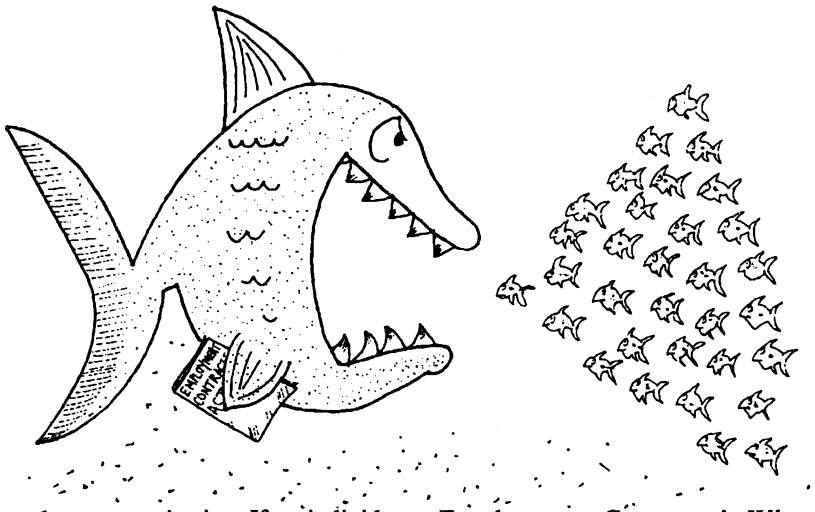

an employee organisation. If an individual has been authorised to negotiate or act on behalf of employees it is undue influence for any one to put pressure on them to stop acting (s.8).

2. The Act changes the legal status of unions. In fact there is a total absence of reference to unions in the Act. The Act refers to 'employee organisation' which is defined as a body 'which exists in whole or in part to further the employment interests of the employees belonging to it' (s.2). Registration and rules on control and procedures of unions that existed under the previous *Labour Relations Act* have been abandoned and unions are now deemed to be incorporated societies and have re-registered under the *Incorporated Societies Act* 1908.

3. Individual employees can decide whether they want to negotiate their own contract or have a 'bargaining agent' negotiate for them (ss. 9 and 10).

4. Bargaining agents must be registered and must show that they have authority to bargain for all the people they purport to represent (s.12). Employers can insist on sighting a signed authority from every single employee that a union or bargaining agent represents.

5. The employer is obliged to 'recognise' the authority of the appointed bargaining agent. However, it is unclear whether 'recognise' entails an obligation to negotiate, and whether an employer is still free to negotiate directly with a worker when a third party has been authorised to represent that worker.[4]

6. Any person or employee organisation wanting to be a bargaining agent for any group of employees can only get access to the work site with the agreement of the employer (s.13).

7. The Act provides for both 'Individual Employment Contracts' and 'Collective Employment Contracts'. Where an employee is not covered by a Collective Employment Contract the employer and employee can enter into an Individual Employment Contract as they think fit. An Individual Employment Contract is between the individual worker and the employer. It must be in writing if the employee requests. Where there is an applicable Collective Employment Contract, an Individual Employment Contract must not be inconsistent with terms and conditions of the Collective Employment Contract (s.19). A Collective Employment Contract applies to more than one worker and one or more employers. It must be in writing. New employees can be included into the Collective Employment Contract if the Contract contains a term allowing for the extension of coverage. If employees are not covered by a Collective Employment Contract, for example, in the case of new employees where the Collective Contract does not extend coverage, then their individual contract can provide different conditions from the Collective Employment Contract (s.20).

