

LEGAL FORUM

One Year of Practise with the Act

Peter Kiely and Andrew Caisley*

Introduction

The introduction of the Employment Contracts Act 1991 marked a fundamental change in New Zealand Industrial Law. This change is clearly reflected in the introductions to the Act and its predecessor.

The purpose of the Labour Relations Act 1987 was:

- "(a) To facilitate the formation of effective and accountable Unions and effective and accountable employer's organisations.
- (b) To provide procedures for the orderly conduct of relations between workers and employers;
- (c) To provide a framework to enable agreements to be reached between workers and employers;
- (d) To repeal the Industrial Relations Act 1973 and certain other enactments."

By contrast the purpose of the Employment Contracts Act 1991 is "to promote an efficient labour market and, in particular:

- (a) To provide for freedom of association;
- (b) To allow employees to determine who should represent their interests in relation to employment issues..."

Each of the statutes proceeds on the basis of a contrasting and conflicting set of political, philosophical and economic assumptions, and after a year of operation the practical effects of this change are becoming apparent.

The year has seen a wide variety of new legal developments as employers, employees and all others in the area adapt to the new environment. The purpose of this paper is to examine some of the more significant issues which have arisen, and record the approach the Employment Court and the Employment Tribunal have adopted. No attempt is made to

* P T Kiely BA, LLB is a partner in the Auckland law firm of Hesketh Henry. He is New Zealand Director of Pacific Forum Line.

P A Caisley BA, BCom, LLB is a solicitor practising in employment law at Hesketh Henry, Auckland.

provide a comprehensive view of all the issues that have arisen, as that would require a paper of considerably greater length. Rather, seven areas have been selected which clearly mark the distinctiveness of the new environment.

These topics, which emerged in broadly chronological order over the first 12 months, are:

- Sanctity of contract
- The "right to manage"
- The expiry of CECs
- Implied terms
- Partial lockouts
- Strikes and lockouts
- Picketing

Sanctity of contract

One of the most surprising features of the jurisprudence to emerge since the passage of the Act has been the Court's repeated statements that employers may not unilaterally vary employment contracts. This is surprising, not because it is a novel legal concept, in fact for precisely the opposite reason. It is a surprise that the Court has been required to consider the issue of unilateral variation of contract at all.

Perhaps the most fundamental feature of contract law is that if the arrangement entered into meets the requirements for a valid "contract" then it is binding and enforceable and may not be varied except by consent. Precisely why some employers have failed to comprehend this notion, which is so fundamental to all business and commercial activity, is not clear. One might speculate that some of the misleading publicity prior to the introduction of the Act is in part to blame.

Even for employers who do not understand the central feature of contract law, the Act expressly states that "employment contracts create enforceable rights and obligations" (Section 43(a)). However the issue has arisen, and the Courts have had several occasions to comprehensively reject the notion.

The most succinct early rejection of a right to unilateral variation arose in *Grant v Superstrike Bowling Centres Ltd* (ALC 81/91, Finnigan J, 11/7/91). His Honour recorded:

"the employer was attempting to alter the terms and conditions of her employment contract. It is trite law that such a change cannot be unilateral, it must be mutual"

and later

"the law governing unilateral variation of an employment contract is unequivocal"

and again

"a contract is a contract, and it must run its course".

Two of the other early cases in which the Court reiterated its commitment to the notion of sanctity of contract, and rejected employer attempts to unilaterally vary were *NZ Resident Doctors' Associations v Otago Area Health Board* (1991) 4 NZELC 95, 334 and *Prendergast v Associated Stevedores Limited* (ALC 84/91, 26 July 1991).

Right to manage

The right to unilaterally vary is most commonly alleged to arise as part and parcel of "an employer's right to manage their business". Precisely why this "right" should give rise to a power to unilaterally vary contracts is not clear. It is unlikely that there is a business person in the country who would assert that his or her "right to manage their business" gives them the power to unilaterally reduce the rent payable to their landlord, or unilaterally reduce the price of supply contracts, and yet for some reason they persist in asserting that they do have the "right" to unilaterally vary their employment contracts. The fact that there is this different attitude in the area of employment suggests that the concept of an employment "contract" is still not well understood.

