ADRIENNE CLAIRE MEIKLE

PUTTING THE HUMANISM BACK INTO THE EMPLOYMENT RELATIONSHIP, WILL FAIRNESS KILL EFFICIENCY?

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CONTENTS

ABSTRACT

The focus of this paper is a comparison of labour market regulation under the Employment Contracts Act 1991 and the Employment Relations Act 2000. Consideration is given to the objectives of the Employment Contracts Act 1991 and the Employment Relations Act 2000, which are heralded by their respective creators as substantially different. The Employment Contracts Act 1991 is proclaimed by the "new-right" as focusing largely on efficiency of the labour market. The Employment Relations Act 2000 has in contrast been promoted by the "social-left" as an Act that aims for equity by recognising that the employment relationship is an inherently unequal bargaining relationship.

This paper asks what fundamental differences exist between the Employment Contracts Act 1991 and the Employment Relations Act 2000 and particularly whether the objectives of efficiency and equity are mutually exclusive. Ultimately this paper asks the question whether the equitable concepts that are being introduced into the labour market by the Employment Relations Act 2000 will eliminate the efficiency elements that were introduced into the labour market by the Employment Contracts Act 1991? It also asks what impact there will be for different sectors of the labour market? In order to answer these questions consideration must be given to the economic agendas that are the basis of each Act's prescribed objective.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16700 words.

I INTRODUCTION - TERMINOLOGY AND CONCEPTS

The regulatory agenda behind the Employment Contracts Act 1991 ("ECA") and the Employment Relations Act 2000 ("ERA") are often portrayed as being in conflict with one another, with the first representing the economic goal of efficiency and the second the social justice goal of equity. Whether this juxtaposition is indeed correct and whether the two concepts of efficiency and equity need be considered as mutually exclusive are important questions because they challenge the prevalent discourse surrounding the two Acts. Before embarking on such an analysis, the terminology and concepts that make up the basis of this paper's hypothesis require introduction.

A *A Brief Introduction to the Two Acts*[1]

1 The ECA

A landslide victory in the 1990 election was accepted by the National Party as mandate to introduce revolutionary changes to the New Zealand labour market by way of the ECA. The fundamental principle behind the ECA was the introduction of efficiency considerations into the labour market through recognition of the need for flexibility that had not existed in the previous legislation. The Long Title to the ECA stated that it is intended to "promote an efficient labour market" and is often referred to (though as this paper will discuss, not necessarily accurately) as the legislation that introduced free-market economics to the labour market.

[1] There is other legislation that significantly impacts on the labour market and it is referred to by the writer as the "minimum code". This includes the Holidays Act 1981, Minimum Wage Act 1983, Equal Pay Act 1972, Parental Leave and Employment Protection Act 1987, Wages Protection Act 1983, Human Rights Act 1993 and the Health and Safety in Employment Act 1992.

2 *The ERA*

Nine years after the introduction of the ECA the Labour Party has returned to power with coalition partner the Alliance. The repeal of the ECA was one of the main election platforms for the Labour Party. The objective of the ERA is ensuring the creation of productive employment relationships through the introduction of equitable considerations into the employment relationship and recognition of the inequality of bargaining power in the employment relationship. The decision to introduce equitable considerations into the employment relationship was in response to concerns that the solely efficiency orientated objective behind the ECA had resulted in considerable inequity.

B The Labour Market

When one party demands a good and another party supplies it, economics tells us that this interaction takes place in a market. In the simplest of terms a market amounts to a "location or situation where buyers and sellers can be in contact,"[2] therefore the labour market is the situation where buyers and sellers of labour make contact. One way of thinking about the labour market is to consider it as "shorthand for the wide range of institutions, customs and personal contacts through which people are recruited for particular jobs and their rates of remuneration determined."[3]

1 Segmentation

There are many different types of jobs and individuals have training and experience in different skills. It is proposed therefore, that it is not plausible to treat the labour market as a coherent whole. The labour market can be seen as being segmented into a variety of different sectors within which different demand and supply factors exist for labour. Segmentation of the labour

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[2] Susan St John and James Stewart *Economic Concepts and Application: The Contemporary New Zealand Environment* (Pearson Education, Auckland, 1999) 52.

[3] Economic Monitoring Group *Labour Market Flexibility* Report no 7 (New Zealand Planning Council, Wellington, 1986) 4.

market recognises that factors such as training, education and location mean that all workers in the labour market are not subject to the same factors of demand and supply, competition or production. While many theories of labour market segmentation exist, some of which deal with a multitude of different segments, for the purposes of this paper it is sufficient to deal with the most rudimentary form of labour market segmentation, the dual labour market.

1 The dual market and contracting out

According to the dual labour market theory:

> the labour market can be seen as consisting of two sectors namely a primary sector and a secondary sector. The secondary sector (.....) has jobs with low pay, employment insecurity, poor working conditions and so on. In contrast the primary sector has high wages, job security, good working conditions, prospects for advancement and well-defined administrative rules.[4]

It is often assumed that because of the training and cost involved that the transition from the secondary to the primary sector is a difficult one to make. The investment that is required in human capital to make this transition is costly and time consuming.

Some in the primary sector find the well-defined administrative rules of primary employment (that those in the secondary sector seek) too restrictive. They wish to enjoy the freedom and financial benefits of being a self-employed contractor, which amounts to contracting out of the upper end of the primary sector. In contrast the status of contractor in the secondary sector generally does not provide the same freedom and financial rewards and may be a status forced upon individuals by employers trying to avoid minimum

[4] David Sapsford and Zafiris Tzannatos *The Economics of the Labour Market* (MacMillan Press, London, 1993) 92.

code obligations.

C Regulation

Regulation of the labour market is intended by the writer of this paper to mean direct government intervention into what would otherwise be a free-market (where the economic forces alone control all interactions). Regulatory intervention is often said to take place for economic efficiency reasons or equitable (public interest) reasons. These two objectives are often portrayed as being in contrast with one another.

1 Efficiency

Efficiency is presented in this paper as the distribution of resources that best maximises the well being of society, the production of outputs at the lowest cost and the notion of resources being allocated to production as is required. One view of efficiency in the labour market context is that it is "about using labour resources as well as possible, about ensuring that labour services are used in the way which has the highest value to consumers, and thus yields the best possible return to the worker."[5] It is significant that the notion of efficiency is associated in neo-classical economics with a voluntary transaction between two parties. As this paper goes on to discuss, there are some instances where the question indeed arises whether the transaction to undertake a contract to deliver labour services is always voluntary, due to the lack of available alternatives.

2 Equity

Equity in the context of this paper is the concept of everyone having a fair start through processes that do not favour certain already advantaged groups. It does not mean that all individuals should receive exactly the same reward for delivering varied levels of contribution based on different skills, experience and expertise. Therefore the writer feels it is acceptable to

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[5] Penelope Brook *Freedom at Work- The Case for Reforming Labour Law in New Zealand* (Oxford University Press, Auckland, 1990) 48.

interchange the terminology of equity and fairness but insists that equity should not be confused with equality of outcome. Equity can be seen to amount to fairness in process or an equal opportunity and while the notion of equity reaches into the concept of getting a fair division of the gains from trade, it does not represent the goal of equality of outcome for all parties to a transaction. A fairer division of the gains from trade sees distribution of the gains from the employment relationship more fairly, though not equally, distributed between the employer and employee. Equitable policy goals are commonly associated with the left wing of the political spectrum.

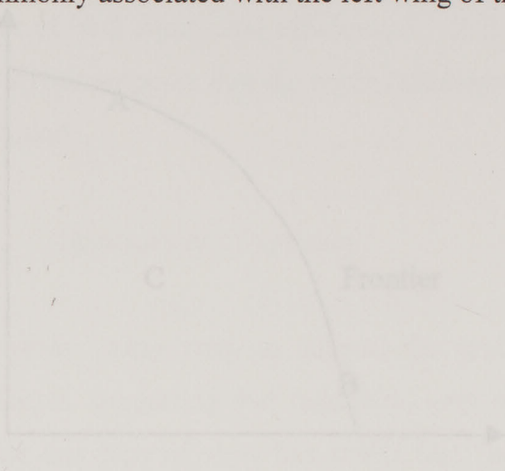


Table One: The Efficiency/Equity Trade-off

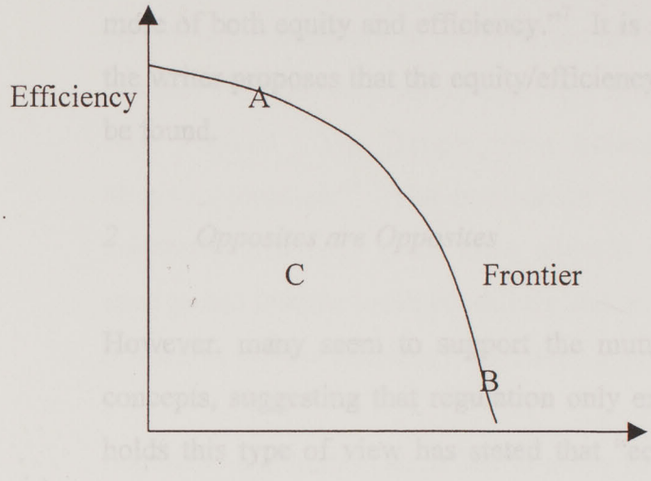
A The Equity/Efficiency Frontier

The curve represents a 'frontier [and] at a point such as A, the economy is highly efficient but there is a very unequal distribution of income so that equity is low. To improve equity and achieve a point like B, income must be transferred and in the process some efficiency is lost. Equity gains are at the expense of efficiency. As more and more equity is pursued, the steepness of the 'efficiency/equity frontier' or the 'efficiency' costs 'become higher and higher.'[24] Therefore regulation that takes place on the frontier is where the concepts of equity and efficiency are mutually exclusive.

[24] St John, above n2, 250.

II THE EQUITY/ EFFICIENCY TRADE-OFF

The equity/efficiency trade-off is the model often used to describe the equity and efficiency content of market regulation and can be represented diagrammatically as in Table One below. By posing the two concepts on opposing axis, the equity and efficiency content of regulation can be plotted in terms of the trade-off that is made.



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[6] St John, above n2, 250.

1 Opposites attract

It is the writer's contention that the posing on these two concepts in opposition to one another, as takes place at the frontier, does not accurately reflect the manner in which equity and efficiency considerations are represented in labour market regulation. There are, the writer proposes, instances where equity is gained through efficiency and vice versa, without any actual trade-off taking place. Therefore the writer proposes that a point within the equity/efficiency frontier such as point C can represent where "it should be possible to have more of both equity and efficiency."[7] It is somewhere within the frontier that the writer proposes that the equity/efficiency content of the ECA and ERA can be found.

2 Opposites are Opposites

However, many seem to support the mutually exclusive nature of the two concepts, suggesting that regulation only exists on the frontier. Bonner who holds this type of view has stated that "economists...extol the efficiency of markets but are less enthusiastic about their equity. Efficiency is apparently compatible with a great deal of inequality."[8] It is this type of black and white approach to the equity/efficiency trade off that creates a discourse surrounding regulation that assumes there can only be either an economic or a social policy goal represented in regulation, not both.