8. When a Collective Employment Contract expires, the terms of the Collective Contract become the terms of an Individual Employment Contract. Section 19(4) provides that on the expiry of the collective contract 'each employee who continues in the employ shall . . . be bound by an individual contract based on the expired Collective Employment Contract'. However, as Anderson points out, this provision does not provide explicitly for continuity of employment, and the words 'who continues to be in the employ of' are somewhat ambiguous.[5] Furthermore, a recent decision in the Employment Court has meant that when a contract expires, an employer can unilaterally change workers' wages and conditions. In the matter of the New Zealand Society for the Intellectually Handicapped and the New Zealand Community Services Union, the court found that when a contract has come to an end, an employer can reduce the terms of employment for its staff with the effect of creating a lawful lockout.[6] This decision gives the power to employers to reduce wages unilaterally on a 'take it or leave it' basis.

9. All contracts of employment are covered by the Act, including those which had previously been governed by the law of contract in the ordinary courts (s.3). Workers who had previously been denied access to tribunals and unfair dismissal procedures now have access to these proceedings.

10. The Act retains a specialist Employment Court and Tribunal (Part VI). The object of the Tribunal is to establish a 'low level, informal specialist Employment Tribunal to provide speedy, fair and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible' (s.76(c)). The Tribunal has both mediatory and adjudicatory jurisdiction. The Employment Court has an appellate and supervisory role in relation to the Tribunal. It retains the Labour Court's jurisdiction over compliance orders and review proceedings; and has general jurisdiction to hear and determine any action founded on an employment contract and to make any order in such proceedings that the High Court or District Court may make under any enactment or rule of law relating to contracts (s.104).[7] The court has a new jurisdiction over 'harsh and oppressive' contracts (s.57). The court has no jurisdiction to set aside, modify or grant relief in respect of employment contracts that are 'unfair or unconscionable bargains', and as Hughes has pointed out, thereby excludes that body of common law principles which has been developed.[8] The court may also set aside contracts and direct any party to pay compensation where an 'employment contract or any part of it, was procured by harsh and oppressive behaviour or by undue influence or by duress'.

11. Strikes and lockouts are legal if they relate to the negotiation of a collective employment contract for the workers concerned or if they relate to health and safety matters (ss.64 and 71). Strikes and lockouts are unlawful if:

- workers concerned are covered by a Collective Employment Contract;

  they relate to freedom of association (union membership), personal

grievances and disputes (this appears to be strange when those who proposed the Act asserted that it would create freedom at work and freedom of association);

- they take place in an essential industry and notice has not been given;

they are over the issue of whether a Collective Employment Contract should bind more than one employer;

they take place in breach of a court order (s.63).

Effects

The abolition of the 'award' wage system has left New Zealanders with minimal employment rights. The *Minimum Wages Act* 1983 remains in force and provides a statutory minimum floor for the wages of workers *over the age of 20*. According to Brosnan and Rea the 1991 minimum wage is about 46% of mean earnings.[9] The *Wages Protection Act* 1983 provides the manner in which wages must be paid and the *Holiday Act* 1981 provides minimum entitlements to holiday and sick leave. The *Equal Pay Act* 1972 remains and so does the *Parental Leave and Employment Protection Act* 1987. The *Employment Contracts Act* does, however, give access to grievance procedures, tribunals and the Employment Court to those workers who had previously fallen outside the scope of the *Labour Relations Act*.

As outlined above, the Act makes it difficult for trade unions to act on behalf of workers wishing to make a collective contract. These organisational hurdles pose problems and indeed could herald the demise of less financial unions that represent small and dispersed workplaces. This point is illustrated by the October 1991 decision taken by the New Zealand Clerical Workers Union to disband because of organisational problems caused by the Act.

The relegation of trade unions to a peripheral role in the employment relationship also means that trade unions have lost any control over the bargaining process; the bargaining process is now controlled by employers. Trade union representatives have expressed concern about this. One New Zealand union official feared that the union had lost control of the bargaining procedure for as much as 60% of its members. This could result in the unilateral imposition of wages policy on workers. This appeared to be the outcome in some workplaces where the contract was offered as 'sign it or else'. Trade union officials stated that many new contracts brought to their attention involved massive concessions and give backs in wages and conditions on the part of workers.

