

## THE EMPLOYMENT CONTRACTS ACT 1991: AN EMPLOYER HISTORY

ANNE K. KNOWLES\*

Depending upon one's point of view, New Zealand's Employment Contracts Act, which came into force on May 15, 1991, was either a disaster or an overnight success. Most employers saw it as the latter, but, like nearly all events to which the "overnight success" label is attached, success was far from instant. Rather, it was the consequence of a great deal of preliminary hard work.

For the New Zealand Employers' Federation, proposals to change the country's rigid system of industrial relations were first mooted towards the end of the 1970s. Until 1973, when a new Industrial Relations Act was introduced, the country had operated under a statute which, although revised from time to time, had effectively been in existence since 1894. This statute, the Industrial Conciliation and Arbitration Act, had come into being following the election of a Liberal Government and largely as the consequence of a damaging maritime strike—damaging, that is, for the defeated unionists. The Act guaranteed unions registered under it the right to negotiate on behalf of their members, with a prohibition on strike action as the *quid pro quo*. Unions, therefore, became concerned largely with obtaining awards, that is, collective agreements, by arguing their case before a Conciliation Board or the Court of Arbitration. This led a later American observer to describe unions in New Zealand as "litigious, rather than militant organisations, the creatures and instruments of State regulations."<sup>1</sup>

Initially, negotiated awards covered only limited areas, known as industrial districts, but in time the negotiation of national awards became possible. Awards themselves were mostly occupation or craft-based, so that any one employing organization might be covered by a number of documents, such as a carpenters' award, a plumbers' award, an electrical workers' award, a clerical workers' award, and so on. Unsettled awards could, for the greater part of the period (until 1984), be subject to compulsory arbitration;

---

\* Anne Knowles, CNZM, LLB (Hons), is Deputy Chief Executive, New Zealand Employers' Federation. I should like to acknowledge the research undertaken for this Article by Barbara Burton, Legal Adviser to the New Zealand Employers' Federation.

1. Herbert Roth, *Trade Unions*, in *LABOUR AND INDUSTRIAL RELATIONS IN NEW ZEALAND* 8 (John M. Howells et al. eds., 1974).

union membership, if not actually compulsory (as it was for many years), was effectively compulsory.<sup>2</sup>

But as time went by, the rigidities of New Zealand's system of industrial relations became ever more apparent, creating problems that the 1973 Industrial Relations Act did little to alleviate. The new statute introduced the disputes of rights, disputes of interest concept, but, as to essentials, left the previous bargaining system much as it had always been. Disputes of interest were disputes aimed at achieving a new award,<sup>3</sup> or at achieving an agreement covering a particular occupation in one or more enterprises, while disputes of rights were disputes over award/agreement interpretation, operation, or application, and personal grievance disputes, where an employee claimed either that he or she had been unjustifiably dismissed or that the employer had acted in some way to the employee's disadvantage. Measures for dealing with disputes now placed in the disputes of rights category had first been incorporated into all negotiated awards by a 1970 amendment to the Industrial Conciliation and Arbitration Act. The 1973 Act merely built on the earlier amendment to the Act, again with the aim of preventing strike action related to such disputes. Work stoppages over rights-type disputes had become increasingly common. As the quid pro quo for the provision of statutory disputes resolution procedures, such action was made unlawful.

With the new disputes procedures and the prohibition on strike action when award negotiations were in progress, the framers of the Industrial Relations Act doubtless hoped that the statute would preside over an era of industrial peace. This prohibition was, however, defeated, by a simple expedient: unions would withdraw their claims for a new collective document and go on strike, often against an individual employer. Concessions gained in this way were taken back first to conciliation, and, if that failed, to compulsory arbitration. Here they became the basis for an award covering all employers engaged in such work. The 1970s and 1980s were notable for this sort of strike activity, with its consequent flow-on effects. Frequently, strike action saw documents directed to specific enterprises negotiated at a higher level still (second-tier bargaining), while any employer who, at a later date, employed someone to do the kind of work which an award covered, would be automatically subject to it through a statutory "subsequent parties" provision. It was a one-size-fits-all arrangement with, on top, the possibility of a more generous enterprise agreement using the award as its basis. Award negotiations were conducted by national advocates—union and employer—far

---

2. Union membership was made compulsory in 1936, after the election of New Zealand's first Labour Government. After 1962, a clause requiring union membership was usually inserted into an award in the course of negotiations, while in 1987 the Labour Relations Act, which superseded the Industrial Relations Act 1973, provided somewhat complicated union membership balloting procedures. A brief period of voluntary unionism occurred in 1985.