Two clear statements by the Court have expressly denied the existence of any such presumed right. In *NZPSA v Electricity Corp.* (WLC 54/91 27/6/91) the Court observed:

"But the various observations about the employer's right to manage are not available as a general pretext for avoiding legal obligations voluntarily entered into but which it is no longer convenient to fulfil. So pernicious a doctrine would undermine the enforceability of collective agreements which is the cornerstone of the Labour Relations Act 1987".

Notwithstanding this, at the end of last year the argument was advanced again in the Court. In *NLGOU & Beazley v Auckland City* (AEC 42/91 Goddard CJ, 3/12/91) it was argued for Auckland City that the Council "was justified in making the changes to conditions of employment for commercially compelling reasons". The Court comprehensively rejected the submission and stated:

"by and large, however, the time for the exercise of the management prerogative is when entering into employment contracts and not at the time of their performance. If an obligation has been assumed then it must be discharged and a party to an employment contract which fails to discharge an obligation is always at risk of being ordered to comply with the contract. It is quite fallacious to regard some obligations under an employment contract (for example, to pay wages) as being important and others (for example, such as those in dispute in the present case) as being some way subsidiary and requiring to be complied with only if the party on whom the obligation rests sees fit. The cardinal rule is that employment contracts create enforceable rights and obligations and it is not for the Court or the Tribunal to decide which obligations should be enforced and which not need be; the parties have already decided that for themselves by entering into the contract, and it is not open to the Tribunal to exempt any party from the obligations it has assumed".

A view has been expressed that if "breach of contract" actions (which are essentially what the unilateral variation cases are) are brought using the vehicle of personal grievance proceedings alleging an unjustifiable action to the employee's detriment, then the employer is given scope to argue the commercial justification for his or her actions.

It is doubtful whether this is correct. It would be regrettable if by simply altering the form of pleadings the employer could gain or lose something as fundamental as a unilateral right to vary a contract. In principle there would seem to be good reason for restricting the employer's right to defend actions on the grounds of commercial necessity to cases where the act complained of is lawful, but alleged to be unreasonable.

This approach received support in the *Auckland City* case where the Court, after discussing the alleged "right to manage" arising out of *G N Hale & Son Ltd* [1991] 1 NZLR 151, observed:

"to all this can be added the obvious observation that there was no question of any breach of contract by the employer in the *Hale* case; the Labour Court (and the Court of Appeal) was concerned with the question of whether an employer which had acted lawfully so far as the contract was concerned had nevertheless acted unjustifiably".

Of course in many cases it will be preferable to approach the matter by way of compliance order, since this is really what the employee is seeking, and also avoids any possibility of the employer being able to defend his or her actions on the grounds that they were commercially justifiable.

What are the terms?

Given that the Courts have so trenchantly stated that the terms of employment contracts cannot be varied unilaterally it is critical to determine precisely what the "terms" are. This has been one of the other principle areas of litigation during the first year of the Act. As awards and agreements have expired some attention has come to be focused on the proper interpretation of Section 19(4) of the Act, and particularly the meaning of the words "based on".

The clause basically provides that where a collective employment contract expires employment continues under an individual employment contract based on the expired collective contract. The first major decision which indicated the approach of the Court was *Prendergast and the NZ Waterfront Workers' Union v Associated Stevedores Ltd* (ALC 84/91, 26/7/91). The Court adopted an approach which strongly favoured the preservation of existing terms and conditions and held:

"if the Tribunal can be persuaded that particular terms and conditions of the expired collective employment contract can have no application to the individual employment contract and do not affect or concern the employee, either directly or indirectly, then such terms and conditions may not form part of the individual employment contract". (*Emphasis added*).

In the immediate case before the Court this test enabled the employees to retain protection against "casualisation" of the workplace.

