

# LABOUR LAW AND FLEXICURITY: COMPARATIVE PERSPECTIVES

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*Dans cet article, l'auteur offre aux lecteurs un panorama des derniers développements législatifs et jurisprudentiels du droit du travail australien et néo-zélandais.*

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## I INTRODUCTION

Labour law is a surprisingly young discipline. As an academic subject in its own right, labour law only became fully recognised at the European universities after World War II. German scholars, in particular, were instrumental in developing this new field of study. The great Kahn-Freund singled out Hugo Sinzheimer as the founding father of labour law. It was Sinzheimer who brought about 'the conception of labour law as a unified, independent legal discipline'.<sup>1</sup>

German scholarship traditionally defines labour law as employee protection law (*Arbeitnehmerschutzrecht*). It is an expression that captures the essence of the subject matter at the heart of labour law rather well. While the employment relationship technically is based on contract, simply to apply the general rules of contract law proves problematic as the relationship between employer and employee is fundamentally and inherently unequal. Put simply, it concerns a relationship whereby one party is economically dependent on the other for his or her livelihood. The subordinate nature of the employment relationship is exacerbated by the consideration that it involves an on-going relationship between

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<sup>1</sup> Otto Kahn-Freund *Labour Law and Politics in the Weimar Republic* (Basil Blackwell, Oxford, 1981) 75.

the parties as opposed to one-off relationships in other types of contract such as, most commonly, contracts of sale.<sup>2</sup>

Its relatively recent origins notwithstanding, the employee-protective nature of labour law has come under serious pressure of late. The combined effect of various factors – rapid technological change, the shift towards a more knowledge-based economy and, not least, the ever more pervasive forces of globalisation – has been to trigger calls for a re-balancing of the social concerns of employees and the economic imperatives of business. The dawn of a new millennium provided a further impetus for policy makers to revisit the regulatory framework of labour law head-on. Thus, in 2000 the European Council met in Lisbon where the heads of state and government formulated a strategic, and certainly a most ambitious, goal for 2010: for the European Union to become 'the most dynamic and competitive knowledge-based economy in the world', capable of 'sustainable economic growth' and typified by 'more and better jobs' as well as 'greater social cohesion'.<sup>3</sup> When a mid-term review of the so-called Lisbon agenda lamented the lack of progress in the implementation thereof, it was officially relaunched as 'the Lisbon strategy for growth and employment' in 2005.<sup>4</sup> One year later the European Union sought to initiate public debate throughout Europe on how labour law regulation best could be adapted to support the Lisbon objective. The starting point for this debate became a 2006 Green Paper with the suggestive title of *Modernising Labour Law to Meet the Challenges of the 21<sup>st</sup> Century*.<sup>5</sup> The Green Paper is discussed more fully below.<sup>6</sup>

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2 Martin Vranken "Autonomy and Individual Labour Law: A Comparative Analysis" (1989) 5 International Journal of Comparative Labour Law and Industrial Relations 100.

3 Lisbon European Council 23 and 24 March 2000, Presidency Conclusions, 1. An electronic version of the text can be found at <[www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)>.

4 The 2004 Report from the High Level Group chaired by Wim Kok (a former Prime Minister of the Netherlands) is entitled *Facing the Challenge: The Lisbon Strategy for Growth and Employment*. An electronic version of the text is available on the web site of the European Commission at <[www.ec.europa.eu/research/evaluations/pdf/archive](http://www.ec.europa.eu/research/evaluations/pdf/archive)>.

5 Commission of the European Communities, COM(2006) 708 final, Brussels, 22.11.2006: <<http://eu-lex.europa.eu>>.

6 See II Modernising Labour Law in Europe: Flexicurity.

The drive towards a revamped labour law better suited to the demands of the 21<sup>st</sup> century, while alive and well in Europe,<sup>7</sup> is by no means confined to that part of the world. In terms of actual reform the picture is decidedly mixed. The USA represents one (extreme) side of the spectre. In that country fundamental reform effectively goes back to the Great Depression of the 1930s. It triggered the adoption of the National Labour Relations Act, also known as the Wagner Act, in 1935. Intriguingly, no substantial change has proven politically feasible since.<sup>8</sup> Allowance must be made, of course, for the impact of the civil rights movement of the 1960s on employee protection against discriminatory treatment by the employer. By contrast, in Canada, Professor Emeritus Harry Arthurs was appointed by the Minister of Labour in 2004 to review aspects of the Canada Labour Code and, in particular, the employment conditions – the so-called labour standards – of workers in federally regulated enterprises. A comprehensive report, including a list of recommendations for change, was published in 2006.<sup>9</sup> It was followed by an extensive public consultation period which ended in June 2009 and this is where the matter rests – for now. Closer to home, the Australian/New Zealand model of compulsory conciliation and arbitration, with its associated philosophy as regards the pivotal role of the state in industrial relations, succumbed – to a greater (in New Zealand) or lesser (in federal Australia) extent – to the forces of a free market economy during the final two decades of the 20<sup>th</sup> century. The current legislative framework for the regulation of what is, highly symbolically, no longer called industrial relations but, much more fashionably, employment relations in both countries is best appreciated against this broader backdrop.<sup>10</sup>

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7 Silvana Sciarra '*Modernisation' of Labour Law: A Current European Debate*', International Institute for Labour Studies (ILO), Geneva, 2007.

8 Matthew W Finkin "Law Reform American Style; Thoughts on a Restatement of the Law of Employment" in Roger Blanpain and Manfred Weiss (eds) *Changing Industrial Relations and Modernisation of Labour Law* (Liber Amicorum in Honour of Professor Marco Biagi) (Kluwer Law International, The Hague, 2003) 139.

9 Federal Labour Standards Review, *Fairness at Work. Federal Labour Standards for the 21<sup>st</sup> Century*, Human Resources and Skills Development Canada, Gatineau (Québec), 2006, 302pp.

10 See, respectively, the Employment Relations Act 2000 (NZ), as amended, and the Fair Work Act 2009 (Cth).

## ***II MODERNISING LABOUR LAW IN EUROPE: FLEXICURITY***

### ***A The Green Paper on Modernising Labour Law***

The Green Paper<sup>11</sup> starts from the premise that European labour markets face the challenge of 'combining greater flexibility with the need to maximise security for all'.<sup>12</sup> The Green Paper thus acknowledges the emergence of two broad reform strategies of the various EU member states at the national level.<sup>13</sup> First, several continental European countries opted for a gradual transformation of their labour law systems, essentially by leaving any traditional employee protection devices untouched while yet allowing for a new series of flexible but less secure employment devices to coexist in a parallel fashion. The latter are known as atypical or precarious forms of employment. As their appeal grows, so does the risk of labour market segmentation. The net result is a two-tier labour market divided between 'insiders' enjoying full employment rights and 'outsiders'. These 'outsiders' often are new entrants to the job market or retrenched middle-aged 'permanent' employees. This approach to labour law reform can be found in France and Germany, as well as Belgium, Luxembourg and Austria. The Green Paper sees this development as fraught with problems and therefore undesirable in the long run. An alternative, and ultimately more attractive, broad reform strategy at a national level of the EU member states can be found in Northern Europe and, in particular, Denmark, Finland, Sweden, as well as the Netherlands. In these countries reform has tended to focus pretty much on the labour market across the board, but it has been complemented by proactive social and employment policies that are as generous as they are rigorous.<sup>14</sup> It is this second reform strategy that has come in for closer scrutiny in EU circles through the newly coined term of "flexicurity".