3. The legislation also used the term "collective agreement."

removed from the employers and workers they purported to represent. And as they had been since 1894, where the union and employer parties could not reach their own agreement, awards were settled by compulsory third-party arbitration.

Even before the 1973 Industrial Relations Act employers were becoming increasingly doubtful of the merits of compulsory arbitration, but they were, interestingly enough, not alone in these sentiments. As early as 1970, unions were seeking free wage bargaining outside the arbitration system, reflecting a 1969 comment by the then Federation of Labour that "compulsory arbitration protects the interests of employers and restricts the efforts of workers."<sup>4</sup>

New industrial relations legislation notwithstanding, the history of the 1970s provides a clear illustration of union determination to enjoy the best of both worlds. Unfortunately, and union ambitions aside, the 1970s were, for New Zealand, an increasingly inflationary period. The entry of Great Britain into the Common Market brought reduced access to what had been a traditional, and safe, market; there were steep and unexpected increases in the price of oil (all, at that stage, imported); and, in 1972, an Equal Pay Act required a re-evaluation of wages paid to women, with re-assessments to be implemented over a span of three years. What had hitherto been a highly protected economy began to experience the cold winds of change. The initial response was further regulation.

In an attempt to keep things under control, the National (conservative) Government in 1971 introduced a Stabilisation of Remuneration Act that provided for six monthly across-the-board cost-of-living increases and set a 7 percent guideline for new wage settlements. Agreements above the ceiling were to be subject to approval by the Minister of Labour on the advice of a Remuneration Authority established under the Act. But as is often the way with good intentions, the results were not those anticipated. The "ceiling" tended to become a "floor," as many unions sought and gained far greater increases. Consequently, the Act was amended to give the Remuneration Authority the ability to rule on Court of Arbitration awards. Earlier events had served to weaken the Court's authority.<sup>5</sup> This new intervention did nothing to enhance it.

The year 1972 brought a new Labour Government, the Remuneration Authority's abolition, and a brief period of unrestricted wage bargaining, in the sense that no attempt was made to impose any regulatory limit. But high wage increases in 1973/74 again saw a resort to regulation, first a mandated wage increase, and then a total wage freeze, equal pay increases excepted.

---

4. Herbert Roth, *The Historical Framework*, in *INDUSTRIAL RELATIONS IN NEW ZEALAND* 48 (John Deeks et al. eds., 1978).

5. The Court of Arbitration had the ability, for many years, to grant General Wage Orders to compensate for increases in the cost of living. During a recessionary period in 1968, the Court, in the interests of economic stability, had turned down a General Wage Order application from the union movement.

The introduction of the new Industrial Relations Act<sup>6</sup> did little to change matters. The attempt to regulate wage increases continued, this time by means of Wage Adjustment Regulations. Unions, as a consequence, shifted their attention to negotiating fringe benefits, in the form of allowances for all manner of things from clothing to work in dirty or wet conditions. Price controls were attempted, but nevertheless prices continued to rise and inflation—and industrial unrest—to increase. In 1976 a 12-month “wage freeze” proved unsuccessful, and in 1977, accompanied by government calls for voluntary restraint, “free” wage bargaining was restored. In 1978 a new Arbitration Court was established<sup>7</sup> and, in carrying out its award arbitration function, enjoined to give New Zealand’s economic stability paramount importance. In the event, however, the government’s hope that “free wage bargaining” could be conducted responsibly on a national award basis proved unattainable, runaway wage increases were achieved even after the introduction of the Remuneration Act 1979.<sup>8</sup>

