

Labour law under stress: some thoughts on Covid-19 and the future of the labour law

GORDON ANDERSON*

Abstract

Even before the Covid-19 crisis, academics and policy analysts were becoming aware of the cumulative impact that are increasingly placing strains on the existing regulatory design of New Zealand's labour market. These forces include decades of globalisation, increasing international migration flows, various manifestations of the digital and technological revolution, rapid growth of digital-Taylorism as a form of labour control, and perhaps the most devastating in the longer term, the potential impacts of climate change.

It is increasingly recognised that these forces will have a significant long-term impact on labour markets, however, the Covid-19 crisis has shown how rapidly the world can change. This article outlines the (maybe) good, the (sometimes) bad, and then ugly of the Covid-19 pandemic and its economic consequences on New Zealand's labour relations, labour architecture, and the future of labour law.

Keywords: New Zealand labour law, Covid-19, pandemic, employment law, future of work, software tracing

Introduction

The Covid-19 pandemic and its economic consequences have provided a severe and real-life stress test of the regulatory architecture of New Zealand's labour relations and labour law. Stress testing is a term that has shifted from engineering into the language of economics and banking but in all these disciplines, stress testing is of course something of a hypothetical concept. Even the best engineering tests will not necessarily identify weaknesses that may only become apparent under operational conditions.¹ In the case of economics, the testing of regulatory models governing financial institutions is likely to be somewhat further removed from the realities of real-life circumstances. It is only significant real-life crises that provide genuine stress testing of the resilience of regulatory models. Moreover, the various crises that have occurred over the last century have allowed legislators and institutions the time to adjust to changing circumstances. From time to time, the law has faced significant regulatory challenges but normally such crises are of the slow slip category, rather than the result of a sudden and dramatic movement.

Even before the Covid-19 crisis, academics and policy analysts were becoming aware of the cumulative impact of relatively slow, but nevertheless inexorable forces that are increasingly placing

* Professor of Law, Faculty of Law, Te Herenga Waka-Victoria University of Wellington. gordon.anderson@vuw.ac.nz

¹ The collapse of the Alexander L Kielland drilling platform in 1980, in which 123 people were killed, was traced back to a 6 mm weld. Defects in the profile of the weld were the starting point for a series of sequential issues that eventually lead to the rig's collapse.

strains on the existing regulatory architecture of New Zealand's labour market. These forces include the labour market impacts of three to four decades of globalisation, increasing international migration flows, the various manifestations of the digital and technological revolution such as the Uberisation of many forms of work, the rapid growth of digital-Taylorism to control labour and to drive work intensification, and, probably the most devastating in the longer term, the potential impact of climate change.

It is increasingly recognised that these forces will have a significant long-term impact on labour markets. Perhaps the obvious manifestation of these concerns is the multitude of domestic and international projects focused on "the future of work". In the New Zealand context, the Labour Party, while in opposition, actively promoted such projects and, in government, has taken a number of steps to further that work, most recently the Productivity Commission's Report on the Future of Work (New Zealand Productivity Commission, 2020).

While such reports identify future pressures that require change, they also tend to assume that we have the luxury of time to carefully consider possible reforms and weigh possible alternatives. The Covid-19 crisis has, however, shown that the world can change very rapidly and that it is wise for regulatory structures to provide the flexibility to allow rapid responses to such crises. At the same time, society must ensure that there are strong laws and processes protecting society's democratic and human rights and, additionally, that they provide appropriate accountability from decision-makers. The Covid-19 crisis may represent something of a tipping point for societies, but it is unlikely to be the only such event in the lifetime of younger New Zealanders.

Before offering some thoughts on labour law and Covid-19, I should emphasise the point that the Covid-19 crisis is (at the time of writing this article) just over six months old. Comments made at this stage are at best speculative. It is yet too early to adequately evaluate the success or otherwise of many of the measures that have been taken by the government to support the economy and the labour market. The time for such an evaluation is likely to be months if not years away.

