

CONTESTED OUTCOMES: ASSESSING THE IMPACTS OF THE EMPLOYMENT CONTRACTS ACT

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INTRODUCTION

There are a number of reasons why analysis of the outcomes of the Employment Contracts Act is both contentious and complex. The contentiousness is a reflection of the conflicts surrounding the passage of the legislation and the broader issues of the respective roles of unions, employers, and the State in the establishment of conditions of employment and the regulation of labor markets. Ideological divergence inevitably underpins debates on these matters and influences the data that are sought and disseminated in the public arena as supporting "evidence" for positions adopted. As one commentator has said, "[t]he technique is simple. Quote only the material that supports your case, and do not address the critics. Do not even mention them, because the reader might look up the critic and see the strength of the argument, even if you have misrepresented it."¹

The complexity lies in the limitations of the information available publicly to inform these debates. Statistics New Zealand, like many other government departments and agencies in recent years, has been forced into a cost-cutting mode. Unlike Australia and the United Kingdom, New Zealand has no regular reliable workplace surveys that establish sound bases for longitudinal assessments of changes in workplace conditions and practices.² Most particularly, in the context of assessments of the impacts of the Employment Contracts Act, little systematic research and information is available about the secondary labor market. In terms of "evidence," some of the key debates on the Act draw upon opinion-based surveys and limited if not biased frames of reference and analysis. And other aspects of the assess-

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1. Brian Easton, *Ignoring the Critics*, LISTENER, Feb. 1, 1997, at 60.

2. Erling Rasmussen, *Workplace Reform and Employee Participation in New Zealand*, in INNOVATION AND EMPLOYEE PARTICIPATION THROUGH WORKS COUNCILS 392 (Raymond Markey & Jacques Monat eds., 1997).

ment, as we will see in examining the debate over productivity, are inherently problematic.

“Outcome” Measures: The Questions to Be Asked

Given the genesis of the Employment Contracts Act and its subsequent history, any analysis of the Act’s impacts, including ours, is likely to be controversial. Reading the debates around the passage of the Employment Contracts Act suggests that the perceptions of the major parties in those debates—employers, unions, government, and the political parties—as to the “real” intentions and significance of the Act were, in their public expression at least, quite different. The Act had multiple agendas attached to it. Some of these agendas were quite explicit, as for example in the stated intention of the Act as an Act designed to promote an efficient labor market through encouragement of voluntary unionism and individual contracting in employment matters.³ Evaluating achievements against such explicit intentions is far from easy. But in addition, other agendas were implied, and these varied according to a particular party’s perception of the political and ideological forces driving the legislation. The union perception, for example, was that the Act was clearly designed to diminish union influence, undermine long-standing practices of collective bargaining, and drive down the real level of wages.⁴ Government spokesmen, however, saw the Act as opening up a brave new world of higher productivity, increased employment opportunities, improved workplace relations, and widespread prosperity.⁵

Inevitably, given the differences in perception as to the intentions of the legislation, the debate on the “outcomes” of the Act has been similarly polarized. Roger Kerr, Executive Director of the New Zealand Business Roundtable, has rightly recognized that not all economic improvements in New Zealand since 1991 can be attributed to the Employment Contracts Act. Nevertheless, directly or by association, he argues that the Act has led to economic, employment, and productivity growth; significant reductions in unemployment; and “enormous changes in enterprise culture, in particular far greater trust and cooperation in workplaces, less disputation and more job security.”⁶ In contrast, Ken Douglas, President of the New Zealand Council of Trade Unions, argues that the Employment Contracts Act has failed to raise national prosperity and has been “a key instrument in widen-

3. Employment Contracts Act, 1991 (N.Z.).

4. Ken Douglas, *Organising Workers: The Effects of the Act on the Council of Trade Unions and its Membership*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND 197* (Raymond Harbridge ed., 1993).

5. Bill Birch, *A Stepping Stone on the Path to Prosperity*, *DOMINION*, May 1, 1991, at 10; *NATIONAL PARTY, NEW CHOICES IN INDUSTRIAL RELATIONS* (1991).

6. Roger Kerr, *Obstacles to Employment and Productivity Growth in New Zealand’s Labour Market* (Institute of International Research, 11th Annual Industrial Relations Conference, 1997) (unpublished, on file with author).

ing inequality in the distribution of income, wealth, and power in New Zealand, both between classes and within classes.”⁷

Each party, in arguing about the outcomes of the Employment Contracts Act, gives precedence to a particular set of indicators, generally those that are congruent with their original frames of reference concerning the merits or otherwise of the legislation when it was originally conceived. Since the range of indicators that can be drawn upon is quite large, it is not surprising to find frequently that the parties talk past each other. Positions are reinforced but not modified on the basis of the available data and its possible interpretations. While we must accept that there can be no final objective assessment of the impacts of the legislation, it may nevertheless be helpful to clarify the different kinds of questions that are being asked about the Act's outcomes. We can then look at the extent to which there are data available to throw light on these questions before re-engaging the debate about the relationship of these data to the Act itself.

This Article discusses some of the issues raised by attempts to measure, evaluate, and agree upon the outcomes of New Zealand's Employment Contracts Act 1991. It initially sets out a range of questions that have been raised concerning the impacts of the Act. It then summarizes, on the basis of research completed to date, the answers to some of those questions in so far as they are currently known. For the sake of analysis, we have classified the questions being asked in association with the Employment Contracts Act related to the period since 1991 into four categories: institutional, economic, social, and political.

*Institutional*⁸

Has there been a shift from collective to individual bargaining and from collective employment contracts to individual employment contracts? What changes have there been in representation in bargaining? What changes have there been in union membership numbers and in union density? What changes have there been in the numbers and forms of disputes and in the procedures used to resolve them?

Economic

What movements have there been in real wages? What changes have there been in wage dispersion? What has happened to productivity in general and labor productivity in particular? What changes have there been in levels and kinds of unemployment? What changes have there been in labor

7. Ken Douglas, *Forming Productive Partnerships for Greater Prosperity, Productivity and Parity* (Institute of International Research, 11th Annual Industrial Relations Conference, 1997) (unpublished, on file with author).

8. The questions in this category concern bargaining relationships and the institutional structures and processes surrounding bargaining.

force participation? Has there been increased casualization of work? Has there been a shift from full-time to part-time employment? Do workers have more or less job security?

Social

What have the impacts been on New Zealand society? Is there greater or lesser disparity in the distribution of wealth and status? Have the rich become richer and the poor poorer? Do people have more or less in control of their lives? Are they more or less dependent upon the state? Do they have an increased or decreased sense of economic and social security? Is there an increased or reduced sense of equity and justice? Is there a greater or lesser sense of community?

Political

Has there been a shift in the balance of power in the workplace between workers and management and between unions and management? Has there been a shift nationally in the relative power and influence of unions and employers vis-a-vis government? What has been the impact of the debates surrounding the Employment Contracts Act on the relative standing and electorate appeal of the political parties and on the viability of alliances between them?

