Strike ballots: the New Zealand experience

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This article analyses the legal history of strikes in New Zealand and in particular the role of strike ballots within the statutory framework. The principal focus is on the current legislative requirements, but the role of the strike in employment relations since 1894 is analysed in order to locate the current legislative provision in the context of the role of the state in the regulation of trade unions.

Role of Trade Unions in a Social Democracy

Within any social democratic society governed by the rule of law, there is legal recognition of the right of citizens freely to associate; including 'the right to form and join trade unions for the protection of his interests'.[1] New Zealand has affirmed its commitment to this fundamental right through ratification of both United Nations Treaties[2] and some of the relevant International Labour Organisation Conventions.[3] It has, however, reserved the right not to apply the Articles in ICESCR and the ICCPR concerning freedom of association for trade union purposes. Furthermore, although ILO Conventions Nos 87 and 98 are recognised in the objects of the *Employment Relations Act 2000* (NZ) ('ERA'), New Zealand has not yet ratified Convention No 87.[4]

The reluctance of successive New Zealand governments to recognise these fundamental rights relating to trade unions reflects the determination of governments to exercise control of trade unions and their activities through a domestic regulatory

[1] Universal Declaration of Human Rights, Article 23 (4), *New Zealand Handbook on International Human Rights*, New Zealand Ministry of Foreign Affairs & Trade, Wellington, (2008).
[2] International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8; International Covenant on Civil and Political Rights (ICCPR), Article 22; *New Zealand Handbook on International Human Rights*, above n 1.
[3] The most important in the present context are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No 98), although it should be noted that NZ has not ratified Convention No 87.
[4] *Employment Relations Act 2000* (NZ) ('ERA') s 3(b), 'The Object of this Act is …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'.

framework. In New Zealand, international Conventions do not take direct effect in domestic law and only have effect through domestic legislation if enacted.[5]

Historically, the role of trade unions within New Zealand has been twofold: as representative of the worker in the workplace and representative of the interests of workers in the political process. Both roles have traditionally been acknowledged within the domestic legal regulatory framework. The workplace role was incorporated into the Industrial Conciliation and Arbitration (IC&A) system and is presently reflected in the ERA. The representative role of trade unions is more precarious. While the legal status of trade unions to represent workers' employment interests is protected by the *Trade Union Act 1908* (NZ), their ability to effectively represent those interests is fragile in legal terms. This is the result of increasing legal constraints on the activities of unions, including access to the right to strike, and also of the changing New Zealand labour market.

This second factor is reflected in the fact that an increasing number of workers fall outside the legal definition of employee, due to legislative changes to the definition of employee[6] and the disintegration of the vertical employment model, whilst many others work under various forms of insecure arrangements.[7] For example, in 2012 the percentage of employees in temporary work was assessed as 10% in Statistics New Zealand *Survey of Working Life*,[8] while research by the New Zealand Council of

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[5] Paul Mackay, 'The Right to Strike: Commentary' (2013) 38 NZJER 58-70. Note that Mackay's opinion that the right to strike is not supported by Convention 87 reflects the view that has been put by the Employer's Group at the ILO over the past few years (see Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338). However, it is not the accepted understanding, which holds that the right to strike is protected by Convention 87, see Committee of Experts on the Application of Conventions and Recommendations, *Giving Globalisation a Human Face, General Survey on the Fundamental Conventions concerning right at work in the light of the ILO Declaration on Social Justice for a Fair Globalisation*, International Labour Conference, 101st Session, 2012, Report 11 (Part 1B), ILO, Geneva, 46-50. B Gernigon, A Odero and H Guido, *ILO Principles Concerning the Right to Strike*, ILO, 1998, 7-12.

[6] For example in 2010, the New Zealand Parliament passed an amendment to the ER Act, excluding all 'film production workers' from the definition of 'employee' in s 6 of the Act: see further Margaret Wilson 'Constitutional Implications of "the Hobbit" Legislation' (2011) 36(3) *New Zealand Journal of Employment Relations* 89.

[7] For discussion of the rise of precarious and insecure work in New Zealand see *Under pressure: A Detailed Report into Insecure Work in New Zealand* NZCTU, Wellington, 2013 www.org.nz/unpressure: Max Rushbrook (ed) *Inequality: A New Zealand Crisis* (Bridget Williams Books, 2013, Wellington.

[8] www.stats.govt.nz/browse_for_stats/income-and-work/employment (accessed 29 January 2016).

Trade Unions (NZCTU)[9] has claimed at least a third of New Zealand workers are employed in precarious or insecure work. Such trends inevitably compromise the representative role of unions in the workplace. It may be that the difference in the percentage of employees in permanent and temporary (precarious/insecure) work may reside in the definitions used by the studies. The point for present purposes is that the right to strike is of little relevance unless the provisions of the ERA apply and they only apply to employees.