Flexicurity is a key concept in the 2006 Green Paper. The term captures the need simultaneously to embrace economic flexibility and employment (but not

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<sup>11</sup> Above, n 5.

<sup>12</sup> Ibid, at 1.

<sup>13</sup> See the discussion (in Dutch) by Marc De Vos "Perspectief op oorsprong, realiteit en duurzaamheid van flexicokerheid" in Frank Hendrickx, Mathieu van Putten, Wim Vandepitte, en Anne Rahmé (eds) *Arbeidsrecht tussen wel-zijn en niet-zijn* (Intersentia, Antwerpen, 2009) 729.

<sup>14</sup> Ibid, at 730.

necessarily job) security. In doing so, it is not the built-in tension between flexibility and stability but rather the complementary nature of both pursuits that is meant to be brought to the fore. The origins of flexicurity can be traced to two EU member states, in particular. Dutch professor Hans Adriaansens, a sociologist, reportedly used the term in speeches and interviews in the mid-1990s. Flexicurity is also a notion that can be linked to a Danish government policy pursued under Prime Minister Poul Nyrup Rasmussen during the 1990s. At its core, the Dutch/Danish 'model' is perhaps best understood in terms of a pyramid or triangle with three interrelated components. The starting point, and a central feature at the top of the pyramid, is a relaxed (ie 'flexible') approach to the legal regulation of hiring and firing. It is typified by reduced limitations on the use of non-standard ('precarious') employment contracts and a relatively unrestricted approach to employee dismissals. In exchange, and to one side at the bottom of the pyramid, generous unemployment benefits are made available to anyone who finds themselves 'in between jobs'. This financial assistance through the public purse (but with the possibility of contributions from private industry) in turn forms a vital part of a dynamic labour market policy, to the other side at the bottom of the pyramid, directed at creating rights (but not without corresponding obligations) with respect to life-long continuing education and training.<sup>15</sup>

The term flexicurity itself, including the associated search for a 'coherent' balance between security and flexibility, has been acknowledged as a desirable objective in the Arthurs report commissioned by the federal government in Canada.<sup>16</sup> In Europe, a one-size-fits-all approach to flexicurity was deemed inappropriate given the national diversity of the various EU member states alluded to above. The Green Paper certainly does not advocate a *tabula rasa* approach to the existing labour regulation in the member states. Even so, the Green Paper provides a solid basis for reflection upon the national state of affairs in the member states.

### **B From 'Common Principles' of Flexicurity to Flexicurity 'Pathways'**

Subsequent to the release of its Green Paper the European Commission formulated eight so-called 'common principles' on flexicurity and these were

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<sup>15</sup> See the discussion in Martin Vranken *Death of Labour Law? Comparative Perspectives* (Melbourne University Press, Melbourne, 2009) 204 (chapter 8).

<sup>16</sup> *Fairness at Work. Federal Labour Standards for the 21<sup>st</sup> Century*, above n 9, 254.

formally adopted by the Council of the European Union in December 2007.<sup>17</sup> Most striking is the level of their generality and this in turn casts some doubt over their ultimate usefulness in revamping labour law in Europe. Clearly, the EU finds itself caught between a rock and a hard place. It cannot dictate reform in a top-down fashion as it lacks exclusive powers: labour law and, even more so, social security remain a shared jurisdiction at best. The 2009 Treaty of Lisbon does not alter this state of affairs. The 'common principles' then have to accommodate national (and regional) diversity in – for now – no fewer than 27 member states encompassing a population totalling some 500 million people.

The eight common principles on flexicurity can be set out as follows:

1. Flexicurity is about more and better jobs, adaptability and social inclusion.
2. Flexicurity requires an integrated approach to contractual employment arrangements, comprehensive lifelong learning strategies, effective (active) labour market policies, and adequate yet sustainable social security systems.
3. Flexicurity, by definition, is not about a single model or strategy to be superimposed on all.
4. Flexicurity is about overcoming labour market segmentation.
5. Flexicurity is to be pursued both at micro and macro economic levels.
6. Flexicurity is about promoting equal opportunities for both genders.
7. Flexicurity requires a climate of trust among the social partners.
8. Any costs associated with flexicurity ought to be spread fairly between public authorities and private parties, while making allowance for the special position of small and medium-sized businesses.

Of special note is the seventh common principle. It acts as a vivid reminder that, both at the national and EU levels, the cooperation of the collective representatives of employees and employers has often proved of the utmost importance – both as regards the actual drafting of labour law rules and compliance.

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<sup>17</sup> Council of the European Union, 16201/07, SOC 523, ECOFIN 503, Brussels, 6 December 2007. The text of this document is reproduced in Vranken, above n 15, 256 (appendix 3).

To assist the member states in bringing about flexicurity domestically, the European Commission additionally set out a number of so-called 'pathways' – effectively, four packages of suggestions for change that seek to cater for any differences in the regulatory frameworks of individual member states.<sup>18</sup> These pathways were developed on the basis of a report prepared by a committee of experts – the European Expert Group on Flexicurity – with (economics) Professor Ton Wilthagen from the University of Tilburg in the Netherlands as its *rapporteur*.<sup>19</sup> Pathway 1 seeks to tackle contractual segmentation and it therefore targets countries where the key challenge is labour markets with insiders and outsiders – arguably, the core member states of France, Germany and Belgium, in particular. This first pathway aims at distributing flexibility and security more evenly across the entire workforce. It suggests moving away from a situation where fixed-term contracts, on-call contracts, agency work, and the like, operate as *de facto* employment traps by improving the employment conditions of temporary workers in creative ways. These improvements can include greater access to training facilities at industry and/or regional level, bearing in mind that temporary workers often miss out on on-the-job training opportunities due to employer reluctance to invest in 'transient' workers. They can also involve a remodelling of a particular country's social security system in order to allow temporary workers to accumulate rights and make entitlements portable across individual firms or even industries. Simultaneously, new stepping stones in what is referred to as a 'tenure track approach' to secure employment might be created by redesigning the traditional open-ended contract of employment. This redesign would involve a gradual build-up of job protection, starting with a relatively basic level of security upon commencing employment and culminating over time in 'full' protection.<sup>20</sup> The idea then is to reduce the risk of people becoming 'stuck' in

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<sup>18</sup> Annex I (Flexicurity Pathways) of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions: Commission of the European Communities, *Towards Common Principles of Flexicurity: More and better Jobs through Flexibility and Security*, COM (2007) 359 final, Brussels, 27 June 2007.

<sup>19</sup> European Expert Group on Flexicurity, *Flexicurity Pathways: Turning Hurdles into Stepping Stones*, Brussels, June 2007.

<sup>20</sup> A parallel can be drawn with recent legislative change in New Zealand extending the availability of trial periods of up to 90 days without full dismissal protection rights to all companies regardless of workforce size: see IVB4.1 below.

less protected contracts by providing a quasi-automatic progression towards better contractual conditions in a tenure-track fashion.