In the case of labour law, the difficulty is further compounded as decisions arising as a result of the Covid-19 crisis are only now beginning to emerge from the Employment Relations Authority (the Authority) and are unlikely to reach the courts for some months. Given the fluidity of concepts such as "justifiable" or "good faith", it is not easy to predict how the courts will interpret them in the types of situations that have arisen during the crisis. Any current evaluation must also rely, to a large extent, on anecdotal material and news reports. Such sources provide a snapshot of some events and issues but not necessarily a panoramic view of the total landscape.

With all these qualifications, however, I hope in this this brief article to offer at least some reflections on how our existing labour law structures have coped during the Covid-19 crisis, and also some reflections on the efficacy and resilience of those structures for meeting the potential challenges of the next half-century.

The Covid-19 crisis

During their lifetime, most working New Zealanders will have been affected by at least one economic crisis, and if not the oil shocks of the 1970s then at least the Global Financial Crisis of the first decade of this century. The Covid-19 crisis, at least in the last 70 years, is unique for the multitude of challenges it poses. The nature of the pandemic is such that, as well as the short-term economic and social disruption resulting from attempts to combat the disease itself, it seems increasingly likely that

the effects of its disruption, including its economic and labour market impacts, will be felt for well over a decade. Complicating matters is that the other forces noted above are also destabilising labour markets and are unlikely to diminish, but rather to increase in intensity over the coming decade. Indeed, in at least some cases, the Covid-19 crisis may have had the effect of accelerating those changes.

At this time, it is too early to speculate, at least to speculate informatively, on whether Covid-19 will result in a resetting of regulatory frameworks or whether we will see a return to business as normal. Given the social and economic challenges facing the world over the coming decades, it might be hoped that at least some lessons will be learnt from the crisis and that these lessons lead to regulatory structures with the strength and resilience to help carry the workforce through these challenges.

The Good (maybe): Integrating the regulatory framework

Perhaps the most important lesson to be learnt from the Covid-19 crisis is that different regulatory structures must operate as a cohesive whole and be underpinned by a broad, common, set of assumptions. New Zealand has been fortunate that its governmental and regulatory structures, unlike those of many other developed countries, appear to have possessed the inherent flexibility necessary to enable an effective all-government holistic response to the crisis. The exact reasons for this achievement will require a longer-term analysis, but among the more important is certainly the professionalism and cohesion of the public service combined with the close linkages and high levels of trust existing between the government and the public service. An analysis of this wider question, however, is one for the political scientists rather than the labour lawyer. I turn, therefore, to what Covid-19 may have taught us about labour market regulation.

First, it is worth being clear what I mean by labour law. Over recent years, there have been pressures to reframe “labour law” in much narrower terms as “employment law”: that is, as the law governing the formation, management and termination of employment relationships. This narrowing focus reflects the neoliberal agenda that employment should be viewed purely as a matter of contract between two individual parties, ignoring the wider legal and economic context regulatory context within which work takes place. The attempts to try and narrow labour law to meaning purely employment law reflects the same phenomena that one observes in trying to reframe labour relations within the much narrower framework of human resource management.

There is, of course, nothing novel in this broad conception of labour law. From both an academic and a policy perspective, labour law has long included the totality of law that regulates the labour market interactions of the workforce as a whole; “workforce” in this context being taken to mean the totality of people who are, or who are seeking, to participate in paid employment (see, for example, Mitchell, 1995). From a macro perspective, and when considering the economic impact of Covid-19, and in the longer term the impact of the other forces mentioned above, the regulatory focus of labour law must involve building the analytical framework of labour relations and labour law on the foundation of the lifetime movement of workers into and out of employment. That, in turn, requires a common set of understandings that underpin all the relevant areas of law. Most obviously, it involves the coordination of at least four areas of law: the law structuring vocational education and training, labour law, social welfare law, and immigration law. Moreover, as far as possible, the law should regulate to remove unjustifiable barriers, such as discrimination, to labour market movement while also regulating to positively enable labour market opportunities through measures, such as childcare for working parents and the like.

