



Employment Contracts Act

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Introduction

Although the Employment Contracts Act 1991 ("the Act") has passed only its second anniversary it continues to have a high media profile. This is but one affirmation of the impact which the Act has had on New Zealand's industrial relations environment.

Whilst the majority of trade unions that existed prior to the Act are still in existence, we have seen the demise of some trade unions (e.g., the Clerical Workers Union) and overall a significant reduction in trade union membership. On the other hand employers have been actively using the legislation and taking advantage of the new bargaining arrangements to negotiate contracts better suited to the individual employer and/or their industry. The major changes that have occurred in the area of penal and overtime rights are well documented. Anecdotal evidence suggests that in some instances employers have seen increased productivity and improvement in staff relations as a consequence of these changes.

Changes introduced by the Act include:

- * voluntary membership of trade unions;
- * the abolition of national awards and statutory bargaining structures;
- * a choice between either collective or individual employment contracts; and
- * the extensions of personal grievance procedures.

Against this background we take a brief look at some recent issues which have been before the courts.

Lock Outs

It is important when considering the often emotive issue of lock outs to remember that a lock out is essentially the flip side of a strike. Further, an employer's ability to lock out as a bargaining tactic existed well before the introduction of the Act.

Accordingly, when considering the legality of a lock out, a simple rule of thumb is to consider whether a strike in the same circumstances would be illegal.

Nevertheless the introduction of the Act has seen some subtle shifts in the parameters of what is or is not a valid lock out.

An employer is perfectly entitled to mount either a total or a partial lock out where:

1. the lock out relates to the negotiation of a new collective contract; and
2. any existing collective employment contract has expired. (Section 63 and Section 64 of the Act).

The question of whether an employer is able to lock out an employee when negotiating an **individual** employment contract is a little more vexed. The Act does not specifically refer to this situation. However, in our view indications from the Employment Court support the view that if a lock out does not fall within the permitted parameters set down in the Act then it is unlawful. *O'Malley v Vision Aluminium Limited* (CEC 31/92).

Application of Personal Grievance Procedures to Management

The possible and actual adverse consequences of the impact of the Act on organised labour has been a recurrent theme in the media. However, the fact that the Act empowered a new group of employees has largely been ignored.

That is, the personal grievance procedures in the Act are now available to management personnel on individual contracts.

Under the old system, middle and senior management outside the award/union structure were forced to take employment related disputes through the traditional Court system. Now, all individual employment contracts are deemed to include personal grievance and dispute procedures, either as provided for within the Act or as may be agreed between the parties. The Act gave management staff access to specialist employment judges and, arguably, a more informal, cheaper, and, to date, a speedier resolution procedure. In our view the flow of claims into the Employment Tribunal and significant increase in the levels of compensation awarded to employees for unjustified dis-

missal reflect the Act's extension to management.

There is a tendency among many employers to regard an employment contract as subject to the ordinary rules of contract. However, employment law was and remains a distinct branch of legal practice. A decision in a personal grievance matter will consider factors not at issue in a standard contractual dispute. This fact is well illustrated in disputes arising from dismissal of management (and other) staff. An employer must now justify a dismissal of any of its management personnel on the grounds that it is both substantively and **procedurally** fair.

To satisfy the latter requirement, an employer would be well advised to have in place a policy as to the procedural steps to be carried out where there is concern as to a manager's performance. Such a policy needs to include the type and nature of warnings which should be given to enable the manager to make the necessary improvements. Although managers are included in the grievance procedures under the Act, the case of *Coleman v Irvines Bakery Limited* (1992) AT198/92 illustrates that clinically stepping a senior management employee through a disciplinary procedure is not necessarily the correct approach. The employer must advise the employee of problems which he or she considers may exist and allow the opportunity for explanation and rectification of the problem. In *Irvines Bakery*, the employer successfully justified its dismissal of a senior manager by showing that problems were brought to the manager's notice but without improvement.

In view of the sizeable claims of management personal grievance disputes coming through the Employment Tribunal there is a financial incentive for employers to reconsider and/or put in place management performance review procedures in keeping with legal expectations.

Possibly as a reaction to the above, and also for tactical and confidentiality reasons, there is an increasing tendency for senior management employment contracts to include alternative dispute resolution procedures involving independent arbitrators. Arguably, little advantage is gained by this approach. Whilst the Act permits alternative dispute resolution procedures, these must not be inconsistent with those of the Act, **cannot** remove rights of appeal and must adopt the same rules of law in respect of employment disputes. However, while the mediation services of the Tribunal are confidential, adjudications are not. Thus whilst there may be perceived advantages in respect of confidentiality by using private arbitration such advantage disappears if the employee exercises rights of appeal.