It is relevant to note in this context that the political role of trade unions and their capacity to influence the legislative rules that govern them has also been compromised in recent years. There is no formal political role for trade unions in New Zealand, though many trade unions have affiliated to the NZ Labour Party and worked for policy and political change through that Party. There has also been an expectation that governments will consult the NZCTU on policy and legislative change. There is however no formal or legal requirement for such consultation and the degree and seriousness with which it is undertaken is dependent on the attitude of the government of the day. The *Industrial Relations Act 1949* (NZ) established a tripartite Industrial Advisory Council in 1951, but this was after the Second War World when there was an emphasis on a cooperative approach to rebuild the New Zealand economy. Although this Act was repealed in 1973, the Industrial Relations Act 1973 established an Industrial Relations Council to provide a forum for tripartite advice that was used from time to time, including to examine long term wage fixing in the 1980s. Any form of such a cooperative approach to industrial relations however did not survive the 1991 Employment Contracts Act (ECA).

Although trade unions have always been politically active in New Zealand, the legal status of such activities were in question until the election of the first Labour government in 1935 and the enactment of the *Political Disabilities Removal Act 1936* (NZ). This Act was repealed and replaced by the *Political Disabilities Removal Act 1960*, provides that a trade union can apply funds for political purposes if members decide by simple majority ballot to do so. However, any member may give notice within 14 days of the ballot that they object to paying any levy and will be exempt. The Act also provides that a member who so objects will not be excluded from the

[9] *Under Pressure: A Detailed Report into Insecure Work in New Zealand* NZCTU, Wellington, 2013 www.org.nz/unpressure (accessed 14 October 2015).

benefits of the trade union. It is this legislation that gives trade unions the legal right to participate in the political process as an entity. Section 21 of the *Human Rights Act 1993* (NZ) protects the right of employees not to be discriminated against on the grounds of political opinion or lack of political opinion. The *New Zealand Bill of Rights Act 1990* (NZ) under s 14 gives a general right to be free from discrimination on the grounds referred to in the Human Rights Act.

The Argument

The right to strike is seen to be an essential element of a citizen's right to pursue their interests in the workplace. It has always been a contested right however that in law and practice has been hedged around with complex procedural processes that can in practice significantly undermine or negate the right to take any or effective industrial action. One such tactic is to impose complex ballot provisions that are difficult to comply with and leave unions and worker vulnerable to interim injunctions.

The purpose of this article is to test the proposition whether statutory requirements for strike secret ballots in New Zealand, often justified in the name of democratic process, are in reality anti-democratic because they place further constraints on the representative role of the trade unions in the workplace. The simple answer to this proposition is that two recent Amendments to the ERA have imposed so called 'democratic' procedural requirements on the right to strike, that in reality are part of a regulatory scheme that places further constraints on the ability of the union to use direct action as a means effectively to represent the interests of their members during collective bargaining.

The *Employment Relations (Secret Ballots for Strikes) Amendment Act 2012* (NZ) imposed a strike ballot as a pre-condition for a union to undertake legal strike action, and required trade unions to include provision for such a ballot in their rules. While the rules of most trade unions already contained such a provision, the legislative change made this a legal requirement rather than leaving it to trade unions to determine the content of their own rules. The 2012 Amendment was followed by further restrictions on the right to strike when the *Employment Relations Amendment*

Act 2014 (NZ) came into force on 6 March 2015.[10] This Amendment inserted a new requirement for strike notices, including that unions provide employers with detail of the time and place of strike action. It also sought to ensure that, like a full strike, partial strike action would result in loss of wages for the workers concerned.

It is now proposed to provide an overview of the regulatory framework, and then to describe the 2012 and 2014 amendments together with the arguments used to support them. It will be argued that since the collapse of the IC&A system in the 1970s there has been a series of statutory enactments that have placed increasing restrictions on collective bargaining, including the use of the strike as a means of leverage in the bargaining process. Cumulatively, these amendments have undermined the ability of trade unions to fulfil their representative role in the workplace.

Finally, the paper will argue that the decreasing role of strikes in employment relations is linked historically and currently to the role of trade unions and their relationship to the state. In the New Zealand context trade unions have always been regulated by the state for the purpose of controlling collective action by workers that may threaten political and economic stability. Historically there have been attempts by unions to act independently of the state, but all have been unsuccessful. While in the past the state has acknowledged the right of workers to form unions and the legitimacy of their representative role, the state now provides minimal support for this representative role. The current employment relations regulatory framework is consistent with the general neo-liberal approach to public policy.

Overview of the Regulatory Framework applicable to Strikes[11]

The 2012 and 2014 amendments illustrate the continuing inter-relationship between strikes and collective bargaining. Since 1894 and the enactment of the industrial conciliation and arbitration statutory framework (IC&A), the strike has been centre stage in the regulation of industrial relations. The Maritime Strike of 1890[12] has been

[10] The amendments also include restrictions on the right to collective bargaining, and rest and meal breaks.

