

THE IMPACT OF THE NEW ZEALAND EMPLOYMENT CONTRACTS ACT ON INDIVIDUAL CONTRACTING: MEASURING ORGANIZATIONAL PERFORMANCE

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The management disciplines in the 1990s have seen an extraordinary preoccupation with human resource practices and organizational performance.¹ Any number of configurations are offered as the magic formula to produce superior economic value added.² However, employers have long argued that, to be in a position to experiment with various workplace practices, they first need the removal of collective influence or institutional barriers that impair flexibility in the employment relationship. This argument translates into the covert demand for unilateral control over contracts inclusive of the ability simply to terminate and replace at will. The New Zealand Employment Contracts Act 1991 (ECA) is perhaps the boldest piece of modern labor legislation that systematically dismantles prior employee protections and replaces them with enticements to employers to seek aggressively radical changes to employment conditions.

This Article begins with a brief examination of the theoretical foundation for these employer behaviors followed by a review of the relevant sections of the ECA which encourage the pursuit of individual contracting. The main body of the Article contains a statistical analysis of recently collected data from New Zealand organizations. Here, we hypothesize that the ECA

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1. See *Special Research Forum: Human Resource Management and Organizational Performance*, 4 ACAD. MGMT. J. 733, 1060 (1996).

2. The term "economic value added" (EVA) refers to financial returns beyond what would be received by investing within current prevailing money markets.

encourages a preference for individual contracts and that firms adopting the opportunities provided by the legislation will report higher levels of profit vis-a-vis employers who have not pursued this option. Indeed, this outcome is the statutory intention of the Act.

WORKPLACE CONTROL AND LABOR LAW

In mature economies, employers struggle to come to terms with how they might maintain effective control over workers.³ The parameters of these concerns stretch from ensuring what tasks workers should accomplish, to the appropriate remuneration associated with such efforts. Where civil society has yet to take root, employers are at liberty to use muscle and might to obtain compliance from labor and general submission to a task environment defined upon unilateral terms. However, where the edifice of jurisprudence and broad ethical concerns have long been established, employers turn to legal sanctions to justify and sustain their primary, if not sole, prerogative to determine employment conditions. Concomitant to these considerations, worker resistance, together with political intrusions by government, invariably establish institutional impediments which prevent employers from exerting their unfettered will over workers.

Labor law is the terrain upon which these contradictions and conflicts rage. Legislation is both the repository and reflection of social forces which shape the employment relationship.⁴ Statutes and judge-made law provide a dynamic tapestry upon which employers and workers struggle to service their different agendas.⁵ Nevertheless, these machinations do not cohere in a mechanistic or predictable fashion. Statutes may stand as testimony to the ascendancy of the victor in ideological wars fought in historical context, yet judicial interpretation has frequently seen variance with statutory intentions.⁶ Additionally, we may recognize that labor laws are passed to achieve a particular end. The researcher may therefore fruitfully ask two related questions. First, do labor statutes unfold along expected and predicted dimensions and, second, have the more specific outcomes envisaged by the statute been achieved? These questions are most apposite to the present New Zealand environment, along with the period 1991, the year in which the Employment Contracts Act was passed.

For Marx, the conundrum facing employers is how to turn labor power

3. M. BURAWOY, *THE POLITICS OF PRODUCTION* (1985).

4. Robert Kagan, *How Much Does Law Matter? Labor Law, Competition, and Water-front Labor Relations in Rotterdam and U.S. Ports*, 24 L. & Soc'y REV. 35, 35-36 (1990).

