
**Australasian Law Teachers Association - ALTA
2006 Refereed Conference Papers**



**Australasian Law Teachers Association – ALTA
Annual Conference**

61st Annual ALTA Conference

Victoria University, Melbourne, Victoria, Australia
4 – 7 July 2006

Legal Knowledge: Learning, Communicating and Doing

Published Conference Papers

This paper was presented at the 2006 ALTA Conference in the
'Labour Law' Interest Group

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*Conference Papers published by the ALTA Secretariat
2006*

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**PROTECTING VULNERABLE WORKERS:
CONFLICTING PRIORITIES OF POLICY AND COMMON LAW**

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I INTRODUCTION

The contract of employment has long been recognised as possessing special characteristics which differentiate it from purely commercial contracts¹. The extent of this differentiation and the effect of public law considerations of employment protection, however, have been strongly and ideologically contested in New Zealand employment law cases of the last fifteen years, since the enactment of the *Employment Contracts Act* (NZ) in 1991. The vigorously articulated philosophy of the statute was consciously premised on achieving an efficient labour market through the unfettered interaction of free individual contractual choices. These assumptions shaped the jurisprudence developed by the Court of Appeal throughout the nineties.

With the introduction of the *Employment Relations Act 2000* (NZ) a more pluralist employment law model, overtly recognizing the power imbalance in the employment relationship, replaced the contractualism of the *Employment Contracts Act*. This paper examines the extent to which, in the development of common law principles, the Courts have yet to respond to that change.² After providing a brief context by reviewing the treatment of common law principles in leading cases, the paper focuses on the Employment Court's approach to a 2004 amendment to the ERA dealing with 'vulnerable workers'. The amendment itself, in prioritising statutory employment protection, demonstrates the extent to which the underlying legislative policy has moved away from a purely contractualist framework. The decision of the Employment Court in *Gibbs v Crest Commercial Cleaning Ltd*³ in which the Court was required to interpret this legislation, provides a good example of the conflict between the shift in policy which now underpins the legislation and the common law principles reflecting the contractualist approach which the Court still applied.

¹ *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, 611

² The Court of Appeal in the Bryson case characterising this change as 'more of a "nudge" rather than radical change in this area of law' [2004] 2 ERNZ 526, 544

³ [2005] 1 ERNZ 399.

II DEVELOPMENT OF COMMON LAW PRINCIPLES

Before 1991, judicial development of common law principles governing the employment contract was considerably restricted in New Zealand during almost one hundred years of a centralised wage bargaining system focussed on industry based awards and compulsory unionism⁴. Although the employer-worker relationship itself continued to be defined by the common law, for the majority of wage workers the entire scope and governance of the relationship was structured by the statutory framework, the collective bargaining machinery and the arbitration decisions of the specialist employment institutions. Even where employment relationships fell outside of the award system, the policy considerations of the major legislation shaped the context in which the employment relationship was considered. The *Industrial Conciliation and Arbitration Act 1894* (NZ) and its successor legislation assumed an economic imbalance of power between wage workers and employers countered by the collectivisation of the labour force in registered unions, with centrally negotiated, industry based working terms and conditions.

The enactment of the *Employment Contracts Act 1991* (NZ) replaced these mechanisms of a collective system with a largely deregulated labour market, organised around individual employment contracts, and governed by legislation in which unions were not mentioned. Despite the retention of a modified specialist employment tribunal and court, these arrangements involved the private ordering of industrial relations, predicated on contractualist notions associated with neo-liberal concepts variously described as new institutional economics, public choice theory, transaction cost analysis, agency theory, and economic rationalism.⁵

Central to the contractualist approach is the elevation of individual intention and freedom of association as pivotal considerations in the ordering of employment

⁴ LexisNexis, *Employment Law Guide* (7th ed, 2005) 9.