It was at this point that the Federation published its first paper on bargaining reform. Entitled “Balance in Bargaining,” the paper proposed a new approach to bargaining which, in the light of later developments, now seems remarkably conservative.<sup>9</sup> While pointing out that “[t]he combination of New Zealand’s legal and institutional procedures and the unrestrained use of the strike weapon now gives unions a decided advantage over employers in negotiations,”<sup>10</sup> this brief monograph advocated only a modified version of the existing system, seeking, in particular, award negotiations on industry, rather than occupation-based, lines. With respect to negotiations for an award—with subsequent blanket coverage (subsequent party clauses, *supra*), state enforcement of the award, sole collective bargaining rights, and financial assistance with the costs of negotiation—the right to strike or lockout would be renounced completely. However, it would be possible also to bargain on an enterprise basis, with the parties free to take industrial action as part of the negotiation process but not during the currency of the document negotiated. It was to be an either/or arrangement—not, as at that time, an award negotiation with an in-house negotiation on top, plus general adjustments outside the bargaining process, as had long been the case.

Change did not, however, eventuate. A further general wage increase was granted in 1980, and by 1981 inflation was raging unchecked. As the Federation had pointed out in “Balance in Bargaining,” though the eco-

---

6. The Industrial Relations Act of 1973 came into force on March 8, 1974.

7. Initially, under the Industrial Relations Act of 1973, the arbitration function had been given to an Industrial Commission, with an Industrial Court responsible for award interpretation, operation, application, and personal grievance disputes where these remained unsettled after low-level conciliation/mediation.

8. For example, a 10.4 percent increase in the Auckland, Wellington, Canterbury, and Hawke’s Bay Bulk Freight Forwarders (Stores) Award base rate granted by regulation under the 1979 statute.

9. NEW ZEALAND EMPLOYERS’ FEDERATION, *BALANCE IN BARGAINING* (1979).

10. *Id.* at 14.

conomic interactions were complex, the evidence pointed to a link between high wage settlements and high rates of inflation. The inflation was not solely imported as many wanted to believe and “[s]imply demanding a wage increase to match last year’s consumer price index increase [would] not reduce this year’s price movement, especially where there [was] no productivity growth.”<sup>11</sup> The National Government’s desperate remedy was the imposition, on June 22, 1982, of a 12-month freeze on wages and prices. After a decade or more of government intervention in the wage negotiation process, it was a response which might be described as the ultimate in government wage fixing.

The wage/price freeze, later extended to cover allowances as well, was continued beyond its initial 12-month period first by the National Government and then, following a snap 1984 mid-year election, by the incoming Labour Government, ultimately remaining in place until November 30, 1984. To gain support for the continued freeze on wages and prices, the Labour Government promised to restore compulsory union membership, which had been briefly voluntary since February 1984. With the agreement of both the union movement and employers, the new Government also removed compulsory arbitration, and, by the same amending legislation, established a Tripartite Wage Conference to develop guidelines for the forthcoming wage round. The purpose of the wage guidelines was to foster wage restraint but, emerging from a wage freeze situation, that purpose remained unrealized. Although the guidelines were set at 4 to 5 percent, in 1985 most awards and agreements settled at 6.5 to 7.2 percent, with some considerably higher settlements achieved. An inflationary post-freeze aftermath was soon apparent.

In mid-1984, the Federation commissioned a report that considered the defects of the existing system of industrial relations and the kind of changes which should be effected.<sup>12</sup> Point 6 of the Summary to this document indicates the direction in which the Federation wished to move:

The aim in the long run ought to be the achievement of a more voluntarist system, moving away from the rather corporatist, centralised system of industrial relations and pay determination based upon institutional monopolies and imposed uniformities which are no longer in harmony with the need for more flexible responses that can only be achieved by voluntary agreements that fit conditions that may differ greatly from enterprise.<sup>13</sup>

However, by 1984, it was not only the Federation which had recognized the need for reform of some kind. Late in 1985, the Government introduced a “Green Paper” entitled “Industrial Relations, a Framework for Review,” the preface to which begins: “The Government’s pre-election policy state-

---

11. *Id.* at 10.

12. Ben Roberts, *Reforming Industrial Relations in New Zealand* (1984) (unpublished, on file with the N.Z. Employers’ Federation Library).

