

THE FREEDOM OF ASSOCIATION IN THE EMPLOYMENT CONTRACTS ACT 1991: WHAT HAS IT MEANT FOR TRADE UNIONS AND THE PROCESS OF COLLECTIVE BARGAINING IN NEW ZEALAND?

ANNE BOYD*

INTRODUCTION

Without freedom of association, or in other words, without employers' and workers' organisations that are autonomous, independent, representative and endowed with the necessary rights and guarantees for the furtherance and defense of rights of their members and the advancement of the common welfare, the principle of tripartism would be impaired, if not ignored, and the chances for greater social justice would be seriously prejudiced.¹

The right to freedom of association is one of the most fundamental human rights in existence. It constitutes the basis of any free and democratic society, and is recognized in Bill of Rights documents and international conventions throughout the world. In New Zealand, it is recognized in section 17 of the 1990 New Zealand Bill of Rights Act and in Part I of the 1991 Employment Contracts Act (ECA). In an employment law context, the right to freedom of association is paramount to give effect to the process of collective bargaining; without it, the role of trade unions is seriously impaired. In this Paper I suggest that the principal difficulty with the Employment Contracts Act lies in its liberal theory of contract as suggested by a "new right" ideology. This "new right" ideology endorses an idealized concept of freedom of association. The central failure of the ECA rests in the fact that conferring the right to freedom of association has little or no value unless employees have sufficient power to make use of this freedom.

* Ms. Boyd is the legal officer for the New Zealand Council of Trade Unions. This Paper is an excerpt from her dissertation for a Master of Laws Degree, University of Waikato School of Law, New Zealand.

1. INTERNATIONAL LABOUR ORGANIZATION, ILO LAW ON FREEDOM OF ASSOCIATION: STANDARDS AND PROCEDURES (Geneva, 1995).

THE CONFLICT BETWEEN BILL OF RIGHTS AND EMPLOYMENT LAW BASED NOTIONS OF FREEDOM OF ASSOCIATION

The greatest conceptual difficulty presented by the Employment Contracts Act relates to defining the concept of "freedom of association." Freedom of association lies at the heart of the Act and is central to its ideology that individuals should have the freedom to choose all matters relating to the negotiation of employment contracts. It is also of paramount importance to trade unions, since it is the principal mechanism that gives effect to the practice of collective bargaining in New Zealand.

In this section I intend to show that a fundamental conflict exists between New Zealand Bill of Rights based notions of "freedom of association" on the one hand, and the meaning accorded to freedom of association in an employment law context on the other. Such differences have led to a state of affairs whereby freedom of association has been accorded a narrow Bill of Rights based definition. This narrowing, in turn, has led to the erosion of the process of collective bargaining, rendering it useless.

The common law conceives a narrow construction of the concept of freedom of association. This construction is reflected in section 17 of the Bill of Rights Act 1990, which simply states that "everyone has the right to freedom of association." Thus, it focuses on civil and political rights such as the right to vote, freedom of political and religious thought, and gender and racial equality. All of these rights are public rights conferred by the state to maintain democratic order. None entail affirmative action of any description. In this context, freedom of association means nothing more than individuals having the right to assemble.

On the other hand, international human rights instruments that refer to the right to freedom of association have far more expansive definitions. Justice Dickson asserted the following:

The most salient feature of human rights documents . . . is the close relationship in each of them between the concept of freedom of association and the organisation and activities of labour unions. . . . Moreover, there is a clear consensus amongst the ILO adjudicative bodies that Convention 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities—that is of collective bargaining and the freedom to strike.²

Convention 87, Article 11 of the International Labour Organisation requires that the government "take all necessary and appropriate measures to ensure that workers . . . may freely exercise the right to organise."³ The right

2. R. Doyle, *The Industrial/Political Dichotomy: The Impact of Freedom of Communication Cases on Industrial Law*, 8 A.J.L.R. 91, 100 (1995) (citing Reference Re Public Service Employee Relations Act [1987] 1 S.C.R. 313, 355).

