

# The Employment Relations Amendment Act 2004

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## DISCLAIMER

The following article is an overview of the Employment Relations Amendment Act (No. 2) 2004. The article does not purport to be a detailed legal discussion and is not intended to be legal or professional advice. While every effort has been taken to ensure that the information is accurate, no person should act specifically on the basis of the material contained in this publication. Anyone seeking guidance on specific matters of law should refer to the Amendment Act itself or a comprehensive legal commentary.

## Introduction

The Employment Relations Amendment Act 2004 represented a significant turning point in New Zealand employment legislation. Officially, the changes were simply a matter of "fine-tuning" to address shortfalls in the original version of the Employment Relations Act. From the perspective of some employer groups however, the changes were far more significant than even the introduction of the original Act (Tritt, 2004), introducing major constraints and requirements on employers' behaviour and creating a bias towards collective bargaining and union membership.

This article outlines the social and political dynamics which lead to the emergence of the amendment, as well as providing an overview of some of key changes brought by the legislation, in the areas of good faith and collective bargaining, as well as changes affecting the sale or transfer of businesses.

## The original objectives of the ER Act

Following the 1999 general election and change of government, the original Employment Relations Act 2000 (ERA 2000) was the central aspect of a broad programme of employment relations reform (Haworth, 2004; 34). The legislation was intended to reverse the radical free-market approaches of the Employment Contracts Act, and replace these with a model that was more consistent with traditional employment relations (Wilson, 2004a). The legislation returned to a more collectivist approach, with a primary objective being "to build productive employment relationships through the promotion of mutual trust and confidence" (s3(a)), which was to be achieved through approaches such as good faith, the promotion of collective bargaining, and recognition of unions. The legislation was based on two contentious assumptions; firstly, that there is an "inherent inequality" between employers and employees, and secondly, a belief that collaboration and collectivism would lead to increased productivity.

*Fair and productive employment relationships are an essential ingredient in developing a more innovative economy while protecting the more vulnerable in society....To achieve this, the Act acknowledges the inherent inequality of power in employment relationships, and seeks to balance the interests of employers and employees through the promotion of unions and collective bargaining, the*

*obligation to act in good faith, and the provision of a continuum of services and bodies designed to support and enhance ongoing employment relationships wherever possible. (Parliament of New Zealand, 2003a)*

Alongside the new Employment Relations Act, a series of changes to the minimum employment standards were also introduced in order to "promote fair dealing and protect vulnerable workers from exploitation" (Wilson, 2003). This reform programme included the introduction of paid parental leave, amendments to the Holidays Act, significant increases in the Minimum Wage, as well as amendments to Health and Safety legislation (Haworth, 2004).

These legislative changes provoked heated public debates which generated considerable media attention (Rasmussen and Ross, 2004). Business and employer groups were highly vocal in their criticism of the Employment Relations Act, leading to a period known as the "winter of employer discontent" in 2000. These groups described the new laws as detrimental to business and predicted unfavourable outcomes including increased unemployment, a loss of workers for overseas, and industrial unrest (Deeks and Rasmussen, 2002). In contrast, unions defended the changes and even argued that the new legislation (particularly the Employment Relations Act), did not go far enough in protecting workers.

## **What eventuated: The Review**

As the months passed following the introduction of the Act, business displeasure seemed to gradually fade (Rasmussen and Ross, 2004). By 2002, it appeared that the most dire predictions had failed to eventuate. Business confidence had not plummeted, the country had not been crippled by a major increase in strike activity, and there had not been a major exodus of companies fleeing to Australia in order to escape local employment laws. Furthermore, unions did not seem to have acquired unbridled power, nor had their ranks been swelled with vast numbers of new recruits. In fact, the most notable feature was actually the lack of change, as the level of union density had not altered significantly since the introduction of the new Act (May et al., 2003).

