New Zealand Council Of Trade Unions' Complaint to The International Labour Organisation on the Employment Contracts act

OPINION
BY
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FOR THE
NEW ZEALAND BUSINESS ROUNDTABLE

Dr Colin Howard was educated at Prince Henry's Grammar School, Worcestershire, and at the University of London and Melbourne University. He taught in the Law Faculties at the University of Queensland (1958-60) and Adelaide University (1960-64) before becoming Hearn Professor of Law at Melbourne University for 25 years (1965-90). He was awarded his Ph.D. from Adelaide University in 1962 and his Doctorate of Laws from Melbourne University in 1972. He is now a practising member of the Victorian Bar, being perhaps best known for his constitutional expertise, but specialising also in commercial and administrative law, and has published a number of texts for both lawyers and laymen. During 1973-76 he was General Counsel to the Commonwealth Attorney-General. He is also a long-established commentator on public affairs.

IN THE MATTER OF THE EMPLOYMENT CONTRACTS ACT 1991 (NZ) AND A COMPLAINT BY THE NZCTU TO THE ILO

MEMORANDUM OF ADVICE

1. I have been asked to review issues raised by the International Labour Organisation ('the ILO') in response to a complaint ('the complaint') dated 8 February 1993 made by the New Zealand Council of Trade Unions ('the NZCTU'). In substance the complaint is that the Employment Contracts Act 1991 (NZ) ('the Act'), which came into operation on 15 May 1991, does not accord with principles adopted by the ILO in relation to freedom of association and collective bargaining.

2. The complaint relies particularly on ILO Conventions 87 and 98. These are respectively the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949. New Zealand is a member of the ILO but has not ratified these two conventions.

3. From the materials supplied to me, I understand the sequence of events thus far to have been as follows. The complaint was referred to the ILO Committee on Freedom of Association ('the Committee'). A response to the complaint was sent to the Committee by the New Zealand Government ('the Government') and apparently received on 14 September 1993.

4. The Committee held a two day hearing in Geneva on 4 and 5 November 1993; deferred the matter until the next scheduled meeting of the ILO Governing Body ('the Governing Body'), due in March 1994; and under Case No. 1698 produced a Tentative Working Paper ('the Working Paper') dated November 1993. The Government forwarded a response to this document in February 1994. The New Zealand Employers' Federation also forwarded a submission dated 28 February 1994. These materials were not taken into account at the meeting in March 1994.

5. In the meantime the Working Paper had been made the basis of a report by the Committee to the Governing Body ('the Report') numbered 292 and ultimately dated March 1994. The Report made a number of changes to the Working Paper recommendations but described its own conclusions as 'interim' only. One of them was that the next step should be for an ILO direct contacts mission to visit New Zealand to gather more information. That is not expected to eventuate until later in 1994. Meanwhile the Government, through the Minister of Labour, Mr Kidd, made a statement rejecting the interim findings at the annual ILO conference on 8 June 1994.

6. On the basis of the foregoing understanding of events I proceed to the issues raised by the ILO. Although as a matter of form the Working Paper has been superseded by the Report, a comparison between the two yields helpful information. Before making the comparison, however, the logical starting point for an analysis of the issues raised by the ILO is the policy underlying the Act.

7. The opening words of the statute make that policy clear: it is an Act 'to promote an efficient labour market'. It is clear also, from both the remainder of the long title and the substantive terms of the Act, that the principal means by which this end is to be achieved is a far-reaching restructuring of the labour market in the direction of freedom of contract as between employer and employee. At the present day it cannot be seriously argued that, in an orderly western democracy which is subject to the rule of law, such means are not well adapted to the end in view.

8. This, however, does not appear to be the issue. The quotes in paragraphs 2.1 and 2.2 of the complaint sufficiently attest that before the enactment of the Act there was general agreement in New Zealand on the need for change in labour relations, and perhaps indeed for radical change. One effect of the Act has been to bring to a head sharp disagreement about what the NZCTU President, Mr Ken Douglas, is quoted as calling 'the form of change'. This might more accurately be expressed as 'the future role of trade unions'.

9. The point is important because it goes directly to the magnitude of the changes made by the Act to the employment bargaining process. Throughout this century labour relations in New Zealand, as in Australia, have been dominated by three institutions: governments, trade unions and employer organisations. Trade unions in particular have flourished under that system. It follows that if the system is modified to any significant extent, it is the influence of the unions that is likely to be most affected.

