THE INTERFACE BETWEEN THE LAW AND THE WORKPLACE THE ROLE OF HUMAN RESOURCE MANAGERS

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1. Introduction

Much modern labour legislation is intended to achieve its objectives through influencing an employer's internal decision making processes. The benefits of this mode of regulation are particularly apparent where the legislative objective is to deliver tangible protections to employees by restraining the discretionary powers of the employer. Examples include constraints on disciplinary powers, provisions to encourage flexible working arrangements and generic expectations such as conducting employment relations in good faith. If such expectations are not successfully embedded at workplace level the legislative objectives are likely to have limited success. Given factors such as parsimonious damages awards, negative impacts on future employability and the problems of enforcing a judgment, standard legal remedies provide only Pyrrhic victories. Legislation of this character is one form of instrumental decentred regulation and is intended to achieve public policy objectives through the encouragement of private systems of self-regulation, such as internal management processes "to infiltrate the firm's decision-making matrices and erect signposts that direct decision-makers towards the state's desired course of action."[1]

Prior to the neo-liberal reforms private, workplace-based, regulatory mechanisms were likely to be mediated through an employee's union representatives or delegates, particularly in the case of large and medium size employers. However the rapid decline in union membership and the growth of individual employment arrangements has led to a re-orientation of the interface between employees and their employing entity. To a significant extent the role traditionally filled by the union representative has been assumed by HR managers, although of course HR managers represent the employing entity and are likely to reflect its values. As a consequence the manner in which HR managers approach their role is critical in influencing the extent to which legislative objectives are effectively implemented at the organisational level, or are instead resisted or impeded.

This paper reports on research that investigates the extent to which HR managers and their organisations encourage/discourage or are indifferent to legislative compliance. It builds on initial research by the authors exploring the relationship between employment law and human resource management.[2] That work has shown that with the enactment of statutory requirements setting

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[1] David Doorey "A Model of Responsive Workplace Law" (2012) Forthcoming Osgoode Hall Law Journal at 17 available at SSRN: http://ssrn.com/abstract=1965685. .

[2] Gordon Anderson and Jane Bryson "Developing the Statutory Obligation of Good faith in Employment Law: What Might Human Resource Management Contribute?" (2007) 37 VUWLR 487; Gordon Anderson and Jane

expectations of employer conduct the courts have paid increasing attention to the internal processes of employers and in particular to their HRM practices when evaluating employer decisions.

The project from which this paper is derived investigates the extent to which HR managers are aware of legal reforms and developments and how they and their organisations respond to such developments. It seeks to assess the extent to which legal solutions are sought, for example external legal advice, new forms of employment contract, development of employment policies, as well as the approach taken within the firm: for example is the firm response dominated by risk avoidance, minimal compliance or active resistance or is there a positive acceptance of the need to implement legislative objectives and if so to what extent.

2. HR context

Prior to 1991 terms and conditions of employment in New Zealand workplaces were regulated at industry or occupational level through detailed awards negotiated with the relevant union. Union membership was compulsory for employees covered by an award with the result that there tended to be a reasonably strong union presence in most medium-large workplaces including, in many cases, job delegates. Consequently there was a relatively high degree of union/employee involvement not only in the determination of terms and conditions of employment but also in the administration of the employment relationship and particularly in dispute resolution.

This picture changed rapidly following the enactment of the Employment Contracts Act 1991. Enterprise-based determination of employment conditions became the norm and there was a significant de-unionisation of workplaces. Union density decreased rapidly falling to approximately 20 per cent by the end of the 1990s, a figure which has remained relatively constant since that time. Within the private sector density is significantly lower, approximately 10 per cent compared to approximately 60 per cent in the state sector. Today, broadly speaking, 2 out of 3 union members are in the state sector and 2 out of 3 persons covered by a collective agreement are employed in large enterprises of 500 or more employees.[3]

From the perspective of HRM these reforms had important consequences. First, the move to enterprise based determination of terms of employment meant that ER/HR experience needed to be based at the level of the enterprise rather than at industry level as previously; second the move to individualised employment resulted in the employing entity gaining much greater power in determining conditions with ER/HR managers having a pivotal position in that process; and finally the administration of the employment relationship became much more a matter of management prerogative, as well as more legalistic, rather than being a matter of joint regulation.