13. *Id.*, Report Summary 3.

ment identified an urgent need to review New Zealand's industrial relations legislation."<sup>14</sup> The document itself identified by a series of questions the key areas on which the important decisions were to be made, and called for submissions. The Federation provided a detailed response which indicated the extent to which its thinking had developed since the publication of "Balance in Bargaining." The specific objectives sought by the Federation were to separate the processes of registration of unions from their recognition for bargaining purposes; separate the bargaining structures and jurisdictions for enterprises and industries from those for conciliated awards; ensure that the parties to awards and collective agreements were locked in to negotiations, once begun, until the matter was disposed of; require the explicit citation of parties to awards and collective agreements; encourage stable bargaining structures in enterprise and industry jurisdictions, represented by single bargaining agents on each side; reduce the number of agreements covering any one workplace; eliminate second-tier bargaining; require that enterprise and industry agreements be complete codes of employment; make enterprise and industry agreements enforceable contracts for which the parties themselves were responsible; and ensure that the sanctity of agreement was recognized as an essential requirement for bargaining reform.

While national awards would continue for the interim, the Federation believed that there should also be procedures for the negotiation of enterprise and industry agreements, with new bargaining jurisdictions leading to the breakdown of rigid, horizontal, historical relativities. Flow-on effects would be minimized because instruments would relate only to particular, explicitly cited employer and worker parties. The Federation also favored individual freedom of association, or, in other words, voluntary union membership. A public discussion paper "designed to stimulate discussion amongst employers and other interested parties leading up to the formal response of the Employers' Federation to the Government's Green Paper" set matters out rather more succinctly.<sup>15</sup> "Our present industrial relations system has had it," it declared.<sup>16</sup> New Zealand needed a system of integrity relevant to the times where a deal is a deal and honored as such; where the needs and circumstances of both the employer and worker are recognized and where the law is respected; where we have good relationships in our workplace; where productivity growth is encouraged; and where we create more jobs.<sup>17</sup> The Government received 188 submissions in response to its Green Paper exercise and produced a summary of these prior to the release, in September

---

14. 1 NEW ZEALAND GOVERNMENT, INDUSTRIAL RELATIONS, A FRAMEWORK FOR REVIEW 3 (1985).

15. NEW ZEALAND EMPLOYERS' FEDERATION, THE REAL AGENDA, AN EMPLOYER PERSPECTIVE ON THE INDUSTRIAL RELATIONS GREEN PAPER (1986) [hereinafter THE REAL AGENDA].

16. *Id.* at 3.

17. This is essentially a quote from THE REAL AGENDA, *supra* note 15, at 3.

1986, of its White Paper, "Policy Statement on Labour Relations."<sup>18</sup> The Minister of Labour's preface to the Policy Statement noted that, while it was clear from Green Paper submissions that a climate for substantial reform existed, "there is little consensus on the nature of that reform."<sup>19</sup> Consequently, he concluded, the responsibility for decision-making shifted "squarely on to the Government."<sup>20</sup>

The statute which followed, the 1987 Labour Relations Act, did bring change, but not the move to genuine enterprise bargaining for which the Federation had hoped. The Federation's submission on the Act in Bill form was in three parts. Part A pointed out what the Federation considered wrong with the Bill and just how much of the old system was retained. "The Bill," the submission stated, "fails to effect any real reform of the labour market needed to accommodate economic change or the needs of industries."<sup>21</sup> It was not good law "because it denies any equality of status, initiative, or rights to employers as compared with unions."<sup>22</sup> Part C of the Federation's submission set out without prejudice changes which the Federation believed should be made to the Bill if it were to become law. Part B provided employer proposals for labor market reform. These proposals were, the Federation said, echoing its original thoughts on industrial relations change "designed to ensure a balance in bargaining by providing the negotiating parties with equality of status."<sup>23</sup> The Federation wanted employers themselves to be able to initiate enterprise bargaining on a collective basis (not unions, as the Bill provided), and was of the view that in small establishments, individual employment contracts should apply. In the absence of an award system, a minimum code covering such matters as holidays, maternity (later parental) leave, personal grievances, and so on would provide a safety net for employees not covered by collective contract agreements.

However, the Federation's hopes were not realized. Instead, one of the most notable changes effected by the Labour Relations Act was the bringing of state employees (certain transitional provisions excepted) into the ambit of private sector bargaining. Prior to the Labour Relations Act, employees of the state had had their own system of wage negotiations, a system often accused of "leading" private sector negotiations. The new Act was to apply to both the state and private sectors.