Other questions could have and have been asked in relation to the outcomes of the Employment Contracts Act, and some of them provide the basis for other contributions to the present *Symposium*. In broad terms, the debates to date in New Zealand have clustered around data related to institutional and economic questions and the interrelationships between them. Indeed, as we shall see, much of the advocacy for further reform of the Act rests on the presumption that additional institutional changes, particularly with respect to the roles of the Employment Court and the Employment Tribunal, provide the key to improved economic performance. In contrast, in-depth considerations of the Act's impacts from a societal and equity perspective, very necessary as they are to a more comprehensive assessments of its outcomes, are less common.⁹

Bargaining Institutions and Outcomes

The institutional questions are the easiest to answer. The Employment Contracts Act has had clear and measurable impacts on bargaining structures and bargaining processes and the role of bargaining agencies. Since 1991, there has been a massive shift from collective employment contracts

9. But see ELLEN J. DANNIN, *WORKING FREE* (1997), for a social equity focus rather than a purely economic and institutional one in assessing the outcomes of the ECA.

(CECs) to individual employment contracts (IECs). It has been estimated that collective contracts covered around 56 to 60 percent of the total employed workforce prior to May 1991.¹⁰ This was to some degree attributable to the notion of "blanket coverage," whereby wages and conditions were applied to a particular industry or occupation.¹¹ The elimination of blanket coverage produced an immediate shift towards individual employment contracts, with 45.6 percent of the workforce being on IECs by February 1992¹² and 56.6 percent by February 1993.¹³ There has been no economy-wide survey focusing on the distribution of collective and individual employment contracts since February 1993. It is possible, however, to establish a rough estimate of the distribution by piecing information together from surveys of bargaining trends and from the two databases of collective employment contracts.¹⁴ The two databases cover around 20 to 24 percent of the workforce, but there are probably a number of smaller CECs that are not covered by the databases.¹⁵ Thus, we would estimate that around 25 to 30 percent of the workforce are covered by CECs.

The shift from CECs to IECs, together with the fall in union density described below, have brought large changes in bargaining representation. However, the unions have kept their representation status when it comes to the negotiation of CECs. According to the two databases on CECs, unions represent over 80 percent of all employees covered by CECs.¹⁶ While there has been a rise in representation by other employees at the workplace, there has yet to be a significant increase in the use of professional "bargaining agents."

Of all the direct outcomes that can be unequivocally attributed to the Employment Contracts Act, the massive decline in union membership has

10. Jelle Visser, *Trends in Union Membership*, 1991 EMPLOYMENT OUTLOOK 97-134.

11. JOHN DEEKS ET AL., *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND* 66 (1994).

12. Grant Andrews & Erling Rasmussen, *Quarterly Employment Survey, February 1992—Survey of Employment Contract Coverage*, in *DIVERGENT PATHS?* 30 (Nigel Haworth et al. eds., 1993).

13. STATISTICS NEW ZEALAND, *LABOUR MARKET* 1994 159 (1995).

14. The most influential and comprehensive surveys are the following: HEYLEN RESEARCH CENTRE & TEESDALE MEULI & Co., *A SURVEY OF LABOUR MARKET ADJUSTMENT UNDER THE EMPLOYMENT CONTRACTS ACT 1991* (1992); HEYLEN RESEARCH CENTRE, *A SURVEY OF LABOUR MARKET ADJUSTMENT UNDER THE EMPLOYMENT CONTRACTS ACT 1991* (1993); JOHN SAVAGE & DAVID COOLING, *A PRELIMINARY REPORT ON THE RESULTS OF A SURVEY ON THE EMPLOYMENT CONTRACTS ACT* (NZEIR Working Paper 96/9, 1996). It should be noted that the Department of Labour undertook another survey in August 1996, but the survey results have yet to be published. See Mathew Dearnaley, *Survey of Contracts Act and Election Year Not Linked*, N.Z. HERALD, Mar. 16, 1996, at 5.

15. Raymond Harbridge & Aaron Crawford, *The Employment Contracts Act and Collective Bargaining Patterns: A Review of the 1996/97 Year*, in *EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1996/97* 6 (Raymond Harbridge et al. eds., 1997); DEPARTMENT OF LABOUR, *CONTRACT* 22 (1997).

16. Harbridge & Crawford, *supra* note 15, at 6; DEPARTMENT OF LABOUR, *CONTRACT* *supra* note 15, at 22.

been the most marked. There was an immediate decline in union membership from 603,118 members in March 1991 to 428,160 in December 1992.¹⁷ While the membership decline has continued since then, it has been of a lesser magnitude—to 362,200 in December 1995.¹⁸ The current stagnation in union membership must be seen in relation to the large increase in employment since 1992. Because of the inability of unions to recruit a sufficient number of new members in the last three or four years,¹⁹ there has been a continuing fall in union density—from around 41 percent in March 1991 to around 21.7 percent in December 1995.²⁰ Interestingly, the number of trade unions increased from 58 in December 1992 to 82 in December 1995.²¹ Consequently, despite union mergers and closures in the intervening period, by the end of 1995 the number of unions was almost identical to the number in existence (80) at the time of the passage of the ECA.²²

In discussing the data on disputes, it is necessary to distinguish between collective disputes in terms of work stoppages (strikes and lockouts) and individual disputes in terms of claims before the Employment Tribunal. The number of recorded work stoppages has been relatively stable in the 1991-96 period, fluctuating between 54 stoppages in 1992 and 69 stoppages in 1995.²³ However, the picture is different when the impact of stoppages on working days and wages lost is considered. Lost working time was the highest in 1992, with 113,700 working days lost, compared to only 23,800 days, 38,300 days, and 53,400 days lost, in 1993, 1994, and 1995, respectively. A similar picture is found when the loss of wages is considered. The latest official figures released show the same level of disputation, as there were 74 stoppages involving 44,400 employees in the year to December 1996.

The level of lockouts fluctuated strongly. Lockouts constituted between 4.2 percent and 11.1 percent of all stoppages in the 1991-94 period, but declined sharply in 1995 to constitute 2.9 percent of all stoppages.²⁴ The decline in 1995 is probably associated with the fact that, subsequent to a decision by the full bench of the Employment Court in June 1994,²⁵ a partial

17. Raymond Harbridge & Anthony Honeybone, *Trade Unions Under the Employment Contracts Act: Will the Slimming Be Fatal?*, in *THE CHALLENGE OF HUMAN RESOURCE MANAGEMENT* 235 (Peter Boxall ed., 1995).

18. STATISTICS NEW ZEALAND, *LABOUR MARKET* 96, 123 (1997) [hereinafter 1997 STATISTICS NEW ZEALAND].

19. Unions have recruited new members, but some unions—for example the Service Workers union—will have to recruit at least 20 percent of its total membership each year to avoid an overall decline in its membership numbers.

20. Aaron Crawford et al., *Unions and Union Membership in New Zealand: Annual Review for 1995*, 2 N.Z. J. INDUS. REL. 2, 188-93 (1996).

21. 1997 STATISTICS NEW ZEALAND, *supra* note 18, at 123.

22. Erling Rasmussen, *New Zealand Employment Relations—Settling Down or . . . ?*, 2 INT'L EMP. REL. REV. 59-73 (1996).

23. 1997 STATISTICS NEW ZEALAND, *supra* note 18, at 122.

24. *Id.* at 104.

