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Labour Law reform: a time for re-establishing core values

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The formation of the Labour-led coalition government is likely to be strongly felt in the area of labour law and labour relations. The promised reforms in the first 100 days are perhaps predictable and essentially involve restoring the status quo ante, taking the law back to where it was left when Labour lost office. Those reforms are important and the reversal of some of National's reforms are also symbolic: the repeal of the Hobbit law makes it clear that industries should not have personal exemptions carved out of labour law; the right to enter workplaces is important not for unions but the workers they service, a point that is often lost sight of. That reform, and the removal of the ability to deduct pay for non-stoppage strikes, make the point that workers have rights and that the ethos of master and servant law should be left in the past.

The interesting question will be how far beyond this Labour is prepared to go.– The Employment Relations Act (ERA) was far from revolutionary and Labour's reluctance to undertake more radical reforms when last in power meant that many of the laudable objects of the Act were never achieved. One key value introduced in that Act, the statutory obligation of good faith, has however become established as a central feature of New Zealand labour law and provides an example of the reform ethos that should be central to any ongoing reforms.

I would suggest that four reforms are required if the objects of the ERA are to be achieved during this period of Labour government.

First, all New Zealanders employed to personally perform work have the right to be protected by a set of minimum employment standards. Many modern employment practices are designed to avoid such protections and have had the effect that many workers who are indistinguishable from employees are not entitled to these protections. A priority of any reform must be to ensure that the floor of employment rights is extended to all persons who are contracted to personally perform work, whether or not as 'employees'. Such a reform does not undermine flexibility, it merely sets the minimum rights that society requires for any worker.

Second, employees must have the right to freely choose to be represented at work and have an effective voice at work. If workers are to have an effective voice in their workplace they need the right to effective representation though a trade union or through alternative mechanisms that allow the expression of worker voice. Most importantly employers must be obliged to maintain a position of partial neutrality in relation to union membership – it is not their business. In order to ensure that workers are able to freely exercise their choice, conduct likely to have the effect of placing unwanted

or unreasonable pressure on individual workers should be prohibited. It is also important that union members, and indeed employees generally, should have the right to elect a workplace delegate with the rights necessary to represent the interests and concerns of those employees to management.

Third, obtaining decent conditions of work requires effective collective bargaining. The current provisions on good faith bargaining, with the restoration of the requirement to conclude a collective agreement, will provide a solid foundation for collective bargaining, but if they are to be effective further reforms are needed. One of the most obvious, but clearly contentious reforms is to define "employer" in economic and not legal terms: that is any group of companies operating as a single economic unit. Multi-employer bargaining should be defined as bargaining with economically independent employers.

Fourth, all workers are entitled to respect and the protection their personal dignity. Workers are first and foremost people – employees are a legal construction. Unfortunately this point is recognised only with reluctance by the common law, and many employers. The law, its origins rooted in serfdom and the primacy of property, regards employees as subordinate and having limited rights within the workplace and restricted rights outside. Human rights and the right to personal dignity should not stop at the workplace door. There is therefore considerable merit in developing a statutory 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. The Authority or Court should be given the power to declare invalid clauses or employer policies that are either harsh or oppressive or which constitute an unreasonable intrusion on the employee's privacy personal dignity, personal life, or rights as a citizen. The rapidly expanding practice of monitoring and controlling employee lives in great detail makes this reform a matter of urgency.

These principles reflect a pluralistic vision of labour relations in the context of the twenty-first century and reflect something of the pluralist vision that was the philosophical foundation of the arbitration system. Workers are not a commodity and that they are entitled to the full benefits and rights of citizens in a democratic country. For an expansion of these arguments see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064287 .