

SIX YEARS HARD LABOR: WORKERS AND UNIONS UNDER THE EMPLOYMENT CONTRACTS ACT

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The passage of the Employment Contracts Act (ECA) in 1991 indicated that the neo-liberal assault on the welfarist consensus that dominated New Zealand's parliamentary politics since 1943 was moving into its final stage. Claims of the success of the ECA from government and business circles have been quite staggering. The ECA, they claim, has been responsible for lowering unemployment, promoting growth, reducing employer costs, reducing wage inflation, and reducing strikes. A modern day miracle! The effect of the ECA on New Zealand workers and their organizations has not received anything close to the same attention. The workers' story is about increasing casualization, the destruction of collective bargaining, lowering of real wages, and massive deunionization. That story is also about the different responses of organized labor to the monetarist assault.

This Paper has two parts. The first describes the trade union landscape immediately prior to and following the passage of the ECA. It also describes the formation and response of the New Zealand Trade Union Federation (TUF) to the post-ECA industrial world. The second part is derived from a recent speech of Maxine Gay to a seminar on the role and usefulness of the New Zealand Employment Court. This form of presentation gives readers both a background to the formation of the TUF and a feel of the culture, passion, and at times irreverence of the organization and its new President. The TUF seeks to give voice to blue collar manufacturing, construction, transport, primary production, and service sector workers as they struggle for their survival in the hostile environment of the ECA and all the other aspects of full-blown economic liberalism that the New Zealand experiment

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contains. The change in tone of the second part reflects the intensity of current concerns, presenting the passage of the Act and the formation of the TUF in a way that reveals a greater distance from the passions of the day.

PART I

THE ECA AND THE NEW ZEALAND TRADE UNION FEDERATION

In 1993, two years after the enactment of the ECA, the New Zealand Trade Union Federation (TUF) was formed following growing discontent with the strategic approach adopted by the New Zealand Council of Trade Unions (CTU). The CTU and some key members, such as the Engineers Union, pursued what they claimed to be a realistic response to existing conditions. In reality, this response has embodied a wholesale adoption of business unionism and employer partnership rhetoric rather than tactics based on the need for independent workers' organizations representing the needs of workers, especially where those needs are in conflict with those of employers. A number of unions rejected these accommodationist policies and formed the TUF to promote a different model for New Zealand unionism. This vision includes expanding workers' organization, building alliances with other disadvantaged and marginalized social sectors, confronting globalization and corporate power, and promoting an independent workers' voice.

The CTU's compromised political position had been obvious since its formation in 1987, as the trade union movement became increasingly reliant on the Labour Party and a statist response to issues rather than a clear workers' struggle orientation. This statist orientation was characterized by increasing reliance on parliamentary and state regulation, lobbying, and negotiation rather than direct action and the organization of a workers' movement. Despite the suffering of their members, the trade union movement was notably silent during Labour's structural adjustment program of the 1980s. Jane Kelsey has outlined the key elements of this program.¹ She stresses the changes in fiscal and monetary policy, including currency devaluation and monetarist anti-inflationary policy; the removal of export and domestic subsidies; active pursuit of free trade programs and objectives; and a shift from direct to indirect taxation.² Associated with these changes came the corporatization and often privatization of state activities with, at the very minimum, a widespread commercialization of state functions.³ Related to this commercialization of state functions, government departments were split into policy and operational agencies with an increasing emphasis on commercial overtones. The final steps came with cuts to welfare benefits

1. JANE KELSEY, *THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT?* 1-11 (1995).

2. *Id.*

3. *Id.*

and a systematic application of policies assuming widespread charitable assistance justified by the argument that in many cases recipients of state support secured considerable private gain. These changes were the most blatant articulation of increasing dependence on women and Maori communities to provide social support. In the face of these attacks on workers, opposition was led by community groups, unemployed workers, and other increasingly dispossessed social sectors.

The trade union movement was able to use its influence in the Labour Party and in Labour's parliamentary caucus to ensure that labor market reform did not include the end of State-sponsored unionism. It responded to Labour's increasingly precarious political position in 1989/90 by negotiating an Australian Accord-like wages compact. This agreement limited workers' pay raises to 2 percent at a time when inflation was significantly higher. Although receiving millions of dollars of State money for trade union education during this period, the union movement did little as a whole to educate and organize against the neo-liberal policies of the Labour Government or to prepare workers for the likely onslaught from the National Party. The result was that, in 1990, the election victory by the conservative National Party left workers and unions facing an even more hostile government. The movement was woefully unprepared, unable and unwilling to resist the next wave of attacks on workers. Having politically and structurally isolated itself from workers during the 1980s, the CTU nationally did little if anything to organize resistance to the severe benefit cuts the National Government introduced in December 1990. The CTU left this job to unemployed workers, some unions,⁴ and other beneficiaries' groups. However, the real crime during this period was the CTU's refusal to campaign actively to defeat the Employment Contracts Bill. Although token opposition was mounted, an active campaign would have involved, in many people's minds, a general strike and an on-going campaign of mass struggle.

The National Government's plans regarding industrial relations reform were clear during the lead up to the 1990 election—it intended the complete deregulation of the labor market. The CTU, having committed itself to its compromising compact with Labour, could not organize an activist worker's movement at the same time. This predicament left the CTU tactically and politically unprepared for a struggle around the ECA. Furthermore, years of compromise with Labour's attacks on working people, through the structural adjustment program, made it difficult for the CTU even to appear as an effective opposition and thus gain credibility among workers.⁵

Otago University Political Studies lecturer Brian Roper has analyzed

4. For example, the Clerical Workers and Service Workers' Unions, and the Auckland and Manawatu District Councils of the CTU.