3. INTERNATIONAL LABOUR ORGANIZATION, 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 1919-1991 437 (Geneva, 1992).

to organize is not simply conferred, but positive intervention by the state is required. Similarly, Article 22 of the International Covenant on Civil and Political Rights 1966 states:

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 interest.
2. No restrictions may be placed on this right other than those which are prescribed by law which are necessary in a democratic society in the interests of national security and public safety. . . .⁴

The International Covenant on Economic, Social and Cultural Rights 1966 goes further and states in Article 8:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation 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 and freedoms of others. . . .⁵

In *Fire Services Commission v. Ivamy*,⁶ the Court of Appeal has adopted a narrow approach to the interpretation of freedom of association, where the right to associate was affirmed without recognizing the affirmative action required to give effect to those rights. The Court had no regard for international human rights standards which are now well-established principles of law of persuasive value in New Zealand. It has been argued that freedom of association is confined simply to the right to join a trade union and any subsequent rights are statutory rights.⁷ In effect, the status of freedom of association has been downgraded and disassociated from the right to bargain collectively through a representative.⁸

Similarly, the Privy Council and the Supreme Court in Canada "have held that a constitutional freedom of association need merely mean a right to associate, and need not involve the right to do anything in that association."⁹ For example, in *Reference Re Public Service Employee Relations Act*,¹⁰ a Canadian court held that section 2(d) of the Canadian Charter, which confers the right to freedom of association, protects the right to form and join trade unions. However, the majority of the Court rejected the notion that the section should be accorded a purposive interpretation. Thus, protec-

4. <gopher://wiretap.spies.com/00/Gov/UN/iccp.un>.

5. <gopher://wiretap.spies.com/00/Gov/UN/icescr.un>.

6. [1996] 1 E.R.N.Z. 85.

7. G. Anderson, *Recent Case and Comment*, 4 EMPLOYMENT L. BULL. 64, 68 (1996).

8. *Id.*

9. EMPLOYMENT LAW para. 1.6 (M. Thompson ed., 1995).

10. [1987] 1 S.C.R. 313, 391.

tion of the right to strike and engage in the practice of collective bargaining did not fall within the section.

The question remains, which definition of freedom of association is appropriate in an employment law context? A New Zealand Bill of Rights standard is an unsatisfactory means of defining the concept of freedom of association for several reasons. First, the retention of a specialist employment law jurisdiction by the Act is recognition that the employment relationship is incapable of being governed by ordinary principles of law. An employment contract is a special contract and is best governed by standards which are particular to employment law. Thus, the concept of freedom of association may be best defined within an employment law-based context.¹¹

Second, a Bill of Rights based definition defeats the purpose of Parts I and II of the Employment Contracts Act. It has been well established that the object of Part I of the Employment Contracts Act is to confer the right to freedom of association, which materializes in the form of collective bargaining. Section 12(2) gives effect to the process of collective bargaining in New Zealand. It is clear that the rights conferred in sections 8 and 12 are essential to give effect to Parliament's intentions to preserve the right to freedom of association in the Act. Thus, Part I confers the freedom and Part II provides the mechanism or ability to use that freedom effectively.

Third, as asserted by Justice Dickson in his dissenting judgment in *Reference Re Public Service Employee Relations Act*, freedom of association should be given a purposive interpretation:

If freedom of association does not protect the very activities for which the association was formed, the protection is vapid. . . . While it is vital to protect the ability to form, join and maintain unions, unless workers are also protected in their pursuance of the objects for which they have associated, the freedom is meaningless.¹²

Thus, Justice Dickson recognizes that conferring the right to freedom of association has no value unless a worker has sufficient power to make use of that freedom.

THE INTERNATIONAL LABOUR ORGANISATION

The International Labour Organisation was established at the end of the First World War to formulate labor standards through the creation of conventions and to supervise their implementation. It represents an important external check on the labor standards adopted by world states. Although the conventions of the ILO are binding only if ratified by a Member State's government, as a global common law standard, the conventions remain a

11. It is notable that the general trend is that the specialist jurisdictions of the Employment Tribunal and Employment Court take a more robust approach to the interpretation of the Bill of Rights in an employment law context.

12. Doyle, *supra* note 2.

strong moral influence over Member States regardless of ratification. Some commentators have further argued that “[b]y membership of the ILO itself, each Member State is bound to respect a certain number of principles of freedom of association which have become rules above conventions.”¹³

New Zealand is one of the few prominent members of the ILO that has not ratified Convention 87 (the 1948 Freedom of Association and Protection of the Right to Organise Convention) and Convention 98 (the Right to Organise and Collective Bargaining Convention). These Conventions are the principle ILO conventions relating to the right to freedom of association. They assert that workers are free to organize in trade unions and promote voluntary collective bargaining to settle industrial disputes.

While the former Industrial Conciliation and Arbitration system was in force, union membership was compulsory in New Zealand, and unions had monopoly rights to bargain on behalf of workers. Because this was contrary to Convention 87 and the principle that workers have the right to join organizations of their own choice, the Convention was never ratified.¹⁴ When the Employment Contracts Bill was introduced into Parliament, the Minister of Labour speculated that New Zealand may be able to ratify Conventions 87 and 98. This has not happened.

