Creating an Elegant Solution

We live in a period where people of all political persuasions and backgrounds accept the broad problems in the current employment law paradigm, but where governmental efforts to address these problems – on both the left and the right – are specific, crude, and largely ineffective. I argue here that these problems can be avoided if we generalise the principles on which our laws rely, and instead of protecting individual groups and classes provide protection to the vulnerable party in all commercial relationships characterised by severe power imbalance and dependence. I will begin by sketching the successes and limitations of the Employment Relations Act 2000 (ERA 2000) and then proceed to elaborate on the concepts entrenched therein. I will then discuss the limitations of the ERA, as well as the problems with much well intentioned legislation since then; I will then expand upon precisely what principles should be advanced by our law. Finally, I will explain what can be done to solve this problem, and lay out a pathway for the necessary reforms in the future.

Since taking office in 2008, the current government has repeatedly tinkered with the ERA 2000; the Employment Relations Amendment Act 2014 was the fifth such amendment in almost as many years. These changes have not been dramatic, but have steadily eroded the protections originally in the document. Since the amendment the Government has introduced more changes, again in a haphazard way that reflects a lack of deep understanding of either the extent or the causes of the problems that have become apparent. The attempt to address zero hours arrangements, for example, has been criticized as more likely to entrench rather than eradicate the problem.

The ERA 2000 radically changed the way New Zealanders approached employment relationships. Margaret Wilson successfully integrated concepts that were taking hold in other jurisdictions, such good faith and relational/transactional contract distinction, and extended concepts, like natural justice, that were already established. These concepts summed to a legal ethos that is now taken for granted by people of all political persuasions.

This success was for several reasons. First, these concepts resonated with the courts and establishment because they were part of an international intellectual movement in employment law. Secondly, they were more practical in application than the concepts in the Employment Contracts Act 1991, which they replaced. The employment relationship cannot afford to be one of ongoing hostility, is usually sustained, and requires mechanisms and a language that all parties can use to resolve conflict; the 1991 Act ignored this reality, but the 2000 Act understood this implicitly. Thirdly, the independent and specialist institutions that adopted the approach – the mediation service, the Authority and the Court – adequately supported the concepts in the Act.

Precarious Concepts

I have said that these concepts are taken for granted across the political spectrum. However, this does not mean they are invulnerable; rather, they are often poorly understood and unappreciated. They are therefore precarious.

Power Imbalance

This is the most important concept in the ERA, and the recognition of the inherent imbalance of power between employer and employee is the moral and political foundation for all that follows. It is strongly ideological and therefore remains controversial, but it is still there: this government, despite it being previously disregarded in the Employment Contracts Act, has not directly challenged it.

The independent Court enthusiastically embraced the concept of power imbalance, relying on it repeatedly. This way of approaching the employment relationship likely appeals because the accords with the experience of specialist judges, so it resonates. Courts can legitimately use this concept to justify their response to issues of, for example, consent and agreement.

Is Power Imbalance in Working Relationships Understood as a Social Harm?

Power imbalance is not something that many practitioners in employment law necessarily understand. In a politically polarised field of law, many working in the field are working exclusively for large employers or wealthy employees, and the experience of power abuse is not a given.

Power imbalance is something increasing alien to wealthy parts of our society. Increasing inequality in our society is well-documented, so it should come as no surprise that many people have no concept of the need to redress this imbalance.

Collectivity

The basic purpose of collective organisation is to correct this power imbalance, by empowering the workers who would be individually vulnerable. As a society, therefore, popular acceptance of the value of collective organisation necessarily relies on popular understanding that it plays this role, but unfortunately public education on this issue has been limited; while it survives, and is judicially applied, there is little understanding of the broader issues at stake.

This failure of understanding manifests in a legislative backlash whenever collectivity is perceived to get in the way of some economic goal. Consider the Ports of Auckland dispute, or the changes in collective bargaining within the film industry; in both cases industrial disputes prompted abrupt legislative changes to weaken unions.