5. RICHARD LEMPERT & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES AND DISTRIBUTION* (1986).

6. See Ellen Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917 (1997).

into actual labor.⁷ As variable capital, workers have the essential capacity to develop minds of their own and to make choices regarding the extent of their work efforts. The onset of scientific management at the turn of the last century with the separation of conception of work from its execution attempted to induce both predictable and compliant worker behavior with management of the workplace, yet even in the most asymmetrical employment environment between employer and worker, the quest for complete workplace control by management remains elusive.⁸ Many theorists have argued that, rather than search for overt effective control over workers, it is far better to manufacture consent over a period of time.⁹ Although it can be argued that the search for consent in the employment relationship remains a subtle method of control, the distinction between direct and indirect control of the workplace is important.¹⁰ Direct and immediate control requires a disciplinary regime wherein the established parameters of behavior are likely set out with policing and surveillance techniques formally articulated in contracts and documents that can be tailored to individual workers. Consent-based management ideology is more likely to see a concentration on “softer” practices that have little relationship to the initial form of contracting where workers may be encouraged continually to re-define their multiple roles and purpose. In many respects, this type of workplace environment presupposes the right of management to alter working conditions independent of existing contracts. Nevertheless, the ECA unquestionably encourages employers to pursue the former scenario as opposed to the latter.

THE ECA AND INDIVIDUAL CONTRACTS

In many respects, the ECA has little to say about the nature of employment regulation. It was drafted in a period of considerable ideological upheaval, with the new right gaining control of all aspects of its construction.¹¹ Its main objective was to introduce freedom of contract to encourage “an efficient labor market.”¹² Although the ECA expresses no preference regarding individual or collective contracts,¹³ the general expectation is that the parties, particularly employers, will choose individual contracting over collective representation. This is very much in line with neo-classical economic theory that drives the ECA, in particular that each party will seek its

7. 1 KARL MARX, CAPITAL 173, 181 (1974).

8. HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY (1974).

9. M. BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOUR PROCESS UNDER MONOPOLY CAPITALISM (1979).

10. A. FRIEDMAN, INDUSTRY AND LABOUR: CLASS STRUGGLE AT WORK AND MONOPOLY CAPITALISM (1977).

11. Ellen J. Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Law Reform*, 16 BERKELEY J. EMP. & LAB. L. 1, 168 (1995).

12. Employment Contracts Act, 1991 (N.Z.) [ECA].

13. ECA § 18(1)(a).

own rational advantage.¹⁴ The Minister of Labour at the time of the passing of the ECA, Bill Birch, re-calibrated his theoretical leanings in the following way:

That is what labour market reform is all about—increased productivity and better ways of doing things, leading to better output, more exports, better profits, a higher standard of living and better wages. That is the bottom line. It is time for us to seek improvements in our work arrangements so that we are more efficient, more productive and more export oriented.¹⁵

Clearly, the notions of internal workplace flexibility and external market clearing go hand in hand. The assumption of rational individual behavior and the ability to terminate one's interests freely lies at the heart of the ECA's philosophy.

Several sections of the ECA serve to underscore the bias towards individual contracts. Section 9 introduces the choice concerning "an individual employment contract or a collective employment contract, with the type of contract and the contents of the contract being, in each case, a matter for negotiation." This means that, even if a majority of employees wish to negotiate a collective agreement, the employer can cite Section 9 of the ECA and argue for individual contracts. Not only is this destabilizing, but the International Labour Office (ILO) saw it as a repudiation of New Zealand's membership of the ILO, since this clause, along with Section 18, fails to promote collective bargaining.¹⁶ Additionally, the ECA states that, without an applicable collective contract, "each employee and the employer may enter into such individual employment contract as they think fit,"¹⁷ and further encouragement towards individual contracting is proffered upon expiry of a collective contract where, in the absence of a new contract, the parties will "be bound by an individual employment contract based on the expired collective employment contract."¹⁸

Not surprisingly, this legislative backcloth served to influence employers quickly to treat employment contracts as nothing more than commercial contracts. Indeed, Kiely and Caisley reported that, contrary to all known contract law, employers now "persist in asserting that they do have the 'right' to unilaterally vary employment contracts."¹⁹ Although the ECA does contain provisions for collective employment contracts,²⁰ Dannin offers the

14. See Dannin, *supra* note 11.

15. Parl. Deb. (Hansard) 1429 (Apr. 23, 1991).

16. International Labour Office, 295th Report of the Committee on Freedom of Association, Case No. 1698 (Nov. 1994).

17. ECA § 19(1).

18. ECA § 19(4).

19. Peter Kiely & Andrew Caisley, *The Legal Status of Bargaining under the Employment Contracts Act 1991: A Review of Recent Case*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 55 (Raymond Harbridge ed., 1993).