But while under the Labour Relations Act union membership remained effectively compulsory, while the system which gave bargaining authority only to registered unions was effectively retained (provision was made for

---

18. NEW ZEALAND GOVERNMENT, POLICY STATEMENT ON LABOUR RELATIONS IN NEW ZEALAND (Sept. 1986).

19. *Id.* at v.

20. *Id.*

21. New Zealand Employers' Federation Submission to the [Parliamentary] Labour Select Committee on the Relations Bill, Mar. 1987.

22. *Id.* at 3.

23. *Id.* at 5.

changes in union coverage, but the process was complicated and little used), while only unions could initiate bargaining on an enterprise basis, the Act did seek to eliminate second-tier bargaining. Employees were to be covered by a single set of negotiations, and only one document, either the award or, as the case might be, the relevant agreement, was to be enforceable in the new Labour Court.

The Act created a new Arbitration Commission, charged with registering awards and agreements once negotiated, but arbitration itself remained voluntary with, for the first time, a clear statement that strike and lockout action was legal if it related to award or agreement negotiations. The bargaining process was therefore to be the responsibility of the bargaining parties, although, as under the Industrial Relations Act, a last resort provision allowed for intervention by the Minister of Labour in any dispute involving a strike or lockout, or threatened strike or lockout, should intervention be necessary. New enforcement provisions about unlawful strikes and lockouts, other breaches of the Act, award breaches, and so on were included. Grievance and dispute procedures were extended to union members not covered by an award or agreement, provided they belonged to the union which had coverage of their kind of work. To obtain registration under the Act, unions themselves were required to have a minimum of 1,000 members.

The Federation, which had earlier complained to the International Labour Organisation about employees' inability to join the union of their choice, again pointed out this problem, achieving this time a finding from the ILO's Freedom of Association Committee that the Labour Relations Act's system of union registration "indirectly brings into question the workers' right to establish and join organisations of their own choosing."<sup>24</sup> The Committee also concluded that the 1,000 minimum membership requirement "might be able to deprive workers in small bargaining units or who are dispersed over wide geographical areas of the right to form organisations capable of fully exercising trade union activities, contrary to the principles of freedom of association."<sup>25</sup>

It was, however, a victory in name only. Nothing really changed. Amendments to the Labour Relations Act in 1988 and 1989 were largely technical in character, the latter, in particular, providing new balloting procedures by which the incorporation into awards and agreements of compulsory union membership clauses might be determined. Then in 1990, a further amendment to the Labour Relations Act, in force from August of that year, introduced a form of employer-initiated enterprise bargaining that hedged around with procedural difficulties and was limited to employers with at least 50 employees. The notion of good faith negotiations was also introduced, in effect a return to compulsory arbitration, although after a

---

24. CASE NO. 1385, 265TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 61, 66 (1989).

25. *Id.* at 66.



lapse of time. The Arbitration Commission would be able to impose final offer arbitration where at least two years had elapsed since the currency of an award had expired (or since negotiations were initiated, if the parties were not seeking to supersede a current award), where there was no disagreement about coverage, and where it could be shown that any party had not been negotiating in good faith. Industry awards, as distinct from enterprise agreements, might be initiated at any time and could be registered even though their coverage clause overlapped that of an existing, occupational award. Other provisions dealt with composite agreements (covering a number of occupations), redundancy, and personal grievances.

The amendment to the Act, in Bill form, was opposed by the Federation, which did not consider that the proposals encompassed the range of reforms necessary to enhance labor market flexibility and accelerate bargaining reform. In particular, the Federation was concerned that the Bill did not give employers equal rights with unions to cite their enterprises in or out of an award. For internal use, the Federation set out its position in an unpublished memo dated March 21, 1990. Titled "The System of the Future," the memo provided the following:

- Workers may join any union/s they wish.
  - Union membership is an individual issue and gives no rights in respect of representation, right of entry, etc. etc.
  - Workers at individual sites ballot as to desire for organisation.
  - If workers decide that they do not wish to be organised, individual contracts, underpinned by a minimum code, apply.
  - If workers decide that they do wish to be organised they may:
    - (a) put their bargaining rights out to tender;
    - (b) elect to join another existing or proposed bargaining unit by agreement.
- NB: 1. Membership of unit voluntary; however, all persons by simple majority required to fund operation notwithstanding membership.
2. Bargaining agent may or may not be an existing union.
- Agency rights would last for a minimum of the term of the eventual contract and a maximum of three years at which time members make a conscious decision by ballot to:
    - (a) continue, or
    - (b) put out for new tender, or
    - (c) cease to be organised.
  - Agency right does not determine the shape of the document.
  - Employer has corresponding right to be a unit on own or to join with others in a unit.
  - Employer similarly must appoint an agent for the purpose of representation.
  - In any event negotiations for application and scope of agreement as well as conditions may be initiated by either party.