B Rhetoric and Reality

Much political rhetoric clouds the debate around regulation of the labour market and the writer suggests that the equity/efficiency trade-off is a significant, though not necessarily explicitly acknowledged, part of that rhetoric. The writer proposes that the debate surrounding the ECA and ERA is fuelled by rhetoric reflective of the two most extreme ends of the

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[7] St John, above n2, 250.

[8] John Bonner *Politics, Economics and Welfare: An Elementary Introduction to Social Choice* (Harvester Press, Sussex, 1986) 111.

efficiency/equity trade-off (Points A and B). It is in using the extreme ends of the efficiency/equity trade off that politicians find the most powerful language and concepts through which to influence the general public.

1 Sweatshops are efficient

The Labour party has regularly made reference to the powerful image of the re-emergence of sweatshops in New Zealand. With the emotive image of 14 Thai women in New Zealand being required to undertake work for little pay and in harsh conditions in the forefront of the public's mind, Margaret Wilson has said that "this situation is untenable and can not be allowed to take hold in New Zealand. The [Employment Relations] Bill attempts to deter such abusive processes."[9] The implication is that the ECA and its free-market orientated efficiency goals have allowed or encouraged sweatshops to re-emerge and that the harsh conditions and less than minimum pay are the result of the free-market efficiency orientated approach to the labour market.

Economic arguments can in fact be made that sweatshops are efficient because the transaction may indeed represent an allocatively efficient result that is welfare enhancing for both parties.[10] However what is not mentioned when these images of sweatshops are referred to, is the fact that what is actually being breached is the minimum code, rather than this happening because of an action that is facilitated under the ECA. The writer suggests that the sweatshop image is borrowed directly from the efficiency extreme of the equity/efficiency trade-off frontier (where there would be no regulation for minimum wages or standards). This type of *all efficiency no equity* approach represented by Point A of the frontier is a situation that should not exist in New Zealand because of the existence of the minimum code.

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[9] *ERB Frequently Asked Questions* <http://www.labour.org.nz/erb2stmt.html> (last accessed 20 July 2000).

[10] See Rawls in E Zajac *Political Economy of Fairness* (MIT Press, United States of America, 1994) 82, where Zajac has pointed to Rawls' view that Pareto-efficient states can be prima facie unjust and that "it may be that under certain conditions serfdom can not be significantly reformed without lowering the expectations of the representative man , say [those] that of land owners, in which case serfdom is efficient."

2 *Fairness is a return to the Jurassic era*[11]

The other side of the debate is the rhetoric suggesting that the introduction of equity considerations into the labour market by the ERA will mean economic ruin for New Zealand. The words of National Party MP Annabel Young articulated this view when she stated that:

> the biggest worry is that the Employment Relations Bill does not reflect what goes on in workplaces today. It is written in a bygone era. The Bill would be okay for a New Zealand where we didn't have to play a role on the world stage, where technology innovation and enterprise were the domain of a few and where doing business and doing it well didn't depend on enterprise and flexibility to respond to change.[12]

There have been cries that the economy will be ruined, that big businesses will go to Australia and that smaller businesses will simply collapse under the financial pressure of the obligations created by the introduction of equity considerations by the ERA. These arguments appear to be fuelled by an assumption that the ERA in fact comes from the most extreme equity end of the equity/efficiency trade–off frontier. It is suggested that the ECA "subordinate[s] efficiency considerations to demands for security and equality of outcome."[13] It is the writer's contention that this rhetoric is once again borrowed from the equity extreme of the trade-off, which does not accurately reflect the intent, and effect of the ERA.

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[11] See the National Party website on the Employment Relations Bill called "Walking with Dinosaurs" at <http://www.dinosaur.org.nz/erbsummary.htm > (last accessed 8 March 2000).

[12] Brookers Employment News Service *ERB means Tougher Times for Local Businesses: National Claims* 20 April 2000.

[13] Wolfgang Kasper *Freedom to Work: The Liberation of New Zealand's Labour Market* (The Centre for Independent Studies, St Leonards) 22.

III A FREE LABOUR MARKET

To make a full comparison of the equitable and efficiency reasons for intervention in the labour market consideration must first be given to what a free labour market would look like. The "new right" with its preference for economic liberalism has embraced the vision of a free-market economy as a means of achieving efficiency. According to the most extreme "new-right" view, labour should be traded as a commodity in the market without any intervention, meaning that the wage would be determined by response to supply and demand, competition and economic factors alone. There are few however from the "new-right" that would say that the labour market should be left completely to its own devices because of existing market failures that lead to inefficiencies. Regulation of the labour market takes place from an efficiency point of view to address the following market failures.

A The Assumption of Full Information

It is not realistic to assume that parties in the labour market have full information as the neo-classical model of an efficient free-market suggests. The reality is that there are information asymmetries that exist for both the supplier and demander of labour.

1 The demander

Demanders of labour do not necessarily know what is available by way of supply in the market. When it comes to purchasing labour they are not aware of the experience and expertise of the supplier offering their services other than what they are told by them. The way that the market has dealt with this information asymmetry without state regulation is through the practice of the provision of curriculum vitaes and referees to allow the demander to determine the suitability of the supplier for the position. There has also been the establishment of agencies to provide verifiable information about those that are available.

A supplier is unaware of the culture and nature of an organisation, the way that they will be treated within it and a variety of other details when they accept to deliver their services to an organisation. Not unlike a consumer of a good or service, suppliers of labour are not always aware of the details of the bargaining they are entering into. Therefore there is focus in regulation on providing mechanisms that address the information asymmetry for the supplier. Health and safety in employment legislation is one example of this type of regulation. A worker entering into the working environment is unable to know exactly how safe the environment is, largely because they would not have the skills and expertise to test the environment before working there. Health and safety legislation means workers need not be at an information disadvantage, because the employer has an obligation at law to ensure certain minimum standards are met.

B Complete Mobility

The neo-liberal economic model of an efficient free-market suggests that there is complete mobility amongst those in the market, however there are several reasons why there is not complete mobility in the labour market. One of these relates to the issue of segmentation of the labour market. In the secondary segment there are problems in making the transition to the primary segment of the market because of the training and time required to make the transition. There is also the issue of geographical location that may mean that certain individuals are not able to follow the demand for their skills because it requires considerable cost or is simply not feasible in relation to their living and family situation. An economic model of mobility considers only the supplier of labour and does not take into account factors such as family members and social obligations.

It is notable once again that those in the secondary market are restricted in terms of segment mobility and are more likely to be geographically immobile because of the lower wages associated with the secondary market. The

primary market, it can be argued, is more mobile because there is the assumption of more available cash-flow secured from better wages and an ability to move more freely within the primary segment to follow demand.

C Competition

The efficient market model of neo-liberal economics is characterised by competition between many buyers and many sellers. Many buyers and sellers do not exist in any one segment of the market at any one time.

1 The buyer's bargaining power

A buyer has more bargaining power if they are in a situation where they are the only, or one of only a few, buyers of labour. The buyer in the strongest bargaining position is in a monopsony situation where they are the single buyer of labour. Bargaining power can increase through lack of competition from other buyers. This increase in bargaining power for those without competitors may impact on the immobile secondary sector more harshly than the primary market. The immobility of the secondary work force both geographically and between segments is going to mean that this group is more susceptible to limited buyer scenarios. The buyer's power increases still further if there is an oversupply of suppliers amongst whom there will be competition.

2 The supplier's bargaining power

On the other extreme are situations where there are a few heavily in demand labourers and large constraints of supply. The most extreme situation is where there is only one supplier of a certain type of labour and there is considerable demand, amounting to a monopoly. This is an unlikely situation but there are situations in speciality areas where there are only a few suppliers of a certain type of labour available and a monopoly type situation may exist. In such a situation it is suppliers that have the bargaining power.

It is the writer's view that it is significantly more likely that bargaining power through constraint of supply is likely to take place in the primary market where specialist training and expertise are more likely to be developed. However in relation to the secondary market, suppliers may gain some control through reducing competition between suppliers through collective bargaining. By removing competition amongst workers collective bargaining creates a stronger bargaining position to enable control of the supply of labour.

IV EQUITABLE REASONS FOR INTERVENING IN THE FREE LABOUR MARKET

There are two main objections to free-market economics being applied to the labour market, which make up the basis of the equitable reasons for intervention. One is the argument that labour is not a commodity like others traded in markets, because of the human nature of the relationship and the social significance of the wage. The second is that the market does not adequately address the inherent inequality in the bargaining relationship between employees and employers. These equitable interventions reflect a dynamic long-run perspective on the labour market rather than a short-run analysis.

A Social Justice

Equitable reasons for government intervention in the labour market are often connected with what Brook refers to as "social justice."[14] A "social justice" approach to the labour market suggests that there must be fairness in the allocation of the gains from trade, not just equity of opportunity. This amounts to recognition of inequity of opportunity in the differing parties' starting positions, something economics does not do, as well as fairness in division of the gains from trade. Many do not support a view that takes into account the original endowments of the parties as justification for equitable outcomes, including Hayek who expressed the view that:

> the classical demand is that the State ought to treat all people equally inspite of the fact that they are very unequal. You can't deduct from this the rule that because people are unequal you ought to treat them unequally in order to make them equal, and that is what social justice amounts to.[15]

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[14] Brook above n5, 8.

[15] FR Hayek Television Program "Firing Line" (11 November 1997) in Zajac above n10, 79.

Brook argues that the introduction of "social justice" reasoning in labour market regulation arose because of the view that "the unpredictable and often unfortunate outcomes of the market should be controlled and corrected by values embodied in a more ethically pleasing end state."[16] The popularity of the approach was in Brook's view supported by the immediacy of impact that direct State intervention could provide and the ability to plan ahead.

B Labour, is it a Commodity?

It is the writer's starting proposition, in considering whether labour is a commodity, that:

> Labour is a factor of production - but a worker is a human being and his work involves social as well as technical relations. Work is not merely the way to get a living, but a way of life, a game or a thraldom, a field of conflicts and loyalties, anxieties and reassurances, prestige and humiliation ...the occupation and social structures are interlocked.[17]

Traditionally economists and politicians have viewed labour as something quite different from other commodities in that it should not be left the subject of voluntary transactions in markets. The:

> prevailing traditional philosophy of governance in virtually all Western 'mixed economies' has long asserted that labour markets are special and different from markets for other production factors and products, in that the price (the wage) has great social impact. It was concluded that the labour market should not be left to the vagaries of the market process and that labour should not be treated as a commodity.[18]

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[16] NP Barry *The Invisible Hand in Economics and Politics* (Institute of Economics Affairs, London, 1988) 41-42.

[17] Henry Phelps Brown in Brook, above n5, 11.

[18] Kasper, above n13, 22.

Only a few weeks before the ERA became law Margaret Wilson stated that "New Zealanders do not want their workplaces to be market places. They do not want their labour to [be] bought and sold as if it were a commodity."[19] This statement is based on the belief that the commodity under transaction, the labour of an individual, is part of a social relationship between two people that is ongoing and has a considerable impact on the remainder of the individual's life. Labour and the wage it produces are according to this view, the source of not only meeting personal needs but also improving quality of life. The reluctance to treat labour as a commodity amounts to a fear that if left to the determination of the market, that the wage will sink to a "dehumanising level"[20] because no human factors are taken into account.