Given that the Act was intended to promote collective bargaining which could only occur through unions, the lack of significant changes in union membership and collective agreements raised important questions as to whether the new legislation was actually achieving what it set out to deliver. In 2002, the government announced its proposal to review the operations of the ER Act, to identify if any "fine-tuning was needed, either in the law or in its administration" (Wilson, 2003) for the Act to achieve its "statutory objectives of promoting productive employment relationships, good faith, collective bargaining and the effective resolution of employment problems" (Secretary of Cabinet, 2003a, Secretary of Cabinet, 2003d). The Review of the Employment Relations Act which followed drew upon a number of sources, including Department of Labour research projects assessing the impacts of the Act (Waldegrave et al., 2003), along with case law developments, as well as submissions from a range of groups such as practitioners, the Council of Trade Unions and Business New Zealand.

## **Findings of the Review**

The findings of the Review suggested a mixed situation. While the Review noted many areas where the Act seemed to be producing the desired outcomes, it also identified a number of "behavioural, administrative and regulatory issues" which acted as barriers, preventing the Act from achieving its goals (Parliament of New Zealand, 2003b; 34). One set of problems related to the details of the legislation itself, and with judicial decisions which had interpreted the law in a manner that was seen as inconsistent with the government's statutory or policy intent. Other problems related to the behaviour of some parties, particularly the reports of non-supportive, and even obstructive behaviours of some employers, which were seen as preventing the full intent of the Act from being implemented (Wilson, 2003).

In order to remedy these issues, a series of legislative amendments were developed. These changes were based on the recommendations of the Review and had the aim of "clarifying and strengthening" the Act in order to assist it to better achieve its objectives (Secretary of Cabinet, 2003a). Key amendment areas centered on the definition of good faith and the requirements that this imposed upon parties, along with accompanying changes which sought to promote collective bargaining, offering greater incentives to encourage parties to enter into collective agreements, as well as removing barriers and preventing employer behaviours that could undermine collective bargaining.

The Government's attention during this period was not only limited to the Review of the existing Act. The contentious issue of protecting employees in situations where a business changes ownership, had originally been part of the Labour Party's 1999 election policy, and had been included in the draft of the Employment Relations Bill, but was dropped after encountering strong business opposition. Following recommendations from a tripartite working party, the government now proposed to also address this issue as part of the legislative changes.

## **The 2004 Amendment**

The changes were contained in the "Employment Relations Law Reform Bill" which was introduced to Parliament on 4 December 2003. After progressing through the parliamentary process this became the "Employment Relations Amendment Act (No 2) 2004" ("the Amendment Act") which was enacted on 28 October 2004, and came into force on 1 December 2004.

The earlier version of the Employment Relations Act which had been in effect since 2000, became known as the "original enactment".

## **The responses and the debate:**

The proposed amendments were contentious and provoked widespread disagreement, with unions supporting the general direction of the changes, while employer and business groups took the opposite perspective and opposed the moves. The Labour-lead government was confronted with conflict on a variety of fronts; once again it faced opposition from business groups, however it was also criticised by its supposed allies in

the union movement regarding the slow progress of the amendments, and internally, within the caucus there were even signs of divisions between the pro-worker and pro-business factions. In general, the introduction of the amendment once more highlighted the sharp divisions and lack of consensus between the parties to employment relations in New Zealand.

## 1. Unions

The core issue that shaped each party's response to the amendments was whether or not they accepted the assumptions underlying the Employment Relations Act. Unions for example, shared the government's beliefs concerning the inherent inequality between employees and employers, along with the need to support collective bargaining, and so unions generally endorsed the findings of the Review. Initially, there had been an expectation among unions that the introduction of good faith into law would lead employers to be more accepting towards collective bargaining. However, the reality under the Act turned out to be somewhat different and instead unions described their experiences as being at times, a "continuation of the unreconstructed industrial warfare" from the 1990s (Little, 2004).