There are, of course, many ways in which this integration is occurring. The focus of many policy agencies on employment as such, rather than conditions of employment, is one indication of this. There remain, however, significant disjunctures between some of the areas identified above. These disjunctures are, in many cases, largely political, and most obviously illustrated by the labour law-welfare law interrelationship. Since the implementation of the Ruthanasia policies of the early 1990s, the ethos of New Zealand's social welfare system has tended to be strongly punitive. The recent report of the Welfare Expert Advisory Group (2019) has concluded that the welfare system "no longer meets the needs of those it was designed to support". The social welfare system is, of course, designed to meet the needs of a much larger group of persons than those experiencing short to medium term unemployment. Nevertheless, to the extent that the welfare system is intended to provide a social insurance component for those facing unemployment due to both macro and micro labour market factors beyond their control, it reflects a more general societal ethos of blaming the unemployed for their own situation. The failure of New Zealand regulatory systems to properly reflect labour market insecurities is also seen in the failure of the law to provide some degree of economic protection when workers are made redundant, such as prescribed redundancy pay or minimum periods of notice. The costs of labour market flexibility are seen less as societal than as costs to be borne by the individual.

The advent of Covid-19 forced an urgent rethink of that situation. In dealing with the economic impacts of the pandemic, that ethos was no longer economically tenable, or politically acceptable. The result was that the government took a generally holistic approach to dealing with the large-scale unemployment. While, hardly unsurprisingly, that response may not have been perfect, it was forthcoming. Employment law itself remained fully intact and the government's primary response was the introduction of the national wage subsidy scheme. This introduced what is effectively a social insurance approach to dealing with the levels of unemployment and decreased incomes faced by large numbers of workers (see Duncan, 2020, for an overall summary of New Zealand's response to Covid-19).

Unfortunately, this generally positive approach was undermined by the refusal of the government to activate s 64 of the Social Security Act to permit migrant workers to have access to welfare benefits. This decision reinforced the government's negative attitude to what has become an increasingly important part of the New Zealand workforce. The refusal to properly recognise the key role of migrant labour in the New Zealand workforce was probably the most disappointing aspect of the overall governmental response.

It might also be noted that the government's response extended beyond the social welfare-employment nexus to also encompass enhanced vocational training which may hopefully provide a positive pointer for future labour market regulation.

As with any scheme designed in haste and involving significant sums of money, there will inevitably be disclosures of problems ranging from outright fraud to the low-level rorting of its benefits. Indeed, such reports are already common. This should not detract from the overall positive impact of the scheme and its implementation at the point where it was most needed, and would have the greatest impact. Monitoring and accountability for the use of the funds is, and should be, an embedded part of the scheme, but in the circumstances, the detection of abuses is rightly seen as something to follow the event rather than creating time consuming and delaying bureaucratic hoops at the time of application (Walker & Hawes, 2020).

To sum up this section. The most valuable lesson to be derived from the governmental response to Covid-19, to date, is the need for labour market regulation to adopt a holistic focus on both short and medium term workforce movements, and to treat these flows as one of the inevitable characteristics of

labour markets. The law should possess sufficient resilience to ensure that it is capable not only of effectively regulating labour markets in periods of uncertainty or crisis, but also of providing a reasonable degree of economic security during the inevitable transition periods that many workers will face as economic and social circumstances change.

Genuinely dramatic changes in New Zealand's labour market regulation have been rare. Such change has occurred only twice. The first was the enactment of the Industrial Conciliation and Arbitration Act 1894 which was a response to rapidly evolving contemporary social and political forces, and even then, a three-year process. The second, the Employment Contracts Act 1991, was enacted in only a few months and was almost entirely driven by ideological motives and to benefit one segment of society.

The Covid-19 crisis presents an opportunity for another major reimagining of our labour law architecture, not only to cope with the current crisis but to cope with those of the not too distant future. But to use the quote of many a sports fan in the context of progressive labour reform: "It's not the despair, I can take the despair. It's the hope that kills you".

