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TRIANGULAR EMPLOYMENT UNDERMINING NEW ZEALAND'S LABOUR LAWS

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Contents

Abstract

This paper explores triangular employment in New Zealand and how it undermines existing labour laws. It examines the existing legislation, how the courts have managed triangular employment within the current framework, the proposed legislative changes and its likely effectiveness in light of how triangular employment has been managed throughout the world. It finishes with an analysis as to how the proposed changes could more effectively increase protections for workers in triangular employment.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 7507 words.

Subjects and Topics

Triangular employment and labour-hire agencies, minimum employment rights and entitlements in New Zealand, triangular employment and international law, and the Employment Relations (Triangular Employment) Amendment Bill 2018.

I Introduction

Triangular employment is a type of employment which is being used increasingly to undermine New Zealand's labour laws and a worker's minimum rights. The proposed amendment to the Employment Relations Act 2000 (the ERA) in the form of the Employment Relations (Triangular Employment) Amendment Bill 2018 (the Bill) aims to close some of the loopholes that this type of employment arrangement has created within existing employment law.

Triangular employment, along with other non-standard work, is a growing type of employment arrangement which differs from the conventional bi-lateral employment relationship.[1] Triangular employment relationships can take various forms. In one scenario, a labour-hire agency will employ a worker, who will then be assigned to a host company to supply some form of work or service. The host company will have control and direction over the worker akin to a traditional employer. Other scenarios see a worker being engaged by the agency as an independent contractor, and then contracted to a host company. However, for the purposes of this paper, and the Bill, it is assumed there is at least an initial employment relationship between the worker and the agency.

Triangular employment has essentially always existed as formal work relationships facilitated by a third party, but the phenomenon is growing.[2] It is the shift to long-term placements and extending the use of triangular employment to avoid the responsibility associated with employing a permanent worker that have become problematic. The emergence is largely attributed to the changing nature of work, but reality suggests it is often used as a means of flouting labour laws.[3] It is worth noting that triangular employment can provide some advantages for workers and employers alike. For employers, it can allow for legitimate fluctuating business needs, such as on- and off-peak seasons. For some workers it can mean a flexible working life-style which can be desirable. For many others, however, it is a vital means of gaining paid work but leaves them without adequate protection and perpetuates their vulnerable state by providing no certainty of work.

There are two issues in triangular employment: is there an employment relationship? Who is it with? This paper is concerned primarily with understanding the different relationships and how this often leads to the worker not being afforded their rights. It will address the legislation and issues affecting workers in triangular employment by examining the Bill, reviewing recent

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[1] Jamie A Peck and Nikolas Theodore "Temped Out? Industry Rhetoric, Labor Regulation and Economic Restructuring in the Temporary Staffing Business" (2002) 23(2) Sage Journals 143 at 144.

[2] International Labour Organisation "International Labour Conference: The Employment Relationship" (3 July 2006) International Labour Organisation <www.ilo.org.nz>.

[3] Above n 2.

New Zealand and Australian case law, considering triangular employment in other jurisdictions, and comparing the Bill to these other models to assess its effectiveness.

II Labour Law in New Zealand

New Zealand's labour laws are primarily found in legislation and supported by decisions of the courts. Several pieces of legislation make up the minimum rights and entitlements of workers in New Zealand. The principal Act is the ERA. Other pieces of legislation also regulate employment relationships. In the event of disputes, the legislation is interpreted in individual cases by the Employment Relations Authority (the Authority) or the courts. International law can be influential but is not enforceable unless enshrined in domestic law.

A The Legislation

The ERA governs all contracts of service between employers and employees, establishes the framework for negotiating collective and individual employment agreements, and governs dispute resolution. It also empowers the Authority.[4] Section 6 of the ERA is particularly important in the triangular employment context as it defines an employee. A person must come within this definition for the minimum rights and entitlements, as established by the ERA and other Acts, to apply to them.

Other key employment legislation includes the Holidays Act 1981 setting the minimum entitlements to leave;[5] the Health and Safety at Work Act 2015 covering employer duties of care and health and safety rights;[6] the Minimum Wage Act 1983 which sets a minimum hourly wage rate for workers;[7] the Equal Pay Act 1972 which prohibits gender-based discrimination in rates of pay;[8] the New Zealand Bill of Rights Act 1990 which sets the fundamental rights of employees such as freedom of association;[9] and the Human Rights Act 1993 which prohibits discrimination based on factors such as gender, race, and religion,[10] including in employment.[11]

No legislation explicitly alludes to the regulation of triangular employment. This remains governed by the ERA, as far is it extends in these arrangements. The Authority and the courts are required to interpret the legislation which has not so far been developed to specifically

[4] Section 156.
[5] Section 3.
[6] Section 3.
[7] Sections 4-4B.
[8] Section 2A.
[9] Section 17.
[10] Section 21.
[11] Sections 22 and 23.

address triangular employment. There have been some significant decisions on triangular employment providing useful precedents and assisting development of the proposed changes.[12]

B Employment Agreements

Employment agreements, whether individual between the employer and employee, or collective between the employer and a union, contain the obligations of the employer and the employee in a particular workplace and role. Employment agreements must meet the minimum standards found in the legislation, but are flexible beyond the statutory minimums, for instance in relation to rates of pay, minimum notice periods required when an employee intends to end their employment, provision for meal breaks, and leave entitlements. Any employment agreement is both enforceable and challengeable under the ERA.[13]

When a dispute arises in an employment relationship, there are various avenues open to the parties. Dispute resolution procedures must be included in an employment agreement.[14] Usually the first step will be mediation. Mediation is provided for in Part 10 of the ERA.[15] If mediation fails, then it will be for the Authority, Employment Court or Court of Appeal (and in some exceptional cases, the Supreme Court) to interpret the law and make a decision on the dispute. The statutes are comprehensive, administering various aspects of the employment relationship. However, there remains wide scope for the courts to apply and interpret the law.