Unions cited a range of employer behaviours which they saw as obstructing the implementation of the goals of the Act. One of the most significant was the process of "passing on". This was where a union would expend considerable resources in negotiating a collective agreement intended for its own members; employers however would then automatically pass on those improved conditions to the other, non-union employees in the company. So, while official union membership statistics recorded the employees contributing to the union, they ignored a very large number of employees who were enjoying all the benefits of a collective agreement, without being union members. The fact that these non-union employees were effectively receiving a "free ride", receiving all the benefits of the collective without having made any contribution, created a very strong sense of injustice among union members (Treanor and Rasmussen, 2003, Wilson, 2004b). Unions argued that "passing on" significantly undermined union membership because it meant that there was little incentive for employees to belong to a union if they could still receive all the benefits of the union's work without being members.

Unions also accused employers of exploiting various loopholes in the existing law, so as to obstruct and undermine the activities of unions. These centred particularly on strategies for blocking union attempts to establish collective agreements, with the result that, even after a lengthy and expensive bargaining process, union members were left with only individual agreements, rather than enjoying the benefits of a collective. Once again, the effect of these various employer tactics was that the unions' power and relevance to employees were considerably diminished. Overall, unions alleged that the main reasons for the slow growth in collective bargaining and union membership were employers' obstructive behaviours, which prevented the Act's goals from being achieved.

From a union perspective, the amendment's attempts to remedy these problems were seen as "a genuine attempt" to address the problem areas, even if the details fell short of what they would have liked (Wilson, 2004b). For union representatives, the amendment was "a modest improvement to a moderate law" (Conway, 2004, Wilson,

2004b)

## 2. Employers

In contrast, from the start, employers had generally rejected the Employment Relations Act's primary assumption that there was an inherent inequality in bargaining power and so they saw the overall approach of the Act as flawed. Employers disliked the Act's collectivist perspective and frequently believed that the Act focused more on protecting union rights than employers' interests (Burton, 2004). Despite their extreme opposition at the time of the introduction of the Act, by 2004 employer groups reported that they had "grown to live with" the Act in its original enactment (Mapp, 2004). However, the proposed amendments provoked strong opposition. While the government had consistently described the Review and the amendments as simply measures to "fine-tune" the Act (Secretary of Cabinet, 2003a), employer groups claimed that changes represented "an even more significant reform... than the Employment Relations Act...itself" (Tritt, 2004). The proposed amendments provoked another "winter of employer discontent" similar to the one seen in 2000 (Tritt, 2004), with employers' opposition expressed in the slogan "if it ain't broke don't fix it".

The employer and business lobby had a very different explanation for the fact that collective bargaining and union membership had not increased significantly under the Act. Employers argued that this simply indicated that workers did not want to be involved in collectives. From an employer perspective, unions were the only ones dissatisfied with the situation under the ERA 2000, and the amendments were unwarranted and caused unnecessary harm to employers. In the media, employers suggested that there was collusion between the government and the union movement, alleging that the amendments represented even more of a union charter than the original enactment (Burton, 2004). The amendments most sought by unions, especially regarding collective bargaining, good faith, and protection for employees during changes of business ownership, were among those most strongly resisted by employers. Business New Zealand alleged that employers were losing a range of freedoms, and employer groups warned that the changes would lead to negative effects on areas such as employment, investment and productivity. The National Party predicted a strong and lasting detrimental effect on the economy and promised to repeal each and every part of the amendments (Mapp, 2004).

## The amendment

### Content - overview

The stated aim of the Amendment Bill was to amend "the Employment Relations Act 2000, to enable it to better meet its key *objectives* of promoting fair, productive and effective employment relationships between employees, employers and unions" (Parliament of New Zealand, 2003a).

The proposed amendments covered a range of areas, and some of the more significant aspects included the areas of:

- good faith
- collective bargaining
- protections for employees in change-of-employer situations

## 1. Defining what is “good faith”

A key principle to understand regarding the Amendment Act was the reason for the very central role that good faith played, and why so many of the changes involved aspects of good faith. The introduction of good faith in the original Employment Relations Act in 2000 had been a significant move. Given that employment relations essentially concern the relationships between parties, good faith was therefore a central concept for regulating and guiding the ways in which the parties interacted. Good faith was intended to promote attitudes and behaviours that were part of a new, higher standard of relationship.