Employees or Independent Contractors

The forestry sector and in particular the forest establishment and harvesting areas employ significant numbers of independent contractors. Concerns have been voiced recently following well publicised decisions such as *TNT Express Worldwide (NZ) Limited v Cunningham WEC31D/92* and *Challenge Realty Limited v Commissioner of Inland Revenue (1990) 3 NZLR 42*. In short, these cases have held that, notwithstanding the belief of the employer that an independent contractor relationship existed, in fact the relationship was of employee/employer.

It should be borne in mind that there are two forces at work here. One source comes from the Inland Revenue Department, the other is generated by plaintiffs wishing to access the employment court system and avail themselves of the personal grievance procedures.

In the latter situation, the plaintiff has to establish an employee/employer relationship so as to fall within the jurisdiction of the Employment Court and Tribunal and the benefit of the technical unjustified dismissal arguments. The *TNT* case is an example of this situation. From a different perspective, if the IRD can substantiate a finding of an employee/employer relationship, the employer has an obligation to deduct PAYE and the employee is no longer able to deduct expenditure such as vehicle expenses, depreciation, telephone expenses, claim and charge GST and so forth. (The *Challenge Realty* case is an example of this situation.) It also needs to be remembered that most cases involve self-contained contractors, e.g. the real estate agent or courier owner/driver.

The cases show that, notwithstanding a statement in the contract to the effect that the relationship is that of independent contractor, the courts will look behind the contract and consider the actual relationship which exists between the parties.

Factors which support the existence of an independent contractor relationship include:

- * a lesser degree of supervision and control over the contractor than would be normal for an employee;
- * whether the contractor is able to maintain a client base other than the company and is not bound to provide exclusive service;
- * the contractor having freedom of movement within the company and not being bound by routine hours;
- * the contractor not being bound by staff regulations, dress codes or similar in-house rules which employees are expected to abide by;
- * the contractor being exposed to financial risk, with the financial and admin-

istrative burdens (including ACC, taxation, GST) normally associated with an employer;

- * the nature of the work undertaken by the contractor and whether it is of a fixed duration as opposed to an ongoing servicing role.

We stress the above is by no means an exhaustive list and in fact the IRD has prepared an independent contractor/employee check list that contains over 70 questions.

If viewed in isolation and without reference to the surrounding circumstances the application of the tests formulated at common law and by the IRD seem to throw a significant question mark over many self-employed forestry contractors. The employer company may, for example, apply quite rigorous codes of practice on the contractor in relation to health and safety in work-place matters. The employer company may exercise a high degree of control and supervision over the contractor's output. There is often little or no scope for the contractor to establish a wider client base.

On the other hand it seems absurd that

a logging contractor with a significant outlay in capital equipment (and often an employer in turn) should be classified from a tax perspective as other than an independent contractor. The IRD's case is stronger, it is submitted, in the case of silvicultural contractors. However, the IRD may take some comfort from the requirement that a forestry contractor must have a withholding deduction made from any payment to that contractor by the forestry company. Conversely, it seems unreasonable that a contractor operating as a limited liability company should be able to realistically pursue a personal grievance case for termination of contract. With competent legal advice and careful drafting, it is possible to construct a contractual relationship in a way that points more to a relationship of independent contractor than that of employee/employer. However, if the combined forces from the perspective of tax and employment related law continue to push in their current direction, then the industry may be well advised to look to statutory intervention/relief.

John Murray Balneaves

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months when he was basically confined to home. John was committed to his research and was determined to finish up the work that he started and not leave any loose ends for others to have to deal with. This was just another example of John's unselfishness.

It was never enough for John just to write a report or a paper on his research projects; he ensured that the results were effectively transferred to forest managers, always looking for a way to improve management practices. In this regard John was exceptional, especially so in his influence on forest establishment practices in the South Island, but also throughout New Zealand and internationally as well. In recognition of John's contribution to forestry in New Zealand and the high regard in which he was held, the forestry sector has established a memorial scholarship to help fund young researchers eager to gain overseas experience in forestry research. John was thrilled by this tribute and it boosted his spirits at a time when he needed it the most.

Excellent Ambassador

Although based at Rangiora for most of his career, John collaborated very closely with scientists in Rotorua and also

in the United States and Canada, especially during the last decade of his career. He was an excellent ambassador for New Zealand when he had the opportunity to travel to the US and Canada (once on a David Henry Scholarship), as the North Americans instantly warmed to his friendly manner and genuine interest in them and their work. He was often quite forthright in his criticism of some of their nursery and forest management practices, but rather than being offended they usually took his comments on board and sought his advice on how to improve their systems. John, for his part, also learned a great deal from them, although he always professed to being hampered by not having a formal science background.

John will be remembered by his friends and colleagues for his warm, friendly personality, his big smile, and genuine interest in others. His contribution to forest management in New Zealand will continue to have an impact on future generations of forest managers who never had the pleasure to know John as a person.

W.J. Dyck