

## **An employer perspective: employment relations now and past the 2020 General Election**

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### **Abstract**

The present government has presided over a number of changes to employment law and has committed to more, should it be returned to office in this year's general election. However, Covid-19 has cast a debilitating shadow over employment relations, in general, and is obscuring the effects of recent changes, at least for now. It is, therefore, harder to comment on whether or not the changes made, to date, have helped or hindered. However, it is possible to look forward at some of the additional changes being proposed, and assess whether or not, particularly in the economic confines of the Covid-19 straitjacket, changes to holidays, pay equity, and collective bargaining will assist New Zealand's return to prosperity. This article examines some of these issues through an employer lens.

**Keywords:** New Zealand general election, employment relations changes, Covid-19 pandemic and business prosperity.

### **Introduction**

In 2017, the Labour Party campaigned on an extensive employment relations agenda. This was virtually identical to its very detailed 2011 manifesto. Partly in response to a clear backlash among voters in 2011, Labour toned down its workplace relations policy for the 2014 election, instead promoting its Future of Work Commission, which reported back in 2016. The Commission's report essentially endorsed Labour's earlier approach and became the party's mandate to continue promoting its 2011 proposals for reforming the New Zealand labour market.

Most of the 2017 manifesto commitments have now been implemented, with the notable exception of Fair Pay Agreements. Changes have centred around lifting wages, strengthening collective bargaining, strengthening union rights, strengthening employee rights and a preference for employment over contracting. They have included the enactment of the Employment Relations (Triangular Relationships) Act, the Equal Pay Amendment Act, the Employment Relations Amendment Act, and family violence amendments to both the Employment Relations and Holidays Acts.

Reviews have been completed on the film industry, Holidays Act and significant work done on issues such as better protections for contractors, protection from exploitation of migrant workers and the Future of Work.

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However, with the exception of recent increases in the minimum wage, it could be said that, so far, there has been insufficient time to assess the impact of the changes that have been enacted.

Changes to the Holidays Act were not part of the government's 2017 manifesto commitments. However, nationwide frustration expressed by both businesses and workers over the complexities of the Act, particularly the calculation of holiday pay, encouraged the government to commission a review of the Act. While the Holidays Act Working Group reported back to government in late 2019 with a series of recommendations, Covid-19 has put progress on a slower footing. It is to be hoped progress will resume now that Covid-19 is relatively well contained by New Zealand's border management processes.

In the meantime, issues continue to arise under the present Act, as businesses struggle to calculate holiday pay using the complex calculations and rules that currently apply. The costs of investigation and remediation for many businesses already amount to millions.

There will be considerable pressure on the incoming government to act on the recommendations of the Holidays Act Working Group as soon as possible. The last thing business needs in the economic straitjacket imposed by Covid-19 is costs that can be avoided. Prolonging the introduction of a badly needed simpler Act, therefore, will not be welcome.

### **And then came Covid-19...**

Covid-19 has impacted workplace relations in ways that are both obvious and yet to be understood. Obvious impacts include the effects of lockdowns and the effective closure of many businesses for extended periods. Many businesses have had to close altogether and almost all the remainder have had to reconfigure staffing and operations under the constraints of New Zealand's Alert Level system. For instance, the closure of our borders to international tourism slashed revenues in education, tourism, hospitality and accommodation. This has seen a distinct pivoting towards the domestic market. Yet to be understood is whether these responses are sustainable. Also yet to be understood are the timing and extent of a predicted recession as constrained markets for goods and services continue to bite. Working from home has emerged as part of mainstream conditions of work, however, its effects on workplace productivity and employee health, safety and wellbeing are still poorly understood. As time goes on, we will almost certainly see a growth in bargaining over home-based conditions of work, including the employment-related costs to be borne by employers who permit their employees to work from home.

Covid-19 has also spawned a growing series of legal questions; in particular, over issues such as how the wage and leave subsidies have been managed. For instance, many businesses, whose revenue streams dried up completely, were unable to pay their employees any more than the \$585 per week Covid-19 wage subsidy. However, the Employment Relations Authority, in a case now before the Employment Court, found the employees should have been paid at least at the minimum wage rate instead of just the subsidy, as they were technically working. The Employment Court will need to decide whether an employee who is not actually working but is still receiving wages (the subsidy amount) is working for the purposes of the Minimum Wage

Act. If so, many businesses face having to make significant payments of wage arrears, thus adding to the burden imposed by a badly timed minimum wage increase.<sup>1</sup>

Overall, Covid-19 has created some of the tightest operating conditions for business in living memory. An incoming government, if it wishes to preside over a successful recovery, cannot ignore this fact and definitely should be slow to impose additional costs.

## **What can we expect under Labour's proposed ER Regime?**

If Labour is returned to government, it has promised to introduce Fair Pay Agreements, raise the minimum wage to \$20 per hour, double sick leave entitlements, and introduce employment protections for contractors, including allowing them to bargain collectively.