25. Felicity Lamm, *Chronicle*, 19 N.Z. J. INDUS. REL. 334 (1994). The case was *Witihera v. Presbyterian Support Services (Northern)*, A.E.C.31/94 (E.C.), June, 17, 1994.

lockout is no longer considered lawful under the Act. It is mainly in manufacturing and in the public sector that work stoppages have occurred. The two industrial classifications—"manufacturing" and "community, social, and personal services" (which partly incorporates the public sector)—accounted for over 75 percent of all stoppages during 1992-95. In 1995, the public sector lost more in working days and wages than the private sector.

Since the introduction of the Employment Contracts Act, there has been a significant growth in claims brought to the Employment Tribunal. In the year to June 1992, the Tribunal received 2,332 applications. This increased to 5,144 cases in the year to June 1996.²⁶ The large majority of these applications were in respect of personal grievances alleging unjustified dismissal.²⁷ A number of explanations can be offered for this growth.²⁸ First, the Act significantly expanded coverage of the personal grievance procedures, with people on individual employment contracts gaining access to the Employment Tribunal and the Employment Court.²⁹ Many of these people have the resources, education, and will to take cases to the Tribunal.

Second, the growth in tribunal cases has been influenced by the declining role of unions in settling disputes before they enter the legal grievance machinery, and the willingness of other employee representatives (mainly lawyers and consultants) to take claims to the Tribunal and Court on a contingency fee basis. To this must be added the incentive effect, prior to April 1997, of avoiding the 26-week stand-down period before unemployment benefits were payable. The stand-down period covers employees leaving their employment voluntarily, but employees who could prove in front of the Tribunal that they were unjustifiably dismissed could draw such benefits immediately. It has been alleged that, as a consequence, a number of claims have been prosecuted on flimsy ground or on the basis of procedural irregularities in the dismissal process. In April 1997, in part implementation of the recommendations of the Employment Taskforce,³⁰ the stand-down period was reduced to 13 weeks. It remains to be seen whether this will influence the number of cases taken to the Employment Tribunal.

It has become a frequent complaint from employers and unions alike that American-style litigation has become more accepted in New Zealand in recent years. The rise in personal grievance cases brought to the Employment Tribunal, and in occupational safety and health cases brought to the

26. Harbridge & Crawford, *supra* note 15, at 47.

27. Alastair Dumbleton, *The Employment Tribunal—Four Years On*, 1 N.Z. J. INDUS. REL. 22 (1996).

28. Raymond Harbridge, Recent Industrial Disputes and the Impact on Future Industrial Relations Management (Institute of International Research, 11th Annual Industrial Relations Conference, 1997) (unpublished, on file with author).

29. Erling Rasmussen et. al., *Industrial Relations and Labour Market Reforms in New Zealand*, in STATISTICS HUMAN RESOURCES DEVELOPMENT OUTLOOK 1995-1996 (Pacific Cooperation Council (PECC), 1996).

30. Erling Rasmussen & Gavin Schwarz, *Chronicle*, 30 N.Z. J. INDUS. REL. 344-45 (1995).

District Courts, and the detailed attention paid by employment relations managers to procedural and contractual matters, are all indicative of such a shift towards increased litigation over employment issues. It can be argued that the Business Roundtable and the New Zealand Employers' Federation have contributed to this trend, since their long campaign against the Employment Court (in particular, the notion of procedural fairness) has convinced many employees that "it is impossible to dismiss anybody." One can also speculate that the large compensations to employees mentioned in the media have been another contributing factor.³¹

The non-prescriptive or "enabling" nature of much of the Employment Contracts Act has, in the determination of lawful employment practices, placed too great an emphasis on the development of legal precedents. This has given rise to more cases at the Employment Court and to numerous appeals at the Court of Appeal. It is a cumbersome, drawn-out process which adds to the insecurity of employers and employees and has significant costs both for the parties involved and for the society as a whole. As we shall see below, it has also created considerable debate about the need for further reform (or abolition) of the Employment Tribunal and Employment Court.

Wages and Wage Dispersion

The economic questions are more difficult. There is some evidence on what has happened in the period since 1991 in terms of real wage levels, wage dispersion, productivity, and employment. How much of what has happened is attributable, directly or indirectly, to the Employment Contracts Act and how much to other changes in the New Zealand economy in the last six years is a more contentious matter. First, however, let us look at the prevailing opinions and data.

Average hourly earnings have increased every year in the 1990s, from \$13.78 per hour in February 1990 to \$15.80 per hour in February 1996, a 15-percent rise.³² This number compares with an increase in the Consumer Price Index of 15 percent over the same period.³³ Average real hourly earnings have therefore been stagnant in the 1990-96 period. Furthermore, the Real Wage Index fell from 1,003 in December 1993 to 978 in March 1996,³⁴ a decline of 2.5 percent during a very strong economic upswing. There is also a slight shift in favor of higher incomes which is mainly offset by a fall in the lower incomes; in terms of real wages, the better paid improved their position relative to the less well paid.³⁵ While the Index underrepresents certain wage rises, these figures nevertheless indicate why so many people have complained that they have not felt the fruits of the economic upswing

31. Erling Rasmussen, *Chronicle*, 1 N.Z. J. INDUS. REL. 115 (1995).

32. 1997 STATISTICS NEW ZEALAND, *supra* note 18, at 94.

33. *Id.* at 86, 96.

34. *Id.* at 96, 102.

35. *Id.* at 104.

of 1993-1996.

There was an expectation prior to the Employment Contracts Act that the dismantling of the award system would lead to increased wage dispersion, it being assumed that weaker employee groups would fail to keep up with other employee groups in a system of market-driven, decentralized wage negotiations. These expectations were fulfilled in the first two years after the Act by the widespread downward adjustment or abolition of penal rates and overtime payments. These cuts to penal rates and overtime payments were clearly evident in the two databases on collective employment contracts,³⁶ in the economy-wide surveys conducted by the Department of Labour,³⁷ and in numerous individual case histories.

In this context, discussion amongst employment relations researchers has mainly been about whether the concessions obtained by employers fell short of expectations prior to the Act. Thus, employer behavior in the 1991-93 period has been described as moderate, rather than either progressive or aggressive.³⁸ The influential Heylen surveys conducted by the Department of Labour in 1992 and 1993 appear to be a source of confusion by downplaying the radical changes imposed on employees. This influence may explain why significant adjustments to conditions can be interpreted as "moderate" employer behavior. For example, the so-called moderate or "inactive" employers introduced significant changes to employment conditions: they scored lowest on average take-home pay rises; 16 percent of them had reduced or abolished overtime pay rates; 39 percent had increased work effort; and 10 percent had reduced the ability to accumulate leave.³⁹ Other researchers have pointed to the significant concessions obtained by employers in that period.⁴⁰ These concessions have become very important, since employees have had little success in reversing them as the economic upswing gathered pace from 1993 onwards.⁴¹

Clearly, cuts to penal rates and overtime payments would have their most significant effects in those areas of the labor market where hourly

36. DEPARTMENT OF LABOUR, CONTRACT, *supra* note 15, at vols. 3-8, July 1992-Feb. 1994; Kevin Hince & Raymond Harbridge, *The Employment Contracts Act: An Interim Assessment*, 3 N.Z. J. INDUS. REL. 243-44 (1994).