10. The tripartite structure of traditional labour relations is directly reflected in the structure of the ILO. Its main decision-making body, the General Conference, consists of representatives of the member states, half of whom are government delegates and half of whom represent respectively employers and employees from within those states. For this reason it is not surprising if, as has evidently occurred in the present case, ILO officers and committees have difficulty in understanding a labour relations system which accords no special priority to trade unions and proceeds upon a much wider concept of freedom of association than the one to which they are accustomed.

11. It should be noted also that, in its very nature, the ILO is necessarily trade union oriented. The purposes for which the organisation was brought into existence are set out in the preamble to its constitution. They are wholly concerned with benefits to workers. This, of course, accounts for the fact that most, and possibly all, of the considerable ILO output of Covenants, Conventions, Recommendations and so on is similarly concerned with benefits to workers.

12. Under the traditional tripartite structure of labour relations, benefits to workers (by which is meant wage earners) are peculiarly the concern of trade unions. It follows that it is inherent in the character of the ILO that it should conceive of its functions in much the same way as a trade union does and take its ideas from the same source. It is noteworthy that the possibly wider ambit of the Philadelphia Declaration of 10 May 1944 has not modified this mindset.

13. It further follows that, confronted with legislation like the Act, the initial ILO reaction is likely to be to see it more as an attack on trade unions, and therefore on workers' entitlements, than as a new approach to achieving precisely the peace and social justice aims for which the ILO exists. It has also to be remembered that the ILO has a highly diverse membership, much of which is likely to be unfamiliar with the everyday assumptions and mode of operation (e.g. as to consultation) of a common law parliamentary democracy.

14. I return now to the Working Paper and the Report. I have mentioned already that a comparison between the two documents yields useful information. This applies most obviously to the respective sets of recommendations but has a bearing also on the summaries of the cases presented by the parties. Those summaries remain unaltered. In my view they are weighted heavily in favour of the complaint.

15. This may not be intentional. It may simply reflect the fact that the ILO officers found themselves on familiar conceptual territory with the NZCTU arguments but out of their depth with the first Government submission. Nevertheless, even if one makes that

allowance, it is hard to believe that equal attention has been paid to both sides. The Government's original submission is a model of comprehensive precision. Its responses to the Working Paper recommendations are similarly not susceptible of misunderstanding and should have been taken into account.

16. Whatever the true explanation, the summary of the Government's case cannot be accepted as adequate either in its own right or, with one possible exception, as a basis for any of the recommendations. Much of the Government's original submission has been ignored, overlooked or not properly comprehended. Its response to the Working Paper recommendations has officially been ignored.

17. The possible exception to which I refer is the Report recommendation (o) that an ILO direct contacts mission proceed to New Zealand to find more facts. Even this recommendation, however, is of uncertain effect. It refers to the 'enormous complexity' of the case, to 'additional detailed information' and to the necessity for 'full knowledge of all the facts'. This is hard to follow.

18. The complexity eludes me. I can find nothing in the Act in the least inconsistent with the Philadephia Declaration, freedom of association or collective bargaining. It is true that the Government's understanding of the two latter concepts differs somewhat from that of the ILO as expressed in Conventions 87 and 98, and no doubt elsewhere, but that is a matter of New Zealand law. Any perceived complexity seems to derive from the ILO's apparent inability to grasp this fairly elementary point. It is also the very reason why the Government is not in a position to ratify the two Conventions, if that be thought relevant.

19. It is similarly hard to understand what additional information is to be sought or what is meant by all the facts. Indeed, although no doubt inadvertently, the latter could be taken to imply a suspicion that the parties are concealing something from the ILO. The vagueness of such statements inevitably gives rise to the thought that the Committee's unacknowledged concern is how to get itself out of a situation that it should never have been in in the first place, and of which it seems to have little understanding.

20. Before turning to the other interim recommendations, I draw attention to a recurrent theme in the ILO material. This is the assumption, scattered throughout the frequent references to freedom of association and evident in Report recommendations (k) and (m), that that concept includes a right to strike. The following Australian incident may be of interest.

21. The Industrial Relations Reform Act 1994 of the Commonwealth came into operation on 30 March 1994. It extensively amended the Industrial Relations Act 1988. One of the amendments was the insertion into the principal Act of a Division 4 of Part VIB conferring a limited right to strike. It being quite possible that a right to strike is incompatible with the conciliation and arbitration legislative power of s.51(xxxv) of the Australian Constitution, this provision relies primarily on the power in s.51(xxix) for the Parliament to legislate with respect to external affairs.

22. For practical purposes this meant that parliamentary counsel had the task of finding an ILO Covenant or similar document, to which Australia was a party, that conferred a right to strike. The task was evidently not an easy one. Five possible sources of power are relied on in s.170PA(1) of the principal Act, as follows:

    (a) Article 8 of the International Covenant on Economic, Social and Cultural Rights of the United Nations;

(b) the Freedom of Association and Protection of the Right to Organise Convention of the ILO;

(c) the Right to Organise and Collective Bargaining Convention of the ILO;

(d) the constitution of the ILO;

(e) customary international law relating to freedom of association and the 'right to strike'.