⁵ Labour market deregulation occurred in a context of far reaching economic and political change including the corporatisation and privatisation of governmental functions, the contracting out of large areas of state provision, the dismantling of trade protections and currency regulation, the abolition of state subsidies to agriculture and manufacturing and the deregulation of financial markets.

arrangements.⁶ The implicit assumption of the efficacy of unfettered market choice is reinforced by an idealisation of the classic transactional contract as the common law template for the employment relationship. Atiyah has described the classic contract as:

...first, a bilateral executory agreement. It consists of an exchange of promises; the exchange is deliberately carried through, by the process of offer and acceptance, with the intention of creating a binding deal. When the offer is accepted, the agreement is consummated, and a contract comes into existence before anything is actually done by the parties...The contract is binding because the parties intend to be bound; it is their will, or intention, which creates the liability...The whole model is suffused with the idea that the fundamental purpose of contract law is to give effect—within limits of course—to the intention of the parties. It is their decision, and their free choice, which makes the contract binding, and determines its interpretation, and its results in the event of a breach.⁷

The legislative policy of the *Employment Contracts Act 1991* (NZ) derived consciously from contractualist concepts of freedom of association and individual intention,⁸ specifying the promotion of an efficient labour market as its main object with subsidiary objects of (*inter alia*) providing for freedom of association, allowing employees to choose the nature of their employment representation and enabling employers and employees to choose the nature of their employment contract.

In reality, of course, the *Employment Contracts Act 1991* (NZ) did not impose the complete totality of the contractualist ideal. The statute contained personal grievance procedures as a remedy for unjustifiable dismissal or disadvantage in employment and continued in modified form the specialist institutions of an employment tribunal and

⁶ Penelope Brook, *Freedom at work: the Case for Reforming Labour Law in New Zealand* (1990); Derived from Epstein's analysis of the common law of contract in Richard Epstein, 'A Common Law for Labor relations: A critique of the New Deal Labor Law Legislation' (1983) 92 *Yale Law Journal* 1357; and Richard Epstein, 'In Defence of the Contracts at Will' (1984) 51 *University of Chicago Law Review* 947. The general line of argument is based on the thinking of Hayek in Friedrich Hayek, *Law, Legislation and Liberty* (1979).

⁷ Patrick Atiyah, *Essays on Contract* (1986) 12.

⁸ See generally Brook, above n 6.

court to administer these. But the leading cases of the 1990s gradually shaped an increasingly contractualist jurisprudence.

In *Aoraki Corporation Ltd v McGavin*⁹ ('*Aoraki*') the Court of Appeal described the interaction between common law principle and the policy of the *Employment Contracts Act 1991* (NZ):

The 1991 Act represents a substantial departure from the collectivist principles of previous industrial relations legislation in favour of a model of free contractual bargaining. In adopting a contractual approach, however, the statute also recognises that the nature of employment and the employment relationship differentiate employment contracts from conventional commercial contracts governing the supply of goods and services. The Act departs from the common law of contract in setting the yardstick of unjustifiable dismissal and unjustifiable action, in specifying procedures and remedies, and in other respects. As well, the personal grievance provisions themselves can be traced back to the Industrial Conciliation and Arbitration Amendment Act 1970, s 4, and the Industrial Relations Act 1973, s 117....But the context in which they operate is sharply changed by the emphasis in the 1991 Act on contractual freedom. The remedies, too, are narrowed by the scheme and language of the whole statute...

Inevitably there is a tension between a pure contract approach and social and economic concerns inherent in the relationship. The responsibility on the Courts is to give effect to the intent of Parliament as expressed in the statute.¹⁰

The decision also criticised the approach of the Employment Court's approach to applying the personal grievance provisions. 'The important qualification expressed in s 104(3) is that the exercise of the jurisdiction cannot be inconsistent with the *Employment Contracts Act*...It cannot frustrate the policy of legislation.'¹¹

⁹ [1998] 1 ERNZ 601.

¹⁰ Ibid 611-612 (emphasis added).

¹¹ Ibid 611 (emphasis added).