5. For an outline of these events, see Ellen Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labour Law Reform*, 16 BERKELEY J. EMPLOYMENT & LAB. L. 1 (1995), and ELLEN DANNIN, *WORKING FREE: THE ORIGINS AND IMPACT OF NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT* (1997).

the position adopted by the CTU leadership in terms of the theory of contingent bureaucratic conservatism, while Sarah Heal has specifically applied this approach to a consideration of the CTU response to the ECA.⁶ Although both Roper and Heal stress the need to consider the specific circumstances of any political or industrial struggle, they also urge the inclusion of the “contingent bureaucratic conservatism of full-time union officials.”⁷

Since the ECA’s enactment, the CTU leadership has continually failed to lead workers and to confront the policies that have caused so much damage. In terms of industrial responses, the CTU has emphasized the need for negotiation and compromise, while officials made concessions to ensure a union role as bargaining agent. Although the ECA denies unions a specific role in industrial relations, the CTU has been able to lay claim to an active role in the new industrial system by facilitating the introduction of employer plans. Overall, the CTU has failed to coordinate action against a range of attacks from militant employers and governments. In its response to the introduction of the Employment Contracts Bill in December 1990, the CTU failed to coordinate a general strike despite good evidence of overwhelming working class support for direct action. It chose, instead, to produce leaflets and press releases stressing workers’ “powerlessness” and to advocate compromise and negotiation.

The CTU’s isolation from rank and file membership along with its compromised political role during the fourth Labour Government, both factors explained by the notion of contingent bureaucratic conservatism, led the national body to seek negotiation on and amendment of the Bill rather than a strategy centered on opposition and defeat. Heal argues that a key factor in the final form of the ECA was the “capitulation of the trade union leadership to the wishes of employers and the National Government.”⁸ The CTU’s leadership failure was a major factor, as was the economic crisis and the shift in the balance of political and ideological power. Furthermore, the CTU did not simply display the characteristics of a contingently conservative bureaucratic leadership in regard to the ECA. In fact, the CTU had adopted a conciliatory approach from the outset and in negotiations over the Compact (1989) had proceeded in an undemocratic manner by failing to involve the rank and file in decision-making and keeping many of the specifics isolated from even the National Executive.

6. Brian S. Roper, *Leading From the Rear? A Theoretical Analysis of the Contingent Bureaucratic Conservatism of the NZCTU Leadership*, in *Labour, Employment and Work in New Zealand 1994: Proceedings of the Sixth Conference*, Nov. 24 & 25, 1994, 265-73 (Philip S. Morrison ed., 1995); Sarah Heal, *The Struggle Over the Employment Contracts Act, 1987-1991*, in *Labour, Employment and Work in New Zealand 1994: Proceedings of the Sixth Conference*, Nov. 24 & 25, 1994, 274-80 (Philip S. Morrison ed., 1995).

7. Roper, *supra* note 6, at 269.

8. Heal, *supra* note 6, at 274.

Special Affiliates Conference

The event which best captures and has come to symbolize the CTU's failure of leadership came in 1990/91 with the struggle over the introduction of the ECA. Most criticism has focused on the CTU's refusal to call a national strike. The national body persistently refused even to consider this tactic despite strong rank and file support for such action. Not only did it fail to take the leadership, but it refused to act according to the popular votes of its constituent members. This criticism turns around the crucial call for a general strike at a special affiliates conference held on April 18, 1991, less than a month before the Bill was finally passed. This call was defeated as a result of opposition by public sector unions, including teacher unions, the Public Service Association, and the Engineers. These unions voted against a general strike even where their own memberships overwhelmingly supported such action. Criticism of refusal to support a general strike gained support when the compromise "National Day of Action" held on April 30, 1991, drew mass support with over 60,000 protesters taking part. This special affiliates conference is a crucial point in subsequent trade union organization and a significant factor in the development of the TUF.

The conference was called to discuss a CTU National Executive proposal for a National Day of Action on April 30, 1991, but soon changed when Service Workers' Federation Secretary (and now Labour MP) Rick Barker moved an amendment calling for a 24-hour general strike after unanimous calls for such a tactic occurred at Service Workers' stopwork meetings. Barker's Amendment came after proposals from the Tramways and Journalists Unions for "a campaign of mass action to oppose the Employment Contracts Bill until it is withdrawn or defeated."⁹ The Barker Amendment was defeated, drawing 43 percent of a card vote (weighted for union membership numbers). The resolution was opposed by the public sector unions, the Engineers Union, and Financial Sector Union. The general strike call, however, had the active support of a number of unions outside the CTU, including the powerful Seafarers and Manufacturing and Construction Workers Unions. More important, a number of union officials voted against the decisions of their members to oppose the general strike call. The Nurses Organisation, for instance, opposed the Barker Amendment, even though 87 percent of Nurses Association members (the larger of the two elements of the Nurses Organisation) had supported a general strike.¹⁰ Union officials tended to argue that there had been no specific debate among their membership for a general strike, whereas the high level of support for general strike in stopwork meetings nationwide suggests that leadership should have been aware of the feeling (even if no ballot had been taken). The CTU leadership had made it clear they did not support a general

9. Heal, *supra* note 6, at 277.

10. *Id.*

strike and would not be leading the call for such action. Speaking in the South Island West Coast town of Hokitika on April 15, 1991, CTU President Ken Douglas had said that workers would be “waiting forever” for him to call for a general strike and that there has to be “an answer other than just leading a protest parade.”¹¹