23. So far as (a) is concerned (the United Nations Covenant), the only relevant text is as follows:

"1. The States Parties to the present Covenant undertake to ensure:

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country."

In my view, briefly put, the terms of this provision are too vague and imprecise, not to mention self-contradictory, to confer any identifiable international obligation or correlative right.

24. The two ILO Conventions (b) and (c) are mainly concerned with rights to belong to trade unions and make no reference to a right to strike. As to (d), there is no reference in the constitution of the ILO to a right to strike, and as to (e), there appears to be no relevant body of customary international law. I conclude that no legitimate criticism can be made by the ILO of the strike provisions of the New Zealand Act. Indeed, if the United Nations provision cited above means anything, it gives primacy to the provisions of the Act over ILO documents.

25. I have the following further comments on Report recommendations not yet specifically referred to.

Recommendation (a)

I agree with the view that this recommendation implies a criticism of the manner in which the Act was enacted. In so doing it reveals a degree of ignorance of New Zealand's system of government that undermines every aspect of the interim Report. The recommendation cannot stand.

Recommendation (b)

The assertion of mixed fact and law on which this recommendation proceeds is not only wrong but so wrong as to raise a doubt whether the Committee has understood the Act's provisions at all. The Committee is referred specifically to Part I of the Act and to sections 10, 12(2), 13, 14, 17, 59, 170 and 185. The recommendation cannot stand.

Recommendation (c)

This is not a recommendation. It is a request for information. The request is expressed in terms which suggest that the Committee is ignorant of the New Zealand judicial system, and indeed of the common law system in general. Specifically the Committee's attention should be drawn to the judgments of the Court of Appeal in Eketone & Docherty v. Alliance Textiles (NZ) Ltd, CA 388/91 5 November 1993. Had the Committee taken into account the Government material forwarded to it for the March meeting it would have been aware of that decision, particularly the observations of the President of the Court at p.6 of his judgment, from which no other member of the court dissented. Recommendation (c) has been complied with already. If the Committee is not aware of that fact, the fault is its own.

Recommendation (d)

Having regard to the situation with recommendation (c), (d) is superfluous.

Recommendation (e)

What this recommendation seeks to do is confine negotiation to the collective agreement model in which trade unions do the negotiating on behalf of, but to the exclusion of, employees. Such a recommendation entirely misses the point of the Act, which is to enable every individual to decide for himself or herself what form of negotiation to enter into and whether with a view to a collective contract or not. It is, moreover, impossible to understand how it can be said that an Act which meticulously preserves representative negotiating and collective contracts among the alternatives available does not encourage and promote them. The recommendation is entirely misconceived and cannot stand.

Recommendation (f)

This recommendation is superfluous for the reasons given under (c).

Recommendation (g)

All one can say about this recommendation is that the Committee appears to have entirely misunderstood the New Zealand case law on which it purports to rely and seems to have no awareness of the actual dynamics of industrial negotiation. Neither does it appear to have understood ss.27 and 28 of the Act, particularly s.27(1)(c) and the concluding words of s.28(1). The recommendation cannot stand.

Recommendation (h)

This recommendation appears to rest on no sounder basis than unproven NZCTU allegations that have not been made the subject of any legal proceeding. There is no way of avoiding the conclusion that such a recommendation on such a basis reveals a want of integrity in the Committee. It goes together with recommendation (a) in undermining every aspect of the interim Report. As to domination of representatives by employers, the Committee should inspect ss.8, 10, 12, 16, 27, 28, 30 and 57 of the Act, which constitute a formidable range of safeguards against any such thing. The recommendation cannot stand.

Recommendation (i)

This recommendation goes together with recommendation (e) as being simply a denial of the individual freedom of association which is the fundamental object of the Act. It is similarly misconceived and cannot stand.

Recommendation (j)

This recommendation should be accepted. It is nevertheless quite extraordinary in the context. It appears to be entirely consonant with the laws of New Zealand, to render practically everything taken under consideration thus far otiose and to require the immediate dismissal of the complaint.

Recommendations (k), (l) and (m)

I refer to the conclusion reached in paragraph 24 above. Recommendations (k) and (m) cannot stand. Agreement may be expressed with (l), but the point is immaterial.

Recommendations (n) and (o)

I have dealt with recommendation (o) in paragraphs 18 and 19 above. Recommendation (n) is merely another request for information.

Colin Howard

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