[11] A detailed account of the regulatory framework relating to strikes and lockouts is found in Gordon Anderson and John Hughes, *Employment Law in New Zealand* (LexisNexis, Wellington, 2014) Chapter 13.

[12] H Roth, *Trade unions in New Zealand: ast and present* (Reed Education, Wellington, 1973); David Allen Hamer, *New Zealand Liberals: The years in Power 1881-1912* (Auckland University Press, Auckland, 1998).

identified as a major factor in provoking the Liberal government of the day to legislate to prevent such a strike in the future. Preventing future strikes was not the only motivation for the legislation but it was important because it was linked to economic instability and the prospect of class antagonism. A primary concern amongst some Liberal politicians of the period was to prevent the British class system taking root in the new colony. The desire to develop a more equal society was the motivation for the foundations being laid for a social and industrial system during the 1890s that was to survive until the 1980s.

The experience of the Maritime Strike had exposed the fragility of the trade unions in terms of negotiating with employers without state support. The promise of organisational security through registration and the right to get employers to the negotiating table and the prospect of achieving a settlement under arbitration was in reality much more important than preserving the right to strike that had already proved ineffectual. In fact the original 1894 Act did not outlaw all strikes and lockouts, only those stoppages where there was available a compulsory disputes procedure.[13] Today the reverse position prevails with all strikes being unlawful except for those related to collective bargaining.

Although in the short term better wages and conditions were achieved without the need to strike, it soon became apparent that the arbitration system had become the 'leg-iron of labour' when the next generation of trade union leaders attempted to use the strike as leverage for wage increases that were not forthcoming from the Arbitration Court.[14] In less than 20 years the state-regulated system of industrial relations had ensured no trade union could survive independently of the IC&A system. The *Labour Disputes Investigation Act 1913* (NZ) effectively prevented non-registered unions organising, let alone striking in support of negotiating a collective agreement. The state was quick to use the law to control not only wage fixing but also the role of the trade unions and their activities. This control extended to continuing the illegality of the strike as a means of leverage during wage negotiations.

Whatever the legal status of strikes, in reality workers resorted to strikes on a continuing basis with little legal consequence until the 1951 Waterfront

[13] Cf *Conciliation and Arbitration Act 1904* (Cth), ss 6 and 6A.
[14] See H Roth, *Trade Unions in New Zealand: Past and Present* (Reed Education, 1973) 17-41 for an account of this period.

Lockout/Strike. A pattern has been observed that strikes have been a signal for a change in the regulatory system. This happened in 1890 with the Maritime Strike, 1913 with the Waihi Strike[15] and in 1951 with the Waterfront Lockout.[16] While the causes of major strikes are complex, the 1913 and 1951 strikes may be seen as examples of attempts to break out of the legal constraints on the strike as a means to leverage bargaining power.[17] The 1954 IC&A Act was a response to the 1951 Waterfront Lockout/Strike and like the *Labour Disputes Investigation Act* 1913 (NZ) was in response to the 1913 Waihi Strike, reaffirming the state's commitment to the IC&A system. By the 1960s however it had become apparent that changes in the economy were placing increasing pressure on the wage-fixing role of the Arbitration Court.

The end of the IC&A system was foreshadowed by an increasing number of strikes in the 1960s and 1970s as trade unions attempted to protect the interests of their members from the rapidly changing economy.[18] Working days lost through strike action steadily increased over the decade 1966 – 1976 from 99,095 in 1966 to 488,442 in 1976. The Arbitration Court was no longer capable of controlling strikes or wages when the trade union movement made the political decision to ignore the Court and return to direct bargaining. An agreement eventually emerged between the Federation of Trade Unions and the Employers Federation to examine the role of legislation from which emerged the *Industrial Relations Act 1973* (NZ). Although much of the infrastructure of the IC&A system survived in the new Act, there was a change in relation to the right to strike. The Act recognised the legality of strikes during disputes of interest (negotiation for new awards/agreements) but they remained unlawful during disputes of rights (disputes during the award/agreement). This approach was similar to the Wagner Act model of labour law in the United States where the strike was established as the primary mechanism for resolving bargaining

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[15] H E Holland and R S Ross, *The Tragic Story of the Waihi Strike* (The 'Worker' Printery, Auckland, 1913).
[16] D Grant (ed), *The Big Blue: Snapshots of the 1951 Waterfront Lockout* (Canterbury University Press and Trade Union History Project, 2004).
[17] A similar example in the Australian context is the 1989 airline pilots dispute, see K McEvoy and R Owens, 'The Flight of Icarus: Legal Aspects of the Pilots Dispute' (1990) 3 *Australian Journal of Labour Law* 87.
[18] J M Howells, N S Woods, FJL Young, (eds) *Labour and Industrial Relations in New Zealand* (Pitman Pacific Books, Carlton, 1974) provides a collection of essays that reflect the analysis of the economy and industrial relations during the transition from the IC&A system.

impasses.[19] Importantly there was recognition of the right to bargaining collectively outside the IC&A institutional framework. The foundations for the current law relating to strikes was laid down during this period with the distinction between disputes of rights and disputes of interests being maintained today.