The CTU’s refusal to lead a general strike and to demonstrate support for serious opposition to the ECA was a betrayal of its role at a crucial time. This betrayal was compounded by other (in)actions. The CTU leadership stressed compromise and had great faith in its negotiating ability, as seen in the approach of advocating modification rather than defeat of the Bill. The attitudes of the CTU leadership are summed up by Steph Breen of the Nurses Organization and John McKeefry of the Engineers Union. Breen argued: “There’s a difference between idealism and pragmatism and realism: about who’s got their feet on the ground and who’s just standing up waving the banner. If you’re going to say we’re going to do this you’ve got to be able to deliver or otherwise your credibility goes down the tubes.”¹² McKeefry adopts a far more compromised and concessionary approach, suggesting a much stronger sense of bureaucratic conservatism, when he argues the following:

They (National) were going to do it, *we’d best not enrage them further*, we’d best not take that option and what we’d best do is prepare a very well-researched submission arguing for the alternative which we needed to have a coordinated labour relations policy across the country to ensure that standards are kept up and that the emphasis is not on short-term wage cutting solutions but investing in training and skills and things like that and we’d best educate our own employees.¹³

McKeefry’s position that it would not be in unions’ interests nor serve their members’ interests to “enrage” the government or its allies seriously compromises the power of unions to support workers. This response, along with corporate unionism, where unions operate as businesses rather than sites of working class struggle, is now embodied in the Engineers Union’s policy and approaches, as well as in the positions adopted by the CTU.¹⁴

Ken Douglas, CTU President, explicitly advocates this employer partnership role. He justifies his advocacy of workplace reform as a means of

11. *Id.* at 276.

12. *Id.* at 278.

13. *Id.* (emphasis added).

14. This position is articulated and justified in Ken Douglas, *Organising Workers: The Effects of the Act on the Council of Trade Unions and its Membership*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* 197-209 (Raymond Harbridge ed., 1993); Rosalie Webster, *Operating Under the Act: One Union’s Experience*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* 237-50 (Raymond Harbridge ed., 1993); Suze Wilson, *Organized Labour in the Employment Contracts Environment*, in *Labour, Employment and Work in New Zealand 1994: Proceedings of the Sixth Conference*, Nov. 24 & 25, 1994, 281-84 (Philip S. Morrison ed., 1995).

building a more cooperative industrial relations environment by advancing the argument that union involvement is crucial to ensure the desired outcomes from quality improvement programs.¹⁵ Little in Douglas' case suggests that desirable outcomes for workers and employers are different. He builds his case for this as a modern approach to changed circumstances by portraying trade unions as basically conservative institutions resisting change merely for the sake of the protection of their own power.¹⁶ He says:

Cut off from decision-making responsibilities, unions focused on protecting workers from exploitation by using Taylorism as a base for shop floor power. Multiple job classifications were negotiated, wages were linked to the job instead of a worker's skills and a whole structure of job control unionism was born which gave unions a negative sanction against management but not a positive power to influence operations. Assisted by the wider role of regulation within the economy, unions were encouraged to believe that they were able to exercise a power of veto over all change in the workplace. This has led, in my view, to an ossification of thinking within the trade union movement and trade unions in particular, that has turned unions, which grew and developed as organizations for change, to protectors of the status quo.¹⁷

In this case, Douglas is arguing that the problem with unions is that they have resisted employers' attempts to increase their profits at the expense of workers' incomes.

The response required of the CTU, in Douglas's view, is one of its own re-education in issues of workplace reform and methods of work in consultative systems, clarification of employer plans and objectives, identification of union and labor movement needs in workplace reform, and the development of strategic activities to "produce the outcomes to achieve workplace reform and the productivity gains that will be made."¹⁸ Douglas appears to advocate the position that the role of the CTU is to identify union needs but then to develop a strategy that will implement the bosses' objectives. The TUF sees this as a flawed approach, premised on the notion that workers and employers have common interests and seek the same, or at least broadly similar, outcomes from workplace reform and other industrial relations changes.

Employer Partnership

This argument that unions are failing in the new industrial environment is also advanced by former Engineers Union organizer, Suze Wilson.¹⁹ She

15. Douglas, *supra* note 14.

16. *Id.*

17. *Id.* at 206-07.

18. *Id.* at 209.

19. Suze Wilson, *Organized Labour in the Employment Contracts Environment, in Labour, Employment and Work in New Zealand 1994: Proceedings of the Sixth Conference, Nov. 24 & 25, 1994, 281-84* (Philip S. Morrison ed., 1995).

asserts that unions are not well prepared or acting well under the new regime and are failing to represent any workers effectively as well as exposing the shallowness of their organization as based on a narrow range of approaches and tactics.²⁰ Furthermore, she contends, many unions have also failed to come to grips with the new environment. Like Douglas, she paints a picture of an ossified labor movement stuck in the past: “[T]he left/labour movement remains paralysed by immature debate about collaboration and the scope of the welfare state while workers remain exposed to, and poorly equipped for, the rigours of the market economy.”²¹ Over the years, the Engineers Union has responded to this exposure to market demands by implementing programs such as teams that direct workers’ organizational power to the service of the employer rather than organizing for workers’ objectives. Management at the Nissan plant in South Auckland implemented the team plan 1988 and 1989 with the active support of the Engineers Union—and over the opposition of other unions on the site. Similar programs have been introduced with the collaboration of the Engineers at Fisher and Paykel, New Zealand’s largest appliance manufacturer. This workplace reform has become a tool which employers use to undermine workers’ organization.

The most disturbing aspect of the reform process is that trade unions have actively aided this employer strategy. Janet Sayers, lecturer in Human Resource Management, criticizes claims that Total Quality Management-type schemes (such as those at Nissan and at Fisher and Paykel) are a sign that the ECA is working because these schemes actually began before the ECA.²² While she is correct in this chronology, the ECA is an ideological extension of the 1987 Labour Relations Act and an integral part of the structural adjustment program, meaning that these types of schemes should be seen as a sign of the Act’s acceptance and implementation. The ECA did not in itself represent a fundamental rupture in the direction of industrial relations policy, but is the final step in both the structural adjustment program and the culmination of changes since 1968.²³ The ECA facilitated the intensification of workplace reform rhetoric and its associated rates of exploitation, which is borne out by the experience of unions that see teamwork rhetoric increasing. This rhetoric is seen in attempts to build company loyalty and cut costs or increase the rate of exploitation, as a path to reducing union influence.²⁴

20. *Id.* at 281.