1 The market determination of the wage

The demand for labour in a market can be largely attributed to two things, the demand for goods and services by consumers and the productivity of the workforce. The supply of labour is largely driven by the size of the workforce, within New Zealand or increasingly globally, and the ability of individuals to participate in the work force due to restrictions such as the school leaving age. A standard labour market supply and demand curve is set out in Table Two.

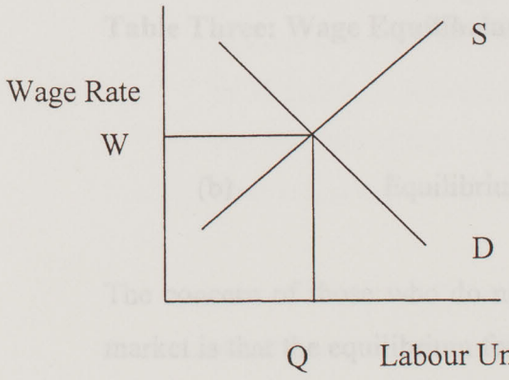

Table Two: Supply of Demand and Labour with Equilibrium

[19] Hon Margaret Wilson *Address to New Zealand Engineers, Printing and Manufacturing Union Biennial Conference* (Quality Hotel Logan Park, 28 July 2000).

[20] Brook, above n5, 13.

The market supply curve (S) moves upwards for left to right while the demand curve (D) goes up from right to left. The point where supply and demand meet is the equilibrium and it is at this point where the market determines the wage and the quantity of labour.

(a) The wage in the dual labour market

Taking the dual labour market that is the focus of this paper into account there will be two equilibrium points as demonstrated in Table Three.

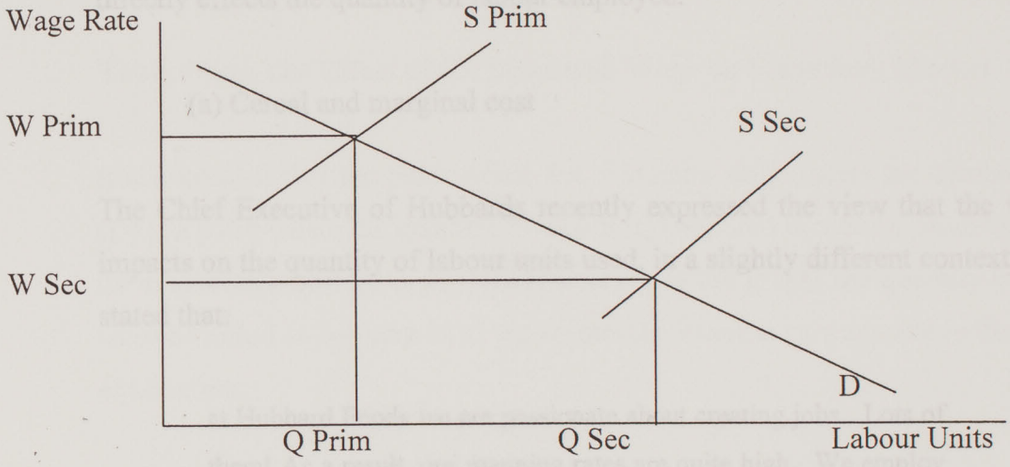

Table Three: Wage Equilibrium in Dual Labour Market

(b) Equilibrium below subsistence level

The concern of those who do not support the wage being determined by the market is that the equilibrium for demand and supply will sink below the level of human subsistence. The "new-right" response is that the demander of labour has a real incentive to increase wages above the equilibrium because of competition in the market. In a free-market it is assumed a demander of labour will be forced to increase wages by the threat that those supplying labour may be drawn to supply their services elsewhere. Competition,

according to market theorists, will ensure that wages will not sink to a dehumanising level, though as discussed above, competition does not always exist. In recognition of this fact the majority of those in the "new-right" in fact support the introduction of minimum wage legislation.

2 *Minimum wage legislation*

Minimum wage legislation in New Zealand acts to ensure that those in the secondary market who may be subject to over-supply and lowered demand, get a liveable wage rather than the wage determined by the supply and demand equilibrium of the market model. From the neo-classical economic point of view the demander of labour treats the minimum wage as a marginal cost that directly effects the quantity of labour employed.

(a) Cereal and marginal cost

The Chief Executive of Hubbards recently expressed the view that the wage impacts on the quantity of labour units used, in a slightly different context. He stated that:

> at Hubbard Foods we are passionate about creating jobs. Lots of them! As a result, our manning rates are quite high. We employ 90 people in our factory floor alone- similar sized cereal processing companies here and overseas would only employ 25 to 30 people.....However to achieve this, we can only afford to pay mid rates of pay. Of course we could pay higher rates of pay if we dropped our manning rates.[21]

The suggestion is that an increase in quantity means a decrease in wages and vice versa. How the minimum wage impacts on labour quantity in a similar manner is demonstrated diagrammatically in Table Four, where the equilibrium

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[21] Dick Hubbard *Hubbards Clipboard 47* "Did the Wheels Come off at Hubbard Food Ltd" (Auckland) 2.

point where demand (D) and supply (S) meet can be compared with the new equilibrium created by the minimum wage intersecting with the demand curve.

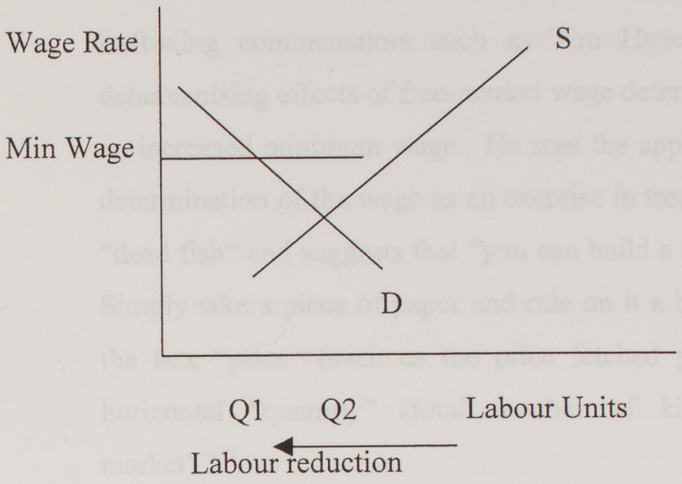

Table Four: The Effect of the Minimum Wage on Secondary Market

It can be seen that the point where the minimum wage meets the demand curve (D) is a point where the quantity of labour (Q) required is reduced from Q2 where the market equilibrium is to Q1. According to the graph, the quantity of labour used will need to be reduced to counteract the increase in wage above the market equilibrium.

(b) A South African example

An example of this has recently taken place in South Africa where the African National Congress came into force on 1994 and enacted a series of laws requiring firms to treat their workers generously including increases in the minimum wage. It was "a disaster. Faced with soaring labour costs employers slashed their work forces. More than 500,000 jobs have vanished since 1994. Perhaps one third of the labour force is out of work. Unskilled workers have become so costly that bosses tie themselves in knots to avoid hiring them."[22]

[22] "Pay Packets"(2000) 356 The Economist, 45, 45.

(c) The left wing and dead fish

Left-wing commentators such as Tim Hazeldine have spoken about the dehumanising effects of free-market wage determination and he has lobbied for an increased minimum wage. He sees the application of market forces to the determination of the wage as an exercise in treating human beings the same as "dead fish" and suggests that "you can build a dead fish model for yourself.... Simply take a piece of paper and rule on it a box. Label the vertical sides of the box "price" (such as the price fetched per kilogram of fish), and the horizontal "quantity" (total number of kilograms moved through the market)."[23]

Hazeldine does not agree that that an increase in minimum wage need be treated as a marginal cost that has a direct effect on the quantity of labour used or creates a surplus of unemployed. In Hazeldine's view the cost of increased wages can be countered by efficiencies in other areas, which may lead to increased production. This view is in conflict with what has actually happened in South Africa but it must be noted that the jobs that have been lost there as a result of the minimum wage have been largely domestic, meaning there is no opportunity to gain efficiencies in other areas as there may be in other industries.

C Bargaining Power

Another social-justice argument for not treating labour as a tradable commodity in the free-market, is the inequitable bargaining relationship between the employee and employer.

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[23] Tim Hazeldine "You Can't Treat Workers like Dead Fish" New Zealand Herald, Auckland, New Zealand, 20 December 1996 in St John and Stewart, above n2, 91.

What then does it mean to say that there is an inherently unequal bargaining relationship between an employer and employer and what is the basis of this assumption?

(a) A fair share of the national cake

Knox has articulated one view of the effect of inequitable bargaining power when he stated that:

> as a result of the gross inequities of power in our society, the last few years have seen a decline in working people's share of the national cake. The beneficiaries of this decline are the large companies and the record profits and those companies have made in the last few years have been expanded on increased dividends to shareholders and a consolidation of corporate ownership within the economy i.e. increasing monopolisation. The free market policies of recent times have accentuated this process of increased profit and monopolisation.[24]

The suggestion is that there is likely to be exploitation of employees if employers are not restrained in some way from their self-maximising behaviour and that unequal bargaining power results in an inability to get a fair share of the "national cake." The idea that the employers interest in securing the best gains from trade are posed in the bargaining balance against the employee is strongest in the secondary market where the employee is more immobile, both geographically and segmentationally, meaning suppliers' bargaining power is further reduced.

[24] W.J Knox *Looking Ahead: A More Just Industrial Relations System* (New Zealand Federation of Labour, 1987) 2.

(b) A fair share of the pizza

An example of this type of situation is drivers at Pizza Hut who are treated as contractors rather than workers. They have stated that "most of us can't even afford to make our cars road-legal…this is a blatant case of Pizza Hut using its new found position in the market to make even more profits at our expense."[25] The delivery driver has suggested that Pizza Hut's new position of market power (gained because they have recently bought out one of the major competitors) has made the bargaining power between employer and contractor more iniquitous. However the driver then goes on to make the point that "we all know that Pizza Hut is finding it hard to get drivers, and is it any wonder?"[26] This suggests that there is some competition, possibly outside the pizza delivery business, and that the drivers are selling their skills to that competition. Therefore competition strengthens the bargaining position of the drivers but arguably it is not considerably strengthened if they continue with the same inability to secure a fair share of the gains from trade.

2 Bargaining power and the accessibility to other buyers

As discussed above, the employee's bargaining power may not be less than that of their employer if they have the option of going to a competitor to sell their services. However lack of competition and immobility in the labour market mean this is not always possible. In theory at least, it can be argued that an employee has as much bargaining power as there is competition for their labour. In reality and in some parts of the labour market there may be only a few demanders of labour and an oversupply of suppliers. It is the writer's contention that this type of situation indeed exists in rural towns in New Zealand where the less skilled secondary market has only one or two options of where to sell their labour such as the local mill or factory. In this situation,

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[25] Jonathan Milne "Pizza Couriers Plan Blue Flu Action Over Pay" (Wednesday 23 August 2000) Dominion 14. This is a particularly interesting example because of the reference to the roadworthiness of the vehicles. Pizza Hutt has avoided health and safety obligations and other minimum standards by not treating the drivers as employees.

[26] Milne, above n25, 14.

where there is a lack of competition, it is the writer's belief that there would clearly be an inequity in the bargaining power.