20. Employment Contracts Act § 20, 1991 (N.Z.).

Most fundamentally, the ECA does not support or promote collectivity; thus it contains no mechanism to foster collective, as opposed to individual, negotiation outcomes. Not only does the ECA not support bargaining, it does not require bargaining with the other party. Furthermore, it disaggregates every component of bargaining and what would be, under the Wagner model, the process of gaining representation. Consequently, the individual worker who faces the employer cannot rely on collective bargaining as an aid.²¹

Elsewhere we have reported on the incidence of collective employment contracts in New Zealand and in particular its preponderance to resist erosion, perhaps understandably, in larger organizations.²² Nevertheless, the boundaries between individual and collective contracts are so obscure, for the purposes of this study it seemed sensible to focus specifically on those employers who were willing to incur the potential transactional costs of multiple individual contracts. Since the ECA was supposed to embody all the ingredients for labor market efficiency and flexibility, we wished to investigate the Act's ability to deliver. Our overarching research question concerns the relationship between employers pursuing individual contracts and organization performance.

DATA COLLECTION

As part of a much larger research project investigating human resource issues in three countries, we collected data on a number of variables relating to individual employment contracts and industrial relations in New Zealand. A mail survey was directed to the chief executive officer or managing director of New Zealand establishments using a mailing list provided by New Zealand Post. Although we mailed questionnaires only to establishments with a minimum of 50 employees as identified by New Zealand Post, we include in our analysis responses from a small percentage of respondents that had reduced their workforce and subsequently dropped below the 50 employee threshold. It should also be underscored that, while we use the term "organization" in the Article, the unit of analysis is actually the establishment or workplace. In other words, a respondent establishment may be part of a larger organization.

Data collection was completed in 1995. For the New Zealand component of the survey, we received 782 responses for a response rate of 51 percent. However, since this Article focuses on the pursuit of individual contracts among private sector organizations, it was necessary to omit responses from employers in the not-for-profit sector. In addition, a small

21. Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455, 465 (Spring 1996).

22. Clive Gilson & Terry Wagar, *Enterprise Bargaining in Australia and New Zealand: Private Sector Comparisons*, in CURRENT RESEARCH IN INDUSTRIAL RELATIONS: PROCEEDINGS OF THE 11TH AIRAANZ CONFERENCE 11, 138-45 (Tom Bramble et al. eds., 1997).

number of cases were excluded from the analysis because of missing data. As a result, the findings presented in this paper are based on 655 useable responses.

DEPENDENT VARIABLE

Our dependent variable was calculated on the basis of responses to two questions. First, we asked respondents whether their organization was unionized. Second, we also asked unionized participants the question, "do you actively pursue individual contracts with your hourly paid workforce?" Using this information, we classified respondents into one of three categories: non-unionized respondents (coded 0), unionized respondents that do pursue individual contracts with their hourly paid workforce (coded 1), and unionized respondents that do not pursue individual contracts with their hourly paid workforce.

INDEPENDENT VARIABLES

While descriptive information on the pursuit of individual contracts is informative on its own, a more important objective of this Article is to study the relationship between the pursuit of individual contracts and several independent variables. In other words, our aim is to use statistical analyses as a means of distinguishing organizations that were (or were not) pursuing individual contracts. More information on the measurement of these variables is provided below.

One variable addressed the organization's economic environment. Respondents were asked to indicate, using a six-point scale, the demand for their organization's primary product or service over the past three years (1 = substantial increase and 6 = substantial decline). A second question focused on the organization's opposition to unionization. This variable was based on employer responses to the statement, "maintaining the nonunion status of nonunion employees is very important to the organization." This variable was measured using a six-point scale with "1" representing strong disagreement and "6" indicating strong agreement with the statement. Six variables measured various aspects of organizational strategy, change, and decision-making. Using an approach employed previously by Ng and Maki,²³ respondents were asked to indicate their level of agreement (1 = strongly disagree and 6 = strongly agree) with the statement, "the organization has relied more on introducing new products/services in the marketplace than on selling existing products/services at lower prices to stay competitive." A low score (such as 1 or 2) on this item would suggest more of a "defender strategy," a score in the mid-range (3 or 4) would represent more of an

23. Ignace Ng & Dennis Maki, *Trade Union Influence on Human Resource Management Practices*, 33 *INDUS. REL.* 121, 135 (1994).

