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Rethinking the Legislative Architecture

Presentation for CLEW 50th Anniversary Seminar: *Is it time to reset our Employment Relations Systems?*

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Summary

- New Zealand's current labour law architecture continues to reflect the fact that it was developed on the basis of an extremist ideology which was designed to destroy the pre-existing labour relations system.
- At the core of the pre-1991 system was the belief that labour relations should be a tripartite system balancing the interests of workers and capital and which ensured an income adequate to provide a reasonable standard of living and which respected the human dignity of workers.
- What is needed is an Act for the future is an Act that reflects a contemporary and probable future reality but retains those core values that governed New Zealand labour law for most of its history.

Key Arguments

- Artificial legal constructs differentiating between different groups of workers should be removed so that the full gamut of statutory rights and protections apply to all workers, defined broadly as persons who are contractually required to personally perform work for another person.
- A new act, centred on the labour market and labour relations systems of the mid-21st century, is required. It must incorporate a significantly more effective worker voice, both individual and collective, in the formation and management of employment relationships.
- Any reforms must reverse the influence of common law notions of employment that were embedded in statutory law in 1991 and reinforced by judicial decisions through the 1990s. The common law perspective rejects worker autonomy, any notion of bipartite industrial democracy and in any notion of “democratic space” in the workplace.

Workers as the Foundation of Labour Law

- Any natural person contracted to personally perform work should enjoy the same rights as all other such persons and all working people should be entitled to receive the benefits of statutory protections.
- This paper proposes that access to all statutory entitlements should depend on a person being a “worker”, a term that should be clearly defined by statute.
- The following definition is widely in use in the United Kingdom.
    - “an individual who has entered into or works under (or, where the employment has ceased, worked under) -
    - a contract of employment, or
    - any other contract, whether express or implied and (if it is express) whether oral or in writing, *whereby the individual undertakes to do or perform personally any work or services for another party to the contract* whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual (emphasis added).

An Act for 21st Century Labour Relations:
Freedom of association and employer neutrality

- The right to join a union is a clear and unequivocal right accorded to workers by international conventions, principal specifically recognised by the objects of the Act. Arguably the provisions in the current Act fail to meet New Zealand's international obligations.

- Freedom of association, and in particular the practical ability to join a trade union, are critical to achieving the Act's objects, particularly promoting collective bargaining, but also ensuring that other mechanisms for worker voice are effective.

- Electing union membership should be a matter of free individual choice if one is to recognise the inherent inequality of power in employment relationships

- In order to protect individual choice and freedom of association it is proposed that the Act be amended to insert clear and enforceable provisions requiring employers to be union neutral in all interactions with their employees. This does not prevent employers expressing general views relating to union membership. Rather it restricts the expression of those views in situations designed to directly influence individual choice and to take

An Act for 21st Century Labour Relations:

Collective determination of terms and conditions of employment

- The object of "promoting collective bargaining" is not reflected in the Act's substance. Workers should have effective rights to obtain collective agreements taking into account the current realities of labour markets where industrial action may be ineffective in breaking bargaining impasses.

- The definition of an "employer" should be extended to capture economic groupings rather than the immediate legal employer, often a limited liability company that is largely controlled by other companies in the group or through contractual relationships.

- The provisions relating to facilitating bargaining and determining collective agreements should be strengthened.

    - Facilitation could be strengthened by augmenting the Authority's power to make recommendations so that the Authority may order that at least some aspects of a recommendation may become binding 30 days after the issue of a recommendation unless the parties agree to some other resolution. Such a provision would be something of a half-way house but may be effective in increasing the pressure to settle or providing a resolution.

    - Determination should also be more readily available where employer prevarication tactics are used to undermine union membership and delay bargaining.

An Act for 21st Century Labour Relations:
Management of employment relationships

- Workers, whether or not union members, should have an effective voice in their workplace and that access to the mechanisms for promoting voice are controlled by workers, not their employer.
- The powers, rights and protections for both delegates and workplace committees should be defined in the Act and it would also need to be clear that unions are entitled to be involved in and lead such initiatives.
- One possibility is that the current duty of good faith should be extended by adding:
  - "to facilitate the promotion of productive employment relationships by:
    - Entitling all employees to elect a workplace delegate to represent their views to the employer, and,
    - Enabling all employees to choose to establish workplace representative committees.
- supported by a schedule to the Act specifying a default template for the establishment of a workplace committee

An Act for 21st Century Labour Relations:
Respecting and Protecting the Personal Dignity and Personal Life of Employees

An Expanded Vision of Good Faith

- good faith has the potential to be a transformative influence in the re-articulation of the underlying principles of New Zealand labour law including a recognition that employment is a relational agreement but one in which the inequality of the relationship is expressly recognised. It involves a recognition that an employment relationship must properly be approached as one of mutuality, one that the parties enter into with separate interests but for their mutual benefit.

The right to a private life and personal dignity

- Employer increasingly assert the right of increasingly invasive intrusions into the private lives of employees as AI capabilities become increasingly intrusive not only in an employee's work life, but increasingly into non-work activities including personal health, presence on social media and other public activities

- I would propose that several key reforms are necessary to adapt the duty of good faith to the contemporary and future world of work.

    - First, a key provision to make it clear that employment relationships must respect and protect the dignity of workers and recognise their right to personal and family life including the right to participate in society as citizens.

    - Second, the Authority or Court should be given the power to invalidate clauses in employment agreements, or the application of similar clauses via employer policies, that constitute an unreasonable intrusion on the employee's privacy, including privacy at work, or which constitute an unreasonable intrusion on the employee's personal dignity, personal life, or rights as a citizen.

    - Third, the test of "justification", both in relation to the matters above and for the actions of an employer in a personal grievance claim, should be a neutral test: ie the standard of a "fair and reasonable person, balancing the interests of both the employer and employee …"

Conclusions

The issues raised in this paper focus on the reform of the Employment Relations Act. These reforms are only one piece of the jigsaw. Others include

- As became clear during the Covid-19 pandemic, the social security -employment relationship needs to be re-thought and consideration given to new social insurance models to provide greater economic security for those in precarious employment considered.

- The role of Government as an exemplar has been largely unexplored as has the concept of social conditionality – that is the receipt of government funding should be conditional on respecting a minimum level of employment expectations

- Perhaps the most urgent problem facing workers today is access to justice. It is a well-recognised problem that is extremely difficult to resolve. But resolved it must be if workers are to have access to the institutions that protect their rights at work, which attempt to preserve their health and safety, and which minimise the ability of more exploitative employers to abuse their position. No matter how well the substantive law is written, the exercise loses much of its point if those it is intended to protect cannot take advantage of it.

New Zealand needs to rewrite its labour law based on a set of principles that reflect the mid-21st century and which will be sufficiently endurable and flexible to regulate a labour market that is in a state of flux and which is likely to change rapidly in the coming decades. We require a law that is ready to regulate the next Uber, not struggle to respond to the previous one.