

From collectivism to individualism in New Zealand employment relations

Erling Rasmussen and Felicity Lamm
The University of Auckland

ABSTRACT

The shift from collectivism to individualism in New Zealand employment relations has been rapid and triggered profound employment relationship changes. This paper overviews the growth in individual employee rights prompted by public policy changes. In particular, the paper focuses on the paradoxical results of public policy changes: so-called deregulation facilitated increased regulation in the 1990s and the recent support for collectivism in the Employment Relations Act 2000 has resulted, so far, in a decrease in the coverage of collective employment agreements. The rise in individual employee rights appears to have embedded a culture of workplace bargaining and individual employment agreements in New Zealand.

Introduction

This paper focuses on the growing importance of individual employee rights in New Zealand employment relations over the last 15 years. It does so for three reasons. First, the rise in individual employee rights has been profound. This has had a significant influence on employer and employee thinking which in turn have led to adjustments in human resource management (HRM) policies and practices. This raises several questions regarding what these employee rights are, how they have influenced employer and employee thinking and behaviour, what the impact has been upon HRM policies and practices, and so on. Second, the more comprehensive employee rights cut across the so-called 'New Zealand experiment' in the post 1984 period in which both Labour and National Governments promoted the rhetoric of deregulation and 'free market model'. It is paradoxical that there was 'regulatory avalanche' between 1984 and 2000, with a considerable extension of individual employee rights being a key component. It begs the question whether it was correct to describe this period as 'deregulatory'. Third, although the Employment Relations Act 2000 supports explicitly unionism and collective bargaining, paradoxically individual employee rights have become further entrenched as collective bargaining coverage have declined and there have been several extensions of individual employee rights since 1999.

The paper will detail the growth in individual employee rights *prompted by public policy changes*. First, the rise in individual employee rights mainly happened in the 1990s as three key pieces of legislation enhanced anti-discrimination measures, stipulated privacy protections and, most importantly, granted all employees the possibility of pursuing a personal grievance in areas of unfair dismissals (Deeks *et al.*, 1994; Harbridge, 1993). Second, the personal grievance entitlement gained further importance since its prominence happened in a period of dramatic weakening of employee power as union density and collective bargaining coverage declined sharply during the 1990s. It is discussed how 'procedural fairness' took on a previously unknown importance and how employers started to realise the dangers of a contractual mindset amongst employees. Third, the Employment Relations Act's explicit support for collectivism has co-existed with a further increase in individual employee rights and more employees are covered by individual employment agreements than previously (Rasmussen, 2004). While the rise in individualism appears to have gained ground it has happened in the context of further state intervention and institutional adjustments. This changing context, as well as the shift in public policy being relatively new, means that it is necessary to be cautious in predicting: whether the continuous rise in individual employee rights will continue in the future is unclear (Caisley, 2004; McAndrew, *et al.*, 2004). Still, individualism appears at the moment to be firmly embedded in New Zealand employment relations.

The rise in individual employee rights

The early years of the 1990s are often regarded as the pinnacle of the 'New Zealand experiment' with major deregulatory changes in social welfare, health and employment relations (Dannin, 1997; Easton, 1997; Harbridge, 1993; Kelsey 1997). While this assessment is correct, it does overlook that the 1990s also witnessed a major break-through of individual employee rights. The emphasis on individualism was in line with the dominant public policy thinking at the time. In employment relations, the Employment Contracts Act 1991 promoted direct employer-employee relationships at the workplace level as this was expected to provide more productive and flexible outcomes (Deeks and Rasmussen, 2002; Harbridge, 1993).

However, the perception that this period epitomised deregulation and further (employer) flexibility belied the fact that there was also a rise in the number of regulations. In fact, the notion that deregulation was synonymous with the 1990s is probably something of a misnomer.