While most attention to date has been focussed on Fair Pay Agreements as the vehicles for change, less attention has been given to what changes might be carried in these vehicles. An indication of possible areas of focus for pan-industry or occupationally based Fair Pay Agreements can be found in those conditions of employment that have changed most since the cessation of awards in 1991.<sup>2</sup> Put simply, a reversion to pre-1990 approaches. This suggests that we may see a move towards specified paid rates and service-based pay increments, and away from a performance pay-based regime as well as a return to contractual definitions of ordinary hours, shift hours, penal hours and overtime hours, each attracting different rates. Ironically, these were largely discarded in the 1990s as being economically inefficient.

Another predictable effect of Fair Pay Agreements is likely to be a return to the principle of fair relativity.

Prior to the introduction of enterprise bargaining in 1991, awards were negotiated in a strict hierarchy, and settlements were reflective of the perceived historical relationship between one award and another. For example, the private sector Metal Trades Award traditionally set the scene for all other trades occupations. Settlements would not disturb the overall wage relativity between awards. Any attempt to do so was usually met with concerted and widespread industrial action. In the state sector, secondary school teachers headed a long chain of relativities that ended with school audiologists.

Occupational relativities disappeared as the basis for wage setting upon the introduction of the Employment Contracts Act in 1991 and the general move to enterprise bargaining. Awards as such vanished. However, the Labour Government's new pay equity legislation and proposal to introduce Fair Pay Agreements may see the re-emergence of relativities as a key factor in wage setting.

Occupationally-based pay equity settlements will, by definition, be relativity-based settlements. A female-dominated group that achieves a pay increase as a result of being compared to a male-dominated group doing work deemed of equal value will, in future, be "pegged" to that male-dominated group. The recently enacted Equal Pay Amendment Act 2020

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<sup>1</sup> Before 1 April 2020, the difference between the minimum wage and the subsidy was \$122 per week. From 1 April, this rose to \$170 per week.

<sup>2</sup> As measured by the annual *Bargaining Trends and Employment Law Update* published since 1990 by the Centre for Labour Employment and Work at Victoria University

effectively requires that claimant group wages be kept in line with those of the comparator group.

Similarly, Fair Pay Agreements will be relativity-based. A fair pay agreement for truck drivers will not escape comparison with similar agreements for bus drivers or train drivers. Agreements for retail workers will be compared to those for bank tellers and so on. Prior to 1990, cleaners, caretakers and security guards were treated as equal, and, in fact, all were covered by the same award.

The complex negotiations required to manage these issues require infrastructure and expertise that has been largely absent since 1991. This creates real concerns about the costs of the process as much as the effects of the outcomes.

### *Minimum Wage*

With respect to lifting wages, the government has announced its intention to complete its 2017 commitment to progressively increase the minimum wage to \$20 by 2021, having already increased it to \$17.70 on 1 April 2018, and again to \$18.90 on 1 April 2020.

Business leaders have warned that imposed increases create a greater than normal risk of job losses and business failures. Increases in minimum wage rates boost wages but of themselves do not boost productivity. Increased costs that are not offset by increased productivity typically flow through either into increased prices or, if the market cannot sustain higher prices, cost cutting and, often, job losses that shrink the pool of work available to the least skilled and least educated. In other words, increasing wages without cutting jobs needs to be paid for by productivity. For many businesses right now, this is simply not possible.

Furthermore, the impacts of increases in the minimum wage do not spread evenly across the economy. Jobs in the manufacturing, primary produce, retail, hospitality, services and tourism sectors (the very jobs that will be the backbone of economic recovery in the short and medium term) will be impacted more significantly than jobs in other sectors. This is mainly because there are higher proportions of lower paid workers in these sectors than in, for instance, the finance sector.

Jobs in the sectors referred to also contain a significant number of entry level jobs (e.g. supermarkets), making them important gateways to long-term employment for young people in particular. Business responses to increased costs, notably via automation, will likely disenfranchise many young people as a result.

Automation is not the only flow-on effect of imposing increased wage costs. In some cases, increased wage rates are leading to less take home pay. For instance, hospitality businesses typically operate on small margins. Most employ at least some staff (often students) on the minimum wage. Typically, such business owners (often couples) increase their own work hours and reduce those of their staff to avoid imposing price increases on customers. This removes income from workers, negating the value of the increase in the minimum wage and often also reducing their total take home pay.

Furthermore, increased wage costs are frequently followed in short order by increased supply and transport costs. Suppliers and transport businesses will have had to increase prices to

accommodate increased wage costs. The net result is often less income for everyone – and fewer jobs.

The key challenge is to increase the value (as opposed to the cost) of low paid work. Put another way, low wages need to be dragged up by improvements in the performance of the economy, not pushed up, adversely affecting the rest of the economy.

If the government is focused on raising New Zealand's productivity and growth rate, as well as the standard of savings, we believe that a better means of providing all New Zealanders with the opportunity to save and invest is through restructured personal and company tax rates.