The issue was further considered by the full Court in *United Food & Chemical Workers v Talley and Anor* (WLC 73/91, 9/8/91). The Court approved the test in *Prendergast* and said:

"in deciding the precise terms of any individual employment contract under Section 19(4), it will not be the norm to exclude terms of the expired collective contract".

However the full Court adopted an approach which may be even more narrow than the *Prendergast* approach and stated:

"we conclude that "based on" may be regarded as an equivalent in English of the convenient Latin phrase "mutatis mutandis". The expired collective document is to be amended to the extent necessary, but no more, to make it read sensibly as a contract between an individual worker and the employer or as a series of contracts between individual workers and the employer or employers".

The Court upheld various existing Union rights such as rights of entry, Union meetings and deduction of Union fees. It should be noted that the *Prendergast* decision at least is subject to appeal.

Implied terms

There has been a perception that the Industrial Courts have been comparatively liberal in their approach to interpreting employment contracts, and implying terms. The Courts have, for example, firmly accepted the notion that awards and agreements are usually not drafted by experts and therefore require a liberal interpretative approach. They have also been relatively ready to find that a custom and practise can amount to an implied term, and generally have upheld the value of taking an interpretative approach which recognises industrial/workplace realities, sometimes at the expense of strict legal principles. Of course there may have been some value in this.

The decision of the full Court of the Court of Appeal in *Attorney-General v Post Primary Teachers' Association* (CA 357/91, 20/12/91) may help employers narrow the contractual obligations by which they are bound. The Court of Appeal, in a judgment delivered by Gault J, held that the test for implying terms into employment contracts is the same as that for implying terms into any other contract. Particularly the Court found that:

"there is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding conditions of engagement for the reason simply that it would be reasonable to do so".

The Court set out the four bases on which terms may be implied into contracts. They are:

- (a) Implication by rules of law.
- (b) Custom.
- (c) Interpretation of contractual provisions by reference to an underlying assumption.
- (d) The business efficacy test.

The Court detailed the "business efficacy" test for implying terms into contracts and held that before any term can be implied on this basis it must be:

- (a) reasonable and equitable;
- (b) necessary to give business efficacy to the contract;
- (c) so obvious that it goes without saying;
- (d) capable of clear expression;
- (e) not contradicted by any express terms of the contract.

Case law regarding implied terms in ordinary commercial contracts reveals that it is often difficult to satisfy the foregoing requirements, particularly the requirement that the implication of the term must be necessary to give business efficacy to the contract.

Partial lockouts

Disputes arising out of renegotiation of employment contracts have also been the subject of judicial consideration. The decision which has probably attracted the most attention in the area of negotiations for employment contracts is *Paul & NZ Community Services Union v NZ*

Society for The Intellectually Handicapped (WEC 1/92, 15 January 1992).

In very broad terms, the factual background was that the IHC was facing serious financial difficulties, and in the preceding two financial years had incurred cash losses in excess of \$9 million. It had undertaken restructuring which resulted in the disappearance of some 300 positions, but notwithstanding this had a projected deficit for the 91/92 financial year of \$11.5 million. Formal negotiations for a new collective employment contract began in August 1991, but had broken down by the end of November. The talks were deadlocked and further attempts to make progress were unsuccessful.

The employer issued a notice to all staff advising them that as from 6 January 1992 the IHC would not be "observing or performing certain provisions of your employment contract with a view to compelling you and your fellow employees to accept the terms specified by IHC as your employer for a collective employment contract". The letter went on to specify the terms of the expired collective contract that would not be complied with, and basically advised that the IHC was imposing a wage cut. The plaintiffs issued proceedings seeking injunctions and the matter was accorded an early fixture so that it was determined on the substantive basis, not purely on an interlocutory basis.

The company defended its actions on the grounds that it was engaging in a lockout as defined in Section 62 of the Employment Contracts Act, and that the lockout was not specifically unlawful pursuant to Section 63, and did relate to negotiations for a collective employment contract and was therefore lawful pursuant to Section 64.