The extensive legislative reforms have further burdened organisations already straining under the need to adjust to the rapidly changing economic environment. While both Labour and National Government have called continuously for a self-regulatory approach and labour market deregulation since 1984, the rhetoric has not matched the practice. According to the 2001 Ministerial Panel on Business Compliance Costs, successive governments have enacted about 1,700 statutes and 3,800 regulations since 1990. Rasmussen & Lamm, 2002: 120).

A number of major legislative reforms have impinged on employment relations but in particular four major Acts have had a crucial impact: the Employment Contracts Act 1991, the Human Rights Act 1993, the Privacy Act 1993, and the Employment Relations Act 2000 (for an overview of these Acts, see Deeks & Rasmussen 2002 and Rasmussen & Lamm 2002). The *Employment Contracts Act 1991* is infamous for its abolition of the award system and union membership coverage rights. However, it also brought a major shift in individual employee rights and the way in which individual rights were pursued:

Prior to 1991, personal grievance claims by employees could only be conducted through their trade unions (Anderson, 1988). But the introduction of the ECA provided enhanced access to the personal grievance procedure. All employees, whether on individual or collective contracts, whether union members or not, could use the procedure and, if they so wished, initiate the procedure themselves. This led, as expected, to a sharp rise in the number of personal grievance claims coming before the Employment Tribunal ... While the extension of the personal grievance procedure to all employees was expected to lead to more claims, the actual level of claims was a surprise to most commentators. (Deeks and Rasmussen, 2002: 90)

In the year to June 1992, the Tribunal received 2,332 personal grievance applications. This increased to 5,144 cases in the year to June 1996, as seen in table 1. There were several reasons for this significant rise in cases. The extended coverage of the personal grievance rights to employees at the higher end of the labour market – often with the educational and financial background to pursue grievances – clearly altered the 'playing field'. In addition, the sharp rise in personal grievance cases in the first half of the 1990s made headline news and that generated its own dynamic. Media reports of large payments created employer anxiety and it became a common complaint from employer representatives that the Courts' interpretations and personal grievance entitlements had made it 'impossible to dismiss employees'. Cullinane and McDonald (2000) have argued that the shift towards weaker unions, individualism and contractualism contributed to the rise in personal grievance cases. They have also argued that the link to the stand-down period (for claiming the unemployment benefit) was important (see also Boston and Dalziel, 1992).

A final factor that may have influenced the number of unjustifiable dismissals was the length of the 'stand-down period'. (The 'stand-down period' refers to the time that elapses between a person losing his and her job and being able to claim unemployment benefit). As part of the benefit changes that coincided with the introduction of the Employment Contract Act, a stand-down period of 26 weeks was introduced for employees who left their employment voluntarily or were dismissed. However, an employee in such a situation could still obtain the unemployment benefit without the stand-down period if the employee had lodged a claim of unjustifiably dismissal with the Employment Tribunal. (Deeks and Rasmussen 2002: 90-91).

TABLE 1
 Personal
 grievance claims
 before the
 Employment
 Tribunal,
 1992–1999

Year to June	Outstanding applications at start	Applications received	Applications withdrawn	Applications disposed	Outstanding applications at end
1992	17	2 332	459	743	1 079
1993	1 079	3 207	743	1 568	1 919
1994	1 919	3 592	1 046	2 447	1 954
1995	1 954	4 248	976	3 040	2 184
1996	2 184	5 144	1 121	3 218	2 985
1997	2 985	5 424	1 190	3 787	3 432
1998	3 432	5 332	1 299	3 768	3 787
1999	3 787	4 466	1 490	3 501	3 364

Sources: Deeks & Rasmussen 2002: 91; Harbridge 1998: 12; Department of Labour 1998; 1999.

It was also a frequent complaint from employers and unions alike that American style litigation had become more accepted in New Zealand in recent years. The rise in personal grievance cases brought to the Employment Tribunal, and in occupational safety and health cases brought to the District Courts, and the detailed attention paid by employment relations managers to procedural and contractual matters, were all indicative of this a shift towards increased litigation over employment issues. It can be argued that the Business Roundtable and the New Zealand Employers Federation contributed to this trend with their long campaign against the Employment Court (Rasmussen and Lamm 2000).