21. *Id.* at 283.

22. Janet Sayers, *Women, the Employment Contracts Act, and Labour Flexibility*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* 210-23 (Raymond Harbridge ed., 1993).

23. See Kevin Hince, *From William Pember Reeves to William Francis Birch: From Conciliation to Contracts*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* 7-12 (Raymond Harbridge ed., 1993).

24. See, e.g., NATIONAL DISTRIBUTION UNION, *SHORTCHANGED: RETAIL WORKERS AND THE ECA* (Auckland, 1997).

These strategies of compromise have done little to extend the reach of trade unions or to expand their membership base. The growth of the Engineers Union, for instance, has been almost exclusively due to mergers with other unions, notably the Printers Union, picking up members from the collapsed Communication and Energy Workers Union and by actively "poaching" other unions' members. This "poaching" has been most pronounced in the food and beverage and wood industries. The Engineers Union has made no secret of the fact that it intends to be the major union in both these sectors. Like any good corporation, it has identified that these are the growth areas, as compared to the shrinking metals sector which it traditionally covered. That the unions with the traditional coverage in food and wood have rejected amalgamation with the Engineers Union has simply given the signal to the Engineers to attempt to poach these already organized workers. Poaching tactics have included offers of discounted pay, TV subscriptions, and airfares for joining the Engineers Union. Where these tactics have not worked, the Engineers have recruited full-time organizers from among job delegates on sites they wish to poach, with the expectation that the rest of the workforce, will follow. Even this tactic has met with only partial success for the Engineers Union and disaster for the workers. A typical example of this is the Tegel Chicken site that had almost 100 percent membership in the United Food and Beverage Union before the poaching started. Now 30 percent belong to the Food Union, 30 percent belong to the Engineers Union, and 40 percent have become de-unionized. The employers, of course, are delighted with this scenario. There is little evidence of on-the-ground organizing by the Engineers Union in new sites or with new groups of workers. Approaches such as this do not extend the ambit of union organization beyond the core workforce, leaving marginal and other difficult-to-organize workers exposed to the tactics of employers, a decline in their working conditions, and the vagaries and insecurities of existence in secondary labor markets.

In addition to tactics which undermine the position of the hard-to-organize, such as a shift away from a focus on penalty rates, the CTU has intervened on a number of occasions since 1991 to force union amalgamations that further threaten the position of those in the secondary labor market. The most notable example of this was the case of the New Zealand Clerical Workers' Union (CWU).²⁵ The CWU was a union with a high proportion of women members covering a range of administrative and office occupations in a wide range of worksites and industries. The CWU was wound up in a series of steps in late 1991 and early 1992. The union had lost membership due to the ECA. The union's central district lost 15 percent of its membership between May and September 1991, the first four months of the Act. This rate is reportedly lower than the membership loss suffered by the Engineers Union in the same region during the same period. The deci-

25. Maxine Gay was a Clerical Workers Union organizer from 1985 to 1992.

sion to wind up the CWU was not taken as a result of the ECA or because this membership loss had made the union unviable, but rather because the CTU decided that the union, as an occupational rather than an industrial grouping, should not continue to exist in the new industrial environment. The primary beneficiaries of the CWU's dissolution were the Finance Sector Union (FINSEC) and the Engineers Union, both of which had lost significant numbers of members.²⁶

A more important concern than the self-serving machinations of CTU affiliates desperate to maintain membership numbers has been the effect of the CWU's dissolution on the extent of union organization and the range of issues at the core of organizing attempts. In the central region, covering the lower North Island and upper South Island, the CWU was one of the few unions with a significant number of organizers in regional areas. FINSEC, for instance, which took over responsibility for clerical workers in the banks and other finance houses, had no organizers in the region outside Wellington. Thus, those clerical workers outside that core area have lost their local representation and regular contact with union organizations. In addition, the move from occupational to industrial organization cost many clerical workers their specialist representation. Clerical workers became part of an organization with a number of other occupational groups with the result that the specific concerns of clerical workers became submerged in the concerns of a larger segment of the enterprise's workforce. The concerns of the small number of clerical workers in large factories have become lost in the issues of the much larger workforces on the factory floor. It is not surprising, therefore, that rather than strengthening the unionization of clerical workers, the destruction of the CWU led instead to much greater de-unionization than if the CWU had continued to exist. Equally importantly, the CWU had led the way on issues such as pay equity (comparable worth), women's involvement in trade unions, and action against sexual harassment. The collapse of the CWU has been a major setback for organization on these crucial issues.