There are many social factors that may limit an individual's mobility including their broader family considerations, something the market model does not take into account, as well as their desire to move, ownership of property in that area, tradition, or other non-economic reasons for remaining in the area. Therefore there may be a number of social reasons why this is not desirable or in fact feasible to move to meet demand. The social realities of immobility present some dynamic long-run arguments for equitable regulation aimed at empowering employees through the collective or the introduction of compulsory awards across industries. Historically regulation for equitable reasons took place to address the inherently unequal bargaining power in a blanket fashion. This meant that what was applicable to those in one industry in Auckland was applicable to those in the same type of industry in Bluff. Such intervention was aimed at eliminating the effects of lack of competition in certain areas on the bargaining power of the potentially immobile employee.

3 *Bargaining Power and Constraints of Supply*

There are also situations where available supply may not be able to meet the growing demand. This means the employee may in fact have the strongest bargaining power. This has been the case in the computer industry in New Zealand where it is the employee who can call the shots and has the stronger bargaining position because there is a huge demand for their labour and a genuine shortage of qualified and experienced workers. The situation in the computer industry is likely to eventually change when a surplus of suppliers is reached and overcomes the demand. However currently it could be said that because of the shortage of supply they hold the bargaining power and can therefore drive their wage above the equilibrium that would exist if adequate competition existed. The balance of the bargaining power being in favour of the employee in this situation is not necessarily inequitable because both parties may continue to get a fair division of the gains from trade. However having the bargaining power in the complete control of the employee may result in inefficiencies because the distribution, production and allocation of

resources may not take place efficiently.

4 Collective bargaining can readdress the imbalance

State recognition of collective bargaining in labour market regulation can be seen as directly addressing the inherent imbalance in the employment relationship. Posner states that "the primary purpose of a union is to control the supply of labour so that their employer can not use competition among individual labourers to keep down the price of labour."[27] Regulating for unions and collective bargaining amounts to removal of the competition between employees who may be able to compete more aggressively by accepting lower wages.

Regulatory recognition of the collective group means that a wage rate can be set which is applicable to the collective group and therefore employers can not use competition between individual employees to force down the wage. Collective bargaining also redresses the bargaining power imbalance in that it counteracts the information asymmetry that can exist between employee and employer. As a collective group the total sum of the group is going to be considerably broader and more extensive than the knowledge of the single employee. The collective may also be better equipped than the individual to collect new as well as retain historical information. These efficiency goals are also equitable goals because they represent a better balance of the bargaining power for the individual through the collective and the increased chance of a fairer distribution of the gains from trade.

[27] Richard Posner *The Economics of the Law* (Little Brown and Company, Boston, 1977) 239.

V A COMMON OR LABOUR LAW?

A The Common Law Approach

If you assume, as the new-right do, that labour is no different from any other tradable commodity it can also be assumed that there is no need for a specialist jurisdiction of labour law or a specialist labour court to regulate the transactions that take place within that market. Notably however, even those in full support of the Common Law being used to facilitate labour market transactions have acknowledged that:

> as a substantive matter, the defen[c]e of a common law system is not an assertion that the "market" can handle every social problem. The law of property and the law of torts are strictly required in order to establish the framework of original rights in which voluntary transactions can take place.[28]

Epstein said "in speaking of "the" common law, I am referring to the best set of private law rules that can be devised to handle the problems of labour relations."[29] According to his view, having a specialist labour law encroaches not only on the liberty of the individual but also the entire democratic tradition.[30] This is because he assumes that the individual should be free to enter into a contract as they see fit without the dictation of terms from a State generated labour law, which tends to support collectivism and equitable non-efficient ends.

1 Contracts of Employment

The entering into of an employment contract is a significant notion because

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[28] Richard Epstein "A Common Law for Labo[u]r Relations: A Critique of the New Deal Labo[u]r Legislation" 92 YLJ 1359 ["A Common Law for Labo[u]r Relations"].

[29] "A Common Law for Labo[u]r Relations", above n28, 1359.

[30] Rose Ryan and Pat Walsh *Common Law versus Labour Law: the Debate over the future of the Specialist Institutions* (Industrial Relations Centre Working Paper 2/93, Wellington) 1993.

the contract represents the terms agreed by the parties alone. That is significant because:

> it was only comparatively recently that such legislation began to take its effect by conferring on the workers contractual rights, which could not be abrogated to their detriment. The normal pattern of protection was through the law of tort or through special statutory rights unconnected with the contract of employment.[31]

The Common Law view assumes that there is little or no need for government intervention in the employment relationship, because "a labour law regime based on the notion of freely contracting parties entering into binding agreements appear[s] to rule out a major role for the State in regulating the process of contract management."[32]

If there are disputes about the interpretation and application of the contract then these will be considered and ruled upon by the general courts in terms of the law of contract, therefore focusing on the terms agreed by the parties. Possible transaction costs are averted because the contract contains clauses reflecting how the parties thought best to resolve the issues. Epstein marked the significance of the employment contract in this regard when he said that:

> I quite agree with the view that a labour contract is not the same as a contract for the sale of baked beans. But the parties to a labour contract already know that. When I work, the title for my person does not transfer from a seller to a buyer. The difference between the case lies in the terms of respective contracts express and implied.[33]

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[31] Otto Kahn-Freund "Blackstone's Neglected Child: The Contract of Employment" 93 LQR, 508, 524.

[32] Harbridge, above n7, 18.

[33] Richard Epstein *Employment Law: Courts and Contracts* (New Zealand Business Round Table, Wellington, 1996) 4 [*Employment Law: Courts and Contracts*].

Before the ECA was enacted Treasury was of the view that there should be no specialist labour institutions meaning there would be no development of precedents relating specifically to labour relations that created implied terms. Treasury "argued that, as far, as possible, labour law should be embedded within the general law as it applied to contracts rather than leaving in place a specialist body of labour law and specialist institutions."[34] One gains the impression that Treasury was concerned that the effect of specialist labour institutions would be to introduce too many equitable and collective considerations and that precedents would develop that would restrict and regulate the contracting parties as implied terms.

B The Specialist Labour Law Approach

According to those in support of specialist labour law and institutions, namely the social-left, not only should specialist labour laws exist to ensure essential terms are not excluded from contacts of employment, but specialist institutions are also required to deal with the interpretation of contracts of employment and the specialist labour law under which they are developed.

The view in support of government intervention through the creation of a specialist labour law and institutions can be seen as equitable because it is often enacted to support the collective group which provides the individuals within it with more bargaining power. Those who support the development of a specialist labour law believe the individual nature of the Common Law approach creates a presumption against collectivism and collective bargaining. Kahn–Freund holds the view that the Common Law knows nothing about the balance of collective forces, in his view, "it operates between individuals and not otherwise."[35] In fact the Common Law is largely hostile to collectivism

[34] Raymond Harbridge *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 21.

[35] Paul Davies and Mark Freeland *Kahn-Freund's Labour and the Law* (Stevens and Sons, London, 1983) 13.

and without intervention it creates real barriers to collective bargaining.[36] Historically labour law legislation has been enacted to support collectivism and specifically allow for state intervention both in prescribing terms and obligations as well as establishing specialist institutions. Specialist labour courts have existed in recognition of the fact that there are certain issues surrounding employment contracts that require specialist consideration.

[36] Examples of the common law's hostility to collective bargaining, namely trade unions, are the criminal action of conspiracy and tort of interference with economic action.

VI A BRIEF HISTORY OF LABOUR LAW IN NEW ZEALAND

Historically the three main areas of State intervention have been in relation to compulsory unionism, arbitration and awards. For New Zealand the intervention of the State in the labour market began near the end of the nineteenth century when "New Zealand was viewed by the world as a progressive social laboratory."[37]

A The Beginnings

In New Zealand in the 1880s and moving into the 1890s there was considerable labour market reform.

1 Conditions of Employment

The first Factories Act was enacted in 1891 and was a step towards the development of a cohesive health and safety regime. A Shops Act covering minimum hours was enacted and legislation slowly developed to protect women and children in the workplace, starting with the Employment of Females Act 1873. Health and safety legislation continued to grow in a haphazard fashion right through the twentieth century until 1992 when numerous Acts such as the Miners Act 1970, and the Boilers, Lifts and Cranes Act 1950 were merged into the broad obligations of the health and Safety in Employment Act 1992. The New Zealand Department of Labour was established in 1891 under the name of the Bureau of Industries and its aim was not only to try and facilitate the unemployed into work but also to try and ensure that minimum standards were being met.

2 The Industrial Conciliation and Arbitration Act 1894

The most significant labour legislation from this era was the Industrial Conciliation and Arbitration Act 1894 ("ICA Act"), which introduced

[37] Harbridge, above n34, 7.

compulsory conciliation and arbitration into labour relations. Under the ICA Act unions were registered and "the statute sought to encourage the philosophy of collectivism."[38] It is of some consequence that the ICA Act was enacted at a time of economic turmoil in NZ and that it prohibited strikes and lockouts during arbitration and in direct response to strikes of the preceding era. The economic depression of the years before had meant wages had dropped and in response there had been a reaction of union militancy that in turn lead to the suppression of unions to the point where "from 1890 to 1894 unions in New Zealand nearly ceased to exist."[39] The ICA Act regulated the registration of union members and:

> bargaining rights and access to the state-supported mechanism of conciliation and arbitration, with resultant coverage of minimum terms and conditions of employment contained in awards and agreements, were conferred on registered organisations, and state provided enforcement mechanisms underpinned the standards thus established. A system of preference for unionists evolved into a legislative basis for compulsory unionism, providing substance for the contemporary political debate on compulsory unionism and freedom of association.[40]

Incredibly the compulsory arbitration and collective bargaining framework created by the ICA Act remained largely unchanged for some 90 years. The ICA Act did not in fact stipulate compulsory unionism rather "unions could demand a clause in their award compelling employers to hire union members in preference to non-union members where equally qualified union members where available."[41] It wasn't until the 1930s, the time of the next economic depression, that labour law saw further change. In 1932 the compulsory arbitration set up by the ICA Act was abolished, but then it was enacted into

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[38] Harbridge, above n34, 7.

[39] Ellen J Dannin *Working Free: The Origins and Impact of New Zealand Employment Contracts Act* (Auckland University Press, Auckland, 1997) 13.

[40] Harbridge, above n34, 8.

[41] Brook, above n5, 22.

legislation again in 1936 by the same legislation that made unionism compulsory. New Zealand had become a member of the International Labour Organisation (ILO) since its formation in 1919 as a tripartite group of employer, worker and government bodies.

B Things Start to Change

In 1973 the Industrial Relations Act was passed and recognised a distinction between disputes of interest and disputes of rights. Then came the Industrial Relations (Amendment) Act 1984, which introduced a minimal amount of voluntarism into what was historically a compulsory agenda. This however was limited and amounted only to a requirement that parties had to agree to take disputes to arbitration rather than being compelled to do so as had always previously been the case. These changes though taking place slowly, did eventually amount to a considerable change, but the philosophy of collectivism remained. That is except for the National party's abolition of compulsory unionism on 1983, a short-lived exercise, as the law was quickly reverted by the Labour government's return to power the following year.

C The Labour Relations Act 1987

In 1987 the Labour Relations Act was enacted at a time when there were in existence some 383 awards and approximately 200 unions.[42] The Labour Relations Act 1987 ("LRA") reflected a change in attitude and in s132(a) allowed Unions to "cite out" and remove an employer from an industry award allowing what was known as enterprise bargaining. Despite this mechanism few employers and unions undertook enterprise bargaining.

