Bridging the Divide:

The impact of protective employment legislation on contract service workers

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Dedication

To Luci Highfield

1966-2009

Whose passion and
commitment transformed the
lives of so many contract
workers

Abstract

The subject of this thesis is the effectiveness of legislation introduced to provide continuity of employment for contract workers in the service sector, during the sale or transfer of a business. A review of minimum standards in 2001 found that workers were materially and psychologically disadvantaged by the process of contracting out. This study is about whether the subsequent law for specific service workers called *Continuity of employment if employees' work affected by restructuring* achieved that outcome. Such a study has not been undertaken to date.

The thesis consists of a theoretically-driven narrative, in which the practice of contracting out is explored within the context of the new social democracy in New Zealand. The theory of risk society and the third way contribute to a critique of the institutionalized individualism of modern society. This critique is supported by stories from nine commercial cleaners and hospital kitchen workers who share recent experiences of a change of contract. These stories serve to illustrate the effectiveness of the new law. The experiences of these workers are gathered through conversations held in interviews and focus groups and provide a link between theory, history and the reality of the frontline.

The study concludes that the destiny of contract workers is tied as much to the policy nest in which the employment protection law resides, as the subsequent legislative amendment. The risk of disadvantage to contract workers is linked as much to the processes of institutionalized individualism in modern society and the freedoms incorporated into the Employment Relations Act 2000, as to the new minimum standard providing continuity of employment for workers. I conclude that the existing protections for vulnerable workers are fragile and without minimum entitlements that ensure workers have the capability to access those rights, the risk of material and psychological disadvantage remains high.

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Photograph by Lynette Shum

Paula Atatagi
From *For the Love of the People: Photographs and stories from the work and lives of seven contract cleaners*

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Chapter One

Introduction

Does employment protection law for contract service workers really make a difference? The evidence from a report in 2001 suggested that many workers were materially and psychologically disadvantaged during the contracting out or sale of a business (Minimum Standards Review). Employment law was amended in 2004 so that selected workers would have their terms and conditions transferred to a new employer taking over a business and thus be assured of continuous employment and financial security. Many thousands of workers, employed as cleaners, kitchen hands and cooks, orderlies, security officers and caretakers were to be affected by the law change that was strongly contested in the political arena at its introduction and represented a new approach to employment rights in New Zealand. The issue that will be considered in this thesis is whether the law has successfully bridged the divide for workers between one contract for service and the next.

This analysis of legislation for contract workers is informed by Ulrich Beck's theory of risk society, in which flexibility underpins the employment contract, the hours of work, and the nature of the workplace; and where institutionalized individualism has transformed the experience of work. Conversations with nine workers from the commercial cleaning sector and hospital kitchens provide an illustration of the world of contract workers, highlighting their personal and collective struggle for stability and certainty in times of crises. These stories help to inform thinking about the implications for future policy for contract workers in a modern social democracy.

1.1 The context

The basic human need for economic security lies at the heart of the crisis created for workers by the contracting out, transfer, or sale of a business. The conflict between the needs of capital and labour infuses the debate about regulating employment rights. In such a debate, employers argue against constraints being placed on their ability to manage their business as they see fit, while the interests of labour argue that its financial and psychological investment in a job should be protected and not constrained by "artificial" barriers (Mazengarb's Employment Law (NZ), 2009d). The practice of contracting out is an "artificial" management technique that has consequences for labour and its investment, while the law designed to protect that investment has consequences for the unconstrained operation of a business. The history of legislation providing workers with continuity of employment in the event of a business transfer illustrates both the tension between the interests of capital and labour and the challenge for regulating workplace behaviour in the commercially competitive and politically contested domain of contract work.

In 2001, a milestone toward new legal protection for contract workers was reached in the form of a review entitled the *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business to the Minister of Labour* ("Minimum Standards Review"). It outlined the repercussions of contracting out on workers, including the reduction in terms and conditions of employment, the lack of job security and the lack of control over the future of the workplace, particularly where workers had little bargaining power (Minimum Standards Review, 2001, p. 35). The majority view of the expert group ("Advisory Group") was that there was "prima facie evidence that many vulnerable employees are materially and psychologically disadvantaged by the impacts of contracting out" (p. 21). The Advisory Group noted that legislation promoting collective bargaining had assured a voice for many workers but that further support would be required for the most vulnerable. At the same time it expressed the importance of balancing this support with the need for businesses to survive, stating that legal intervention needed to "achieve employee protection and no more" (p. 19).

Professor Otto Kahn-Freund described labour law as "a technique for the regulation of social power" designed to support, restrain or create power but not being, in itself, the source of social power (1972, p.4 cited in Anderson, 2007, p. 11). The new law for contract workers sought to re-engineer the balance of power to provide employee protection where evidence suggested a need, while limiting employee power where it might unduly constrain business. It is a fine, if precarious, balance of interests reflecting 200 years of law, described by Collins as balancing the "logic of the market system with the liberal aspiration to ensure that individuals are treated with respect and justly and that they have the opportunity to construct meaningful lives" (2003, p.5, cited in Anderson, 2007, p. 11). The question remains as to whether the engineering was conducted with sufficient precision to guarantee the balance that was sought. The answer considers whether aspiring to such a balance is realistic or simply a convenient mantra in the contested political environment of a social democracy.

1.2 The chapters

In **the second chapter** the political and economic context of Continuity of Employment legislation is presented. The literature traces the history of the liberalisation of employment law and the burgeoning service sector which set the scene for a transformation of traditional work patterns. Against a backdrop of international debate about employment protection legislation, the New Zealand developments are explored in their unique cultural context. An analysis of the literature raises questions about the feasibility of eliminating disadvantage to contract workers within the current neo-liberal paradigm, where law-makers aspire to a "voluntarist" model that delivers a balance between equity for workers and efficiency for business (Haworth, Rasmussen, & Wilson, 2009, para. 18).

In **the third chapter** the theoretical lens is assembled to examine the impact of the legislation. The issues facing workers in an individualized modern social democracy are considered primarily through Ulrich Beck's theory of risk society but I also draw on other theories, such as the third way and neo-liberal governmentality. In particular, Beck's

analysis of the concepts he describes as individualization, flexibilization and decentralization of labour (1992), offer a fitting framework for understanding the precarious world of contract workers.

In **the fourth chapter** the methodology chosen to explore the effectiveness of the legislation and the policy challenges for the future, is outlined. This analysis reflects a critical orientation, supported by a qualitative research design involving interviews and focus groups. My goal in writing this thesis is to critique social policy; it is an attempt to uncover the impact of a new law on a vulnerable workforce and to explore options that place equity at the centre of deliberations on future policy.

The fifth chapter belongs to nine cleaners and kitchen workers interviewed about the experience of a change of contract at their workplaces. The conversations are presented according to four themes illustrating material survival, the impact of the contract cycle on workplace relationships, the perceived value placed on the work performed by the contract workers, and the role of industrial democracy in the future of the workplace. These workers embody the humanness of employment relations that lies in the shadow of the machinery of government and is so easily lost from sight in the creation of new legislation.

The sixth chapter presents an analysis of the effectiveness of Continuity of Employment law as a means of bridging the divide between one contract for service and another so that workers have the economic security of permanent ongoing employment. Kahn-Freund argued the purpose of all labour law was "to counteract the inequality of bargaining power inherent in the employment relationship" (1972, p.8, cited in Anderson, 2007, p. 4). This analysis questions the adequacy of the law in addressing the inequality of power in the employment relationship. Drawing on Amartya Sen's capability approach, I consider whether the law enables workers to transform the rights they have acquired into effective freedoms.

The seventh chapter is firmly grounded in the politics of the possible, the policy implications for the real world of decentralized authority and de-unionised workers. Future policy considerations extend from issues of social justice in the workplace to

democracy in civil society as a whole. Policy opportunities that support equity for workers draw on notions of modern regulation from Braithwaite and Weil, generative politics from Giddens and industrial democracy from Sinzheimer and Beck.

The eighth chapter is the conclusion to this study. I outline the benefits of the new law and the challenge of delivering effective employment protection law in a new social democracy. For these workers the question is not so much about the continuity of employment legislation as the quality of the legislative framework through which workers access those rights. Assuring workers of job security is not so much about the rights to transfer to a new employer at a time of contracting out, as the quality of the rights to voice and representation and the standards that guarantee fair and equitable outcomes for all workers.

Chapter Two

Continuity of employment: A policy of protection

2.1 A political and economic perspective

In this chapter I review the literature on the world of contract workers and the approaches to statutory protection both in New Zealand and overseas. The history and characteristics of contract work are explored alongside commentary from the frontline of the service sector prior to the legislation being introduced. An analysis of the literature about the economic and industrial restructuring of the last 20 years uncovers the political and economic background to the new law and the rationale for introducing the legislation. Models of protective legislation for contract workers exist in many other jurisdictions and informed the development of the New Zealand policy. In particular, an explanation of the key features of European law assists a better understanding of the local experience. Finally, I will provide an overview of the amendment providing Continuity of Employment protection and address some of the questions that this law generates more than three years later.