Bryson "The Good Employer: The Image and the Reality" (paper presented to International Labour and Employment Relations Association 16th World Congress, Philadelphia, 2012) available at SSRN: http://ssrn.com/abstract=2110382 .

[3] Detailed information on bargaining can be found in Stephen Blumenfeld, Sue Ryall and Peter Keily *Employment Contracts: Bargaining Trends and Employment Law Update 2011/2012* (Industrial Relations Centre, Victoria University of Wellington, 2012).

These changes were actively promoted by the Employment Contracts Act 1991 and other legal reforms.[4] In the decade after 1990, legislation intervention in determining terms and conditions was limited to laying down a basic floor of rights, including protection from unjustified dismissal, leaving all other terms and conditions to be determined by negotiation. In practice this meant, in the absence of collective bargaining, determined by management. This position changed somewhat with the Employment Relations Act 2000 which introduced a generic duty of good faith, although this can be seen as building on the pre-existing need to justify dismissals and other decisions that disadvantage employees. The Labour government also introduced some specific, but timid, mandatory conditions such as rest breaks and the right to request flexible working arrangements .[5]

3. Attitudes of HR managers.

The background above makes it clear that the ER/HR function has become increasingly important within enterprises and secondly that it has developed in an environment which places few constraints on terms and conditions of employment, which strongly favours management prerogative and employer flexibility, and in which employers have been largely free to determine conditions of employment and to unilaterally manage employment relationships with the exceptions noted above.

While it is not intended to review the entire literature on attitudes of HR managers it is useful to refer to some specific research carried out in New Zealand; for instance the study carried out by Geare et al in 2005[6] when the reforms in the Employment Relations Act 2000 had been in place for some five years. Geare et al report that while HR managers retain a predominantly pluralistic perspective on the employment relationship at the societal level of abstraction, this finding is reversed at the workplace level of abstraction where 62 per cent of managers viewed employment relationships as being unitary. The authors offer various suggestions for this difference. One is that at the societal level they are likely to report an empirical viewpoint of what they perceive as occurring in organisational life but when they respond from the workplace perspective may be reporting a normative viewpoint of what the situation should be or what they are trying to construct. They also suggest that this shift in ideological thinking could be the result of the influence organisational characteristics and individual characteristics and experiences have on shaping the values and beliefs of managers. The study's finding that managers of smaller organisations tended to report their employment relationships to be more unitary than did managers of larger organisations may support this last argument as managers of larger firms are more likely to have to work with unions in a pluralist environment, a point the authors also make when they suggest unitarist views are stronger in non-unionised workplaces which are more typical of smaller businesses. The study also suggests that strong unitarism is associated with increased use of a high commitment model of HRM practice,

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[4] Most notably the Health and Safety in Employment Act 1992 which contained no provision for employee involvement in matters of workplace safety.

[5] On good faith see Gordon Anderson "Good Faith in the Individual Employment Relationship in New Zealand" (2011) 32 Comp Lab L & Pol'y J 685. On the reforms of the 1990s and 2000 generally see Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011).

[6] Alan Geare, Fiona Edgar and Ian McAndrew "Workplace Values and Beliefs: An Empirical Study of Ideology, High Commitment Management and Unionisation" (2009) 20 International Journal of Human Resource Management 1146.

Geare et al suggest that after a decade of neo-liberal unitarism HR managers remained relatively flexible in their beliefs but that these beliefs will adapt to the circumstances of a particular workplace. A study by Foster et al,[7] while more focussed on collective bargaining, lends support to the view that the strength of unitary beliefs is situational and that employers involved with unions are more comfortable with pluralist processes.

4. The research

The objective of our research was:

- To provide information on the extent to which HR Managers are aware of legal reforms and developments, and how they and their organisations respond to such developments, and
- To assess the extent to which legal solutions are sought, as well as the approach taken by the organisation to legal reforms, for example positive acceptance of legislative objectives; minimal compliance, risk avoidance.