With the Employment Contracts Act in its present form, New Zealand is unable to ratify both conventions because the “new right” ideology that supports it has propelled the industrial relations system so far in the opposite direction that the right to freedom of association can now be interpreted as offending the positive right to associate.

Article 11 of Convention 87 requires the government to “take all necessary and appropriate measures to ensure that workers . . . may freely exercise the right to organise.” This Article not only confers the right to organize, but requires positive intervention for the promotion and protection of this right. The Employment Contracts Act, however, does not promote the positive right to organize, but merely the right to organize. The Minister of Labour attempted to argue that the Act does conform to Article 11 of Convention 87 because it gives workers the freedom to choose whether they organize and in what form.¹⁵ He referred to the Court of Appeal’s interpretation of the Act as “union neutral” in *United Food and Chemical Workers Union of New Zealand v. Talley*¹⁶ to support his view. The Minister incorrectly assumed neutrality meant the same thing as taking “all necessary and appropriate measures.” The latter requires positive intervention, and it is clear that in this sense the Employment Contracts Act does not conform with Convention 87.

13. FREEDOM OF ASSOCIATION DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO 9 (1995).

14. G. Anderson, *International Labour Standards and the Employment Contracts Act*, 86 INDUS. L. BULL. (1991).

15. W. Birch, *Correspondence*, 7 INDUS. L. BULL. (1992).

16. [1993] 1 E.R.N.Z. 360.

The objective of Convention 98 is that worker organizations be independent from employers so they can freely represent the interests of workers. Article 2 requires that workers' organizations be protected against control by employers. This means that, for example, officials employed by workers' organizations should not be subject to employer retribution. The Employment Contracts Act also offends this Convention. Convention 98 requires that the Act lay down specific remedies for acts of interference by employers.¹⁷ No such remedy section currently exists.

The Act may also be contrary to Article 4 of Convention 98, which requires promotion of voluntary negotiation between workers' organizations and employers.¹⁸ Instead, the Act encourages employers to exert as much pressure as they desire so long as such pressure falls short of undue influence under section 8.

THE NEW ZEALAND COUNCIL OF TRADE UNIONS' COMPLAINT TO THE INTERNATIONAL LABOUR ORGANISATION

Although the New Zealand Government has not ratified Conventions 87 and 98, the New Zealand Council of Trade Unions (NZCTU) brought a complaint to the ILO on the grounds that by virtue of membership of the ILO itself, it was bound to respect the principles of freedom of association. The NZCTU had three basic complaints: first, it argued the Employment Contracts Act does not promote collective bargaining. For example, so-called collective agreements were not collective in the true sense as envisioned by the ILO, but were simply an aggregation of individual agreements. The NZCTU cited *Adams v. Alliance Textiles*¹⁹ to support this claim. Secondly, the NZCTU argued the Act was contrary to the principle that the parties should bargain in good faith and make every effort to reach an agreement. The Act enables employers to dominate the appointment of bargaining representatives. Furthermore, the ratification and authorization procedures hinder collective bargaining and the right to organize. Thirdly, the NZCTU argued the Employment Contracts Act restricted the right to strike.

The ILO's Freedom of Association Committee made fifteen principal recommendations in its interim report.²⁰ The most notable are first, negotiation between employers and worker organisations should be encouraged and promoted; second, the Act does not promote collective bargaining and the Government should take steps to ensure that the legislation encourages and promotes collectivity; third, the Committee held the Act provided inadequate protection for workers against acts of interference and discrimination by employers in the case of authorization of a union. Thus, the Government

17. Anderson, *supra* note 14.

18. *Id.*

19. [1993] 2 E.R.N.Z. 788.

20. COMMITTEE ON FREEDOM OF ASSOCIATION, CASE NO. 1698, 292D REPORT (1994).

requires the legislation to enact explicit remedies and penalties against acts of interference and discrimination on the basis of authorization of a union.

The Committee also criticized the Act's requirement that a union establish its authority for all workers it claims to represent in negotiations for a collective employment contract. This requirement is excessive and contradicts the freedom of association principles, because it may be used to impede the right of a workers' organization to represent its members. The Committee therefore requested that the Government remove the offending provisions from the Act.

As a whole, the recommendations of the Freedom of Association Committee constituted a scathing attack on the credibility of the Employment Contracts Act. The Government responded to the ILO's recommendations in an attempt to justify the rationale behind the Act. The ILO sent a direct contact mission to New Zealand to investigate the matter further and produced a final report. The final report had two principal recommendations: first, it reasserted that the Government should have regard for the principles of collective bargaining and recommended that the Government initiate and pursue tripartite discussions to ensure the Act was consistent with the principles of freedom of association. Second, workers and their organizations should be able to call for industrial action in support of multi-employer collective contracts, which is illegal under section 63(e) of the Act.