A policy of providing protection for workers who are contracted out is new to industrial relations in New Zealand and its impact has not yet been assessed. The final amendments to the ERA were introduced in 2006 with the aim of providing continuity of employment for workers in the event that the business they work for was sold, transferred or contracted out. The legislation was introduced following a government review that determined there was evidence that contract workers were materially and psychologically disadvantaged by this process (Minimum Standards Review, 2001). The absence of literature on these recent developments in New Zealand highlights the opportunity for a study that explores the effectiveness of Continuity of Employment law and considers the implications of the findings on future employment relations policy.

2.2 Definitions

Contracting out or "outsourcing" refers to the situation where an enterprise, or principal, contracts an external provider to deliver a service. It may also include what is described as second (third, fourth etc) generation or subsequent contracting out, where the principal terminates one contract and replaces it with a new service provider (Highfield & Towner, 2002). This is consistent with the definition applied by the *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business to the Minister of Labour* (Minimum Standards Review, 2001).

Continuity of Employment legislation refers to a provision of the Employment Relations Act 2000 (Part 6A Subpart 1) called *Continuity of employment if employees' work affected by restructuring* which provides protection for employees if, as a result of a proposed restructuring, their work is to be performed by another person (for example, where a business is sold or an employer loses a contract to deliver a service to another provider).

Contract workers are workers employed in a manner consistent with the definition of contracting out (above). Contract workers may also be referred to as "contract service workers".

Contract service workers are those workers specified in the Employment Relations Act 2000 (Schedule 1A). They are defined as employees providing services involving cleaning, food catering, caretaking, or laundry services for the education, health, residential care, public service or local government, airport facility or aviation sectors, or cleaning or food catering services in relation to any other place of work.

Material or psychological disadvantage is a concept drawn from a ministerial review, the *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business to the Minister of Labour*, in which it is stated there was "prima facie evidence that many vulnerable employees are materially and psychologically disadvantaged by the impacts of contracting out" (2001, p. 21).

Minimum Standards Review refers to the 2001 report: *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business to the Minister of Labour*.

Principal enterprises are those organisations and businesses that sell or contract out a service to another company.

2.3 The life and times of contract service workers

> **In early 1996 Tempo proposed a new national collective employment contract that effectively cut wages by about 25%. This was rejected. Workers were told that unless they agreed to it Tempo would go into voluntary liquidation. The workers rejected the offer. In February 1996 Tempo went into voluntary liquidation.**
>
> John Ryall, Service and Food Workers Union Nga Ringa Tota, submission on the Employment Relations Amendment Bill, April 2006 (Service and Food Workers Union Nga Ringa Tota, 2006).

The stories of service workers provide a powerful backdrop to an analysis of Continuity of Employment legislation. The experiences of cleaners and catering workers were documented in submissions to Parliament's select committee, prior to the enactment of legislation, and bring to life the reality of the least powerful players in the contract cycle. In this section, the context for the introduction of Continuity of Employment legislation is defined, including the size and growth of the contract sector and the motivations behind public and private sector businesses divesting of their non-core activities through contracting out.

2.3.1 The emerging contract service sector

> **[Orongo Home] was run by a non-profit religious organisation until they sold it to a company. There was a CEA [collective employment agreement] for the site. The religious organisation simply made all the workers redundant. While workers were invited to reapply for their jobs by the new owner, the rates of pay were lower, there were no penal rates and the new owner offered individual employment agreements.**
>
> Service and Food Workers Union Nga Ring Tota, submission on the Employment Relations Amendment Bill, April 2006 (Service and Food Workers Union Nga Ringa Tota, 2006)

Policies for protection of contract workers emerged against a background of a burgeoning service sector and a well-defined trend towards non-standard work throughout the 1980s in New Zealand (McLaren et al., 2004). Changes to the structure of the labour market between 1987 and 2000 showed the greatest growth occurred in the service sector; a shift, in part, attributable to the trend toward the contracting out of services (Minimum Standards Review, 2001, pp. 30,31). The primary and secondary sectors declined by five percent and three percent respectively, while services in the tertiary sector grew by eight percent (p. 30)[1]. Continuity of Employment legislation would target workers, such as food catering and cleaning services, in the mushrooming service sector.

Statistics New Zealand provides some indication of the size of the target group and the growth in some of the applicable categories of service workers. For instance, in Building and Other Industrial Cleaning Services between 2001 and 2008, there was a 10 percent growth in firms, from 2016 to 3185; and a 10 percent increase in employees, from 18,140

[1] The primary sector includes agriculture, mining, and quarrying; the secondary sector includes manufacturing, electricity, water and gas, and construction; the tertiary sector includes wholesale and retail trade, transport and communication, business services, and community and personal services.

to 20,220. In the same period, the number of Catering Services firms grew eight percent, from 633 to 688; and the number of employees in that category, 27 percent, from 7040 to 9640 (Department of Labour, 2010, p. 15).

Statistics New Zealand Labour Market Statistics 2008 show an estimated 5479 employers are currently affected by the Continuity of Employment legislation, including 3185 employers in Building and Other Industrial Cleaning Services, and 30,126 commercial cleaners (Department of Labour, 2010). The 2006 census indicates that cleaning, food preparation and laundry workers are predominantly women (64-68 percent) and of mixed ethnicity, with 62 percent of New Zealand European origin (50,142), 17 percent Maori (14,049), and 10 percent comprising each Pacific, Asian, and Other (Department of Labour, 2010, p. 15). While accuracy is difficult in a sector characterised by multiple job-holding and informal work practices, the statistics clearly indicate a growing contract service sector representing a diverse segment of the workforce.

2.3.2 Fashion and efficiency

> **Our jobs were sold to a multi-national airline catering company. I had to reapply for my job by attending an interview off site, without my union representative present, undergo medical testing, car and locker search, agree to speak only English on site and never leave the site even in my breaks and sign a company Collective Employment Contract.**
>
> Nick Law, a Caterair worker, Service and Food Workers Union Nga Ringa Tota, submission on the Employment Relations Amendment Bill, April 2006 (Service and Food Workers Union Nga Ringa Tota, 2006)

Outsourcing was first popularised as a management tool with the introduction of compulsory competitive tendering in the British public service in the early 1980s before taking root in many other countries (Quiggin, 2002). Collins (1990) described

outsourcing as one of a number of methods that marked a reorganisation of production during the late twentieth century in the United Kingdom, from vertical integration toward vertical disintegration of production (Collins, 1990). It aimed to generate efficiencies and, according to Collins, succeeded, as new work patterns emerged that were left outside the traditional paradigm of full time, stable work, and beyond the scope of employment law (1990, p. 353).

The Minimum Standards Review (2001) provides a background to the rise of outsourcing in New Zealand, which escalated in popularity during the period of public sector restructuring, following the election of the Labour Government in 1984. Contracting out of non-core activities, such as cleaning services, was described as being a consequence of cost-cutting in the public services and the pursuit of profit by the new State Owned Enterprises surviving in competitive commercial environment. In the Service and Food Workers Union Nga Ringa Tota ("SFWU") submission to the Employment Relations Amendment Bill in 2006, Nik Law (see above) described his experience of being re-employed during a process of contracting out in the airline industry. In the light of such experiences, it is useful to explore the motivation of businesses to contract out both in New Zealand and overseas.

The pursuit of efficiencies, described by Collins in the British experience, is reflected in much of the international literature. The Minimum Standards Review (2001) reported that the phenomenon of contracting out was largely attributable to a drive by businesses to reduce costs and increase efficiency. A comparative study of 52 studies across five OECD countries, concluded that in 40 of those studies, private provision of services was "unequivocally more efficient" (Abelson, 2005, p. 3). Contracting out has been attributed to a "fashion" for downsizing (Quiggin, 2002, p. 6), or what some employers in New Zealand have described as "a fad" to be reversed again in the future (p.6 UMR Research Ltd, cited in Minimum Standards Review, 2001). More generally, however, it was perceived to be strongly economically motivated (Fudge, Turner, & Vosko, 2002; Quiggin, 2002; Ryan & Herod, 2006b), whether this was expressed as the need to free up assets, to reduce costs (Abelson, 2005; Fudge et al., 2002; Harland, Knight, Lamming, &

Walker, 2005; Quiggin, 2002), to divest of economic risk, or gain numerical flexibility (Easton, 1997).

The literature also highlights the relationship between contracting out for efficiency and associated wage pressure on workers (Collins, 1990; Harland et al., 2005; Sjoholt, 1998). The Minimum Standards Review noted that contracting out reduced the risk of union activity, a strategy articulated by More as the avoidance of third party monitoring of compliance: "A large measure of its flexibility derives from the possibilities it offers to entrepreneurs to avoid…employment protection law" (1995, as cited in Minimum Standards Review, 2001, p. 85). Quiggin (2002) wrote that, while Australian studies estimated public service contracting out could mean a 20 percent reduction in average costs, other studies showed that this depended on wages and conditions being reduced in the process. Contracting out was, by most accounts, motivated by the pursuit of efficiency, with evidence indicating that this was at a cost to the workers delivering the service.