C International Sources

The International Labour Organisation (the ILO) was established in 1919 as an agency of the League of Nations, by the signatories to the Treaty of Versailles.[16] New Zealand is a founding member.[17] The ILO is now a specialised agency of the United Nations.[18] It is a tripartite organisation made up of governments, workers and employers. It is the international body governing international labour standards.[19]

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[12] *McDonald v Ontrack Infrastructure Ltd* and *Prasad v LSG Sky Chefs New Zealand Limited* are discussed further below.

[13] Employment Relations Act 2000, s 129.

[14] Section 65(2)(a)(vi).

[15] Sections 143-155.

[16] International Labour Organisation "Origins and history" International Labour Organisation <www.ilo.org>.

[17] International Labour Organisation "The ILO in New Zealand" International Labour Organisation <www.ilo.org>.

[18] United Nations System "Directory of United Nations System Organisations" United Nations System <www.unsystem.org>.

[19] International Labour Organisation *Rules of the Game: A Brief Introduction to International Labour Standards* (International Labour Office, Geneva, 2014), at 9.

International labour standards are found in conventions, treaties and recommendations of the ILO.[20] The need for such standards was provoked by the Industrial Revolution, and the harsh working life and culture that were a by-product of this significant cultural and economic shift.[21] These standards reflect recognition that labour is not merely a commodity for exploitation, but a very significant part of a person's life that provides them with security and dignity. Although these standards are not directly enforceable on a national level in New Zealand, they influence and are used as an instrument to provide scope for domestic policies and law-making.[22]

III Triangular Employment and Workers' Rights

Triangular employment has grown rapidly as a method of employment in many countries.[23] The number of people in such employment arrangements is increasing, presenting issues for the application of the existing labour laws.[24] Workers in triangular employment relationships can be especially vulnerable as they lack security of hours and duration of work, and experience uncertainty as to whether they can assert their rights as workers, and against whom. These shortfalls are in direct contradiction to the ERA and the protections enshrined in it, both as the primary piece of employment legislation, but also its main policy principles and purposes of creating an employment relations framework, not a mere contract.

The judiciary has confirmed that notwithstanding written agreements, it is the real nature of the employment relationship that needs to be established in instances of triangular employment.[25] The cases that follow have shed light on the extent to which workers in triangular employment relationships could be being exploited by host companies who use this method to avoid the liability and responsibility that comes with being an employer. Section 6 of the ERA allows for the Authority or the courts to determine any given employment relationship, regardless of what the original intentions were.

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[20] At 16.

[21] Above n 16.

[22] Above n 19, at 22.

[23] Werner Eichorst and Paul Marx (eds) *Non-Standard Employment in Post-Industrial Labour Markets: an Occupational Perspective* (Edward Elgar Publishing, Cheltenham, United Kingdom, 2015) at 246.

[24] Richard Rudman *New Zealand Employment Law Guide* (2013 edition, CCH New Zealand Limited, New Zealand, 2013) at 20.

[25] *McDonald v Ontrack Infrastructure Limited* [2010] NZEmpC 132 at [14].

A Triangular Employment and the ERA

The ERA replaced the Employment Contracts Act 1991 (ECA) to:[26]

> [I]ntroduce a better framework for the conduct of employment relations. That framework is based on the understanding that employment is a human relationship involving issues of mutual trust, confidence and fair dealing, and is not simply a contractual, economic exchange.

This policy purpose is consistent with the philosophy of international labour standards – labour is a human interaction, not just a resource for exploitation.[27] The provisions of the ERA only apply to employees as defined by s 6. The cases discussed explored the real nature of the employment relationship. These cases were brought when the workers were aggrieved by some action of the host company, not the agency.

1 Dismissal from Employment

Section 103(1)(a) of the ERA provides for an employee to bring a personal grievance against a former employer for unjustified dismissal. For an employer to dismiss an employee, the employer must act in good faith, have a good reason, follow a fair and reasonable process and keep an open mind to ensure outcomes are not pre-determined.[28] An employee can claim their dismissal was unjustified if they can show they were dismissed and they believe that the employer did not have a good reason to dismiss them, and the process was unfair. The onus is on the employer to prove that the dismissal was justified.[29]

Triangular employment arrangements mean that an employee can be dismissed from an assigned workplace without the host company being required to go through a fair process or have a justified reason. The host company can simply have the person removed from the workplace by asking the agency to reassign the worker, asking for a new worker or by terminating the assignment. Although this does not mean that they are dismissed as an employee of their employer, the agency, it does mean that the paid work they were undertaking and relying on is no longer available to them. Had they been a permanent employee of the host company under a contract of service, they would have coverage of s 103(1)(a) and could bring a personal grievance claim against them as their employer.

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[26] Employment Relations Bill 2000 (8-1) (explanatory note) at 1.