The *Employment Relations Act 2000* (NZ) was intended as a reforming measure, repealing and replacing the *Employment Contracts Act 1991* (NZ). Rhetorical changes included the substitution of the word ‘agreement’ for ‘contract’, emphasis on employment (rather than contractual) relationships and the reintroduction of the term ‘union’. Substantive changes involved the creation of a statutory duty of good faith in a range of employment contexts, regulation of collective bargaining processes, registration and operational requirements for unions, a compulsory mediation requirement before access to further litigation and the replacement of the Tribunal with an Employment Authority with some novel inquisitorial jurisdictional aspects. The object of the *Employment Relations Act 2000* (NZ) is expressed to be ‘to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship’ to be achieved by *inter alia* ‘acknowledging and addressing the inherent inequality of power in employment relationships’ and by ‘promoting collective bargaining’.¹² The policy intent of the legislation clearly involved a move away from a neoliberal contractualist approach towards a more pluralist approach.

The first major case decided under the new statute, *Baguley v Coutts Cars*,¹³ (*Baguley*) examined this contention in some detail. In considering a redundancy situation, the Employment Court took the opportunity ‘to revisit first principles and to determine how the law has been modified by the new legislation’.¹⁴ The judgment of a Full Bench of the Court said that:

The Employment Contracts Act 1991 has been repealed. A markedly different regime has been established in its place. It is therefore not satisfactory to make decisions in reliance on cases decided while the Employment Contracts Act 1991 was in force unless they state principles of general application as opposed to principles peculiarly arising out of the Employment Contracts Act 1991.¹⁵

¹² *Employment Relations Act 2000* (NZ) ss 3(a), 3(a)(ii), 3(a)(iii).

¹³ [2000] 2 ERNZ 409.

¹⁴ *Ibid* 420.

¹⁵ *Ibid*.

In overturning the Employment Court's *Baguley*¹⁶ decision, the Full Bench of the Court of Appeal did not perceive the new legislation as introducing the 'substantial departure' from previous principle which they had detected with the previous legislation. The Court of Appeal did not see that the new statutory obligation on employers and employees to deal with each other in good faith introduced any significantly different obligations from those already imposed by the common law implied duty of mutual trust and confidence.¹⁷

Parliament amended the *Employment Relations Act 2000* (NZ) in 2004, explicitly rewriting references in the statute to make clear that the statutory duty of good faith 'is wider in scope than the implied mutual obligations of trust and confidence'¹⁸ and spelling out that, in redundancy situations, good faith included a requirement to consult affected employees.¹⁹

The Court of Appeal clearly did not share one commentator's assessment of the nature of the changes introduced by the *Employment Relations Act 2000* (NZ). Gordon Anderson asserts that:

The reforms might be interpreted as radical and as effecting fundamental changes in labour law structures. This interpretation is strongest when the overall structure of the ERA is contrasted with the neo-classical market approach of the ECA. The good faith obligation of the ERA is intended to be a driver of a quite different pluralist approach to employment relationships that contrasts with the market driven ERA. The broad formulation and scope of the statutory obligation, along with the statutory recognition and support given to the common law and an implied term of mutual trust and confidence, together signal a radical change of direction in labour law philosophy.²⁰

¹⁶ [2000] 2 ERNZ 409.

¹⁷ *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660, 672 (Richardson, P Gault and Blanchard JJ).

¹⁸ *Employment Relations Act 2000* (NZ) s 4(1A)(a).

¹⁹ *Employment Relations Act 2000* (NZ) s 4(1A)(c) The Select Committee Report to the House during the passage of the amending legislation specified that the changes were to 'overturn the effect of the decision of the Court of Appeal in *Baguley* to the extent that it sought to limit good faith to the pre-existing common law obligations of mutual trust and confidence'.

²⁰ Gordon Anderson, 'Transplanting and Growing Good Faith in New Zealand Labour Law' (2006) 19 *Australian Journal of Labour Law* 1, 13.

