ‘promoting mediation as the primary problem-solving mechanism’. Adequate staffing of the Department of Labour’s Mediation Service has allowed mediators to take a lot of strain off the employment institutions which previously resulted in long waiting

times. There are still issues associated with the employment institutions and with legal precedent, as discussed below, but they appear to function well with limited public criticism and fewer media headlines (see also McAndrew et al. 2004, Rasmussen and Walker 2009: 154–59).

In the growth of individual employment rights in the last two decades, the introduction of personal grievance rights for all employees has been a stand-out feature. This right has been ensconced under the ERA and aligned with the Human Rights Act. While the 2008 change to personal grievance rights of new employees in small organisations (see the chapter by Rasmussen and Anderson) has been a significant adjustment, there appears to be little appetite for further changes. This does not mean that employer complaints about transaction costs and the ‘gravy train’ of employee litigations have died away. Despite this being a recurrent employer theme, there are some doubts, as McAndrew argues in his chapter, whether this is really such a major issue and whether it really is a ‘gravy train’. In fact, there have been complaints that the level of payouts – ‘remedies’ – has eroded the effectiveness of the personal grievance protection (Caisley 2004). Recent in-depth research by Walker (2009) has indicated that employers can control the personal grievance process and its outcomes to a large degree.

The 1990s fluctuation of legal precedents (partly driven by a stand-off between the Employment Court and the Court of Appeal) has been less noticeable under the ERA. There have been a small number of high-profile cases but the ERA and some of its new concepts have yet to lead to a flurry of court cases. What has been noticeable, however, is that the Courts have had their own understanding of the legislative intentions, especially in the area of good faith. This prompted the government to be more directive in the Employment Relations Amendment Act 2004. As Caisley shows in his chapter, this has changed little in terms of legal precedents. In fact, legal precedent on the issue of ‘passing on’ of union-negotiated employment improvements has made the changes in the 2004 Amendment Act more or less irrelevant. Although there probably is, as Caisley argues, nothing new in the Courts’ approach it does make a bit of a mockery of ‘Parliament’s role as the highest court in the land’. It makes one wonder whether it is positive that the Courts have been able to override or nullify government intention.

Moving away from major, radical reforms?

The election of a National-led coalition government in late 2008 has heralded further legislative changes. There have been some high-profile areas targeted for action, such as the speedy abolition of personal grievance rights for new employees, possible changes to holiday entitlements, and abolishing unions’

preferential collective bargaining position. However, it does appear that the employment relations framework is not in for another major overhaul, at least not in the government's first electoral cycle. Still, there are several 'neo-liberal' employment relations ideas resurfacing, such as 'collective contracting', less emphasis on the positive role of statutory minima, and more funding control of public sector organisations (including staff cuts and privatisation plans). As such it is unclear where the current government is going and there also appears to be considerable rethinking happening amongst the Labour Party and the unions (see the chapters by Harré and Kelly).

The disappointing productivity levels will also provide a lot of instability and will probably propel employment relations back to the forefront of public policy at some stage. The fundamental issue is what role employment relations will play in breaking with – what Haworth calls – 'a high labour utilisation, low labour productivity approach'. The limited productivity success under the ECA and the ERA indicates that some new thinking is necessary. This is further buttressed by the now well-recognised social fallouts of the 1980s and 1990s reforms as well as the significant fiscal constraints operating for the foreseeable future. There are also pressures arising from an unstable labour market. The current high unemployment rate amongst young people (around 20% at the time of writing), restricted availability of training and education places and latent skills shortages (as more 'baby boomers' reach the retirement age) constitute an uncomfortable combination. This brings to the fore the comparatively low wage levels in New Zealand – often associated with low productivity levels – which make overseas employment opportunities attractive.

Further pressure for employment relations change may also come from the employers, unions and employees. While employers have achieved an environment of individualised employment agreements or collective arrangements at workplace level, they are faced with competitive pressures and a workforce with changing expectations and demands. It is a major question whether employees are satisfied by the current state of affairs. Gratefulness over having a job will evaporate when unemployment starts turning and then concerns – such as living standards, careers, flexible working arrangements and enjoyable work and work situations – which have dominated employment relations in the new millennium will be back on the table. It is also clear from the chapters by Harré, by Blumenfeld and by Kelly that trade unions are unhappy with the current state of affairs and will be seeking some kind of legislative changes as soon as the Labour Party returns to power.

In short, the current state of New Zealand employment relations is rather unstable and it is difficult to see how a sustainable path of change can be implemented. The various chapters of this book show that there are many

major unresolved issues, there are many different understandings and ‘prescriptions’, and there are many imbalances and economic, social and political pressures. It is also necessary to stress that this book has only been able to touch on some of the key employment relations issues; there are many other important issues which have or will gain notoriety in the public debate. Against that background, it is probably safe to expect that New Zealand employment relations will continue to excite and surprise in the immediate future.

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