The Bad (sometimes): Covid-19 at the workplace

While one can make broad generalisations on the overall governmental responses, it becomes more difficult to do so when considering the actions of individual employers. Of course, many employers will have gone to great lengths to protect and retain their workforce. Many others, facing significant financial losses and having no available work, may have had little choice but to dismiss some or all of their workforce to reduce labour costs. However, other employers, and quite often larger employers who should have had the financial cushion to absorb much of the financial shock for at least some period of time, appear to have chosen to place financial returns and shareholder profits well ahead of the interests of their workforce. It is unlikely that an accurate picture of the balance between these two aspects of firm level management will be available in the medium term, if ever. Newspaper reports suggest that a number of large employers rushed to make workers redundant or to use the Covid-19 crisis in order to push forward with restructuring agendas already decided on (see Foxcroft & Edmunds for criticism being directed at The Warehouse). In the absence of more accurate information, it is of course difficult to fully evaluate the truth or otherwise of these claims and, thus, to comment on how well the law protected the affected employees. The following, therefore, is a few thoughts on the strengths and weaknesses of employment law at the level of the workplace and some comments on the type of litigation that seems likely to emerge in the coming months.²

Perhaps, the first point to make is that New Zealand's employment law remained intact throughout the crisis. The law that applied at the beginning of 2020 has continued in place until the present time. This, of course, includes the minimum entitlements in the Minimum Wages Act 1983, Wages Protection Act 1982 and the Holidays Act 2003 as well as the Employment Relations Act 2000 (ERA) itself. To the extent that the law might adjust, it can only be through the judicial articulation of what might or might not be justifiable conduct, or failures to exercise good faith during the crisis. At this point, there seem to be several areas where challenges to employer actions are most likely.

First, minimum entitlements. Among the first determinations to have emerged from the Authority are a number of cases relating to Gate Gourmet New Zealand Limited, where it was made clear that

² Anecdotally the author has been informed that there has been a significant increase in employment relations problems being filed in the Employment Relations Authority.

employees could not contract out of their minimum wage entitlements. In that case, the Authority also rejected a “no-work, no-pay” argument advanced by the employer where the employees are willing and able to work their contracted hours.³ In another case concerning redundancy, the Authority has held that unilaterally determined redundancy payments breached the relevant employees’ employment agreements and the Wages Protection Act.⁴

Second, contractual variations. The Authority has affirmed the basic legal principle that any variation to an employment agreement must be consensual⁵. Variations of an agreement must also comply with the right to seek advice under s 63A of the ERA, the provisions on unfair bargaining in s 68 and any requirements relating to fixed-term contracts and the like. Given the speed of many changes to remuneration terms and hours of work, it seems likely that some such variations may be subject to challenge.

Third, redundancy. It seems clear that the consultation protections built into the good faith requirements in s4 of the ERA, and particularly subs 1A, have not proved to be particularly effective during the Covid-19 crisis. This is hardly surprising given that they were not particularly effective before Covid-19. Subsection 1A requires that information relevant to the continuation of an employee’s employment is to be provided to employees whose employment is likely to be adversely affected. Employees are also entitled to have the opportunity to comment on that information before any decision is made. New Zealand law, including employment law, has interpreted “consultation” in a relatively strong manner and, in particular, has held that it must be more than a window-dressing exercise (Anderson et al., 2017). In principle, these obligations are enforceable through compliance orders or by an injunction, but in the absence of the financial backing to seek such remedies, challenges to a failure to consult are unlikely to occur. Consequently employers, particularly those with a non-unionised workforce, were generally able to go through a rudimentary consultation process resulting in few, if any, changes to decisions already made. Consultation requirements are largely ineffective unless the affected workers are represented by a union prepared to take an active stance in relation to consultation. Even if this is done, the action is likely to do little more than delay redundancy.

Covid-19 has merely highlighted one aspect of a long-standing lacuna in New Zealand employment law – that is, disincentives that might cause employers to resist the impulse to resort to knee-jerk redundancies as a first response to business difficulties. Neither Labour nor National governments have been prepared to address this issue and, on the contrary, governments seem more responsive to largely imaginary arguments that greater labour market flexibility is needed. In practice, New Zealand law provides very limited protection to redundant workers at the best of times and few financial incentives for employers to consider options other than redundancy. Redundancy compensation is only payable if provided for in an individual or collective employment agreement and given the very low coverage of collective bargaining in the private sector, few workers are entitled to compensation. Neither are workers entitled to any service-based minimum periods of notice. An employee may have worked for an employer for 20 years and find themselves dismissed for redundancy with very little notice. Stories of such cases have appeared reasonably frequently over the last four to five months.

