

Legislative inertia: New Zealand's reaction to the issue of redundancy

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ABSTRACT

As a consequence of major restructuring of the economy and 'reworking work', New Zealand has experienced considerable redundancies over the last 20 years. During this time, however, there has been no specific redundancy legislation giving protection and compensation to workers being made redundant. The paper examines the consequential level of judicial activism, whereby the Courts attempted to create de facto entitlements for redundant workers, and how Courts and tribunals progressively interfered in the employer-employee relationship creating a high level of uncertainty as to the outcome of any redundancy situation.

Introduction

The theme of this conference is 'reworking work' – an activity with which New Zealand has become very familiar over the last 20 years, following the 1984 Labour Government. This paper does not look at 'reworking' per se, but rather at the flow-on effects, namely restructuring and redundancies, the legislative response and the consequences.

The restructuring of the New Zealand economy and the New Zealand Public Service led to many redundancies and a sharp increase in unemployment. In 1985 New Zealand's unemployment rate was half that of Australia (4.1% compared to 8.2%), but by 1990 New Zealand's unemployment rate (7.8%) had overtaken that of Australia (6.9%) (Geare, 2000:443). Employment in the Public Service dropped from 89,505 at 31 March 1986 to 58,038 at 30 June 1989 (Yearbook, 1990:72).

Notwithstanding the extent of the redundancies, particularly through the 1980's and 1990's, succeeding Governments have displayed marked inertia in their response to redundancies.

This inertia is more than somewhat surprising, given that the 1972 Labour Government put forward a Severance and Re-employment Bill near the end of their term in 1975. The Bill was minimalist – the maximum it guaranteed was only six weeks pay for redundant workers with five to forty years service – and was never enacted. Since then there has been no attempt at an explicit piece of legislation, rather there has been the occasional indirect reference to the issue in the not inconsiderable number of industrial relations acts in force during this period. In 1984 the Industrial Relations Act 1973 was the principal legislation. This was followed by the Labour Relations Act 1987 (LR Act); then the Employment Contracts Act 1991 (EC Act); the Employment Relations Act 2000 (ER Act); and currently the Employment Relations Law Reform Bill 2004 (ERLR Bill).

With the exception of the ER Act which was basically cosmetic, each Act, and the Bill have all introduced or proposed quite radical industrial relations changes. In the ERLR Bill there has been some limited proactive legislation – in the other instances there has been negligible explicit reference to redundancy, although some legislation has been indirectly of significance.

The research objective of this paper is to examine the consequences of this legislative inertia in the area of redundancy. The past inertia has led to:

1. Significant interference by Courts and lower level committees/tribunals in the employment relationships of employers and employees;
2. This involvement later developed into judicial activism of a quite extreme level, perpetrated in the main by the specialist Court (Labour Court 1987-1991, Employment Court 1991- present). The Court of Appeal has, under some Presidencies been almost as extreme, while under others, has tempered the activism to some degree.

It is believed that the limited protection for 'at risk' workers provided in the ERLR Bill will possibly lead to a quite unintended consequence:

3. Strong demands for improved performance, leading to constructive dismissals, or discipline and actual dismissals.

Opportunity for judicial involvement in redundancy situations

During the past twenty years Courts and committees/tribunals have been able to become involved in redundancy situations through two basic avenues:

1. Through the general unjustified dismissal procedures in the statutes; and to a lesser extent:
2. Through their statutory ability to settle 'rights' disputes – that is a dispute over the 'interpretation, application, or operation' of an industrial agreement, employment contract or agreement.

Unjustified dismissal procedures

When workers lose their job in a redundancy situation they have been dismissed. It is clearly open to them to make use of the general statutory protection against unjustified dismissal which has been available in all the industrial relations statutes over the past twenty years. Until 1991, this protection applied to union members only, under the EC Act and current legislation this protection applies to every employee, including senior managers. The wording of the statutes has been basically similar, although common law has obviously developed over the years.