Pathway 2 is directed at countries with low job mobility, whether within or between companies. It therefore might be called a pathway for tackling a lethargic workforce.<sup>21</sup> This second pathway is directed at countries where the primary source of employment security is created by and within large companies. Employees consequently tend to develop a strong attachment to their employer which results in low labour market mobility. When these countries additionally operate generous social security systems, it can prove particularly difficult to 'persuade' any employees who become unemployed to actively seek and accept alternative employment elsewhere. The net result tends to be long-term unemployment for an uncomfortably large part of the country's population at working age. The focus of pathway 2 then is on increasing investment in the employability of workers in two principal ways. First, employees within companies would be provided with opportunities (and expected) to continuously update their skills in order to be better prepared for future changes in production methods and/or the organisation of work. Second, this pathway seeks to look beyond an employee's current job or current employer by putting in place a system that facilitates and encourages job transitions that are both safe (in terms of employment conditions) and desirable (in terms of business needs) whenever company restructuring results in redundancies. In this manner pathway 2 builds upon the European Union's earlier experience with the social implications of economic restructuring at the time of the creation of the single (economic) market. Intriguingly, the position of older employees is not addressed specifically in the Commission document, notwithstanding proposals on this very subject by the European Expert Group on Flexicurity.<sup>22</sup>

Pathways 3 and 4 appear addressed at the relatively poorer member states of the European Union, including the new entrants from the Baltics, Eastern Europe and, most recently, the Balkans. In a nutshell, pathway 3 seeks to tackle social exclusion and upward mobility problems, whereas the focus of pathway 4 is more on dealing with long-term unemployment and the 'informal' (black market) economy. The main challenge identified in the third pathway is lifelong learning

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<sup>21</sup> The discussion below draws heavily from Vranken, above n 15, 223.

<sup>22</sup> Ibid, 224.

with a special emphasis on improving the initial schooling system. Under this pathway early school leaving is to be 'fought' and the general qualification levels of all school leavers improved. Further, pathway 3 recognises the need to address illiteracy and innumeracy problems among the adult population. Workforce training needs to be targeted especially at the low skilled, informal learning recognised and 'easy access' language and computer training organised both inside and outside the workplace. Pathway 4 targets countries that have only just begun their transition to a market-based economy. In these countries employment and income security overwhelmingly used to be provided by the state or state-run companies. Traditional, often industrial, companies have been forced to lay off large numbers of people. Unemployed workers receive benefits that are often designed as 'labour market exit benefits' rather than 'transition into new employment'. Further, investments in active labour market policies are limited and people's prospects of finding alternative employment low. The main suggestion under this fourth pathway is for improving opportunities of 'benefit recipients' and, in particular, shifting from informal to formal employment through the development of 'effective' active labour market policies and lifelong learning systems combined with an adequate level of unemployment benefits.

### **C From 'Mission for Flexicurity' via 'Flexicurity in Times of Crisis' to a 'Europe 2020' Strategy**

Individual EU countries first had to report on the implementation of their specific national pathways towards flexicurity by the end of 2008, with follow-up reports to be submitted in 2009 and 2010. To assist the member states in the preparation of their initial national report, the European Commission launched a fact-finding committee, referred to as Europe's Mission for Flexicurity. This Mission for Flexicurity in essence entailed the establishment of a small working group, comprising EU officials and representatives of the European social partners (unions and business). The group's *modus operandi* was to visit a limited number of self-selecting (if not entirely random) member states for in-depth discussions.<sup>23</sup> More generally, the 'mission for flexicurity' initiative was meant to allow the Commission to monitor the member states' progress in their

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<sup>23</sup> These countries were France, Sweden, Finland, Poland and Spain.

implementation of the 'common' flexicurity principles as outlined earlier in this paper.<sup>24</sup>

The Mission for Flexicurity presented its report to the Council of the European Union in December 2008.<sup>25</sup> At that stage the global financial crisis was in full swing. The first of three 'general lessons' learned by the Mission stressed the need to persevere with the implementation of flexicurity. Short and long-term gains (in terms of jobs, productivity and competitiveness) were said to justify 'keeping the reforms on course'. Secondly, the role of the social partners in establishing national flexicurity pathways was identified as 'crucial', both because of the need to create a broad-based consensus and the need for a high degree of trust between the social partners themselves. Thirdly, matching the needs of companies and the skills of employees (including jobseekers) was said to require constant fine tuning and, in particular, an ongoing effort at 'anticipating' trends in the labour market and the demand for skills.

The continued impact of the global financial crisis on economic activity ultimately had its toll after all. On 8 June 2009, certain conclusions on 'flexicurity in times of crisis' were adopted by the Council.<sup>26</sup> They provided an opportunity for the Council to stress that:<sup>27</sup>

The current economic situation is difficult and complex and will severely jeopardize the employment targets of the Lisbon strategy and may undermine long term sustainability. *This should be taken into account when implementing the flexicurity approach.* All measures taken should aim at maintaining a high level of employment and job creation, and thus promoting the long-term growth potential of the EU economy (emphasis added).

In March 2010 the Commission put forward a 'Europe 2020' strategy in which it set out its vision of Europe's social market economy for the 21<sup>st</sup> century.<sup>28</sup> As

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<sup>24</sup> See IIB above.

<sup>25</sup> Council of the European Union, 17047/1/08 REV 1 (en) SOC 776, ECOFIN 606, Brussels, 12 December 2008.

<sup>26</sup> Council Conclusions on Flexicurity in Times of Crisis, Luxembourg, 8 June 2009; 10388/09 SOC 374, ECOFIN 407, Brussels 28 May 2009.

<sup>27</sup> Ibid, Paragraph 16.

<sup>28</sup> European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020, Brussels, 3 March 2010.

part of an 'agenda for new skills and jobs', the Commission reiterated its aim to create conditions for modernising labour markets so as to raise employment levels within the EU and ensure 'the sustainability of our social models'.<sup>29</sup> To this effect the Commission has undertaken, among other things, 'to define and implement the second phase of the flexicurity agenda' in conjunction with the European social partners.<sup>30</sup>

The 'Europe 2020' strategy was formally adopted by the European Council at its June 2010 meeting. The precise shape of any future EU action on flexicurity remains unclear at this stage. At a national level as well, the pervasive nature of the economic recession may severely test the faith of several European governments in flexible labour markets. Europe's problems are by no means confined to Greece. In France proposals for even modest pension reform triggered public outcry and demonstrations during the autumn of 2010. In two further founding member states of the (then) EEC, prolonged negotiations for the formation of a central government have only added to a general picture of inertia.<sup>31</sup>

### ***III MODERNISING LABOUR LAW IN AUSTRALIA: THE FAIR WORK ACT 2009 (CTH)***

#### ***A Doing Away with Work Choices***

In enacting the Fair Work Act of 2009, the Rudd Labour government honoured an election promise to abolish the controversial Work Choices legislation from the Howard era. Broadly speaking, 'work choices' epitomises the Coalition's approach to the regulation of industrial relations since the Howard government took office in 1996. More narrowly, 'work choices' refers to legislation adopted in 2005 to amend the Workplace Relations Act 1996 (Cth). The 1996 legislation in turn replaced the Industrial Relations Act 1988 (Cth), as amended from time to time.

In terms of substance, a core feature of the Coalition's reform agenda was the introduction of so-called Australian workplace agreements (AWAs). AWAs are,

<sup>29</sup> Ibid, 16.

<sup>30</sup> Ibid, 17.

<sup>31</sup> In the Netherlands and Belgium these negotiations were conducted throughout the European summer of 2010 and beyond.

in effect, statutory individual employment contracts. As such, AWAs need not be a particularly controversial instrument for determining terms and conditions of employment. However, when championed as the primary and, ideally (from a government's perspective), sole instrument for negotiating employment conditions, outmanoeuvring collective bargaining in the process, AWAs acquire the potential to bring about significant change not only in the approach to labour law regulation in Australia but also in the actual contents of labour law itself. At a minimum, 'work choices' then is to be understood as a label reflecting a contractual approach to the negotiation of wages and other terms of employment between individual businesses and their workforce.