[27] Cf ILO Constitution preamble.

[28] Above n 24, at 304 and 305.

[29] At 301.

2 Disadvantage

Unjustified disadvantage occurs when an employer's actions unjustifiably impact on a worker's employment or working conditions in a way that disadvantages them. Examples of this are cancelling or withholding shifts from the employee, demoting the employee, transferring the employee to another location without consultation, and not dealing with an issue that the employee has brought to the employer which makes it harder for them to do their job properly.[30] Employees in New Zealand do not have to suffer a material or monetary loss to bring a personal grievance claim of unjustified disadvantage.[31] Section 103(1)(b) of the ERA provides that the disadvantage must apply to "the employee's employment, or 1 or more conditions of the employee's employment".

According to FIRST Union,[32] many of these workers are reluctant to bring up any issues they might be facing in their characteristically temporary workplace as they are fearful of losing their paid work. They do not want to give the host company any reason to remove them from the assignment.[33] Likewise, if these workers take leave or become unwell, they can find their hours reduced or their assignments ended without notice.[34] It is common that when embarking on an assignment, the worker will not be informed of the start or end dates, the rate of pay, the location of the assignment, the required hours, or any compensation for being available for work that is then cancelled.[35]

3 Hours of Work

On 1 April 2016, the Employment Standards Legislation Bill 2016 came into effect amending the ERA to address, amongst many other issues, what is colloquially termed "zero-hour contracts." Zero-hour contracts contained no guaranteed hours, but would oblige employees to be available for work should their employer require it.[36] This left many workers in precarious positions because they had no security in hours, and therefore income, and could not pursue additional employment as they had to remain available to work. Section 67C of the ERA now provides that where hours of work are agreed by an employer and an employee, this must be included in the employment agreement, and there must be guaranteed minimum hours of work.[37]

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[30] Ministry of Business, Innovation and Employment "Unjustified disadvantage" (2018) Employment New Zealand <www.employment.govt.nz>.

[31] Above n 24, at 305.

[32] FIRST Union represents more labour-hire workers than any other organisation in New Zealand.

[33] FIRST Union "Submission to the Education and Workforce Committee on the Employment Relations (Triangular Employment) Amendment Bill 2018" at [3.5].

[34] At [3.3].

[35] At [3.6].

[36] Employment Standards Legislation Bill (select committee report) at 8.

[37] Sections 67C(1) and 67C(2).

This provision is supported further by the new s 67D which provides that an availability provision may only be included in an employment agreement that specifies agreed hours of work, including guaranteed hours, and must relate to a period for which an employee is required to be available, in addition to those guaranteed hours of work.[38] Section 67G restricts the employer's ability to cancel shifts without a reasonable period of notice, and reasonable compensation must be paid to the employee if a shift is cancelled without such notice.[39]

The coverage of these new provisions is limited. First and foremost is a requirement for there to be agreed hours of work, before the provisions apply. Many labour-hire contracts are casual which means they do not require an hours of work clause.[40] Casual contracts of service are work availability-dependent. Casual employees are not defined in the ERA, but the term usually means a situation where the employee has no guaranteed hours and no on-going pattern or expectation of work.[41] A worker could face each week without knowing how many hours they will be offered or expected to work. The purpose of these changes was to abolish these unfair labour practices by retaining flexibility where both parties desired, but to also increase certainty and security by ensuring both parties understood their commitments.[42] Triangular employment allows the sorts of unfair practices outlined to continue.

B The Real Nature of the Employment Relationship

Andersen v Eastern Institute of Technology (*Andersen*) considered a triangular employment relationship that had not been formulated through the use of an agency. The plaintiff made claims under the Contracts (Privity) Act 1982 (CPA), the Fair Trading Act 1986 (FTA) and the ECA. The plaintiff was employed by Park Medical Ltd (Park Medical) to provide counselling services at the Eastern Institute of Technology (EIT). The plaintiff argued that EIT was a joint employer with Park Medical and was therefore jointly liable for the alleged breaches under the FTA and the CPA. The claim under the ECA was to establish jurisdiction. The plaintiff had a written employment agreement with Park Medical, and Park Medical had a written agreement with EIT.

The Employment Court followed the ruling of Cooke P in the Court of Appeal that, notwithstanding the evidence of considerable control being asserted over the plaintiff by EIT, the intentions of the written contract were not displaced.[43] The plaintiff had a written employment agreement with Park Medical, but not with EIT, and therefore it was found to be

[38] Section 67D(2).

[39] Section 67G(2).

[40] Above n 33, at [4.3].

[41] Above n 24, at 128.

[42] Employment Standards Legislation Bill 2016 (53-1) (explanatory note) at 1.

[43] *Andersen v Eastern Institute of Technology & Anor* WEC 57/00, 5 July 2001 at [85].

impossible for EIT to be in breach of the FTA.[44] The claim under the CPA also failed on this basis, namely that the contractual promises made by EIT to Park Medical could not possibly extend to the plaintiff.[45] The judgment also concluded that it did not have jurisdiction due to the lack of written employment agreement between the plaintiff and EIT.