[42] Dannin, above n39, 14.

VII THE EMPLOYMENT CONTRACTS ACT AND THE OBJECT OF EFFICIENCY

It was the view of the National party in 1990 that the "comprehensive micro-economic liberalisation"[43] that had taken place since the reforms initiated by the Labour Government in 1984, was restricted by the heavily regulated labour market. The National Party manifesto for the 1990 election attacked the concepts behind the LRA as moderate and claimed that it was "constraining employers and employees from developing their own specific labour relations policies, and consequently restricting growth in productivity, income and employment."[44] The industrial policy of the National Party before the 1990 election portrayed 5 basic principles, which were:

(1) Voluntary Unionism
(2) A choice of bargaining structure
(3) Agreements that amounted to binding contracts
(4) Access to Dispute resolution
(5) Minimum Code for safety

A To Promote an Efficient Labour Market

The National Party had a desire to "promote an efficient labour market" and to do so through introducing flexibility. Flexibility would allow for adaptability to all situations and response to the demands of the market. The idea behind the ECA was that it would unshackle the labour market and allow individuals to reach agreement on terms without the type of State intervention that had historically existed, including the State dictated terms of compulsory unionism, arbitration and industry wide awards.

However introducing flexibility, according to the ECA's critics, would amount to "a revised system of legal regulation which favoured employers and

[43] Kasper, above n13, 1.

[44] Harbridge, above n34, 16.

disadvantaged workers."[45] In other words it would provide efficiency through flexibility but work to disadvantage workers because it did not promote equitable goals such as collective bargaining which improved bargaining power.

The ECA can not be said to represent a complete liberation of the labour market, because it actually prescribed terms and requirements that put some restraint on the parties' agreed terms and conditions. The question for consideration however, is whether these requirements were simply responding to potential market failures and transaction costs thus actually ensuring efficiency, or were they implicitly or explicitly reflecting equity considerations?

B Freedom of Association

Part I of the ECA dealt with freedom of association and provided employees with the "freedom to chose whether or not to associate with other employees for the purpose of advancing the employee's collective interests."[46] Despite the available freedom to work collectively, the ECA actually focused on de-collectivism and decentralisation. The ECA reflected the neo-liberal economic focus on individuals' freedom of contract. Even the terminology used in the ECA, such as "employment contract" rather than the pervious vocabulary of "awards" and "agreements" reinforced the individualistic nature of the approach. What was previously known under earlier law as "blanket coverage," where entire industries were treated as a whole, was gone because it was in complete conflict with the concept of individual bargaining for efficient terms.

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[45] Peter Brosnan and David Rea *Rogernomics and the Labour Market* Victoria University of Wellington, Industrial Relations Centre, Wellington, 1992) 2.

[46] ECA 1991, s5(a).

1 *Collectivism remains but is not actively promoted*

The ECA consciously limited the compulsory power of unionism by clearly stipulating that no clause in an employment contract "shall require any person to be, or remain a member of any employees organisation."[47] The ECA represented the concept of voluntary unionism and the impact of this was a drop in union membership from 51% before the ECA to 19 % after.[48] The freeing up to allow individual bargaining certainly reflected the goal of efficiency and flexibility because the labour supply was fragmented into individuals who could agree on individual terms to reflect production. It could be argued that not outlawing unions altogether was an equitable consideration for those in the secondary market, however with largely decreased union representation resulting from the restrictive collective bargaining terms of the ECA, the result was not necessarily equitable. The reality became that many individuals did not have access to unions through which their bargaining power could be increased and other collective bargaining groups simply did not exist.

2 *What the International Labour Organisation thought*

It is of significance that the New Zealand Council of Trade Unions made a complaint to the International Labour Organisation ("ILO") that the ECA violated International Convention 87, relating to freedom of association and Convention 98 the right to organise and collectively bargain. The basis of the complaint was that the ECA did not promote collective bargaining, as the conventions required. The ILO accepted that the ECA did not promote collective bargaining and was in breach in the convention. However the National government did not change the legislation, effectively ignoring the finding and making the argument that the convention had never been ratified in New Zealand.

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[47] ECA 1991, s6(a).

[48] Gordon Campbell "Workers of the World" The Listener, Auckland New Zealand, 9-15 September 2000, 29.

C Bargaining

Part II of the ECA provided for what amounts to a "largely unstructured regime for negotiation of employment contracts."[49] In line with its goal of efficiency, the ECA moved away from compulsory arbitration by the State to bargaining only between the two parties to the contract, which was also more flexible. The contents of contracts under the ECA were largely to be determined by employers and employees or their authorised representatives. Individuals were no longer bound to representation by a union, if they wished to be represented by a bargaining agent they could select any representative.

Interestingly when the drafting instructions for the ECA first went to the Department of Labour there was "the absence of an obligation upon employers to recognise the bargaining agent chosen by the employee."[50] The Department of Labour expressed real concern that this would result in considerable procedural uncertainty and transaction costs to both parties. The uncertainty was portrayed in economic terms as transaction and compliance costs, but ensuring the existence of representation also inadvertently supported equitable concerns because it allowed employees in an inequitable bargaining position to be represented by someone at less of an information asymmetry, namely by a lawyer or specialist negotiator. While the existence of a representative bargaining agent was sold to the National government as a mechanism to address market failure, the effect has also been that there are equity gains through efficiency without any trade-off between the two.

D Individual and Collective Contracts

Part II of the ECA also described the nature of individual and collective employment contracts.

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[49] Philip Bartlett, William Cromwell-Hodge, Phillipa Muir, Christopher Toogood *Employment Contracts* (Brookers, Wellington, 1991) EC.02.

[50] Harbridge, above n34, 19.

1 *Individual Contracts*

There were no obligations under the ECA regarding the structure of an individual contract, which also allowed for complete flexibility. Individual employment contracts were not even required to be in writing unless an employee so requested.[51] Equity, it could be argued however, was present in the nature of an obligation that "where there is an applicable collective employment contract, each employee and employer may negotiate terms and conditions on an individual basis that are not inconsistent with any terms and conditions of the applicable collective employment contract."[52] This can also be described in efficiency terms as reducing transaction costs for employers who deal with both collective and individual contracts.

2 *Collective contracts*

The structure of collective contracts under the ECA had some very basic requirements, such as they needed to be in writing[53] and the requirement that the employer must provide the employee with a copy.[54] These requirements addressed in the writer's view, the potential for inefficient transaction costs and the information asymmetries that may have existed if the employee did not have a copy of the collective agreement. There are obvious expediency reasons for the need for a written contract in a collective situation. Without the collective contract in writing there are too many people who can have too many views of what was agreed, which could result in large compliance costs. Having the contract in writing also restricts transaction costs while parties' dispute about what was intended. Having the contract in writing and providing the employee with a copy was also more equitable because it meant that both parties were aware of its terms and could recognise when they were being broken.

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[51] ECA 1991, s19.

[52] ECA 1991, s19(2).

[53] ECA 1991, s20(4).

[54] ECA 1991, s20(5).

E Personal Grievances

Part III was one of the more extensive and prescriptive parts of the ECA. The object of Part III was set out in section 26, which suggested that efficiency rather than equity considerations were the reason for the prescriptive nature. Section 26 provided that one of the objectives was to establish that "all employment contracts must contain an effective procedure for the settlement of personal grievances." This is clearly regulation of what would otherwise be the parties' individual choice of whether to have a grievance procedure in their contract. If a clause was not introduced into a contract, a standard clause on the procedure for settlement of personal grievances had to be adopted from the first schedule of the ECA. The requirement meant that what could otherwise be the time consuming matter of ongoing dispute about procedures was eliminated thus cutting down on compliance and transaction costs. Having to provide for grievance procedures also had an equitable impact because it ensured that the employees were aware of a pre-established procedure that could be relied upon and enforced in law. Without such a procedure an employee would find they had no established right to pursue the unjustifiable actions of the employer at law.

A personal grievance could be brought against an employer in a number of situations including unjustifiable dismissal, unjustifiable action, discrimination and duress to join or for not joining an employee's group and sexual harassment. These amount to situations where an employer could use their power advantage to undertake certain actions that may not be considered fair or just. The personal grievance procedure allowed the employee the ability to turn to a third party to seek their view on the lawful and reasonableness of the employer's action. Remedies could be sought ranging from reinstatement to reimbursement of lost wages and damages. The personal grievance procedures can be seen as both efficient and equitable because in ensuring the employee is treated fairly there is also an assurance that the parties are complying with the agreed contract and that it continues to be welfare enhancing for both parties.

F Enforcement of Employment Contracts

Part IV of the ECA set out a requirement that under law "employment contracts create enforceable rights and obligations."[55] The terms of the contract that could be enforced in law were terms both explicit and implied. There has been much Court of Appeal commentary on the issue of introducing implied terms into employment contracts and largely a "strict" and arguably efficient approach was taken. In *Air NZ v Raddock*[56] the Court of Appeal found that implied terms would not be imported into a contract contrary to express terms. There are obvious inefficiencies in implied terms in agreements because they are not terms that have necessarily been agreed to by the parties but have been imposed by a party outside of the contract. This approach can be seen to be inequitable because it does not allow the introduction of terms that are fairer for the weaker party if to do so is inconsistent with what may be an efficiently welfare enhancing agreement.

G Strikes and Lock-outs

Part V of the ECA provided for a very limited right to strike or lock-out at times outside of the existence of a current contract of employment. The ECA allowed for lawful strikes and lock-outs only where the strike or lock-out related to freedom of association, a personal grievance or where the strike or lock-out was concerned with the issue of whether a collective employment contract would bind more than one employer.[57] Strikes have been an issue of great debate across the political spectrum. The ECA's attempt to more or less outlaw strikes, which were part of the bargaining power of unions under the old regime, reflects the goal of productive efficiency. It is assumed that at times of strike that the output of the economy is not produced at the lowest cost because of lost production, and factors such as the cost of replacement staff. In economic terms when a strike takes place there are negative externalities effecting all parties involved as well as productivity, thus

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[55] ECA 1991, s43(a).

[56] *Air NZ v Raddock* [1999] 1ERNZ 30 (CA).

[57] ECA 1991, s60(c)(i)-(iii).

amounting to inefficiency. The massive restrictions on the ability to strike in the ECA can be argued to be inequitable because they removed a powerful tool in the balance of power between an employee and employer and lessened the bargaining power of the collective.

The common law approach to strikes is restrictive because torts such as trespass and interference with economic action mean that those organising or participating in strikes could be liable for losses that resulted. The ECA therefore provided a lawful power to strike at certain restricted times that meant that the Common Law causes of action could not be applied at that time. The limited scope of lawful strikes meant there was no protection from the Common Law remedies if an unlawful strike took place, meaning that strikes could take place only when an agreed contract was not in existence and for a limited number of reasons.

H Institutions

The ECA did not eliminate specialised employment institutions, which would have been entirely consistent with the its neo-liberal economic philosophy. Part VI of the Act created two institutions, the Employment Tribunal and the Employment Court. A limited right of appeal to the Court of Appeal existed on points of law. Ironically the ECA extended the coverage of the Employment Court from not only those under collective contracts (as was the case under the LRA) but to all employees including those on individual contracts. This meant that:

> on one hand the Act deregulate[d] the process of contract negotiation, by disestablishing mechanisms which regulate trade union representation and contract negotiation. On the other hand institutional arrangements philosophically consistent with this were rejected in favour of retaining the specialist labour law jurisdiction.[58]

[58] Harbridge, above n34, 13-14.