A particularly controversial aspect of the Work Choices Act 2005 (Cth) was its encourage-hiring-by-facilitating-firing philosophy as regards employment growth. In practical terms, employees in companies with a total workforce up to (and including) 100 people were prevented from challenging the fairness of their dismissal.<sup>32</sup> In a further attempt at maximising flexibility for business, redundancies occurring in the context of company restructuring could not be challenged either, regardless of the size of the particular company.<sup>33</sup> Ironically, individual employers seeking to boost staff morale and loyalty by providing for more employee-friendly termination of employment arrangements became liable for the payment of a fine under the legislation!

Wide-spread public dissatisfaction with Work Choices directly contributed to a Labour election victory in November 2007, notwithstanding amendments made by the Howard administration during its final year in office which aimed at restoring some semblance of balance in the employment relationship by providing for, in particular, a 'stronger safety net' for employees.<sup>34</sup>

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<sup>32</sup> Section 643(10) of the Workplace Relations Act 1996 (Cth) as amended by s 113 of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

<sup>33</sup> Section 643(8) of the Workplace Relations Act 1996 (Cth) as amended by s 112 of the Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

<sup>34</sup> Workplace Relations Amendment (A Stronger Safety Net) Act 2007 (Cth). Other amendments to Work Choices were contained in the Workplace Relations Amendment (Independent Contractors) Act 2006 (Cth). See the discussion by Andrew Stewart and Anthony Forsyth "The Journey from Work Choices to Fair Work" in Anthony Forsyth and Andrew Stewart (eds) *Fair Work. The New Workplace Laws and the Work Choices Legacy* (Federation Press, Sydney, 2009) 1 at 6-7.

## B The Fair Work Legislation

### 1 Flexicurity à l'Australienne

Section 3 of the Fair Work Act 2009 (Cth) states the overall objective of the statute in the following terms:

[T]o provide a *balanced* framework for cooperative and productive workplace relations that promotes national *economic* prosperity and *social* inclusion for all Australians (emphasis added).

The reference to a balanced approach in regulating workplace relations reminds one of a similar emphasis on 'a balance of fairness' in the Explanatory Note accompanying New Zealand's Employment Relations Amendment Bill (No 2) 2010.<sup>35</sup> In this fashion both the Australian and the New Zealand legislatures seek to remedy a perceived imbalance in the pre-existing regime of labour law as inherited from a previous government. Only, a crucial difference is that in New Zealand the proposed legislation comes in response to a presumed pro-employee bias embedded in legislation adopted under a Labour government – the Employment Relations Act 2000. By contrast, the balance the Rudd government sought to bring about in Australia ostensibly meant to give employees a break. Note, however, that nothing in the drafting of the Fair Work Act 2009 (Cth) suggests a *prima facie* hierarchical superiority of employee interests over those of employers.<sup>36</sup>

Among the various means to achieve the objective of the 2009 legislation section 3 lists the provision of rules that are both 'fair to working Australians' and 'flexible for business'. Employee fairness and employer flexibility then are not viewed as mutually exclusive concerns in Australian labour law today. However, the Rudd administration was cautious not to be seen overstepping the mark. After all, its very survival in no small part depended on its economic credentials. As a practical matter, this meant that the interests of business had to be acknowledged as coinciding with the broader public interest in a largely export-driven national economy.

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<sup>35</sup> Explanatory Note 1. See the discussion in IVB below.

<sup>36</sup> Martin Vranken "Employee Protection: An Outmoded Notion in Australian Labour Law?" (2010) 26 International Journal of Comparative Labour Law and Industrial Relations 231 at 235.

Pursuant to the Fair Work Act 2009 (Cth) employees are to be offered 'a guaranteed safety net' of minimum employment conditions that are 'fair, relevant and enforceable'.<sup>37</sup> Two core sources of employee rights to this effect are the statute itself and 'modern' (i.e. revamped) awards. In particular, the statute identifies 10 so-called national employment standards (NES). A further 10 minimum terms of employment become available as the result of a process of award restructuring, entrusted to the Australian Industrial Relations Commission, for employees earning up to AUD \$100,000 (indexed).<sup>38</sup> Minimum employment conditions are precisely that: they cannot be undercut, whether through collective (enterprise) or individual bargaining between employer and employees.

## *2 The National Employment Standards*

Using federal legislation to create substantive employment rights is not a straightforward proposition in Australia. Pursuant to section 51(35) of the Commonwealth Constitution the so-called industrial power is limited to conciliation and arbitration for the prevention and settlement of inter-state industrial disputes.<sup>39</sup> The jurisdictional basis used for the enactment of the NES by the federal Parliament instead is the corporations power in section 51(20) of the Constitution. It helps explain why the personal scope of application of the NES is restricted to so-called 'national system' employees.<sup>40</sup> In essence, these are employees employed by incorporated businesses.<sup>41</sup> The Government estimates that up to 85% of Australian employees may thus be covered by the Act.<sup>42</sup>

In terms of subject matter the NES deal with the following 10 issues:

1. maximum weekly working hours;

<sup>37</sup> Section 3(b) of the Fair Work Act 2009 (Cth) (object clause).

<sup>38</sup> The Government was of the opinion that employees on high pay can negotiate their own terms and conditions of employment and therefore they 'do not require the same level of safety net protection as lower paid employees': Fair Work Bill 2008, Explanatory Memorandum, xxviii-xxix.

<sup>39</sup> For a discussion of the interpretation of s 51(35) over time by the High Court of Australia, see Breen Creighton and Andrew Stewart, *Labour Law* (4<sup>th</sup> ed, Federation Press, Sydney, 2005) 84.

<sup>40</sup> Section 60 of the Fair Work Act 2009 (Cth).

<sup>41</sup> Sections 13 and 14 of the Fair Work Act 2009 (Cth).

<sup>42</sup> Fair Work Bill 2008, Regulatory Analysis accompanying the Explanatory Memorandum, v.

2. flexible working arrangements for employees;
3. parental leave and related entitlements;
4. annual leave;
5. personal/carer's leave, including compassionate leave;
6. community service leave;
7. long service leave;
8. public holidays;
9. termination notice and redundancy pay;
10. 'fair work' information sheet.

A number of observations are called for. Most obvious is that no fewer than six of these NES deal with various arrangements for employees to take leave (and hence to be away from work!). Arguably, this reflects an official concern for employees to balance work and family life. Of note is, however, that these leave entitlements are not necessarily on full pay. Most prominent is the statutory provision for 12 months' unpaid parental leave.<sup>43</sup> It is only pursuant to the Paid Parental Leave Act 2010 (Cth) that employees have since become entitled to payment – from the public purse and at the minimum wage rate - for 18 weeks of those 12 months from 1 January 2011 onwards.

The precise contents of the various NES listed above remains difficult to gauge. Several NES have been phrased rather too loosely for their contents to be clear upfront. Thus, for instance, the statutory provisions as regards the maximum weekly working time of 38 hours expressly allow for and, in effect, expect this particular entitlement to be given shape by the (collective) parties to a (modern) award or enterprise agreement.<sup>44</sup> Other NES create purely procedural entitlements and this renders them rather hollow as for their specific contents. A case in point is the employees' entitlement to flexible work arrangements when caring for young children: at its core, this 'entitlement' merely amounts to a legislated right to ask the employer.<sup>45</sup> The substance of this particular NES then may need to be

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<sup>43</sup> Section 70 of the Fair Work Act 2009 (Cth).