With the passage of the ERA, this position has been significantly altered. Section 6(2) of the ERA provides:[46]

> In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

The policy intent of s 6 of the ERA was to prevent employers labelling some workers as contractors as a means of avoiding the responsibilities as employers for the rights of their workers, in relation to such matters as holiday pay and minimum wages.[47]

In 2005, the Supreme Court authoritatively dealt with the application of s 6 in *Bryson v Three Foot Six (No.2)* (*Bryson*). Ultimately, the Court agreed with the Employment Court that there was an employment relationship between the plaintiff and the company. Judge Shaw of the Employment Court summarised the principles she considered had been established for determining what constitutes a contract of service. These were confirmed by the Supreme Court as:[48]

- the Court must determine the real nature of the relationship;
- the intention of the parties is still relevant but no longer decisive;
- statements by the parties, including contractual statements are not decisive of the nature of the relationship;
- the real nature of the relationship can be ascertained by analysing the tests that have been historically applied such as control, integration, and the "fundamental" test;
- the fundamental test examines whether a person performing the services is doing so on their own account; and

[44] At [85].

[45] At [89].

[46] Above n 13, s 6(2).

[47] Employment Relations Bill "Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee" (June 2000) at 21.

[48] *Bryson v Three Foot Six (No. 2)* [2005] NZSC 34, [2005] 3 NZLR 721 at [5].

- consider industry practice, although this is far from determinative of the primary question.

If *Andersen* was heard under the ERA, it is likely the assessment of her employment and the defendant's liability would be very different, and not weighted so heavily on the existence of the written contracts setting out the intentions of the parties.

C The Real Nature of the Employment Relationship in Triangular Employment

The test of the real nature of the relationship has been extended beyond its original purpose to understand the real nature of triangular employment arrangements. As with the *Bryson* case, it is crucial for the Court to define the real nature of the employment arrangement. It has been used to determine whether or not the employee can assert their rights against the host company as an employee.

1 McDonald v Ontrack Infrastructure Ltd

The 2010 decision of the Employment Court in *McDonald v Ontrack Infrastructure Ltd* (*Ontrack*) was the first to address the real nature of the employment relationship in triangular employment under the ERA.[49] It opened up the possibility that workers in such relationships could be considered employees of the host company, for the purpose of taking a personal grievance.[50] Although the Employment Court referred to the *Bryson* decision, it did not directly adopt the test used, as that was relevant to determining if a person was under a contract of service or a contract for services.[51] It did, however, refer to the principles laid out by Judge Shaw.[52]

In this case, the plaintiff had a casual employment agreement with a labour-hire agency, Allied Workforce Ltd. He received an assignment with Ontrack Infrastructure Ltd where he worked under that company's direction and control for several months. The assignment ended, and the plaintiff wanted to bring a personal grievance against Ontrack Infrastructure Ltd for unjustified dismissal – a right reserved for employees.[53] This was one of the first time the New Zealand courts had dealt with triangular employment, so it relied heavily on cases from other jurisdictions. This led the Court to be quite reserved in its findings, placing the onus on the employee to establish their legal position on the balance of probabilities.[54]

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[49] *McDonald v Ontrack Infrastructure Limited*, above n 25, at [1].
[50] At [52].
[51] At [14].
[52] At [40].
[53] At [2]-[3].
[54] At [52].

2 Prasad v LSG Sky Chefs New Zealand Limited

In *Prasad v LSG Sky Chefs* (*LSG Sky Chefs*) heard in the Employment Court in 2017, the plaintiffs had been working under the exclusive control and direction of LSG Sky Chefs, having been recruited by labour-hire agency, Solutions Personnel Limited.[55] When it became apparent to LSG Sky Chefs that longevity of temporary workers could lead to some legal ambiguities, they set in motion a process of replacing the workers with the longest records of service.[56] The second plaintiff, as one of the longest serving at LSG Sky Chefs was removed and her assignment with them was terminated. The plaintiffs sought a declaration that they were employees of LSG Sky Chefs under s 6(5) of the ERA.

The Employment Court accepted that, while there were factual differences between this and *Bryson*, the fundamental points remained the same: when assessing if there is a contract of service, all relevant matters must be taken into consideration and that any s 6 analysis is an "intensely factual" one.[57] The Court's analysis led to the finding that the plaintiffs were in fact employees of LSG Sky Chefs.[58] Once the plaintiffs had been engaged they underwent LSG Sky Chef induction and training, wore the same uniform as the permanent employees, complied with a roster administered by the management and completed an LSG Sky Chef timesheet. The only thing that LSG Sky Chefs did not do was directly pay them; this was done by the labour-hire agency.[59]

These cases have established that the real nature test from s 6 of the ERA can be used to analyse triangular employment relationships. It is inevitable, although the test primarily was concerned with the status of independent contractors vs employees, that triangular employment will present comparable situations which might mean an employment relationship exists between the worker and the host company.

3 The High Court of Australia

Australian courts are drawing similar conclusions as New Zealand courts. In *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (*Quest South Perth Holdings*), the reality of triangular employment arrangements was tested against the Fair Work Act 2009 (Cth).[60] In this case, two workers had been employed by Quest South Perth Holdings Pty Ltd (Quest) for several years. Quest then engaged a labour-hire agency, Contracting Solutions Pty Limited (Contracting Solutions). Contracting Solutions then purported to engage the two workers as

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[55] *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150 at [3] and [4].
[56] At [8]-[11].
[57] At [36].
[58] At [100].
[59] At [70]-[73].
[60] *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd & Ors* [2015] HCA 45.

independent contractors, who were then contracted back to Quest to provide their services. Quest then represented to the workers that they were performing work for Quest as independent contractors. The workers continued to perform their services in precisely the same manner as when they were employed by Quest. The Court found that they had never actually transitioned away from being employed by Quest and this attempted action contravened s 357 of the Fair Work Act.[61]

Section 357 of the Fair Work Act 2009 (Cth), colloquially known as 'the sham contracting provision', states that an employer cannot misrepresent an employment relationship as one of an independent contractor.[62] To get around this law, employers have been using triangular employment. This decision by the Australian High Court demonstrates a departure from the "Odco" system of contracting where triangular contracting, as it is referred to, was found to be legitimate by the Full Bench of the Federal Court of Australia in 1991.[63] The appeal sought by the applicants was unanimously refused by the High Court.