The campaign against the Employment Court was associated with the increased focus on procedural fairness. As the numbers of personal grievance cases increased so did the numbers of employers who fell foul of the procedural fairness hurdles. This led employer representatives to complain that the lack of objective, easily applied rules created total confusion amongst employers (see Burton, 2001). The argument was supported by that legal precedent was developed significantly in the 1990s, giving employers another 'incentive' to take individual employee rights seriously.

However, by 1999 the number of claims began to stagnate. The possible reasons for the decline are complex and influenced by factors such as HRM practices and policies responding to labour shortages and subsequent attempts to diminish poor employment relationships. The link between personal grievance claims and stand-down periods (for claiming the unemployment benefit) was also weakened when the stand-down period was reduced from 26 weeks to 13 weeks in 1997.

The Human Rights Act 1993 enabled a significant extension of individual rights in employment relations in New Zealand. The Act consolidated similar human rights legislation established in the 1970s and 1980s and presented a wide range of categories on the grounds of which discrimination would be illegal. These included: gender, sexual orientation, marital status, pregnancy, family status, religion, ethnicity, employment status, disability, and age. More recently, the Human Relations Act and the Employment Relations Act have strengthened the anti-discrimination provisions. Their definitions of harassment and discrimination cover a wide range of offensive behaviours, whether these are perpetrated by the employer, other employees, or clients. Moreover, having anti-discrimination provisions under both the Human Relations Act and the Employment Relations Act has had a major effect on the relationship between working parties where employers have had to be specifically mindful of the systems and structures within their organisations that determine such relationships.

In spite of the fact that the human rights legislation has been in existence for over 30 years, the Human Rights Commission is still receiving a large number of complaints. For the year 1998–1999, the Commission received 300 complaints but by 2003–2004, the number of complaints had increased to 1,727 (Human Rights Commission, 2000 and 2004). Since 1998, the largest number of complaints has been associated with discrimination on the basis of disability (an average of 23% of all complaints), with the second number of complaints concerning race, ethnicity or national origin (approximately an average of 20%).

Although there has been a substantial increase in the number of complaints over the years, there is also concern among the enforcement agencies that there is a large degree of under-reporting in discrimination and sexual harassment in the workplace. As stated by the Race Relations Conciliator (2000):

Because employment involves people's livelihoods and working environments, it is easy to understand why employees may be reluctant to complain. They may be fearful of their employer's response to a complaint and therefore choose not to take this course of action /.../ Employment-related discrimination, however, represents of the primary areas of complaint, despite our numbers placing it in third position.

The onus is on the *individual* to seek redress for breaches of the legislation (where the Employment Relations Act has an emphasis on collectivism and it has a more prescriptive approach). This was compatible, of course, with the political philosophy of the 1990s which placed the emphasis on individuals taking responsibility for their own lives. The role of privacy and human rights officers is investigative, relying entirely on incoming complaints. Although officers from the Department of Labour's OSH Service have an inspection function, the current legislation focuses mainly on investigation of complaints rather than on routine inspections.

The Privacy Act 1993 was prompted by concerns regarding personal information in an age of information technology and new types of surveillance equipments. It addresses how personal information is collected, stored and accessed. 'The basic philosophy underlying the Privacy Act is that of individual autonomy: the individual has a right to know what personal information is held about him or her by an organisation and for what purpose this information will be used.' (Rasmussen & Lamm, 2002: 88). Compliance with the Privacy Act assumes that organisations have a privacy strategy, policies and systems in place. In fact, the Act requires every organisation to appoint a privacy officer to implement the legislation and monitor privacy issues. It has also been associated with a wide range of employment relations issues, including staff recruitment, performance management, drug-testing, and staff surveillance.