1 *Separating institutions from the rest*

After the 1990 election the National Party were desperate to get the ECA enacted, but the issue of what should be done with the specialist labour courts had not been fully considered. The way around this for the Minister of Labour, the Hon Max Bradford was to propose that the ECA should be introduced in a two step process, with issues relating to the specialist institutions being considered in the second part. However as policy work developed it became increasingly clear that approaching matters in two stages would not allow for a complete policy debate on all the relevant issues and the two-stage approach was rejected.

2 *The Department of Labour on specialist institutions*

When the National Party asked the Department of Labour to comment on what it saw as the necessary role of the State in the facilitation of the employment relationship, one of the issues they raised was the importance of a specialist labour law institution. The Department of Labour stated that:

> to provide no specialist industrial relations institutions runs the risk that the State has no capacity (short of some form of one-off legislative intervention) to influence bargaining behaviour. On the other hand, the establishment of some institutional presence signals publicly that the State has some interest in constraining excessive bargaining behaviours and promoting industrial harmony.[59]

This approach would be seen by the strict "new-right" as efficiency being traded off for equity considerations.

3 *The New Right on specialist institutions*

Epstein, who represented the theory behind the strict "new-right" approach held the view on specialist institutions, that the bias developed by a specialist

[59]Harbridge, above 34, 20- 21.

court outweighs any positives from having a specialist institution. He stated that "while legal cases will undoubtedly differ in subject matter, in all instances the goal is a set of rules that will maximise the business efficiency of the transaction."[60] In his view this can only be achieved by using a judge who is experienced in dealing with all sorts of market transactions. Eventually however the National Party was swayed by the equitable and efficiency arguments of the Department of Labour and specialist institutions remained intact.

I Contractor or Employee

The ECA defined an employment contract as "a contract of service."[61] The Common Law distinction between a contract for service and a contract for services was therefore preserved by the ECA, with the rights of an employee existing only for those who acted under a contract for service. The rights available to an employee with a contract for service included enforceable rights under the ECA but also rights under the minimum code. In the leading case on the distinction between a contract for service and a contract for services, *Cunningham v TNT,*[62] the Court of Appeal held that the question of whether an owner-driver was an employee was to be approached as a matter of interpretation of contract alone. Though the amount of control that the employer had over the individual was a relevant consideration it was not an entirely persuasive factor.

The Court of Appeal rejected arguments in the *Cunningham* v *TNT* case that advocated for a "shift of policy in favour of the Courts emphasising the desirability of employee protection in interpreting the nature of contractual arrangements, even to the extent of defeating the original intentions of the contracting parties."[63]

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[60] *Employment Law: Courts and Contracts*, above n33, 4-5.

[61] ECA 1991, s2.

[62] *Cunningham v TNT* [1993] 1 ERNZ 956; [1993] 2 NZLR 681 (CA).

[63] Bartlett, above n49, EC 2.12.06.

The strict contractual approach in the case was beneficial to those who made the conscious decision to be contractors rather than employees because of the potential freedom and financial gains (largely those in the primary market) and buyers of labour. However the effect of the *Cunningham v TNT* decision was not necessarily so beneficial in the secondary sector where those with lessened bargaining power and no collective support, might be forced to sign up to contracts that are effectively contracts for services. The judicial focus on the contents of the contract alone would support the interpretation that they had no enforceable employee rights including the minimum code. This strict contractual approach can be seen as inequitable because it does not take into account the surrounding circumstances that may reflect that it was only because of the employees reduced bargaining power that they became a contractor.

J Is it a Free-Market and is it Efficient?

The ECA did not amount to a free labour market framework. In reality the ECA had many prescriptive aspects that required the incorporation of provisions into employment contracts and supported the existence of specialist labour institutions. Many of the prescriptive provisions can be explained in terms of ensuring that efficiency is not lost due to transaction costs, or other market failures such as lack of competition. However many of these can also be explained in equitable terms and while that is not necessarily the object of the ECA, it can not be denied that some equitable considerations existed in the ECA. That is not to say that the ECA is market regulation aimed solely at achieving social justice, but it does contain some equitable considerations, some explicit, others implicitly existent through parallel efficiency considerations.

1 What has been achieved?

Kasper has proclaimed that the ECA was a "success from the viewpoint of efficiency growth, job creation, and equity of opportunity and fits within New

Zealand's overall economic order. It is therefore efficient."[64] So, is Kasper right, did the ECA obtained its objective of efficiency? The National Party is of the view that the ECA obtained its objective over the 9 years it was in effect. The Hon Max Bradford stated that:

> since the Act was passed in law the benefits of flexibility have been clearly apparent. New Zealand has experienced impressive growth and growth in peoples' incomes. The economic reforms since 1990 have given many unemployed people new jobs. Since 1991 employment has risen by over 256,000.[65]

National also states that there has been a saving of over $40 million annually in what was previously lost wages during strikes.

2 Labour on the ECA

According to the Labour Party the measure to determine efficiency is labour productivity and, in their view, labour productivity has decreased under the ECA. Labour states that "according to official Reserve Bank estimates, the average annual increase in Labour productivity between 1991 and 1999 was an astounding 0.36%"[66] compared to a figure of 2% for the years 1987-1990 under the LRA. The Labour Party further points out that the ECA produced a low growth, import driven economy meaning the gap between rich and poor in New Zealand has widened. This can also be described, in the writer's view, as the growing divide between the primary and secondary sectors of the labour market.

While the National Party is able to claim success in terms of flexibility, leading to efficient business returns and an increase in employment, it is Labour's view

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[64] Kasper, above n13, 52.

[65] Hon Max Bradford "National's Labour Market Policy" 24(2) NZJIR 155-165, 156.

[66] *The Employment Relations Bill Explained* para 5 at <http://www.labour.org.nz/erb/erb2tf.html> (last accessed 20 July 2000).

that a large portion of those jobs were in fact casual, part-time or very lowly paid (possibly below the minimum wage if they were contractors). It is the writer's contention that the ECA made the primary labour market more efficient and flexible for suppliers in that market and employers in general. It is proposed however that the effect in the secondary market has not been as positive. This is because the effect of the reduction in collective bargaining has meant that the bargaining power of those in the secondary market has been reduced. Furthermore the definition of "contract of employment" has worked to exclude some secondary market suppliers from the rights of employees. Therefore it is argued that while efficiency may have resulted, inequity has also resulted for some suppliers in the secondary market who have reduced bargaining power and are not in demand.

VIII THE EMPLOYMENT RELATIONS ACT AND THE OBJECT OF FAIRNESS

The Employment Relations Bill (ERB) had its first reading in the House of Representatives on 16 March 2000. It was then referred to the Employment and Accident Insurance Legislation Committee, which received 17,369 submissions regarding its content. On 16 August 2000 the ERB was passed and became law. The ERA came into effect on 2 October 2000.

A The Object of the ERA

The object of the ERA is set out here in full because of its significance:

> The object of this Act is-
>
> (a) To build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and the employment relationship;
>
> (i) by recognising that employment relationships must be built on good faith behaviour; and
>
> (ii) by acknowledging and addressing the inherent inequality of the bargaining power in employment relationships; and
>
> (iii) by promoting collective bargaining; and
>
> (iv) by protecting the integrity of individual choice; and
>
> (v) by promoting mediation as the primary problem-solving mechanism; and
>
> (vi) by reducing the need for judicial intervention.
>
> (b) 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.[67]

The object is not as concise as that of the ECA, with its one line catch phrase, but that is because the Labour Party has approached the regulation of the labour market somewhat differently from the National Party. The Hon Margaret Wilson described this change in approach when she stated that the:

> the Employment Relations Bill signals a new focus in employment relationships rather than the purely economic and contractual relations envisaged under the present legislation. The fundamental difference between the Bill and the Employment Contracts Act is that the Bill is based in the understanding that the employment relationship is a human relationship, which, like other human relationships, functions best in an atmosphere of mutual trust, confidence and fair dealings.[68]

What then does it mean to say that the Act intends "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and the employment relationship"? Is this an equitable or efficient goal, or is it both? These questions can be answered by considering some of the fundamental concepts in the ERA.

B Good Faith

One of the fundamental and arguably the most significant concepts behind the ERA is the concept of good faith. Productive employment relationships, according to the ERA, will be built on several factors including "recognising that employment relationships must be built on good faith behaviour." However before the ERA was passed there was considerable hype from the

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[67] ERA 2000, s3.

[68] Hon Margaret Wilson, Minister of Labour *Address to Rudd Watts and Stone, Employment Relations Bill,* Wellington, 29 March 2000.

National and Act parties suggesting that good faith bargaining would amount to inefficiency not productivity.

Henry Dinsdale, a Canadian labour law specialist brought to New Zealand by the Employers Federation, made the statement that while good faith had been introduced in the United States of America and Canada to affirm the existence of unions, the effect has been that "the law has led to the US Government dictating not only that the parties must try and reach a collective agreement, but what it is that they are bargaining about."[69] This image of good faith bargaining amounting to State intervention in the employment relationship through the backdoor does not accurately reflect the intended effect of good faith bargaining in a New Zealand context. The ERA specifically states that the duty of good faith does not require a concluded collective employment contract[70] and no terms in the ERA suggest that the concept is intended to relate to content rather than process. What then is "good faith" likely to mean in the New Zealand labour relations context?[71]

1 Analogy with consumer law

Section 4 of the ERA describes in some detail the principle that parties in an employment relationship "must deal with each other in good faith." While not limited by the interpretation, "good faith" requires that a party to an employment relationship must not "whether directly or indirectly do anything (i) to mislead or deceive each other; or (ii) that is likely to mislead or deceive each other." If the obligation sounds familiar, that is because it is the same

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[69] Brookers Employment News Service for 22 May 2000 New Zealand Employers Federation Media Release 21 May 2000.

[70] ERA 2000, s33.

[71] It is interesting to note that as part of the coalition agreement between National and New Zealand First after the election in 1996 there was an agreement reached, to introduce an obligation for "fair bargaining" into employment relationships. At that time National was at pains to ensure that people were clear that this was not the same thing as the Canadian or American obligation of good faith. "Fair bargaining" as proposed in the coalition agreement never saw the light of day with the breaking apart of the coalition.

standard stipulated in the Fair Trading Act 1986, where parties should not conduct themselves in a manner that is likely to mislead or deceive. The comparison with consumer law is an interesting one because it highlights one of the significant efficiency considerations behind the concept of good faith, namely market failures associated with information asymmetries. The assumption has been made by many that good faith is all about equity, but it is clear that the concept is also intended to ensure that information asymmetries that may allow one party to mislead or deceive the other do not result in inefficiency. As is further discussed in this paper addressing information asymmetries also becomes important as an issue of determining how the gains from trade will be divided.

2 What will good faith apply to?

Section 4 of the ERA provides a list of the type of interactions, to which the obligation of good faith will apply, ranging from bargaining collective contracts to consultation and access to the workplace. The obligation is far reaching in that it will attach to most interactions between the collective bargaining parties but it is not intended to impact on the content or outcome of any negotiations, discussions or communications.