37. HEYLEN RESEARCH CENTRE & TEESDALE MEULI & Co., *supra* note 14; HEYLEN RESEARCH CENTRE, *supra* note 14.

38. Peter Boxall, *Management Strategy and the Employment Contracts Act 1991*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 148-64 (Raymond Harbridge ed., 1993); Peter Boxall, *Management Strategy and Employment Relations in New Zealand: An Analysis of Contemporary Patterns and Outcomes*, INT'L EMPLOYMENT REL. REV. 1, 27-37 (1995); Erling Rasmussen & Peter Boxall, *Workforce Governance*, in THE CHALLENGE TO HUMAN RESOURCE MANAGEMENT 53-88 (Peter Boxall ed., 1995).

39. HEYLEN RESEARCH CENTRE, *supra* note 14.

40. Jon Henning, *The Employment Contracts Act and Work Stoppages*, 1 N.Z. J. INDUS. REL. 77-92 (1995).

41. Erling Rasmussen, *Workplace Transformation Under the Employment Contracts Act*, in CURRENT RESEARCH IN INDUSTRIAL RELATIONS: CONFERENCE PROCEEDINGS 457-59 (Ray Fells & Trish Todd eds., 1996).

wage payments were predominant. The expectation, therefore, was that such cuts would have a particularly strong effect in low-wage, low-skilled areas such as retailing, cleaning, and care-giving. This assumption has been supported by the research to date, though there are still amazingly few studies of the effects of the ECA on the so-called secondary labor market. Harbridge and Street, in a survey of women in the service sector, found that around 30 percent of their respondents had had wage reductions subsequent to the introduction of the Act.⁴² Similarly, an Auckland pilot study found that women and youth had a vulnerable position in the "new labour market." In 1994 and 1995, the two groups had obtained substandard outcomes in wages and conditions compared to other groups.⁴³ The predominance of women in particular occupations has meant that it has become more difficult to sustain the gender wage differentials that had been established before the Act.⁴⁴ One commentator has predicted, "[t]here are clear signs that there are differential results for men and women employees under the Act. Women are less likely to have had basic pay or take-home pay increases, or have achieved less tangible results such as an increase in job satisfaction."⁴⁵ There appears to be little dispute of this increase in wage dispersion: "... in the first two years following the Act there was increased variation in the size of settlements, leading to a major readjustment of traditional wage relativities. . . . Moreover, these figures are likely to understate the increase in wage dispersion given the shift towards individual employment contracts."⁴⁶

Thus, the Act has put considerable financial pressure on people in the so-called secondary labor market, a conclusion clearly drawn by Ken Douglas, the leader of the union confederation, the New Zealand Council of Trade Unions, when he writes: "Different measures of wage movement all show a widening gap between the top and the bottom."⁴⁷ It must be stressed

42. Raymond Harbridge & Maryan Street, *Labour Market Adjustment and Women in the Service Industry: A Survey*, 1 N.Z. J. INDUS. REL. 23-34 (1995).

43. Erling Rasmussen, *Employee Awareness and Attitudes—A Pilot Study*, 2 LAB. MARKET BULL. 89-101 (1996).

44. Alastair Pringle, *The Pursuit of Flexibility in the New Zealand Supermarket: The Employment Contracts Act, Continuities and Discontinuities*, 3 N.Z. J. INDUS. REL. 306-25 (1993); Janet Hector et al., *Industrial Relations Bargaining in the Retail Non-food Sector: 1991-1992*, 3 N.Z. J. INDUS. REL. 326-41 (1993). Suzanne Hammond & Raymond Harbridge, *The Impact of the Employment Contracts Act on Women at Work*, 1 N.Z. J. INDUS. REL. 15-30 (1993).

45. Richard Whatman et al., *Labour Market Adjustment Under the Employment Contracts Act*, 1 N.Z. J. INDUS. REL. 72 (1994).

46. OECD, ECONOMIC SURVEY: NEW ZEALAND 56 (1996).

47. Douglas, *supra* note 7, at 4. The real disposable income index has also been used to demonstrate that wage dispersion has increased. However, this index did not include people working less than 30 hours a week, which leads to an underestimation of the dispersion effects. However, "[t]he Department of Statistics plans to discontinue this index, releasing instead a Real Wage Rate Index. This new index will not be reported for the income quintiles and accordingly in the future the disparities between different income groups will not be visible." (Hince & Harbridge, *supra* note 36, at 246). As shown above, the Real Wage Index actually fell during the economic upswing. There are clearly sections of the workforce where

again that the increased wage dispersion generally highlighted in the research to date may have been only partially facilitated by the Employment Contracts Act. For example, changes in the profile of the New Zealand labor force—becoming older and better educated and with relatively more professional employees—would increase the pressure to widen wage differentials,⁴⁸ repeating the pattern of rising qualifications-based wage differentials found by Sholeh Maani in the 1981-1991 period.⁴⁹ Thus, while the research evidence generally points to an increased dispersion in wages, this increase is also in line with more general demographic trends and qualifications-based rises in wage differentials. Moreover, a detailed analysis by Sylvia Dixon⁵⁰—still to be published—finds little growth in wage dispersion in the period from 1984 to 1995. This is a puzzling finding. It makes us cautious in our overall evaluation of the effects of the Act on wage dispersion. Given these ambiguities and unresolved issues, further analysis will be warranted when the census data for the 1991-96 period becomes available.

Employment, Unemployment, and Casualization

Since 1992 there has been strong employment growth in New Zealand and a sharp decline in unemployment. From 1992 to 1995, over 120,000 new jobs were created, providing the basis for an 8-percent increase in employment in the period. While the employment growth has been strong, the most remarkable feature of the economic upswing has arguably been the sharp turnaround in unemployment. Unemployment, which had increased from 3.6 percent in 1987 to 11.1 percent in 1992, was down to 5.9 percent by December 1996. These changes in levels of employment and unemployment are even more encouraging when seen in the context of a labor force that has expanded every year to date throughout the 1990s.⁵¹ Following the Employment Taskforce report in 1995, the government took a more proactive approach to activation of the unemployed, an approach that appears

pay rises are slow to filter through: "Over the 27-month period from the index's base of December 1992 quarter to the March 1995 quarter, 36 percent of surveyed ordinary time pay rates did not change." STATISTICS NEW ZEALAND, *LABOUR MARKET 1995*, 154 (1996). In the same period, the average surveyed ordinary time pay rates increased by 4.9 percent, which indicates the skewed distribution of pay rises.

48. Sylvia Dixon, *The Inter-industry Wage Structure: 1971-1994*, 1 *LAB. MARKET BULL.* 62 (1995).

49. SOLEH MAANI, *INVESTING IN MINDS: THE ECONOMICS OF HIGHER EDUCATION IN NEW ZEALAND* (forthcoming 1997).

50. Sylvia Dixon, *The Distribution of Earnings in New Zealand, 1984-1995*, in *RESEARCH INTO LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND* (Philip Morrison ed., forthcoming 1997). Interestingly, Dixon points in another article to the possible pro-cyclical bargaining power position of low-wage, low-skilled workers. Dixon, *supra* note 48. Thus, the very strong economic upswing during 1993-96 could have compressed wage/skills differentials, as low-wage, low-skilled workers fared better in a tight labor market.