One study of the cleaning industry for the Department of Labour in 2004, identified two key features of contracting out that underpinned its attractiveness to business: the regular contract rotation and the distancing of the principal enterprise from the employees who carried out the work (K. Wilson, 2004). Contract rotation meant cleaning companies and workers were under a constant threat of a contract being terminated at its expiry, or before, if performance was poor (p. 12). The study noted that the process enabled the principal enterprise to abdicate responsibility for employees, creating an expectation among some contractors that they should do the same when their service contract was terminated. The second feature of the contract cleaning industry Wilson described was the "distancing" effect whereby the principal organisation detached itself from the effects of the tender agreement on both the contractors and the workers. He told of contractors under pressure to reduce costs to meet the expectations of the tenders and workers under pressure to deliver a service without the ability to influence the decisions that directly impacted on them (p. 13). Wilson concluded that contracting out provided advantages to the business that was divesting of its non-core services but it created pressures for both the competing contractors and the workers they employed.

While the practice of contracting out service workers took place in New Zealand as early as the 1940s[2], significant transformation did not occur until the economic restructuring of the 1980s that resulted in the same vertical disintegration of businesses referred to by Collins in relation to Britain (1990, p. 353). In New Zealand, the process of dislodging workers from a regime of secure employment was accelerated by the disintegration of the centralized bargaining regime in the 1990s (Minimum Standards Review, 2001). I will look first at the reality of those employed in the contract service sector and then turn to the economic restructuring that transformed the work patterns of many employees in the workforce.

2.3.3 The precarious nature of contract work

> **Our employer decided to contract out our jobs as housekeepers. This came as a shock to us because we were in negotiations to renew our collective employment contract and our employer told us we would get a pay increase. We thought our jobs were safe. When the contractor came in we were forced to apply for our own jobs on considerably worse terms and conditions. The new contractor would not even guarantee minimum hours of work. No one who was a union supporter was employed by the incoming contractor.**
>
> Faith Tuala, Hyatt Housekeeper, Service and Food Workers Union Nga Ringa Tota, submission on the Employment Relations Amendment Bill, April 2006 (Service and Food Workers Union Nga Ringa Tota, 2006)

[2] The first contracting out of cleaning services in public hospitals took place in the 1940s at Christchurch Hospital when Crothalls was awarded a contract. It was followed soon after by Wellington Hospital and over the next 30 years a few smaller hospitals around New Zealand (Service and Food Workers Union Nga Ringa Tota & Liquor Hospitality and Miscellaneous Union, 2006).

Contract workers are defined in the literature by a range of terms typically applied to non-standard employment, including "precarious", "contingent" and "vulnerable". In a New Zealand study of non-standard employment, Tucker described precarious work as "employment that is low quality and puts workers at risk of injury, illness, and/or poverty (from low pay and little opportunity for training and career progression)" (2002, p. 2). In a study of contingent workers, Polivka and Nardone (1989) noted that the key criterion for contingency was the degree of job security, rather than the duration of employment. They defined contingent work as "any job in which an individual does not have an explicit or implicit contract for long-term employment or one in which the minimum hours of work can vary in a non-systematic manner" (p. 11). This definition reflected the reality for contract workers, such as Faith Tuala, in the SFWU submission to the Bill (above). The alignment of fixed term contracts for service with employment contracts created a contingent workforce, where every contract renewal could result in jobs being terminated. Ryan and Herod suggested that a decentralized bargaining regime provided employers with the opportunity to take advantage of fixed term arrangements, specifically to drive wages down (2006b, p. 496).

The definition of workers as "vulnerable" has been extensively explored in the literature. In a recent article, Weil (2009) looked at the situation of workers' vulnerability in the United States, highlighting the concentration of vulnerable workers in a few sectors, such as food, retail, janitorial and health services. He identified common characteristics of vulnerable workers, including low wages, being at risk of job loss, a lack of protection against "discrimination and capricious behaviour by supervisors", and a decreasing likelihood of being represented by a union (pp. 413-414).

Highfield and Towner, writing about contract workers in New Zealand, prior to the introduction of the legislation, referred to a "point of vulnerability" that arose from the triangular nature of the relationships inherent in the practice of contracting out (2002, p. 35). This three-way relationship consisted of a contractor and an employee with an employment relationship; and a principal enterprise with influence but no legal obligations toward the employee. The "legal vacuum" between the principal enterprise and the worker defined the "point of vulnerability". McLaren et al drew attention to the vested

interests of the enterprise and the contractor that filled the vacuum in the contracting triangle. They described the "complicated lines of responsibility" that meant the principal enterprise delegated responsibility for a service to a contractor and then expected to be able to impose obligations on the incoming contractor, such as who would be employed, how many would be employed and how the work would be delivered (McLaren et al., 2004, p. 14).

The status of contract service workers as vulnerable was canvassed in the SFWU submission to the Minimum Standards Review, which described these workers as vulnerable on the basis of the low pay; low levels of unionization; often scattered, isolated worksites; the lack of job security; and weak bargaining power (2001, p. 15). The parliamentary debates at the time of the introduction of the Bill providing Continuity of Employment protection, often referred to the targeted workers as "vulnerable" (Employment Relations Amendment Bill: First Reading, 2006, February 23; Employment Relations Amendment Bill: Second Reading, 2006, August 30), as did much of the associated literature (Brookers Online, 2007; Highfield & Towner, 2002; Kiely, 2006). The final legislation, however, did not use the word "vulnerable, referring instead to the term "specified employees" to describe the affected workers and listed the relevant occupational categories in Schedule 1A of the ERA[3]. The ERA also identified criteria for any future employees to be covered by the new protections. Specifically, it covered those whose work was subject to frequent restructuring, where there was limited bargaining power, and where terms and conditions of employment were undermined as a result of that restructuring (s. 237A). In effect, the ERA encapsulated what the government of the day perceived to be vulnerability factors for workers.

[3] Cleaning service, food catering services, caretaking, or laundry services in the education sector; cleaning service, food catering services, orderly, or laundry services in the health and aged care sectors; cleaning and food services in the airline, or other sector (ERA, schedule 1A).

2.3.4 Pressure for productivity

> **We were refused employment with Crothalls from 1st July because we would not accept the Collective Employment Contract that Crothalls offered us. Crothalls "settled" a new Collective Employment Contract with two new workers who had not previously worked for Spotless. Crothalls employed some new staff and bussed and flew in other staff and supervisors from other parts of New Zealand… Many of our workmate's jobs were lost to alternative labour. Five years later the scars of the terrible way that we had our conditions, allowances and recognition of service taken from us have not healed.**
>
> Atareta Adelaide Karini, Service and Food Workers Union Nga Ringa Tota, submission on the Employment Relations Bill 2006

The lives of many contract service workers are shaped by the demands of the contract cycle, as alluded to in the story of Atareta Karini above. A number of studies have highlighted the pressures these workers are under to reduce costs and improve productivity following contracting out. In one study of hotel cleaners three key reasons were given for the growing work intensification of hotel cleaners: market competition, flexible work contracts, and outsourcing (Seifert & Messing, 2006). Herod and Aguiar were unequivocal in their description of the impact of contracting out on workers which they described as "immiseration" through work intensification (2006, p. 428). They drew attention, in particular, to the likelihood of on-the-job injuries as workers were often forced to rush in order to complete their tasks.

Illustrating the nature of cost-cutting practices, the Australasian cleaners unions' Clean Start campaign referred to a 2004 report on contract cleaners from Australia that found

one in four cleaners had inadequate time to do their work; one in five cleaners had to use the same mops for toilets as other areas; and some cleaners were asked to cut sponges in half to save supplies (Service and Food Workers Union Nga Ringa Tota & Liquor Hospitality and Miscellaneous Union, 2006). Whether it was through the reduction of minor costs or, more significantly, wages reductions, the risks associated with this form of employment were described by Allen and Henry as an "inscribed outcome" of the transfer of jobs through the competitive contracting process (1997, p. 187).

The pressure to generate efficiencies is elaborated upon in a recent New Zealand study of health and safety in the cleaning sector, which linked the pressure to reduce costs in a competitive tendering environment, with the pressure on cleaners to perform to an expected standard in less time (Simmers & Associates Limited, 2008, p. 1). They described the adverse health effects on cleaners arising from the requirement to cover larger areas in shorter times with often sub-standard equipment (p. 23). As articulated by Seifert and Messing, businesses that are focused on flexibility to improve the bottom line, are, by their very nature, less attracted to investing in the long term health of their workers (2006, p. 557).

The pressure on wage costs emanates from the people-intensive nature of contracting out. The price of labour in the cleaning industry, for example, is estimated at between 70 percent and 90 percent of the cost of the contract (Highfield & Towner, 2002; Simmers & Associates Limited, 2008). Studies of contract service workers noted the scrutiny of labour costs, the intensification of work, and an inevitable downward pressure on wages and conditions as a result of labour commanding a high percentage of the cost of the contract (Rees & Fielder, 1992; Ryan & Herod, 2006b). In its submission on the Employment Relations Amendment Bill, the SFWU (2006) drew attention to the material costs to workers of contracting out. It outlined the systematic driving down of wages and conditions; the loss of jobs; lack of job security; de-unionization; cuts to hours and other conditions; increased casualization of labour; and effective creation of temporary employment contracts.