(a) Addressing the information asymmetry

In terms of collective bargaining there is an obligation that:

> The union and employer must provide to each other, on request and in accordance with section 34, information that is reasonably necessary to support or substantiate claims or responses to claims made for the purposes of the bargaining. [72]

This is in direct recognition of the efficiency considerations relating to information asymmetry in the market and attempts to address situations where one party can deceive the other based on the fact that the other party is not

[72] ERA 2000, s35.

fully informed. The area where this will have the most significant impact is where employers claim they can not increase wages because there are no available funds to do so. Under the ERA the employer will now have to provide information to back up this claim. Previously under the ECA there was no requirement to prove any such claim.

This requirement to provide details of profits and expenditure is seen by National and Act as entirely a social justice goal, at the cost of efficiency. However it is interesting to note that "as long ago as 1956, the US Supreme Court, not a Kremlin front organisation ruled that an employers refusal to substantiate, say a claim of inability to pay increase wages, could violate laws of good faith bargaining."[73] The reality is that there are likely to be more equitable distributions of the gains from trade if employers are required to provide this information but there is also likely to be more efficiency because the parties have more information. This obligation to provide information is in the nature of a request and can be made by an employer to a union and vice versa. If there is a real concern about the confidential nature of the information then it can be released to a "independent reviewer."[74] They can make a determination on the confidential nature of the information and then if it is found to be confidential "advise the union and employer concerned of the decision in a way that maintains the confidentiality of the information."[75] This means that there is an ability to preserve the confidential nature of information but that parties will no longer be able to hide behind claims that they can not substantiate with fact.

(b) Good faith in individual employment agreements

The good faith obligations discussed above do not apply to the individual contracting situation where it could be argued that the information asymmetry and potential inequities are greater than when there is a collective agreement.

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[73] Campbell, above n48, 30.

[74] ERA 2000, s34(4).

[75] ERA 2000, s34(6).

However the information asymmetry in an individual situation is addressed in other ways, namely by the requirement that the individual who is not a union member be covered by the collective, if one exists, for the first 30 days.[76] If there is no collective contract in existence the employer must provide the individual with a copy of the intended contract and advise the employee that they can seek advice on it.[77] In the context of an individual relationship, good faith behaviour is broadly described as being "promoted by providing protection against unfair bargaining" and is considered as "consistent with the implied term of mutual trust and confidence between employee and employer."[78] Therefore the issue of honest dealings is a theme for all types of good faith behaviour.

3 *The Code of Good Faith*

A draft code of good faith has been produced by the Interim Good Faith Code Committee and reinforces that good faith surrounds the processes associated with collective bargaining rather than the content.[79] The draft code, intended to be a generic code, includes such concepts as recognition of the role and authority of representatives, the development of an agreed bargaining processes and the nature of meetings to take place between the parties. The code is intended to provide guidance to employers and unions on what good faith behaviour is in bargaining a collective agreement and acts to facilitate a framework within which the parties have more equitable bargaining power but also addresses efficiency issues because transaction costs are reduced by the impact of a predetermined framework.

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[76] ERA 2000, s63.

[77] ERA 2000, s64.

[78] ERA 2000, s60.

[79] See <http://www.ssc.govt.nz/documents/code_good_faith_bargaining_agreement.htm> (last accessed 14 September 2000).

4 Why are parties required to act in good faith?

A significant question for consideration is why the requirement of good faith is actually required as a statutory obligation. Wouldn't the parties act in good faith without regulatory requirement? The answer to that question has to be "maybe." While parties may participate in some procedural good faith behaviour without a regulatory requirement, much of the reason behind good faith bargaining is to try and avoid the "take it or leave it" approach to bargaining. It is this aspect of good faith bargaining that is not necessarily complied with without regulatory intervention. Parties it seems will act to preserve the position that results in the best division of trade for them. The party that ends up with the best result will be the party with the most bargaining power. If there is little or no competition, or there is over supply of labour or one party has most of the relevant information then they are likely to be able to tell the other party that they can take or leave an offer, as they have little or no motivation to act otherwise.

An obligation to act in good faith has been found to have been implied in the employment contract for some time and in *New Zealand Institute v State Services Commission* it was stated that "there can be no doubting the existence of a duty to bargain in good faith as between parties to an existing contract of employment.[80] However this applied only to existing employment relationships rather than those being entered into and there was no certainty about what was required by any such implied obligation, making it difficult to enforce and meaning compliance was more or less voluntary. The statutory stipulation and development of the code of good faith means that what is meant by good faith is made clear and it can therefore be enforced with some certainty

C Inherent Inequality in Bargaining Power to be recognised

The ERA assumes that there is a need to recognise that those in the

[80] [1995] 2ERNZ 339, at 349.

employment relationship have unequal bargaining power and that the employee is at a bargaining disadvantage, therefore requiring assistance from the State. The ERA delivers this in many ways, but most notably through the promotion of collective bargaining and the statutory recognition of unions as the sole collective bargaining agent.

1 The recognition of the collective group and unions

The rationale behind the ERA is that in the collective group the individual worker will find the strength to get a better share of the gains of trade. The re-introduction of statutory recognition of collective bargaining is hailed by those who do not support the ERA, as a step back in time, amounting to compulsory unionism and union monopoly. This approach seems to ignore the fact that there are a number of ways to effectively opt out of collective bargaining either by having an individual contract of employment or by becoming an independent contractor.

Furthermore it is difficult to see how any union will have a monopoly when union power is contestable, with any 15 people able to set up an incorporated society able to become a registered union.[81] It is the writer's contention that what the ERA has actually done in reintroducing the promotion of collective bargaining is support the secondary market by increasing their bargaining power. However the bargaining power imbalance that the ERA acknowledges in section 3 does not in fact exist for all employees. As has been discussed in this paper, in the primary sector where employees may chose to be on individual contracts and to contract out of the employment relationship to enjoy the benefits of contracting, the bargaining power is not necessarily unequal. In that situation there is arguably little or no bargaining imbalance. The ERA does not restrict this groups freedom to act individually.

[81] ERA 2000, s13.

2 ERA not a mirror of the past

The ERA is not a mirror of the strict regulatory regime, that existed in varying incarnations before the labour market was "freed" by the ECA, when varying degrees of compulsory unionism existed. It represents a balance of collective and individual interests, employer and employee interests and secondary and primary market interests. The Hon Margaret Wilson made the point when the ERA was still a Bill, that:

> the Bill has not gone back to the days when compulsory unionism, national awards, and compulsory arbitration were the three legs on which the system stood……..The Employment Relations Act is the way of the future. It will work in practice for business. It will work in practice for employees…..Good faith and the honest open communication that is the corollary and consequence will improve productivity and confidence throughout New Zealand.[82]

The ERA does not therefore address the issue of inequality of bargaining power by assuming that all employees require the protection of the collective group, it leaves room for employees to make choices about representation that ensure efficiency of outcome as well as equity.

D Employee or not Employee, that is the Question?

Another significant concept in the ERA is the manner in which it deals with who is and is not an employee. The ERB that went to the Select Committee had the following definition of employee:

> (1) In this Act, unless the context otherwise requires, employee-
>
> (a) means any person of any age employed by the employer to do any work for hire or reward under a contract of service; and

[82] Brookers above n12, 3.

(b) includes

(i) a home worker; or

(ii) a person intending to work

(2) in deciding whether a person (person A) is employed by another person (Person B)-

(a) a primary consideration is the extent to which the work that person A does under the agreement, contract, or arrangement and how and when person A does the work is-

(i) subject to the control and direction of person B; or

(ii) integrated into person B's business or affairs; or

(iii) both; and

(b) The court or authority (as the case may be) must, among the other matters that the Court or Authority takes into account, give less weight to anything in an agreement, contract, or arrangement that, expressly or by implication---

(i) describes person A as a contractor or independent contractor; or

(ii) describers the agreement, contract, or arrangement as an agreement, contract, or arrangement for services; or

(iii) provides that the relationship between person A and person B is not that of an employee and employer. [83]

This definition sent shock waves through many organisations that employed independent contractors for specific jobs or on an ongoing basis and to whom no employee benefits were paid and no minimum code is applied. The

[83] ERA 2000, s6.

definition was particularly problematic for those agencies that organised for the contracting out of individuals to organisations, on the basis that they were self-employed contractors. They were concerned that what was a contractual relationship would need to become an employment relationship.

1 To protect the secondary market

The Select Committee commented that the policy intent of the definition of "employee" in the ERB was intended to "stop some employers labelling individuals as "contractors" to avoid responsibility for employee rights such as holiday pay and minimum wages."[84] The concern therefore was for those in the secondary market where there is less competition, less mobility and an inherent imbalance of bargaining power. What Labour were trying to avoid was the situation where an employee is forced to be an independent contractor so that the employer can avoid compliance with employee rights. The images of the sweatshop and pizza delivery drivers, already mentioned in this paper, are relevant examples of avoiding such obligations by treating employees as contractors.

2 Objection from the primary market

The objection to the definition of "employee" largely came from those in the primary market that wished to opt out of the employment relationship in order to get better conditions and payment. The Select Committee went on to say that these primary sector groups considered that "clause 6 would alter mutually beneficial relationships, overrule the intention of the parties, increase business costs, and create uncertainty."[85] The Select Committee believed the answer was to clarify the provision to ensure that the policy intent was clear. The ERA is aimed at protecting those who are likely to be forced to be contractors by employers hoping to avoid minimum code obligations rather

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[84] Employment and Accident Insurance Committee Report on Employment Relations Bill page 3 at < http://www.gp.co.nz/wooc/bills/erb/comm-2.html >(last accessed 15 August 2000).

[85] Employment and Accident Insurance Committee, above n83, 3.

than restrict those in the primary market from electing to opt out of employment relationships where there are mutually beneficial results.

3 *Who is an employee under the ERA?*

After changes were made as a result of the Select Committee process, section 6 of the ERA now acknowledges specific legislation that covers those that are contractors such as real estate agents and share-milkers[86] and explicitly draws a distinction between the needs of those in the primary and secondary labour market sectors. The Employment Relations Authority and the Employment Court still have the ability to determine the real nature of the relationship, but must now consider:

> (a)all relevant matters, including any matters that indicate the intention of the persons; and
> (b) is not to treat as a determining matter any statement by the persons that describes the nature of the relationship.[87]

The ERA allows the Court or Authority to make a declaration on application from a relevant party whether or not they are an employee for the purposes of any of the Acts listed in s223, which includes the Equal Pay Act 1972, the Holidays Act 1981, the Minimum Wage Act 1983, the Volunteers Employment Protection Act 1973, and the Wages Protection Act 1983.

The ERA therefore does not restrict the contracting out of those in the primary market but it is aimed at protecting those individuals forced to be contractors in the secondary market. This means that the policy goals of efficiency and equity have resulted from an implicit acknowledgement of the different needs of different sectors of the labour market.

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[86] The ERA 2000 has no effect on the Real Estate Agents Act 1976 or the Sharemilking Agreements Act 1937.

[87] ERA 2000, s6(3)(a) and (b).