Perhaps the one positive outcome of the Covid-19 crisis concerning redundancy was the identification of a serious misinterpretation of the Social Security Act by the Ministry of Social Development which led to many workers (about nine per cent) who had received redundancy compensation being wrongly denied benefits (Scanlon, 2020).

³ *Sandhu v Gate Gourmet New Zealand Limited* [2020] NZERA 259.

⁴ *Raggett v Eastern Bays Hospice Trust* [2020] NZERA 266. This determination dealt only with the wages point, leaving the justification for the redundancies yet to be determined.

⁵ *Raggett*, above.

Fourth, unjustifiable disadvantage grievances. Another legal issue likely to arise is employee challenges to employer actions through the personal grievance process. The test for assessing the justification of an employer's action, "what a fair and reasonable employer could have done in all the circumstances at the time...", already heavily favours employers. It seems possible that, in the absence of strong evidence of bad faith, the Authority or Court may take a relatively benign approach to employers who dismiss employees or otherwise disadvantage them as a response to demonstrable economic pressures affecting them during the Covid-19 crisis.

It will be also interesting to see if the unjustified disadvantage personal grievances will be used to challenge at least some employer actions, especially where there was any significant degree of pressure placed on employees to agree to such actions under an implied threat of redundancy. It seems to have been not uncommon for employers to put considerable pressure on employees to agree to measures, such as a reduction in hours of work, going on unpaid leave or short or long-term wage cuts, to reduce the employer's wage cost.

In addition to the problems identified above, it is also possible that employees may seek to challenge other cost-cutting initiatives by employers.

Finally, holidays. Another area for potential challenges may be the misuse of the power of employers to direct that annual holidays to be taken (Holidays Act 2003 s9). While the power to require holidays to be taken is fairly clear-cut, it is also an issue that has rarely been litigated. It, therefore, remains an interesting legal point as to whether the power of direction is untrammelled or whether it must be exercised in good faith and in a manner that does not undermine or defeat the objects of the Holidays Act and, in particular, the object of "annual holidays to provide the opportunity for rest and recreation" (Holidays Act 2003 s9).

Problems of this nature are most likely to occur when the direction to take holidays has more to do with the employer's desire to reduce liabilities on the balance sheet than with the recreational opportunities available to the employee. For example, directions to take half day or one day holidays may be questionable, especially where the rest and recreation component is effectively negated by the necessity or obligation to make up work that would otherwise have been done on the day in question. Even more problematical would be where there was an unspoken assumption or pressure to actually work on the required holiday. There have also been reports of employees being instructed, or pressured, to take leave that has not yet been accrued. While there is no barrier to an employee requesting leave in advance, an employer has no right to require such leave to be taken.

The ugly: Digital – Taylorism enters the home

In politics, there is a well-known saying that one should never let a good crisis go to waste. It seems clear that this lesson has not been wasted on vendors of software monitoring systems or on many employers. The shift to working at home during the Covid-19 crisis provided a major marketing opportunity for software vendors (Hooper et al., 2020), for example United States-based Hubstaff, which develops and markets employee time-tracking software, reported a three-fold increase in New Zealand sales during the first month with of lockdown (Hatton, 2020). Over recent years, such software has become increasingly sophisticated and, as a result, increasingly intrusive. Software can track what websites employees visit, take screenshots throughout the day, and track pace of work through mouse and keyboard movements as well as utilising a computer's camera to directly monitor employees and their surrounding environment. Many employees are unlikely to appreciate the full extent of the reach

of an employer's actual or potential surveillance and unlikely to have the technical skills to monitor it. Experience also indicates that electronic monitoring of employees is likely to be abused.⁶

