

T368 THAVETHOO, M. ILO influences on New Zealand ...

MELKIAU THAVETHOO

ILO INFLUENCES ON NEW ZEALAND
AND
THE SINGAPORE TRIPARTISM APPROACH

DIPLOMA IN LAW RESEARCH PAPER

EMPLOYMENT LAW (LAWS 532)

LAW FACULTY
VICTORIA UNIVERSITY WELLINGTON

2002

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ABSTRACT

The object of this paper is to relate the formulation of labour standards by the International Labour Organization (ILO) through the creation of Conventions and Recommendations as well as its representation as an external check on labour standards adopted by world States. New Zealand being the founder member of the ILO, the paper focuses on how ILO standards are being influenced into New Zealand's Employment Law via Conventions relative to Employment Law via the process of ratification by establishing:

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ABSTRACT

The object of this paper is to relate the formulation of labour standards by the International Labour Organization (ILO) through the creation of Conventions and Recommendations as well as its representation as an external check on labour standards adopted by world States. New Zealand being the founder member of the ILO, the paper focuses on how ILO standards are being influenced upon New Zealand, particularly the core Conventions relative to Employment Law with an emphasis on those not being ratified, by establishing:

- The conceptual difficulty presented by legislations of New Zealand as against the Conventions and other International Covenants.
- The rationality/justification for not having ratified Conventions but the same remaining a strong moral influence over member States like New Zealand as a global common law standard.
- The ILO complaints mechanisms available and the effectiveness of their intervention upon member States, in this instance New Zealand for the sanction of non-compliance of ILO standards through bad publicity of its failure in the broader context of the overall human rights record.

Consistent with this approach, the paper also makes an effort towards comparing and contrasting concisely the different national approach undertaken by Singapore (with whom New Zealand has entered into a Free Trade Agreement) and their success of achieving global competitiveness by adopting the ILO tripartism concept in its decision making mechanisms of its national socio-economic policies; thus justifying the need for changes in the approach within the ILO for flexibility of application by ensuring the practicality of standards.

Word Length

The text of this paper (excluding contents, page, and footnotes) comprises approximately 15,000 words.

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Introduction

New Zealand and is a founder member of the ILO in 1919 (created by the Treaty of Versailles) and it was after the 2nd World War, ILO met in Philadelphia (the 26th International Labour Conference – presided in fact by the former Prime Minister of New Zealand Sir Walter Nash); at which conference the aims & objectives were broadened and refined with such foresight and vision that the unanimous “Declaration of Philadelphia” appended to the International Labour Organization Constitution remains even today as one of the most powerful statement of objectives for the international community on Labour & employment matters written. New Zealand has therefore been intimately associated with the ILO since its inception.¹ This paper therefore delves into the principles governing the ILO declarations and its influences in New Zealand labour/employment policies as well as its difficulties towards not being able to adopt all the ILO declarations in spite of being also the founder member of this international body and how they get roped in towards “compliance” despite having not ratified the respective conventions.

The ILO

Before pursuing into the adoption / influences of the ILO Conventions & Recommendations, it would perhaps be of essence to look into briefly the background of the ILO, its international standards on labour issues and the role played by the ILO relative to its Conventions & Recommendations. It is worthwhile noting the uniqueness of ILO as a specialised agency amongst UN League of Nations, being older than even the UN. The uniqueness being:

- (i) Its tripartite structure having Employer, Worker members as well as Government representatives in its governing body and its annual conference being the only international forum allowing both employers and workers the full voting rights with Governments.
- (ii) Its supervisory power to require member countries to report regularly and publicly on the way in which they implement the ratified conventions.

¹ ILO Conventions Ratified (Dept. of Labour) 1993 – Foreword of former Prime Minister of NZ, Mr. Jim Bolger

The role or the prime function of the ILO, as laid down in its constitution, was to establish international standards across wide range of issues related to labour. The standards that it has set over the years are collectively called the International Labour code & consist mainly of Conventions & Recommendations adopted by its annual general conference. From a legal perspective, the fundamental differences between these 2 kinds of instruments are:²

- (i) **Conventions.** An international labour convention is a treaty, which is designed to be ratified by members. In ratifying, the member state **undertakes** to comply with all its provisions and to report regularly to the ILO on how it does so. These reports are examined by an independent committee of eminent jurists; the Committee of Experts on the application of conventions & recommendations. The Committee publishes its main findings in a report as a basis for discussions at the annual conference between Governments concerned and a tripartite committee of representatives. Individual issues are also discussed with members by the Expert committee to enable ILO resources to be used for practical assistance if necessary.
- (ii) **Recommendations.** International labour recommendation sets a number of standards as guidelines for Governments to follow. These are not a treaty and have no legal force in Employment Law.

Within 12 months after the ILO annual conference, full text of every Convention & Recommendation adopted is published along with a statement of action for NZ Government proposes to take on it, as an appendix to Parliamentary Paper (the Report of the NZ Government delegates to the Conference; which are available in appendices to the Journal of the House of Representatives).³

It can therefore be summarised that the ILO was established to formulate labour standards through the creation of conventions and to supervise their implementation. It represents an important external check on the labour standards

² ILO Conventions Ratified (Dept. of Labour), 1993

³ Id., P. 9

adopted by world States. Although the conventions of the ILO are binding only if ratified by a member State's Government, as a global common law standard, the conventions remain a strong moral influence over member states regardless of ratification. Each Member State is therefore bound to respect a certain number of principles, which have become like rules above conventions.⁴

Influences of ILO on New Zealand (NZ)

ILO influences upon New Zealand can be reasonably deciphered from its actions as a member state by way of its:

- (i) Ratifications of Conventions.
- (ii) Rationale for Non-ratification of selected Conventions but endeavouring to exercise its adoption as far as possible from a strong self imposed obligation.

This paper cannot cover the entire ILO Conventions to date but will confine to essential aspects of those relative to Employment Law perspective, in particular the Fundamental ILO Conventions.

The ILO Governing Body has identified 8 ILO Conventions as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member states. These rights are a precondition for all the others in that they provide for the necessary implements to strive freely for the improvement of individual and collective conditions of work. One major achievement of the ILO has been the adoption of the Declaration of Fundamental Principles and Rights at Work 1998. This declaration is of particular importance because it is seen as imposing a constitutional obligation on all members:⁵

“arising from the very fact of membership in the Organisation, to respect, to promote and to realise in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of the Conventions.”

⁴ Freedom of Association Digest of Decisions & Principles of the Committee of Governing Body, 4th Edition (1996) – (hereafter referred Digest), Para 10

⁵ The Role of International Labour Standards, By Gordon Anderson, Employment Law Bulletin (referred hereafter as ELB), March 2002, P 22

The core conventions are those concerned with:

- Freedom of association and the effective recognition of the right to collective bargaining (Convention No. 87 and 98);
- The elimination of all forms of forced or compulsory labour;
- The effective abolition of child labour;
- The elimination of discrimination in respect of employment and occupation (Convention No.100and 111)

The ILO's adoption of this declaration, and the concentrated campaign to make its observance a reality represents an important restatement of the core values on which the organization was founded and hopefully it may provide the most effective medium term means to advance core international standards.⁶ These fundamental ILO conventions and its impact of influence upon New Zealand is therefore of symbolic significance.

Conventions ratified through registration with the Director-General of the International Labour Office shall be binding upon NZ after 12 months for a period of 10 years and it becomes incumbent upon them to:

- Establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to the respective convention after consultation with employers' and workers' organizations.
- It must regularly submit a periodic report on its compliance with the convention. Unions and employers' associations may make submissions on the government report. These in turn are dealt with by the ILO's Committee of Experts, which produces a public report concerning the country's compliance with the particular convention in question. Where there is a serious problem concerning the country's compliance, it is referred to the tripartite Conference Committee on the Application of

⁶ The Role of International Labour Standards, by Gordon Anderson, ELB, March 2002, P 22

Standards during the annual International Labour Conference (the ILO's plenary body).⁷

In addition to this periodic reporting process, there are two complaints procedures under the ILO Constitution for breach of ratified convention. There is the procedure under Article 24 of the Constitution, whereby an organization of workers or employers can make a representation to the ILO Governing Body that a state party has breached a convention; and there is the procedure under Article 26, under which one state party can complain to Governing Body of a breach of convention by another state party.⁸

In the case of conventions not ratified by NZ, the probing questions that would need to be addressed in stages would then be:

- a) What is the justification / rationale for NZ having not ratified?
- b) Would NZ be able to neglect or disregard these conventions as it deems appropriate?
- c) Does NZ get influenced by the ILO in anyway inspite of having not ratified?

First and foremost, it is the policy of NZ to ratify all treaties and international instruments only when the law of the land becomes compliant. Accordingly the Government has specifically stated that "because of the **obligations incumbent** on ratifying countries, NZ ratifies any ILO convention only when there is strict compliance of law and practice with all provisions of the particular Convention".⁹ This has been criticised by some commentators as "unduly conservative",¹⁰ as the ILO Constitution does not require conformity prior to ratification but only when it comes into force 12 months after ratification. Despite arguably giving ample time to bring the law into compliance and the very nature of ILO conventions has been suggested to contemplate implementation by means other than government action,¹¹ the policy remains still

⁷ Ratification of ILO Conventions, By Dr. Paul Roth, ELB-Jan 2002, P 4

⁸ Id. P 4/5

⁹ International Labour Standards and the Review of Industrial Law (1986) by Gordon Anderson (NZ Journal of IR 27, 28)

¹⁰ Id. 29

¹¹ Id.

in force and this paper will also further addresses the rationale of having to continue with such a policy.