The trade union movement is hampered in its ability to make collective contracts by the restrictions placed on strikes. As mentioned above strikes are unlawful if they are concerned with binding more than one employer to a collective contract. This will have the effect of isolating workplaces and makes sympathy strikes and secondary boycotts unlawful. Furthermore, employers may have the way open for them to alter contracts where a settlement has resulted from an unlawful strike, because these contracts could be deemed to be 'procured by harsh and oppressive behaviour or by undue influence or by duress'.[10]

The removal of the award wages system, an inadequate minimum code and the discouragement of unionism may result in the loss of employment rights for industrially weak groups such as women and minority groups. It would appear that both Australian and New Zealand working women have benefited from the award system. Cross-national studies indicate that regulated labour markets result in a more egalitarian outcome for women workers. For example, in 1986 in Australia, women earned 82% of male average weekly earnings; in New Zealand the figure was 77%. In the less regulated labour markets the differential was much greater. In Japan the male/female differential was 57%, the United Kingdom 66% and the United States 69%.[11]

Conclusion

The *Employment Contracts Act* heralds a radical re-direction of public policy on labour regulation in New Zealand. It espouses notions of 'individual freedom' and 'freedom of association'. It ignores the inherent inequality of the employment relationship and misrepresents the structure of modern day corporate capitalism. It is simply incorrect to assume that individual workers can sit down with their employers and freely negotiate wages and conditions of work. Freedom is an empty proposition if workers do not have the ability to bargain on an equal basis. This is particularly relevant in times of high unemployment, as in New Zealand at the moment. Furthermore, to argue that the individual worker only attains 'freedom' in a competitive labour market denies the existence of labour market discrimination and segmentation. As Brosnan and Rea point out, the labour market is highly differentiated and competition between workers for jobs and between firms for labour is limited by the differing needs of firms and the characteristics of individual workers. Segments of non-competing groups are an intrinsic feature of labour markets.[12] Women and minority groups who are relegated to the secondary labour market are unlikely to achieve 'freedom' in a deregulated labour market. In fact they will be at a greater disadvantage because they lack labour market mobility and the necessary bargaining power to at least maintain minimum conditions.

Australian politicians are seeking to emulate the changes to industrial relations that have taken place in New Zealand. John Howard, the Federal Opposition's spokesperson for Industrial Relations, stated after the Industrial Relations Commission's October 1991 National Wage Decision that 'until the law was changed to allow employers to negotiate contracts directly with workers instead of through a union, genuine enterprise bargaining was not possible'.[13] The New Zealand *Employment Contracts Act* is an attempt to de-unionise the workforce and has already resulted in a lowering of wages and conditions for some workers. The Act stands as a timely warning to workers and unions in Australia.

References

1. Hansard, 19 December 1990, p.478.
2. Hansard, ibid., p.485.
3. Anderson, G., 'The Employment Contracts Act 1991: An Employers' Charter', (1991) 16(2) *New Zealand Journal of Industrial Relations*, 127-142.
4. ibid., p.133.
5. ibid., p.138.
6. *New Zealand Society for the Intellectually Handicapped v New Zealand Community Services Union*, Decision 16 January 1992.
7. Hughes, J., 'The Employment Tribunal and the Employment Court', (1991) 16(2) *New Zealand Journal of Industrial Relations*, p.178.
8. ibid., p.182.
9. Brosnan, P. and Rea, D., 'An Adequate Minimum Code: A Basis for Freedom, Justice and Efficiency in the Labour Market', (1991) 16(2) *New Zealand Journal of Industrial Relations*, p.149.
10. Hughes, op. cit., p.183.
11. Brosnan, P. and Wilson, M., 'The Historical Structuring of the New Zealand Labour Market', Industrial Relations Centre, Victoria University of Wellington, 1989.
12. Brosnan and Rea, op. cit., p.151.
13. *Age*, 31.10.91, p.1.