Quest South Perth Holdings draws significant parallels with *LSG Sky Chefs*. In both cases, employers were falsely using independent contractors engaged by third parties to avoid the obligations associated with being the employer of the workers. In the absence of law reform, however, each arrangement needs to be evaluated by the courts on its own facts.

IV The Employment Relations (Triangular Employment) Amendment Bill 2018

The Bill was introduced on 1 February 2018. It resurrects parts of the Employment Relations Amendment Bill (No. 3) that was abandoned in 2009. The Bill has two purposes:[64]

> The first is to ensure that employees employed by one employer, but working under the control and direction of another business or organisation, are not deprived of the right to coverage of a collective agreement covering the work being performed for that other business or organisation.
>
> The second purpose is to ensure that such employees are not subjected to a detriment in their right to allege a personal grievance by providing that where an employee is employed by one employer, but working under the control and direction of another business or organisation, that employee may join the other business or organisation that is party to any personal grievance action. Such joinder requires leave of the Authority or court.

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[61] At [5]-[10].

[62] Section 357(1).

[63] *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.

[64] Employment Relations (Triangular Employment) Bill 2018 (17-1) (explanatory note) at 1.

The Bill proposes to achieve these objectives by amending s 5 of the ERA to extend the existing definition of an applicable collective agreement, and inserting two new definitions of "primary employer" (that is, the agency) and "secondary employer" (that is, the host company),[65] and by inserting in s 56 a new subsection which provides that primary employers may be bound by any collective agreement to which the secondary employer is a party.[66] Lastly, a new s 102A will be inserted to provide for joining a secondary employer to a personal grievance.[67]

Under existing laws, workers who are part of a triangular arrangement are being precluded from accessing the terms of the collective agreement which might cover the workplace of the host company, and cannot take personal grievances against the host company, unless they can establish a direct employment relationship. The right to collective bargaining and to claim personal grievances are two fundamental aspects of New Zealand's labour regulations.[68]

A New Definitions

The proposed new definitions are in cl 4:[69]

> Section 5 amended (Interpretation)
> (1) In section 5, in the definition of **applicable collective agreement**, after "member of the union", insert "and includes any collective agreement binding an employee and a primary employer under section 56(1)(c)".
> (2) In section 5, insert in their appropriate alphabetical order:
> **primary employer**, for the purposes of sections 56(1)(c) and 102A, means any person who employs a person to do any work for hire or reward under a contract of service;
> **secondary employer,** for the purposes of sections 56(1)(c) and 102A, means any person who enters into any contract or other arrangement with a primary employer whereby the employee of that primary employer performs work for the benefit of that person and where that person exercises or is entitled to exercise control or direction over the employee equivalent or substantially equivalent to that which would normally be expected of an employer.

A legislative framework for triangular employment requires each role to be clearly defined. There are three parties in a triangular employment relationship. This departure from the traditional bi-lateral arrangement leads to the current gap in the coverage of effective employment rights. For this paper, it is assumed that the labour-hire employee will come within

[65] Clause 4.
[66] Clause 5.
[67] Clause 6.
[68] Above n 13, ss 31 and 103.
[69] Clause 4.

the definition of 'employee' as supplied in s 6 of the ERA: "An employee is someone who is employed by an employee to do any work for hire or reward under a contract of service."[70]

The proposed new definition of "secondary employer" departs from the 2008 Bill's proposed terminology of "controlling third party":[71]

> **controlling third party** means a person –
> (a) who has a contract or other arrangement with an employer under which an employee of the employer performs work for the benefit of the person; and
> (b) who exercises or is entitled to exercise control over the employee that is substantially similar to the control an employer exercises or is entitled to exercise in relation to the employee.

These definitions are similar, but the term "controlling third party" gives a greater sense of what the arrangement truly entails. The term "primary employer" implies dominance in the arrangement, but in reality, it is the "secondary" or subsidiary employer that has the control and direction over the worker.

B Collective Agreements

Clause 5 amends provisions related to applicable collective agreements:[72]

> Section 56 amended (Application of collective agreement)
> In section 56(1), after paragraph (b), insert "and;" and also insert:
> (a) the employees are performing work for a secondary employer where that work is within the coverage clause of any collective agreement to which the secondary employer is a party; and
> (b) those employees are a member of the union party to that collective agreement; and
> (c) those employees are not bound by any other collective agreement to which the primary employer is a party.