“analyzer” strategy, and a higher score (5 or 6) would be more indicative of a “prospector” strategy.

Six-point scales were used to measure investment in new technology (1 = no investment and 6 = substantial investment); short-term focus (1 = low pressure and 6 = high pressure to focus on short-term profits); and emphasis on obedience to authority (1 = strongly disagree and 6 = strongly agree with the statement, “the organization emphasizes obedience to authority”). Permanent workforce reduction was a dichotomous variable (1 = permanent workforce reduction over the past three years and 0 = no reduction).

Progressive decision-making ideology was derived from Goll²⁴ and calculated by averaging employer responses to three items reflecting the use of participative decision-making, the explanation of proposed changes to those affected, and the presence of open channels of communication. Each of these items was measured using a six-point scale (1 = strongly disagree and 6 = strongly agree). Cronbach’s coefficient alpha, a measure of the reliability of the scale, was .82. Four employer demographic characteristics were also included in the analysis. They were the number of years the establishment has been in operation, whether the establishment was part of a larger organization (1 = yes; 0 = no), the size of the establishment (natural logarithm of the number of employees), and the industry sector (1 = service; 0 = manufacturing).

RESULTS: DESCRIPTIVE STATISTICS

Means and standard deviations for the independent variables are reported in Table 1. With reference to characteristics of the sample, the mean number of employees per establishment was 388. However, there was considerable variation in size, with 32 percent of organizations having less than 100 employees, 54 percent having between 100 and 499 employees, and 14 percent having 500 employees or more. About 49 percent of the employers were in manufacturing, while 51 percent were in service-related industries.

When considering the number of years the organization had been in operation, the average for the sample was 46 years. Almost three-quarters (74 percent) of respondents indicated that they were part of a larger organization, and 35 percent reported having permanently reduced the workforce over the past three years. On average, respondents indicated that demand for their primary product / service had increased slightly over the past 3 years (mean score of 2.6), there had been some investment in new technology (mean score of 4.1), and there was a modest degree of obedience to authority (average score of 3.4).

A breakdown of employers on the basis of organizational strategy re-

24. Ian Goll, *Environment, Corporate Ideology, and Involvement Programs*, 33 J. INDUS. REL. 138, 149 (1991).

vealed that almost 24 percent were more closely aligned with a defender strategy, just under 47 percent were in the analyzer category, and close to 30 percent were in the prospector group. Respondents, on average, agreed that there was pressure to focus on short-term profits (mean of 4.5), a desire to have non-union employees remain union-free (mean of 3.9), and a moderately positive decision-making ideology (mean of 4.4).

THE PURSUIT OF INDIVIDUAL CONTRACTS

Prior to examining the factors associated with the pursuit of individual contracts, we provide some basic information on the presence of individual contracts. Of the 655 respondents, 246 (37.6 percent) were not unionized, 136 (20.8 percent) were unionized and actively pursuing individual contracts with their hourly workforce, and 273 (41.7 percent) were unionized but not actively pursuing individual contracts.²⁵ In other words, about one-third of unionized establishments were pursuing individual contracts.

Since the dependent variable consists of three distinct categories, multinomial logit is an appropriate estimation technique to examine the relationship between the pursuit of individual contracts and the independent variables.²⁶ Note that in the multinomial logit estimations, the comparison group is the one comprised of employers that are not unionized. The results comparing non-unionized employers and unionized employers pursuing individual contracts are provided in Model 1 of Table 3, and the findings comparing non-unionized employers and unionized employers not pursuing individual contracts are contained in Model 2 of Table 3.