New Zealand Trade Union Federation

The CTU leadership's ongoing resistance to an activist response to the ECA, coupled with its belief that the Bill could not be defeated, have created a major source of stress within the movement. A number of private sector unions, such as the Seafarers and the Manufacturing and Construction Workers Union—stalwarts of the now defunct Federation of Labour—declined to join the CTU after it was formed from the merger of the FOL and the Combined State Unions in 1987. Even at that time, these unions recognized a fundamental political and economic rupture between the inter-

26. See *Births, Deaths & Marriages*, LABOUR NOTES 4, Oct. 1991, at 12; Robert Reid, *De-unionising Clerical Workers*, LABOUR NOTES 5, Mar. 1992, at 4, 7.

ests of their members and those of workers in the core labor market represented by the majority of CTU constituent unions. The struggle over the ECA within the CTU did not cause these stresses, but it did accentuate and exacerbate them. A number of unions, such as the Manufacturing and Construction Workers Union, recognized that the political and tactical approaches of employers in their industries were likely to be different from those adopted by employers in, for instance, the public sector and that appropriate union responses would therefore be different as well. Although these unions were often criticized for fearing that a formal alliance with white collar and public sector unions would constrain their "militant" actions, these unions were more concerned with being able to determine political and industrial tactics appropriate to their industries. This criticism, mounted by those both within and outside the trade union movement, accepts the rhetoric that the strike and other forms of direct action were the preferred tactic of these unions simply because they preferred disruption. The criticism is inherently anti-union and is a surprising criticism to be mounted by other unions. A more common critique from within the union movement has been that these, primarily male, unions feared the influence of the feminized public sector unions. Using pseudo-feminist arguments obscures real differences of need and opinion within the union movement.

The CTU's lack of resistance to the ECA and its passionate embrace of what it called "strategic unionism"²⁷ was the final factor leading to the emergence of a second national trade union umbrella grouping. Between 1987 and 1993, the trade union movement was led by the CTU, although a number of unions remained independent. In 1993, twelve unions combined to form a second national trade union center, the NZ Trade Union Federation. The Federation's members are drawn from two primary sources: first, strategically placed and highly organized workers, such as seafarers, auto-workers, construction, and pulp and paper workers. The second source of membership are unions from the increasingly marginalized segments of the labor market or those where rates of unionization are uneven across the industry, such as those in clothing, footwear, clerical, hospitality, and other trade service occupations, as well as forestry workers and others in the primary sector. With the exception of the Service Workers Union (SWU), which represents workers in health care, janitorial, hospitality, and similar industries, the CTU membership is drawn from unions whose members' conditions most resemble standard employment. Although depicted by some as "dinosaurs" hoping to retain the tactical responses of the old-style trade union movement, held to be irrelevant in the post-Fordist, post-industrial economy, the emergence of the TUF is a recognition of the uneven distribu-

27. Bramble and Heal define "strategic unionism" as "a commitment by unions to forsake workplace industrial action in return for access to political power." Tom Bramble & Sarah Heal, *Trade Unions, in THE POLITICAL ECONOMY OF NEW ZEALAND* 119, 134 (Chris Rudd & Brian Roper eds., 1997).

tion of these trends towards postmodernity²⁸ with its variations in work style. It is also a recognition that tactics appropriate to some sectors are meaningless and useless in others. The tragedy of the CTU-TUF rupture is that the core unions simply cannot recognize that their experience is not the only experience, and have resisted efforts to build joint or cooperative approaches in response to common political issues.

This response points to the second source of pressure leading to the CTU-TUF disjuncture. The CTU, and the private and public sector union umbrella groupings before it, had adopted a consistently corporatist and statist response to workers' issues throughout the 1980s. Critics within the broader trade union movement saw this approach as failing to mobilize the influence that workers could have brought to bear on both politics and industry. As a result, the CTU leadership was seen as actively impeding workers' organization and influence. The distinction at this point was between unions that retained a strong class identification and a "class struggle" approach to organizing and those claiming to be more "realistic" in following the path of employer partnership. Politically, this distinction often, but not always, revealed itself through the parliamentary and party alliances of unions and their leaders.

Those dominant in the CTU also tended to be closely allied to the Labour Party and often seemed to be impelled by a need to ensure Labour's electoral success even at the expense of their members' needs and interests. This need was a prime factor in the Compact negotiated in the final months of the fourth Labour Government. The Compact was an attempt to depict the trade union movement as responsible and to effect some influence over economic planning and policy. As such, it flew in the face of the overwhelming neo-liberal agenda. Tactical debates are regularly framed by a discourse of union "responsibility." In other words, the preferred tactics were those that would not label those in the labor movement as wild hot-heads, and which would risk painting the Labour Party with the same brush. This is not to say that association with the Labour Party necessarily produces these responses. The SWU has strong Labour Party links, yet remains critical of many of the CTU approaches, while non-Labour activists often advocate the "responsible" position within the CTU. Equally, many leading members of the TUF have close Labour Party links, yet adopt a more critical and activist response. These "Labourist" tendencies are clearly moderated by the interests of workers within particular labour market segments. Relations between the CTU and the TUF must, therefore, be read within this complex political and economic dynamic.

28. This Paper uses this term in the sense it is used by DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (Oxford, 1989).

Second Wave of Attacks

This overview of the effects of the ECA and reconsideration of the tactical responses to the introduction of the ECA is not designed simply to criticize the CTU or to justify the formation of the TUF. Pressure is mounting for amendments to the ECA in the wake of the formation of a conservative coalition government after the 1996 general election. Employer and big business groups, especially the NZ Employers' Federation and the NZ Business Roundtable, are seeking the abolition of all specialist labor law in favor of reliance on contract law alone. Indeed, as some commentators have described, "the campaign to abolish the specialist labour law jurisdiction and its associated institutions is the unfinished agenda of labour market deregulation."²⁹ This debate also centers around the common law-specialist law disjuncture. Opponents of specialist institutions say that the legitimate role of the law is to ensure that contracts are negotiated fairly and in accordance with rules of common law, but that the content of the contracts should be left up to the parties. In this view, specialist law is seen to have costs in terms of freedom as well as economic costs where most organized groups of workers do best outside of the regime. Conversely, advocates of specialist law argue that common law is not an appropriate benchmark to assess success of specialist law while also invoking the historical evidence that the application of a common law approach in the late nineteenth century was found to be flawed, thus sparking the search for a new approach that resulted in specialist law. Different assumptions exist in regard to social, political, and economic power with the pro-common law argument assuming an equitable relationship between employer and worker. Missing from these debates is the question of whether specialist or any other courts benefit workers.