- First issue for determination in negotiation being coverage of document.
- Probably no reason why multiple agents should not be permitted at negotiation. However, one agent per side would need to be given formal rights re signing negotiated outcome and for purpose of document administration for its term.
- No need for bargaining unit registration.
- No need for agency rights registration.
- No need for registration of negotiated document.
- Good faith bargaining required, i.e. meet and negotiate. No requirement to agree. No compulsory arbitration.
- No need for [Arbitration] Commission.
- Court becomes labour wing of High Court.
- Mediation service competes with accountants/lawyers and consultants.
- *Transition*
- Workers covered by existing award conditions.
- Employer and worker agents entitled equally to cite out.
- This process initiates the negotiation but again does not determine outcome (shape of any new agreement).
- In the case of worker agent initiative, citation could be for one or multiple sites.
- In the case of employer initiative citation, may be against any combination of awards applying in the workplace.
- Citation out takes effect (i.e., award coverage ceases):
  - on achievement of new agreement,
  - on expiry of existing award, or
  - 3 months after the date of application, whichever is the sooner.
- If no agreement exists prior to citing out taking effect, you're on your own.<sup>26</sup>

But as things turned out, the election of a National Government in October 1990, two months after the amendment Act came into force, meant that the amendment's provisions were never invoked. Instead, the new government focused on preparing legislation along the lines developed by the Federation over the years. In opposition, it had come to realize that genuine labor market deregulation was essential to New Zealand's growth as a truly competitive economy. Although the Labour Government that came to power in 1984 had gone a very long way towards freeing up the country's economy, deregulating financial markets and removing many existing protections, it had, as the 1987 Labour Relations Act clearly shows, lacked the courage to make any real changes to the labor market. The changes that were made were largely cosmetic, leaving registered unions still very much

---

26. NEW ZEALAND EMPLOYERS' FEDERATION, INTERNAL MEMO (Mar. 1990) (unpublished, on file with author).

the driving force.

These events had come to a head in 1989 when a Conference of Exporters brought home to the Labour Government the necessity of freeing up the operation of the country's ports. But, even so, the final step was not taken. Something more needed to be done, and—as had become increasingly clear—it would be for the National opposition to do it, when in the course of time it was elected to office. As a result, regular meetings were held throughout 1990 with the National opposition aimed at convincing its members that the view of industrial relations which the Federation had developed over the years was the one which must prevail. Employers needed to be able to negotiate for their own enterprises if the country was to be able to hold its own in world markets. Otherwise, its standard of living, in decline for many years, would continue to deteriorate. By the October election, the opposition had been convinced. The Employment Contracts Act followed on May 15, 1991, incorporating much, if not all, of what the Federation had, over the years, come to see as appropriate for industrial relations legislation.

And what has been the result?

The change from a highly centralized system of wage bargaining to a system focused, almost exclusively, on the individual enterprise occurred quite rapidly. Employers, not all of whom had relished moving from a situation where they did not have to talk to their employees about earnings because the matter was decided for them, soon came to see the advantages of enterprise-level negotiations. Multi-employer contracts in particular declined in number and, by July 1993, constituted only 2.5 percent of collective contracts covering 20 or more employees (such contracts must be lodged with the Secretary of Labour), representing a mere 4 percent of the total employed labor force.<sup>27</sup> According to the latest Department of Labour Survey,<sup>28</sup> 98 percent of contracts in the Department's data base are now single-employer documents.