It was apparent during this period of transition of 1970s and 1980s that the role of the state in the regulation of industrial relations was undergoing a fundamental rethink. The election of the National government in 1990 marked the end of the IC&A system with the enactment of the ECA. This Act marked the beginning of a statutory system that supported an independent trade union movement and market driven collective bargaining. The ECA clearly signalled the withdrawal of state support for the IC&A system. It did not however represent de-regulation of the industrial relations system. What occurred was in effect a re-regulation of the system in which any semblance of providing a balance in the relationship between trade unions and employers was to be determined by the market. Apart from the provisions relating to personal grievances, the ECA attempted to institutionalise within the legal framework the values of the market as the primary mechanism to determine wages and conditions of employment. There was no recognition of inequality of bargaining within the new regime and trade unions were expected to compete with employers in the bargaining process but with restrictions on the right to strike. The so-called level playing field was therefore tilted to support employer bargaining power.

Although the principal focus of this article is on the ballot and notice provisions, strikes are lawful only when they relate to collective bargaining, so it is appropriate briefly to consider the regulatory provisions relating to collective bargaining. This is important because the right to lawfully strike is restricted to collective bargaining and if it is further restricted the question arises whether the recent statutory requirements are in reality to promote democratic practice or are designed to inhibit effective collective bargaining. An argument can be made that the enactment of the ERA was designed to support collective bargaining through the notion of good faith bargaining and the provision for facilitated agreements in the event no agreement could be

[19] A Colvin, 'Strike Ballot Law and Practice in the United States: Order Without Law in Labor Relations?' (2016) 29 *Australian Journal of Labour Law*, forthcoming.

reached after undergoing an extensive procedural process. Whether it was successful is questionable given the 2012 *Survey of Working Life.*[20]

The survey recorded that only 2 in 10 employees were covered by collective agreements, 6 in 10 were covered by individual agreements, whilst the remainder were unaware of what kind of agreement covered them. This low level of collective bargaining helps explain the relatively low level of strikes in New Zealand discussed later in this paper. It is also relevant to note that the ERA contains a facilitation process in ss 50B-50I where parties to collective bargaining can seek the assistance of the Employment Authority in resolving serious difficulties in reaching an agreement. This process is infrequently used: there were only 20 applications between 2004 and 2009, although successful applications are associated with protracted bargaining and acrimonious strikes or lockouts.[21]

The 2000 ERA object section relating to collective bargaining stated originally in s 31 that amongst other objectives the statutory provisions were:

> (a) to provide the core requirements of the duty of good faith in relation to collective bargaining; and
> (aa) to provide that the duty of good faith in relation to section 4 requires parties bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

Since the election of the National government in 2008 there has been a series of amendments, including the 2012 and 2014 amendments, which undermine collective bargaining. For example, the 2014 Amendment repealed s 31(aa) and the requirement to conclude a collective agreement unless there is a genuine reason based on reasonable grounds not to. The Amendment also repealed s 33 which set out the definition of 'genuine reason' and replaced it with a new s 33 entitled 'Duty of good faith does not require collective agreement to be concluded.' The new section also states however, that the duty of good faith is not complied with if the employer refuses to enter into a collective agreement and does so 'because the employer is opposed, or objects in principle, to bargaining for or being a party to a collective agreement'. It remains to be seen exactly how this provision is to operate in practice

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[20] www.stats.govt.nz/browse_for_income-and-work/employment (accessed 25 January 2016).
[21] Ian McAndrew 'Collective Bargaining interventions: contemporary New Zealand experiments' (2012) 23 *The International Journal of Human Resource Management* 495.

but in practical terms it would inevitably be very difficult for a union to prove the employer had in principle objections to engaging in collective bargaining.

Much of the Government's opposition to collective bargaining has focussed on multi-employer agreements.[22] The 2014 amendments include new provisions that enable an employer to opt out of collective bargaining not later than 10 days after receiving the notice to initiate bargaining.[23] This provision will make multi-employer collective agreements very difficult to negotiate. There is also a further provision that enables the Employment Authority to determine that bargaining has concluded and if it makes a declaration to this effect then bargaining cannot be initiated sooner than 60 days after the date of the declaration without the agreement of the other party. There is a reasonably stringent process to be gone through before a declaration is made and the new s 50KA requires the Authority to dismiss an application for a declaration if it is satisfied the party seeking it has failed to observe good faith.