In a further Court of Appeal decision on employee or contractor status, *Bryson v Three Foot Six Ltd*,²¹ the majority described the statutory changes made by the *Employment Relations Act 2000* (NZ) to the definition of ‘employee’ as ‘more in the nature of a nudge rather than radical change in this area of law’.²² Although the advent of the new Supreme Court prevented this particular judgment from becoming the leading case on employment status,²³ it illustrated the Court’s determination to rely on a construction of the parties’ intention at the outset of the relationship, despite conceding that the way Mr Bryson’s engagement worked out in practice ‘smacks very much of employment’.²⁴ The Court of Appeal decision reflected a continuing assumption that common law principles shaped during the nineties are ‘principles of general application as opposed to principles peculiarly arising out of the Employment Contracts Act 1991’.²⁵ In not acknowledging the legislative intent to achieve more radical change than something ‘in the nature of a nudge’, the Court was in danger of flouting its own advice to the Employment Court in *Aoraki*²⁶ that ‘[t]he responsibility on the Courts is to give effect to the intent of Parliament as expressed in the statute’ and that the Court ‘cannot frustrate the policy of legislation’.

III VULNERABLE WORKERS’ LEGISLATION

Like the legislative provisions at issue in *Baguley*,²⁷ the *Employment Relations Amendment Act 2004* (NZ) has also required the introduction of further amending legislation as a result of the way in which it has been interpreted by the Court. The irony in the case of the *Employment Relations Amendment Act 2004* (NZ) is that the decision being negated is one from the Employment Court. Having consistently supported the notion that the new statute involves a major shift in legislative policy, the Employment Court in *Gibbs v Crest Commercial Cleaning Ltd*²⁸ (‘*Gibbs*’) found

²¹ [2004] 2 ERNZ 526.

²² Ibid 544 (William Young and O’Regan, JJ).

²³ *Bryson v Three Foot Six Ltd* SC CIV 24/2004; [2005] NZSC 34.

²⁴ Above n 2, 547; See also Pam Nuttall and Felicity Reid, ‘Employee or Contractor: Comments on *Three Foot Six Limited v Bryson*’ (2005) 30 (1) *New Zealand Journal of Employment Relations* 87.

²⁵ Above n 14.

²⁶ [1998] 1 ERNZ 601.

²⁷ [2000] 2 ERNZ 409.

²⁸ Above n 3.

itself compelled to support a position that might indicate that the public policy aspects of the statute did not prevail against private law considerations.

The intent of the *Employment Relations Amendment Act 2004* (NZ) ('the 2004 Amendment Act') was to protect a small, specified group of workers considered to be 'vulnerable' by giving them the right to elect to transfer to the new employer on the same terms and conditions and with service being recognized, where the new employer's employees will be performing substantially the same work as the vulnerable employees.²⁹

The 2004 Amendment Act was originally intended to apply in situations where:

- The employer sells or transfers its business
- The employer contracts out work
- A contractor's contract ends and the employer takes the work back 'in-house'
- A contractor's contract ends and the principal awards the contract to a new contractor (succession contracts).

IV GIBBS DECISION

The Court in *Gibbs*³⁰ was required to decide whether the wording of the 2004 Amendment Act extending to succession contracting. It concluded that it did not. The result has been that the Government has moved swiftly to introduce further amending legislation in the form of the *Employment Relations Amendment Bill 2006* (NZ) in

²⁹ Section 69F *Employment Relations Amendment Act 2004* (NZ). If the employees are surplus to requirements because of their transfer in to the new employer then they are entitled either to redundancy compensation if it is provided for under their existing agreement, or if is not, they are entitled to bargain with the new employer for redundancy entitlements (s 69I) Where the new employer and the employee cannot agree the matter can be referred to the Employment Relations Authority for investigation who made either determine how further bargaining is to occur or, significantly, may determine the redundancy entitlements due to the employee (s 69J). *Employment Relations Act 2000* (NZ) sch 1A sets out the categories of workers covered. They are cleaners and caterers in all sectors; orderlies in the health and aged-care sectors; laundry workers in the health and education sectors; and caretakers in the education sector.