Demand for the employer's primary product or service was not significantly associated with the pursuit of individual contracts by unionized employers. However, there was a modest positive relationship ($p < .10$) when comparing non-unionized organizations and unionized establishments that had not pursued individual contracts; such unionized establishments were more likely to indicate that demand for their primary product or service had declined. Opposition to unionization was an important variable distinguishing unionized and non-unionized employers. Both union groups (that is, those pursuing individual contracts and those which were not) were significantly less likely ($p < .01$) to support the position that maintaining the non-union status of nonunion employees is very important to the organization.

When considering the strategic orientation of the employer, the results suggest that unionized employers pursuing individual contracts were more likely ($p < .05$) to place their focus on cutting costs, as opposed to introducing new products or services, to remain competitive. In addition, modest evidence existed that both union groups were under less pressure to focus on short-term profits compared with their nonunion counterparts ($p < .10$ for the

25. See Table 2, Appendix.

26. WILLIAM GREENE, *ECONOMETRIC ANALYSIS* (2d ed. 1993). See Table 3, Appendix.

union group pursuing individual contracts and $p < .05$ for the union group not pursuing such contracts). In addition, the probability of permanent workforce reduction was higher among employers in the two union categories. However, progressive decision-making ideology was not significantly associated with the pursuit of individual contracts. Two demographic characteristics of the organization were also statistically significant (at $p < .01$). Compared with nonunion employers, unionized respondents (including both those pursuing and not pursuing individual contracts) were more likely to be larger in size and less likely to be in the service sector.

ORGANIZATIONAL PERFORMANCE AND INDIVIDUAL CONTRACTING

While examining the factors that distinguished the pursuit of individual contracts as a primary objective in this Article, we also investigated whether the pursuit of individual contracts was associated with management perceptions of performance/workplace outcomes. It should be emphasized that our measures of performance/workplace outcomes are perceptual. While it can be argued that managers may be biased in their assessments, there is a growing body of literature acknowledging the use of perceptual measures.²⁷ Furthermore, because our unit of analysis is the establishment, using published financial measures was not an option.

In the survey, respondents were asked to provide their perceptions of current performance and change in performance over the past five years. Consistent with past research using a different data set, our factor analysis produced three distinct factors.²⁸ The first factor, which we labeled "economic performance," addressed issues such as productivity, product or service quality, and customer-client satisfaction. The second factor, which we called "employee quality of work life," focused on issues such as morale, commitment to the organization, and employee satisfaction. The third factor, entitled "employer-employee relations," dealt with issues such as the rate of grievances, absenteeism, employee turnover, resistance to change, and conflict within the organization. Each of the three scales was calculated by averaging the results across all of the relevant items contained in the scale.

Contrary to our expectations, we found little evidence of a relationship between the pursuit of individual contracts and the various performance/workplace outcome measures. Rather, a number of other variables were significantly associated with performance/workplace outcomes. In

27. Kim Cameron, *Strategies for Successful Organizational Downsizing*, 33 *HUM. RESOURCE MGMT.* 189, 211 (1994); John T. Delaney & Mark A. Huselid, *The Impact of Human Resource Management Practices on Perceptions of Organizational Performance*, 39 *ACAD. MGMT. J.* 949, 969 (1996); John Godard, *Whither Strategic Choice*, 36 *J. INDUS. REL.* 206, 206-28 (1997).

28. TERRY WAGAR, *HUMAN RESOURCE MANAGEMENT PRACTICES AND ORGANIZATIONAL PERFORMANCE: EVIDENCE FROM ATLANTIC CANADA* (1994).

particular, enhanced performance was associated with greater levels of investment in new technology, the following of a "prospector" strategy in which the focus is on new product/service development, and the presence of a "progressive decision-making ideology" that encourages participative decision-making and open communications. In addition, organizations reporting a permanent reduction of the workforce generally had less favorable performance scores. This result suggests that the pursuit of individual contracts, on their own, is not sufficient to enhance performance markedly. Rather, workplace strategies and practices appear to be much more important.