These provisions provide another opportunity for the employer to opt out of bargaining and are illustrative of a struggle to retain the notion of good faith while accommodating the desire of employers to avoid collective bargaining. How they will work in practice has yet to be seen and whether they place further constraints on collective bargaining and strike action. There is currently a case involving the NZ Meat Workers Union and AFFCO NZ Ltd[24] before the Employment Court relating to the breakdown of the collective bargaining process where the parties have been referred to mediation. If mediation breaks down then the employer may exercise their right under s 50K to seek a declaration that bargaining had concluded. This dispute has been characterised by a long history of strikes and lockouts. The decision in this case may provide guidance on how these new provisions will be interpreted.

The discussion will now look more specifically at the provisions regulating strike action. The strike provisions in the ERA tightly regulate strikes. Lawful strikes can take place only during a statutory defined period for collective bargaining and involve those employees bound by the proposed collective agreement.[25] Strikes and lockouts

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[22] The employer in this context is the employing entity and not a group of associated companies.
[23] ERA s 50.
[24] *NZ Meat Workers Union & Ors v AFFCO NZ Ltd* [2015] NZ EmpC 94; 144; 149; 204.
[25] ERA ss 83-86.

are regulated by Part 8 of the ERA. The object of these provisions is set out in s 80 as follows:

> (a) to recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in this Part); and
> (b) to define lawful and unlawful strikes and lockouts; and
> (ba) to provide notice requirements for all strikes and lockouts; and
> (bb) to provide for specified pay deductions, and to specify how the amount of such deductions must be calculated; and
> (c) to ensure that where a strike or lockout is threatened in an essential service, there is an opportunity for a mediated solution to the problem.[26]

These objects reflect the limited role of the strike within the overall statutory framework established by the ERA. Although the objects provision of the Act promotes the resolution of disputes through mediation, the Act recognises the historic role of direct action in providing leverage in the bargaining for a collective agreement. Essentially strikes are unlawful unless related to collective bargaining.[27] Strikes will be unlawful, as will lockouts, if they occur during bargaining for a proposed collective agreement that will bind the employees participating in the strike or lockout unless at least 40 days have passed since the bargaining was initiated and if on the date bargaining was initiated the employees were bound by the same collective agreement that has expired.[28]

The elements of a strike under New Zealand law were summarised by Richardson J in *Collins v Independent Fisheries Ltd*[29] as follows:

> There are two elements to strike within [s.81]. The first is conduct falling within one or more of the separate paragraphs. …The further requirement… is that the act of those employees in discontinuing that employment was "due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any employees…"

Notice of intention to strike is not in itself a strike. It is indicative only of participation and does not of itself constitute the act of striking.[30]

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[26] Subsections (ba) and (bb) were inserted by the *Employment Relations Amendment Act 2014* (NZ).
[27] ERA 2000 s 83.
[28] ERA s 86.
[29] [1993] 2 NZLR 290 (CA) at 294.

The discussion will now examine the 2012 and 2014 Amendments to the strike provisions in detail and consider the rationale for their introduction.

2012 Employment Relations (Secret Ballot for Strikes) Amendment Act

On 14 May 2012 the *Employment Relations (Secret Ballot for Strikes) Amendment Act* was enacted. This measure began life as a Member's Bill but was supported by the National led government and passed on a 61 to 60 vote. The amendment requires unions to hold a secret ballot when voting on strike action.[31]

The new provisions require a union to hold a secret ballot of members, prior to the commencement of any strike action, except where the strike relates to health and safety issues. The question to be voted on is specified in the Act as "whether the member of the union is in favour of the strike".[32] The union must announce the results of the ballot to their members as soon as practicable after completion of the ballot. For the strike to be lawful a majority of those who vote must vote in favour. The majority is of the members who voted, not the members eligible to vote.[33] This contrasts with the situation under the *Fair Work Act 2009* (Cth) (FW Act) in Australia, where not only must there be a majority in favour of the proposed industrial action, but a majority of those who are eligible to do so must cast a valid ballot: ie under the Australian dispensation, abstentions effectively count as votes against.[34]

The 2012 amendment also requires that union rules must provide a process for holding a secret ballot. Although most union rules already made such provision, a transition period of two years was provided for in the legislation. This means that, in contrast with the FW Act, the process for the conduct of the secret ballot is left to the union rules and permission to ballot is not required.[35]

The rationale for the Amendment is difficult to understand as most union rules already contained a provision requiring a secret ballot before strike action was taken.

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[30] *Heke v Attorney-General* [1998]1 ERNZ 583 at 586.
[31] Sections 82A to 82C ERA.
[32] ERA s 82B.
[33] ERA s 82A(3).
[34] FW Act s 459(1)(b) and (c). See Creighton, Denvir and McCrystal, 'Strike Ballots and the Law in Australia' (2016) 29 *Australian Journal of Labour Law*, forthcoming.
[35] See ibid.