51. STATISTICS NEW ZEALAND, *LABOUR MARKET 1995* 65, 95 (1996) [*hereinafter* 1996 STATISTICS NEW ZEALAND].

to be continuing under the new Coalition Government.⁵² This approach is important as unemployment has edged upwards in 1997.

Around three-quarters of all new jobs created in the 1994-96 period have been full-time jobs. At the same time, there has been a continuous rise in the numbers in part-time employment and in self-employment.⁵³ This has led to talk about "McJobs" and casualization.⁵⁴ While part-time employment in itself cannot be interpreted as a clear indicator of casualization, there are indications that some part-time employment falls in this category.⁵⁵ Thus, there has been a strong growth in part-timers that are looking for more hours and in part-timers seeking a full-time job. The number of part-timers who would prefer to work more hours increased by 27 percent from February 1991 to February 1996. In the same period, the number of part-timers who were looking for full-time work increased by 22 percent. There was also a strong rise in contractors by over 22 percent in the 1991-96 period. Similarly, there has been an 18 percent increase in multiple jobholders in the 1991-96 period, as more people raised their income by having more than one job. Finally, there is strong anecdotal evidence that some employers are using on-call arrangements and split shifts more.

There are, however, some surveys that indicate that casualization has occurred to a much lesser degree than expected.⁵⁶ In our evaluation, we put less emphasis on the figures from these surveys since they have signifi-

52. Although it is beyond this Article to deal with it in detail, it must be pointed out that there are several less positive features contained in the rosy employment figures. These negative features have become more pronounced as the economy slowed down in 1996 after the exceptional growth spurt in 1993-95. Some examples have recently been mentioned by the Minister of Social Welfare, Mr. Roger Sowry:

In the year ended June 1966, our strong economy saw 62,000 more people employed but only 5,000 fewer on unemployment benefits, and an extra 7,000 on other benefits. Between 1991 and 1996, the number of unemployment beneficiaries fell by 12 percent. Domestic purposes beneficiaries rose by 11 percent, numbers of sickness beneficiaries rose by 68 percent, and invalid beneficiary numbers rose by an equally staggering 44 percent. By last year, 21 percent of working age people were dependent on a benefit, compared to just 8 percent in 1985.

Roger Sowry, *Moves to Break Welfare Dependency Cycle*, EVENING POST, Mar. 14, 1997, at 4; Kevin Hince & Raymond Harbridge, *The Employment Contracts Act: An Interim Assessment*, 3 N.Z. J. INDUS. REL. 243-44 (1994).

53. 1996 STATISTICS NEW ZEALAND, *supra* note 51. Erling Rasmussen, John Deeks & Maryan Street, *The Entrepreneurial Worker: Changes to Work and Contractual Relationships*, in ACCORD OR DISCORD? 335-56 (Jocelyn Gibson ed., 1996).

54. Erling Rasmussen, *Chronicle*, 2 N.Z. J. INDUS. REL. 231, 233 (1995).

55. The figures in this paragraph are all from 1997 STATISTICS NEW ZEALAND, *supra* note 18, at 61.

56. Peter Brosnan & Pat Walsh, *The ECA and Non-standard Employment in New Zealand 1991-95*, in RESEARCH INTO LABOUR, EMPLOYMENT AND WORK IN NEW ZEALAND (Philip Morrison ed., forthcoming 1997); Anne Knowles, *Impact of a Greater Casualisation of the Workplace on Your IR Strategy* (Institute of International Research, 11th Annual Industrial Relations Conference, 1997) (unpublished, on file with author).

cantly less statistical "robustness" than the figures from the official surveys done by Statistics New Zealand. It must also be noted that the use of fixed-term employment contracts has probably been restricted by the interpretation of their status by the Employment Court. It will be interesting to see whether a recent decision on fixed-term employment contracts by the Court of Appeal will lead to a more widespread use of such contracts.⁵⁷

While the debate about casualization, "McJobs," has focused on people working less than 40 hours per week, it may be just as worrisome that more and more people are increasing their hours at work. An upward pressure on working time has made the 40-hour week less prevalent under the Employment Contracts Act. The workforce is now split into roughly three sections where a third (32.9 percent) usually work less than 40 hours a week, another third (31.7 percent) usually work the traditional 40-hour week, and the remaining third (35.4 percent) work more than 40 hours a week.

"Of those people who usually work more than 40 hours, a significant proportion usually work very long hours. About one in four people (147,000 or 26.4 percent) who usually worked more than 40 hours in 1994/95 usually worked at least 60 hours, with 60,300 (10.8 percent) usually working at least 70 hours."⁵⁸ Thus, there has been a strong rise in the average weekly hours normally worked by full-time male employees: from 44.61 hours in 1991 to 45.31 hours in 1996. In the 1991-96 period, the number of men working on average 50 to 59 hours per week increased by 30 percent, while the number of men working on average more than 60 hours per week increased by 31 percent. These numbers clearly raise some pertinent questions about work distribution and the balance between work and family life, and have important longer term implications for health, safety, productivity, and effective decision-making.⁵⁹

A Productivity Failure?

The Employment Contracts Act was promoted as a way of creating a new and more productivity-oriented employment relations culture to support the extensive restructuring of the economy.⁶⁰ "By introducing voluntary unionism and changing bargaining procedures it will increase productivity, enhance employment and encourage the sharing of benefits that flow from increased output."⁶¹ The award system and compulsory unionism were regarded as major blockages to more productive work practices,⁶² and it was

57. Peter Cullen, *Court Rules on Fixed-term Contracts*, NAT'L BUS. REV., June 13, 1997, at 50.

58. 1997 STATISTICS NEW ZEALAND, *supra* note 18, at 177.

59. *Id.* at 114.

60. Birch, *supra* note 5.

61. NATIONAL PARTY, ELECTION MANIFESTO 27 (1990).

62. See, e.g., PENELOPE BROOK, FREEDOM AT WORK: THE CASE FOR REFORMING LABOUR LAW IN NEW ZEALAND (1990).

assumed by many—even some opponents of the Act—that the new Act would facilitate a lift in productivity levels.⁶³ However, there seems to be little argument that productivity performance has been disappointing under the regime of the Employment Contracts Act. Why this has been the case is one of the key current debates surrounding the Act. In particular, widespread reports of improved productivity within many individual organizations have had surprisingly little impact on the official figures on labor productivity.

While productivity growth is frequently mentioned in association with employment relations changes, it is notoriously difficult to measure actual productivity increases across an economy. Measurement problems arise in the context of assessing productivity in areas where the product is service—now covering the major part of employment through the various service sectors and the public sector, in the increased emphasis on quality rather than quantity in the output of goods and services, and in the growing use of non-standard labor (e.g., casual, part-time, and contractors). These problems have surfaced in the current debate in New Zealand, as the various estimates presented below illustrate. In fact, some economists have taken to using survey information—surveys of managers' opinions about productivity increases—as their evidence for satisfactory productivity growth.⁶⁴ While it is clearly no solution to rely on opinion surveys, it highlights one of the key issues in the current debate: managers and some organizations have recorded significant productivity rises, which have yet to influence the national statistics. Finally, it is difficult to agree on what a satisfactory level of productivity growth would be, since this issue was not specified at the introduction of the Act.