E Fixed Term Contracts

Another significant concept in terms of the ERA's equity and efficiency content is the issue of fixed term contacts. The Select Committee commented that clause 81 of the ERB as it related to fixed term contractors, "caused considerable confusion and concern. In particular, employers were concerned that an initially sensible/justified decision to offer a fixed term contract could be subject to challenge on the basis that the circumstances had changed."[88]

Clause 81 of the ERB originally stated that:

> (1) An employee and an employer may agree that the employment of the employee will end
>
> (a) at the close of a specified date or period:
>
> (b) on the occurrence of a specified event:
>
> (c) at the conclusion of a specified project:
>
> (2) An employee whose employment comes to an end under subsection (1)(a) is to be treated as having been dismissed unjustifiably unless that employee's employer establishes that:
>
> (a) at the time that the date or period was specified, there were genuine reasons for doing so relating to the employer's operational requirements; and
>
> (b) at the close of the date or period specified, the employer considered that those reasons continued to apply.

There was concern expressed by those who employed fixed term contractors that this provision meant that there was no certainty in hiring employees on fixed term contracts and that there would be less flexibility for employers. The Select Committee recommended change in response to these concerns and the respective provision in the ERA, s66 now reads as:

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[88] Employment and Accident Insurance Committee, above n83, 9.

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1) the employer must—

(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employees is to end in that way; and

(b) advise the employee of when and how his or her employment will end and the reasons for his or her employment ending in this way.

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

(a) to exclude or limit the rights of the employee under this Act:

(b) to establish the suitability of the employee for permanent employment

The changes that have been made are clearly in recognition of the goals of efficiency and flexibility but equity remains. The provisions now suggest that so long as the process is fair in terms of advising the contractor of their status and that there is a genuine reason for the end of the contact, then it is not unjustifiable dismissal when it ends. A fixed term contract can therefore continue to be welfare enhancing for both parties. While the original clause was equitable in approach, by ensuring that there was no exploitation of fixed term contractors to enable employers to avoid their employment obligations. The final clause reaches a balance between equitable and efficiency interests allowing parties that are in positions of equitable bargaining power to reach mutually beneficial agreement to have a contract for only a fixed period.

F Personal Grievances

Under the ERA the grounds on which a personal grievance can be raised have been expanded to include racial harassment in the work place. The ninety-day rule for the lodging of a personal grievance continues as under the ECA but there are exceptions specified for when this rule does not apply, including the equitable ground that the employee's agreement did not explain the 90 day

rule.[89] Therefore the personal grievance aspects of the ERA are not unlike those that existed under the ECA and the concept continues more or less unchanged to provide a combination of equitable and efficiency considerations as discussed above in relation to the ECA.

G Strikes and Lockouts

Strikes are seen by the "new right" as incredibly inefficient because of the flow-on effect strikes have for the employer and the economy as a whole. However little has changed under the ERA to cause the "new-right" concern, rather the law relating to strikes has merely been slightly enhanced. The concern most often expressed by the "new-right" about the ERA's strike provisions is the return of the ability of employees to strike in support of multi-employer bargaining. However as Hughes has pointed out "few employees in New Zealand (Nurses? Supermarket workers?) are in a position to pursue a multi-employer agreement."[90] Therefore the impact of reintroducing such a provision may be of little practical effect.

While the ERA has not done away with striking to ensure efficiency prevails, it has provided for some mechanism to lessen the effect of a strike on an employer and the economy as a whole. One of the significant mechanisms is the requirement to notify of a strike relating to an essential service some 14 days in advance for some services and 3 days for others. This will obviously lessen the impact of the strike and removes the information asymmetry that exists for the employer. There is also a power to replace striking employees within certain limitations (namely that they already work for the employer, or it is necessary on health and safety grounds)[91] which is in direct recognition of efficiency grounds. There is also the ability to suspend non-striking employees where work is not available during a strike leading to productive

[89] ERA 2000, s115.
[90] Campbell, above n48, 30.
[91] ERA 2000, s97.

efficiency.[92] Therefore it can not be said that the strike provisions have not taken some efficiency considerations into account.

H New Institutions

Under the ERA there are three separate institutions, a Mediation Service, the Employment Relations Authority and the Employment Court. The objective section relating to institutions, includes recognition that the institutions will "support successful employment relationships and the good faith obligation that underpin them."[93] One of the most significant objectives of Part X of the ERA is that it aims to "recognise that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information and assistance needs to be available at short notice to the parties in those relationships."[94] This reflects a desire to be both efficient and fair through ensuring that information asymmetries are rectified by the provision of information to both parties and the existence of a specific labour law jurisdiction. There is an interesting balance here of equity and efficiency gains and a clear recognition that "procedures for problem solving need to be flexible."[95]

1 Mediation

Mediation services are going to be provided through a variety of means including telephone, fax, internet, e-mail, the services of providing general information about employment and services available, services to promptly resolve problems and assistance on fixing new terms if required. The ERA also places an emphasis on resolving matters at this lower level and supports private mediation even before going to the Mediation service.

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[92] ERA 2000, s88.

[93] ERA 2000, s143(a).

[94] ERA 2000, s143(c).

[95] ERA 2000, s143(d).

2 *Employment Relations Authority*

While the Employment Relations Authority effectively replaces the Employment Tribunal there is a change in the modus operandi of the institution. This institution will have very board inquisitorial powers, as well as making determinations according to the substantial merits of the case.[96] Changes were made at the Select Committee stage where a statement was introduced to the ERA that the Authority must "comply with the principles of natural justice.[97] Amongst the new-right there is concern that this Authority has powers that are too broad including some powers traditionally reserved for the High Court. Of further concern was the fact that the Employment Authority members need not be legally trained or hold a practising certificate of any kind. These fears seem to reflect a concern that the members may be too equitable and apply fairness considerations in determining the outcomes of cases and therefore not take efficiency considerations into account in their decision making.

3 *Employment Court*

The Employment Court continues with similar a jurisdiction and powers to those that existed under the ECA. Matters that are removed to the Employment Court for consideration from the Authority either during the hearing or after a determination has been made are heard, may at the Court's direction be heard *de novo*. This may be done if the Court is satisfied that the applicant has participated in the Employment Authority's investigation in a way that was designed to resolve the issues, in other words of they have tried to resolve matters in good faith.

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[96] ERA 2000, s157.

[97] ERA 2000, S173.

I What will the ERA Achieve in Terms of Equity?

Papers ascertained from the Department of Labour and Treasury, by way of the Official Information Act 1982, include comments that suggest the ERA is likely to have the overall effect of producing "a labour market that functions in a manner that is fairer for workers, and also redistributes more in favour of workers on lower incomes."[98] The philosophy behind the ERA clearly reflects the "social justice" reasons for regulation of the labour market and the aim of a fairer division of the gains from trade. It also allows for flexibility for those who wish to have an individual contract or contract out of the employment relationship, meaning efficiency considerations are also present.

It is the writer's belief that the ERA amounts to an Act that reflects a consciousness of the dual labour market in offering the equitable objectives of collective bargaining and centralised unions to those in the secondary market (where they have less bargaining power because of lack of competition, immobility and information asymmetries) but also allows for flexibility and efficiency in the primary market. Therefore the answer of what it will achieve in terms of equity, is that any equity gains may result in the secondary market. For those in the primary market who do not need the protection of equitable provisions that may in fact act to restrict their desired flexibility, the flexibility of a market orientated system remains. The writer proposes that the ERA was written in contemplation of the fact that restrictive labour market regulation would not have a beneficial effect on the labour market or the economy as a whole and therefore balanced the interests of the different parts of the market, the goals of equity and efficiency and the interests of the employee and employer.

[98] Ministry of Labour Briefing Paper to the Minister of Labour *Labour Market Impacts of Policy Reforms*, 14 February 2000.

IX CONCLUSION- WILL FAIRNESS KILL EFFICIENCY?

The answer to the question whether the fairness considerations introduced by the ERA will eliminate efficiency has to be answered, in the writer's opinion, in the negative. The Department of Labour has indicated that it believes the ERA is intended to "promote a better balance of fairness over efficiency concerns in the employment relationship."[99] It is the writer's view that this is indeed the case, but that in doing so the ERA has not sacrificed efficiency considerations for those who have a strong bargaining position in the employment relationship, namely those in the primary market.

The ERA recognises there is a dual labour market and in doing so is able to balance the interests of both segments of the market. Therefore exploitation of those in the secondary market is avoided because they have the availability of protection from collective bargaining. The freedom to act as an individual remains an option for those in the primary sector. The writer proposes that a balance of equity and efficiency considerations exist in the ERA and agrees with the view that in comparing the ERA to the legislation of Europe and the United States of America that "over all, no other country has tried to balance the rights of the collective with the rights of the individual quite as finely as in New Zealand."[100]

The ECA did allow for more flexibility in the labour market by moving away from the constraints of the previous legislation with its compulsory obligations and direct State intervention. However the ECA did not address the fact that what was efficient for one segment of the market (the primary sector and employers) may be inequitable to the other (the secondary sector). While the ECA contained some equity gains through efficiency and in fact contained some aspects explicitly reflecting equitable policy goals the singular goal of promoting an "efficient labour market" did come at a cost to equity. The ECA

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[99] Briefing Paper from Department of Labour to Minister of Labour *Employment Relations Bill- Overview of Policy Issues* 21 January 2000.

[100] Campbell, above n48, 29.

did not recognise that failures in the market such as lack of competition, immobility, lack of demand and information asymmetries meant those in the secondary market might be exploited without the protection of collective bargaining. Therefore it did not contain the same balance of equity and efficiency that the ERA provides.

The writer concludes that the equity/efficiency trade-off frontier which is part of the political rhetoric surrounding the two Acts is not a helpful mechanism through which to measure the equity and efficiency content of the ECA and ERA. It is however a helpful mechanism for opposition parties to draw emotive imagery. The concepts of equity and efficiency are not mutually exclusive as the trade-off is used to suggest in political rhetoric. Often when one of these objectives is aimed for, the other also results without a trade-off between the two taking place. In many instances equity and efficiency require the same regulatory mechanisms for intervention because they seek the same ends.

Goddard CJ suggested that equity and efficiency need not be mutually exclusive but could be gained simultaneously soon after the ECA was enacted. When looking at its Long Title of the ECA he said that the:

> overall objective is to promote an efficient labour market. To promote means to encourage, actively support and advance, and an efficient labour market I take to be one that works well. In the concept of efficiency there is something more than the ideal of harmony enshrined in previous labour legislation. However since efficiency contains also a connotation of productiveness the old notions and the new notions are not necessarily at odds with each other, for harmony may be thought to lead to productiveness and productiveness to enhance harmony. [101]

[101] *Adams v Alliance Textiles (NZ) Ltd* [1992] 1ERNZ 982; (1991) 4 NZELC 95, 423 at 1003.

It is the writer's view that the ERA better reflects the goal of harmony through productivity and productivity through harmony that the Chief Judge had hoped would result under the ECA.

The rhetoric and language borrowed from the equity/efficiency trade-off has created a perception however that where equity exists there is no efficiency. The ECA specifically recognised some equity considerations and gained others inadvertently through efficiency goals that had the same effect. The ERA aims to provide a fairer outcome for those in the secondary market in a position of reduced bargaining power, but supports flexibility and efficiency for those in the primary market. It can not yet be known whether this acknowledgement of the differing needs of those in the dual labour market and the balancing of the needs of the individual and collective will bring the two sectors of the labour market closer together in terms of improved wages and conditions as a result of increased bargaining power. What can be said with some certainty at this point is that putting the humanism back in the employment relationship will not kill efficiency.

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