The Review had found however, that for a variety of reasons, these hopes for a new type of relationship had not always eventuated. Many of the problems stemmed from the ways that parties related to each other, exhibiting “bad faith” behaviours. To address those issues therefore, the legal requirements of good faith were used as a way of shaping and regulating the ways parties interacted.

Some problems stemmed from the ways in which the Courts had interpreted the wording of good faith sections in the original enactment. For example, a Court of Appeal decision (*Coutts Cars Ltd v Baguley* - [2002] 2 NZLR 533), had determined that, for individual employment relationships, the obligations were not significantly different from what had existed under the Employment Contracts Act (Caisley, 2004). In effect, the Court's decision had thwarted the government's intention by interpreting “good faith” in such a way that it failed to produce a change in this area.

To address this, the Amendment sought to “clarify” the duty of good faith. The Act was rewritten so that, from the very opening lines, good faith became a key principle for the whole Act, with employment relationships built on “good faith in all aspects” (s3(a)(i)). The definition of good faith was amended to clearly state that it was a broader concept, and individual employment agreements were now explicitly listed as areas where this higher standard of good faith applied (s4 (4) (ba) (bb)).

Another criticism of the original enactment was that it lacked detail as to precisely what constituted “good faith”, and this had made it difficult to apply. The Amendment dealt with this by adding more prescriptive elements, describing specific behaviours that were required. The parties now had to be “active and constructive in establishing and maintaining a productive employment relationship”, as well as being “among other things, responsive and communicative” (s4(1A) (b)).

The Amendment also established additional good faith obligations for situations where an employer was proposing to make a decision that would, (or was likely to), adversely

affect the employees' continued employment. Firstly, the employer had to provide the employee(s) with information about the aspects that could affect their employment; secondly, the employee(s) had to be given an opportunity to comment (s4(1A)(c)). This meant that employers were now required to inform and consult with staff in situations such as plans for lay-offs and redundancies.

## **2. Good faith and collective bargaining**

“Bad faith” behaviours, particularly from employers, were alleged to be key elements that had prevented the Act from achieving its goals in the areas of union membership and collective bargaining. The challenge for lawmakers was therefore to identify options that would prevent these types of behaviours, while still maintaining the balance between the rights and obligations of the parties.

The Amendment introduced a range of changes in the area of collective bargaining. The first set of changes sought to specifically identify what good faith required, so as to rectify the problem of undermining tactics.

### **(a) “Passing on” (“free-riding”) and bargaining fees**

Addressing the issue of “free riding” and the “passing on” of terms and conditions to non-union employees, was particularly complex, as it required achieving a balance between several competing dynamics.

On one hand, some employers preferred to standardise terms and conditions, keeping these the same for both union and non-union employees. These employers were often simply motivated by a desire to reduce their administration work, as well as ensuring parity between employees performing the same work. Unions alleged however, that other employers had more aggressive motives, deliberately using a range of tactics such as “passing on” in order to undermine unions. In those situations, employers openly promised non-union employees all the benefits of a collective, and sometimes even better conditions, in order to discourage their staff from joining the union, and so weaken the union’s position. Cases were reported for example, where collective negotiations had been virtually concluded but the employer then refused to settle and instead offered the agreed terms and conditions to all employees individually, as part of a calculated undermining tactic (Secretary of Cabinet, 2003a).

Whether “passing on” was done for administrative ease, or with tactical intent, the end result in both circumstances was that it had the effect of undermining the union. An obvious solution to this problem might seem to be to outlaw “passing-on”, so that only union members would benefit from the conditions in a collective agreement. However, this approach would conflict with the principles of voluntary union membership and the freedom of association. If the only way to access the superior conditions in a collective was by joining the union, then this could be seen as indirectly pressurising employees into union membership, or creating a thinly disguised form of compulsory union membership.