There have been several estimates of post-ECA productivity growth. The OECD has estimated a 1.5 percent per annum productivity growth in the 1992-96 period,⁶⁵ a situation the OECD clearly finds unsatisfactory. Its figures show a decrease in 1995, but its overall productivity estimate appears to exclude the recent slow-down in economic activity in the mid-1990s. The Reserve Bank expects a trend in labor productivity growth of no more than 1.25 percent per annum.⁶⁶ Vic Hall has estimated a 2.0 percent per annum rise in labor productivity and 2.3 percent in total factor productivity, over the three years to March 1995.⁶⁷ These estimates have often been quoted by proponents of the Employment Contracts Act as indicating posi-

63. Easton, *supra* note 1, at 12.

64. See, e.g., JOHN SAVAGE, WHAT DO WE KNOW ABOUT THE ECONOMIC IMPACT OF THE EMPLOYMENT CONTRACTS ACT (NZIER Working Paper 96/7, 1996).

65. OECD, *supra* note 46, at 10.

66. Don Brash, The New Inflation Target and New Zealanders' Expectations About Inflation and Growth, Address to Canterbury Employers Chamber of Commerce (Jan. 23, 1997).

67. Vic Hall, *New Zealand's Economic Growth: Fantastic, Feeble, or Further Progress Needed*, VICTORIA ECON. COMMENTARIES, Mar., 7 1996.

tive productivity outcomes from the legislation.⁶⁸ However, labor productivity is no higher for the 1992-95 period than Hall's estimates for the 1979-87 and 1987-1992 periods. The estimates also relate to the economic expansion phase⁶⁹ and, "[g]iven that the most recent year's data, which are not included in Hall's analysis, showed negative growth in output per hour, it is highly likely that total factor productivity was lower, bringing the average closer to the 1.3 percent mark."⁷⁰ The labor productivity figures in Table 1 below are at the lower end of the various estimates, though Gobbi's estimate of a 0.9 percent average labor productivity per hour worked in the four years to December 1996 is fairly similar.⁷¹

Table 1: Aggregate Labor Productivity (% p.a. change)⁷²

Years	Real GDP	Employment	Labor Productivity
1978-1984	2.0	0.1	1.9
1984-1988	2.0	0.6	1.4
1988-1992	-0.4	-2.2	1.9
1992-1996	3.8	3.1	0.7

Although there are some variations in the estimates, the expected increase in productivity argued by the proponents of the Act still remains to be seen. "The absence of a clear improvement in output per hour growth rates, combined with a rapid fall in productivity growth in the last two years, has raised questions about why better outcomes have not been evident in the post-reform period."⁷³ This is difficult to answer, since there appears to be no single reason why the productivity performance has been so low.⁷⁴ In employment relations terms, there appear to be several factors at play.

68. See, e.g., Kerr, *supra* note 6; Roger Kerr, *Employment, Productivity and Growth All Blossom Under the Employment Contracts Act*, N.Z. HERALD, Oct. 5, 1996, at A17.

69. Hall, *supra* note 67, at 8.

70. Maria Gobbi, Bryan Chapple & Michael Fletcher, *Labour Market Trends and Outlook*, 1 LAB. MARKET BULL. 20 (1996).

71. Maria Gobbi, *Some Notes on Determining Real Wage Movements*, 1 LAB. MARKET BULL. 97 (1997).

72. Brian Philpott, *A Note on Recent Trends in Labour Productivity Growth*, VICTORIA U. PAPER 3 (1996).

73. Gobbi et al., *supra* note 70, at 14.

74. Brian Easton, *Productivity Puzzle*, LISTENER, July 27, 1996, at 51; Easton, *supra* note 1.

First, the restrictions on productive work practices may have been less than previously assumed. As Brian Easton has stated,

[m]ore generally, it is possible that the various allegations of unions interfering with the market are not true. It may be that unions do not inhibit productivity gains or compress wage differentials to an extent that when they are weakened there are major increases in output, and wage dispersion. That is the experience in the case of the ECA.⁷⁵

This argument shifts the focus to more deep-seated influences and to the efficiency of management practices. Another commentator has said, “[i]t seems that the problem lies with the quality of management in the average NZ business. We certainly can’t blame the trade unions for the country’s recent productivity performance. Management has had a freer hand than at any other time in living memory.”⁷⁶

Second, the productivity assumption behind the Act may have floundered because of more systemic factors. Some of these factors could be a tight monetary policy (resulting in a significant currency appreciation and high real interest rates); inadequate infrastructural investments and reduced public services; and a rise in transaction costs through the fragmentation of bargaining and the counter-productive effect of an avalanche of employment relations legislation since the mid-1980s. The New Zealand Council of Trade Unions (NZCTU) has constantly criticized the assumed productivity-enhancing effects of the Employment Contracts Act.⁷⁷ The NZCTU has argued that inadequate investments in infrastructure, education, and training, and the continuous restructuring of public services, together with the short-term contractual focus created by the Employment Contracts Act, would act as barriers to high, sustainable productivity growth.⁷⁸ The focus on transaction costs is associated with the idea that the fragmentation of bargaining has increased the bargaining effort at organizational level. While this must be regarded as a short-term investment to improve long-term organizational effectiveness,⁷⁹ it may also have reduced productivity in the short term. Likewise, the extensive legislative reforms—at least nine new comprehensive legislative packages over the last 10 years—have added a further burden to organizations already strained under the adjustment to the new economic environment.

Third, employers may not have used the productive opportunities created by the Act. Peter Boxall has argued that too few organizations have implemented better work practices and that, generally, the implementation

75. Easton, *supra* note 1, at 12.

76. Peter Boxall, *The Great Labour Productivity Debate*, EMPLOYMENT TODAY, June 4, 1997.

77. Douglas, *supra* note 4, at 198.

78. NEW ZEALAND COUNCIL OF TRADE UNIONS, ELECTION BACKGROUNDER 1-12 (1996).

79. Rasmussen & Boxall, *supra* note 38.

of new work practices has been of limited scope.⁸⁰ An indication of the latter point is that, in spite of a very active Workplace Reform movement in New Zealand, no widespread implementation of workplace reform has taken place. Few organizations are involved in full-scale workplace reform. Rather, there is a tendency to pick and choose organizational changes instead of applying a holistic approach, and there is a distinct preference for task-related participation schemes.⁸¹ Boxall also suggests that the small size of many New Zealand private sector organizations is a considerable barrier to reform processes that might lead to productivity improvements.⁸² This may interact with the managerial "overload" and the short-term rise in transaction costs mentioned above. Additionally, the changes to employment conditions instituted by employers in the 1991-93 period could have hampered the introduction of new, productive work practices. The undermining of "psychological" or "implicit" contracts would make sustainable, productive workplace changes difficult to achieve. Whether that has actually happened is difficult to establish, though there are some indications in that direction.⁸³

Finally, it must be stressed that the current approach to industry training may not overcome the traditional problems in this area and facilitate a move towards a high-wage, high-skill economy.⁸⁴ The industry training approach was radically altered by the Industry Training Act 1992. In 1993, the OECD found that "[l]ittle information is available on the amount and quality of business investment in skills, but it appears that in-company training efforts are weak by international standards."⁸⁵ This assessment still applies, and a recent OECD report pointed to a shortage of skilled workers as a barrier for growth opportunities.⁸⁶ There has been some increase in the overall training effort in recent years, with more training modules being available and more people participating.⁸⁷ Unfortunately, this relative increase appears substantial only when compared with the severe cut-back in training efforts in the 1987-1993 period. The economic upswing has coincided with skills shortages. There are still concerns that inadequate government funding, the un-systematic development of the Industry Training Organizations (ITOs), and

80. Boxall, *supra* note 76.

81. Rose Ryan, *Workplace Reform in New Zealand—the State of Play*, WORKPLACE N.Z. REP. (1995); Rasmussen, *supra* note 2.