This complete change of emphasis has probably been the most significant effect of the Employment Contracts Act. In an era of protection, centrally achieved wage increases could be readily passed on to the consumer. However, mid-1980s deregulation made such an approach entirely unsustainable. The fact that employers, since the advent of the Employment Contracts Act, have been able to negotiate on an enterprise basis has contributed greatly to their ability to remain competitive, and so, of course, able to employ. The reduction of New Zealand's unemployment level from a high of 10.2 percent in mid-1991 to its current 6.4 percent level is a clear demonstration of the capacity of a labor market freed from institutional rigidities to generate employment.

Obviously, the Employment Contracts Act has its critics, not least

---

27. DEPARTMENT OF LABOUR, 7 CONTRACT: THE REPORT ON CURRENT INDUSTRIAL RELATIONS IN NEW ZEALAND 1 (July 1993).

28. DEPARTMENT OF LABOUR, 21 CONTRACT: THE REPORT ON CURRENT INDUSTRIAL RELATIONS IN NEW ZEALAND 1 (May 1997).

among those whose hitherto protected interests have been undermined by it. As an example, unions, like employers' associations, now have to compete for membership and for the right of representation. And to succeed, they need to show that becoming a union member and accepting union representation has advantages for the individual employee. Then there are the critics who act on gut feeling, rather than knowledge. On this point it is of some interest that an independent survey conducted for the Federation in 1995 found that of those most likely to disapprove of the Act (of the 24 percent of all those aware of the Act who disapproved), 39 percent were over the age of 55, 44 percent were retired people, and 35 percent were people not currently in paid employment.<sup>29</sup> It seems that the Act is the victim of bad publicity, rather than being the satanic statute some of its opponents still like to claim. Of course, bad individual work practices have continued and will continue to exist. No amount of industrial legislation will change that fact. But they are the exception, not the rule. Nevertheless, where such practices are revealed, some have automatically blamed them on the Employment Contracts Act.

The MRL Research Group survey was closely followed by a survey conducted by the New Zealand Institute of Economic Research (NZIER) and reported in its Quarterly Survey of Business Opinion.<sup>30</sup> This preliminary report noted, among other things, a substantially changed industrial relations environment, with more people than formerly employed under individual employment contracts and a decrease in rates of unionization. The most common changes to employment contracts as a result of the Employment Contracts Act were higher ordinary-time wages, lower over-time and penal payments, an increase in flexible work practices, reduced demarcations, increased multi-skilling, and increases in performance-based pay. The most notable labor market outcomes were increased productivity and operational flexibility, and greater training.<sup>31</sup>

The brief Quarterly Survey of Business Opinion report was elaborated on in an address given by the Director of NZIER and a Senior NZIER Research Associate at a Federation conference in Auckland on May 15, 1996.<sup>32</sup> Among many matters referred to was the fact that "[m]uch of the effects of the Employment Contracts Act debate have [sic] focused on its wage im-

---

29. The survey was carried out in October and November 1995 by MRL Research Group using its monthly telephone omnibus, MARKETSCOPE, which interviews 1,000 New Zealanders nationally.

30. NEW ZEALAND INSTITUTE OF ECONOMIC RESEARCH, QUARTERLY SURVEY OF BUSINESS OPINION, No. 140 4 (Apr. 1996). See also JOHN SAVAGE & DAVID COULING, A PRELIMINARY REPORT ON THE RESULTS OF A SURVEY ON THE EMPLOYMENT CONTRACTS ACT (N.Z. Institute Of Economic Research Working Paper 1996/97).

31. *Id.*

32. Dr. John Yeabsley, Director, & John Savage, Senior Research Associate, New Zealand Institute of Economic Affairs, What Do We Know about the Economic Impacts of the Employment Contracts Act?, Address to the New Zealand Employers' Federation Conference (May 15, 1996).

pacts," with the comment that "surprisingly little empirical work has been carried out on this issue."<sup>33</sup> Some survey results, however, implied "... outcomes rather different from those which many commentators had expected; namely higher rather than lower wage rates."<sup>35</sup>

With respect to the statistical finding that over recent years productivity performance in New Zealand has been below average, much-quoted by the Employment Contracts Act's opponents, the same address noted that the quality of the data on economy-wide productivity was "notoriously poor," and then offered an explanation on why this should be so.<sup>35</sup> Survey data, by contrast, it was noted, tended to counter aggregate data, with the survey itself finding that productivity and related developments appeared to be "a very central driver of the Act's impacts on firm performance."<sup>36</sup>

