

AN ADDRESS BY
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TO THE

EMPLOYMENT LAW INSTITUTE INC.
Auckland and Wellington

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Mr/Madam President, Institute Members,

Thank you for the opportunity to address you today.

First, 10 seconds on my background plus a disclaimer. Since May this year I have worked as the Principal Adviser at Business New Zealand, attempting to fill the role previously held by Anne Knowles. I previously worked in my own employment law practice and as in-house Counsel for the Meat Industry Association. Prior to that I worked as a Corporate Solicitor for ACC.

As to the disclaimer, what follows are my own thoughts on some aspects of the topic I was given, the Employment Relations Act - but I would hope for the large part they coincide with policy advocated by Business New Zealand. I will hereafter refer to the Employment Relations Act by its revealing and rather familiar acronym E.R.A.

Speaking of eras, employment as it used to be known industrial law like, for instance, Accident Compensation law, has seesawed tremendously in New Zealand during the last few decades. ACC had total overhauls in 1982, 1992, 1998 and 2001. Likewise employment law had major refits in 1973, 1987, 1990 (ECA), and 2000. Further changes are imminent.

The ERA is, of course, too large a topic to cover comprehensively in the time allocated. I could, for example, focus solely on the concept of Good Faith underpinning the ERA, but even that topic alone, especially when considering its interpretation and application in overseas jurisdictions, would require more than the time available to do justice to it. However, I

would mention in passing that the dearth of findings of substantial breaches of good faith may be indicative of a fuller realisation that good faith during bargaining applies equally to both parties. In as much as employers need to be wary not to breach the standard, so too unions must uphold the same level of wariness. Further, the ability under the Act to use third parties has not been extensively pursued, for example the use of Independent Reviewers as intermediaries dealing with sensitive financial information management has not, to my knowledge, been widespread.

Given the time constraint I would like to focus on what is a small part of the ERA and impending Employment Relations Law Reform Bill, but what is a large part of the employment relationship and employment law, namely that of unjustified dismissal.

The ERA formalised the concept of employment relationship and arguably a dismissal is akin to one spouse in a marriage relationship seeking a divorce. The major difference is however that the employer cannot divorce the employee from the employment relationship as of right, what is needed is good, or in other words, justifiable, cause.

At this juncture I would like to spend a few minutes on the concept of at-will dismissals. I recently heard Professor Richard Epstein from the University of Chicago speak on the concept of equality of bargaining power. The ERA, of course, formalised the notion that employment relationships were premised on an inequality of bargaining power. Professor Epstein's view was there was no such inequality and any law based on the premise was flawed. Dismissals at-will ie for good reason or bad reason or no reason at all would free up the labour market

because employers would be much more inclined to hire. Professor Epstein also spoke of the folly of affirmative action where a centralised mandatory scheme most likely disincentivises employers from employing. Employment of those with disabilities in the US actually declined when affirmative action laws were enacted intending to increase the employment. In much the same way the law in making employers search for good reasons to dismiss acts as a disincentive to employment.

Overseas at-will probation periods for new employees are used. In the UK I am led to believe the period was in fact two years recently reducing to one. Here the current government will not countenance any such at-will ability but a new government may well consider it. Small businesses, in particular, would benefit by such a move.

Now I will turn to some background on the ERA. When the ERA was being debated at the Select Committee stage prior to October 2000 there was substantial employer opposition to many parts of the Bill in large part, no doubt, due to its complete departure from the relative freedom of contract under the Employment Contracts Act 1990. Some elements of the Employment Relations Bill were so inflammatory to employers they were taken out pending a later review. Chief among these elements were the contracting out/sale of business and protection of employees' jobs.

This review duly took place ending around July 2003. The result was the Employment Relations Law Reform Bill introduced just prior to Christmas 2003.

The explanatory note to that Bill reads:

“This Bill furthers Government policy by amending the Employment Relations Act 2000 to enable it to better meet its key objectives of promoting fair, productive, and effective employment relationships between employees, employers, and unions.

To achieve this, the Act acknowledges the inherent inequality of power in employment relationships, and seeks to balance the interests of employers and employees through the promotion of unions and collective bargaining, the obligation to act in good faith, and the provision of a continuum of services and bodies designed to support and enhance ongoing employment relationships wherever possible. The operation of the Act since 2000 has, however, revealed a number of areas where it can be strengthened so that it can better achieve Government’s employment relations policy objectives.”