NZ being one of the founder members of the ILO, the most intriguing and pertinent focus would be on the original stand taken by the Government on the ratification of ILO Conventions and relating it to the existing governing policy. This could be aptly deciphered from the deliberation of Mr. Thorn, the NZ Government delegate at the fourth sitting of the International Labour Conference session, San Francisco on 24th June 1948; the relevant passage of which is being quoted:

“...that there was a far better prospect of Governments accepting a Convention agreed on by the ILO **with its tripartite representation** than there would be if proposals reached them from any other organization whatsoever. And this is the view of NZ Government.

But I must add here that the mere adoption of a Convention of the ILO is inadequate. The Convention must be **honestly accepted** by Governments of Member States and be **properly administered**. This involves the creation of an active, informed and favourable public opinion, and in this connection every well-disposed citizen of nations represented here must accept some responsibility. Governments exercise great power, but in the last resort the people possess the power and it depends on how they think and act as to whether or not Conventions become realities in industrial and social life. More than the Convention, even, is the popular will, and to ensure that the Convention will yield its best effect that will **must be public-spirited and enlightened.**”¹²

This paper will therefore take cognisance of this standpoint and apply the adoption / acceptability of the Conventions below to the Government, Employers, Workers and the public at large. Although international labour standards and their application probably do not feature largely in the daily concerns of unions, employees and employers in New Zealand it is, from time to time, worth recalling that the labour standards taken for granted in New Zealand

¹² 4th Sitting of International Labour Conference, 31st session, San Francisco, 24/06/1948, By Mr. Thorn – NZ Govt. Delegate

are not enjoyed by the great majority of the world's workers. Indeed in many countries workers do not enjoy even the most basic of standards.

ILO Interferences & Its Implications

Freedom of Association

The 2 Conventions of relevance are:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87).
- Right to Organise and Collective Bargaining Convention, 1949 (No.98).

Convention 87 provides that workers have the right to establish and join organizations of their own choice without government interference; they have the right to draw up their own rules, choose their own representatives, organise their own administration and decide upon their own programmes; and government administrative authorities may not dissolve or suspend these organizations.

Convention 98 deals with several aspects of freedom of association. It provides that workers must be protected against discrimination on the grounds of their union membership or union activities. It also provides that organizations of workers and employers must be protected against acts of interference, in particular the domination of workers' organizations by employers. The convention seeks to ensure the promotion of collective bargaining through "the autonomy of the parties and voluntary nature of negotiations"¹³

These two conventions have long ranked among the "core" ILO standards. Freedom of Association is fundamental to the structural integrity of the ILO since one third of ILO's constituency is comprised of workers' organisations. Thus, when a country becomes a member of the ILO it implicitly accepts obligations connected with the right of freedom of association.¹⁴

The greatest conceptual difficulty presented by Employment Legislations in NZ relates to defining the concept of "freedom of association". A fundamental conflict exists between NZ Bill of Rights based notions of "freedom of association" on one hand and the meaning accorded to that in an employment

¹³ Ratification of ILO Conventions, By Paul Roth, ELB – Jan 2002, P 4

¹⁴ Id.

law context on the other. The rights as provided in the Bill of Rights Act 1990 are public rights conferred by the State to maintain democratic order. None entail affirmative action of any description. In this context of employment, freedom of association means nothing more than individuals having the right to assemble.¹⁵ In the same manner, Article 22 of the International Covenant on Civil and Political Rights 1966 states:

1. Every one shall have the right to freedom of association of others, including the right to form and join trade unions for the protection of his interest.
2. No restrictions may be placed on this right **other than those, which are prescribed by law, which are necessary in a democratic society in the interest of national security and public safety...**¹⁶

The principal provisions relevant to trade unions and worker organizations would be The International Covenant on Economic, Social and Cultural Rights 1966 which states under Article 8:

- a) The right of every one to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned for the promotion and protection of his economic and social interest. No restrictions may be placed on the exercise of this right **other than those prescribed by law and which are necessary in a democratic society in the interest of national security or public order or for the protection and freedom of others.**
- b) The right of trade unions to establish trade unions.
- c) The right of trade unions to function freely to no limitations other **than those which are prescribed by law and which are necessary in the democratic society in the interests of national security or public order or for the protection and freedoms of others.**
- d) The right to strike **provided that it is exercised in conformity with the laws of the particular country.**¹⁷

¹⁵ Westlaw - 28 CAWILJ 65, P 1

¹⁶ Employment Law Guide (hereafter referred as ELG) 2001, 5th Edition, Para ERpt 3.12(1)

¹⁷ ELG 2001, Para ERpt 3.12(2)

Countries, which have ratified both the Covenants, must report on the measures taken, and on the progress made in achieving the rights the Covenant. Reports are made to the UN Economic and Social Council. New Zealand has ratified both Covenants, but entered reservations in respect of the articles relating to trade union rights. These reservations were primarily required because features of New Zealand law at the time, such as compulsory unionism, union monopoly bargaining rights, and the power to deregister unions, were not compatible with the Covenants.¹⁸

Most OECD countries have ratified Conventions No. 87 or 98; two exceptions however are NZ and the USA.¹⁹ As a matter of fact, New Zealand is one of the few prominent members of the ILO that has not ratified these two conventions, which are the principle ILO conventions relating to the right to freedom and having been declared as the factor in the achievement of social justice and one of the principal elements in the achievement of **lasting peace**; without which the concept of tripartism would be meaningless.

In the light of this, a comparative assessment of the international covenants mentioned above together with the NZ Government's policy rationale be made against the following relevant procedural function of the ILO and mandate accorded to its Committee on Freedom of Association:²⁰

- i. Complaints lodged with the Committee can be submitted whether or not the country concerned has ratified the freedom of association Conventions.
- ii. Where national laws, including those interpreted by the High Courts, violate the principles of freedom of association, the Committee always considered it within its mandate to examine the laws, provide guidelines and offer the ILO's technical assistance to bring the laws into compliance with the principles of freedom of association, as set out in the constitution of the ILO and the applicable Conventions.

¹⁸ ELG, ERpt 3.2

¹⁹ Id., ERpt 3.3

²⁰ Freedom of Association, Digest of Decisions & Principles of the Committee (hereafter referred as Digest), Para 5,8,10,11,13,21,23,24,25 & 27

- iii. When a State decides to become a Member of the ILO, it accepts the fundamental principles embodied in the Constitution and the Declaration, including the principles of freedom of association.
- iv. All Governments are obliged to respect fully the commitments undertaken by ratification of ILO Conventions.
- v. A State cannot use the argument that other commitments or agreements can justify the non-application of ratified ILO Conventions.
- vi. In all the cases presented to it since it was first set up, the committee has always considered that the replies from governments against whom complaints are made should not be limited to general observations.
- vii. When the Committee requests a government to furnish records of judicial proceedings, such a request does not reflect in anyway on the integrity or independence of the judiciary. The essence of judicial procedure is that its results are known, and confidence in its impartiality rests on their being known.
- viii. The development of free and independent organizations and negotiation with all those involved in social dialogue is indispensable to enable a government to confront its social and economic problems and resolve them in the best interests of the workers and the nation.
- ix. Development needs should not justify maintaining the entire trade union movement of a country in an irregular legal situation, thereby preventing the workers from exercising their trade union rights, as well as preventing organizations from carrying out their normal activities. A balanced economic and social development requires the existence of a strong and independent organization, which can participate in the process of development.
- x. The fundamental objective of trade union movement should be to ensure the development of the social and economic well being of all workers.

If the 3 probing questions mentioned earlier are now assessed against the above functions and mandates relative to that of the International Covenants stated and that of the NZ Government policy, it would be quite obvious that the solution to the social and economic problems of any country is dependant upon:

- The socio-economic policies/direction of the Government being the critical factor for:
- The potential business investment climate and expansion of existing business enterprises being the critical factor for:
- The occupational and economic interests of workers.

All the 3 parties are therefore inter-related. ILO, whilst emphasising on the workers interest/safe-guard, it does not seem to have provided any 'safety net' to employers and the government on any eventual "malafide" actions by workers or trade union leaders for their own self-interest/power resulting in economic instability of the Employers, the Nation and/or detriment to the public interest; which is also contrary to that of the two international covenants stated above. The essence of the tripartite concept as articulated Mr. Thorn above is also non evident.

Complaints Mechanism

In addition there are two ILO procedures for dealing with complaints where a country (like NZ at present) has not ratified Convention 87 or 98. In 1950, the Governing Body of the ILO established the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC). It is comprised of 9 independent members appointed by the Governing Body. Cases may only be examined by the FFCC if however; the government concerned consents to participate in the process. It was not until 1964, however, that a government first agreed to be subjected to the process and in its existence the FFCC has examined only 6 cases.²¹ Consisting as it does of a procedure, which respects traditional procedural guarantees, it is relatively long & costly and has only been used in a limited number of cases.²² The shortcomings of this consensual jurisdiction were remedied with the establishment in 1951 of the Committee on Freedom of Association. Since this committee is made up of members of the governing body itself, it does not rely upon a state's consent to deal with complaints. Since its establishment, it has investigated about 2000 complaints, six of which were brought against NZ.²³

²¹Ratification of ILO Conventions, Dr. Paul Roth, ELB, Jan 2002, P 5

²²Digest, P 2

²³Id., ELB, Jan 2002, P 5

Nevertheless, having established that complaints can be still lodged and the obligations for New Zealand to have due regard towards implementation of the ILO principles & policies laid down in the Conventions by virtue of its membership, it may now be prudent to see how the interference / influence process of ILO in relation to NZ employment issues from the following cases:

i) In June 1979, the NZ Public Services Association (PSA) lodged a complaint to ILO on the introduction of a Bill into Parliament that threatens to deregister the PSA and confiscate its assets following an industrial dispute affecting 2000 of its members. It requested early action by the ILO to maintain trade union rights. This Bill would have authorised the Minister of State Services to withdraw recognition of the Association, if in respect of any discontinuance of employment he was satisfied that this had caused or was likely to cause serious loss or inconvenience. One of the effects would have been to place the assets under the temporary management of the Public Trustee.