The research was carried out by conducting semi-structured interviews with 10 large employers in both the private and public sectors. The characteristics of these employers are described in the table below.

Organisation	Union Density*	Employee numbers	Interviewee Position
Finance and Banking Sector	Lo	5000+	Senior Manager Employment Relations
Retail	Lo	2500-4999	Director of HR
Private Health	Av	2500-4999	General Manager HRM
Public Health	Hi	2500-4999	Senior Consultant Industrial and Employment Relations
Media	Lo (Av)	2500-4999	Employment Relations Manager
Primary Industry 1	Av	5000+	General Manager Employment Relations
Primary industry 2	(Hi)	1,000-2499	Employment Relations Manager
Public	Hi	5000+	HR Manager and Manager of Employee policy and ER
Quasi-government	Hi	5000+	Head of HR Policy
Consulting	Lo	1,000-2499	Wellington HR manager

*Hi = 60%+ Av=20-59%, Lo = < 20%: Figs in brackets is density in factory/front line areas

The managers surveyed do not, of course, necessarily represent the views of employers generally and of medium and small sized businesses in particular. They do, however, provide a sample of the views of professional HR managers in larger New Zealand based organisations and as such are likely to represent good practice HR and reflect the perspectives of professional HR managers generally. This is not unimportant as the Employment Court, in developing its approach to good faith, has increasingly emphasised the need for employers to observe good HR practices.[8] Moreover while the respondents may not represent employers generally they are broadly representative of the employers of a substantial number of employees. The sample was drawn from employers employing more than 1000 employees and the respondents' organisations employed a total of

[7] Barry Foster and others "Supportive Legislation, Unsupportive Employers and Collective Bargaining in New Zealand" (2011) 66 Relations Industrielles/Industrial Relations 192.
[8] See Anderson and Bryson, above n 5, at 11.

56,500 employees ranging from 15,600 to 1500. The 137 organisations that have more than 1000 employees employ a total of approximately 625,000 employees or 28 per cent of the employed labour force.

It should also be noted, that unlike many medium and small employers, the great majority of the respondents' organisation had a relatively high rate of union density and were used to dealing with unions, factors that may well affect perspectives on the scope of management prerogatives and the right to manage. Nine were unionised, with union density reported as ranging overall from 14 per cent to 60 per cent but with some slightly higher densities amongst particular occupational groups. The 10th organisation had only three union members hence could be said to operate as essentially non-unionised.

Interviews focussed on three areas

1. The most recent example of a legally influenced HR policy change that has been implemented in the organisation.
2. An existing legal requirement in the Employment Relations Act: Consulting in good faith. This question was sub-divided into consulting generally and consultations in relation to redundancy.
3. An area where the government has proposed changes: Rest breaks

The questions were opened ended and permitted a wide range of response which is reflected in the results of the interviews.

5. Legal issues explored

The two legal issues focussed on in the research were chosen on the basis that they represent different approaches to the regulation of employment conditions, and, in the case of rest periods, that the provision in question was one of some political controversy at the time of the research. Participants also raised other topic legal issues during the interviews and in particular the controversial introduction of 90 day trial periods by the National government in 2008.

The legal rules chosen to focus on represent quite different aspects of employment regulation. The first attempts to regulate the manner in which management exercises its contractual rights, prerogatives and discretions on the principle that when the exercise of such powers affect employees they have the right to be consulted and involved in such decisions. Rest breaks, in contrast represent an example of prescriptive regulation.

(a) Consultation with employees.