<sup>44</sup> Sections 55(3) and 63 of the Fair Work Act 2009 (Cth).

<sup>45</sup> Section 65 of the Fair Work Act 2009 (Cth).

the subject of uncertain (in terms of outcome) individual negotiations between a particular employee and the employer. Tellingly, the latter may refuse the employee's request on 'reasonable business grounds'.<sup>46</sup>

Most NES do not introduce genuinely new entitlements, even though the Fair Work legislation – on its face – doubles the number of 'fair pay and conditions standards' previously available under Work Choices.<sup>47</sup> In effect, the 2009 Act enshrines in legislation a number of benefits previously achieved through the award system. It also consolidates several other benefits previously available under separate (State) legislation. Not even then do all NES become genuinely applicable to all employees. Thus, the statutory entitlement to redundancy pay is not available if the employer qualifies as a small business, i.e. in situations where fewer than 15 employees were employed immediately before the redundancy.<sup>48</sup> New employees, defined as employees with less than 12 months' seniority, miss out regardless of the size of the business that employs them. The (modernised) award may contain further exclusions.<sup>49</sup> Understandably, redundancy compensation is not available to employees for whom suitable alternative employment can be found. Most intriguing is, though, that the actual amount of the redundancy compensation to be paid may vary depending on the individual employer's ability to pay.<sup>50</sup> Particularly in instances of employer insolvency, this can render the particular statutory entitlement rather meaningless!

Not listed as a NES is the minimum wage entitlement. This is because a newly created regulatory body, with the title of Fair Work Australia, has assumed separate responsibility for creating a safety net of 'fair minimum wages' that take into account, among other things, the 'performance and competitiveness of the national economy' as well as the 'relative living standards and the needs of the low

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<sup>46</sup> Section 65(5) of the Fair Work Act 2009 (Cth).

<sup>47</sup> Murray and Owens talk of 'old wine in new bottles': Jill Murray and Rosemary Owens, *The Safety Net: Labour Standards in the New Era*, in Forsyth and Stewart, above n 34, 40 at 49.

<sup>48</sup> Sections 23 and 121 of the Fair Work Act 2009 (Cth).

<sup>49</sup> Section 121(2) of the Fair Work Act 2009 (Cth).

<sup>50</sup> Section 120 of the Fair Work Act 2009 (Cth).

paid'.<sup>51</sup> Minimum wages are the first on a list of 10 'permissible' issues dealt with in the Government's revamped awards, as discussed immediately below.

The NES took effect on 1 January 2010.

### 3 Modern Awards

The NES do not operate in isolation. The minimum floor of employee protection they provide is intended to be supplemented by 'modern' awards, ie revamped awards that are meant to be 'simple, easy to understand' and build a 'fair and relevant minimum safety net' for employees yet are economically 'sustainable' as well as 'promote flexible modern work practices'.<sup>52</sup> Since 1 January 2010 modern awards have become the responsibility of Fair Work Australia which itself replaces the Australian Industrial Relations Commission. In terms of their contents, modern awards can deal with the following 10 'permissible'<sup>53</sup> (as distinct from 'compulsory'<sup>54</sup> and 'prohibited'<sup>55</sup>) items:

1. minimum wages;
2. types of work performed;
3. arrangements for when work is to be performed;
4. overtime rates;
5. penalty rates;
6. annualised wage arrangements;
7. allowances;
8. leave and leave loadings;
9. superannuation;
10. consultation, representation and dispute settlement procedures.

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<sup>51</sup> The legislature refers to this as the minimum wages objective: see s 284 of the Fair Work Act 2009 (Cth).

<sup>52</sup> Section 134 of the Fair Work Act 2009 (Cth).

<sup>53</sup> Section 139 of the Fair Work Act 2009 (Cth).

<sup>54</sup> Sections 143-149 of the Fair Work Act 2009 (Cth).

<sup>55</sup> Sections 150-155 of the Fair Work Act 2009 (Cth).

Pursuant to section 144 of the Fair Work Act modern awards must include a so-called flexibility term. This type of award clause is meant to allow an individual employer and employee to enter into an 'individual flexibility arrangement' by which the contents of the award is 'varied' in order to meet the 'genuine needs' of both individual parties. What is meant by 'genuine needs' is not defined in the Act itself. Even so, the legislature expects both parties to 'genuinely agree' and, significantly, the particular employee must end up 'better off overall' as a result of the arrangement. Flexibility agreements an individual employer may wish to enter into with entire groups of employees trigger the application of the statutory provisions on enterprise bargaining, to be discussed more fully under the next heading.

Not permitted in awards are the inclusion of terms that are deemed 'objectionable'. The payment of a bargaining services fee (as distinct from a union membership fee) expressly qualifies as an objectionable award term.<sup>56</sup>

#### *4 Enterprise Bargaining*

Enterprise bargaining once again has become the (Government) preferred level of negotiations between employer and employee. This represents a break with the immediate past under Work Choices, but it also amounts to a restoration of Labour government policy in place since the labour market reforms initiated by Keating during the 1990s.<sup>57</sup> An important side effect is that only industrial action in the context of enterprise bargaining qualifies as protected action.<sup>58</sup> Pattern bargaining, in particular, remains frowned upon.

Enterprise bargaining provides an opportunity to build upon the inevitably less company-specific contents of awards. In an apparent effort at promoting simplicity, awards and enterprise agreements have not been allowed to operate cumulatively, though. To protect employees, the negotiation of enterprise agreements covering modern award employees is subject to what has been

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<sup>56</sup> Sections 12 and 353 of the Fair Work Act 2009 (Cth).

<sup>57</sup> Anthony Forsyth, 'Exit Stage Left', now 'Centre Stage': Collective Bargaining under Work Choices and Fair Work, in Forsyth and Stewart, above n 34, 120.

<sup>58</sup> Section 408 of the Fair Work Act 2009 (Cth).

labelled BOOT, i.e. the better-off-overall test.<sup>59</sup> The test applies to each and every employee covered by the award, except for employees employed under an individual flexibility arrangement referred to above.<sup>60</sup> Further, Fair Work Australia is permitted to approve enterprise agreements that fail BOOT where, because of exceptional circumstances, approval would not be contrary to the public interest. The legislature gives as example a scenario where the particular enterprise agreement forms 'part of a reasonable strategy to deal with a short-term crisis' in order to ensure the very survival of the company.<sup>61</sup>

The subject matter of enterprise bargaining is never entirely free for the parties to determine. As with regards to award negotiations, the contents of enterprise agreements is limited to 'permitted matters' only, i.e. matters pertaining to – roughly – the employment relationship.<sup>62</sup> Enterprise agreements and modern awards alike cannot exclude the application of the NES either.<sup>63</sup> By the same token, both collective instruments can and, in effect, must help give concrete shape to the various NES listed in the Fair Work legislation. Finally, enterprise bargaining once again becomes subject to a statutory obligation – removed in the Howard era - for each party to act in good faith.<sup>64</sup>

### *5 A proper balance between flexibility and security?*

The real significance of the Fair Work legislation lies not so much in any new employee entitlements it creates – here the score is modest at best – nor in the legislative efforts at (re-)balancing the interests of employee and employer, but in the particular shape this balancing act has taken. The 2009 legislation was enacted, in no small part, for the purpose of undoing the reforms from the Howard

<sup>59</sup> Section 193 of the Fair Work Act 2009 (Cth); Carolyn Sutherland, Making the 'BOOT' fit: Reforms to Agreement Making from Work Choices to Fair Work, in Forsyth and Stewart, above n 34, 99.