Once again, long-standing deficiencies in employment and privacy law have been highlighted by Covid-19. Employees, especially non-unionised employees, have little option but to accept the installation and use monitoring of software. Employees are contractually required to obey the reasonable orders of their employer, and there are normally explicit contractual obligations to comply with employer policies. Again, the standard against which actions are judged is that of the "reasonable employer" – not a neutral party, let alone a reasonable employee. Compounding the problem is that the distribution of monitoring software expanding so rapidly the law has no time to respond, and by the time the courts do have an opportunity to consider the legal implications the software has become the new normal. Other than in egregious circumstances, the courts are unlikely to hold that using widely adopted tools constitutes the action of an unreasonable employer. Similarly, New Zealand privacy law continues to offer very little protection against employer intrusions into the private lives of employees while they are in the workplace, and there can be little expectation that privacy law will provide a positive protection against ever-increasing intrusion into the home workplace.

Conclusion

While it is too early to evaluate the full implications and consequences of the Covid-19 crisis for labour law, there are probably three key lessons to be learnt. First, the crisis has highlighted significant deficiencies in New Zealand's labour law and, more importantly, highlighted the consequences for workers of those deficiencies. Second, it is clear that the need to be able to react to crises, whether immediate or longer term, requires that a holistic view of the regulation of labour markets needs to be further developed. It is also clear that the interests of working people need to be given much greater emphasis in that process. Finally, is the need to recognise that the interests of working people will only be given that emphasis if those interests can be articulated through collective action. If nothing else, the Covid-19 crisis emphasises the need to enhance the rights to freedom of association and collective action.

References

- Anderson, G., Hughes, J., & Duncan, D. (2017). *Employment Law in New Zealand* (2nd ed.). LexisNexis
- Duncan, D. (2020). COVID-19 and labour law: New Zealand. *Italian Labour Law e-Journal*, 13(1s), 1-5. <https://doi.org/10.6092/issn.1561-8048/10956>
- Foxcroft, D., & Edmunds, S. (2020, July 20). *950 jobs to go: Union says The Warehouse using Covid-19 excuse*. Stuff. <https://www.stuff.co.nz/business/300060721/950-jobs-to-go-union-says-the-warehouse-using-covid19-excuse>

⁶ For example, New Zealand Post Ltd managers monitoring the audio recordings of posties including conversations with members of the public: see Case note 289943 [2018] NZPriv Cmr 5

- Hatton, E. (2020, June 2). *Employee surveillance software sales surge in lockdown*. RNZ (Radio NZ). <https://www.rnz.co.nz/news/national/418055/employee-surveillance-software-sales-surge-in-lockdown>
- Hooper, V., Anderson, G., & Blumenfeld, S. (2020, June 16). *A question of trust: should bosses be able to spy on workers, even when they work from home?* The Conversation. <https://theconversation.com/a-question-of-trust-should-bosses-be-able-to-spy-on-workers-even-when-they-work-from-home-140623>
- Mitchell, R. (1995). *Redefining Labour Law: New perspectives on the future of teaching and research*. Centre for Employment Relations Law.
- New Zealand Productivity Commission. (2020). *Technological change and the future of work: Final report*. www.productivity.govt.nz
- Scanlon, G. (2020 June, 4). *Wrongful 'redundancy' benefit rejections affect 8.9% of applicants – MSD*. RNZ (Radio NZ). <https://www.rnz.co.nz/news/national/418250/wrongful-redundancy-benefit-rejections-affects-8-point-9-percent-of-applicants-msd>
- Walker, R., & Hawes, B. (2020, July 15). *Preparing for a Covid-19 wage subsidy audit: Would your business be ready?* Stuff. <https://www.stuff.co.nz/business/prosper/finances/122122703/preparing-for-a-covid19-wage-subsidy-audit-would-your-business-be-ready>
- Welfare Expert Advisory Group. (2019). *Whakamana Tangata: Restoring Dignity to Social Security in New Zealand*. <http://www.weag.govt.nz/assets/documents/WEAG-report/aed960c3ce/WEAG-Report.pdf>