The Plaintiff employees attempted to create a restriction on the definition of a lockout based on certain statements in the judgment of Colgan J in *NZALPA v Air New Zealand Ltd* (AEC 35/91, 4/11/91) (the Pilots' Beards case). In that case Colgan J suggested that where the demands for a new contract, and the breach of the contract, were one and the same thing, no lockout was occurring.

The IHC was able to establish that it was breaking some or all of its employment contracts. In fact the evidence of the plaintiffs clearly supported this fact. It was also able to establish that the reason it was breaking the employment contracts was "with a view to compelling any employees ... to accept terms of employment or comply with any demands made by the employer". Accordingly it was clear that the actions taken by the IHC fell within the definition of a lockout. There was no real question about the lockout being unlawful pursuant to Section 63 as it was clear that none of those provisions applied.

The final question was whether the lockout related to negotiation of a collective employment contract. If it did, then the prima facie unlawful actions of the employer received statutory protection. On the evidence it was clear that the lockout did relate to negotiations for the new collective employment contract and accordingly the lockout was lawful. It should be noted that the Judge expressly stated that he was:

"unable to follow that part of Colgan J's. judgment in the *NZALPA...* case in so far as he expresses the view that the definition of "lockout" in the legislation contemplates compliance with a demand that is independent of the events which contemplate the breach of the contract of employment."

The decision created somewhat of an outcry. At a practical level this is understandable, since in effect IHC was able to impose a unilateral wage cut. However in terms of legal theory it is clear that the *IHC* decision does not give employers a right to unilaterally vary contracts.

When an employer engages in a partial lockout of this type, it is not a variation of the

contract. The contract remains extant, and the employer is clearly in breach of the contract. However if certain conditions are met, the breach of contract is rendered lawful, pursuant to Section 64. If at any time the fundamental circumstances change the employer's actions may be deprived of the protection they otherwise have, and the breach of contract would again become unlawful. Accordingly it is clear that the contract itself has not been varied.

It should be noted that employers have had the legal right to engage in a partial lockout of the IHC variety for a considerable period of time. It is not something new that has been "created" by the Employment Contracts Act. However it may be that in the present economic environment it is a more effective negotiating tactic than it has been previously. It should also be noted that the partial lockout is the employer's equivalent of the employee's right to engage in a go-slow, or refuse overtime or work to rule.

Strikes and lockouts

In the past the right to strike has always been more effective than the right to lockout, since in the days of compulsory union membership (whether de facto, or de jure) and blanket award coverage an employer's operation invariably ceased the moment his existing workforce left the site. The employer had no opportunity of continuing to generate an income, and substantial losses were incurred. By comparison, the employee (at least theoretically) had the freedom to undertake temporary or part time work during a strike or lockout to ensure that at least some income was maintained.

In the new environment, with genuinely voluntary union membership, and no blanket coverage, an employer may now have the power to maintain some limited income during industrial action by engaging a part-time or temporary work force.

Against this background it is useful to consider the approach the Courts are adopting to supervision of bargaining tactics. It was hoped by some that the Courts would even up the perceived imbalance in bargaining power by imposing a requirement to negotiate in good faith, or by relying on the "harsh and oppressive" provisions of Section 57. However after a number of decisions it is now becoming apparent that the Courts will not impose any such gloss on the wording of the statute. In the *IHC* decision *Castle J.* stated:

"I accept Counsel's submission that the only relevant issue is whether negotiations are in fact being conducted, not the quality or bargaining strength of them or the parties. The allegation that IHC has been unreasonable or inflexible, if found to be so, is therefore of no avail to the CSU".