Instead, the Amendment addressed this dilemma by making it a breach of good faith to

pass on terms, but only where the action had *both* the "intention", and also "the effect", of undermining (s59B(2)). Unions and employers could however, agree that terms and conditions, which are "the same, or substantially the same", as those in a collective, would be passed on to other employees (s59B(5)), provided it was clear that the parties had bargained in good faith (s59B(6)(b)). What was important was the process of getting to the final outcomes and whether this involved a genuine bargaining process.

Another option for addressing the free-riding problem was the use of a bargaining fee. This type of model occurs in other countries and involves non-union employees paying a bargaining fee to the union, in recognition of the benefits they gain from the union's work in negotiating their conditions of employment. The amendment specifically made bargaining fee arrangements legal, provided that they met a range of criteria, including consent between employer and union parties, as well as non-union employees voting to endorse the move, (s69).

**(b) Advising an employee not to be involved in collective bargaining**

A related problem concerned other similar anti-union tactics, where employers deliberately sought to deter employees from joining a collective. To address this, the Amendment also made it a breach of good faith if an employer advised an employee(s), or did anything else, with the intention of inducing an employee *not* to be involved in a collective agreement (s4(6)). This move was intended as a signal regarding the importance of good faith;

*"I propose that the Act also be amended to provide that an employer must not advise an employee not to be involved in collective bargaining or be covered by a collective agreement. Such a direct statement would be a strong, clear signal to employers about the existing duty of good faith" (Secretary of Cabinet, 2003b)*

**(c) Requirement to conclude a collective agreement (s33)**

When good faith was introduced in the original enactment, the Act had followed the North American model by specifying requirements of the bargaining processes, but not requiring outcomes. In fact, the Act had specifically stated that the parties were not required to conclude the process and reach an agreement. This was intended to create the freedom for them to work together without being pressured into an agreement. However the problem was that this "freedom" created another loophole where employers could undermine bargaining, for example by making the process unnecessarily drawn out, or even deliberately refusing to settle. As a consequence, employees who desired a collective agreement were not able to gain one. The rights of employers prevailed over the rights of employees. To address such behaviours, the Amendment made several significant changes.

The Act was changed so that an outcome became necessary; the duty of good faith now required the parties to conclude a collective agreement. The only exception to this was if there was "a genuine reason, based on reasonable grounds" for not reaching an agreement (s33). The fact that one party may simply not want to be involved in a collective would not constitute a "genuine reason".

**(d) *Obligation to continue bargaining***

Another related problem occurred in situations where parties were bargaining over a range of issues, but came to a standstill (became "deadlocked"), over one particular point. In some instances employers could use this as a reason to abandon the overall bargaining process, providing another way of blocking the union's attempts to establish a collective agreement. Although the original enactment contained no explicit provisions directly governing this, an Employment Relations Authority decision had determined that, in this type of situation, the duty of good faith required the parties to continue bargaining over their other issues, rather than allowing a single specific, unresolved matter(s) to bring negotiations to a complete standstill; (*NZ Amalgamated Engineering etc Union (Inc) v Independent Newspapers Ltd (2001) 6 NZELC 96,360 (WA 51/01)*). The Amendment "codified" this principle into the Act, establishing this as a statutory obligation.

**(e) *Penalties for failure to comply with the duty of good faith***

The Review had also noted that the effectiveness of the original good faith provisions were limited by the fact that there were few measures for actually enforcing these obligations; some parties failed to behave in good faith because there were few penalties to require them to comply (Secretary of Cabinet, 2003c). To encourage compliance there needed to be real penalties and mechanisms dealing with breaches. The Amendment therefore also introduced another set of new provisions for dealing with breaches.

Outlining the requirements of good faith, Section 4A was amended to include specific penalties for breaches of good faith in three main types of situation;

- If a breach occurred which was "deliberate, serious and sustained", or
- if the breach was intended to undermine bargaining (collective or individual), or the agreement itself, or an employment relationship, or
- there was a breach of the sections relating to "passing on" of collectively negotiated terms and conditions (sections 59B or 59C)

In these cases, if an individual was found to have committed a breach they could be required to pay up to \$5,000, while a company or corporation could have to pay up to \$10,000.