Going back to the principal Act, on the face of it, the ERA did little to change the substantive personal grievance provisions established under the Employment Contracts Act. There was some tinkering around the alignment of sexual harassment and discrimination cases so that a grievant must choose whether to pursue a claim under the ERA or the Human Rights Act. There was also a description of extenuating circumstances in failing to submit a personal grievance within 90 days of it occurring or of it coming to the attention of the grievant.

Of course, the major change was to do with institutional reform. Out went the Employment Tribunal and in came the Mediation Service run by

the Department of Labour and the establishment of the Employment Relations Authority; an investigative body who would deal with disputes in a speedy and less technical or legalistic manner than the previous adjudication process. New Zealand already had an inquisitorial (as opposed to an adversarial) complaints body in the Human Rights Commissioner who had wide powers to investigate complaints under the Human Rights Act.

The combination of near mandatory mediation and timely Authority investigations with an emphasis on avoiding delay and a non-legalistic approach has no doubt led to speedier outcomes but a direct comparison with the previous regime is difficult because of the significant differences involved. With an increased emphasis on mediation and diminishing emphasis on legalities, the Employment Court, even with the right of de novo appeals, has not experienced an upsurge in dispute of rights cases.

Certainly, awards for humiliation and injury to feelings have trended upwards over the years, although again it is difficult to tell if the new system has made a real difference to quantum. There has been some recent guidance by the Court of Appeal on remedies for example in *Nutter v Telecom* injury to feeling awards should be inflation proofed. As to lost income, the Court indicated that something less than full compensation was appropriate but not a conventionalised approach ie a contingent amount which incorporates life's exigencies contingency should be awarded.

Turning now to the Employment Relations Law Reform Bill, significant changes are afoot, among many other things, with the law on dismissal

and, if it is enacted with its current wording, New Zealand will no longer rely on the common law but will have a statutory code governing all dismissals.

The new test under the Bill is:

“whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employers’ actions, and how the employer acted, was fair and reasonable to both parties in all the circumstances at the time the dismissal or action occurred”.

And the test in the Bill also has a sting –

“the employer must have considered and balanced the legitimate interests of the employee and the employer”.

Both the CTU and Business New Zealand took exception to the proposed test, but for different reasons. On the one hand Business New Zealand proposed that there was no need to alter the common law unjustified dismissal test, which had developed over time and reached a steady state, but on the other hand the CTU’s concern was that the wording of the clause may not meet the Government’s intentions.

The CTU’s submission on the Bill referred to an article by Professor Gordon Anderson from Victoria University in Wellington. It was his view that over the last decade the interpretative approach taken to unjustified dismissal had been dominated by the increasingly restrictive approach adopted by the Court of Appeal.

Increasingly, he said *“it seems the test appears to be moving further to the standards of the particular employer making the decision”* rather than a more objective test. What I would like to explore is whether factoring in the standards of the particular employer breaches the objective test; I suggest that it does not.

The Transport and Industrial Relations Select Committee appeared to agree with the sentiment expressed by Professor Anderson and in the explanatory note to the Employment Relations Law Reform Bill the Committee says:

“In particular, the judgment of the Court of Appeal in the Oram case has been taken by many as suggesting that what is considered justifiable may only be considered from the perspective of what the employer considered to be fair and reasonable, and that in any inquiry by the employment institutions they may not substitute their own judgement for that of the employer.

However, it is precisely the function of the employment institutions to examine whether a dismissal or other action was unjustifiable in the light of all of the facts. This inevitably involves some “substitution of judgement”, but one based on an objective assessment of what a fair and reasonable employer would do in the circumstances. Deciding whether an action was justifiable solely on the basis of the subjective judgement of the employer who undertook the action would be neither fair nor reasonable.

In order to clarify matters, the Bill therefore specifies an objective test for justifiability that then goes on to set out the new test...”

Thus the commentary ascribes as a common perception, that is - what is considered justifiable may only be considered from the perspective of what the actual employer considered to be fair and reasonable - as arising from the Oram case. Just who “the many” are who make this assumption is not specified and a simple reading of the Oram case does not suggest this is a correct assumption anyway.

Oram was a case which involved a senior journalist for the New Zealand Herald failing to check that the name in a caption under a photograph actually matched the person in the photograph it identified. The Tribunal had held that there was unjustified dismissal for three reasons:

1. Mr Oram was denied natural justice as the employer had formed a negative view of his change of attitude during the disciplinary process
2. Systemic failure at the Herald contributed to the mistake
3. An incorrect weighting by the employer of some of the relevant considerations (mainly length of service and blemish free record and likelihood of recurrence of the error and the impact of the dismissal).

The Employment Court upheld that decision but did not address the appellant’s submission the Tribunal had substituted its own judgment for that of the Herald.