The challenge to specialist employment law is gaining momentum despite the powers given employers in recent court rulings. The primary struggle at present centers on the role and future of the Employment Court. The call from employers is that parliamentary power be invoked because the Employment Court has recently handed down a few rulings that do not clearly and exclusively meet their demands. Maxine Gay discussed this movement at a recent seminar on the usefulness of the Court.³⁰ The intensity and depth of feeling about these contemporary concerns is reflected in the tone of Part Two of this paper, largely based on that discussion.

29. ROSE RYAN & PAT WALSH, COMMON LAW VERSUS LABOUR LAW: THE DEBATE OVER THE FUTURE OF THE SPECIALIST INSTITUTIONS 16 (VUW Working Papers in Industrial Relations 2/93, VUW Centre for Industrial Relations, 1993).

30. Maxine Gay, *Is a Specialist Employment Court a Better Forum for Women?* (Paper presented as part of the N.Z. Institute of Public Law & N.Z. Institute for Dispute Resolution series on Women & Employment Law, July 16, 1997).

PART II

THE USEFULNESS OF THE EMPLOYMENT COURT

(derived from a seminar given by Maxine Gay)³¹

It is impossible to address the question of the usefulness of the Employment Court without reference to time, place, or circumstance. While the Employment Court is a better forum for workers than a general court, we must also note that the Employment Court is created under the Employment Contracts Act, one of the most pernicious and extreme pieces of industrial legislation in the world. As an institution created by the ECA, asking whether a specialist Employment Court is a better forum for workers is the industrial equivalent of asking whether a specialist doctor is a better person to perform female circumcision.

It seems, at times, that we in the trade union movement are developing a starry-eyed view of the current Employment Court following some recent judgments from that Court. To allow this view to dominate is to have too short a memory. The current Chief Judge, in 1989, heavily fined a TUF affiliate for an alleged contempt of court. That affiliate, the Seafarers Union, was exercising the internationally recognized right to strike. The same Chief Judge was responsible, once the ECA was in force, for the infamous *Alliance* decision, which cemented in the most extreme aspects of the Act.³² The union in the *Alliance* case requested the court to condemn various union busting employer tactics, and the Court declined to do so.³³ The Court of Appeal was left with the task of removing some of the harshness of the *Alliance* decision.³⁴ It is of little comfort to unions that the Employment Court later repudiated its views. By that time, the damage was done.

A similar comment can be made in relation to partial lockouts. It was this specialist court that endorsed the legality of such lockouts, where workers were held to be legally obliged to accept unilateral pay cuts. Two years later, the Court reversed its decision and condemned such lockouts as equivalent to serfdom, but by then substantial damage had been done.³⁵ Just because some recent decisions of the Employment Court have sometimes given some balance to the ECA, we tend to forget that the initial decisions of this same Employment Court were even more extreme than the extremism of the ECA itself.

It is somewhat incongruous that the current more balanced approach of the Employment Court was initially forced on it by the non-specialist Court of Appeal. It is even more incongruous that the Court of Appeal, after sending the Employment Court away on the path to rectify its previous er-

31. *Id.*

32. *Adams v. Alliance Textiles (N.Z.) Ltd.* [1992] 1 E.R.N.Z. 982.

33. *Id.*

34. *Eketone v. Alliance Textiles (N.Z.) Ltd.* [1993] 2 E.R.N.Z. 783.

35. *Wiltshire v. Presbyterian Support Services (Northern)* [1994] 1 E.R.N.Z. 578.

rors, then changed tack itself—a change which even caused one of its own members, Judge Thomas, in *Ivamy*, to conclude that “it is not to be expected that employers and employees alike may conclude that collective bargaining in the form recognized by the Employment Contracts Act is largely vitiated.”³⁶

Given that we are not lawyers,³⁷ we are probably more at liberty to comment that the twists and turns of both the Employment Court and the Court of Appeal on these matters seem to depend more on what is happening politically than on points of law. The intervention of the Court of Appeal in the decisions of the Employment Court just happened to coincide with the complaint of the CTU to the International Labour Organization about the violations of ILO conventions 87 and 98. Between the ILO upholding the complaint of the CTU and the ILO Direct Contact Mission, the Court of Appeal, then the Employment Court, made a number of decisions that moderated the extremes of the ECA and also the extremes of its own previous decisions and those of the Employment Court. This action meant that the ILO Direct Contact Mission was able to moderate the initial findings of the ILO on the Complaint. However, soon after the report of the ILO Direct Contact Mission had been made, the Court of Appeal made an abrupt about-face of which *Ivamy* is the prime example.³⁸

The Employment Court has largely failed to meet the needs of women workers in matters of specific concern to them, primarily pay equity/comparable worth and sexual harassment. Wendy Davis has noted that “the gender bias of decision makers has resulted in decisions which perpetuate male power and privilege, disregard the interests of women, and threaten to undermine the objects of the legislation which make sexual harassment unlawful.”³⁹ Three years later, Caroline Sarah Morris, in a report prepared for the Employment Court, noted that “although the poor record documented by Wendy Davis from 1991 to 1993 seems to have improved there is still a distinct trend to undervaluation of the hurt experienced by women in the events leading to a personal grievance claim.” She continues with the following:

Women seem to have to suffer more than men in order to receive the same amount of compensation, and when the comments discussing worker distress are analysed, similar amounts are made to men and women who suffer differing emotional consequences from their personal grievances. This trend is consistent from 1991-1995 and occurs in both unjustified dis-

36. *N.Z. Fire Service Commission v. Ivamy* [1996] 1 E.R.N.Z. 85.

37. *See supra* note 30. This symposium and the seminar series from which this paper is drawn both feature authors who are practicing attorneys directing their writing to a legal audience.