The fifteen recommendations of the original report were reduced to four in the final report. The Government and the Employers Federation consequently felt justified in arguing that the Employment Contracts Act had been vindicated. In a public statement, the Federation President went so far as to say: "The new findings of the ILO are a substantial endorsement of the fairness and value of the Act."²¹ He also said: "It is pleasing that the ILO came to recognise that the underlying philosophy of the Employment Contracts Act gives equal rights to employees and employers. . . ."²² On the other hand, the NZCTU argued that the bulk of the final report substantially confirmed the ILO's earlier findings.²³ The final report in no way endorsed the freedom of association provisions in the Act. The ILO has consistently maintained that the philosophical foundations of the Act are incompatible with the right to freedom of association because it does not positively promote the right to bargain collectively.²⁴

The Committee requested to "be kept informed of developments," and New Zealand's case before the ILO remained alive. The Court of Appeal

21. New Zealand Employers' Federation, ILO's Report on the ECA, Press Release Nov. 17, 1994.

22. *Id.*

23. N.Z.C.T.U., Rewrite the Employment Contracts Act, ILO Urges N.Z. Government, Press Release, Nov. 17, 1994.

24. For a more detailed discussion, see N. Haworth & S. Hughes, *Under Scrutiny: The ECA, the ILO and the NZCTU Complaint 1993 - 1995*, 20 N.Z. J. INDUS. REL. 143 (1995).

decision in *Fire Service Commission v. Ivamy*²⁵ re-opened the issue of whether the Employment Contracts Act offends Conventions 87 and 98. Subsequently, in 1996, the NZCTU reiterated the Government's continuing breach of the Conventions to the ILO. At its half yearly session in November 1996, the ILO Governing Body adopted a report reminding the Government to act on its 1994 recommendations.

Regardless of the outcome, the principal difficulty with the ILO's complaint mechanism is that the decisions of the Freedom of Association Committee are advisory only. It does not require the Government to ensure that the provisions of the Act are in accord with the Committee's recommendations. The Government's inaction demonstrates it probably has no intention of doing so. However, the ILO is a high profile international organization of which a large proportion of the world's states are members. The NZCTU's complaint generated publicity both in New Zealand and abroad and was a considerable source of embarrassment to the Government, as it was forced to defend its position and justify the content of the Act.

The *Ivamy* decision represents a further development toward extinguishing entirely the promotion of collective bargaining. New Zealand case law has moved to a position where freedom of association means nothing more than freedom of assembly. This is totally at variance with Conventions 87 and 98 and international law contained in the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights.

Justice Thomas summed up the effect of the majority decision when he said it will "... effectively bring to an end the practice of collective bargaining for a collective contract as recognised and defined by parliament in the Employment Contracts Act."²⁶

CONCLUSION

The liberal theory of contract reflected in the "new right" ideology represents an unsatisfactory foundation on which to govern an employment relationship. The new right's notion of freedom of association fails because it is narrowly framed and makes discriminatory judgments about the nature of labor relations. It assumes that all workers are homogeneous in character, rational, and well educated. It ignores cultural, gender, and socio-economic inequalities in society.

The right to freedom of association conferred in the 1991 Employment Contracts Act thus illustrates an on-going tension between legal and social freedom. Legal freedom has no true value unless an individual has sufficient power to make use of it. Thus, legal freedom is contingent upon a individual's degree of social freedom. This principle has been recognized in many

25. [1996] 1 E.R.N.Z. 85.

26. *Id.* at 87.

international human rights documents and labor conventions that implement positive rights by actively promoting the process of collective bargaining. Such documents and conventions seek to balance the competing interests between labor and capital upon which employment relationships are inherently based. Kahn-Freund summed this up best when he said:

[T]o restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will. To mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relation.²⁷

The future of collective bargaining and trade union organization in New Zealand is in serious jeopardy because the Employment Contracts Act confers little more than merely the right to assemble. The Court of Appeal has strengthened this position in *New Zealand Fire Service Commission v. Ivamy* and has effectively rendered useless any rights conferred in section 8 and 12. In order for New Zealand employment law to accord with international principles, and thus provide for true freedom of association in an employment law sense, collective bargaining must be actively encouraged and promoted in the Act.

27. Otto KAHN-FREUND, *LABOUR AND THE LAW* 16 (1972).