In its decision the Court of Appeal traversed the common law of unjustified dismissal and referred to *Iceland Frozen Foods Ltd v Jones* a UK industrial law case from 1982. There Justice Browne-Wilkinson Jones recapped what previous authorities had to say (I'm paraphrasing a little):

1. The Statute is the starting point
2. The Tribunal must consider the reasonableness of the employer's conduct, not simply whether they think the dismissal was fair
3. In judging reasonableness of the decision the Tribunal must not substitute its decision as to what was the correct course for the employer to take
4. In many (but not all) cases there is a band of reasonable responses an employer may take
5. The function of the Tribunal is to determine whether in the particular circumstances the decision fell within the band of reasonable responses. If inside the band it is fair if outside it is unfair.

The Court also referred to what the Tribunal had said:

These are the Tribunal's words:

"Should Mr Oram be dismissed? The Tribunal cannot substitute its own decision for that of the employer if:

The employer has shown that the decision to dismiss was in all the circumstances and at the time a reasonable and fair decision. Airline Stewards and Hostesses of NZ IUOW v Air New Zealand Limited, per Bisson J.

The Court does not function in order to substitute a decision with which it is more comfortable for one which it considers harsh. It is the Court's function to consider the action of the employer at the time of dismissal and in its own circumstances in order to determine whether it is capable of being shown to have been a just decision when it was made. Northern Hotel etc IUOW v Waikato Hospital Board."

The Tribunal carried on:

"Was the decision to dismiss a fair and reasonable one in all the circumstances of the case? There are two issues. Was the conduct complained of capable of amounting to serious misconduct? Whether in all the circumstances of the case dismissal was warranted? See Click Clack International v Jarvis [1994] 1 ERNZ 15."

The Court of Appeal found the Tribunal and the Employment Court had departed from this test by preferring the substitution of judgment test. At no stage was there a finding that no fair and reasonable employer could have found there to be irreparable conduct; instead the Tribunal focused on his own weighting of relevant considerations.

Far from saying fairness and reasonableness should be judged from the perspective of the employer, the Court merely reiterated the common law, which is the objective test. At most Oram changed the common law by substituting the word “would” for “could” referred to in BP Oil to allow an employer to consider a range of responses, consistent with the Iceland Frozen Foods case.

The test the Court of Appeal propounded was:

“The Court has to be satisfied that the decision to dismiss is one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of could and would use in the formulation in the second BP Oil case”.

The Court went on to say

“if in a particular case of summary dismissal the employer shows that the conduct was such that a fair and reasonable employer could see it as deeply impairing of the trust and confidence essential to the employment relationship it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed. This assumes, of course, that the fair and reasonable employer did take into account all the relevant circumstances of the conduct and a particular employment relationship in determining that the necessary confidence and trust had been deeply impaired”.

And also in relation to misconduct:

“The burden on the employer is not that of proving to the Court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.”

Yet the reference by the Select Committee that the Authority should entertain a substitution of judgment approach is not in accord with accepted legal thinking on the judicial or investigative process. Substitution of judgment is the same as “what would I have done in those circumstances.” What the Select Committee is really talking about is (and they finally do get round to talking about it) is the objective test, which involves no substitution of judgment only an application of reasonableness in all the circumstances. A subtle but crucial distinction.

The reference to substitution of judgment was raised in *Northern Distribution Union v BP Oil (NZ) Limited [1992] 3ERNZ 483* a Court of Appeal decision by Justice Hardie Boys J, that the Employment Court had substituted its judgment – and I’m quoting:

“for that of the employer in a matter of which the employer was in reality the best and in law the only judge”.

This dicta is consistent with the role of a judge to be impartial and objective, not subjective, when passing judgment.

However going back momentarily to Professor Anderson, he submits in his paper that the Court is deferring to the employer when deciding a case:

He says:

“the notion that the Authority or Court should defer to the employer – not substitute its judgment for that of the employer – indicates the extent to which neutral evaluation has been displaced by an increasingly subjective standard”.

The possibility for subjectivity increases, he says, with the idea that a dismissal is justified if it is within a range of reasonable responses even if it is a harsh response.

Yet from a reading of Oram and the other cases the Court of Appeal has decided over the years does not advocate that the Authority or Employment Court should defer to the employer but, once deeply impairing conduct has been reasonably established, it is for the employer to decide the sanction, of which dismissal is but one of a range of responses is available.