The labour market context is important for an understanding of the experience of contract service workers and Continuity of Employment legislation. One study of contract

cleaners, for instance, said that de-regulation of labour exposed cleaners to downward pressure on wages and conditions as firms were able to compete for cleaning tenders on the basis of labour costs rather than efficiency (Ryan & Herod, 2006b, p. 495). The subject of the next section is the developments in the New Zealand industrial landscape during this period of service sector growth and contracting out, in particular, the impact on the target group of the legislation, contract service workers.

2.4 The changing industrial landscape

The political economy in New Zealand was dominated by neo-liberalism from the mid 1980s through to the 1990s as the role of the state was diminished in favour of a free market economy (Eichbaum, 2006, p. 48). The radical neo-liberal reform agenda "jolted" the employment relations system in 1990, transforming a history of workplace collectivization into "palpable individualism" (Haworth et al., 2009). The new social democracy of the Labour Government in 1999 reconstructed a role for the state as a "facilitator, coordinator and broker" (Clarke, 2002 cited in Eichbaum, 2006) and reaffirmed a place for unions in the workplace, however, employment relations never returned to the regulated era of awards and compulsory unionism (Churchman & Roth, 2000). In this section, I will look at the period leading up to the ERA and the legacy of a liberalised labour market that continues to shape the lives of contract service workers.

A number of factors are crucial in setting the industrial context for Continuity of Employment legislation: the de-regulation of the labour market; the de-unionization of the workforce; and the decentralization of bargaining. The dismantling of traditional organised labour began with the removal of the law of compulsory arbitration in 1984, which sacrificed weaker unions lacking the industrial muscle to settle agreements through conciliation (Kelsey, 1995, p. 174). This was followed by the introduction of the Labour Relations Act 1987, which forced amalgamations on unions with less than 1000 members, and began the process of fragmenting bargaining units by enabling employers with more than 50 workers to initiate a ballot for enterprise bargaining (Kelsey, 1995).

However, more radical transformation of employment relations was yet to come with the Employment Contracts Act 1991 ("ECA"), designed, according to one scholar, "to force wages down and to break unions" (Kelsey, 1995, p. 182). This was described by the then Minister of Labour, Bill Birch, as "the most fundamental change to industrial relations since the inception of the Industrial Arbitration and Conciliation Act of 1894" (1990, p.40 cited in Roper, 2005, p. 197). The new law removed the special status afforded unions, replacing them with "bargaining agents"; it dismantled industry and occupational awards, with the associated blanket coverage of union members; and it provided for voluntary union membership, where workers had the freedom to join or, not to join, a union (Churchman & Roth, 2000). The underlying assumption of the law was that parties had an equal "freedom" to determine the structure and content of the employment contract (Mazengarb's Employment Law (NZ), 2009c). Legal commentary notes the "illusory" nature of this freedom: "Put simply, it was argued that, where two parties each wished to "choose" a different outcome, both could not have "freedom of choice" in any realistic sense of that phrase" (Mazengarb's Employment Law (NZ), 2009b).

Freedom of choice remains an important theme in the subsequent Employment Relations Act 2000 ("ERA"), which specifically promotes the integrity of individual choice and recognises the right to freedom of association. This law marked a shift back to the centre and a new social democratic model in which the object of the law was no longer expressed as an efficient labour market but productive employment relationships through the application of good faith in all its aspects (Mazengarb's Employment Law (NZ), 2009b). The assumptions of the new law, described in an *Evaluation of the Short-Term Impacts of the Employment Relations Act 2000*, included that parties understood what was expected of them to act in good faith, that unions were more attractive to people because of their rights to access employees and negotiate collective agreements, and importantly, that good faith would lead to increased communication and trust and thus offset some of the consequences of inequality of bargaining power (Waldergrave, Anderson, & Wong, 2003). These assumptions remain relevant in any analysis of the ERA or its subsequent amendments.

Legal commentary noted that the ERA was a "relatively cautious and conservative" approach to building new law on the landscape of the ECA (Mazengarb's Employment Law (NZ), 2009b). Other academics such as Roper, were cynical of the chances of a significant union revival because of the ability for workers to free-ride on the benefits gained by unions and the lack of "working-class struggle" (2005, p. 231). Ryan and Herod described the ERA as "deeply ambivalent" pointing to the exclusion of non-union workers from collective agreements and the predominance of enterprise rather than occupational or industry sector bargaining (2006b, p. 499). Insight can be gained into the impact of the last 25 years of industrial relations reform through the evidence of levels of unionization and coverage of workers by collective bargaining agreements during this period.

2.4.1 The precipitous decline in unionism

The dramatic decline in private sector union membership that followed the introduction of the ECA was, according to Charlwood and Haynes, the "most precipitous" in the OECD (2008, p. 88). The effects were felt most strongly in the secondary labour market where the shift from centralized bargaining, through the negotiation of awards, to individual and enterprise bargaining, had heavily impacted on those workers in the private sector, in scattered workplaces, with low paid work and atypical hours (Charlwood & Haynes, 2008). The percentage of union members in the employed workforce declined during the period of steady de-regulation of the labour market, from 49.9 percent of wage and salary earners in 1985, to 43.5 percent in 1990 and 17 percent in 1999 (Crawford, Harbridge, & Walsh, 2000). Since that time union density as a proportion of the total workforce has oscillated between 17 and 18 percent (Department of Labour, 2009a, p. 11). Private sector union density was 43 percent in 1990, dropping to 14 percent in 2002 and, apart from a small increase in the interim, by 2005 unionization in the private sector was still at 14 percent (Blackwood, Feinberg-Danieli, & Lafferty, 2005). The collapse in union density was triggered by the ECA but it was not reversed following the introduction of the ERA.

Some of the factors that may have contributed to the lack of union growth after the introduction of the ERA were captured in the Minimum Standards Review and included the continuation of voluntary unionism, decentralized enterprise bargaining and the lack of compulsory arbitration (Minimum Standards Review, 2001). Haynes and Boxhall provide a more recent analysis of what they describe as the 'representation gap', or the unsatisfied demand for unionization, which they estimate as 17.8 percent of the labour force (2006, p. 212). They base this on three factors: free-riding, indifference to unions, and a lack of union reach.

Their analysis reflects research conducted by the Department of Labour ("the Department") in 2009. Haynes and Boxhall's research shows that over 60 percent of workers surveyed could not see the point of joining when they got the benefits anyway, otherwise known as "free-riding" (2009a, p. 14; 2006, p. 208). This was reflected in the Department's study in which employers and employment relations' professionals said that free-riding, or the lack of a union advantage in terms and conditions of employment, reduced the perceived value of being in a union (2009a, p. 15). Haynes and Boxhall talk about "union indifference" contributing to the representation gap, which was reflected in the Department's study that found the most common reason for not joining a union was job satisfaction, such that employees could not see the point of belonging to a union (2009a, p. 15). The third factor, a lack of union reach, is also reflected in the Department's study in which unions identified the lack of resources and the mobile workforce as obstacles to providing information and opportunities to workers to join unions. The survey showed 18 percent of employees said they lacked knowledge of unions and how to join a union (2009a, p. 15). The Department's survey concluded that for all the groups surveyed unions had not recovered from the precipitous collapse under the ECA with many more factors conspiring against union membership than in favour of it.

The experience of workers in the service sector presents a microcosm of the national picture but the evidence suggests the impact of the de-regulation process on these workers was particularly severe, in part owing to the fragmented nature of the businesses in the sector. The growth of small firms and the contracting out of government cleaning services

were two significant factors contributing to the challenge of unionising these workers (Ryan & Herod, 2006b). The SFWU estimated in 2001 that about 10 percent of workers in the service sector were unionised (Minimum Standards Review, 2001) and membership was strongest where firms and worksites were large and located within the public sector (Ryan & Herod, 2006b, p. 497). The proliferation of small cleaning firms was, according to Ryan and Herod, facilitated by the breakdown of the award system and the decentralization of bargaining, with "momentous implications" for the workforce (2006b, p. 498). In the next section, I will explore the diminishing collective coverage under a de-regulated bargaining regime.

2.4.2 Diminishing collective coverage

The primary mechanism for reducing union coverage was the new bargaining regime of the ECA which required individual authorisation for any union to act on behalf of a union member in collective bargaining (Kelsey, 1995, p. 182). Harbridge and Honeybone said that in the last award round before the new law was passed in 1990 there were 721,000 employees covered by collective agreements which, by 1993, they estimated to have declined to between 340,000 and 370,000 employees (1994, pp.2-3 cited in Kelsey, 1995). This number continued to decline despite the fact that legislation returned a union monopoly on collective bargaining in 2001. Recent statistics suggest that employee coverage by collective agreements declined from 24 percent of the total number of people employed in 2000[4], to 15 percent in 2008 (Department of Labour, 2009a, p. 18). The ratio of public to private sector coverage by a collective agreement changed dramatically from 3.3:1 to 5.7:1 (Department of Labour, 2009a) reflecting a recovery in public sector collective bargaining since the introduction of the ERA. Illustrating the private sector decline, over 80 percent of businesses in the Finance and Insurance, and the Property and Business Service sectors had no employees covered by collective agreements (Department of Labour, p. 19). The consensus of people surveyed by the Department of Labour was

[4] This includes self employed and therefore represents a larger group than would be likely to join a union and a collective agreement.

that the primary barriers to collective bargaining were the voluntary nature of unionism and the enterprise-based bargaining that demanded resource-intensive union organising (p. 20).