**(f) *Facilitating bargaining***

Breaches of good faith during collective bargaining were an area of special concern, not only due to their effects on employment relationships, but also because they could develop into protracted and costly disputes which affected the wider community. The original enactment contained only limited provisions for mediation assistance and intervention from the Authority or Court, however these were not always effective, especially when there were more serious breaches that undermined bargaining (Secretary of Cabinet, 2003b).

The Amendment introduced a new process or mechanism to ensure that bargaining would continue to move towards an agreement. The intention was that only a very small number of cases, where there were clearly “serious difficulties”, would be eligible for this assistance. The “ordinary” problems, including strike action, that occurred in bargaining would not be sufficient, but instead there would need to be “serious and significant” difficulties (*Secretary of Cabinet, 2003a*); *PMP Print Limited and Anor v NZ Amalgamated Engineering Printing and Manufacturing Union Inc.*). Very tight entry criteria were therefore applied, focusing on problems that were occurring within the bargaining, or potential effects on the wider community. A party could only seek assistance where there was either;

- (a) a serious and sustained failure of good faith which had undermined bargaining:  
*or*
- (b) bargaining had been unduly protracted, and extensive efforts (including mediation) had failed: *or*
- (c) there had been a protracted or acrimonious strike(s) or lockout(s): *or*
- (d) one party had proposed a strike or lockout which was likely to substantially affect the public interest.

In these situations, one party could request the Employment Relations Authority to become involved as a third-party and work with the parties to “facilitate” their bargaining process. This assistance was to serve as an additional form of external “support” which could hopefully “overcome impasses...and facilitate settlement” (Parliament of New Zealand, 2003a, p.5).

A key point is that the Authority’s “facilitation” role was quite limited. The aim was to “encourage - but not compel - settlement”, so that the parties would continue bargaining themselves (*Secretary of Cabinet, 2003a*). The Authority would only *recommend* a conclusion; however this was not binding, and the parties still retained the freedom to accept, or not accept, that option (ss50A, 50B, 50C).

### ***(g) Determining a collective agreement***

Another, more major, change was also introduced with the Amendment. As with facilitation, this provision was also intended to deal with continued breaches of good faith. A small set of extreme situations were identified where the Authority was empowered to go beyond simply facilitating, and instead enter into a radically different role of decision making, determining or “fixing” the provisions of a collective agreement itself.

This power to “fix” an agreement could only be exercised in specific situations. Again, this was only for cases where there was a serious and sustained breach of good faith that undermined bargaining. However for “fixing”, the entry criteria were considerably tighter, making this an option of last resort, when all other options had failed. Three conditions all had to be present at the same time;

- firstly, the breach of good faith was so serious and sustained that it would undermine bargaining

- secondly, all other reasonable alternatives had been exhausted
- thirdly, the “fixing” of the provisions of the collective agreement was the only effective remedy (s50J(3)).

This change represented a significant turnaround, as the original enactment had specifically stated that the Authority was not permitted to act in the role of fixing terms and conditions of employment; (s161(2) of the original enactment). The official rationale for introducing the “fixing” provision was to extend the range of remedies the Authority could utilise, creating another means for settling collective agreements (Secretary of Cabinet, 2003b). Cabinet papers openly spoke of this as a penalty and a remedy “for serious breaches”, providing the Authority “with the power to apply a further penalty of fixing the terms and conditions of the collective agreement”. (Secretary of Cabinet, 2003b).

The introduction of facilitation and “fixing” by the Authority, were some of the most contentious parts of the Amendment. Among employers, there was concern that union representatives could use the provisions to force employers into negotiations that would be guided, or even controlled, by an outside party. Employers strongly opposed third-party involvement in the setting of terms and conditions, perceiving it as a return to a regulated and centralised system of employment relations, alleging that “Authority fixing is nothing so much as compulsory arbitration by another name” (Burton, 2004).