The generic good-faith obligation[9] introduced in the Employment Relations Act 2000 was seen by the then Labour government as the mechanism needed to develop productive employment relationships and to overcome the strongly unitary/contractual approach to employment relationships that had developed during the 1990s. In this environment the Court of Appeal had

[9] The good faith obligation includes specific obligations relating to good faith collective bargaining but these were not considered in this research

explicitly held that employees had no right to be consulted in relation to employment matters including redundancy.[10]

The Minister of Labour who was responsible for introducing the statutory good faith obligations was later quite explicit that it was intended to achieve a change in workplace relations:

> "..legislation cannot change individual values or beliefs. It can, however, influence and change behaviours. Whether legislation successfully changes behaviours depends on whether it is sufficiently practical in its application to enable those affected to conduct their affairs in an orderly and mutually productive manner."[11]

The obligation to consult is a broad one encompassing most matters that might affect an employee's employment ranging from "any matter arising from an individual employment agreement" to "the effect on employees of changes to the employers business."[12] In these cases the employer's obligations are largely non-prescriptive apart from generic requirements such as "not to mislead or deceive" the other party and to be "active and constructive" and "responsive and communicative."

There is however more explicit regulation of the obligation to consult with employees in relation to proposals likely to have an adverse effect on the continuation of their employment includes an obligation to provide access to information relevant to that decision and to provide an opportunity to comment on the proposed decision.[13]

(b) Rest breaks.

Mandatory rest breaks were introduced by the Labour government shortly before it lost office in 2008. Broadly this legislation[14] provides for 10 minute breaks during a four hour period and additionally for a 30 minute meal break in longer work period, breaks to be taken at reasonably constant intervals "as far as reasonable and practical." The incoming National government introduced a Bill to repeal the mandatory provisions and, for practical purposes and in the absence of agreement, to allow employers total discretion to set rest breaks as they see fit. This Bill has lapsed but its provisions are now contained in a general amendment Bill expected to pass this year.

(c) Trial periods

Trial periods were introduced by the incoming National government in 2008. A trial period must be agreed before employment commences and if agreed has the effect that a new employee may be dismissed at any time within their first 90 days of employment without the right to challenge the dismissal through the personal grievance procedure. Two points should be noted: first New Zealand law does not provide for a qualifying period before the personal grievance procedure[15] may be

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10 *Aoraki Corporation Ltd v McGavin* [1998] 3 NZLR 276 (CA).
11 Margaret Wilson "The Employment Relations Act: A Framework for a Fairer Way" in Erling Rasmussen (ed) *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) at 17.
12 Employment Relations Act 2000, s 4(4).
13 Ibid s 4(1A)(c).
14 Employment Relations Act, pt 6D.
15 The personal grievance procedure in Part 9 of the Employment Relations Act allows employees to challenge a number of employer actions of which a claim of unjustified dismissal is the most common.

accessed, and second 90 day trial periods must be agreed between the parties to an employment agreement.

(d) Sanctions

It might be briefly noted that sanctions for breaches of the measures discussed above are minimal. A penalty may be imposed for breaches of the Act but this is limited to a, rarely imposed, maximum of $20,000 for a body corporate. In the case of a failure to consult the more significant sanction is likely to be a finding that a dismissal or other action was unjustified. The courts treat such breaches as a strong indication of lack of justification on the principle that an employer acting unlawfully cannot be said to be acting justifiably. Failure to consult in relation to a significant restructuring could, and in one case did, result in an order delaying the implementation of any proposal until proper consultation had been carried out.

6. Summary of Findings

(a) Attitudes to employment law

The attitude of HR managers to legal regulation can be gauged by their response to two broad questions. First managers were asked for their view of the importance of employment related legislation as an influence on HR management and policy generally and second whether the influence of the law was greater where the law gives employees clear legal rights or where there is an obvious sanction.

The most interesting finding was that in no case did respondents express overt hostility to current statutory regulation or any indeed any strong statement that legislation was over prescriptive. On the contrary all managers interviewed positively endorsed the need to regulate employment and several saw the need for regulation as particularly important in the case of smaller employers. This consensus included the view that the legislation should include processes for dispute settlement. More generally legislation was viewed as providing a necessary baseline or a minimum set of standards that provided the framework on which employing organisations could build.

There was however also a clear consensus among the managers interviewed that their organisations would have met, and probably exceeded, minimum standards in any case. At least some managers considered the way they built on legal minimums provided them with a degree of competitive advantage as well building a particular organisational culture. Overall the general sentiment expressed was summed up by one manager who stated that the legislation "reflects the country's culture - shows what they value and translates to organisational culture."