Addressing the service sector in particular, it was clear that numerically the sector was expanding in size but in reality this growth was taking place in concentrations of low paid, low skilled workers with little bargaining power (Minimum Standards Review, 2001). One group of service workers, commercial cleaners, retained a collective document throughout the tumultuous transition from awards to the employment contracts of the 1990s and into the new era of collective agreements in 2000 - but this was at a cost (Service and Food Workers Union Nga Ringa Tota, 2006). Since the early 1990s, pay rates in the cleaners' collective employment agreement were marginally above the minimum wage and many allowances and benefits, including redundancy pay, were ceded during negotiations in the early 1990s in order to retain collective coverage, as National Secretary John Ryall commented:

> The negotiation of the first multi-employer CEC [collective employment contract] in 1992 was a one-sided affair, with the Union agreeing to major cuts in cleaners' leave entitlement and allowances, to achieve a national multi-employer [contract] (Service and Food Workers Union Nga Ringa Tota, 2006, p. 102).

At the time of writing, the rate for commercial cleaning staff in the private sector was $12.55 per hour, just five cents above the minimum wage, and there were few additional benefits ("New Zealand Cleaning Contractors Multi-Employer Collective Agreement," May 1 2008 - 30 April 2009).

Centralized bargaining and the industry or occupation-based award system, offered greater protection to contract workers in situations of contracting out because the comprehensive coverage of the sector by a single set of terms and conditions ensured that the workers continued to be covered by the same terms and conditions following the transfer of a service contract (Minimum Standards Review, 2001). The rise of individual and enterprise bargaining served a flourishing and competitive service sector but cast many workers beyond the reach of the protections that were once provided by unions and the

collective agreements they negotiated. It was within the context of this de-unionised environment, with its fragmented bargaining regime, that the argument was mounted for a legislative safety net for contract workers.

2.5 The international context of protective legislation

New Zealand looked beyond its borders to international jurisdictions for models of protective legislation for contract workers, where employee regulation covering a transfer of undertakings was relatively common (Churchman, 2002b). In 2001, it was estimated that protective legislation existed to cover some 360 million people worldwide (Minimum Standards Review, 2001). The models varied with different limitations placed on its application. For instance, while 10 percent of workers covered by Federal Canadian law enjoyed mandatory rights of transfer, those in Ontario were covered only in the event of the sale of a business and not for situations of contracting out. Further, continuity of employment only applied if workers were first offered employment by the new owner (Churchman, 2002b). Other legislation has evolved over time, such as the Australian legislation, where continuity of employment protection initially applied only to workers on collective agreements but was extended to all workers under the Fair Work Act 2009 (Fair Work Ombudsman, 2009).

The concept of employment protection legislation emerged first in Europe in response to the rise of business transfers in the 1970s, which were estimated to have doubled every three years in the European Union during the 1980s, accounting for 40 percent of the global business transfers at that time (Marchington, Cook, Earnshaw, & Rubery, 2004). The European Community developed a policy instrument called the Acquired Rights Directive 77/187/EEC (ARD) to specifically address these transfers. The passage of this law over the next 30 years reflected the tensions between equity and efficiency that later characterised the New Zealand debate. In the next section, consideration will be given to the European developments, with particular reference to legislation in the United Kingdom.

2.5.1 The Acquired Rights Directive

The European Acquired Rights Directive ("ARD") guaranteed that if a business "undertaking" was transferred, resulting in a change of employer, the employees and their associated rights would also transfer to the new employer. Workers were protected from dismissal unless the termination occurred for economic, technological or organisational reasons (Eur-Lex, 2001). As the types of business transfer expanded, including into contracting out, the ambit of the ARD, via revisions (Council Directive 2001/23/EC) or European Court decisions, also expanded. It captured the new forms of restructuring to such an extent that the ARD had "the controversial status as a champion of employee's rights" (More, 1995, p.135 cited in Hunt, 1997, p. 337). In particular, this was attributed to the protection afforded workers against cuts in their pay and conditions at the time of a transfer, thus constraining cost-cutting in the tender process (Hunt, 1997). The developments in the ARD were evolving to maintain consistency with the original purpose: to safeguard workers' rights in the event of a transfer of an undertaking, business, or part of a business (Eur-Lex, 2001).

While one of the ARD's objectives was social protection of workers, the directive also aimed to "assist in the process of restructuring, allowing more competitive and efficient undertakings to emerge" (Barnard, 1993, cited in Hunt, 1997). The ARD attempted to "balance employment protectionism with commercial realism" (Hunt, 1997, p. 347). Its detractors argued the employment protection available to workers threatened to make a "failed economic experiment" of competitive tendering (Adnett, Hard, & Painter, 1995, p.21), acting as a deterrent to the transfer of a business, rather than facilitating the transfers (Barnard, 1993, cited in Hunt, 1997).

Adnett et al (1995) draw attention to the importance of the cultural context for understanding social protection developments and compare the experiences of Europe and the United Kingdom. They argue the ARD emerged out of a European social policy model characterised by cooperation and cohesion, in which workers secured stable jobs and high wages in return for high productivity. Within this context driving down wages

through competitive tendering processes could be seen to threaten the "efficiency-generating" social contract (Adnett et al., 1995, para. 4). The United Kingdom, by contrast, was legislating at a time when its Government had embraced liberal market ideology with a strong emphasis on self-regulation (Adnett et al., 1995). It is the experience of the ARD in Britain that relates most closely to the New Zealand situation, where industrial relations leading up to the introduction of the new law was similarly shaped by economic liberalisation.

2.5.2 Transfer of Undertakings (Protection of Employment) Regulations, UK

The ARD, while binding, required member states to legislate its local form and, therefore, varied from one jurisdiction to the next. The Directive was implemented in Britain through the Transfer of Undertakings (Protection of Employment) Regulations 1981 ("TUPE") and its history exemplifies the challenge of balancing economic and social needs in a neo-liberal market economy. From 1979, the Conservative Government in Britain adhered to the view that market forces were self-regulating in a competitive economy and government regulation would distort the market (Adnett et al., 1995, para. 5). Compulsory competitive tendering was introduced as part of a programme of privatisation of public services in the 1980s, explicitly designed to reduce costs and increase efficiency in a free market (Kelliher, 1996). Regulation of the competitive tendering environment and the ARD, with its goal to safeguard the rights of employees during a transfer, ran counter to the prevailing policy in the United Kingdom (Adnett et al., 1995).

The key planks of the ARD were incorporated into TUPE, including the right of employees to be assigned to a transferred undertaking on their existing terms and conditions (McMullen, 2006, p. 116). There was also a duty to inform and consult with workers and their representatives prior to any transfer. TUPE was revised a number of times in response to European Community Commission litigation, to a revision of the

ARD (2001/23), and to address uncertainties (McMullen, p. 113). In 2006, TUPE codified European case law on the definition of a transfer; restricted the ability of employers to vary workers' terms at transfer; required a new company to be given timely written notification of individual employee liability information; and extended the coverage to changes of service contracts, including subsequent contracting situations (McMullen, 2006). The latter amendment resulted in the United Kingdom providing protections superior to the ARD (McMullen, 2006).

The Conservative Government resisted introducing protective legislation and, from its inception, TUPE law was unpopular with employers (Adnett et al., 1995). A number of studies showed active resistance to its implementation. One survey of 68 employers in the late 1990's revealed widespread non-compliance (Painter & Hardy, 1999) and a Unison survey in 2000 indicated 90 percent of contractors were paying new workers less than those who had transferred, creating a two-tiered wage structure (Foley, 2002). Evidence in a 2004 study also suggested that a large gap existed between the requirements of the law and the reality for workers, particularly with respect to terms and conditions of employment and work intensification (Marchington et al., 2004; Marchington, Cook, Earnshaw, & Vincent, 2000). As noted by Adnett et al the political and judicial climate in which TUPE law matured was resistant to any challenge to managerial prerogative and provided a stark contrast to the emphasis on social cohesion in the policy of the European Union (Adnett et al., 1995) and a challenge to the goal of the ARD to safeguard workers' rights in the transfer of an undertaking.

2.6 Steps toward standards for New Zealand workers

The New Zealand legislation had its own unique history but reflecting European aspirations, it sought to achieve a balance between equity and efficiency (Employment Relations Amendment Bill: First Reading, 2006, February 23). While New Zealand shared the United Kingdom's history of a neo-liberal market economy, local developments differed in the extent of political commitment to reform. From its genesis, with the election of the Labour Government in 1999, the concept garnered political

support but its rocky journey into law reflected the controversial nature of the amendment. In this section, I trace the legal and political passage of the law from 2000 until the final amendments in 2006.

2.6.1 A challenge to common law

While many overseas jurisdictions provided statutory guidance on the rights of employees in the transfer or sale of businesses, the absence of such legislation in New Zealand meant that transfers in this country were governed by common law. The practice of contracting out was able to take advantage of a common law principle that established a fundamental right of employers to enter into new employment relationships with staff when a business was purchased (Highfield & Towner, 2002, p.499). The principle established that

> a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his consent (Nokes v Doncaster Amalgamated Collieries Ltd [1940] 3 All ER 549, 552).