Throughout **the** all these issues of good faith there was a dilemma for lawmakers as they sought to balance the rights of employers and those of workers. The earlier enactment had protected the rights of employers but this had sometimes been at the expense of employees rights; for example, an employer could potentially refuse to enter into a collective agreement even though the majority of the workers sought one. The Amendment altered this so that the rights of employees were recognised, and yet employers construed this as a removal of their own freedoms, since for example, they became less free to choose not to continue bargaining, or reach an agreement, and could be subject to intervention from the Authority in guiding, or even determining the outcomes of their bargaining.

### **3. Transfer of undertakings**

A different area involved situations where a business changes ownership. These can have a significant effect on workers, yet this area had received little attention in the original enactment of the ERA 2000. In the post-1984 deregulated environment there had been a widespread move among companies to outsource or “contract out” a broad variety of functions in order to reduce costs and become more efficient. The legal framework provided that when these types of business changes occurred, the employment relationship also ceased, leaving the employees without a job. The new owner of the business, or the new holder of the contract, could then choose which people to re-hire. In some cases, the new employer would offer less favourable terms and conditions, presenting these on a “take-it-or-leave-it basis”. If there were no other employment options available, the workers would have to simply accept the employer's terms (Secretary of Cabinet, 2003c). In many cases employees were often left worse off after such changes.

Certain employee groups were particularly affected, with cleaners for example, sometimes having their employer change up to four times a year (Parliament of New Zealand, 2000). With each change the workers could either become unemployed, or have to work under conditions that were less than with the previous employer/contractor, despite the fact that they were still doing essentially the same work. The result was that their employment security was undermined and their terms and conditions could progressively deteriorate (Parliament of New Zealand, 2003a). These workers were usually in labour intensive sectors, performing low-paid work, which made them particularly vulnerable, as they had little bargaining power and were exposed to frequent restructuring (Bradford, 2004). This group was therefore identified as requiring new provisions to safeguard them from being disadvantaged.

Attempting to legislate in this situation was another complex issue though, as it required achieving a balance between protecting vulnerable workers, while at the same time recognising business realities, including the interests of business owners. Business groups argued strongly for their freedom to organise their businesses and to make changes, so as to remain efficient and minimise costs. Right wing political parties argued that creating additional protections would actually harm the vulnerable workers as the extra costs would force employers to reduce the numbers of jobs.

Earlier attempts to address this issue had been unsuccessful. Original drafts of the Act in 2000 had included an employment protection clause, however amidst intense opposition from employers this was dropped. Consequently, the original enactment was only left with indirect guidelines and no detailed, substantive protections. This was in marked contrast with many overseas jurisdictions, including Western Europe, where legislative protection for workers in change of ownership situations was commonplace.

The proposal to introduce protections in the Employment Relations Act created further controversy. Faced with intense resistance from employer groups, Cabinet wrestled with various options, resulting in the delays in the Bill's release (Oliver, 2003). Eventually, a model suggested by the Council of Trade Unions was adopted, which targeted a small number of groups for detailed protection, rather than providing substantial protection for all workers.

The key principle of the legislation was providing "continuity of employment" if an employer's business was "restructured". Within this, however, there were two separate sets of provisions, with one set addressing a small set of specifically identified employee groups, and a second set for all other employees.

**(i) Specified categories of employees**

The first set of provisions dealt with a narrow group of employees, who were seen as particularly "vulnerable" and at risk in restructuring situations (Commentary, 2004). The Amendment specifically listed the specific categories in considerable detail, however the general principle was that they were defined by two features;

- the service they provided - for example, cleaning services, laundry work, catering, and orderlies
- the sector in which they worked - for example, education, health, or age-related residential care

For these employees, the Amendment used the term "restructuring" (in a different sense from its usual meaning), referring to situations where;

- the business was sold or transferred
- work that was previously performed in-house was "contracted out"
- contracting work was lost because a business decided to do its work in-house ("contracted in")

Detailed provisions spelt out what would happen for these employees. The primary option was to provide continuity of employment, by providing the right to transfer to a new employer on their existing terms and conditions. Alternatively, the employees could negotiate an alternative such as redeployment, or take redundancy.