<sup>60</sup> See the discussion in IIIB3 above.

<sup>61</sup> Section 189 of the Fair Work Act 2009 (Cth).

<sup>62</sup> Section 172 of the Fair Work Act 2009 (Cth).

<sup>63</sup> Section 55(1) of the Fair Work Act 2009 (Cth).

<sup>64</sup> Section 228 of the Fair Work Act 2009 (Cth).

era and, in particular, to 'tear up' Work Choices.<sup>65</sup> Inevitably, this had to skew the statute in favour of the employee. However, the drafters by no means started with an entirely clean slate. The focus at all times was squarely on tackling the excesses of deregulation only. Certainly, a full-scale return to compulsory conciliation and arbitration was never on the cards. The net result then is one where the Rudd government can be seen to have chosen to err on the side of caution. It has done so by displaying a remarkably high sensitivity to the interests of business, ostensibly for the sake of protecting an export-driven economy. When translated into actual labour law rules, this has meant that any promotion of employee rights became heavily qualified by the need to ensure sufficient flexibility for the employer. Perhaps it is somewhat of an exaggeration to suggest that employee protection thus has become an outmoded notion in Australian labour law.<sup>66</sup> Some commentators argue that Australian labour law was never that pure in any event.<sup>67</sup> Be this as it may, contemporary Australian labour law undeniably is about much more than principled employee protection; rather, it is about pragmatic labour market regulation. The Fair Work Act 2009 (Cth) epitomises this functionalist approach.<sup>68</sup>

The architect of the Fair Work legislation was the Hon Julia Gillard, the (then) Minister for Employment and Workplace Relations. In June 2010 Ms Gillard ousted Kevin Rudd as Prime Minister. Following federal parliamentary elections held in August of that same year, she was sworn in on 14 September 2010 as Australia's first Prime Minister to head a minority government since World War II. In sharp contrast to the elections of 2007, workplace reform was not a central feature of Labour's election platform in 2010. No substantial change to the Fair Work Act 2009 (Cth) has been foreshadowed by the incoming Gillard administration.

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<sup>65</sup> Australian Labor Party, *Forward with Fairness: Labor's Plan for Fairer and More Productive Workplaces*, Canberra, April 2007; Australian Labor Party, *Forward with Fairness: Policy Implementation Plan*, Canberra, August 2007.

<sup>66</sup> Vranken, above n 36.

<sup>67</sup> See the various contributors to Chris Arup and Richard Mitchell (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, Sydney, 2006).

<sup>68</sup> About the distinction between the pure (or traditionalist) and pragmatist (or realist) approaches to labour law regulation, see Vranken, above n 15, 32 ff.

## **IV MODERNISING LABOUR LAW IN NEW ZEALAND: THE EMPLOYMENT RELATIONS AMENDMENT ACT 2010**

### **A Antecedent: The Employment Relations Act 2000**

The Employment Relations Act 2000 was enacted under a Labour government and replaces the Employment Contracts Act 1991 previously adopted by a conservative (National) administration. The 2000 legislation aims at addressing an imbalance in the employer-employee relationship, deliberately created by the 1991 legislature in favour of business. Tellingly, its long title described the Employment Contracts Act 1991 as '[a]n Act to promote an efficient labour market'. Efficiency here must be understood to stand for economic efficiency first and foremost. Somewhat ironically, perhaps, the Employment Contracts Act thus in effect sought to build upon a deregulatory agenda that had been initiated under Labour during the 1980s already.<sup>69</sup>

The Employment Relations Act 2000 attempts to steer a middle course between the individualistic approach of the 1991 legislation and the centralism that typified the old award system.<sup>70</sup> Margaret Wilson, the then Minister of Labour, stressed the need for a greater balance between economic and social policy objectives in regulating labour law.<sup>71</sup> The stated objective of the Act is 'to build productive employment relationships through the promotion of mutual trust and confidence'.<sup>72</sup> Significantly, this objective is expressly said to be achieved best by, among other things, 'acknowledging and addressing the inherent inequality of bargaining power in employment relationships'.<sup>73</sup>

<sup>69</sup> Pride of place in this regard took the Labour Relations Act 1987. See Kevin Hince and Martin Vranken "Legislative Change and Industrial Relations: Recent Experience in New Zealand" (1989) 2 Australian Journal of Labour Law 120. See also Kevin Hince and Martin Vranken "A Controversial Reform of New Zealand Labour Law: The Employment Contracts Act 1991" (1991) 130 International Labour Review 475; Brian Brooks, Deregulating the Labour Market; Reflections on the New Zealand Experience, in Chris Engels and Manfred Weiss (eds) *Labour Law and Industrial Relations at the Turn of the Century* (Kluwer, The Hague, 1998) 651.

<sup>70</sup> Martin Vranken "Labour Law Reform in Australia and New Zealand: Once United, Henceforth Divided?" (2005) NZACL Yearbook 11, 25 at 31.

<sup>71</sup> Hon Margaret Wilson "The Employment Relations Act: A Statutory Framework for Balance in the Workplace" (2001) 26 New Zealand Journal of Industrial Relations 5.

<sup>72</sup> Section 3(a) of the Employment Relations Act 2000 (object clause).

<sup>73</sup> Section 3(a)(ii) of the Employment Relations Act 2000.

## ***B The Employment Relations Amendment Act 2010***

### *1 The Explanatory Note*

To the extent that the Government's intentions can be inferred from the Explanatory Note that accompanied the Employment Relations Amendment Bill (No 2) 2010, it would seem that the amendments to the 2000 legislation do not seek to fundamentally alter the legal regulation of employment relations in New Zealand. Instead several adjustments are being made to the existing regulatory framework for the stated purpose of providing 'more flexibility, greater choice'.<sup>74</sup> The reference here is to more flexibility for business and to greater choice for the employer, in the first instance. While the Government claims to ensure 'a balance of fairness for both employers and employees'<sup>75</sup> overall, its legislative reforms effectively seek to tweak in favour of employers the balance that existed previously under the 2000 Act. It is against this backdrop that the recent changes as regards union access to the workplace, direct communications by the employer with employees during collective bargaining, and employee access to the personal grievance procedure together with the remedies available following a successful personal grievance claim, in particular, must be appreciated.

The Employment Relations Amendment Act 2010 also makes changes to the operation of various employment institutions – the mediation services and the Employment Relations Authority, especially – as well as to the role and enforcement powers of the labour inspectorate. These changes are stated to be directed at improving the Act's overall operation and efficiency. They are not discussed in detail here. Of greater interest, when focussing on the New Zealand approach to flexicurity, are the changes to another (related) piece of legislation, the Holidays Act 2003. Technically, the Holidays Amendment Act 2010 simply seeks to improve – once again – the overall operation and efficiency of the principal legislation. However, in several respects this effectively translates into an increase in flexibility at workplace level. A discussion of the Employment Relations Amendment Act 2010 therefore is incomplete without due reference – towards the end of this article – to the Holidays Amendment Act 2010.

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<sup>74</sup> Explanatory Note, 1.

<sup>75</sup> Ibid.