The application of this principle resulted in the terms and conditions of employment being negotiable when the sale or transfer of a business took place. Under common law the relationship was with the employer and not the business so there were no obligations on the new contractor to offer employment to the existing workers (Churchman, 2002a). As employers sought to increase their profit margin with the purchase of the business, workers would commonly experience cuts in terms and conditions. Far from protecting the citizens in their exercise of choice, common law was exposing them to termination of employment without choice. These were the ramifications, according to Churchman (2002a), that led the Government to look at a legislative solution around contracting out .

2.6.2 A process of trial and error

The pathway to law was a protracted one, intercepted by legislative revision and Employment Court decisions. The ERA, in 2000, incorporated a requirement that collective agreements include a clause to protect workers in the event of the sale, transfer, or contracting out of a business. Roth (2001) questioned whether the scant protections conferred any rights and in 2003 a decision of the Employment Court[5] concluded parties only had to include a clause "with a view to" protecting employees and failure to do so would not, therefore, be unlawful (Ryall, 2006, p. 4).

A milestone toward the introduction of more substantive protections for contract workers was reached with the publication of the tripartite working group report in 2001: the *Minimum Employment Standards Review: Report of the Advisory Group on Contracting Out and Sale and Transfer of Business to the Minister of Labour* ("Minimum Standards Review"). The majority view of the Advisory Group concluded that legal intervention was warranted because of the extent to which contracting out had become a tool of business to use "without sufficient reference to the social consequences of those decisions". It stated that

> there is prima facie evidence that many vulnerable employees are materially and psychologically disadvantaged by the impacts of contracting out. Furthermore they accept the view that a change in ownership of a company (whatever the form the change takes) should not a priori lead to the cessation of the employment contracts of affected employees (Minimum Standards Review, 2001, p. 21) .

The Advisory Group's report affirmed the Government's commitment to additional measures for the most vulnerable workers and noted that it was low wages, weak bargaining power, little job security and a lack of control over the workplace that made

[5] Service and Food Workers Union Inc v Vice-Chancellor of the University of Otago 2003

certain groups particularly vulnerable (p.35). These factors would be reflected in the statutory criteria for inclusion in Schedule 1A[6] of the ERA.

In 2004, a two-tiered system of protection was introduced to the ERA for employees who were subject to "restructuring". Firstly, specified employees were entitled to be transferred to a new employer, on the same terms and conditions, in situations of sale, transfer or contracting out (Subpart 1). Secondly, and reflecting the 2000 general protections, all other employees would be required to have a provision in their agreement relating to negotiations over any transfer of employees affected by restructuring (Subpart 3).

In an Employment Court case, *Gibbs and others v Crest Commercial Cleaning Ltd*, in 2005, it became apparent that, after the initial contracting out, subsequent service transfers would not be covered by the legal protections of Part 6A (Subpart 1). The Employment Relations Amendment Bill was introduced in 2006 in direct response to this decision (Kiely, 2006). It aimed to create clarity of purpose and certainty, in particular, in relation to subsequent contracting (Employment Relations Amendment Bill: First Reading, 2006, February 23). This amendment overcame the problem of ongoing litigation experienced in Europe around the coverage of contracting situations by the ARD, following a 1997 case[7] that determined there was no continuity of employment in a subsequent contracting situation (Department of Labour, 2010). It had been a process of trial and error but on September 14, 2006, the Employment Relations Amendment Act came into force.

2.6.3 Balancing social justice and workplace flexibility

The contracting out of workers and associated legislation for continuity of employment entailed a debate about business flexibility versus employee protection. The primary reason for contracting out services was to achieve economic efficiencies and the primary motivation behind introducing Continuity of Employment legislation was to protect

[6] Refer footnote 3
[7] Suzen v Zehnacker Gebaudereinigung GmbH Krankenhaus Service [1997] IRLR 225; [1997] ICR

workers' terms and conditions of employment (Churchman, 2002a). Roth wrote the Government's justification for legislation was industrial peace and social justice, while the opposition to the law was focused on the desire for business flexibility and contractual freedom (2001, p. 4). Legislation entailed a trade-off between the two positions. The debate was foreshadowed in the Minimum Standards Review which stated: "The scope and effect of any legal intervention needs to achieve employee protection and no more. It needs to balance this with the need not to create an impossible burden for business to develop and survive" (2001, p. 19).

This was a message reiterated in Parliament in 2006 when the law was described as a way to ensure a balance between efficiency and equity by encouraging businesses to utilise existing talent and to facilitate productive employment relationships and business growth, at the same time as protecting vulnerable workers when their work was restructured (Employment Relations Amendment Bill: First Reading, 2006, February 23). A voice articulating the interests of workers was the Maori Party, which summed up the new law as a way of safeguarding terms and conditions of vulnerable workers, protecting against ever-increasing workloads, preventing deteriorating health and safety of workers, and preventing job losses in the contracting out process (Employment Relations Amendment Bill: Third Reading, 2006, September 7). The legislation was described as

> a step along the way to assisting our vulnerable workers improve their lot. But it is still only a limp band-aid on a seeping hakihaki, that's like a sore, oozing out over this nation. The spreading sickness of poverty (Sharples, 2006).

The interests of capital were canvassed in the Minimum Standards Review (2001) in which employers opposed regulation that would compromise commercial efficiency. The New Zealand Employers' Federation expressed their opposition to any rules that would impose restrictions on employers, stating that regulatory intervention would have an adverse effect on business and employment opportunities. They said: "Such intervention will impact on businesses' ability to deal with their investment as they see appropriate, the ability to restructure, and become more efficient in order to reduce costs to become

competitive both domestically and internationally" (Minimum Standards Review, p. 11). The Retail Merchants' Association feared it would "reduce the value of businesses and be detrimental to employment in the sector" and the Building Service Contractors' Association were concerned that they would bear responsibility for decisions made by the principal enterprise in issuing a contract for service (2001, p. 55). Their sentiments were echoed by the Opposition in Parliament which argued that the law would result in poorly performing workers retaining their jobs and undermining the performance of the company. In essence, they viewed the law as undermining "business freedom" and "commercial reality" (Employment Relations Amendment Bill: First Reading, 2006, February 23).

2.6.4 The amendment to the Employment Relations Act 2000

The 2006 amendment to the ERA (Part 6A) was called *Continuity of Employment if employee's work affected by restructuring* and enabled specified employees[8] to elect to transfer to a new employer on the same terms and conditions of employment if their work was sold, transferred or contracted out (s. 69I), including in situations of subsequent contracting out. New workers could be added to the schedule for coverage, through an Order in Council on the recommendation of the Minister, if they were employed in a sector that restructured frequently, their terms and conditions of employment tended to be undermined as a result of that restructuring, and they had little bargaining power (s. 237A(4)). The new law stopped the automatic cessation of employment agreements during the cyclic renewal of contracts for service (Employment Relations Amendment Bill: First Reading, 2006, February 23) and in doing so addressed the concern expressed in the Minimum Standards Review that a change in ownership of a business should not, a priori, lead to the cessation of the employment contracts of affected employees (2001, p. 21).

The new amendment juggled the interests of business and labour through the inclusion of both constraints and freedoms on the behaviour of affected parties. On the one hand, the

[8] Refer footnote 3

principal enterprise and the employer had to ensure workers had the opportunity to elect to transfer, along with sufficient information to make an informed decision (s. 69G). On the other hand, affected workers could bargain away their right to transfer by negotiating alternative arrangements (s. 69H). The balance was further expressed through the rights to redundancy. On the one hand, the employer could terminate an employee for reasons relating to the transfer, or to the circumstances arising from the transfer; on the other hand, the worker could bargain for redundancy compensation and, if necessary, apply to the Employment Relations Authority for a determination on compensation (s. 69O).

The legislation differed from its European counterparts in a few significant ways pertinent to this study. The first concerned the provisions for consultation. Highfield and Towner drew attention to the importance of including workers in management decision-making to reduce other potential points of vulnerability, through processes such as consultation, the provision of information, and the involvement of workers in decisions about options for redeployment (2002, p. 35). Consultation was an integral requirement of the ARD but it was not incorporated into Part 6A (Subpart 1), instead the smooth management of employment relationships would fall to the good faith requirements of the ERA. Secondly, the right to elect to transfer ran counter to European developments. Under European law an employee could not waive rights of transfer or diminish them in anyway through the consent of the parties (McMullen, 2006). In effect, TUPE law meant that a variation was void if the reason was the transfer, or connected with the transfer so that, in effect, numbers or functions would have to change for any variation to be lawful (McMullen, 2006). Thirdly, New Zealand law entitled an employer to terminate a transferred worker by way of redundancy, in contrast to European law where it was clear that dismissals could not occur if the reason for termination was the transfer itself, or a reason connected with it that was not economic, technical or organisational (McMullen, 2006).