The number of strikes in recent years has been consistently low so there was little or no inconvenience to the public generally.

The low level of strike activity is illustrated by the statistics. In 2010 there were 18 strikes recorded, 2011: 12 strikes, 2012: 10 strikes, 2013: 6 strikes and 2014: 13 strikes.[36] Section 98 of the ERA requires all work stoppages to be notified to the Ministry of Business, Innovation and Employment. Partial strikes and lockouts are included in the statistics provided they meet the threshold of five or more person-days of work lost. It should also be noted the single stoppage may consist of one or more periods of industrial action if they concern the same issue.[37] The statistics likely underestimate levels of strike action due to the high threshold for recording, but despite this they indicate that strike action is at historical lows.

The primary argument put in support of the new provisions during Parliamentary debate was that they would protect union members from intimidation when voting on whether to strike.[38] Significantly, the supporters of the amendments did not adduce any concrete evidence of instances of intimidation in practice. They also failed to provide a clear indication as to the identity of the likely perpetrators of the apprehended intimidation, although both employers and trade unions were mentioned in the debates.

The Member who introduced the Bill claimed that: "It is all about transparency, it is about democracy. It is all about the rights of the individual person who is being asked to withdraw his or her labour."[39] The notion of transparency however was only to be applicable to trade unions and not employers in the event of direct industrial action. In reality the amendments were not about ensuring that unions act democratically in relation to initiating industrial action. There is no evidence any union had acted undemocratically. It was clear from reading the debates that the motives behind the

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[36] www.mbie.govt.nz/publications-research/research/employment-relations/work-stoppages-2014-report.pdf (accessed 21 October 2015).
[37] Work Stoppages – Technical Notes, www.mbie.govt.nz/publications-research/research/employment-relations/work-stoppages-2014-report.pdf (accessed 21 December 2015).
[38] Parliamentary Debates, 21 April 2010 Vol 668 page 15207 *Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill*. These debates are similar to those held in Australia over the introduction of compulsory secret ballots before the Work Choices changes, see Creighton, Denvir and McCrystal, above n 34.
[39] Parliamentary Debates, 21 April 2010 Vol 677 page 738 *Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill* (Hon Tau Henare).

Bill were a combination of improving productivity by reducing rates of industrial action and protection of individual rights. These arguments were consistent with the National government's agenda to provide greater flexibility in the labour market through promotion of individual as opposed to collective agreements.

Although the Opposition supported the Bill, its arguments focussed on the fact that there was no evidence to support the need for the legislation because existing trade union practice was to hold strike ballots. The then Opposition Labour Spokesman Trevor Mallard said in the First Reading debate, this "bill will do effectively nothing".[40] He pointed out that there was no evidence of members being intimidated by their union in this context. He then raised a further argument that generally there is a balanced approach to the legal regulation of union and employers and that applying this principle in the present instance '…for companies it will be appropriate for at least the board of directors to make a decision before workers are locked out'.[41]

The reference to a balanced approach reflects the fact that while there is inherently an inequality of power in the employment relationship, this inequality is formally acknowledged in ERA s 3, the Objects section. The provisions of the legislation are designed to redress this imbalance through promoting collective bargaining amongst other provisions. The imbalance in bargaining power became more apparent after the enactment of the *Employment Contracts Act 1991* (NZ) (ECA) when employers began to use the right to lockout as an offensive tactic to undermine union bargaining. The explicit acknowledgment of the inequality of bargaining power in the ERA was recognition of the change in employer strategy after the enactment of the ECA to take advantage of the removal of arbitration to resolve interest disputes.

The NZCTU adopted a similar position to the Parliamentary Opposition in relation to the 2012 amendments when it issued a press statement stating it did not oppose the Bill because unions already followed a strike ballot procedure. However, it was critical of the "the lack of balance in the bill and argued that it must be changed to also require employers to follow democratic procedures including a secret ballot of

[40] Parliamentary Debates, 21 April 2010 Vol 668 page 10351 *Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill* (Hon Trevor Mallard).
[41] Ibid.

shareholders prior to a lockout." [42] The notion of a balance in the regulatory framework is fundamental to the legitimacy of the current statutory framework that was designed to redress the inequality of power in the employment relationship.

In New Zealand all legislation is subject to a report to Parliament from the Attorney General on whether the legislation is consistent with the *Bill of Rights Act 1990* (NZ).The Government received support that the Amendment did not breach the NZ Bill of Rights Act 1990 from the Attorney General's section 7 Report that stated the legislation was consistent with the rights and freedoms in the New Zealand Bill of Rights Act 1990. The reasoning for consistency was given as follows:[43]

> Central to the ability to strike are the rights to freedom of expression, freedom of peaceful assembly, and freedom of association. Accordingly, we have considered the Bill for consistency with section 14 (freedom of expression), 16 (freedom of peaceful assembly) and 17 (freedom of association) of the Bill of Rights Act. We have concluded that the Bill does not place unreasonable limitations on the ability of unions or their members to express themselves through strike action or to peacefully assemble or associate for the purposes of strike action.