However, following the PSA's initiative to refer the dispute over the electricity workers to industrial mediation, the Government agreed to withdraw the Bill from Parliament. Accordingly, in July 1979 PSA expressed the desire to withdraw its complaint. The ILO Committee however being guided by a principle that once a representation has been submitted to it, it alone was competent to decide what effect should be given to it and that "the withdrawal by the organization must be well founded and not by exercise of pressure by the Government. After having established the facts furnished thoroughly, the Committee noted that the decision was not one that was coerced and therefore does not call for further examination."²⁴

ii) In March 1980, the NZ Federation of Labour alleged to the ILO the Government's contravention of the principles of freedom of association as follows:

²⁴ Case No 936 -197th report of the Committee on Freedom of Association (CFA)

a) The Fishing Industry (Union Coverage) Act 1979, which limits the freedom of coverage of union activities.

b) Discretionary powers vested upon the Registrar of Industrial Unions & Arbitration Court and the Minister of Labour through the Industrial Relations Act 1973.

The Govt. clarified to the Committee that it is merely protecting traditional rights of fishermen who were not members of any union and worked without a master-servant relationship. Secondly, rationalising union structure to that of a single industry-based union.

The Committee recommended to the ILO Governing Body to draw the attention of the Govt. that:

- The fundamental principles of freedom of association is that workers' organizations should be able to draw up and amend their own constitutions and rules;
- Governments should promote and encourage collective bargaining and
- Establishment of unions for workers should be without distinction whatsoever so as to establish and join on their own choosing.
- Minister's discretion appears to go beyond mere formalities concerning requirements for registration of workers' organization.²⁵

iii) In May 1985, NZ Employers Federation alleged that the government through the Industrial Relations Amendment Act 1985 had:

a) Reintroduced compulsory trade unionism by way of a 18 month statutory compulsion for trade union membership upon attaining employment and the unions being free to decide on the level of subscriptions.

b) The requirement for employer to dismiss any worker who fails to join a union unless granted exemption.

All of the above are an infringement of the freedom of association as it is incompatible with workers right to join of his choosing resulting in not providing workers the effective choice of unions as well as a breach to the fundamental principle governing human rights.

²⁵ Case No 956 - 204th report of CFA

The government and the Federation of Labour defended the legislative imposition as it:

- a) Also laid down democratic requirement of balloting after the eighteen-month period.
- b) Recognises a collective responsibility to negotiate with exclusive bargaining rights.

The Committee for Freedom of Association recommended to its Governing Body that:

- a) Union security is similar to those establishing a trade union monopoly and such being not compatible with the rights of workers to establish and join organization of their choosing. Compulsory union membership for eighteen months is therefore not compatible with this principle.
- b) The balloting procedures are not in conflict with the principles of freedom of association.²⁶

iv) In November 1988, the NZ Employers Federation lodged a complaint relative to changes in the system of union registration contained in the Labour Relations Act 1987 as follows:

- The granting of broad exclusive rights to unions by registration eliminated workers' freedom to choose resulting in the continuance of what amounted to compulsory union membership.
- Excessively high minimum membership requirement of 1000 members gave monopoly to existing registered union and hindered the further creation of trade unions.

The government defended its position by emphasising that:

- It does not hinder formation of any unregistered union except that they will not have access to the Labour Court but remedy can be enforced through contract law in civil courts.
- Minimum membership requirement is an essential component of the Government's policy designed to encourage the development of effective and efficient union.

²⁶ Case No 1334 -244th report of CFA

- Formal requests can be made to the government for the minimum membership requirement to be lowered.

The Committee in its conclusion expressed regret over the government's inability to supply information/data concerning key issues of the real existence of free choice unions, the democratic process to change union coverage and evidence on the existence of any other unregistered organizations. The Committee therefore recommended to its governing body that:

- a) The union registration system seriously hindered in so far as workers would be motivated to only registered organizations since such organizations enjoy broader rights; thus denying workers right to establish and join organizations of their own choosing.
- b) Depriving workers in small bargaining units who are dispersed over wide geographical areas of the right to form organizations capable of fully exercising trade union activities is contrary to the principles of freedom of association.
- c) It consequently requested the government to re-examine the system established under the 1987 Act in the light of the principles of freedom of association and asks the government to keep it informed of any steps taken in this connection.²⁷

v) One of the most lengthy complaints made to the ILO with complexity of issues covered was by the New Zealand Council of Trade Unions (NZCTU) who brought a complaint on the grounds that by virtue of membership of the ILO itself, the NZ Govt. was bound to respect the principles of freedom of association.²⁸ The NZCTU had three basic complaints: first, it argued the Employment Contracts Act does not promote collective bargaining. For example, so-called collective agreements were not collective in the true sense as envisioned by the ILO, but were simply an aggregation of individual agreements. To support its claim, the NZCTU cited *Adams v. Alliance Textiles*²⁹ case, where the employer had approached union members

²⁷ Case No 133 -256th report of CFA

²⁸ Case No 1698, 292nd report of CFA

²⁹ (1993) 1 ERNZ 360

individually and asked them to withdraw the bargaining authorities given to the union and sign non-union contracts that offered bonuses. Secondly, the NZCTU argued the Act was contrary to the principle that the parties should bargain in good faith and make every effort to reach an agreement. The Act enables employers to dominate the appointment of bargaining representatives. Furthermore, the ratification and authorization procedures hinder collective bargaining and the right to organize. Thirdly, the NZCTU argued the Employment Contracts Act restricted the right to strike. The ILO's Freedom of Association Committee made fifteen principal recommendations in its interim report. The most notable are first, negotiation between employers and worker organisations should be encouraged and promoted; second, the Act does not promote collective bargaining and the Government should take steps to ensure that the legislation encourages and promotes collectivity; third, the Committee held the Act provided inadequate protection for workers against acts of interference and discrimination by employers in the case of authorization of a union. Thus, the Government requires the legislation to enact explicit remedies and penalties against acts of interference and discrimination on the basis of authorization of a union. The Committee also criticized the Act's requirement that a union establish its authority for all workers it claims to represent in negotiations for a collective employment contract. This requirement is excessive and contradicts the freedom of association principles, because it may be used to impede the right of a workers' organization to represent its members. The Committee therefore requested that the Government remove the offending provisions from the Act. The recommendations of the Freedom of Association Committee constituted a scathing attack on the credibility of the Employment Contracts Act.³⁰ In the final report, the Committee had concluded that "taken as a whole, the Act does not encourage and promote collective bargaining", and recommended that the Government take appropriate steps to ensure that legislation encourage and promote voluntary collective bargaining. The Committee also concluded that "protection against interference and discrimination on the basis of membership of a union is insufficient in the New Zealand context", and asked the

³⁰ Westlaw - 28 CAWILJ 65

Government to take the necessary measures to explicitly prevent acts of interference and discrimination in the basis of the authorisation on a union. Concern was also expressed on the independence of the parties to collective bargaining and the Committee asked the Government to amend the legislation to prevent negotiations being undertaken by organization appointed by or under the domination of employers. The Committee also found that:

“...s 63(e) which prohibits strikes if they are concerned with the issue of whether a collective employment contract will bind more than one employer is contrary to the principles of freedom of association on the right to strike and that workers and their organizations should be able to call for industrial action in support of multi-employer contracts.”

The Government responded to the ILO's recommendations in an attempt to justify the rationale behind the Act. The ILO sent a direct contact mission to New Zealand to investigate the matter further and produced a final report.

The Committee's final report being heavily influenced by subsequent judicial developments which signalled a marked reversal of its approach in Eketone stated, “the Committee noted that developments have taken place which have a bearing on the issues discussed in the interim report, and in particular various Court decisions which have to a certain extent clarified the meaning of several provisions of the Act”. It goes on to examine the various cases in some detail and concludes:

“...it is perhaps unfortunate but not unusual for new labour legislation to require a period of testing and judicial interpretation before it can be applied with certainty and this consideration applies with special force when the changes introduced by the legislation are radical and result in a system which is unique in nature...It is to be hoped that the decision of the Court of Appeal in Capital Coast will clarify the meaning and interrelation of the relevant provisions in the Act”.³¹

³¹ ELG, 2001, Para ERpt 3.6

The report goes on to discuss problems with collective bargaining. It accepted "on a prima facie basis that a significant number of collective bargaining problems have arisen and continue to arise". The Committee concluded that "in effect, it seems that the Act allows collective bargaining by means of collective agreements, along with other alternatives, rather than promoting and encouraging it". Of course, the Conventions require the latter option. The Committee expressed the view that most of the problems stemmed from the EC Act's philosophy, which placed individual and collective contracts and individual representation on the same footing. The Committee found "it difficult to reconcile" this as being in accord with the ILO principle faith, and suggested that bypassing representative organizations, where they exist, might be "detrimental to the principle that negotiation between employers and organizations of workers should be encouraged and promoted".

Finally, the Committee repeated its criticism of the prohibition on strikes relating to multi-employer contracts.

The only other recommendation made by the Committee was the expression of "the hope that the Government will initiate and pursue tripartite discussions as part of a process of ensuring that the provisions of the Employment Contracts Act are fully consistent with [the established principles on collective bargaining]".