Access to union membership is a fundamental right recognised by international labour standards.[73] New Zealand has accepted this standard and provided for it in the ERA and other legislation.[74] ILO Convention 98 on the right to organise and collectively bargain is one of the eight fundamental conventions that New Zealand has ratified.[75] The second purpose of the Bill

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[70] Section 6(1)(a).
[71] Employment Relations Amendment Bill 2008 (289-1) cl 5.
[72] Clause 5.
[73] Above n 19, at 28 and 31.
[74] Above n 13, parts 3-5.
[75] Ministry of Business, Innovation and Employment *International Labour Conventions ratified by New Zealand* (MBIE, Wellington, 2015) at 68.

is to increase access to collective agreements for workers in triangular employment. As it stands, a person employed by a labour-hire agency does not have the opportunity to join the collective agreement that might cover their assigned workplace.

The Bill provides that for a worker to benefit from coverage of a collective agreement in a host workplace, they must be employed by an agency, but contracted to, and under the direction and control of, a host company, as with an employer.[76] The worker must also be a member of a union party to the collective agreement, and not covered by a collective agreement between a union and the agency.[77] Finally, the employee must be included in the coverage clause of the host company's collective agreement.[78] If these criteria are met, then it should follow that a worker will be covered. In its current form and without being tested, it is a broad provision with few limitations, for example, the duration of the assignment.

The purpose of this provision is to prevent undermining of existing collective agreements through the use of triangular employment and to allow for equity in terms.[79] E tū union, who took the *LSG Sky Chefs* case, noticed that there were no new workers being employed on the collective agreement terms they had negotiated with LSG Sky Chefs. Instead LSG Sky Chefs had been using triangular employment to avoid the terms of the collective agreement, notably the wage rates.[80]

C Personal Grievances

Clause 6 provides the proposed new s 102A:[81]

> New section 102A inserted (Joinder of parties to personal grievance)
>
> **102A Joinder of parties to personal grievance**
>
> (1) Where an employee employed by a primary employer raises a personal grievance against that employer the employee may, if the grievance has also been raised with any secondary employer of that employee, apply to the Authority or court to join that secondary employer to the grievance.
>
> (2) For the subsequent determination of a personal grievance the actions of any secondary employer are deemed to be the actions of the primary employer.
>
> (3) Any secondary employer joined under this section is jointly liable with the primary employer for remedies awarded to the employee unless the Authority or court makes and order determining the proportion of any award to be made by each party.

[76] Clause 4(2).

[77] Clause 5(c)(iii).

[78] Clause 5(c)(i).

[79] (21 March 2018) 728 NZPD.

[80] E tū "Submission to the Education and Workforce Committee on the Employment Relations (Triangular Employment) Amendment Bill 2018) at 4.

[81] Clause 6.

(4) The Authority or court must grant leave if –
  (d) the actions of the secondary employer have resulted in or contributed to the grounds of a personal grievance as defined in section 103; and
  (e) it considers it just to do so.

Personal grievances are legal claims brought under s 103 of the ERA against a current or former employer, if the employee believes they have been dealt with unfairly or unlawfully. There must be, or have been, an employment relationship for any such claim to be raised. It provides universal coverage for all employees.[82]

As noted, under New Zealand law the employer is the legal entity employing the employee.[83] In triangular employment, that legal entity is not the one, or the only one, which has control and direction over the worker. In triangular employment, often the only role that is played by the agency on a day-to-day basis is paying the worker their wages.[84]

Under the current law, scope already exists for workers to apply to take personal grievances against the host company, given the 'real nature' test under s 6 of the ERA has been satisfied. This new provision would remove the need for the Authority or Court to find that there was an employment relationship between the worker and the host company before allowing the personal grievance. This will provide efficiency and accessibility for people to assert their rights. However, it will not resolve the real nature of the employment relationship.

V Discussion

A Triangular Employment throughout the World

In seeking to understand what the impact of this proposed law change might be, it is useful to examine the international standards, and to explore how other jurisdictions have approached the issue.

1 Triangular Employment and the ILO

In 1933, just four years after its establishment, the ILO adopted Convention 34 on fee-charging employment agencies, which called for their abolition.[85] This was then revised by the ILO in 1949, where it softened its position, giving its members the option of abolition or strict

[82] Section 103(1)(a)-(j).

[83] Above n 13, s 5.

[84] For example, *Prasad v LSG Sky Chefs*, above n 55, at [6].

[85] International Labour Organisation Convention 34 on Fee-Charging Employment Agencies 1933 (opened for signature 29 June 1933, entered into force 18 October 1936), art 2.

regulation.[86] By 1997, the ILO had further revised and moved away from the prescriptive approach. It recognised that there was a place for private employment agencies in "a well-functioning labour market."[87] Thus, ILO Convention 181 on private employment agencies was adopted.

Convention 181 "[…] establishes the general parameters for regulation of recruitment, placement and employment of workers engaged by private employment agencies."[88] It requires member states to ensure their domestic labour laws and practices provide protections to employees of such agencies. An assessment undertaken by the World Employment Confederation found that in those countries which had ratified Convention 181, there was lower rates of informal, unregulated work, greater cooperation between public and private employment agencies, and more freedom of association.[89] New Zealand, however, has not ratified this Convention nor its predecessors.

2 Triangular Employment in Europe

The European Union Directive on Temporary Agency Work of 2008 defines the general parameters applicable to the working conditions of workers in triangular employment. It sets wide standards in a number of diverse economies. Article 2 provides:[90]

> The purpose of this Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment, as set out in Article 5, is applied to temporary agency workers, and by recognising temporary-work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working.