Initially the Courts determined that for a dismissal to be justifiable it had to be:

- a. substantively justified, and
- b. procedurally fair.

From 1990 the approach followed that of the Court of Appeal (*Airline Stewards and Hostesses of NZ IU W v Air New Zealand Ltd* [1990] 3 NZLR 548) in that:

... dismissal was justifiable if the employer has shown that the decision to dismiss was in all the circumstances and at the time a reasonable and fair decision (at 555-6).

By 1992 the Court of Appeal considered that the question was essentially whether (*Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483) 'The decision to dismiss is one which a fair and reasonable employer would have taken in the circumstances' (at 487).

In the recent *Oram* decision, the Court of Appeal (*W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448) acknowledged (at 457) that 'there may be more than one correct response open to a fair and reasonable employer' and stated they preferred 'to express this in terms of 'could' rather than 'would.'

The ERLR Bill however, has stated the approach should revert back to 'would'.

Whether this change has any effect remains to be seen. It is probable it will result in careful wording in decisions by some – but this brevity has never met with Chief Judge Goddard's approval and he clearly prefers to be left more scope for his discretion. This is reinforced in *Phipps v NZ Fishing Industry Board* [1996] 1 ERNZ 195 which came some years after the Court of Appeal's rulings cited above:

it is misleading and therefore unhelpful to draw a distinction between substantive and procedural shortcomings ... (the approach should be) whether, on the evidence the employer gathered following a fair, honest and adequate process, the employer had reached a conclusion that was just and fair at the time and thereafter treated the employee in a way that was fair and reasonable in the circumstances (at 200).

This clearly leaves (and equally already was intended to leave) considerable discretion for the Courts to decide whether or not the process used by the employer and the treatment afforded the employee was sufficiently fair and reasonable.

'Rights' disputes procedures

The Courts and tribunals have always had the power to settle a rights-type dispute. That is, a dispute over the interpretation, application or operation of a term in a union-management document. If a clause concerning redundancy was unclear, then the rights procedure would apply.

Judicial activism

In simplistic terms, it is the role of the legislature to pass laws and the role of the Courts to apply and interpret those laws. Interpretation of legislation by Courts creates the so-called 'common law' or 'judge-made law'. The interpretation should be a genuine and honest attempt to discover the true meaning of the words used in the legislation. Judicial activism is a pejorative term used when it is considered the Courts have gone beyond legitimate interpretation and are, in effect, writing legislation, or creating rights and obligations into union-management agreements. The matter is always one of degree, with a blurred boundary between acceptable 'interpretation' and unacceptable 'judicial activism'.

This paper will now examine the extent to which judicial activism has occurred by exploring both the unjustified dismissal procedure and the rights-disputes procedures under three regimes: the IR Act/LR Act; the EC Act and the ER Act and ERLR Bill.

IR Act/LR Act

Research shows that in the early 1980's, less than 10 percent of collective documents had full redundancy agreements. Geare (1983) showed that in 1980, of 851 collective documents:

509	(59.8%)	made no reference to redundancy
271	(31.9%)	specified only that notice be given
8	(0.9%)	required negotiation
63	(7.4%)	full redundancy agreements

Some of the 271 documents requiring that notice be given specified that the notice was to 'allow discussions to take place.' The Arbitration Court in *Cornhill Insurance Co. Ltd v NZ Insurance Guild IUW* [1981] ACJ 443, considered a clause with similar wording and ruled that the employer could not be compelled to do more than what was in the clause: 'notify and discuss.' The Court stated (at 444) that the employer 'cannot be compelled to do anything further, however unsatisfactory the results may be to the union and to some of its members.' This was clearly a non-judicially active Court.

There was legitimate involvement in *Wellington Local Bodies' Officers' IUW v Wellington Hospital Board* [1983] ALJ 1047, where the clause stated (at 1049) the employer 'shall negotiate with the union a mutually agreed redundancy contract. In the event of any dispute hereunder the matter shall be dealt with under Clause 18 (Disputes).' The matter was not settled in negotiation and went to the Disputes Committee, then the Arbitration Court and finally on to the Court of Appeal.