Initially, there was a great deal of confusion surrounding the interpretation and implementation of the Act and the number of complaints to the Privacy Commissioner more than doubled from 500 in 1994 to 1200 in 1996. However, by 2003 the number of complaints declined to 928. Since 1994, most of the privacy complaints made by employees concerned matters of drug testing, intrusive employee surveillance and employee access to confidential personal information (Privacy Commissioner, 2003).

Individual employee rights under the Employment Relations Act

The Employment Relations Act is primarily developed to enhance 'productive employment relationships' through the support of individual choice, unionism and collective bargaining (Wilson 2001, 2004). However, the Act has not led to the expected rise in collective bargaining. In fact, the opposite has taken place: "...our data for the year to June 2003 show collective bargaining levels declining to the lowest level seen over the last twenty-five years." (Thickett *et al.*, 2004: 39). There are several factors at play but it seems clear that making the concluding of collective agreements the exclusive domain of unions under the new Act has facilitated a paradoxical outcome. Under the Employment Contracts Act, many employees were part of 'collective contracting' where collective contracts were concluded without the involvement of unions (Dannin 1997). These employees have opted predominantly for individual agreements under the Employment Relations Act as 'collective contracting' is no longer an option (see Waldegrave *et al.*, 2003)

The Employment Relations Act also continues and enhances personal grievances for all employees. The personal grievance entitlement is further aligned with the anti-discrimination policies of the Human Rights Act. Furthermore, statutory individual entitlements in the areas of minimum wages and leave entitlements have been increased significantly. The statutory minimum wage for adults has risen by 29% (from NZ\$7 to NZ\$9) during the 1999-2004 period. Paid parental leave has been introduced, the Holidays Act has been reformed and a fourth week of annual leave will be implemented in 2007. Overall, the continuous strong emphasis of individual employee rights cuts across the support for collectivism and, to some degree, it undermines the unions' attempts to increase union density.

One could ask: if many entitlements can be obtained without becoming a union member or participating in collective bargaining, why would people become union members? An answer is that many entitlements – for example, redundancy and long service leave – are only obtained through collective agreements, improvements over and above the statutory minima are often stipulated in collective agreements, and many people join unions for security or philosophical reasons. Nevertheless, the inability to limit the flow-on of improvements from collective agreements to individual employment agreements – the so-called ‘free-riding’ issue – has been a major concern for New Zealand unions (May *et al.*, 2003; May, 2004). A survey of employers and employees found that it has become common practice to extend collective agreed improvements to employees on individual employment agreements (Waldegrave *et al.*, 2003). For employers, this makes sense in terms of fairness and transaction costs:

Employers for the most part perceived that the extension of conditions to all employees regardless of agreement type was consistent with the Act’s requirements for good faith behaviour and freedom of choice. (Waldegrave, 2004: 132).

The Employment Relations Law Reform Bill – coming into force in December 2004 – is trying to deal with the ‘free-riding’ issues in several ways (Department of Labour 2004; Patterson 2004). This includes: employers are not allowed to discourage employees from participating in collective bargaining, it can be a breach of good faith if employers automatically pass on collectively agreed improvements and this undermines collective bargaining, it is legal to agree a bargaining fee arrangement for non-union employees if these employees benefit from collectively agreed improvements (ERS 2004: 2-6). While it will be seen whether these changes will curtail the ‘free-riding’ issue, it will undoubtedly put the spotlight on how employers negotiate and consult with individual employees.

Likewise, good faith obligation has been further refined by the Employment Relations Law Reform Bill. This obligation – a new concept introduced by the Employment Relations Act – focuses on bargaining behaviour, stipulates a number of process requirements and makes unfair and misleading bargaining unlawful (see: Davenport and Brown, 2002; Deeks and Rasmussen, 2002: 185-190; *New Zealand Journal of Industrial Relations*, 28(2) and: www.dol.govt.nz). It has been discussed whether the ERA and the good faith obligation have increased the *legal* demands on employer behaviour (see Caisley 2004, Hughes 2004). While most employers have not changed their employment relations approach considerably, they are aware of the obligation and have lifted their information and contractual efforts (Waldegrave *et al.*, 2003).

