Centre for Labour, Employment and Work

EMPLOYMENT LAW ISSUES

Reinforcing and Enforcing New Zealand's Minimum Employment Standards

Professor Gordon Anderson, Faculty of Law, Victoria University of Wellington

New Zealand labour law remains largely based on the neoliberal proposition that individuals should be free to contract on whatever terms they deem appropriate and that power imbalances are either non-existent or irrelevant. This position is largely reflective of the common law – parties are free to contract on whatever terms they wish and as long as the contract is entered into freely the law should not be concerned with the adequacy of the bargain or its terms. There are of course some protections even at common law – a contract obtained by duress, undue influence or misrepresentation may be held unenforceable and some specific terms such as excessive restraint of trade clauses may be unlawful for reasons of public policy.

In real life of course power relationships are abused and in the absence of legal constraints many workers, especially the more vulnerable, are heavily exploited. Indeed even where there are legal constraints exploitation is far from unusual. In New Zealand protection from exploitation relies on two mechanisms, the legislated minimum employment standards and informed consent to the terms of the employment agreement.

To deal with informed consent first - the Employment Relations Act (ERA) provides that a potential employee is entitled to be fully informed of the key terms of the proposed employment agreement and has the right to seek advice on those terms. If the employee elects to accept the terms offered the law has little further interest. Neither the common law nor the ERA are much concerned with the actual terms of an employment agreement. Indeed the ERA did not re-enact s 57 of the Employment Contracts Act 1991 that allowed an employee to challenge "harsh and oppressive" terms in a contract. Likewise there is no equivalent to the (admittedly limited) provisions relating to unfair contract terms in s 26A of the Fair Trading Act 1986. Unfair bargaining for an employment agreement is limited to the relatively narrow situations set out in s 68, primarily some form of diminished capacity or the use of oppressive means.

The second mechanism is the set of minimum legislative employment standards that set a basic floor for all employment agreements applicable to all employees within New Zealand's jurisdiction. The Ministry for Business Innovation and Employment (MBIE) in *Playing by the Rules* (2014) defined these standards as the Employment Relations Act 2000, Holidays Act 2003, Minimum Wage Act 1983, Wages Protection Act 1983, Parental Leave and Employment Protection Act 1987, Equal Pay Act 1972 and the Volunteers Employment Protection Act 1973. With the arguable exception of the level of the minimum wage, these standards set a reasonably acceptable floor of employment conditions. While occasional breaches of these standards may be expected it has become increasing obvious over recent years that they are being systematically and deliberately violated by at least some employers. Most typically are those employing vulnerable workers who are unable to adequately protect their own interests, often

migrant workers but by no means exclusively. Issues such as abuse of corporate structures to deny employees their legitimate entitlements in particular is a much broader problem.

Over the last few years a number of legislative initiatives, the most recent coming into effect on 1st April following the enactment of the various amendments to the above Acts included in the Employment Standards Legislation Bill, have been taken to address this problem. These recent amendments would seem to largely complete the Government's reform programme in this area as the enhanced protections have been generalised after first being focussed on particular groups. The first two rounds of reforms were directed first at the specific problems in the fishing industry and then undocumented and short term visa workers.

The fishing industry: The problems with working conditions on chartered boats fishing in New Zealand's exclusive economic zone have been of long-standing but received broad publicity following the publication of *Not in New Zealand's Waters, Surely?* (Stinger, Simmons and Coulston, New Zealand Asia Institute, 2011) which documented the degree to which the crews of foreign charter vessels were subject to gross violations of both employment and human rights. Following lengthy governmental procrastination and attempts to utilise voluntary solutions the Government finally saw that only clear legislative action was likely to alleviate these problems. The Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014, the key provisions of which will come into force on May 1st this year, requires all vessels fishing in New Zealand waters to be New Zealand flagged and therefore subject to New Zealand maritime and employment legislation.

Vulnerable migrants: The second group of reforms related to the particular problems experienced by undocumented migrant workers and workers on short term visa workers. These reforms were implemented by way of amendments to the Immigration Act 2009 s 351 which deals with the exploitation of "unlawful employees and temporary workers" and deal with two problems - "serious" breaches of the Holidays Act, Minimum Wage Act and the Wages Protection Act; and engaging in a range of actions used to prevent or hinder the employee from leaving the employer's service, leaving New Zealand, ascertaining their entitlements or disclosing the circumstances of their work. The Act lists examples such as taking possession of passports or travel documents, blocking access to a phone, or preventing the worker leaving premises or doing so unaccompanied. A person convicted of a breach of s 351 is potentially liable to 7 years imprisonment or a $100,000 fine. These penalties are criminal in character and therefore guilt must be established beyond reasonable doubt, by no means and easy matter. In other than most egregious cases enforcement agencies may find the remedies noted below more accessible.

General reform: The final group of reforms, those in the Employment Standards Legislation Bill, will reinforce minimum standards for all employees by a combination of measures that increase penalties and which facilitate more effective enforcement. The provisions concerned are contained in detailed amendments to the relevant Acts but can be summarised as follows.