This response was short and almost pro forma without any real analysis. The focus was solely on the exercise of individual human rights. The relationship between individual and collective rights was not addressed. This was not surprising given that the primary focus on the policy and legal framework is now on individual rights. This means there was no analysis of the effectiveness of the freedoms of expression, peaceful assembly and association by prescribing the method by which those rights can be fully and effectively exercised. There was also no analysis of the effectiveness of this provision on the equality of bargaining power exercised by unions and employers when negotiating a collective agreement. Such an analysis would have been justified given one of the primary objectives of the ERA in s 3(a)(ii) is stated as being 'acknowledging and addressing the inherent inequality of power in employment relationships'.

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[42] New Zealand Council of Trade Unions, Media Statement, 26.2.2010, http://union.org.nz/news/2010/unions-discuss-strike-ballot-bill-26210 (accessed 14 October 2015).
[43] Ministry of Justice, http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/ (Accessed 21 October 2015).

As noted previously, New Zealand still has a reservation to Article 22 of the ICCPR that states everyone has the right to freedom of association including the right to form and join trade unions to protect their interests. The rationale for this reservation has been that existing legislative measures ensures effective trade union representation, but the measures are not consistent with Article 22. There would appear to be a fundamental contradiction between support for continuing the reservation that promotes freedom of association including in trade unions, and the current ERA that explicitly recognises freedom of association.[44] The continuing reservation would suggest that the real rationale is that the state is reluctant to relinquish sole control of the regulation of trade unions through acknowledging the fundamental human right for individuals to join a union.

2014 Employment Relations Amendment Act

The 2012 amendment was followed by further restrictions on the right to strike when the Employment Relations Amendment Act came into force on 6 March 2015.[45] This measure requires that further details of the time and place of strike action are to be provided to the employer, as well as ensuring partial strike action will incur deductions from wages. A strike notice requires the following information:[46]

(a) the period of notice which is being given;
(b) what the strike is about;
(c) whether the strike will be continuous;
(d) where the strike will take place;
(e) the date and time the strike action will begin;
(f) when the strike will end or what event will end the strike.

Interestingly there is no provision specifying the amount of notice that needs to be given. This approach contrasts with the statutory requirements in Australia and the United Kingdom.[47] Existing notice provisions relating to strikes and lockouts in essential industries in New Zealand remain unchanged.[48] The lack of statutory

[44] ERA 2000 Part 3.
[45] *Employment Relations Amendment Act 2014* (NZ).
[46] ERA s 86A.
[47] See eg FW Act s 414; *Trade Union and Labour Relations Consolidation Act* (UK) s 234A. See discussion in Creighton, McCrystal and Denvir, above n 34; T Novitz, 'UK Regulation of Strike Ballots and Notices – Moving Beyond "Democracy"?' (2016) 29 *Australian Journal of Labour Law*, forthcoming.
[48] Sections 90 and 91 of the ERA require notice to be given of strikes in essential services – the period of notice varies from 3 to 14 days depending on the nature of the industry.

specificity will require the court to interpret the provisions and provide guidance to the parties. There has been no case to date relating to the new strike notice provisions but the Employment Court generally applies a good faith test when interpreting the provisions of the Act. This is a reflection of the fact that s.4 of the ERA imposes a general obligation of good faith on the parties when dealing with each other on employment matters, while ss 32 and 33 set out the good faith obligation in the context of collective bargaining. The good faith obligation also applies to the strike and lockout provisions in Part 8 of the ERA. Section 80, the Objects section for Part 8, provides '(a) to recognise that the requirement that a union and an employer must deal with each other in good faith does not preclude certain strikes and lockouts being lawful (as defined in this Part)'.

An indication of the approach of the Employment Court to interpreting strike notices, in particular with respect to technicalities, may be found in the judgment of Judge Colgan in *Service and Food Workers Union Inc v OCS Ltd*[49] where he remarked:

> I accept that Parliament has required certain minimum content of notices…in essential industries and services and that, as is illustrated by cases decided over more than 20 years dealing with strike and lockout notices, strict compliance is expected with those statutory requirements of content and timeliness. But that said, the Court should take a pragmatic, rather than pedantic, approach to interpreting such notices and attempt to put itself in the shoes, not of a lawyer minutely scrutinising such notices legal documents for error after the event, but, rather, and to the extent possible, from the perspective of the parties to the bargaining.