A realistic assessment of the report is that the Committee saw significant divergence between the EC Act and the ILO standards on collective bargaining and promoting and encouraging it, the difference in philosophy was seen as being at the heart of the problems with the EC Act. The comment might also be made that the more restrained stance taken by the Committee in its final report owed little to the Government itself, rather the way in which the Court's have interpreted the Act.³²

One issue that seemed to escape the Committee's attention was the prohibition on secondary and sympathy strikes, even by workers in the same economic

³² ELG, 2001, Para ERpt 3.6

unit. Similar restrictions have been the subject of adverse comment in reports in the UK.³³

The two principal recommendations stressed upon are: first, it reasserted that the Government should have regard for the principles of collective bargaining and recommended that the Government initiate and pursue tripartite discussions to ensure the Act was consistent with the principles of freedom of association. Second, workers and their organizations should be able to call for industrial action in support of multi-employer collective contracts, which is illegal under section 63(e) of the Act.³⁴

The fifteen recommendations of the original report were reduced to four in the final report. The Government and the Employers Federation consequently felt justified in arguing that the Employment Contracts Act had been vindicated. In a public statement, the Federation President went so far as to say: "The new findings of the ILO are a substantial endorsement of the fairness and value of the Act." He also said: "It is pleasing that the ILO came to recognise that the underlying philosophy of the Employment Contracts Act gives equal rights to employees and employers...." On the other hand, the NZCTU argued that the bulk of the final report substantially confirmed the ILO's earlier findings. The final report in no way endorsed the freedom of association provisions in the Act. The ILO has consistently maintained that the philosophical foundations of the Act are incompatible with the right to freedom of association because it does not positively promote the right to bargain collectively. The Committee requested to "be kept informed of developments," and New Zealand's case before the ILO remained alive. The Court of Appeal decision in *Fire Service Commission v. Ivamy* (1996) 1 E.R.N.Z.85 re-opened the issue of whether the Employment Contracts Act offends Conventions 87 and 98. Subsequently, in 1996, the NZCTU reiterated the Government's continuing breach of the Conventions to the ILO. At its half yearly session in November 1996, the ILO Governing Body adopted a report reminding the Government to

³³ ELG, 2001, P.122

³⁴ 28 CAWILJ 65, P 4

act on its 1994 recommendations.³⁵

Regardless of the outcome, the principal difficulty with the ILO's complaint mechanism is that the decisions of the Freedom of Association Committee are advisory only. It does not require the Government to ensure that the provisions of the Act are in accord with the Committee's recommendations. The Government's inaction demonstrates it probably has no intention of doing so. However, the ILO is a high profile international organization of which a large proportion of the world's states are members. The NZCTU's complaint generated publicity both in New Zealand and abroad and was a considerable source of embarrassment to the Government, as it was forced to defend its position and justify the content of the Act.³⁶

The failure in ratification resulted primarily from the fact that the legislatively protected position of trade unions, until 1991, was contrary to the terms of those instruments. Compulsory union membership and monopoly rights to bargain within an industry were both regarded as contravening the conventions. The EC Act removed most of the barriers to ratification identified at that time, but it also moved the law too far in the opposite direction to allow ratification.³⁷

Regardless of ratification, however, the adoption of international instruments may still be influential in the interpretation of domestic law. In *Eketone V Alliance Textiles (NZ) Ltd.* (1993), it was stated:

"It is appropriate to have regard to such international instruments when interpreting the scope of those rights under other legislation. Nothing in those instruments requires a broader prohibition than that found in s 8 EC Act, that there must be no direct or indirect exertion of undue influence with intent to interfere with the freedom of choice as to membership of an employees association. Freedom of Association is much broader than the rights to join or not join."³⁸

³⁵ 28 CAWILJ 65, P 4/5

³⁶ Id., P 5

³⁷ ELG, 2001, Para ERpt 3.4

³⁸ (1993) 2 ERNZ 784,795 (CA), Gault J

The decision in *NZ Fire Service Commission v Ivamy* [1996] 1 ERNZ 85, represents a further development toward extinguishing entirely the promotion of collective bargaining. This case law has moved to a position where freedom of association means nothing more than freedom of assembly. The Court of Appeal followed this line of reasoning in taking a restrictive view of freedom of association in New Zealand. In that case the right to bargain collectively was held not to form part of the freedom to associate protected by the NZ Bill of rights but to be a statutory right deriving from the EC Act. It was thus seen as subordinate to an employer's freedom of expression. In the process, the Court of Appeal through majority decision appeared to overlook (or ignore) the position it had taken in *Eketone*.

While international standards are clearly influential in domestic law, it is also clear that this influence is only one of several factors that operated to guide legal interpretation. If the standards are to be fully part of the domestic legal system the relevant conventions need to be ratified and given full effect in New Zealand law.³⁹

This is totally at variance with Conventions 87 and 98 and international law contained in the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights.

Justice Thomas in his dissenting decision on the *Ivamy's* case summed up the effect of the majority decision when he said, "Such a decision will effectively bring to an end the practice of collective bargaining for a collective employment contract as recognised and defined by the EC Act"⁴⁰

Rejected Philosophy of the EC Act

The free market "new right" philosophy that underpinned the Employment Contracts Act broadly viewed the labour market like any other market. The wage-work bargain was essentially a commercial exchange, with the

³⁹ ELG, 2001, Para ERpt 3.4

⁴⁰ *NZ Fire Service Commission v Ivamy* (1996) 1 ERNZ 89 (CA)

employment contract, as entered into between the parties, being the primary means of determining the rights and obligations in the employment relationship. This relationship was viewed as essentially one between the individual employee and employer only, with no particularly necessary role for trade unions to play.

In the spirit of deregulation, unions were not treated any differently from any other type of "employees organization," "bargaining agent," or "employee representative". Whereas prior labour law promoted pluralism, whereby unions were granted special rights in relation to organising and representing workers in order to redress an accepted inherent imbalance of power between workers and employers, the Employment Contracts Act proceeded from a unitarian frame of reference, which viewed workers and their employers as sharing an essential commonality of interest. Labour and capital were not in competition with each other. Rather, the true competition was taking place in the commercial arena, with one enterprise competing against another. Where an employer prospered, therefore, so too did the employer's workers.⁴¹

This did not mean that equity was no longer an important value. Equity in the labour market, however, was not to be achieved through government regulation and the promotion of unionism, but through the market place itself. Unionism was viewed as discriminating against the unemployed, as it kept the price of labour artificially high, keeping the unemployed out of the labour market. The market place, on the other hand, did not discriminate against the unemployed. The most effective protection for workers as a whole, therefore, was a truly competitive labour market.

The chief innovations introduced by the Employment Contracts Act were:

- The dismantling of the award system;
- The removal of the special legal status and privileges accorded to unions; and

⁴¹ NZ Law Seminar, October 2000, The Philosophy Behind The ERA (hereafter referred as NZLS), P 1/2

- The establishment of a single statutory regime covering all employment relationships.

In removing the "blanket coverage" of awards, the legislation changed the fundamental basis on which many employees' terms and conditions of employment were based. No longer were fundamental terms and conditions to be determined on the basis of occupational class, but through direct negotiation by the parties themselves, or their representatives, on the enterprise level. Moreover, the ability of employees to negotiate multi-employer collective employment contracts, that is, contracts in the nature of an award, was restricted in that employers were not required to participate in negotiations for such contracts if they did not wish to, and no industrial action was lawful in respect to such negotiations.

The Employment Contracts Act also made union membership voluntary, and viewed freedom of association as not only the freedom to join a union, but as the freedom not to join a union – in other words, as a freedom to dis-associate. Moreover, the legislation generally did not promote unionism, as New Zealand was bound to do by virtue of its membership in the International Labour Organisation. The Employment Contracts Act took a neutral stance insofar as unions were concerned, so that unions became merely one type of possible agent in relation to the representation of employees' interests.⁴²

The Employment Contracts Act also established a single statutory regime to regulate employment relationships. This regime applied to all employees, not just those who were unionised or covered by awards. With this move, unions lost their unique rights of access to statutory personal grievance procedures and other rights available only to them under labour law legislation. Those rights stood in stark contrast to the more limited causes of action under common law that were available to the non-unionised workforce. The loss of this potential enticement also had the effect of contributing to the decline in union membership.⁴³

⁴² NZLS, P 2

⁴³ NZLS, P 3

The channelling process of complaints to the ILO therefore brought about their intervention. Ultimately, the sanction for non-compliance with the ILO standards is bad publicity. If the country concerned has not remedied a situation, it will be reminded of its failure in subsequent ILO country reports, which will normally be echoed in the broader context of the country's overall human rights record when periodic reports are considered under the two major United Nations human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights.⁴⁴

Compliance Through The Employment Relations Act (ERA)

The rejected philosophy of the EC Act thus led to the passing of the Employment Relations Act 2000 (ERA), the object of which as set out in Section 3 is two fold:

To build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship

and

To promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.⁴⁵

The legislation treats these two aims as interdependent. The link between mutual trust and confidence, and the promotion of unionism and collective bargaining; the relationships in which there is a mutual respect, therefore, are assumed to depend on there being some degree of relative equality between the parties.⁴⁶

⁴⁴ Ratification of ILO Conventions, ELB, Jan 2002, By Dr. Paul Roth.