82. Boxall, *supra* note 76.

83. See, e.g., Francis Wevers, *Managerial Perception of the Quality of Human Resource Management Practice in New Zealand*, NZIM REP. (1995); Francis Wevers, *The New Zealand Index of Human Resource Management and Organizational Effectiveness*, NZIM REP. (1996). Erling Rasmussen & Andrea Jackson, *Employment Relations in the New Zealand Banking Industry* (OECD-MIT Research Network Paper on Banking, May 1996).

84. Boxall, *supra* note 82, at 31-32. Erling Rasmussen, *New Zealand Employment Relations—Settling Down Or . . . ?*, 2 INT'L EMPLOYMENT REL. REV. 43-57 (1996).

85. OECD, ECONOMIC SURVEY, NEW ZEALAND 104 (1993).

86. SUNDAY STAR-TIMES, Apr. 6, 1997, at D8.

87. 1996 STATISTICS NEW ZEALAND, *supra* note 51, at 139-40.

tensions between the key public agencies are blocking a widespread and concerted training effort.⁸⁸ The traditional employer reluctance to invest in training has yet to be overcome and a "training culture" yet to be established in New Zealand organizations.

Insufficient Institutional Reform?

During the debate of the Employment Contracts Bill, the Business Roundtable, N.Z. Employers' Federation, and the Treasury were rebuffed in their attempt to abolish specialist labor law institutions. Instead, the Cabinet endorsed the formation of separate institutions—the Employment Tribunal and the Employment Court.⁸⁹ Since then the Business Roundtable and the Employers' Federation have conducted a vigorous campaign to overturn this policy. This campaign has gathered momentum in the 1994-97 period, with publication of a number of articles and papers attacking the Employment Court.⁹⁰ The ferocity of the debate prompted the Chief Justice, Sir Thomas Eichelbaum, to the unprecedented move of criticizing "well-heeled sectors of the community" for trying to pressure the government and the judiciary to alter the justice system in accordance with their own interests.⁹¹ The debate has been the focus of an entire issue of the *New Zealand Journal of Industrial Relation*⁹² and it has been featured frequently in the various law journals.

Currently, officials from the Department of Labour are analyzing the decisions made by the Employment Court as part of a review of the Employment Contracts Act by the Coalition Government. It appears that the employers' campaign will be a fruitful one, since the current Minister of Labour, Mr. Max Bradford, a former employee of the Employers' Federation, has publicly aired several misgivings about the decisions made by the Employment Court.⁹³

Besides the attempts to fashion all spheres of society in line with their

88. Barbara Myers, *Industry Training in New Zealand in the 1990s*, Research Essay, University of Auckland (unpublished thesis, 1996). Erling Rasmussen et al., *Where Are We and How Did We Get Here? Skills, Skills Shortages and Industry Training in New Zealand*, in CURRENT RES. IN INDUS. REL. CONFERENCE PROCEEDINGS 473-84 (Ray Fells & Trish Todd eds., 1996).

89. Pat Walsh & Rose Ryan, *The Making of the Employment Contracts Act*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 13-30 (Raymond Harbridge ed., 1993).

90. See, e.g., C. Howard, *The Interpretation of the Employment Contracts Act*, N.Z. BUSINESS ROUNDTABLE (1995); Graham Hunt, *Employment Court Judges Need to Fall into Line with Free Market*, NAT. BUS. REV., May 17, 1995 at 13; Bernard Robertson, *Judges Should Stick to Their Legal Knitting*, NAT. BUS. REV., June 21, 1996, at 16.

91. *Chief Justice Takes Poke at Business Roundtable*, N.Z. HERALD, Sept. 24, 1996, at A3.

92. 21 N.Z. J. I.R. (Apr. 1996).

93. Max Bradford, *Curb Judicial Activism to Make the ECA Work as Parliament Intended*, THE INDEPENDENT, Mar. 14, 1997, at 8-9. Gordon Campbell, *The Max Factor*, LISTENER, May 3, 1997, at 24-26.

philosophical ideas, the employers' attack on the Employment Court can be associated with several trends. First, the Court is the icon of separate institutions, and abolishing the Court and transferring its jurisdiction to the High Court would be a significant step towards abolishing separate institutions.⁹⁴ While the attacks have focused on the Employment Court, it appears that the end goal is also to abolish the Employment Tribunal, thereby creating an "employment at will" framework.⁹⁵ Secondly, Employment Court decisions in a number of areas have been attacked. In particular, the Court's firm intention to uphold the notion of "procedural fairness" has raised the ire of employers. The employers' attacks on Court decisions have also focused on bargaining issues such as access for bargaining agents,⁹⁶ bargaining agent recognition, harsh and oppressive contracts, and home workers' contractual status.

The focus on bargaining issues is caused by the "permissive nature" of the Employment Contracts Act, which left bargaining guidelines "incomplete, inconsistent and invisible."⁹⁷ Thus, the notion of "fair" bargaining practices has constantly been challenged by both sides. For example, employers have tried to avoid bargaining with the duly chosen bargaining agent and instead sought to communicate directly with employees. Although this practice has been restricted to some degree by several Employment Court and Court of Appeal decisions, there is still room for further interpretation: "As these decisions illustrate, the boundaries and parameters of bargaining under the legislation is both a fluid and developing process. It will undoubtedly continue to be so as employers and employees test and extend the legal boundaries of bargaining."⁹⁸

It has also been common practice to bypass the employee protections under the Employment Contracts Act by employing workers as contractors. This use of notional contractors may be restricted in the future because of a recent Court of Appeal decision which deemed ten home-care workers to be employees.⁹⁹ This decision created some media debate, as it involved the Central Regional Health Authority as the employer with the workers being paid less than half the statutory minimum wage in some cases.¹⁰⁰ In occupa-

94. Bernard Robertson, *The Arguments for a Specialist Employment Court in New Zealand*, 1 N.Z. J. INDUS. REL. 34-48 (1996).

95. Gordon Anderson, *Introduction*, 1 N.Z. J. INDUS. REL. 3 (1996).

96. While the popular term "bargaining agent" is used, it is clear from the section on bargaining outcomes above that unions are still representing the vast majority of employees in collective bargaining.

97. Lorraine Skiffington, *The Role of Specialist Legal Institutions in Bargaining Under the Employment Contracts Act 1991: Saboteurs or Saviours?*, 1 N.Z. J. INDUS. REL. 50 (1996).

98. Peter Kiely, *Employment Law Update*, in *EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1995/96* 58 (Raymond Harbridge et al. eds., 1996).

99. *Cashman v. Central Regional Health Authority*, Aug. 26, 1996 [1996] 2 E.R.N.Z. 159.