³⁰ [2005] 1 ERNZ 399.

which it has sought to make it clear that succession contracting is covered. It has also included a clause which provides that these arrangements apply regardless of whether the new employer in fact intended to have any employees perform the work at all.³¹

The effect of the 2004 Amendment Act and of the proposed Bill is to require the new employer in any situation covered by the legislation to enter into employment relationships regardless of whether that employer wants to or not. Thus, the legislation represents a clear move away from the philosophy underpinning the *Employment Contracts Act 1991* (NZ) which emphasised freedom of contract.

The Full Court of the Employment Court (Colgan CJ, Travis and Couch JJ) in *Gibbs*,³² extensively traversed principles of statutory interpretation before concluding they could not 'read up' the wording of the legislation to include succession contracting. In doing so they referred to the history of the legislation. They noted that it was clear that it was the intention of the Minister of Labour that the legislation would apply to succession contracting. However the wording of the Bill as originally introduced was altered by the Select Committee. The Court concluded that the effect of the altered wording was such they could not be confident that it was the intention of Parliament that succession contractors be covered.

The Court noted that under the legislation the new employer has no entitlement to bargain about the terms and conditions of the new employment relationship 'unlike the usually applicable position' and that the new employer becomes a party to any collective agreement that formerly bound the employee electing to move. This is by operation of law.³³ The Employment Court concluded that these provisions were contrary to established common law principles and raised a freedom of association issue. The Court said:

³¹ Employment Relations Amendment Bill 2006 (NZ) cl 69I(3)(b).

³² [2005] 1 ERNZ 399.

³³ Employment Relations Amendment Bill 2006 (NZ) cl 69I(3)(b).

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So a new employer under this legislation is required by law to associate with a new employee or new employees in a way unknown to the previous common law and, very arguably, prohibited by it. It is a significant new law setting aside long-established common law. This is therefore a freedom of association issue. It is a long standing principle of employment law that no person may be compelled to engage and continue in an employment relationship with another. Where that involved compulsion of an employee, it once took the form of slavery or servitude...

It is also a fundamental common law freedom of an employer to choose to engage or not any particular employee in an employment relationship subject to constraints on that choice under human rights legislation, including those involving discrimination, none of which is applicable here.³⁴

This was relevant because the Court felt it was unable to interpret the legislation in the manner advanced by the applicants because the *New Zealand Bill of Rights Act 1990* (NZ) requires an enactment to be given a meaning consistent with the rights and freedoms contained in that Act. The Court said that if 'Parliament is to compel persons to associate in employment as Part 6A purports to do, it must do so clearly and deliberately'.³⁵

Therefore, in order to support its interpretation the Court appeared to be relying on a constitutional freedom not to associate which they seemed to suggest was tied in with a 'fundamental common law right' not to enter into employment relationship. It is however questionable whether the constitutional freedom not to associate extends as far as employment relationships between two people.

³⁴ Above n 3, 430.

³⁵ Ibid.

V FREEDOM NOT TO ASSOCIATE

The Employment Court in New Zealand has recognised a freedom not to associate on more than one occasion.³⁶ However, what is notable about the *Gibbs*³⁷ case is that it appears to be the first case to consider the existence of a freedom not to associate with potential employees rather than employee organisations. In previous decisions where the Courts have recognised a freedom not to associate, such as *Air New Zealand Ltd v Kippenberger*³⁸ and *New Zealand Public Service Association Inc v Southland Regional Council*³⁹ the Court was interpreting legislation not only in the light of the *New Zealand Bill of Rights Act 1991* (NZ), but also in the context of the relevant sections of the employment legislation dealing with the freedom not to be compelled to join a union.⁴⁰

Similarly while commentators such as Rishworth, Huscroft and Optican⁴¹ have recognised the existence of a freedom not to associate as being part of the freedom to associate, their interpretation of that freedom is in the context of organisations not contractual relationships. This is consistent with the limited case law on freedom to associate in other jurisdictions such as Canada, which has largely concerned formal

³⁶ See *Ivamy v New Zealand Fire Service* [1995] 1 ERNZ; See also the Court of Appeal decision in *Eketone v Alliance Textiles NZ Ltd* [1993] 2 ERNZ 783.