While New Zealand law differs from British law in these fundamental ways it is consistent with the object of the ERA, which grounds the employment relationship in the duty of good faith. The ERA recognises the inherent inequality of power in employment relationships and at the same time promotes the integrity of individual choice (s. 3(a)). A

tension exists, potentially, in these principles but the expectation is that good faith will ensure the smooth functioning of the employment relationship at all times, including during the sale, transfer or contracting out of a business (s. 4(4)(d)). The legislation forges new ground in employment relations by providing a bridge across two contracts of employment, enabling the transfer of workers from one employer to the next. In doing so, the law captures in the regulatory net for the first time the triangular relationship of principal, contractor and employee. The question remains whether for workers, the evident material and psychological disadvantage they experienced before the legislation was introduced, was effectively eliminated by the new entitlements.

2.7 Conclusion

The purpose of this chapter was to uncover the cultural and legislative nest in which Continuity of Employment law emerged. The literature paints a backdrop of a flourishing service sector within a liberalised economy. The combination of vertical disintegration of production and de-regulation of labour law that characterised the employment relations environment at the end of the twenty first century, exposed contract service workers to a precarious existence, where worker's contracts of employment were effectively contingent on their employer's contracts for service. This is illustrated by the tales of material and psychological disadvantage from the frontline where cleaners and catering workers endured the pressures of the contracting cycle, often at the expense of their entitlements and their jobs. Work patterns were transformed during the period of economic liberalisation and workers were increasingly left beyond the reach of the traditional protection of unions and collective agreements. They were described in the literature variously as precarious, contingent and vulnerable. One such group was the growing sector of contract service workers, who would become the focus of new Continuity of Employment law.

The legislation emerged out of a tripartite process of consultation but, as noted by the Minimum Standards Review and the parliamentary debates, change was opposed by many representing the interests of business. The amendment constrained the common law right

of employers to employ whomsoever they wished when embarking on a new contract for service. However, for the advocates of the new law, it provided workers with the opportunity to have certainty and security - a bridge to ongoing employment at a time of crisis. The crisis for which legislation was designed was the cyclic termination of employment agreements with the change of a service contract. The amendment was not introduced to address the inherent inequality of power in the employment relationship or the competitive tendering processes that were the genesis of the disadvantage they evidently endured. Its goal was to protect workers terms and conditions within the context of a thriving and efficient market economy. Its objective was to balance the interests of labour and capital.

New Zealand drew upon the experience of overseas models, most notably the British law, however, TUPE was characterised by political resistance, litigation and employer non-compliance. While New Zealand shared with the United Kingdom a culture of self regulation, it differed in its political commitment to legislative change. The question remains whether the ground was adequately prepared for the new law or, if the permissive, "voluntarist", approach of the ERA (Haworth et al., 2009), would prove an obstacle to achieving its purpose. The next chapter seeks a deeper understanding of the legislation through an analysis of its neo-liberal context and by examining its development through the theoretical lens of risk society.

Chapter Three

The Risky World of Contract work

3.1 Introduction

The subject of this chapter is the transformation of the New Zealand labour market over the last 25 years of economic liberalisation. From the rise of contractualism to the new social democratic vision in 2000, the "motor of individualization is going at full blast" (Beck, 1992, p. 99). What some theorists would celebrate as a source of growth and prosperity, others would describe as the cause of social exclusion, financial insecurity and poverty. Individualization provides the theme of this chapter, in which the new social democracy in New Zealand is examined through the lens of Ulrich Beck's theory of risk society, with a particular focus on the world of contract workers. The theory of neo-liberal governmentality and the concept of the third way help to define the nature of the labour market where the state is in retreat, collectives are disintegrating and the individual becomes an active citizen and entrepreneur. In this chapter, I trace the persistence of individualism in the modern era, the emergence of flexibility as the instrument of progress in the labour market, and the decentralization of workplaces through mechanisms, such as contracting out. Beck's theory of risk society provides a useful framework for uncovering the impact of this modernising process on contract service workers, the risks they bear and the material and psychological consequences of liberalisation.

3.2 The rise of neo-liberalism

The rise of individualism in the neo-liberal era is extensively explored in the literature (Beck & Willms, 2004; Giddens, 1994; Kelsey, 1995; Miller & Rose, 1990) and

fundamental to an understanding of the transformation of the New Zealand workplace. The theory of governmentality describes a shift that takes place from passive citizenship, defined by solidarity and social security under the post-war welfare state, to an active citizenship which is individualistic and entrepreneurial (Lemke, 2001; Miller & Rose, 1990). Governmentality presents individuals as rational and moral economic actors who weigh up the costs and benefits of their actions maximise the returns and assume responsibility for any failure (Lemke, 2001; Miller & Rose, 1990). In the transition to active citizenship responsibility for social risks, such as poverty, are transferred, from the state, representing collective interests, to the individual (Lemke, 2001, p. 202). The state is in retreat and governs through "the regulated choices of individuals" instead of "collective solidarities and dependencies", in effect, shaping the power and the will of individuals and enterprises from a distance (Rose, 1996, p. 40). This description of political and economic transformation resonates with the New Zealand experience and informs thinking on the challenges of protecting workers who are increasingly beyond the reach of social institutions.

The emerging political economy in New Zealand during the last two decades of the twentieth century embodied the values of Friedrich von Hayek, who Rose described as celebrating individual freedom as the source of progress and growth (1996, p. 50). This was evidenced in New Zealand by what Roper called the Treasury's "methodological individualism" of the 1980s, in which briefings to the Government of the day advocated that economic prosperity would result from individuals selfishly contracting in the market (2005, p. 163). The government would reduce its role as the protector of citizens and expand its role in harnessing and supplementing the markets (Kelsey, 1995, p. 56). This was a stark contrast to the paradigm of the welfare state through which the state "would "social-ize" both individual citizenship and economic life in the name of collective security" (Rose, 1996, p. 48). Institutionalized individualism took root in New Zealand society in the 1980s, prevailed for the next twenty years regardless of political leadership and reshaped industrial relations for the first time in 100 years (Roper, 2005).

3.3 Embedding contractualism in the workplace

A description of contractualism in the New Zealand labour market can begin with the Fourth Labour Government when the first cracks appeared in the foundations of traditional workplace collectivism. Significantly, the introduction of the Labour Relations Act 1987 and the State Sector Act 1988 promoted a choice of enterprise bargaining, over large scale industry or occupational awards in the public and private sector (Roper, 2005, p. 185). Nevertheless, until 1991 labour law was based on the rights of the collective, both in negotiation for agreements and the management of personal grievances (Churchman & Roth, 2000). It was not until the introduction of the Employment Contracts Act 1990 ("ECA") that contractualism was embedded in the workplace through the creation of self-regulated workplace relationships (Yeatman, 1995, p. 125), or what Roper described as the codification of employment relationships as private relationships (2005, p. 209). Yeatman defined contractualism as obligations which are mediated by the consent of the individual (1995, p. 124). This was expressed in the ECA through rights of freedom of association (s. 5) and negotiation (s. 9), including the replacement of unions as legal entities with voluntary representation by "bargaining agents" (s. 10). The individualizing of relationships was not the sole preserve of the neo-liberal 1990s but endured through to the next decade of social democratic change and industrial relations reform in 2000.

The Labour Government came into power in 1999 driven by a different programme and a "softer" neo-liberal stance (Roper, 2005, p. 224) but the emphasis on individual consent remained. The approach reflected international developments in liberal rationality sometimes referred to as the third way (Roper). This is a useful concept for an understanding of the New Zealand environment after 2000. The international debate about the third way centered on the value placed on the role of the state and the free market in society and on the balance between individual and collective responsibility (Eichbaum, 2006). The architect of the theory in Britain, Anthony Giddens, described the third way as a "social democratic renewal" which transcended neo-liberalism and social democracy; where the state intervened, not because of market failure but to make

markets more efficient (1998; Giddens, June 07, 2004). The third way retained a strong emphasis on individual responsibility and "entrepreneurial independence" (Giddens, 2000, p. 6). Regulation, according to Giddens' prescription, should not inhibit basic economic goals because markets ultimately had a role in working for the social good (p. 84). In New Zealand, according to Eichbaum, there was not so much a third way as a "new modern social democratic view" without the clear ideological framework of Tony Blair's New Labour Government (2006, p. 53). However, the third way is relevant to local developments in industrial relations in respect of its emphasis on the state as an "enabler" rather than a direct provider (Giddens, 2003, p. 2) and on flexibility of product, capital and labour markets through de-regulation (Giddens, 2000, pp. 75-76). These elements go to the heart of the persistence of individualism in the New Zealand workplace.

3.4 Labour in the new social democracy

The ERA illustrated the search for a balance between individualism and collectivism and between the interests of business and labour. As Wilson stated, the ERA aimed to sustain a successful economy at the same time as it ensured workers a voice and the vulnerable, protection (2001, para. 12). The object of the ECA, "to promote an efficient labour market" (ECA 1.), was replaced with the contrasting object of the ERA: "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship" (s. 3(a)). The law shifted from a sole focus on efficiency to a balance between efficiency and equity; from an emphasis on individuals freely contracting in the labour market, to an increased emphasis on collectivism. The ERA acknowledged "an inherent inequality of power in employment relationships" (s. 3(a) (2)) and sought to address this through new measures that bolstered collectivism (Haworth et al., 2009).