At last year's NZLS Employment Law conference, Margaret Wilson said plainly that she had failed to foster collective bargaining in the ERA 2000. This is undoubtedly true; at a macro level, the ERA 2000 and the last Labour Government failed to address the widening gap between rich and poor.. I contend that these are closely linked; the chosen mechanisms to strengthen the bargaining power of workers failed, workers were weakened, and so the gap between rich and poor widened. That does not mean that collectivity and unions are not entrenched concepts, of course: it is a matter of degree. It is a small irony that whenever the honourable John Key talks about unions it is with the assumption that they are still powerful institutions, and this is true of many others of his political persuasion; there is an assumption that no matter how hard unions are kicked they will continue to exist. There is also an assumption that collective bargaining is here to stay. Unions and collective bargaining may be seen as negative forces that are used to coerce employers, but they are nonetheless assumed, and therefore are entrenched in the popular consciousness to some extent. That is not to say that they are working perfectly, or even well, or that they are not vulnerable; indeed, when they start becoming effective they are eroded, as we have seen with the Ports of Auckland or the Hobbit fracas.

Entrenchment

The changes made by this Government and the approaches to those changes indicate that the following concepts are broadly regarded as entrenched:

Good faith
Personal rights of the employee
Natural justice (despite the 90 day trials)
Job security for higher paid employees
Relational agreements
A legitimate place for legislative protection for the lowest paid.

Not Entrenched or Precarious

The concepts that are not yet entrenched, or are precarious because they were not successfully dealt with by the ERA in the first place, are:

The legitimate place of employment law in addressing the gap between rich and poor and creating higher wages
Job security for low and middle-income employees
The paradigm of employment
Collectivity, unions and bargaining
Power imbalance

The latest reforms weaken important provisions covering these concepts. These provisions originally existed to advance these ideas, but in practice failed to do so, and certainly failed to entrench them.

Where has the ERA taken us?

The successful entrenchment of some concepts, such as good faith, and the failed entrenchment of others, such as collectivization, push the interactions between individuals in employment towards increased individualization and legalisation of the employment relationship.

The area is now highly legalistic; unions may resist that fact, but they ignore it at their peril. This is realistically the way people are now engaging with their employers or employees when something goes wrong.

Learning lessons from what went wrong

The last years of the Labour Government were those of missed opportunity. Changes were made to try and address the failings of the ERA 2000, but they were disjointed and lacked the consistent, easily understood principles that are obvious in the original Act. They did not address the fundamental injustices that had become apparent by that time, and what changes they did make were more vulnerable to erosion as a consequence.

Example

By 2006, it was clear that the practice of contracting out was causing serious problems. While permanent employees could negotiate over time for improved conditions and remuneration, contracting out broke up the principle of collectivity and caused a bidding war among the contractors, driving down wages dramatically. The government of the day responded with Part 6A The change came about as a result of specific events and specific lobbying, and as a result listed a specific group of occupations for protection, instead of reflecting overall vulnerability. This meant workers on the same money facing the same mischief were not afforded the same protection. Part 6A ensured that an employee on $120k per year had protection of employment and his terms and conditions when contracted out as a caterer, but one on $40K per year doing maintenance in the city parks did not.

Protection by occupation was often arbitrary. For example, a cleaner working indoors was protected, but a maintenance worker cleaning the city parks was not. When I appeared in *Lendlease*[1], for the maintenance employees who were found not to be covered, the Auckland City Council's lawyer noted that the CTU submission had been that the law meant to protect "Pacific Island women cleaners", which in turn led to the exclusion of the largely male maintenance employees. This arbitrary categorisation means that there is not a clear and defensible concept to reinforce by case law.

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[1] Lend Lease Infrastructure v Recreational Services Ltd [2012] NZEmpC 86

Future changes to the law must instead act through clear and universal principles. This will reinforce the value of the concepts and mechanisms that would otherwise be vulnerable to erosion over time, and serve an educational role persuading the public of their importance. [2]

Job security for people on lower and middle-incomes

Recent case law has left behind the superficial and impractical view of the relationship between employee and employer as a transactional contract. Consider the latest case between AFFCO and the Meatworkers Union, which reinforces the rights of seasonal employees to their jobs next season; other cases indicate the development of a right to redeployment for those who positions are restructured.