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[86] International Labour Organisation Convention 96 on Fee-Charging Employment Agencies (Revised) 1949 (opened for signature 1 July 1949, entered into force 18 July 1951), art 3.

[87] International Labour Organisation Convention 181 on Private Employment Agencies 1997 (opened for signature 19 June 1997, entered into force 10 May 2000), preamble.

[88] International Labour Organisation "Workshop on ILO Convention No. 181 on Private Employment Agencies" (25 April 2012) International Labour Organisation <www.ilo.org>.

[89] Ciett: International Confederation of Private Employment Agencies "Workers enjoy more protection in countries that have ratified ILO Convention No. 181 on private employment agencies" (21 January 2014) World Employment Confederation: The Voice of Labour Market Enablers <www.wecglobal.org>.

[90] Directive 104/2008 on Temporary Agency Work [2008] OJ L327/9, art 2.

(a) Germany

German law follows an inherent principle that the economic and employment risk of the employer should not rest with the employee,[91] and has legislated for triangular employment since the 1970s under the German Temporary Employment Act 1972.[92] In its most recent amendments, three key changes were enacted: the maximum duration of temporary employment, the equal pay principle, and a prohibition on deploying temporary employees to disrupt industrial action.[93]

The maximum duration of temporary employment was reduced from two years to 18 months. If this timeframe is exceeded, then an employment relationship will automatically be deemed to exist between the worker and the host company.[94] This essentially establishes a statutory presumption for what New Zealand courts have adopted as the 'real nature' test. The principle of equality is a simple principle of temporary workers being paid the same and afforded the same rights as the host company's permanent employees.[95] This formerly was limited to the first nine months of any temporary employment. It has now been extended to the duration of the temporary employment. The final new measure is a ban on using temporary workers as a tool for disrupting industrial action.[96] Employers can face significant fines if they operate in breach of the ban.[97]

(b) United Kingdom

The United Kingdom's Agency Workers Regulations 2010 form part of the United Kingdom's labour laws. It was designed to implement the European Union Directive. This statutory instrument aims to abolish unfair practices and discrimination against those who work for employment agencies – in essence, enshrining fair and equal treatment, with those working full time or permanently for the host company. The Regulations share many features with the German legislation. Equal treatment and entitlements as provided for under the Employment Rights Act 1996 (UK) are covered by reg 5, including coverage of any differing terms in a collective agreement.[98] This is, however, qualified by reg 7 which provides that reg 5 will not apply until the temporary worker has completed the "qualifying period". This is defined as 12

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[91] Jannis Breitschwerdt "What rights and protections are there for workers on zero hours contracts in Germany?" (23 September 2016) Global Workplace Insider <www.globalworkplaceinsider.com>.

[92] Original name Arbeitnehmerüberlassungsgesetz.

[93] Cf s 97 of the ERA on strike breaking.

[94] Temporary Employment Act 1972 (Germany), § 1(1b).

[95] Section 8.

[96] Section 11(5).

[97] Isabee Faulkenburg "Reform of the German Temporary Employment Act – New rules in respect of the maximum duration of temporary employment and of equal pay." (3 March 2017) PKF News <www.fasselt-news.de>.

[98] The Agency Workers Regulation 2010 (UK), r 5.

continuous calendar weeks with the same host company.[99] Until that period is complete, provisions such as s 86 of the Employment Rights Act 1996 (UK), will not apply.

Section 86 of the United Kingdom's Employment Rights Act provides for "reasonable notice" to be given when an employer is dismissing an employee. What is reasonable is defined in the Act and varies depending on tenure.[100] Temporary employees will inevitably still be vulnerable to being dismissed from their assignment within that specified 12-week period. This is, however, far greater protection than temporary workers are afforded in New Zealand now, or under the proposed Bill.

B How the Bill Compares to the European Models

Mischiefs will remain, even if the Bill is passed. The more progressive laws in place in Germany and the United Kingdom provide examples of further measures that could be taken in New Zealand. It is inefficient for the Authority or courts to have such a burden, in resolving these matters, as opposed to automatic coverage. The Bill only has two purposes, whereas these European models have entire legislation or regulation specifically to manage the complexities of triangular employment.

1 Hours of Work

A significant and persistent issue for those employed by labour-hire agencies, is that there is often no certainty of work. Even if an assignment is set for an amount of time, the person filling the role from the agency, has no guarantee that they will be there for the duration. If the host company decides to end the assignment, or they do not want that particular worker there, they can return to the labour-hire agency and request a new person. This is in direct contradiction to dismissal principles, and the recently enacted law to combat zero-hours contracts.

When embarking on an assignment, it is reasonable to expect that the host company would have a sound understanding of the amount of work for which the worker will be needed. If it is a full-time equivalent assignment, then the host company will know. It is also reasonable to expect that the provisions on hours of work in the ERA could be extended in these circumstances. These workers are otherwise in the exact position which these new provisions aimed to combat – insecure in their hours and unable to pursue other work as they may be required to work.

In Germany, it is not possible to enter into a valid zero-hours employment agreement. Section 12 of the Part-Time Work and Fixed Term Employment Act 2000 (Germany)[101] provides that

[99] Regulation 7.

[100] Employment Rights Act 1996 (UK), s 86.