Judge Colgan also made reference in support of this approach to the Court of Appeal case *New Zealand Rail Ltd v New Zealand Combined Union of Railway Employees*[50] that characterised the exercise as one of common sense rather than one of pedantry.

Failure to give the correct notice under the ERA makes the strike unlawful. This means the trade union is liable to proceedings founded in tort; proceedings for the grant of an injunction; action or proceedings for a penalty or grant of compliance order.[51] A justification for this level of detail in the notice provisions is linked to the

[49] [2005] ERNZ 717 (EmpC at [18]).
[50] [1995] ERNZ 84.
[51] ERA 2000 s 85.

right of the employer to deduct wages during a partial strike.[52] These provisions are very detailed and are designed to prevent what may be termed inventive ways to strike by taking limited withdrawal of labour by ensuring workers' wages can be deducted for the duration of what is termed a partial strike.[53] A similar notice requirement also applies to lockouts.[54] Employers therefore will have to ensure they also comply with the detailed provision required in the notice of a lockout. There have not yet been any instances of the application of this provision in practice. These provisions are an attempt to ensure formal equality of legal provisions on direct action regardless of who instigates it. This is another example of the principle of 'balance' in the regulatory framework.

Conclusion

It may be argued that the recent Amendments to the ERA place constraints on the capacity of unions to undertake effective strike action when bargaining. Although the ERA attempted to provide a greater balance of power in the bargaining process, there remains an inequality of bargaining power. This is reflected in the decline in wages and conditions of employment in recent years. Growing inequality has been attributed in part to the declining capacity of unions to negotiate on behalf of their members. New Zealand is recognised by the OECD as having the fourth lowest level of protection relating to temporary work and the lowest level of regulation on temporary agency work.[55] There is a growing gap between employees on standard collective agreements and those on insecure individual agreements.

This gap is reflected dramatically in the decline in the number of unions and their membership that affects their bargaining capacity. By 1998 trade union membership had declined from 683,006 in 1985 to 306,687 which represented a decline from 43.5% to 17.7% of the workforce.[56] This reflected the impact of the ECA regulatory

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[52] ERA 2000 ss 95A-95F. Employment Relations Amendment Bill 2012 – Paper One – Collective Bargaining and Flexible Working Arrangements. Cabinet Economic and Infrastructure Committee 3 May 2012 www.mbie.nz/info-services/employment-skills/legislation-reviews/pdf-library/cabinet-paper-er-2012-collective-bargaining.pdf (Accessed 21 October 2015).
[53] Susan Hornsby-Geluck, 'An Uneven Playing Field: Partial Strikes' (2012) 37(1) *New Zealand Journal of Employment Relations* 60-69.
[54] ERA s 86B.
[55] *OECD Employment Outlook 2013*, http://dx.doi.org/10.1787/emplo_outlook-2013-en, ch 2 (Accessed 29 December 2015).
[56] *Trade Unions: Number and Membership Trends* (2000) Research Papers, Parliamentary Library www.parliament.nz/resources/en-nz/ (accessed 14 October 2015).

framework. Recent data indicates that in 2013 there were 138 registered unions representing 371,613 members or 20.1% of wage and salary workers.[57] It is union members who are the main beneficiaries of collective bargaining but current statutory provisions place considerable constraints on trade unions' capacity to represent their members in the workplace, including the use of the right to strike. The strike weapon is still used by trade union members but the data indicates that its use is declining. However, it is not clear whether this is because of the increasing legal compliance requirements. They are likely to be a contributing factor but more research is required on the role of the regulatory requirements before it would be possible to reach any definitive conclusions in relation to the matter. In the past trade unions won recognition of their rights through being able to engage strike action that created inconvenience for employers and sometimes the community at large and influence regulatory change. If their capacity to do so in the future is significantly curtailed, then self-evidently they will no longer be able effectively to protect and to promote the interests of their members.

If therefore, trade unions are to be able effectively to represent their members they will need a change in the statutory provisions. This is unlikely without a change of government. There also needs to be community support for the notion of the collective as a legitimate form of representation in the workplace. The current public policy framework positions individuals as consumers who become the centrepiece of policy whereas the individual as citizen is rarely acknowledged. While the advent of social media has provided an important tool for communication of individuals' interests to political and policy decision-makers, real influence on policy is only effected through sustained commitment and organisation through use of the democratic process. The use of the media to highlight the inequality of zero contracts in the fast food industry is an example of a developing tactic to secure better wages and working conditions.[58] To effect sustained protection and improvement in working conditions however, requires viable representative organisations in the workplace. The representative role lies at the foundation of social democracy but it will need to

[57] www.societies.govt.nz/union-membership-return-report-2013%20(1).pdf (accessed 14 October 2015).
[58] www.unite.org.nz/how-unite-took-on-fast-food-companies-and-won (Accessed 29 December 2015).

be reinvented to ensure employees are engaged in a democratic process within both the workplace and society.