Change here has been widespread and significant; legal rights to fair treatment, natural justice and substantive justification of termination of employment all reinforce job security for those in permanent employment, and despite the 90-day provision there is a real assumption and assertion of these rights by those employees who have the money to assert them.

These theoretical rights, however, mean very little for those without the ability to pursue them, either through unions or personal means. These principles have been deepened and reinforced through case law, and unsurprisingly highly paid or socially elite individuals have taken the lead on many of these cases.[3] Ironically, while these rights were originally intended to protect blue-collar employees, the simultaneous weakening of collectivity means those same blue-collar employees are more likely than ever to miss out.

In theory these cases reinforce the rights of all employees. In reality, however, a personal grievance system is only usable to the extent that it is affordable; for many blue-collar employees, neither the cost nor the risk of using the system is sustainable, and so their legal rights are irrelevant. This situation is getting worse; for example, consider that there is a likely adoption of a scale of costs akin to the High Court for the Employment Court. The tariffs in the Employment Court will be lower than those in the High Court, to be sure, but when I calculated a recent case for a blue-collar employee roughly, on the High Court scale, I could have claimed $63,000. In that case, the employee won, but if the defeat came with that kind of price tag, litigation would be out of the reach of any but the most confident or most well funded employees. Furthermore, this case was an appeal *de novo*, and the employee had won in the Authority only to have to re-litigate in the Court. Even on the level of the Authority, while the inquisitorial approach eases this problem somewhat, challenge is de novo and very expensive.

In summary, therefore, while individual rights and security of employment have been reinforced they are only the rights of those individuals who can realistically litigate. Employers are not stupid, and so they treat employees differently depending upon their capacity to legally challenge their treatment: lower paid or otherwise vulnerable employees are dismissed for less serious offences.

Blue-collar employees will often find the cost of litigation is far more than the remedy they seek. Reinstatement rights have officially been eroded under this Government but in the writers opinion the practice has not changed much as it had become a rare remedy despite a the law stating it was the primary one. Also, is the elegant solution just extending rights based on a power relationship rather than on a particular legal status? Then say so...

Without access to justice, job security and personal rights are worthless, and that access is severely restricted by prohibitive costs and legalistic complexity. Solving this problem will be a fundamental concern of further reforms in this area; perhaps one component of this would be the entrenchment of a right to specific performance, which is to say reinstatement.

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[2] [2007] NZSC 37

[3] In Grace Team Accounting Ltd v Brake [2014] NZCA 541 the employee was represented by her ex-husband who had been an extremely experienced international lawyer.

Extending appropriate protections to all those who should have it

In recent years, large numbers of New Zealanders have technically become contractors, leaving permanent employment to become self-employed. However, many of these individuals remain employees for all practical purposes; they cannot move freely in the market, and hence have all the disadvantages of employment with none of the protections. There is a wide agreement that this problem exists, from both sides of the political aisle as well as from the judiciary – Section 6 has been expanded and *Bryson* confirmed that the state of being an "employee" could, in actual fact, exist even in the absence of an employment agreement – but these reforms have failed to take hold, and the problem persists unabated. I have previously written papers on this problem, so I will not expand much upon the exact causes here, but grappling with the issue remains fundamental.

Protecting these individuals is critical to an equitable and self-consistent system of employment law. Rather than focusing on strict legal categories of workers, we should determine if dependence is present, and if exploitation of that dependence occurs the result should be consistent. By recognising and remedying the underlying injustice in a consistent way, the expectation of good faith and fair treatment can be reinforced, and better outcomes for all concerned can be achieved.

I am not claiming that there is no difference between an overbearing franchise and an employment agreement, but fundamentally the mischief is the same: where the mischief is the same, the solution can be too. We can set this principle in general terms; where a more powerful business partner unjustly exploits a vulnerable party, the legal system is justified in, and indeed obliged to, step in. Broadening the issue from employees, consider the power imbalance inherent in contracts between even quite significant New Zealand businesses and multinational giants. Where the latter acts to abuse that relationship, the state should prevent that abuse. In the case of supermarket chains exploiting their suppliers, for example – suppliers who cannot easily move around in the marketplace, and hence are vulnerable to price setting by the buyer – the state should likewise step in.