³⁷ [2005] 1 ERNZ 399.

³⁸ [1999] 1 ERNZ 390 in which the High Court held that it was generally understood that the right to freedom of association also includes a right not to associate.

³⁹ (Unreported, Employment Court, Colgan C.J., 28 October 2005); See also *New Zealand Dairy Workers v New Zealand Milk Products Ltd* [2002] 1 ERNZ 361 in which Colgan J again relied on *Kippenberger* to support a finding that a 'bargaining agent's fee' compulsorily deducted from the wages of non-union members went beyond an incentive and amounted to compulsion. The Court of Appeal in *New Zealand Dairy Workers v New Zealand Milk Products Ltd* [2004] 1 ERNZ 376 upheld the decision of the Employment Court but did not discuss s 17 *New Zealand Bill of Rights Act 1990* (NZ).

⁴⁰ See s 5 *Employment Contracts Act 1991* (NZ) and s 7 *Employment Relations Act 2000* (NZ) which are identical.

⁴¹ Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (2003) 354.

organisations such as trade unions, rather than employer/employee relationships.⁴²

There is therefore a strong argument that the constitutional freedom not to associate does not extend to the situation addressed in the 2004 Amendment Act, but rather that the Employment Court in *Gibbs*⁴³ was extending the right in a manner not previously recognised by New Zealand (or Canadian) jurisprudence. The cases suggest that the freedom not to associate exists, but is restricted to associations pursuing a common purpose – not an employer and employee entering into an employment relationship. The apparent extension of this ‘fundamental right’ not to associate into a constitutional right suggests the ongoing influence of legal principles shaped by policy considerations in which contractual freedom trumps employment protection.

VI CONCLUSION

The eventual drafting of the section considered in the *Gibbs*⁴⁴ case did not give any Court much assistance in interpreting it consistently with the original intention of the amendment. Nevertheless, the Employment Court also felt unable to extend the wording in line with the general legislative intent of the statute. Instead it justified its inability to read up the provision on the grounds of principles which this paper indicates are the product of a decade of aligning the common law with the legislative policies of the Employment Contracts Act.

⁴² See, eg, the decision of the Supreme Court of Canada in *R v Advance Cutting and Coring* [2001] 3 S.C.R. 209 concerning the requirement to join a union. The Court held that freedom of association includes a right not to associate only if the forced association imposed ‘ideological conformity’ on the individual; See also *Canadian Egg Marketing Board v Richardson* [1998] S.C.R. 157 in which the Supreme Court of Canada rejected an application by egg producers that a farm marketing scheme was in violation of the Charter because it prevented them from associating with others in the marketing of eggs. The Supreme Court held there that freedom of association does not protect the activity itself, but only the associational aspects of the activity and that the ‘argument raised by the egg producers would have constitutionalised all commercial relationships under the rubric of association.

⁴³ [2005] 1 ERNZ 399.

⁴⁴ [2005] 1 ERNZ 399.

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It has been suggested that in marked contrast with its embrace of the neo-classical model of the ECA and its philosophy of ‘free contractual bargaining’⁴⁵ the Courts have been reluctant to accept the ‘quite different pluralist approach to employment relationships that contrasts with the market-driven ECA’⁴⁶ This paper has endeavoured to argue that the application of common law principles to the employment situation in New Zealand since 1991 has been jurisdictionally specific and shaped by the legislative provisions. The effect of this has been to establish the principles of individual intention and freedom of association as the default assumptions of the common law under the *Employment Contracts Act 1991* (NZ). In interpreting the provisions of legislation shaped by markedly different policy considerations, the Courts have struggled to reconcile common law and policy priorities.

⁴⁵ Above n 20.

⁴⁶ Above n 20, 13.