[101] Original name Teilzeit- und Befristungsgesetz.

a worker can be available for on-call work, but the agreement must specify duration of the weekly and daily working hours. If the duration of the weekly hours is not fixed, a minimum of 10 hours will be agreed. If the daily hours are not fixed, the employer must engage the employee for at least three hours.[102] The employer must provide at least four days advance notice of any required work. Any less than that, the employee is not obliged to work.[103] These provisions will apply to workers in temporary triangular employment per the Temporary Employment Act's principle of equality.[104]

2 Equal Treatment

Kieran McAnulty MP, who introduced the Bill, said in the first reading that:[105]

> The objective of this bill is to ensure labour-hire companies and temporary employment agency workers have access to the same rights and conditions as the permanent employees they are working alongside.

Clause 5 of the Bill will prevent host companies from using labour-hire workers to undermine the collective agreement. Coverage of a collective agreement will be beneficial to those workers who satisfy the criteria and are in long-term temporary assignments at a host company. Those engaged in short-term assignments are unlikely to benefit from any collective agreement terms as it will be impractical to pursue it. It is difficult to understand how this will achieve the purpose of this change, in both collective coverage but also access to equal terms. There is no mention of equity with terms in individual employment agreements available to permanent employees of the host company.

What this proposed provision does not consider is that in many instances, work assignments are temporary and short term and might range across different workplaces covered by different unions, or not covered at all. In a submission to the select committee supplied by Adecco Personnel Ltd, they detailed that sometimes an employee might be on multiple assignments at once, some as short as one week.[106] Workers going from workplace to workplace with frequency are unlikely to pursue coverage of the collective agreement at each assignment, or necessarily be members of the relevant union.

To truly achieve equity in treatment and access to rights, the law needs to be explicit and less restricted. There should be no scope for host companies to be able to provide lesser terms to

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[102] Section 12(1).

[103] Section 12(2).

[104] Section 8.

[105] (21 March 2018) 728 NZPD.

[106] Adecco Personnel Ltd "Submission to the education and Workforce Select Committee on the Employment Relations (Triangular Employment) Amendment Bill 2018) at 1.

labour-hire workers over whom they have control and direction. The German and United Kingdom employment law models explicitly provide for equal treatment of these workers.

3 The Role of the Authority and Courts

As noted in the comparable examples of the Australian High Court decision *Quest South Perth Holdings* and the New Zealand Employment Court decision in *LSG Sky Chefs*, it remains the burden of the courts to determine the real nature of the employment relationship. With the introduction of s 102A to the ERA as set out in cl 6 of the Bill, it will no longer be necessary for the courts to determine the real nature of the employment relationship, as a worker can apply for leave to join the host company to a personal grievance claim.

Removing this requirement to determine what the actual employment relationship is, and who it is between, will inevitably result in workers who might otherwise be deemed to be employed by the host company, continuing to operate under incorrect assumptions, and not understanding what their rights are. But what is the harm in this? If the worker is able to join a host company to a personal grievance claim, then it possibly will be of little concern. The question remains, how the Authority or Court will test whether a host company can be joined to a personal grievance. It may be that they will use the test, or some truncated version of it. As s 102A is not a blanket provision, the Authority or Court will be tasked with setting the standard.

In requiring the Authority or Court to make this determination, there is no guaranteed coverage. If the host company is not at fault, then this will be established in the process. If the worker feels aggrieved by an action of the host company, then they should automatically have the option to hold them to account, in the same manner as they would if they were a permanent employee. This idea aligns with the German and United Kingdom approach to these relationships, where the temporary employer is entitled to the same rights in their temporary workplace, as they would have if they were a member of the permanent staff. It also would go much further in achieving the objective of the McAnulty Bill.

VI Conclusion

This paper has outlined how the use of triangular employment has led to New Zealand's labour laws being undermined. Companies are opting for labour-hire workers instead of hiring permanent employees to avoid the responsibility of being an employer. This means some workers are subject to lesser terms than their permanent colleagues, that they cannot assert their minimum workers' rights and entitlements against the entity which has direction and control over them, and there is evidence of some of these workers being discriminated against in matters such as rates of pay.

The law is established to empower the worker, who is the inherently less powerful party in any employment relationship. But triangular employment voids this, as there is no apparent employment relationship between the worker and the host company. The legislation does not address triangular employment and so the courts have been left to adapt the law to these situations. It has been established that the primary test to understand independent contractors vs employees is appropriate when analysing triangular employment, as many of the issues are substantially similar.

The Bill aims to remove some of the uncertainty around triangular employment and prevent some of the discriminatory and unfair practices that are present within it. Its objective is for labour-hire workers to have access to the same rights and conditions as permanent employees. To achieve this, the Bill will see these workers having the opportunity to access the terms of the applicable collective agreement and joining the host company to a personal grievance claim. However, these measures are limited in scope, and likely to be limited in effect.

For more effective law reform, New Zealand should consider the more substantial laws in Germany and the United Kingdom as models. These jurisdictions prescribe equal treatment. The laws do not allow for workers in triangular employment to work under lesser terms than their permanent counterparts. Short of establishing standalone regulation, the Bill should require host companies provide guaranteed minimum hours of work, akin to the hours of work provisions on the ERA; not limit cl 5 of the Bill to collective employment agreements and include terms within individual employment agreements, as a general principle of equal treatment; and remove the requirement in cl 6 for leave to join the host company to a personal grievance claim to guarantee coverage to all workers in triangular employment. Being guided by these models would mean the legitimate use of labour-hire remains intact, but the basic rights of the workers are assured.

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