Using Trends in the Law and Bringing Other Legislation into consistent treatment of the same mischief.

Acknowledging the bigger and changing problem of power abuse in the commercial world may provide a key to finding solutions that appeal to New Zealanders of all walks of life. Contract law and consumer law are moving to find solutions and, just as Margaret Wilson did, it is possible to catch the crest of these changing responses in developing a response that is consistent with these developments.

Are very interesting example is the change to the Fair Trading and Trade Practices Act. We share the Fair Trading law with Australia. It is identical by agreement between the two countries. We have adopted its test for identification of overbearing consumer contracts and its mechanism of blue-pencilling to remedy the injustice caused. While this only applies to some contracts it is an effective mechanism not only for fixing problems for the affected consumer but it acts to disincentivise the practice of proffering such contracts.

Changes like this are not even viewed as ideological. They are not criticised as "nanny state", despite being a direct interference in the "freedom to contract". In consumer contracts, which offend by being, overbearing interference has not been criticised any more than it has in areas like aged care where there has been regulation as a consequence of exploitation for many years.

Extending and Revitalising the Law we already have Buy In for

We already have blue-pencilling in the Illegal Contracts Act and now in the Fair Trading Act

It is possible to extend this capacity to blue pencil to all contracts where there is significant dependence of one party on the other created by the agreement between them, franchises for example. Overbearing power of one party over the other is a simple and clearly understood mischief. If this exploitation of power in commercial arrangements is repeatedly and consistently rejected it will reinforce the ethos, it will change the expected norms and values of our society.

Blue-pencilling has been acceptable with regard to illegal contracts for a very long time. Restraints of trade can be blue-pencilled without the Judge every being called a member of the communist party. Intervention in unfair contracts doesn't have to be done with a sledge hammer but the power to blue pencil might help reinforce the expectation of fair dealing and also close a door to avoidance of the protections in employment by making such a choice where dependency is required by making contracting less desirable.

Restricting restraints of trade and insisting upon substantial separate consideration may also help give employees the power to increase wages. Currently if my barista wants to move from the café where he makes my coffee to one in the same neighbourhood he cannot. His consideration is his wage, which is likely about $18 per hour.

"Fulfilling the reasonable expectations of honest men"

If done with a sledgehammer such a move may be criticised as creating uncertainty in the commercial world but this is the way contract law is going anyway. There has been a movement away from favouring certainty toward principles of fair dealing: See *Wholesale Distributors v Gibbons* as an important indicator of this, which draws on international trend in jurisprudence:

" [149] Notwithstanding its widespread acceptance in most common law and civil jurisdictions in the world and growing judicial support,[88] the courts have not yet incorporated the doctrine of good faith into our law. There is a widespread belief that existing doctrines or judicial devices already encompass a requirement of good faith. It would, it is said, add nothing to the existing tools and principles of the common law, such as estoppel and implied terms.[89] This case serves to demonstrate that this belief is misplaced. It is clearly arguable that WDL have not acted, and are not acting, in good faith. Indeed, if such a doctrine existed in the law, it is doubtful

whether the courts would have been troubled by the company's attempt to achieve an interpretation contrary to its actual intention. I would firmly hold it to that intention."

The footnotes that accompany this dicta are an indicator of the deep thought going on internationally about extending these concepts. The judge cites:

"[87] [88] [89] Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433. See for example the observations of Bingham LJ, as he then was, in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at pp 439 and 445 (CA). See for example Bridge, "Doubting Good Faith" (2005) 11 NZBLQ 426, p 428. For a refutation of this point, see Bigwood, "Symposium Introduction: Confessions of a 'Good Faith' Agnostic" (2005) 11 NZBLQ 371, pp 374 – 375.

There has been movement at a fundamental level in contract law because judges are recognising the injustice of the old approach. Courts all over the world have replaced the parole evidence rule with a greater concern to enforce the good faith intentions of the parties. Law is responding to a new world where it is giving less priority to certainty and more to just enforcement.