On balance, individual employee rights have become further embedded under the Employment Relations Act. However, it has yet to cover all organisations. There appears to be three major issues: *non-compliance, the onus on individual responsibility, and the perceived benefit involved*. Non-compliance has been a major issue, particularly amongst small- and medium-sized enterprises, SMEs (Lamm, 2002). The emphasis on more formalised employment agreement and statutory minima under the ERA, buttressed with a more active enforcement approach, has gone some way to tackle non-compliance. However, there is still a way to go as indicated by two examples. A survey of 2,000 employees found that ‘almost a quarter of employees had either not seen their agreement or were not aware of having any employment agreement.’ (Waldegrave, 2004: 150). A recent survey by Auckland’s Chamber of Commerce found that 30% of the firms responding had no written employment agreements and this rose to 65% for SMEs (NZ Herald, 3-9-2004: C4).

It is also problematic that the onus is on the individual employee when it comes to effective enforcement of individual employee rights. It takes a certain amount of knowledge and effort to start the enforcement process. The lack of employee awareness of entitlements is the first hurdle and then it takes some resolve to proceed with complaints. These two hurdles can be enough to block the enforcement of rights, though recent research has found that many ‘problems’ are settled at the workplace and awareness are reasonably high (Waldegrave *et al.*, 2003). There is also a high level of satisfaction amongst employers and employees who take their cases to the Employment Institutions (McAndrew *et al.*, 2004). Still, there is a third problem: the benefits of pursuing employee rights are in jeopardy. It is highly problematic that many of the recent awards have been rather low. This has attracted critical comments from both the Employment Court and the Court of Appeal and it undermines the Government’s attempt to have effective remedies in place.

[I]t is ironic that a Government which is clearly committed to ensuring that workers can protect their rights has presided over an era when the level of remedies being awarded has resulted in there being real questions concerning the effectiveness of the law. (Caisley, 2004: 71).

While there have been major awards in the area of stress, the low level of awards in other types of cases will reduce the 'incentives' both in terms of deterring employers and in terms of encouraging employees to pursue their grievances. The low level of awards has to be balanced against the considerable 'costs' incurred by employees such as legal fees, emotional stress, time spent, and (possibly) a negative image amongst employers. The real or perceived benefits can become very small or non-existent.

Conclusion

It has been detailed how legislative reforms and public policy changes have fostered a rise in individual employee rights. The rise in individualism is linked to the effects of public policy in 1990s where decentralised bargaining and individual employee rights took hold. Individualised complaints and court cases became a hallmark of the 1990s with personal grievances becoming particularly prevalent. With the decline in union density, direct employer-employee bargaining became the norm and individual employment contracts covered the majority of employees. This has continued in the new millennium as there has been surprisingly little change under the post 1999 public policy which supports collectivism.

While the post-1999 period has delivered substantial gains in areas such as minimum wages and leave, they have mainly come through government intervention. This may have struck at the heart of unionism as it raises the question: why become a union member? The decline in collective bargaining coverage seems to suggest that many employees appear to see little benefit in union membership. This, together with many employees having a low awareness of collective bargaining options, raises serious concerns about the future of collectivism in New Zealand employment relations. There now appears to be an embedded culture of workplace bargaining and individualised employment relationships in New Zealand.

Erling Rasmussen and Felicity Lamm, Department of Management & Employment Relations, The University of Auckland (e.rasmussen@auckland.ac.nz ; f.lamm@auckland.ac.nz). Erling and Felicity are the authors of New Zealand's leading textbooks in employment relations (see: www.employment.org.nz), they are the editors of the New Zealand Journal of Employment Relations (see www.nzjournal.org). Erling has been involved in the recent evaluation of the Employment Relations Act 2000 (see: Rasmussen, 2004; Waldegrave *et al.*, 2003). Felicity is currently involved in case studies of highly productive workplaces in New Zealand.

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