In the *Adams & Others v Alliance Textiles & Others* (CEC 22/91, 22 November 1991) decision the applicants strongly urged the Court to adopt Canadian and American authority importing an obligation of good faith on the employer, and requiring the employer to adopt a neutral stance. In a very lengthy judgment of the full Court the argument was rejected and indeed the Court stated:

"the Act is quite specific as to the conduct which is prohibited and the Court is not justified in putting a gloss on the Act by importing a requirement nowhere expressed in it that the employer should remain neutral when its vital interests are affected and maintain in that situation a "hands-off stance". Provided it does not use undue influence or resort to duress (including economic duress) or harsh or oppressive behaviour, an employer may adopt and impart to its employees a partisan stance".

The Court outlined the obligations which fall on an employer once a bargaining agent has established his or her authority. They are:

- (a) If the employer is going to negotiate, they must negotiate with the authorised representative;
- (b) The employer may not insist upon negotiating with the employees directly, or with some other representative;
- (c) The employer need not negotiate at all;
- (d) The employer may offer direct negotiation with the employees;
- (e) The employer must not exert undue influence on the representative not to act or to cease acting;
- (f) The employer must not exert undue influence in relation to any employment issue on any person by reason of that person's association (or lack of it) with employees.

It is apparent from the stance the Court has adopted that the law now provides very little protection for employee bargaining agents and permits very aggressive bargaining tactics to be adopted by employers.

Picketing

In view of the "more liberal" bargaining environment that the new Act may encourage it can be expected that the issue of what amounts to a lawful picket will be the subject of judicial consideration.

It should be noted that this issue may come before the High Court for consideration, rather than the Employment Tribunal or Employment Court. This is so because the Employment Court has jurisdiction in respect of proceeding founded on an employment contract. Proceedings in respect of unlawful pickets may be founded on a breach of an implied term of an employment contract, but are more likely to be founded on common law torts such as trespass and nuisance.

In dealing with this issue under the Labour Relations Act 1987 Gault J. held that the High Court did have jurisdiction in the decision of *Waikato Asphalt Limited v Northern Distribution Workers* (1991) 4 NZELC 95, 293. Although the issue did not appear to be expressly considered, the High Court again considered an alleged unlawful picket in *McGinty v Northern Distribution Limited* (CP 1959/91, 4 December 1991). That decision was substantially resolved on the basis of undertakings given by the Union so no final decision was given by the Judge. The case is also noteworthy because the Judge raised the issue of the NZ Bill of Rights Act 1990 and the rights and freedoms enshrined therein.

Conclusion

The purpose of the Employment Contracts Act 1991 is to promote "an efficient labour market". The efficiency refers to "economic efficiency" in terms of conservative economic theory. In other words, the purpose of the Act is to create a labour market where there is a high degree of competition, and where wages are both upwardly, and downwardly, flexible.

From the survey of legal issues above, it seems clear that the Courts have adapted to the new environment, and are enforcing the Act in accordance with its purpose.

There can be no doubt now that employment contracts are binding, and enforceable, in

much the same way as all other commercial contracts. Once entered into employers are bound by the terms, and cannot unilaterally vary those contracts even if they consider it desirable, convenient or profitable to do so.

Employers do have a right to manage their business, but as with management in other areas of business this involves carefully considering the terms of all contracts before entering into them, and does not extend to give employers a right to renege on contracts afterwards. Even where collective employment contracts have expired, employers will in most circumstances continue to be bound by the terms of those contracts until some variation is agreed to.

In addition to the express terms of an employment contract, other terms may be implied, but only in accordance with the principles applying in respect of ordinary commercial contracts.

Negotiations for employment contracts proceed on the same basis as negotiations for any other contract, such as negotiations for an overdraft at the bank, or negotiations for a lease with the landlord. There is no obligation to conduct these negotiations in good faith, nor any obligation to adopt a neutral stance. The Court will not enquire as to the reasonableness of an employer's attitude. In addition to this, the employer has the power to engage in lockouts, and the employees have the power to engage in strikes. The Act prescribes the limits within which such activities will be lawful, and the Courts appear to be unwilling to impose any protective gloss to assist employees.

There can be no doubt that the new environment is substantially different to that which has operated previously, and all those involved will be required to develop new attitudes and new approaches.