⁴⁵ NZLS, P 4

⁴⁶ NZLS, P.4

The ERA therefore:

- Represents a half-way house between the Employment Contracts Act and a return to the more distant past. In terms of international standards, it is very much middle-of-the-road, but still within the relatively light-handed Anglo-American style of labour market regulation.
- Has not resurrected the award system. However, the legislation makes provision for the negotiation of multi-employer agreements, which have the potential to become smaller versions of awards. Given the disappearance of an industry approach to employment contract negotiations over the past decade, together with the imposition of certain procedural requirements for the negotiation of multi-employer agreements, such instruments are not likely to be common, and enterprise-level bargaining is going to be the norm.
- Has reversed the previous legislation's approach and now promoted unionism instead of adopting a neutral (or as some perceived it, a hostile position. Union membership, however, remains voluntary, but only unions are empowered to negotiate collective employment agreements. Individuals can be represented in negotiations or legal disputes by representatives of their choice, which includes lawyers.
- Preserves the single statutory regime approach to labour law, and even strengthens it by abolishing alternative common law actions that been available to employees in connection with dismissals. The Act thus retains the extensive provision for individual rights that had been introduced by the Employment Contracts Act.⁴⁷

Before the Employment Contracts Act was enacted, industrial legislation in New Zealand was structured around collective rights and actions. Even personal grievances were primarily collective actions. The main recourse for individuals outside this statutory framework was to pursue a common law action in the courts of general jurisdiction. The opening up of the specialist labour law

⁴⁷ NZLS, October 2000, P 3

institutions to direct access by individuals is what has led to the phenomenal growth of this area of the law in the past decade. Unfortunately, the institutions have had difficulty in coping with the great volume of cases in a timely manner, which accounts for the reforms made by the Employment Relations Act in relation to institutional arrangements.⁴⁸

The building of productive employment relationships is to be promoted by the following means (s3(a)):

- Recognising that employment relationships must be built on good faith behaviour;
- Acknowledging and addressing the inherent inequality of bargaining power in employment relationships;
- Promoting collective bargaining;
- Protecting the integrity of individual choice;
- Promoting mediation as the primary problem-solving mechanism;
- Reducing the need for judicial intervention.

The first three of these matters represent a sharp break with the Employment Contracts Act, while the final three look backwards and build upon it.⁴⁹

As one of the principle objects of the ERA is "to promote observance in New Zealand of the principles underlying International Labour Organization Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively".⁵⁰ A number of aspects of these conventions have been incorporated into the ERA, while in relation to other aspects the particulars will have to be worked out by the Courts in their purposeful interpretation and application of the legislation. It would therefore be essential to now look at what ratification of ILO Conventions 87 and 98 means in terms of New Zealand's compliance with international obligations,

⁴⁸ NZLS, P.3

⁴⁹ Id., P.4

⁵⁰ S.3(b) ERA

and to canvass what effect the legislative object of "promoting observance" of the principles underlying the two ILO conventions has had thus far in the interpretation and application of the ERA.⁵¹

The government is currently positioning New Zealand to ratify ILO Conventions 87 and 98, something it has been unable to do in the past, and it is now engaged in an assessment process towards that end. The Department of Labour is currently preparing a process and timetable for considering the implications of ratifying Conventions 87 and 98. As stated earlier, ratification of Conventions 87 and 98 will have the practical effect of "locking in" the ILO's freedom of association standards for any subsequent New Zealand legislation. This is because firstly, the ILO considers these standards fundamental, and therefore it would be politically unacceptable to resile from principles that are regarded as binding on countries, which are members of the ILO. Secondly, Conventions 87 and 98 require that the relevant right of denunciation can only be exercised ten years after a country has ratified the treaty, and then it does not actually take effect until one year after the date on which the denunciation has been registered with the Director-General of the ILO. Ratification of the two conventions will therefore mean that New Zealand must comply with the relevant treaty obligations for at least the next eleven years. Thus, any new labour legislation that is enacted over this period will have to conform to the standards set by the conventions.⁵²

ERA's Deficiency For Full Compliance

The ER Act substantially complies with Conventions 87 and 98, but there are several areas that are problematic and may need to be amended before ratification can take place:

1. The main stumbling block seems to be that the ER Act does not recognise the lawfulness of sympathy strikes and strikes over social and economic issues.⁵³

⁵¹ Ratification of ILO Convention ELB, Jan 2002, By Dr P. Roth, P.4

⁵² Id. P.5

⁵³ ELB, Jan. 2002, By Paul Roth, P 5

As sympathy strikes are becoming increasingly frequent because of the move towards concentration of enterprises, globalisation of the economy and the decentralisation of work centres,⁵⁴ the ILO Committee of Experts on Freedom of Experts expressed the view that a general prohibition of sympathy strikes could lead to abuse and workers should be allowed to take such an action provided the initial strike they are supporting is itself lawful.⁵⁵ If the ERA were changed to render these forms of industrial action lawful, however, it would run counter to the symmetry that currently exists between strikes and lockouts in New Zealand law. A centre left government should not have any philosophical problem in conferring such rights on unions, but a government eager to please business might feel compelled to give employers corresponding rights to lock out workers in support of other employers.⁵⁶ The difficulty of ratification of this basic core standard and its relevance to NZ One such example of some relevance to New Zealand might be the requirement (derived from ILO jurisprudence rather than the convention) that freedom of association under Convention 87 includes the right to participate in political and secondary strikes. This requirement has posed problems for the United Kingdom (which has been criticised for breaching the Convention in this respect) and may pose problems if the New Zealand Government seeks to ratify the convention. The requirement that secondary and sympathy strikes be permitted, while desirable, would hardly seem to be essential and may well reflect European views of democratic legitimacy particularly in relation to political strikes. A possibly more constructive approach would be to consider whether a country permitted an effective right to strike – a right that clearly does exist in New Zealand. It is arguable, for example, that the current prohibition on replacement labour during a strike can be seen as a quid pro quo for the ban on secondary action. Other standards, especially those directed at specific areas of employment, are often very detailed and

⁵⁴ Freedom of Association & Collective Bargaining, Report III (Part 4B) 81st Session ILC, 1994, ILO – Para 168

⁵⁵ Freedom of Association, Digest of Decisions & Principle of Committee, 4th Edition, ILO – Para 486 & 487

⁵⁶ ELB, Jan. 2002, By Paul Roth, P 5

perhaps stress prescription and detail at the expense of underlying objectives and flexibility of application.⁵⁷

The ERA is also deficient in its protection of workers against discrimination for having gone on strike. Under the ILO freedom of association principles, workers should be protected against discrimination on the grounds of having participated in lawful industrial action. Such protection needs to be extended to situations where strikers are not actually penalised, but non-strikers are effectively rewarded (eg. by being given wage increments). There had been such protection under the EC Act, but section 107 of the ERA purports to set out a complete code of activities intended to be covered by the union involvement discrimination grievance, and it omits the situation where the employee "had been on strike, or had a notice of strike given on his or her behalf under this Act"⁵⁸

Application of Conventions in Cases

To date there has been a number of cases wherein the applications of Conventions 87 & 98 have been adopted towards interpretation of the ERA thus far.

- i. In the case of NZ Employers Federation Incorporated v National Union of Public Employees (NUPE)⁵⁹ and Others, the issue was whether the registration applications of 40 unions had been duly processed by the Registrar of Unions, who purportedly relied on the Interpretation Act 1999, which allows the exercise of a power in anticipation of the coming into force of an enactment where "the exercise of power is necessary or desirable to bring or in connection with bringing, an enactment into operation."⁶⁰ The support of the validity of the union registrations adopted in this case was that the principles underlying Article 2, Convention 87 requires the

⁵⁷ The Role of International Labour Standards, By Gordon Anderson, ELB, March 2002, P 21

⁵⁸ ELB, Jan 2002, By P Roth, 5

⁵⁹ CA 32/01, 24 September 2001

⁶⁰ ELB, Jan 2002, By P Roth P 6

formalities prescribed by law for the establishment of a trade union that union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations.⁶¹ This contention was rejected in that "It does not follow that mass registration of unions before ERA came into force was necessary or that, even with appropriate forward planning there would inevitably have been a logjam preventing employee associations and their members from exercising their rights and responsibilities under the ERA." Such affirms that the registration provisions remain aligned with the Convention as the Unions are justified in exercising their rights to be considered as coming within the scope of legitimate trade union activities.⁶²

As a matter of interest, the nature and role played by the large number of unions that have registered since the introduction of the ER Act, some 150 in the first year was looked at through findings based partly on a telephone questionnaire survey of representatives of some enterprise based unions. Among the findings the following was noted:

- Most of the new unions are enterprise-based and genuinely represent their members although in a narrow range of endeavours. Both officials and members appeared to regard such unions as a collective bargaining vehicle (often being formed from a informal bargaining committee operating under the EC Act) with few wider objectives. Many did not see themselves as a union in any wider sense;
- A small number appear to have a very close relationship with management and appear to exist relationship with management and appear to exist to frustrate established unions gaining access to workplaces;

⁶¹ Digest, Para 251

⁶² Digest, Para 37

- A small number of new unions operating alongside established unions indicated a strong desire to freeload on the main collective agreement usually by “negotiating” a mirror agreement.

This trend of new unions mushrooming after the ERA thus seem to develop the concept of “United we stand, Multiplied we fall”.⁶³ Hence, the fundamental principles of freedom of association which affirms the establishment and joining of unions by workers on their own choosing without distinction whatsoever may seem ideal but from a practical point of view, such could become the causative factor for more complications and/or disputes.

ii. a) In the case of NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Independent Newspapers Ltd,⁶⁴ the applicant union, which had initiated bargaining for a meca, contended that INL, the parent company, and its ten newspapers, breached their duty of good faith by insisting on bargaining only for site agreements. The Authority invoked principles the level of bargaining underlying Convention 98,⁶⁵ which supported the employer’s position that the union could not determine coverage of a collective agreement ought to be a matter that is left to be determined by the parties to the collective bargaining themselves through negotiation. In the result, the Authority issued compliance orders that one newspaper should cease and desist from refusing to consider negotiating a meca; and that all of the respondents meet with union for the purposes of bargaining for a meca. In so doing, the respondents were required to consider and respond to all of the union’s claims.

b) Likewise, in National Distribution Union v Sawmill Services Limited, the union initiated bargaining for a meca, but the three companies concerned did not wish to become parties to such an