In terms of inducing compliance the most important factor was seen as being legislative and legal clarity. The majority of managers were emphatic that their organisations complied with or would comply with their legal obligations and saw compliance as an aspect of corporate citizenship and corporate reputation. Sanctions were generally regarded as ineffective and were not perceived as a major factor in inducing legislative compliance. A number of managers made the point that sanctions were uncertain and relatively modest but also were unlikely to act as a deterrent to large organisations who were more influenced by factors such as corporate reputation. The exception to

this general picture was that some managers saw significant sanctions as clearly justified and effective in some key areas such as safety and health.[16]

(b) Consultation

Consultation with employees generally. All 10 organisations reported that they consult with employees on a range of matters, but which matters are the subject of consultation and the consultation processes differ. All reported consulting in specific types of situations such as: changes to policy; changes to work practices or technology; changes to a job or to a team; restructuring; or health and safety related issues. Some organisations also consulted in order to: improve decisions; get better outcomes; generate staff buy-in to decisions; maintain good employment relations. However, at least half the organisations noted times when consultation did not happen, most commonly because the decision had already been made hence consultation would be pointless and disempowering, or that it can be onerous in commercially sensitive situations.

A full spectrum of trade union involvement in consultation processes was evident, ranging from several organisations meeting regularly with the union to keep them up to date on the business, or to discuss small changes with them that may not be subject to formal consultation. These were generally reported as helpful relationships and a good reminder to consult, but for a minority the union relationship was not helpful and often adversarial.

Most provide feedback of the result to staff including themes of their feedback and what will happen as a result. However, mostly the outcome is that proposals go ahead with only small changes.

(c) Consultation in relation to restructuring and redundancy.

This type of consultation evinced a far more formal and serious process, with clear and meticulous policy. Collective employment agreements, and in one organisation their individual employment agreements, had clear requirements around consultation such as policy, process and timeframe. Processes mirrored those reported for general consultation but some went to an additional round of feedback on revised proposals. At least five organisations also noted putting support mechanisms in place for staff throughout these processes. All reported that the information circulated was specific proposals with a clear rationale or explanation of the business imperative; providing as much information as possible but not "down to the dollar details". At least half the organisations noted that unions, as a third party, made the consultation process easier. Consultation timeframes were generally reported as one to six weeks, with one company allowing up to six months for a major restructuring.

Final decision makers were generally reported as department heads or the executive, senior management team, but certainly not HR or ER Managers. At least three organisations noted that the process and outcome can depend on the person/manager doing it, in particular how adamant they are about the outcome they want and whether they believe staff have anything to add.

[16] Unlike breaches under the Employment Relations Act, offences under the Health and Safety in Employment Act may, in cases of serious harm, attract fines of up to $500,000 and possible imprisonment.

For some organisations, difficulties arose when decisions were made by overseas parent companies but had to be implemented in New Zealand and when proposals involved greater commercial sensitivity such as contracting out.

A common range of reasons were given by all organisations for having their consultation processes which included avoiding legal risk but the more important drivers appeared to be controlling the brand or organisational reputation in order to retain and attract staff and/or customers, dealing in good faith, keeping teams included and engaged, "doing the right thing", being a good employer and getting a better decision.

(d) Rest breaks

Views were sought on whether the government should regulate for rest breaks or leave it as a matter for agreement between the parties or for employer prerogative. The personal opinions of all the interviewees supported rest breaks as very important, a number highlighting health and safety considerations. Nearly all the organisations noted that rest breaks were well prescribed in their existing collective employment agreements, that the arrangements worked well and that they would not seek to change anything should the law change. Most expressed the opinion that there is a need for flexibility in the law in order to accommodate different types of work arrangement, but that there is a need for some guideline or minimum standard to ensure good practice by employers. About the half the interviewees thought that small employers or "ignorant or nasty" employers might need legislation to make them provide rest breaks in a reasonable manner, or at all.