## *2 Employer Right to Control Workplace Access by Unions*

Under current legislation union access to the workplace is regulated in Part 4 ('Recognition and Operation of Unions') of the Employment Relations Act 2000. No fewer than seven provisions deal with issues of access (sections 19-25). In essence, access to the workplace vindicates the union's role in representing the interests of its members, both actual and potential ones. Under the 2000 legislation union access to the workplace constitutes a statutory right.<sup>76</sup> The exercise of this right is not conditional upon employer approval. On the contrary, refusal of access, if without 'lawful excuse',<sup>77</sup> triggers liability to the payment of a penalty by the employer.<sup>78</sup> Even so, the 2000 legislature expects the union to exercise its statutory right of access at all times in a reasonable fashion. Thus, the union must enter an employer's premises<sup>79</sup> 'only at reasonable times', 'in a reasonable way', and in compliance with 'any existing reasonable procedures and requirements' as regards safety, health or security.<sup>80</sup> Further, the representative of the union exercising the statutory right to enter a workplace must make a reasonable effort to inform the employer as to the purpose of the visit and must produce evidence of his or her representation authority.<sup>81</sup>

The 2010 amendments suggest a certain degree of dissatisfaction in some circles with the operation of the current system. The amendments are stated to be motivated by a desire to allow businesses to 'regain' control over who is on a worksite and when. Thus, they seek to reassert the authority of the employer as the one in charge.<sup>82</sup> Henceforth, before entering a workplace, the union representative 'must request and obtain the consent of the employer'.<sup>83</sup>

<sup>76</sup> Section 20 of the Employment Relations Act 2000.

<sup>77</sup> Access may be denied for reasons of national security, to avoid interfering with the investigation of offences, and – under certain specific conditions – on religious grounds: see ss 22-24 of the Employment Relations Act 2000.

<sup>78</sup> Section 25 of the Employment Relations Act 2000.

<sup>79</sup> The definition of workplace expressly excludes a 'dwellinghouse': s 19 of the Employment Relations Act 2000.

<sup>80</sup> Section 21 of the Employment Relations Act 2000.

<sup>81</sup> Ibid.

<sup>82</sup> Explanatory Note, 2.

<sup>83</sup> New s 20A(1) as inserted by s 6 of the Employment Relations Amendment Act 2010.

Intriguingly, this change is intended to 'increase levels of choice and fairness for employers'.<sup>84</sup> To avoid treating the other party unfairly, the employer may not 'unreasonably' withhold consent, though.<sup>85</sup> In this fashion the 2010 legislation reverses the pre-existing state of affairs, giving the employer the psychological advantage in the process.

### *3 Employer Right of Employee Access during Collective Bargaining*

Under Employment Relations Act 2000 both the union and the employer must comply with the statutory duty to bargain in good faith.<sup>86</sup> This means, among other things, that each party must recognise the role and authority of the bargaining representative.<sup>87</sup> In particular, neither party may, 'whether directly or indirectly', bargain with 'persons whom the representative or advocate are [sic] acting for'.<sup>88</sup> More generally, neither union nor employer must 'undermine' the bargaining or the authority of the bargaining representative.<sup>89</sup> The spirit if not the letter of the law as adopted originally then discourages and, arguably, disallows direct communications between employer and the workforce whenever this can be interpreted as an attempt at going over the head of the union representative by, in effect, by-passing the duly appointed bargaining agent of the employees.

The Key government suggests that the 2000 Act never prohibited direct communications in good faith. Instead, 'confusion' is said to exist over what this means in practice. The purpose of the 2010 amendments then is to 'clarify' the (existing) state of the law and, in the process, create certainty for employers when undertaking 'normal and essential business functions' such as, 'for example', 'communications with staff'.<sup>90</sup> Specifically, section 9 of the Employment Relations Amendment Act 2010 adds a new subsection to section 32 of the principal Act as follows:

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<sup>84</sup> Explanatory Note, 2.

<sup>85</sup> New section 20A(2) as inserted by s 6 of the Employment Relations Amendment Act 2010.

<sup>86</sup> Section 32 of the Employment Relations Act 2000.

<sup>87</sup> Section 32(1)(d)(i) of the Employment Relations Act 2000.

<sup>88</sup> Section 32(1)(d)(ii) of the Employment Relations Act 2000.

<sup>89</sup> Section 32(1)(d)(iii) of the Employment Relations Act 2000.

<sup>90</sup> Explanatory Note, 2-3.

(6) To avoid doubt, this section does not prevent an employer from communicating with the employer's employees during collective bargaining (*including, without limitation, the employer's proposals for the collective agreement*) as long as the communication is consistent with subsection (1)(d) of this section and the duty of good faith in section 4 (emphasis added).

Arguably, this amendment amounts to a contradiction in terms: the italicised part of the above quote violates the spirit if not the letter of section 32(1)(d) of the Employment Relations Act 2000.

#### *4 Legislative Attention for the Employer Party in Personal Grievance Proceedings*

##### *(a) The Difference between Probationary Employees and Employees on Trial*

To hire new employees can prove a risky business. If the employee does not live up to expectation, discontinuing his or her employment may be burdensome if the employee concerned seeks to challenge the termination of the employment relationship. Probationary periods then are periods at the beginning of the employment relationship that allow both parties to make an assessment of their suitability to one another before that relationship becomes unconditional. Under the Employment Relations Act 2000 the employer and employee can agree in writing to such a probationary 'arrangement' as part of the terms of their individual employment contract.<sup>91</sup> Intriguingly, the relevant section of the Act, as adopted originally, expected compliance with the laws on unjustifiable dismissal regardless.<sup>92</sup> Thus, employees dismissed during the period of their probation or trial – the 2000 legislature used both terms interchangeably – had access to the personal grievance procedure for purposes of contesting the termination.

In honouring an election promise, the Government in 2008 introduced a Bill to enable employers in small and medium-sized businesses to take on new employees for trial periods during which their suitability for permanent employment could be assessed without the risk of legal proceedings for unjustified dismissal should a particular employee on trial prove unsuitable.<sup>93</sup> The trial period was set at 90 days maximum. To qualify the employer had to employ

<sup>91</sup> The expression 'probationary arrangements' features in the heading of s 67.

<sup>92</sup> Section 67(b) of the Employment Relations Act 2000.

<sup>93</sup> Employment Relations Amendment Bill 2008, Explanatory Note.

fewer than 20 employees. Each new employee could be submitted to one trial period only. However, a later probation period – for instance, one presumes, in situations where the same employee is promoted to a new position within the same firm - on terms to be agreed upon by the parties was not ruled out. Only, any such probationary employees would enjoy protection against unjustifiable dismissal as section 67 of the Act had stated all along. The changes were embodied in new sections 67A and 67B. They took effect on 1 March 2009.<sup>94</sup>

The Employment Relations Amendment Act 2010 extends the scope of application of the 2008 amendments to all employers regardless of the size of the business. The stated purpose is to 'improve labour market flexibility' and to encourage employers to 'take on new staff, particularly from groups that face higher levels of labour market disadvantage'.<sup>95</sup> In practice, employers are offered greater control over the extent to which new employees can access the personal grievance procedure. Union unease about the extension of the trial period to all businesses has been reported on widely, and repeatedly, in the New Zealand media.<sup>96</sup> Be this as it may, both the 2008 and the 2010 amendments continue to allow access on grounds of prohibited discrimination (sexual or racial harassment and the like). Further, under the 2010 reforms access to mediation continues to be 'available at any point'.<sup>97</sup>

#### (b) The Difference between Substantive and Procedural Fairness

A core reason for the use of the personal grievance procedure by employees is the protection it offers against unjustifiable dismissal. While the legislature does not state this expressly, long-standing case law confirms that dismissals can be challenged on substantive and/or procedural grounds. In 2008 an amendment to the 2000 legislation articulated a statutory test for determining whether or not a particular dismissal (including allegedly disadvantageous employer action short

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<sup>94</sup> Section 2 of the Employment Relations Amendment Act 2008.