However, assuming the percentages of clauses requiring negotiation remained at approximately the 1980 level (0.9%) this would leave little scope for judicial involvement. Possibly coincidentally in *Wellington Local Bodies v Westland Catchment Board* [1988] NZILR 1708, judicial activism began. The clause in that case required nothing more than notice to be given to the union prior to the employer informing the redundant worker. Cooke, P., as he was then came out with:

It is true that paragraph (b) makes no express provision beyond the requirement for notice, but it is of some significance that notice is required to be given to the union before notice is to be given to the affected officer. Plainly the intention must have been to allow negotiations to take place between the union and the employer (at 1711).

It is our contention that to convert a simple agreement to give notice, to an agreement to negotiate redundancy payments and further, to agree to allow the Courts to determine the level of redundancy payment – is blatant judicial activism. An interesting fact about that case was that the counsel for the appellant was Mr T E Goddard – soon to become Chief Judge Goddard – who clearly has strong views about the rights of workers to redundancy payments no matter if they have a redundancy agreement, or clauses or not.

Chief Judge Goddard played a leading role in the so-called Hale trilogy of cases, which involved a cleaner who was dismissed for redundancy as the company was in financial difficulties. Cost saving could be made by replacing the employee with a contract cleaner. Goddard, C. J. appeared to have a strategy that he would be extremely judicially active, with his decisions almost certainly being overturned on appeal. However, he could count on openings being left by the decisions of the Court of Appeal which would allow him creative interpretations in the future. So in *Wellington Caretakers IUW v G N Hale & Son Ltd* [1990] 3 NZELC 97,696, he ruled (at 97,719) that since the dismissal 'was not, at the time, commercially necessary to ensure the ongoing viability of the respondent. It was, therefore, unjustifiable.' As expected this assertion was rejected by the Court of Appeal in *G. N. Hale & Son Ltd v Wellington Caretakers IUW* [1990] 2 NZILR 1079 (CA), who pointed out (at 1084) that 'a worker does not have the right to continued employment if the business can be run more efficiently without him.' All five justices chose to speak. While most emphasised that so long as the employer genuinely believed there was a redundancy situation then any dismissal was justified, and it was not for the Court, or the union, to substitute their business judgement, two of the five also gave the view that justification for a dismissal could also turn on whether the circumstances called for reasonable compensation and whether it was given.

When the case went back to the Labour Court (*Wellington Caretakers IUW v G. N. Hale & Son Ltd* [1990] 3 NZELC 97697), Goddard, C. J. of course decided that compensation was needed in this case, and that what had been offered *ex gratia* (and refused) was inadequate. Compensation was set at \$5000.

Judicial activism thus created the situation that it was accepted that:

- a. There was no statutory right to compensation for dismissal on the grounds of redundancy, and no right unless conferred by a collective document or redundancy agreement.

But,

- b. for the dismissal to be justified (and thus avoid having to pay compensation for an unjustified dismissal) compensation for the original dismissal 'may' (i.e. almost always, 'would') be required.

EC Act

The legislature in the EC Act tried to make redundancy agreements a matter for employers and employees. Section 46(3) stated:

Where a provision of any contract deals with the issue of redundancy but does not specify either the level of redundancy compensation payable or a formula for fixing that compensation, neither the Tribunal nor the Court shall have the justification to fix that compensation or specify a formula for fixing that compensation.

Section 46(3) did not even slow the judicial activism. In the next major case (*Bilderbeck v Brighouse Ltd* [1993] 2 ERNZ 74) Goddard, C. J. ruled that the employment contracts did not even mention redundancy so s.46(3) did not apply and the Court could set compensation. He also claimed (at 91) that s.46 applied only to 'dispute proceedings' (interpretation, application or operation of an employment contract) and not to personal grievances. Under that logic, virtually any dispute to which s.46(3) applied could be reformatted as a personal grievance rendering s.46(3) inappropriate.