(d) Trial periods

Respondents were not asked directly about trial periods but in responding to a question about their most recent legally inspired HR policy change four of the organisations cited the 90 day trial. As noted above such a period must be agreed by the parties. Interestingly, for three of the four organisations that commented, the HR policy supported by senior management was to opt out of using the 90 day trial provisions. All three considered that they had good hiring processes, and that the 90 day trial potentially created a poor recruitment and selection culture which they did not want to encourage. The fourth organisation chose to reign in/more closely manage the use of the trial provision by its managers so that it was not used as a mechanism to offset bad hiring practices. In all these cases the senior management stance was supported by the stance of the relevant trade union for that workplace.

7. Discussion

The research reported in this paper was focussed on professional HR managers in large, relatively visible New Zealand organisations. As such the results are, in the main, not unsurprising. In evaluating the results reported from this research some points need to be kept in mind.

First, in the main New Zealand labour law is not over-prescriptive and does not contain detailed compliance requirements although clearly there are substantive obligations that must be complied with. This was seen in the case of consultations in relation to redundancy and is also the case when employees are dismissed. Legal requirements that might be an irritant, such as the need to provide a written statement of basic terms and conditions, are more likely to irritate small employers. It is also smaller employers who are more likely to resent obligations to consult or other measures that

interfere with their assumed "prerogatives." Measures such as the repeal of specified rest breaks and the introduction of trial periods are driven mainly by this group of employers.

Second, the respondents were professional HR managers in large organisations and were used to and comfortable dealing with unions. With exceptions the relationship with unions was positive. These characteristics in particular would be less common with HR managers employed by medium sized enterprises.

Third, in considering the results it is also important to take into account the overall number of employees employed by the organisations included in the interview group and the group from which the sample was drawn, that is approximately 28 per cent of the employed workforce. This is particularly important when considering our findings in relation to surveys of managers/employers where the results include responses from smaller employers. For example the Geare et al study noted above surveyed some 675 managers but only five of these were from firms with more than 500 employees.

In terms of answering the main question of this paper; can public policy change be effected through affecting an organisations decision-making processes when HR managers are influential in directing those processes?, there is some reason for optimism at least among larger employers. As was noted it is these employers that employ a very significant proportion of the workforce and whose influence on other employers, especially medium sized employers, is likely to be positive.

There are several reasons for optimism. One is that the respondents interviewed do not appear to hold strong unitarist views and are comfortable working within a pluralist framework including with trade unions. This would suggest a receptiveness to government policy initiatives although this might be qualified by the observation that the respondents largely saw themselves as leaders in employment conditions and might not expect to be unduly affected by potential initiatives. Indeed among the respondents there was an underlying attitude of we already have good employment conditions and legal protections are more necessary to control smaller employers.

A second reason for optimism is that the driver for compliance with the law in their organisations is not primarily the law itself but rather corporate brand/reputation including the desire to be seen as complying with legislative requirements. That is not to say that the possibility of legal sanctions was not relevant but it was the reputational impact, for example publicity of adverse findings in personal grievance proceedings, that seemed most influential.

A third reason is that the organisations in question have implemented detailed consultation processes. The responses did not indicate whether this was in response to the 2000 reforms, but given the active legal hostility to any form of mandatory consultation during the 1990s, it might be assumed that the adoption or development of such processes would have been at least partially influenced by these reforms, especially as respondents indicated a pro-active approach was taken to changed legal obligations generally. It was also interesting that the approach to consultation did not appear to differ markedly in the one organisation which was effectively non-union. Consultation requirements would seem to meet Wilson's criterion of legislation that "is sufficiently practical in its application to enable those affected to conduct their affairs in an orderly and mutually productive manner."

We embarked on the research expecting to find responses to employment law that were epitomised by either: risk avoidance, minimal compliance, or active resistance. However what we actually found amongst these bigger employers was that they met the law and improved upon it. This behaviour was largely a strategic choice by senior management teams and HR/ER advisors, but also encouraged in a variety of ways by input. This research is however only preliminary research among major employers. Future research is intended to investigate firms in the 100-1000 employee group. If the attitudes identified by Geare et al are correct it is likely that a wider range of behaviours might be exhibited and a more difficult environment for inducing change emerge.