DISCUSSION

On a number of levels, the findings that we present here are counterintuitive to our expectations. In the first place, it is important to mention some significant caveats to the frequencies that we report here. Although only approximately one-third of unionized employers in our survey responded that they are actively seeking individual contracts, our survey instrument was not capable of effective discrimination regarding more sophisticated employer behavior. It is entirely possible that employers are in fact using individual contracts that are so similar in nature that they are effectively collective in all but name, but arrived at without any bargaining process. Although we have tried to factor this phenomenon out of our instrument, we are not confident that we have entirely succeeded. More importantly, our survey cut-off point of organizational size of 50 and over misses out on the vast majority of New Zealand employers who manage much smaller non-union operations for whom collectively negotiated contracts are not feasible.²⁹ For these reasons, we are confident in saying that we are underrepresenting the incidence of direct individual contracting and failing to record what are essentially individual contracts that are being reported by employers as collective. Only more qualitative, detailed case studies can address this dilemma.

However, behind the statistical models lie some quite remarkable findings that directly invert our own hypotheses, but more importantly, provide considerable assaults on the statutory foundations of the ECA and their expected outcomes. Far from inducing new innovation and workplace flexibility, the pursuit of individual contracts in unionized organizations is typically found to be associated with simple cost-cutting exercises, defensive business strategies, workforce reduction, and a marked absence of any form of progressive decision-making. Most dramatic of all, however, despite intensive review of all available data, we cannot find a single statistically significant or reliable relationship between organizations pursuing individual

29. Our own data clearly indicate that union coverage is positively correlated to organizational size.

contracts and our exhaustive measures of firm performance. On the contrary, those that are reporting enhanced performance are those that embrace a prospector strategy which is highly correlated with product innovation. This result goes hand in hand with our measures of progressive decision-making ideology that capture consent-based communication activity within the organization.

Little here demonstrates that the ECA has delivered what it promised with respect to workplace reform and organizational performance. We strongly suspect that the rhythms of the workplace are more collectively based than the drafters of the ECA fundamentally understood. Moreover, we argue that the ECA encourages employers to take a wrong turn. By their own reporting, New Zealand employers have demonstrated that the pursuit of individual contracts has not produced superior organizational performance.

APPENDIX

Table 1: Descriptive Statistics

Variable	Mean	S.D.
Market Demand	2.605	0.936
Opposition to Unionization	3.907	1.463
Strategic Orientation	3.621	1.328
Investment in New Technology	4.101	1.293
Short-term Focus	4.473	1.104
Obedience to Authority	3.440	1.174
Permanent Workforce Reduction	0.350	0.477
Progressive Decision-Making	4.392	0.848
Years in Operation	46.330	37.153
Multi-Establishment	0.740	0.439
Number of Employees (Nat'l Log)	5.135	1.083
Service	0.508	0.500

Table 2: Pursuit of Individual Contracts

Category	Number	Percentage
Non-union Establishment	246	37.6
Unionized Establishment - Pursuing Individual Contracts	136	20.8
Unionized Establishment - Not Pursuing Individual Contracts	273	41.7

Table 3: Multinomial Logit Estimation Results

Variable	Model 1	Model 2
Market Demand	-0.101 (0.127)	0.205 * (0.114)
Opposition to Unionization	-0.312 *** (0.086)	-0.613 *** (0.079)
Investment in New Technology	-0.066- (0.092)	0.055 (0.085)
Strategic Orientation	-0.175 ** (0.088)	-0.011 (0.082)
Short-term Focus	-0.182 * (0.107)	-0.188 ** (0.095)
Obedience to Authority	0.160 (0.103)	0.076 (0.093)
Permanent Workforce Reduction	0.572 ** (0.243)	0.320 (0.225)
Progressive Decision-Making	-0.068 (0.137)	-0.028 (0.127)
Years in Operation	0.001 (0.003)	0.004 (0.003)
Multi-Establishment	-0.446 (0.273)	-0.531 ** (0.246)
Number of Employees (Nat'l Log)	0.323 *** (0.117)	0.522 *** (0.109)
Service	-0.798 *** (0.233)	-1.569 *** (0.213)
Constant	1.396 (1.201)	1.200 (1.101)

Notes: * significant at $p < .10$; ** significant at $p < .05$; *** significant at $p < .01$; standard errors are in parentheses; Manufacturing is the omitted category when considering industry sector.