Goddard, C. J. ruled that although there was a genuine redundancy situation, and although the employees had no redundancy agreement, and had been given the required notice (and, indeed, that three of the four were re-employed by the new owner of the company) because there was no consultation and because the compensation offered was deemed by Goddard, C. J. to be inadequate, he could determine the level of compensation that should be paid. When the case went to the Court of Appeal (*Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243 (CA)) there was a unanimous ruling (at 251) that 'There is no general requirement for an employer to pay compensation in every redundancy situation.'

Notwithstanding, a 3:2 majority of the Court of Appeal upheld the Employment Court's decision, and judicial activism, was again, confirmed.

However *Brighouse* was not allowed to stand, and was later deemed ‘bad law.’ One of the dissenters in *Brighouse*, Richardson, J., became President. A similar case to *Brighouse* (*Aoraki Corp. Ltd v McGavin* [1998] 2 NZLR 278) came to the Court of Appeal. Again, the redundancy situation was genuine, but the compensation was deemed inadequate and there were procedural deficiencies. Richardson, P. called all seven permanent Judges to, in effect, review *Brighouse*.

In a valiant (but vain) attempt to curb the judicial activism the Court of Appeal made a number of significant rulings:

- a. It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy situation ... (However) in some circumstances an absence of consultation where consultation could reasonably be expected may cast doubt on the genuineness of the alleged redundancy ... So, too, may a failure to consider any redeployment possibilities (at 294).

(The *caveats* in the above would be snapped up by the judicially active as loopholes.)

- b. ... except where the employment contract requires payment of compensation when an employee becomes redundant, in which case the Court will enforce that contractual obligation, the statute does not empower the tribunal or Employment Court to require any such payment (at 295).

In addition, the Court of Appeal pointed out that compensation for a grievance is only for that specific grievance. In some dismissal cases procedural deficiencies may cast doubt on the substantive justification for the dismissal. Compensation in those cases will be for hurt and humiliation *and* the loss of the job. But:

In a genuine redundancy the remedies for procedurally flawed dismissal are compensation for the resulting hurt and loss of benefit. They are necessarily limited to the effects of the procedural deficiencies. So there can be no compensation in a genuine redundancy situation for the loss of the job except as provided in the employment contract itself (at 296).

While commentators at the time saw the decision as one which ‘marked a sharp break with the Court’s activist approach to redundancy in the *Brighouse* decision’ (Harbridge & Kiely, 1998:60) – it simply required more creativity on the part of activists. Every comment in a decision provides a possible loophole and opportunity for those inclined to be judicially active.

In *Aoraki* the Court of Appeal said consultation ‘may’ be needed in ‘some’ circumstances. Chief Judge Goddard appears to believe consultation will always be needed. In *Phipps* he ruled that the question is whether a redundancy is genuine and unavoidable. He claims (at 200) ‘It could not be either and certainly could never be both in the absence of the necessary consultation with the employee.’

The Chief Judge also has firm views as to what constitutes consultation. This he outlined in *Cammish v Parliamentary Service* [1996] 1 ERNZ 404:

Consultation is to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done. However, consultation is less than negotiation and the assent of the persons consulted is not necessary to the action taken following proper consultation (at 417).

The period of notice will also come more into focus. In *Rolls v Wellington Gas Co. Ltd* [1998] 3 ERNZ 116, a Mr Rolls was made redundant. While his title was Commercial Sales Manager, he was the only employee in the department and was basically a salesman. When made redundant he was paid according to the formula and given four weeks notice. There was nothing in his contract which stipulated notice.

Nowhere in the Tribunal decision, is there any indication that Mr Rolls or his advocate had any complaint about the notice period. Goddard, C. J., however, determined that, in his view, the appropriate period should have been three months or 13 weeks. He also determined (at 126) that 'It was of course distressing and humiliating for the appellant to be dismissed without being given his contractual period of notice.'

And consequently granted a further \$5000 compensation.

ER Act and ERLR Bill

As mentioned earlier, the ER Act was largely cosmetic although it brought under statute law, the well-established common law principle that there should be 'good faith' in all employment relations dealings.