⁶³ Recent Research, By Gordon Anderson, ELB, May 2002, P 62

⁶⁴ WA 51/01, 3 August 2001, G J Wood

⁶⁵ Digest, Paras 851-855

arrangement. The Authority noted that the issues raised in this case were nearly identical with those in the INL case. In both cases, impasse had been reached because the employers were of the view that they were not obliged to enter a meca if they did not wish to, and the union was of the view that the employers were obliged to negotiate for a meca because of the employee ballot held under s 45 of the Act, and because the union had initiated the bargaining for a meca. The Authority's position was that there was nothing in the statutory scheme that required employers in these circumstances to negotiate on the basis that any concluded agreement necessarily had to be a meca. The Authority found that both sides had closed their minds in relation to whether there would or would not be a meca: "Both positions were based on the parties' understanding of the meaning of the Act, but on an appropriate application of the good faith provisions all parties must be prepared to discuss and reconsider their stance."⁶⁶

- iii. Section 14(1)(d) of the ERA provides that an incorporated society is entitled to union registration if it "is independent of and is constituted and operates at arm's length from, any employer." This provision is consistent with Article 2(2) of Convention 98, which deems as an act of interference with workers' organization any act "which is designed to promote the establishment of workers' organizations under the domination of employers or employers' organizations or to support workers' organizations by financial or other means, with the object of placing such organizations under the control of employers or employers' organizations."⁶⁷

The legal test application of such can be seen in the case of *Meat & Related Trades Workers Union of Aotearoa (MWUA) v Te Kuiti Beef Workers Union Inc (TKU)*.⁶⁸ This case involved a substantial

⁶⁶ AA 134/01, Sep 2001, RA Monaghan

⁶⁷ ELB (Jan 2002) BY P. Roth

⁶⁸ AA 37/01 April 2001, AA 37A

number of employees of UBP who had no wish to join MWUA but formed another union TRU through the assistance of UBP's Managing Director. UBP negotiated the collective agreement with TKU before negotiating with MWUA and the agreements were eventually concluded with both the unions. When the relationship between the two Unions became strained MWUA challenged TKU's independence under Section 14 (1) (D) heard by the employment court. The court however found a statutory presumption of Section 14 (1) compliance arose at the time of Union registration. Therefore, once a Union was registered under Section 14 the court will only hear challenges based on issues arising after registration. As such MWUA must establish that since registration, TKU has ceased to comply with the requirements of Section 14 (1). The court found the facts clearly point to a finding that in practice the actual formation and operation of the TKU were clearly not in breach of Section 14 (1)(D). The crucial factors that lead to this direction was:

- That the initiative to form a Union (and to reject the MWUA) came from the employees concerned and that while the MD of UBP both picked up on this feeling and realised these benefits for them to have an in-house Union. He was careful to ensure that the steps he took to facilitate this was soon to be relatively neutral (other than perhaps the payment of the legal fees).
- The advice given to the potential members, including presentations was balanced and presented with various options. There appear to be no pressure by the MD to force a particular outcome.
- The MD ensured (or possibly events ensured) that the initiative to actually set up the TKU and control of its direction shifted to the members as soon as possible.

- The events after registration gave no particular indication of a lack of independence and it may also be relevant that the MWUA was in effect represented at TKU and negotiated a collective agreement with it.⁶⁹

The test set out by the court provide some guidance as to what may constitute not operating at arms length although some of it may be easy to apply in practice. The court also mentioned that if Union members include an employer or employer's representative that may compromise independence.⁷⁰

- iv. Sections 23 and 24 of the ERA potentially impede the right workers "without distinction whatsoever...to join organizations of their own choosing without previous authorisations" in terms of article 2 of Convention 87. Sections 23 and 24 restrict access by union organisers to certain workplaces. These are workplaces where: the employees are not union members; there are no more than 20 employees; and the employer is an individual and holds a current certificate of exemption from the Department of Labour on the grounds that "the employer is a practising member of a religious society or order whose doctrines or beliefs preclude membership of any organization or body other than the religious society or order of which the employer is a member". These provisions were added to the ER Bill at the request of the Exclusive Brethren.⁷¹ The access provisions in the ERA are significantly wider than those in the ECA where the access provisions are to be interpreted in a manner that reflects the statutory objectives and are not to be narrowly construed or applied in accordance with subjective views of either party.

It may nevertheless be interesting to note the case of National Distribution Union v Carter Holt Harvey Ltd⁷² as it concerns the use of access rights during a strike at a time the work of strikers

⁶⁹ Recent Case Comment, By Gordon Anderson, ELB, March 2002, P 34

⁷⁰ Id.

⁷¹ ELB (Jan 2002) By P. Roth P. 6

⁷² National Distribution Union Inc v Carter Holt Harvey Ltd, (AC 79/01), 3 December 2001

was being done by non-striking workers. 60% of staff were members of the union. Following breakdown of negotiations for a collective agreement the union called a total strike accompanied by a picket which at various times, however, the picket became somewhat disorderly. Union officials sought access to the plant under Section 20 to ensure compliance with section 97 and to seek to recruit employees that might be operating the machinery. They were first denied entry to the premises but later permitted only to the boardroom where they could meet with all employees. This offer was declined and access to the actual plant sought. This was refused on safety grounds. Eventually, when the officials moved towards the plant, they were arrested by Police and charged with trespass. The bail terms precluded the officials supporting the picketers further.

The Employment Court held that:

- The union officials posed no safety threat and were conversant with safety requirements and the real reason was the worry about potential intimidation if the non-striking employees doing work of strikers were identified.
- The officials intent was on exercising their lawful rights of entry and that they “did not seek industrial martyrdom by ritualistic conduct by which they were arrested.” (It might be noted, rightly of course that the Court did not comment on the appropriateness of use of bail terms to deny union officials the right to carry out their jobs.)
- “...the Act supports and sets out to promote collective bargaining and recognises and addresses ‘the inherent inequality of bargaining power in employment relationships’: s3(a)(ii). Section 97 is one of the provisions that does so. Its purpose is to ensure that

employers cannot use strikebreakers to blunt the economic effect of a strike (or equally, a lockout) by limiting the circumstances in which an employer may employ other persons to perform the work of striking or locked out employees. It is putting a strained construction on ordinary language to suggest that s97 does not deal with employment related rights in relation to union members.”

- “Good faith has more to do notions of honesty, frankness and what lawyers call ‘bona fides’ rather than adherence to legal rules.” In this case the arrest of the union officials as trespassers, the refusal of access and the refusal to disclose the true reasons for denying access were held to be breaches of the good faith obligation.

This case confirms the access provisions in the ERA are significantly wider than those in the in the E C Act. Access is no longer purely for the purpose of discussions with members on restricted matters but is much broader and includes a number of monitoring functions as well as access for safety & health matters.⁷³

Also of interest in this case are the Court’s comments on good faith. On the basis of these, unions may find that good faith is very much a two edged sword in industrial disputes and may also find that an unsympathetic court might interpret the obligation in quite broad terms.⁷⁴

The Elimination of Child Labour

The conventions applicable under this heading are:

- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)

⁷³ ELB (March 2002 Recent Cases Comment: By G. Anderson, P 37

⁷⁴ Id

Prior to June 2001, it may on a narrow observation seem totally absurd for N.Z. to have refrained from the ratification of these conventions in particular No. 182 as such an action could cast a deeming policy provision of N.Z. condoning such an inhumane phenomenon. However, on probing into an analysis of the questions for non-ratification of conventions mentioned above relative to the scope, definitions, principles of national policies and action to be undertaken under these conventions reveals that the "sore thumb" of frustration with both Australia and New Zealand was the minimum age factor.

When the motion for convention No. 138 was tabled, Australia raised strong objections to the following Article:

"Each member undertakes a national policy designed to ensure effective abolition of child labour and to raise progressively the minimum age for admission to employment on work to a level consistent with its fullest physical and mental development of young persons."⁷⁵ The higher age limit being 18.

They considered that such is not only vague and absurd but also difficult to apply. They therefore proposed to fix "the minimum age for admission to employment to be in accordance with the requirements of this Convention"⁷⁶ as their rationale of compulsory education policy renders completion of school education at the age of 15; after which they may be allowed work under non-hazardous employment; which was also the case for NZ. This was however dismissed on majority vote.

As for the Convention No. 182 – Worst Forms of Child Labour 1999, the NZ Government during replies and commentary stages of the Convention advocated strongly for the reconstruction of "all forms of child labour" as not all forms of labour are considered to be harmful. Hence proposed for the words "the worst forms of" to be inserted before child labour; which was supported by the NZEF but NZCTU supported the wording "all forms of labour"⁷⁷ to remain. In spite of their strong support and favour of this new Convention they did not ratify the same early. This possibly was due to NZCTU's stand as well as ILO's contention of this Convention being adopted to complement Convention No.138 and such

⁷⁵ ILO Labour Conference, 58th Session Geneva 1973

⁷⁶ Id

⁷⁷ ILO Labour Conference, 87th Session 1999

may produce pressure to ratify Convention 138. In June 2001, NZ ratified Convention No 182 thus accepting the age limitation of 18 as being appropriate for worst forms of child labour, and such will have no coaxing for ratifying No. 138, as NZ like that of Australia are in full adherence to the requirements of Convention 138 except for that of the age factor.

Occupational Safety and Health

Having pursued with the fundamental ILO conventions, it would be essential to also cover the Convention No. 155 concerning occupational safety, health and working environment; which is in fact an integral part of employment law. N.Z. has not ratified this Convention but has enforced national laws governing most of the ILO proposals under Recommendation No. 164. Refocusing on the question for non ratification, the analysis of all essential requisite Articles of the Convention necessitates the public authorities, employers, workers and others to be accountable towards the complimentary character of responsibilities required and that of the national conditions and practice. For instance, the Convention stipulates:⁷⁸

- a) "The branches of economic activity and as well as its workers also includes the public sector". Hence the government is not only the monitoring authority for the private sectors and workers but also on itself. It has to be therefore the perfect model in order to ensure the expectation of such from others.
- b) "Employer's work place also covers all places where workers need to be even if such is not under their direct control". Such would render difficulty of prosecution, as negligence would have to be directly attributable.
- c) "Health covers also the physical and mental elements affecting health at work". These are also difficult aspects to be affirmatively established and proven; thus protracting the litigation process.
- d) "Occupational safety, health and the working environment to be reviewed at appropriate intervals and enforcement of the laws and regulations shall

⁷⁸ ILO Labour Conventions & Recommendations, ILO, Geneva

be secured by an adequate and appropriate system of inspection". The public authorities are at this stage not being able to achieve this efficiently.