1. **Sanctions for serious breaches:** The penalties for a "serious" breach of the minimum entitlements are substantially increased, a point reinforced by vesting the jurisdiction for such breaches directly in the Court. The amendments allow a Labour Inspector to apply to the Court for a declaration that there has been a serious breach of a minimum entitlement. If such a breach is established the Court may grant a range of remedies including a pecuniary penalty order (with insurance for such penalties being unlawful), compensation orders or a banning order or all three. The maximum amount of a pecuniary penalty order is substantial, the greater of $100,000 or three times the financial gain made by the breach if a body corporate and $50,000 if an individual. The liability for breaches is also widened to include officers of

corporate entities and persons able to “exercise significant influence” over the person in breach. A banning order is a new remedy and may be awarded against persons (corporate or natural) who have “persistently” breached minimum standards. Such an order may prohibit such a person from being an employer, an officer of an employer, or involved in the hiring or employment of employees for up to 10 years.

2. **Enhancing enforcement:** The other changes relating to enforcement are aimed not so much at serious violations of the relevant Acts as increasing the effectiveness of enforcement mechanisms overall. The obligations on employers in relation to record keeping are enhanced requiring an employer to keep records in an easily accessible form and in sufficient detail to demonstrate that they complied with minimum entitlement provisions. The powers of Labour Inspectors are enhanced through the power to issue enforceable infringement notices where breaches have been detected. Beyond this the role of mediation is reduced so that in general only breaches that appear to be “minor or inadvertent” need be referred to mediation before being considered by the Authority or Court.
3. **Zero-hours contracts:** While short term and casual employment agreements have long been common in New Zealand the use of the more pernicious zero-hours contract has been a relatively recent development. Such contracts are typified first by a significant disparity in obligations and second by the complex range of formalised secondary terms included in the contracts. Such contracts typically require an employee to be available for work whether generally or for specific periods but impose no reciprocal obligation on the employer to provide work or guarantee payment for a minimum number of hours. Such contracts are also likely to contain a range of clauses that place severe restrictions, in addition to those imposed by the availability clause, on an employee being able to find secondary work. Typically such clauses include (probably unenforceable) restraint of trade clauses, conflict of interest provisions or general or specified prohibitions on secondary employment. The commercial justification for such contracts is often difficult to see – one of the primary users of zero-hours contracts was fast-food chains who almost certainly know their labour requirements in considerable detail!

   The amendments will partly ameliorate these disparities of obligation by requiring, among other matters, that an “availability” clause only be used if there are genuine reasons based on reasonable grounds for including such a clause; guaranteed hours of employment must be specified; compensation must be provided for the employee being “available” and, if shifts are cancelled without reasonable notice, compensation must be provided. Secondary employment restrictions are also subject to detailed reasonableness provisions.

Comment: The suite of reforms described above are of course to be welcomed, especially the strong measures devised to protect some of the most vulnerable groups of workers. However the success of these reforms has yet to be seen and will be conditional on a number of factors. These vary with the reforms in question but include the following.

First is the willingness to enforce the provisions, something that will only occur if the funding and resources of the labour inspectorate are increased to be commensurate with the task allocated. Strong, but inadequately resourced, legislative reforms make for good political publicity but little effective action. Given that the more substantial penalties can only be sought by a Labour Inspector proper funding will be critical. A recent international study (Kanbur and Ronconi (2016) *Enforcement Matters: the effective regulation of Labor,* Discussion Paper No. 11098, Centre for Economic Policy Research) suggests that New Zealand’s effective enforcement of labour standards – measured by the number of labour inspections – is low by international standards. Interestingly this is not an exception

as the study suggests there is a negative correlation between strong labour law (on which New Zealand ranks highly) and enforcement. The New Zealand ranking is in the same approximate space as Australia, Canada and Britain.

One positive feature is that the most recent sanctions are civil in character and established to the civil standard of proof. The new offences in the Immigration Act, in contrast, are criminal and may be difficult to establish. Similarly the reforms to fishing may be successful if applied to New Zealand flagged vessels with New Zealand crew but are likely to be less so where foreign crew are employed and who are therefore vulnerable to unlawful pressures in their home country.

A second weakness is uncertainty. Ideally minimum standards should be clear and unambiguous so as to allow effective enforcement. The greater the level of uncertainty the higher cost of enforcement. Unfortunately many of the reforms appear to have this character. For example the reforms to the Wages Protection Act, intended to limit pay deductions for matters outside the employee's control such as service station drive-aways, only prohibit "unreasonable" deductions, a highly open notion. Specific deductions require the employer to "consult" with the employee – again a provision that is likely to be largely ineffective. The term "reasonable" is also found in a number of the other provisions, for example the availability and secondary employment provisions intended to prevent zero-hours contracts. The class of employee typically exploited by such clauses is unlikely to have either the will or the funding to pursue their remedies given the room for argument over such terms.

Finally avoidance of the new provisions, especially through dubious independent contractor arrangements or other devices, has not been adequately addressed. The Minimum Wage (Contractors Remuneration) Amendment Bill sponsored by David Parker is perhaps indicative of this problem. This writer has recently viewed so-called independent contractor agreements that seem to replicate most of the features of zero-hours contracts and volunteer – internship agreements that provide little if any benefit to the intern but major economic benefits to the "host'.