Notwithstanding, the Employment Court in *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 attempted to use the change in law to distinguish *Aoraki*. If successful they would be unrestrained in terms of activism. When the case (*Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA)) was appealed, the Court of Appeal ruled (at 672) that 'it has long been the law that the special nature of the employment relationship incorporates mutual obligations of trust and confidence' and that they did not see the obligations on employers 'as differing significantly from those referred to in the judgements of this Court in *Aoraki Corp Ltd v McGavin*' (at 671).

The ER Act, however, failed to replicate s.46 of the EC Act which had effectively prevented the Court from determining the outcome of 'failed' negotiations over redundancy issues. In the Canterbury Spinners cases (*Canterbury Spinners Ltd v Vaughan* Unreported CA 270/01 Judgement 23 October 2002 (CA); *Vaughan v Canterbury Spinners Ltd* [2001] ERNZ 399), there was a clause requiring the employer to 'negotiate a level of redundancy compensation.' The employer and the union failed to agree and the matter went to the Employment Relations Authority (latest version of grievance committee, tribunal) which ruled that it did not have authority to set the amount, as s.161(2) states:

The Authority does not have jurisdiction to make a determination about any matter relating to -

- a. bargaining; or
- b. fixing of new terms and conditions of employment

The Employment Court reverted back to the line of cases discussed above under the IR Act and LR Act and determined that the Authority did have jurisdiction. They ruled that it was not fixing new terms and conditions (i.e. settling an interest dispute), but was settling a rights dispute since the clause had established a right to redundancy compensation and the Authority was simply to determine the level. This view was supported by the Court of Appeal.

The ERLR Bill has made some proactive moves towards redundancy legislation – but in a piecemeal, half-hearted fashion. The Bill (which is to take effect from 1 December 2004) considers redundancies in particular for 'specified categories' of workers, namely those in:

Cleaning services, food catering services, caretaking or laundry services, in the education, health or age-related residential care sectors and more limited in public sector and aviation.

These 'specified workers' are to be protected in that if it is decided to make them redundant and bring in contractors, the workers may chose to transfer to the new employer and if so, are entitled to redundancy pay from the new employer should redundancy occur, resulting from the restructuring.

While the provisions may protect the vulnerable workers specified, it may possibly work against them. Given the new provisions make it increasingly difficult and unattractive to replace what are perceived as inefficient or low-productive workers with an outsider contractor, the probability is, that employers will simply become more demanding of their existing employees. Some will resign (and possibly claim constructive dismissal); others will be disciplined and possibly dismissed. Replacements will not be hired until there is only a small core of the workers who will be acceptable to the outside contractor. No redundancies will officially occur.

Discussion

The judicial activism referred to in this paper was probably motivated more by a genuine desire to ensure employees who were made redundant got satisfactory compensation for being made redundant, than by a feeling of superiority and that they were able to create better law than the legislature. Basically judicially active judges were creating a common law which would find favour with many of a liberal disposition.

However, while we may support the sentiments behind the judicial activism, the practice is, in our view, to be wholly condemned. One obvious problem with supporting, or ignoring judicial activism when it suits us (because, for example, it is creating a common law we favour) is that it makes opposition to future judicial activists (who may create common law we find repugnant) much more difficult.

Judicial activism should also be condemned for creating a high level of uncertainty into redundancy situations. As Richardson, J. (as he was then) said in *Brighouse*:

Redundancy is an area of employment law and industrial relations where those concerned, employee and employer, ought to be able to determine at the time what their respective rights and obligations are. They should be able to plan with confidence (at 256).

New Zealand legislatures need to stop treating redundancy with such trepidation, like a child facing a large vicious looking nettle and follow the adage – grasp the nettle – and provide satisfactory and comprehensive legislation. This will enable both employers and employees to know what are their minimum entitlements and responsibilities, and they should also know the outcome should they fail to agree. This will not remove judicial activism, but it should significantly curb it.

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