Revitalising Collectivity

Collective bargaining and unionization are proven to be successful mechanisms for increasing living standards or addressing poverty and the increasing gap between rich and poor but the public don't know this. The perception of unions obviously varies but only a fool would ignore that many New Zealanders consider unions are out of date and that collective bargaining is a form of bullying.

I do not intend to prove unions and collective bargaining are social goods as it is beyond the scope of this paper, the purpose of which is to consider how best to succeed in changing this view and entrench these solutions or, if that is not practical to create an environment where other solutions address the problems they seek to address.

The view of unions and collective bargaining as ineffective and outdated is also in my view, strangely but tellingly, loaded with an assumption that the way we have related in the workplace as a result of these features and these concepts themselves are entrenched – that unions for example will be there forever, no matter how they are treated, protecting the poorest New Zealanders and promoting their interests, regardless of whether these people are even employees. Union's are blamed for not doing enough, while being starved of resource and repeatedly undermined.

The same people who attack unions and collective bargaining assume that unions are stronger than they are and expect them to carry out a much wider role than they can possibly do without proper support. For example they are constantly seen as the voice of the precarious worker, who is not actually even a member of a union and may well not be an employee but a contractor.

Currently the law makes no allowance for the social justice role that unions play.

It is vital that, the role of collective bargaining and unions is revitalised. However, the current proposals from the CTU and the Labour Party tend to ignore the reality that many of the New Zealand public are not great fans of collective bargaining or unions. They need to be won over. The solutions that will work may need to be more subtle and responsive to this view and again build upon what the public can see clearly has value.

There has been a growing expectation of compliance with health and safety for example. There is also an obvious and legitimate need for this. There is plenty of evidence that workplace engagement is vital to really addressing this issue. The recent legal changes to Health and Safety are most notable for their lack of vision or even common sense.

We have had a health and safety crisis because our laws have that consequence. PIKE River was a tragic consequence. A legislative change to health and safety that is supposed to address this will fail because it requires strong employee participation that simply does not exist. The safety imperative is, in my opinion more than just a device to make the public understand the value of unions and employee participation; it is one of the most important reasons why collectivity is valuable.

While solutions that are seen to directly reinforce the power of the union movement and to dictate terms and conditions, like awards are likely to be viewed as backward looking and a power grab by a group of left wing careerists, supporting employee engagement in health and safety is more likely to be received positively by the public and provide a first experience for many people of the advantages of collectivity.

Employee engagement if presented sensitively has the potential for being understood as part of the future of work rather than the past.

The key is to work with not against the public view. The solutions should be designed to foster collectivity and allow employees to experience it and the society to rediscover the value of it. NZers need to be reintroduced to the very idea of collectivity. Health and safety representation provides that opportunity.

The next changes need to **recognize and promote** the value of employee participation in the challenges that face this generation:

- Safer workplaces
- Fairer distribution of wealth
- Secure work
- Participation in the workplace

In Conclusion - New Thinking

I have said Margaret Wilson was very successful in entrenching some concepts. Good faith and relational contracts are related concepts that she was aware would resonate with the international legal community and the local one. She grafted on to this way of thinking and thus made changes that survived. I cynically suggest also that some of the changes that survived also did so because they created a self-interested industry of lawyers.

I suggest the next changes that really create lasting change and a better society will have to be as elegant and well aligned with international and local changes in the way we think about our society but that does not mean they do not have to be weak. The changes suggested here are quite brave and would move the law in the right direction. They would let the judges move it further and more quickly.

Both this government and the last Labour Government have tinkered without really addressing the problem or moving the public perception. My example of this is the changes to Part 6A – they are misunderstood because they are not principled – they are opaque and messy.

The next changes must address safety, the gap between rich and poor and the security of work. There is an appetite for this internationally and locally. There is a very real need.

There are a myriad of potential solutions and the one proposed here may not be the right ones but what is important is that they way we think about them changes, so that when they are attempted they are both successful in achieving the results desires and that they become entrenched. Successful solutions need to be as elegant and fundamental as were those Margaret Wilson successfully entrenched.