The policies and actions stipulated in the convention therefore calls for a tripartite perfection/commitment; failing which there will only be assigning of blame against each other leading to bad world publicity from the international pressure through the ILO and also the increasing level of litigation process leading to possible labour unrest and declining economic stability. Hence, the practical solution is to adopt the ILO Recommendation No. 164 in stages through national laws and create the awareness through the society in a gradual manner; which in fact is in line with the Government's viewpoint as expressed by Mr. Thorn in 1948, leading to the formulation of the Government's standing policy on ratification.

The objective and obligations of the current Health & Safety in Employment (HSE) Act 1992 incorporates major aspects of the Convention relative to Scope & Definitions, Principles of National Policy and its Actions as well as that of the Employers. More fine tuning has been also done by the way of the HSE Amendment Bill expected to come into force soon; which would then bring the Act more closer to the Convention. Some of such changes⁷⁹ proposed are:

- 1) Definition of "harm" will now explicitly include mental harm & "hazard" and will also be extended to arising through mental or physical fatigue. Under Article 3 of the Convention for "health", it includes the physical & mental elements affecting health, which are directly related to Safety & Hygiene at work.
- 2) "Place of Work" will include vehicles so as to be applicable to mobile workers; which under the Convention, "workplace" covers all places where workers need to be or to go by reason of their work.

⁷⁹ www.osh.dol.govt.nz

- 3) Broader spectrum of employees coverage is now made to include also rail workers, crew aboard ships, aircraft & volunteers; making it another step forward to Convention compliance which calls for all “branches of economic activity”.
- 4) Article 19(b) of the Convention stipulates that there should be arrangements under which representatives of workers in the undertaking co-operate with the employer in the field of occupational safety & health. Accordingly, the amendments places a new duty on all employers to have a “system” which may involve electing Health & Safety representatives or it may involve establishing a Health & Safety Committee (as provided for under the ILO Recommendation 164).
- 5) Article 9 of the Convention stipulates enforcement of laws & regulations concerning OSH and the working environment shall be secured by an adequate and appropriate system of inspection for effective enforcement. The Bill increases the imprisonment term and fine under Section 49 (cause of serious harm) of the Act from one year to 2 years and the fine of not more than \$100,000 to now \$500,000. Under Section 50 (Other offences) the 2 fine levels of not exceeding \$50,000 for failure of safety precautions causing serious harm on any person and \$20,000 in any other case is now combined as one with a fine of not more than \$100,000.
- 6) The Amendment will also make it clear that an Inspector’s functions also include ascertaining the Act has been complied with or is likely to be complied with. It will be amended to allow the Inspectors to exercise their powers of entry and inspection in a variety of places rather than being confined to the place of work currently.

The Bill which was before the Select Committee had considered all the public submissions made on the Bill and must now report back to Parliament by 29th November 2002 but can report back earlier.⁸⁰

⁸⁰ www.osh.dol.gov.nz

The Singapore Tripartism Approach

Introduction

Singapore, which is as big as Lake Taupo of NZ but with a population quite close to that of NZ has achieved the status of being the newly industrialised economies of the world. It is a city State without the benefit of resources for development. Hence, it has to function to a significant extent as what a factory does, i.e. it does not own anything as all inputs for production have to be brought and all outputs sold must involve international market. The significant solution for it to maintain as well as increase competitiveness of its products is to keep wages, which constitute a dominant part of production costs, in line with productivity growth. This would require an efficient employment law administration that works effectively on a unique tripartite relationship like that of the ILO but with a genuine spirit of cooperation and collaboration. The labour market mechanisms operating in Singapore are therefore reinforced by its macro-economic policies, which are to maintain a strong currency value and to enable wages to increase through productivity growth so as to ensure continued economic advancement.⁸¹

The Industrial Relations Practice

Singapore has a strong trade union movement. They were initially politically oriented, especially under the British colonial government of the 1950s. However, with independence, their function has changed from an organization whose main objective were to impose restrictive conditions in the conduct of trade or business and to promote, organise or finance strikes, to one that seeks to promote good industrial relations and to raise productivity for the benefit of employees, employers and the economy of the Nation.⁸²

The Registrar of Trade Unions has the power to refuse registration to a trade union if he is satisfied that there is another trade union which may fairly represent the particular trade, occupation or industry or if the proposed union is not in the best interest of the workers affected. Singapore has essentially 3 types of unions: house, general and industry. A house union's membership is limited to

⁸¹ Employment Relations in Growing Asian Economies (ERGAE) P. 63

⁸² Industrial Relations in Singapore – Prof. Basu Sharma, University of New Brunswick, Canada (hereafter referred as Prof. Basu Sharma)

a particular company, that of a general union comes from a variety of industries, while membership of an industry union clearly consists of workers in the same industry. The latter 2 types of unions will accordingly have a number of branches, which in turn, may be affiliated to labour centres such as the National Trades Union Congress (NTUC), which represents about 95% of union members with 70 out of 83 registered unions in the country.⁸³ Such limitation imposed to registration of unions does not reflect the liberal principles enunciated under the ILO Convention no. 87; hence they have not ratified the same to date.

Standard economic theory states that wages are determined according to the law of demand and supply. Hence, in the labour market, the norm is that the trade union gets to set wages, while the employer has the final say on the level of employment. The types of policy adopted by the trade union will give rise to two industrial relations (IR) regimes, the wage-driven and the employment driven regime. If the aim of the trade union is to maximise wages, the IR regime results in wage-driven.⁸⁴ On the other hand, if the trade union seeks to maximise employment for its members, the IR regime would result in employment-driven. The NTUC aims to have wages set at a level which maximises employment. This means that NTUC sets wages at the equilibrium level under perfect competition, as a result of which employment is maximised, thereby shifting the demand for labour by looking for ways to make the economy more competitive.⁸⁵ The most puzzling question is: How is the Union & Employers are able to accept in "good faith" the incomes policy of the Government? The Government had to therefore seek ways of unifying the interests of all 3 parties through the use of consensual approach, giving everyone a better understanding and cooperation to realise the appropriate policy towards employment growth and a good investment climate for business enhancement, thus generating increased revenue for the government, sustainable income as well as future savings through compulsory employee/employer provident fund contributions for the workers and profitability for all businesses. Such mutual/collective discourses between parties developed better understanding of each other's differences by focussing towards

⁸³ ERGAE P. 64

⁸⁴ Employment - Driven Industrial Relations Regime (EDIRR) – Chew/Chew P. 7

⁸⁵ Id P. 8

the reality of situations prevailing and striking the best win-win solution. Additionally, achievement was more enhanced by promoting tripartism very actively through policy-making institutions such as the National Wages Council (NWC), the Skills Development Fund, the Central Provident Fund (compulsory savings mechanism through statutory contributions by both employees & employers).⁸⁶

Accordingly, in order to provide industrial peace which is vital to attract foreign investment, a series of labour legislations are introduced to minimise disputes between management and unions, thereby shifting the concept of the trade union from that of a wage-driven regime to that of an employment-driven regime, where-in wages are not raised to the extent that it causes a reduction in employment and/or inflation.⁸⁷ Hence, unlike NZ however, Singapore has ratified Convention No. 98 and the rationale could be that the promotion of collective bargaining "through the autonomy of the parties and voluntary nature of negotiations" is of significant importance for ensuring that a high level of productivity is maintained and to be constantly vigilant of the various forces which can weaken the economy and adopting the appropriate macro-economic policies⁸⁸ so as to contain such at its inception. Another favourable reasoning for ratification may also be that Convention 98 provides the flexibility of "machinery appropriate to national conditions" for right to organise as well as the "measures appropriate to national conditions"⁸⁹ for voluntary negotiations between employers and workers.

Singapore recognises the right to strike except for workers in the water, gas and electricity sectors, which are considered vital services. Workers in other essential services may exercise the right to strike, but they must give sufficient notice to the employer affected. Trade disputes, the majority of which involved wage issues are more under the non-unionised sector than those of unionised. The

⁸⁶ Id P. 92

⁸⁷ ERGAE P. 64

⁸⁸ Id

⁸⁹ Article 3 & 4, ILO Conventions No. 98

Minister of Labour quite often gets involved in preventive mediation to head off potential disputes.⁹⁰

The NWC is one of Singapore's most important tripartite institutions. It is comprised of a Chairman and 9 members, 3 representatives of each of the government, employers and workers in order to fulfil its mandate.⁹¹ One of the major roles played by the government is in the regulation of incomes as part of the responsibility for the macro-management of the economy, by implementation of the incomes policies through the NWC that is very different from that which is practiced by other developed countries.⁹² The NWC has made several sets of wage recommendations over the years. Although it has no statutory power, the parties and also the Industrial Arbitration Court (IAC) have closely followed its recommendations.⁹³ The IAC for instance, when arbitrating a collective agreement or wage dispute would require explicit guidelines of the economy to make its findings and there is none better than the consensual guidelines from the tripartite body (NWC).⁹⁴ The rigidities inherent in the traditional wage system and the pressure of competitiveness in the 1980s forced the government to re-examine the wage system, thus introducing a flexible wage system in 1986, which comprised of the following components:⁹⁵

1. A measure of stability in workers' income.
2. An annual wage supplement of one month's pay, which could be adjusted under exceptional circumstances.
3. A variable bonus based on individual and company performance to be paid annually or half-annually.
4. A small service increment of which could be given for loyalty, experience and/or length of service.