100. *Landmark Decision a Phillip for Home Workers*, N.Z. HERALD, Aug. 28, 1996, at A13.

tional health and safety, the district courts have stepped up the attack on negligent employers with a number of recent cases resulting in large fines. Interestingly, the courts are now awarding part of the fines to the victims, which has prompted talk about the re-introduction of lump-sum accident compensation payments in another form.¹⁰¹ The focus on Occupational Overuse Syndrome (OOS) incidents has also increased since the first well-publicized conviction of an insurance company.¹⁰²

Finally, the growing tension between the Employment Court and the Court of Appeal has been used by the Employment Court's opponents as an indication of the Court being out of touch. The Court of Appeal, the appeal court for Employment Court decisions, has recently overturned a whole string of Employment Court decisions. This trend could in part be associated with a number of liberal-minded Appeal Court judges leaving the bench in 1994-95 and the Court of Appeal now regularly having a majority of conservative judges on the bench.¹⁰³

Reading the Outcomes of the ECA

In summary, then, what is our reading of the outcomes of the Employment Contracts Act to date? The Act has had a number of direct institutional consequences. These include the rapid acceleration of the move to individual employment contracting, marked by the growth of individual employment contracts (IECs) and the reduction in collective employment contracts (CECs); the reduced role for unions in bargaining, particularly in the private sector; the decline in union membership and in union density; and the greater use of legal remedies in employment disputes and grievance resolution. These direct consequences have, in turn, a number of flow-on effects. One is a general shift in the balance of power in the workplace between workers and management, giving management increased autonomy in the definition of the terms and conditions of employment contracts and employment relationships. This is mirrored at national level in the reduced impact of the NZCTU on national economic and social policy and the general disappearance of active tripartite institutions contributing to policy making on the national stage.¹⁰⁴ The reduction in union influence in the workplace has also led to a greater role for the legal institutions of the employment relations system—the Employment Tribunal and Employment Court—in adjudicating matters related to employment security and disciplinary issues.

101. Kiely, *supra* note 98, at 69-75. The courts' ability to award lump-sum compensation payments was abolished by New Zealand's Accident Compensation legislation.

102. Rasmussen & Schwarz, *supra* note 30, at 344.

103. Peter Haynes, *Guilty or Not Guilty*, EMPLOYMENT TODAY, June, 1997.

104. The NZCTU's need to appeal to the ILO on matters associated with the ECA can be seen as indicative of this changed status. See Nigel Haworth & Steve Hughes, *Under Scrutiny: The ECA, the ILO and the NZCTU Complaint 1993-1995*, 2 N.Z. J. INDUS. REL. 43-162 (1995).

However, employers and other powerful business interests have seen these institutions as defending the interests of those who are now less able to defend themselves through collective action. As a result, the actions and decisions of the Tribunal and Court have been brought increasingly into question, thereby increasingly politicizing these institutions.

The economic impacts of the Act have been less clear cut. Changes in real wages, labor, productivity, and levels of employment and unemployment obviously have some relationship to the ECA. However, how large (or small) this relationship is cannot be determined with any great confidence, given the general economic upturn in the economy in the period under review. We have looked in detail at the productivity data and observed that the anticipated productivity benefits of the Act have not been forthcoming.

On wage dispersion, our general conclusion, notwithstanding the ambiguities in some of the data, is that there has been a growing gap between the better off and the less well off in the labor force and that some of this movement is a direct consequence of the Act. Rising qualifications-based wage differentials may in part explain this change. Nevertheless, the severe reductions in penal rates, overtime rates, and fringe benefits in the years immediately following the passage of the Act, and the greater intensification of work, have created a significant segment in the workforce who have been severely disadvantaged economically by the Act and who have not seen their economic position substantially improved during the 1993-1996 economic upturn. For these people, the wage dispersion effects of the Act can be clearly seen as the rich getting richer and the poor poorer. The social impacts of this situation may be seen specifically in the increased number of beneficiaries in New Zealand¹⁰⁵ and, more generally, in a growing understanding that New Zealand is now a much more divided and less egalitarian society than it has traditionally aspired to be.

Looking to the Future

The Coalition Agreement of December 1996, which established the policy basis for the alliance in government between the National Party and New Zealand First, placed the continuation of the employment relations regime instituted by the Employment Contracts Act at the heart of the coalition government's industrial relations policy. Coalition policy, however, does anticipate some amendments to the Act in the period before the next general election in 1999. Described by the Minister of Labor as "fine tuning," these amendments would include bringing closely related legislation such as the Holidays Act and the Wages Protection Act under the umbrella of the Employment Contracts Act; increasing the obligation on employers to recognize and negotiate with the bargaining agents chosen by employees; and incorporating into the legislation, if possible, Employment Court deci-

105. See Dixon, *supra* note 48.

sions on personal grievances to make more explicit the respective obligations of employers and employees in personal grievance cases, especially those cases arising in the context of dismissals and in the conclusion of fixed-term contracts.¹⁰⁶ At the time of completing the present Article (Aug. 1997), there was no sign of draft legislation to implement any of these policy intents. In the meantime, however, the government had moved during 1997 to increase, from March 1, 1997, the statutory minimum wage for adult employees to \$7 an hour, and the youth minimum wage to \$4.20 an hour, promising at the same time to proceed during 1997 with the review of youth rates outlined in the Coalition Agreement and to commission research on the employment impact of the rise in the minimum wage.

The government continues to be under pressure, particularly from the New Zealand Business Roundtable, to instigate further institutional reform in the employment relations system by abolishing the Employment Tribunal and Employment Court. While concerned with "minimising judicial activism,"¹⁰⁷ the government has given no firm indication that it will pursue such a path. Rather it is determined to ensure, after a study of the Employment Court's decisions, that the underlying intentions of the Employment Contracts Act are not being undermined. There is clearly some tension within the government. The Minister of Labor, Mr. Bradford, has been quite critical of rises in the statutory minimum wages and has taken a "hawkish" line on the review of the Act.¹⁰⁸ Thus, the review may lead to further amendments to the Employment Contracts Act or to reconsideration of the case for abolition of the separate jurisdiction for employment law.

Whether a change in government in 1999 will lead to the repeal of the Employment Contracts Act is a moot point. In the business community, the Act has been promoted, alongside the Reserve Bank Act of 1989 and the Fiscal Responsibility Act of 1994, as one of the key foundations of the economic reform process and a necessary component of "a coherent economic strategy." In the last decade in New Zealand, notwithstanding the different party complexions of government, the influence of business on economic and social policy has been immense.¹⁰⁹ Nowhere has this been more marked than in the industrial relations system where the growth in business influence in national policy making on employment and labor market matters has been mirrored by a growth in employer power in the workplace. Thus, while it is likely that the present Coalition Government will collapse in 1999, we see no evidence at present that a change in government will bring into place a radically different employment relations regime for the new millennium.

106. Max Bradford, *What Happens Now?* (Institute of International Research, 11th Annual Industrial Relations Conference, 1997) (unpublished, on file with author).

107. Bradford, *supra* notes 93 & 106.

108. Bradford, *supra* note 93, at 8-9; Campbell, *supra* note 93, at 24-26.

109. See John Deeks, *Business and Politics*, in *NEW ZEALAND POLITICS IN TRANSITION* (Raymond Miller ed., 1997).