38. *See supra* note 36.

39. Wendy Davis, *Feminist Perspective on Sexual Harassment in Employment Law in New Zealand* (unpublished LLM Research Paper, Victoria University of Wellington, 1993) (on file with author).

missal actions and sexual harassment cases.⁴⁰

The Court is largely failing to recognize the specific concerns and needs of women in cases that include a sexual harassment claim. This problem is also evident in questions of employment equity. Lorraine Skiffington says:

[T]he specialist employment jurisdiction has failed to deliver employment equity to women employees . . . and that rather than breaking down barriers to employment equity the Employment Contracts Act has given employers more scope to exploit women. . . . While the specialist employment jurisdiction provides several avenues to address employment inequities, law is fundamentally reactive and incremental, providing limited remedies for the few cases brought before it. . . . Importantly it must not be forgotten that employment law is created by male legislators and presided over by a wholly male judiciary . . . the Chief Judge has publicly stated that the next three appointments should be women to reflect the gender mix of the workplace.⁴¹

Skiffington concludes by stating that “until this happens little progress is likely to emanate from employment law.”⁴² It is, however, not just a question of the gender mix in the Court. The abolition of the Employment Equity Act was justified as a step to allow the “market to determine incomes.” Women’s marginalized position within the labor force and the segmentary nature of the labor market means that employers have everything to gain from keeping women’s incomes lower than men’s, even where they perform substantially the same functions. Equal pay, forced on employers by legislation, did not significantly close the earnings gap because employers were able to use mechanisms such as job redefinition and workplace reform style processes to reinforce women’s marginalization. Without a legislative base to build a case for employment equity, the Court cannot and will not bring about any significant change.

If within the context of the ECA the Employment Court fails both men and women workers, why do we say that in general terms the Employment Court is better for workers? First, let us consider some of the arguments put forward for the abolition of the Employment Court. In August 1996, the NZ Business Roundtable and the Employers Federation jointly published a study by Bernard Robertson on the Status and Jurisdiction of the New Zealand Employment Court. In a typical piece of BRT/EF tautology, this study begins by claiming that any specialist court “constitutes an interference with the independence of the judiciary.”⁴³ It then claims that the ECA “breaches

40. Caroline Sarah Morris, *An Investigation into Gender Bias in the Employment Institutions* (Interim Report prepared for the Employment Court, Feb. 1996).

41. Lorraine Skiffington, *Employment Equity - Unfinished Business* 13 (Paper presented at Closing the Gap: A Forum on Equal Pay, Wellington, June 1997).

42. *Id.* at 13, 14.

43. BERNARD ROBERTSON, *STATUS AND JURISDICTION OF THE NEW ZEALAND EMPLOYMENT COURT* vii (N.Z. Business Roundtable & Employers’ Association, Wellington,

fundamental constitutional principles” by depriving private citizens the right of access to “ordinary courts” and that the role of the Court of Appeal in employment law undermines the arguments for a separate jurisdiction. Robertson concludes that “the only solution which avoids creating disputes and which preserves the principles of free contracting, the independence of the judiciary and the equal application of the law is the abolition of the specialist employment jurisdiction.”⁴⁴ John Timmins, an Auckland barrister, takes issue with Robertson, seeing his case as “surely specious.” He continues:

It ignores the existence of a raft of specialist courts including, for instance, the Family Court, the Children and Young Persons Court, and the Planning Tribunal (now renamed the Environment Court). There is no magic status of the High Court; rather it is the constitutional role of the courts generally that is important to the fabric of our society. Certainly the Court of Appeal has had no hesitation in holding that the Employment Court is clearly one of the Queens’ Courts. To take Mr. Robertson’s premise to its logical conclusion is to result in absurdities.⁴⁵

New Zealand has a long tradition of jurisdictions specific to certain circumstances. Specialist employment law is a recognition of the complexity and particularity of the issues involved. Not only would the abolition of the Employment Court on the grounds advocated by Robertson imply logical absurdities, but it would also reinforce employer power over workers in the most absolute way.

The current debate on the need or not for a specialist Employment Court is not really about the Court. In reality, it is nothing other than camouflage for the broader and even more sinister agenda of the new right forces. Jane Kelsey recently exposed part of this agenda by identifying two underlying motives for the attack on the Employment Court.⁴⁶ The first is the desire to extend neo-liberal hegemony from the bureaucracy, government, media, and private sector to the judiciary. The second is the desire to reinforce the myth that there is a “level playing field” in employment. This desire is shown in the move to treat employment contracts under the terms of ordinary contract law.⁴⁷

The extent to which this agenda is unfinished was shown in 1996 with the publication of a BRT/EF publication opposing unjustified dismissal provisions. In this, Baird argues that, although the ECA is a “giant step toward the restoration of freedom of contract in New Zealand labour markets,” it has some deficiencies.⁴⁸ As he sees it, “the principle [sic] deficiency of the

Aug. 1996).

44. *Id.* at viii.

45. John Timmins, *Courts Have Their Constitutional Rights*, NAT’L BUS. REV., Sept. 20, 1996.

46. Jane Kelsey, *Mad Max and the Future of the ECA*, LABOUR NOTES, Mar. 1997, at 6, 7.

47. *Id.*

48. CHARLES W. BAIRD, *THE EMPLOYMENT CONTRACTS ACT AND UNJUSTIFIED DIS-*

ECA is its mandate for unjustifiable dismissal restrictions in all employment contracts, collective and individual. Prior to the ECA, only unionized workers were 'protected' by mandatory unjustifiable dismissal restrictions."⁴⁹ Baird argues in favor of "at-will" employment contracts where either party has the right to sever an employment relationship, which would require the ending of unjustified dismissal provisions statutorily required as part of all employment contracts.⁵⁰ The argument relies on the assumption that workers and employers negotiate as equal parties, and calls the notion of unequal bargaining power a "hoary myth."⁵¹ Yet Baird is concerned with maintaining employer power, criticizing unjustified dismissal provisions as effectively transferring job property rights from employers to employees.