The rationale for adopting such incomes policy is primarily Singapore being a non-resourceful state and any unfortunate experience of inflation would be disastrous to its economy making it less competitive in the international market.

⁹⁰ Prof. Basu Sharma

⁹¹ Id

⁹² EDIRR P. 137

⁹³ Prof. Basu Sharma

⁹⁴ EDIRR P. 121

⁹⁵ Prof. Basu Sharma

Thus, in order to eliminate inflation, there must exist a central authority of tripartite structure, which would ensure that all firms reduce their wage increases. Workers would be no worse off as the real wages would be maintained, there would not be any unemployment resulting from less competitive export prices and such policy would also cease the demonstration effect which activates the wage transfer mechanism (spill over effect of wage increase in one sector to another).⁹⁶ Hence, under such an employment-driven regime, apart from maintaining real wages and maximising employment, it also enhances the following:⁹⁷

- Collective Bargaining. Where union negotiates for a fair share of the labour rewards and not for benefits to the extent that employment is adversely affected.
- Work Discipline. It would be in the interest of the union, that it ensures their workforces are efficient; thus developing quality based workers whose wage system has shifted from quantitative to qualitative system.
- Disputes become generally less common and relatively easier to resolve.

All in all, it increases the business competitiveness, rendering the Singapore National Employers Federation's acceptance of the labour movement in Singapore.⁹⁸

Occupational Safety & Health.

Key feature being targeted is to prioritise the inspection schedules. Computerised data on accident statistics and safety performances enables the Occupational Safety & Health Dept.(OSHD) focus on problematic sites and concentrate on preventive measures in specific targeted areas. Factories employing more than 50 or more workers are required to form a safety committee comprising representatives from both management and workers. Their functions are:

⁹⁶ EDIRR P. 138

⁹⁷ Id P. 8 - 12

⁹⁸ Id P 103

- To promote co-operation in achieving and maintaining safe and healthy work environment between management and workers.
- To carry out regular inspections in the factory and to inspect the scene of any accident or dangerous occurrence.

There is also the requirement to employ either full-time or part-time safety officers on the basis of the class categorisation of factories so as to enforce the Department's vision of guiding them towards self-regulation of promoting safety & health at work.

A full-time or part-time safety officer shall spend respectively at least 40 hours or 15 hours per week exclusively on safety supervision and promoting the safe conduct of work.⁹⁹

The Department therefore closely monitors the activities of safety committees and safety personnel at work sites. District Officers would also sit in on safety committee meetings on a selective basis to assist them not only to resolving safety issues but also in reviewing their safety management and audit the safety system already in place and also guiding them towards self-regulation of promoting safety at work. Training of all new workers before commencement of work and continuous on going training is provided at the OSH Training Centre from time to time; as such is expected to develop a serious sense of commitment and awareness towards ensuring safety & health practices at work.

Apart from stringent penalties up to a maximum of \$200,000 fine and one year imprisonment, the tripartite concept of Advisory committees comprising top level representatives from the government, management and workers' unions have also been formed to help improve the standard of safety in the respective industries and to recommend measures for the prevention of accidents.

The major safety & health event, the Annual Safety Performance Awards is another initiative spearheaded by the Government. This is held annually in a leading Hotel to give recognition and honour to those factories / Plants with good

⁹⁹ Factories Act (www.gov.sg/mom/lrd/lrd.html)

safety records through the implementation of sound safety management systems. Advisory committees comprising top-level representatives from government, management and workers unions have been formed to help improve the standard of safety in respective industries and recommend measures for the prevention of accidents.¹⁰⁰

CONCLUSION

The main point to be taken from the above discussion is that ratification of Conventions 87 and 98 is likely in the near future, and that these instruments will be binding on New Zealand for at least the subsequent 11 years. Therefore, in practical terms, ratification will irreversibly set the future tone for collective labour law in this country. The principle obstacle to ratification is the current law's failure to recognise the legality of sympathy strikes and strikes over social and economic issues. Overcoming this obstacle will be likely to involve some adjustment in the symmetry that presently exists in the law's treatment of strikes and lockouts.

The limited role played thus far by Convention 87 and 98 in the interpretation of the ERA has not been one-sided, to the advantage only of unions. Moreover, the case law to date has illustrated that the Conventions and the principles that underpin them are not highly prescriptive, but allow degree of flexibility in their application.¹⁰¹

The perceived tension, between economic growth and labour standards has become most obvious in the World Trade Organization (WTO). If labour standards were incorporated into trade agreements they become considerably more significant as, unlike most international organizations, the WTO has strong and effective enforcement mechanisms. The politics of the WTO on labour standards are far from clear but in general support for the inclusion of such standards derives its support from some, although far from all, developed countries and especially union lobbies within those countries. Developing countries on the other hand are strongly opposed to any trade-labour linkage arguing that the incorporation of labour standards into trade agreements is a

¹⁰⁰ www.gov.sg/mom/lrd/lrd.html

¹⁰¹ Ratification of ILO Conventions, ELB, Jan 2002, By P Roth P 7

protectionist device designed to preclude developing countries from taking advantage of one of their sources of comparative advantage in international trade, namely their low labour costs. This suspicion is clearly justifiable given the tendency of developed economies to develop protectionist devices to discriminate against developing countries that achieve any degree of industrialisation.¹⁰²

The Singapore Labour Minister, during his speech at the 83rd session of the ILO Conference, Geneva on 11th June 1996 emphasised that notwithstanding the significant progress in liberalising trade, we are yet to have achieved true global free trade as the barriers to free and unrestricted trade still exist; as such if linkage between labour and trade were to be established, it could negate efforts to promote free trade and retard economic growth of all nations and worst affected will be the developing countries. Instead of encouraging investment and economic development, such linkage is likely to slow down growth and job creation in the developing countries. Emphasis was also made of the OECD report that there is no "solid empirical evidence to suggest that lower labour standards in the developing countries have enabled them to enjoy gains in market share to the detriment of high standards countries".¹⁰³

To its credit the New Zealand Government has recognised the relevance of international labour standards in the context of its international trade obligations and issued a statement on its approach to this issue which states that "in both multilateral and bilateral contexts, the Government will take a consistent approach that will reflect its objective of promoting decent work in the global economy." The Government statement indicates that it views the ILO's Fundamental Principles and Rights of Work as providing an appropriate basis for the discussion of labour standards within the framework of trade agreements. Hopefully New Zealand employers and unions could all agree on at least that the basic principles in the ILO Declaration and work towards their achievement internationally.¹⁰⁴

¹⁰² Role of International Stds., ELB, March 2002, By Gordon Anderson, P 22

¹⁰³ www.gov.sg/mom/news/news96/ilc2.html

¹⁰⁴ ELB, March 2002 (as above)

In this respect, it would be worthwhile focussing on the outlook of Professor Jean Claude Javillier, Director of the International Standards Department of the ILO and one of the key officials charged with advancing international labour standards. Addressing an audience of academics, lawyers and industrial relations practitioners, Professor Javillier spoke of the need to ensure that the standards emerging from the ILO were flexible, responsive to local cultural circumstances and able to be applied in the field. He stressed, however, that one must never forget the basic principles that lie behind those standards. Over recent years the ILO has been criticised, with some justification, for the overproduction of standards and for producing standards that are so detailed that ratification becomes extremely difficult even when a country conforms to the core principles underlying the standard, even with the basic core standards. He drew attention to a number of developments that may help improve the application and effectiveness of international standards. While these included changes in approach within the ILO, especially towards greater flexibility of application and the need to ensure the practicality of standards. He also cited one interesting development of bipartite standard setting in some areas of international maritime employment is taking place outside the formal ILO tripartite structure; which would represent a major advance as parts of that industry are notorious for their appalling standards of employment.¹⁰⁵

Singapore could also be seen as one of the model ILO members having adopted flexibility of application but with the ILO spirit of tripartism exercised at its level. It is today well known for its stable and harmonious industrial relations. It has proven that stability and harmony are the result of sound and cooperative tripartite relations between labour, management and the government.¹⁰⁶ The economic indicator of Singapore authenticates that since 1978, the number of industrial stoppages and number of man days lost are virtually nil.¹⁰⁷ The symbiotic relationship between the Union and the Government has evolved over the years but more than a decade of "dynamic cooperation" between them and with the corporate managements led to the restructuring of the industrial

¹⁰⁵ ELB, March 2002, By Gordon Anderson

¹⁰⁶ Prof. Basu Sharma

¹⁰⁷ EDIRR, P 45

relations system¹⁰⁸ seen to be stringent (some may even construe it as draconian!) and unacceptable against the principles of the ILO fundamental rights of human beings, but it has proven such being a necessity to meet with the realities of the economic challenges for progress and development of its people through proper utilisation of its only wealth of resource available – “their human resource”.

Legal freedom has no true value as it is contingent upon a individual's degree of social freedom. Many international human rights documents and labour conventions seek to balance the competing interests between labour and capital upon which employment relationships are inherently based; which was summed well by Kahn-Freund:

”To restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will. To mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relation”.¹⁰⁹

Although ideally it may be construed that NZ may be near to ratification of the fundamental core ILO conventions 87 & 98, in reality it may yet be too far! That which can be adduced from the Singapore experience is that freedom is vital and if it is well guided and utilised it forms an integral part for progressiveness of society. However, “absolute freedom” without limitations may become destructive when abused. The collectivism of decision making of its socio-economic policies through the tripartism concept can be seen as the proven success formula for Singapore.

¹⁰⁸ Prof. Basu Sharma

¹⁰⁹ Kahn-Freund, *Labour and The Law*, (1972), P 16.

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