## **(ii) Other Employees**

The majority of employees were not included within the "specified categories", and so the provisions for "other employees" were the ones affecting most workers. These provisions were slightly narrower in terms of the situations they covered, as they excluded "contracting in" situations (where a business changed to performing its work in-house, instead of using contractors).

Unlike the provisions for "specified categories", the legislation did not specify the outcomes that these employees should receive. Instead, parties were simply required to include an "employee protection provision" in employment agreements, to address restructuring situations. The parties were left to negotiate the details of that provision themselves. The clause was to include the process that their existing employer would follow when negotiating with a new employer, the matters that would be negotiated including whether the employees could transfer to the new employer, or alternatively whether any entitlements such as redundancy provisions would be available (s69L(1))

Overall then, there were very marked differences between the detailed provisions for workers in the "specified categories", compared to those for "other employees". While employees in the specified categories had very real protections, the majority of workers only gained a series of process guidelines, rather than substantive outcomes. Those employees were only left with a requirement that employers would "turn their minds to" the situation of the employees, but there was no guarantee that these would be any more than "an empty promise of protection" (Chauvel and Elkin, 2004; 106).

Employers and right-wing political parties predicted many undesirable outcomes from the new legislation. A key issue was the cost of the new protections, and it was alleged that these would significantly reduce the value of businesses, making the task of selling a business very difficult (Prebble, 2004), so that small employers could lose their equity in their business (Burton, 2004). It was also claimed that in some cases it could become more attractive to close a business, rather than reorganise, which would leave employees out of work. More broadly, if the costs of redundancy were too high, then writers suggested that contracting companies may not be able to offer competitive prices for work.

## 4. Other Changes

The Amendment introduced a variety of changes in a range of other areas. Many of these were technical points, however some of the more significant aspects were:

- (a) The establishment of a code of good faith for the public health sector, providing for the health and safety of patients, staff and the public during industrial action in the health sector
- (b) For personal grievances, the legislation introduced a new "test" for judging whether a dismissal or other action by an employer was "justified". The new measure required an assessment of whether the action or decision was what a fair and reasonable employer *would* have done in the circumstances. Previously, the criterion had been developed through case law, and this had a different approach based on whether the employer thought the action was reasonable, and what the employer "*could*" have done. The intention of the change was to provide a more balanced test, rather than one based on the employer's perspective.
- (c) Changes were made to the mediation provisions of the Act so that statutory mediation services were no longer restricted to employers and employees, but also became available to other parties such as independent contractors. Other provisions were introduced allowing mediators to "fast track" minor or straightforward problems with a shortened mediation process. In order to reduce the numbers of opportunistic and potentially unnecessary claims, changes were made which sought to discourage contingency-based representation, (where a party engages a representative on the understanding that they are only required to pay for the representative's services if the party succeeds with their action).

## Conclusion

The Employment Relations Amendment Act 2004 represented a significant move in New Zealand employment law. While a broad range of issues were addressed by the Amendment, some of the more significant changes were in the areas of good faith, collective bargaining, and transfer of undertakings.

The Amendment was the focus of much controversy, with employers and unions holding widely different views. Many of the differences were ideological, and so any assessments of the effects of the amendments are predicated on the value-base from which one approaches the issues. Furthermore, empirical research is likely to be hampered by the fact that a number of the changes were intended to have a deterrent effect. As a consequence, it becomes difficult to directly measure changes in behaviours in areas such as good faith and collective bargaining. Perhaps one of the main criteria for assessing the effectiveness of the legislative changes will be to assess whether these have been associated with moves towards the Act's goals of increasing union membership and collective bargaining.

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