Instigating a broad-based, low rate approach to taxes, while containing government spending to levels around 30 per cent of GDP, will leave most New Zealanders with more cash in hand with which to repay debt, save for a house deposit or invest for retirement savings. The advantages of a tax cut over an increase in the minimum wage rate for low paid workers are numerous and include:

- the rise in the hourly rate through a tax cut does not increase the wage costs for the business, so there is less likelihood of a position being made redundant, and even less likelihood of the position being withdrawn once the current employee leaves or takes on another position.
- the relativity of those earning slightly more than minimum wage workers, because of extra responsibilities or qualifications, continues as their wages also experience an increase. Arbitrary minimum wage increases reduce relativities, fuel wage demands and impose even more non-productive costs on business.

There is also a need to account for the effects of transfer payment schemes such as Working for Families (WFF) on low wage rates. The challenge here is to avoid the complications of abatement regimes in the first place. If it is determined that the government should subsidise incomes, it should do so in a way that is effective in areas of need, is administratively simple, and does not create perverse incentives that contradict other policy initiatives. Currently, the administration of state social assistance programmes requires a monolithic government infrastructure and complex and cumbersome administrative processes. The result is ever-increasing costs.

A way of addressing this issue is to leave the value of government assistance in people's pockets in the first place, and adjusting tax rates and thresholds rather than introducing new ways of distributing welfare is the obvious answer. Except for those genuinely unable to work, this would act as an incentive to find work; it would also mean increases in net income would need to be achieved through effort and productivity.

Taking a tax adjustment approach would simplify administrative issues and reduce government social spending (and its associated administration and compliance costs). It would largely remove the disincentives attached to WFF or the crossover effects into other assistance programmes.

### ***Doubling sick leave entitlements***

Surveys suggest that sick leave usage is commensurate with entitlements. In 2018, the national average of sick leave taken was around 4.7 days, approximately 94 per cent of the statutory five-day entitlement to sick leave and around 7.1 million person days of lost productivity.<sup>3</sup> Applying a similar ratio to an increased entitlement of 10 days per year suggests sick leave taken will increase by around 3.7 days.

### ***Another public holiday***

The proposed addition of Matariki (Maori New Year) to the list of public holidays will push the predicted figure of days not worked (above) to 4.7, that same as for 2018. Given the growth in the workforce since 2018, this will reduce national productivity by an additional factor of significantly more than the 7.1 million person days lost in 2018. This will not assist businesses hard hit in their Covid-19 recovery and may tip many more over the edge into insolvency.

### ***Employment entitlements for contractors***

In New Zealand, there are primarily two categories of workers: employees or contractors. Employees are afforded protection by our legislative framework that provides for minimum entitlements, rights, and protections. Contractors do not receive employment-related entitlements as the vehicle for their relationship with a principal is a commercial contract.

The changing nature of work, including the expansion of the “gig/platform” economy, has led to increased scrutiny of the use of contractors to provide services. Globally, as in New Zealand, contractors are used in all sectors and industries (including by government departments) and contracting takes many forms.

It also needs to be recognised that the so-called “gig” economy is not new, albeit that app-based “platform” work is a relatively recent manifestation. For instance, self-employed tradespersons, who make their living from an unpredictable “spot market” of customer needs, are gig worker. So, arguably, are professions such as doctors, lawyers and consultants.

That said, the emergence of user-based “app” sourcing and assignment of work has introduced new perspectives on who is who in the working relationship. As much as anything, it is this change in perspective that has driven concerns about a rise in exploitative practices, but this is seemingly founded more on a lack of knowledge than on empirical evidence.

This globally increasing diversity of working arrangements reflects a natural response of both workers and employers to the fluid nature of modern business. Put more simply, businesses need flexibility to match supply with unpredictable demand, while workers increasingly seek to balance work with domestic responsibilities in a world where traditional roles are now less prevalent.

An incoming government needs to develop policy responses to this need for diversity and flexibility. Policy responses should enable such responses to exist while protecting the rights of workers and businesses in the process.

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<sup>3</sup> Business NZ and Southern Cross Workplace Wellness Report 2020.

As it stands, New Zealand's current law arguably is adequate for the purpose of deciding who is a contractor and who is not. Ultimately what is needed is improved effectiveness in detecting breaches, which is an issue of education and resources rather than the law. The introduction of simple and effective reporting requirements may also assist. Improved alignment of approach and information sharing between the two branches of workplace inspection (health and labour) would also contribute to better detection of breaches and improved enforcement of labour standards.<sup>4</sup>

As we come to grips with the world imposed by Covid-19, an incoming government will have to balance the needs of workers with the ability of employers to continue to offer work. If the government is to manage its way out of increasing debt, it is imperative that the economy be allowed to grow. This, in turn, requires that businesses are not hobbled in their ability to respond to what will be severe economic pressure for some time to come. Sustainable jobs and better pay do not come from nowhere. They have to be paid for, and economic growth is the only sustainable way of making this happen.

Please government, whichever you turn out to be, do not strangle business at the very time it needs to be able to breathe....

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<sup>4</sup> While MBIE (Ministry of Business, Innovation and Employment) is responsible for labour inspectors and WorkSafeNZ for health inspectors, the work of both overlaps. Health & Safety events may be a symptom of inadequate observance of minimum labour standards in the workplace, and vice versa. Ideally, the two activities should be mutually supportive.