The address, overall, adopted a cautious approach but, even so, concluded that there was evidence that, at an aggregate level, the Employment Contracts Act had contributed to employment growth while having no significant impact on the long-run value of wages. Instead, by increasing the stability of nominal wage settlements, the Act had helped to shift the balance of economic growth towards higher employment outcomes, with its employment and wage effects, in turn, a component of post-1991 growth, inflation, and income results.<sup>37</sup> Moreover, the address attributed better overall performance achieved by surveyed firms since 1991 (and the firms' conclusions that the Act had been positive for them) to the shift to decentralized bargaining.

Earlier this year, with the aim of countering some Employment Contracts Act myths that have continued to abound, the Federation produced for its member companies an "ECA Facts" leaflet, using data from Statistics New Zealand's Quarterly Employment and Household Labour Force Surveys.<sup>38</sup> This document's "Facts at a Glance" provides a useful summary of what has happened since the Act was passed, and, where relevant, of what had happened over a similar period of time prior to the Act's coming into force. The facts include the following:

- Over 220,000 jobs have been created. For every seven jobs when the Act came into force there are now eight.
- Most new jobs are full-time—67% as compared with 33% part-time.

---

33. *Id.* at 9.

34. *Id.*

35. *Id.*

36. *Id.* at 24.

37. New Zealand Employers' Federation, ECA Facts - A Comparison of Labour Market Activity 5 years Before and 5 years After the Employment Contracts Act (Aug. 1997) (unpublished, on file with author).

38. New Zealand Employers' Federation, ECA Facts - A Comparison of Labour Market Activity 5 years Before and 5 years After the Employment Contracts Act (Aug. 1997) (unpublished, on file with author).

- 77% of employees have full-time positions.
- There has been a 16.9% increase in women's employment as compared with a 14.5% increase for men.
- There has been a marked decline in unemployment, from 10% to 6.6%.
- Weekly wages have increased faster than prices, by 15.0% with overtime, and by 16.5% without overtime. The inflation rate over the same period, as measured by Statistics New Zealand's Consumer Price Index, was 11.4%.
- Strike action declined. 328,158 working days were lost through strike action from 1991 to 1995, compared with 1,371,232 working days over the previous five years.
- The output of goods and services, as measured by Gross Domestic Product (GDP), climbed more than 19%.<sup>39</sup>

From the outset, the Federation recognized the Employment Contracts Act as making a positive contribution to companies' economic development and to improved labor market relationships. Nevertheless, in a May 1993 submission to the Parliamentary Select Committee on the Review of the Employment Contracts Act, it pointed to six matters which were then of concern. Of these six, however, all but one have since been resolved, while the remaining concern is not so much with the Act itself, as with the way in which the Employment Court has chosen to respond to certain personal grievance complaints. In far too many instances, the Employment Court searches for some indication of procedural unfairness—unfairness arising from the way in which the termination was carried out—even though a termination of employment was itself substantively justified.<sup>41</sup> In that way, the Court is able to reach a finding of unjustified dismissal and, accordingly, to compensate the grievant.<sup>41</sup>

Stringent procedural requirements developed by the Court, and equally applicable to the giving of warnings about work performance or behavior, have created great uncertainty in the minds of employers about what they must do to establish a procedurally correct outcome. Understandably, such difficulties, together with the knowledge that many personal grievance claims are more opportunistic than real, operate very much as employment disincentives. The Court's desire to protect employees from job loss is understandable. But for many employers and would-be employers, the uncertainties and potential costs of taking on a new employee are now just too great. These concerns aside, however, the Employment Contracts Act is working well. And, certainly, there is increasing public recognition that its retention is fundamental to New Zealand's continued prosperity.

---

39. *Id.* at 2.

40. *See, e.g.,* *Garland v. McHerrons Ltd.* [1995] 1 E.R.N.Z. 486; *Aotearoa International Ltd v. Madsen* [1996] 1 E.R.N.Z. 511 (C.A.).

41. *See, e.g.,* *Garland v. McHerrons Ltd.* [1995] 1 E.R.N.Z. 486; *Aotearoa International Ltd v. Madsen* [1996] 1 E.R.N.Z. 511 (C.A.).