These demands for a second wave of industrial relations reform are articulated as attacks on judicial functions in disputes and the ability to fire at will—both of which are involved in Baird's case against unjustified dismissal provisions. Recent Court rulings suggest that judicial interpretations of the ECA have significantly met the demands of these employer groups. In the recent Court of Appeal case, *Principal of Auckland College of Education vs. Hagg*, the Court ruled that non-renewal of a fixed-term contract did not constitute dismissal and could not therefore be considered unjustified dismissal.⁵² This interpretation of the ECA seems to apply even where a worker has been employed on a series of fixed-term contracts which are used to avoid the obligations of long-term employment. In other words, fixed-term agreements to breach the requirements of the ECA appear to be *prima facie* legal. The majority judgment of the Court in this case recognized the potential for an entire workforce to be employed on a series of fixed-term contracts, but recognizing that this view may violate article 2(3) of ILO Convention 158, the Court observed that it was not its place to remedy such a breach. Given that there is now no legal impediment to a series of fixed-term contracts and that good evidence exists that these contracts may be outside the limited protections of the ECA, the business case for amendments to the ECA seems to have lost its basis. The ECA provides almost no protection to workers, and the position of workers in marginal portions of New Zealand's increasingly segmented labor market has become even more precarious.

The campaign of the Business Round Table, Employers Federation, and the National New Zealand First Coalition Government against the Employment Court and its Chief Judge for "judicial activism" must also be seen as part of the wider campaign for the abolition of personal grievance procedures and the introduction of "fire-at-will" employment. Employer attacks on the Employment Court, therefore, are part of a campaign to introduce

MISSAL: THE ECONOMIC OF AN UNJUST EMPLOYMENT TAX v-vii (Wellington, 1996).

49. *Id.*

50. *Id.*

51. *Id.*

52. Unreported, C.A. 230/96 (Mar. 26, 1997).

completely casualized employment. As so often before, the forces of the new right have used the Business Round Table as the storm troopers of this old employment philosophy dressed up as a new concept. The Employers Federation has, as usual, been somewhat more moderate in its demands, seeking such a "fire-at-will" system of employment only for the first two years of a worker's employment. The Coalition Government sits as the referee in this debate, dedicating itself to amend the ECA to bring greater "fairness, flexibility and neutrality."

In one of his initial speeches on this matter, two years ago on July 22, 1995, Roger Kerr, Executive Director of the Business Round Table, espoused the need to change the current "dismissal with a cause" system with what he termed an "employment at will" system.⁵³ In so doing, he quoted from U.S. Judge Richard Posner in a 1989 Cardozo Law Review article:

Employment at will is a corollary of freedom of contract, and freedom of contract is a social policy with a host of economic and social justifications. Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, forced servitude and guild restrictions. That should be a point in its favor.⁵⁴

What a triumph of obfuscation! This is what happens to the free marketers who reject the need for any plan or map. They think they have arrived at the terminus of a road that begins with slavery when in fact they have gone in full circle and ended up from where they have started.

Is the Specialist Employment Court a better forum for workers? The answer must be "no" if we compare it to the Arbitration Court of the Industrial Relations Act, or even the Labour Court of the Labour Relations Act. The Arbitration Court had the ability to make "awards," which ensured that the most vulnerable of workers received wages and conditions well in advance of what the market would have provided. The Arbitration Court was the instrument of the implementation of equal pay in the 1960s and 1970s. The answer must be a resounding "yes" if we compare it to what the Business Round Table and the Employers Federation have in mind for us. Their abolition campaign is part of an attempt to bring the entire judiciary to heel, to eliminate any aspect of the human element from employment law, and to reduce it simply to an aspect of ordinary contract law. It is part of an attempt to abolish personal grievance procedures and to replace the current "dismissal with cause" system with "dismissal at will" to completely casualize the New Zealand workforce. It is an attempt to remove the last vestige of employment security that workers in New Zealand have. If the terminus for worker rights is no rights at all, what does that say about our society as

53. Roger Kerr, Appeals to the Privy Council, New Zealand Bar Association Conference (July 1995).

54. *Id.* at 2 (citing Richard Posner, *Hegel and Employment at Will: A Comment*, 10 CARDOZO L. REV. 1625-36 (1989)).

we move into the twenty-first century?

CONCLUSION

Since 1984, an ongoing employer assault on the New Zealand working class has met only minimal resistance from the trade union movement and, since 1987, its primary national trade union center, the CTU. The CTU and its model unions are now so compromised that they are unlikely to be able to marshal workers' forces to mount effectively a new stage in the war of position to resist the attacks from the employers organizations and the new-right ideological hegemony. Clearly, new approaches are necessary that reflect the range of circumstances within which workers find themselves. The trade union movement, as the voice of working people, needs to return to the principles of mutual solidarity and support. It needs to reach out to marginal sectors of the workforce, to unemployed workers and other beneficiaries, to build alliances with others suffering under the structural adjustment program. In short, a desperate need exists for tactical and strategic innovation that moves beyond corporatist unionism and is based in active struggle against the continual weakening of working class power. The CTU does not seem able or willing to provide that leadership. There is every likelihood that working people will respond well to new organizations and new systems reflecting their needs as the suffering imposed through the New Zealand structural adjustment program continues. The New Zealand Trade Union Federation, although still in its infancy, is committed to building a block of genuine and independent trade unions and to organizing and advocating on behalf of its members and the working class as a whole.