<sup>95</sup> Explanatory Note, 3.

<sup>96</sup> See eg Martin Kay "90-Day Trial of Union Muscle" *The Dominion Post*, 14 August 2010, B3; Derek Cheng "Plan Makes Sacking Workers Easier" *The New Zealand Herald*, 19 July 2010, A2 and "Experts Warn of Loophole in 90-Day Trial Scheme" *The New Zealand Herald*, 21 July 2010, A4.

<sup>97</sup> Explanatory Note, 3.

of dismissal) is justified.<sup>98</sup> The test can be referred as the objective justification test or, alternatively, the reasonable employer approach to dismissals. Section 103A of the Employment Relations Act 2000, as amended in 2008, specifies in the following terms:

[T]he question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer *would* have done in all the circumstances at the time the dismissal or action occurred (emphasis added).

The Explanatory Note to the (then) Employment Relations Amendment (No 2) Bill 2010 takes objection to the word 'would' in that it may suggest that there is only one possible course of action available to reasonable employers. The new legislation seeks to 'improve' employer 'confidence' in the personal grievance system by substituting the word 'could' instead.<sup>99</sup> While the precise impact of this change remains to be seen, it would seem that the primary focus is on neutralising 'minor' procedural irregularities in an otherwise (substantively) justified dismissal process.<sup>100</sup> To avoid 'pedantic' scrutiny of otherwise justifiable employer action,<sup>101</sup> the Employment Relations Authority and the Employment Court henceforth must run a (non-exhaustive) check list of what a particular employer did or did not do before dismissing the employee as follows:<sup>102</sup>

1. the extent to which the allegations against the employee were investigated, having regard to the (presumably, limited) resources available to the employer;
2. whether the employer previously raised any concerns with the employee;
3. whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns;

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<sup>98</sup> Section 38 of the Employment Relations Amendment Act (No 2) 2004.

<sup>99</sup> Explanatory Note, 4.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Section 103A(3) as inserted by section 15 of the Employment Relations Amendment Act 2010.

4. whether the employer genuinely considered the employee's explanation (if any).

The employer-friendly nature of the revamped section 103A is reinforced in a new subsection (5) to the effect that:

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

- (a) minor and
- (b) did not result in the employee being treated unfairly.

It is doubtful whether the substitution of 'should' for 'would' is necessary to produce the Government's intended result.

(c) **The End of Reinstatement as the Primary Remedy for Unjustifiable Dismissal**

Section 101 of the Employment Relations Act 2000 unequivocally recognises the importance of reinstatement as a remedy in personal grievance disputes involving dismissal. Section 125 of the Act confirms that reinstatement, where sought by the employee, must be the 'primary' remedy 'wherever practicable'. The Employment Relations Amendment Act 2010 substitutes a new section 125 preserving reinstatement as a remedy where practicable 'and reasonable' while discontinuing its status as the primary remedy in unjustifiable dismissal scenarios.<sup>103</sup> According to the Explanatory Note this change is of little consequence for employees as reinstatement 'is seldom awarded' in any event. Employers on the other hand, are said to benefit since the change reduces the need to demonstrate that reinstatement is 'neither desirable nor feasible'. The underlying rationale for this amendment then is an assumption that in most personal grievance cases the relationship of trust and confidence between the parties is irreparably damaged.<sup>104</sup>

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<sup>103</sup> Section 16 of the Employment Relations Amendment Act 2010.

<sup>104</sup> Explanatory Note, 4-5.

### 5 An Attempt at Balance after all?

The position of the employee inevitably is affected by the changes contained in the Employment Relations Amendment Act 2010. From an employee perspective, they are not particularly changes for the better. However, it would be misleading to suggest that employees miss out entirely. Section 11 of the Employment Relations Act 2010, in particular, stands out. It inserts a new section 64 in the principal Act requiring employers to retain a signed (by the employee) copy of individual employment agreements or, where a collective agreement is in place, of any additional terms and conditions that make up the employee's individual terms and conditions of employment. This change must be appreciated against the broader backdrop of a renewed Government effort to ensure compliance with employment legislation by business. In the same vein the role of the labour inspectorate is being revisited and the maximum penalty for non-compliance doubled to \$10,000 for individuals and \$20,000 for incorporated businesses.<sup>105</sup>

For the sake of completeness, reference must also be made to the Holidays Amendment Act 2010. This Bill provides a further illustration of what may be termed flexicurity *à la Néo-Zélandaise*. On its face, it is a distinctly more technical piece of legislation than the Employment Relations Amendment Act 2010. Both statutes are stated to share the same objective: 'to improve the overall operation and efficiency' of the principal Acts.<sup>106</sup> In terms of its approach, the Holidays Amendment Act 2010 increases flexibility for New Zealand businesses and, in principle, workers alike. Specifically, the Act allows employers, upon employee request, to pay out up to a week of the employee's minimum annual leave entitlement. Further, an employer and employee may 'agree' to transfer the observance of a public holiday to another working day. Failing such an agreement, however, the employer will be able to direct the employee when the alternative day is to be taken. One wonders whether sufficient safeguards have been built in to guard against the risk of employee rights being compromised in the process. The same concern is held as regards the legislative changes to the calculation and application of payment for public holidays, alternative holidays, and even sick leave and bereavement leave. Clear it is that, as regards sick leave, the new legislation seeks to tighten the existing rules on curbing employee abuse.

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<sup>105</sup> Section 18 of the Employment Relations Amendment Act 2010.

<sup>106</sup> Holidays Amendment Bill 2010, Explanatory Note, 1.

To this effect employers will be allowed to request proof of an employee's incapacity to work without having to articulate reasonable grounds first, provided always that reasonable expenses incurred by the employee are met by the employer.<sup>107</sup>

The Employment Relations Amendment Act and the Holidays Amendment Act received assent on 26 November 2010. Most changes are scheduled to take effect on 1 April 2011. The amendments reveal New Zealand's approach to the European notion of flexicurity. It is an approach that favours re-emphasising economic flexibility without unduly compromising social equity. It would appear that some (union) feathers nevertheless have been ruffled in the process. To add insult to injury, a separate Employment Relations (Film Production Work) Amendment Act was adopted on 29 October 2010.<sup>108</sup> The sole purpose of this Act is to exclude persons engaged in film production work from the definition of employee in section 6 of the Employment Relations Act 2000. Most controversial also continues to be the removal of the statutory protection against unjustifiable dismissal for certain new employees. Even this unease may prove but a storm in the proverbial teacup. The change will only affect employment agreements that expressly provide for a trial term. Further, the length of any such term is capped at 3 months. By contrast, in Australia a Labour government is happy for dismissal protection to be withheld for a period twice that long and without the need for an express trial clause in the individual employment contract.<sup>109</sup> In any event, New Zealand's labour legislation does not remove access to the personal grievance procedure (including mediation) altogether for new employees. This is consistent with the EU approach to flexicurity, whereby full employee access to the protective umbrella of labour law becomes available gradually only.

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<sup>107</sup> Section 14 of the Holidays Amendment Act 2010 amending s 68 of the principal Act.

<sup>108</sup> The legislation was rushed through the Parliament with the first, second and third reading of the Bill occurring on the same day.

<sup>109</sup> Section 383 of the Fair Work Act 2009 (Cth).