Professor Anderson also referred to an article by Professor Paul Roth of Otago University and a reference by him to a UK case, *Hadden v Van den Burg Foods Limited [1999] ICR*, where the Employment Tribunal favoured a substitution approach:

“the mantra ‘the Tribunal must not substitute their own decision for that of the employer’ is simply another way of saying that the

Tribunal must apply the reasonableness test by going somewhat further than simply asking what they themselves would have done. ... Providing they apply the test of reasonableness, it is their duty both to determine their own judgment and to substitute it where appropriate”.

I understand the law in Haddon has since been overturned in England with the Court of Appeal there sweeping away the substitution idea and allowing a range of responses by an employer so long as the sanction is reasonable in the circumstances.

To me it is a perfectly legitimate response, indeed it has become a stock Kiwi standard, that a decision might be harsh but fair. Indeed in Oram the Court of Appeal said:

“The dismissal might have seemed harsh, but the correct issue was whether it was open to the employer, acting fairly and reasonably, to have seen that as the appropriate response to Mr Orem’s conduct.”

I believe the situation was well put by Justice Williamson in *Wellington Road Transport Union v Fletcher Construction Co* in 1983 by Williamson J said that each case is treated on its own merits and that account must be taken of *“the conduct of the worker, the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract [express, incorporated and implied (this must include the particular work standard expected and any house rules agreed)]; the terms of any other relevant agreements, and the circumstances of the dismissal. The Court also has regard to good*

industrial practice which includes some consideration of the moral and social attitudes of the community”.

If a particular employer has very high standards, as evidenced by the employment agreement, house rules, general practice, and employee's attitude, then the Authority ought not be able to second guess the application of that standard. It might think that the result involved a tough call, and as the employer the Authority would have given the grievant a second chance, but he or she must respect the ability of the employer to make its own decisions.

In other words the focus must be on the objective fairness of the outcome rather than on whether the Authority would have made a different decision in the circumstances. The fact that an authority member may decide substantively that dismissal was not open to an employer is not substitution of judgment, merely an application of the test of reasonableness. Allowing substitution of judgment necessarily involves subjectifying the investigation process. To me substitution is synonymous with subjectiveness. I do not agree with Professor Anderson that there has been a trend towards subjectivity merely because the Court of Appeal has focused on the particular employer's circumstances.

There is another side to the potential created by this particular reform. As we all know, the dismissal decision can be generally looked at from the split perspectives of procedural and substantive fairness, but that it is often not helpful to draw a sharp distinction between the two. In questions of dismissal, the Authority will generally be looking at two

questions, whether a fair process was carried and, if so whether dismissal is justified as a result.

Under the proposed amendment (and particularly taking into account the comments in the Explanatory note) I question what it is that the Authority will need to do to address the new threshold established by the Bill. It is possible that the provision may be interpreted so that the Authority gives itself the power to re-litigate the whole episode leading to a dismissal, that in the Authority investigation may become a de novo decision-making process where the Authority member is authorised to substitute his or her judgment for that of the employer. In, say, dismissals based on dishonesty, will the employer need to prove not only that a fair process was carried out but that it arrived at the factually correct position?

This possible approach calls into question many things not the least of which will be whether the Employment Relations Authority is itself resourced sufficiently to cope with what would be a significant increase in the demands of its time given the additional grievances likely to be raised and the additional investigation times per grievant as a result of the lowering of the dismissal threshold.

Further, the reference to the employer's obligation to consider and balance respective "legitimate interests" in the Bill adds another dimension in terms of complexity and confusion. What does this term actually mean in the context of an employment relationship. Does an employer who is dismissing two people with the same level of culpability need to weigh up the decision differently because of the circumstances

of one employee as to another eg that one has a mortgage and six kids?
What then about disparity of treatment claims?

In leaving this topic one further natural consequence of the reform may be that redundancy decisions as well will be put under the substitution spotlight and the law concerning management prerogative amended to fit within the new regime.

Before concluding, I would like to briefly address fixed term contracts under the Reform Bill. The only change here is that the way the employment will end and the reasons for reasons for it ending that way need to be put in writing in the employment agreement. The Court of Appeal has recently addressed fixed term contracts under Section 66 of the ERA. In *Norske Skogg v Clark* the majority of a bench of three found that because the employer had not satisfied the last of three limbs of section 66 (which is the most technical requirement, namely that the employee must be told why the employment was to end in a particular way), there was an unjustified dismissal. I must say that I prefer Justice Heath's dissenting judgment, which said he could not fathom how a procedural flaw in an otherwise genuine dismissal could lead to reinstatement. All parties knew that Mr Clark's position was temporary pending structural reform by the employer.

Thank you once again and I'd be happy to take any questions from the floor.