Good faith was the principle object by which collectivism would re-emerge; the mechanism by which unions would be recognised, collective bargaining promoted and negotiations conducted (Anderson, 2006). The Explanatory Note to the Employment

Relations Bill 2000 (NZ) said: "employment is a human relationship involving issues of mutual trust, confidence and fair dealing, not simply a contractual, economic exchange" (Mazengarb's Employment Law (NZ), 2009b). The ERA bolstered collectivism by re-establishing a role for unions, which included a monopoly on bargaining collective agreements (s. 5), requiring good faith behaviour in collective bargaining (s. 32) and enhancing union rights of access to workplaces (s. 20). The new law represented a reassertion of the principle of collectivity but, as will be explored next, it belied a more complex vision of the workplace in the new era.

The ERA affirmed a role for the collective in the workplace but at the same time it preserved the rights of the individual in a balance that illustrated Eichbaum's new modern social democratic view. It was described by Churchman and Roth as a "half way house" between the old world of awards and the contractualism of the 1990s, reflecting a "light-handed Anglo-American style of labour market regulation" (2000, p. 7). The ERA re-regulated a role for the collective but retained the principle of consent that underpinned the earlier ECA. This was exemplified in its object of building productive employment relationships by "protecting the integrity of individual choice" (s. 3(a)(iv)).

The principle of consent is illustrated by the rights to collective bargaining, which sit within a framework that is non-prescriptive, in the tradition of the third way (Harris, 1999). For instance, individuals have the right to choose their representation and the nature of their employment arrangements (s. 3(a)(4)). The ERA embodies the third way notion of subsidiarity, where the state delegates responsibility for workplace outcomes to the lowest possible level; in many respects, the workplace actors themselves (Harris, p. 29). The state does not intervene in collective bargaining through arbitration or conciliation of disputes of interest because this could be perceived to stifle "the rights of the subsidiary order of social organisation" (Harris, p. 27). This suggests that under the protective cloak of the duty of good faith, the parties to bargaining were empowered to determine their own workplace agreements. The notion of consent first introduced with the ECA is transferred to the ERA, within a new third way framework.

The third way goal of "reconciling autonomy and interdependence" (Giddens, 1994, p. 13) was reflected in the careful balancing act between freedom of choice and regulating

constraints on behaviour that characterised the ERA. A number of examples serve to illustrate this. Firstly, the ERA supported contestable unionism by enabling any individual to register a union or join a union of their choosing (Part 4), which arguably could create an obstacle to union growth by fostering competition. However, at the same time the ERA provided unions with a device to strengthen their influence by legislating for a union monopoly on collective bargaining (s. 12). In a second illustration, the ERA promoted collective bargaining (s. 3(a)(iii)) but at the same time gave parties the freedom to negotiate the terms of their own workplace agreements (Part 6). In a final illustration, the ERA gave parties access to mediation services to assist with problems in collective bargaining (s. 114(2)(e)) but it also greatly restricted access to judicial intervention (s. 50(c)(1). Through the statutory obligation of good faith, the Government aimed to build a pluralist, cooperative approach to employment relations where the interests of both parties were recognised (Anderson, 2006). The risks associated with a regime that aspired to a balance between autonomy and interdependence and between the interests of labour and capital, are the subject of the next section.

3.5 The risks of the 'second modernity'

The transformation of industrial relations through the introduction of contractualism and the subsequent third way compromise between the interests of labour and the market are an important context for understanding the world of contract workers. However, the concept of risk society is valuable for a deeper analysis of the impact of societal change on workers. Developed by Anthony Giddens and Ulrich Beck, the theory of risk society provides a framework for looking at the emergence of a new form of capitalism, of global economic order, of society and of personal life (Beck, 1999, p. 2). In particular, there are three concepts drawn from Beck's theory of risk society that feed into this analysis: *individualization*, as a driver of the neo-liberal economy; *flexibilization*, as the engine of the labour market; and *decentralization* as an instrument of control over the workplace (Beck, 1992). In the following sections the world of contract service work will be investigated through the lens of risk society.

Beck perceived distinct stages of social development that progressed from the first modernity to the second modernity, although the two models can and do overlap and "interpenetrate each other" (Beck & Willms, 2004, p. 31). The first modernity is recognised as the nation state, it is based on large collective groups and is characterised by full employment and territorially-fixed firms. The second modernity is a neo-liberal society; it is global, production is de-territorialised and labour is fluid or flexible . The first modernity is based on the distribution of goods and the second modernity on the distribution of risks (Beck, 1999, p. 63). Risks are the by-product of people's decisions arising from the hazards of human intervention and in this sense, according to Beck, they are "manufactured uncertainty" and generate further uncertainty and risk (1999, p. 19).

Beck's description of social change is valuable for an analysis of contract service workers because many of these workers symbolise the fluid, flexible workforce of the second modernity. Outsourcing is described by Beck as the de-territorialisation of non-core services where an "internalisation of markets" within the firm has resulted in "organisational metamorphosis" (Beck & Willms, 2004, p. 171). That metamorphosis, the subject of this thesis, has consequences for contract workers, described by the Minimum Standards Review, as psychological and material disadvantage. In the next section, the first of Beck's three concepts is explored: individualization.

3.6 Institutionalized individualism and labour relations

The driver of the second modernity is "institutionalized individualism" in which people are invited to "constitute themselves" in every domain of life, from work, to education, to welfare (Beck, 1999, p. 9). It is individuals, as employees in the labour market, who are invited to take control over their own life, according to Beck (1999). Where people once had the support of a collective, in the form of family, or community, they now become the bearer of rights and responsibilities, as the "social risks" of the past become individualized (Beck, pp. 75, 100). This reflects the notion of third way subsidiarity and the devolution of responsibilities to "expert machines" and decision-makers in governmentality (Rose, 1996, p. 54). Where individualism is institutionalized the government is no longer the

source of knowledge and decision-making so the individual must turn to other sources of expertise, including themselves, for their protection and well-being (Rose, 1996, p. 58). This process began for New Zealand workers with the arrival of contractualism under the ECA and persisted with the regulation of individual choice under the ERA. For 20 years the individual has been the bearer of workplace rights and responsibilities, even if under the ERA, that individual right was to choose to belong to a workplace collective.

Beck describes the emancipated individual of risk society as not really free but dependent upon the labour market and any social laws that protect the individual (1992, p. 130). He talks of a double disadvantage for those located in a space where class and risk society overlap (p. 35). Precarious employees are located in a "social risk position" (p. 23), disproportionately disadvantaged by being wage and consumption dependent, having insecure employment, and lacking the traditional support systems of the family and welfare state (p. 93). Illustrating this, Beck uses the example of unemployment which is a greater risk for a low waged worker than a high waged worker because there is no financial buffer for lean times (Beck & Willms, 2004, p. 158). He says, "poverty attracts an unfortunate abundance of risks" (Beck, 1992, p. 35). A lack of job security, or having no roof for shelter, places a constraint on the freedom of an emancipated individual to participate in society as an active citizen (Beck & Willms, 2004, p. 156).

3.7 Strategic flexibilization

The second concept from risk society, relevant to contract workers, is flexibilization. Flexible work has allowed the "remaining dams of the truncated labor market society to burst" as individuals, increasingly dependent on the labour market, flood into a world of work characterised by underemployment, temporary employment or uncertain employment (Beck, 1992, p. 149). Flexibilization operates as an engine of the labour market, transforming work through the employment contract, the working hours and the work site (Beck, p. 142). Contract cleaners illustrate well this flexibilization. Once protected by an award system that standardised wages and provided mechanisms for their protection during restructuring, commercial cleaners are now subject to fragmented

bargaining arrangements resulting in flexible agreements, whether these are union negotiated collective agreements or individual agreements set by the employer and employee (Minimum Standards Review, 2001).

Beck presents the flexibility associated with the second modernity as strategic, in the sense that "renewable" workers foster a successful competitive environment for business (1999, p. 12). A study by Allen and Henry investigated the relationship between risk society and contract workers, who were subject to irregular and unstable patterns of employment (1997, p. 182). They observed that while many experienced stable employment, the work was by nature permanently "risk-laden", in the sense that the risk of losing their job was a feature of working life (1997, p. 188). The end of a service contract always presented the risk of a "reshaping of the employment relationship" (1997, p. 187). They concluded that increasingly, risk was borne by workers through both reduction in employment rights and institutional rationalising and restructuring. This was reflected in the Minimum Standards Review, which documented the New Zealand experience of "overnight loss of conditions", insecurity, and job loss as a consequence of contracting out (2001).

This is the "fragile work" foreshadowed in the transition from the stable, standardised employment of the first modernity to a new modernity, where the boundaries between work and non-work become fluid, in a flexible world of under-employment (Beck, 1992, p. 142). The risks associated with these flexibilities are exacerbated by the impact of labour law on the support systems available to workers. Beck reflects on a greatly weakened union movement that is increasingly alienated from workplace employment relationships by being party only to the workplace agreement and, invariably, not the internal arrangements around work processes and hours. These flexibilities "elude the bargaining power of trade unions and strategically weaken them" (Beck, p. 98). The role of unions in the rebuilding of the workplace collectives is an important component in the development of future strategies and will be considered much later in this thesis.

3.8 Control by decentralization

A key mechanism by which the flexibility of contract workers is embedded in the workplace is the process of contracting out itself. Contracting out is one manifestation of the third concept of risk society to be discussed, decentralization (Beck, 1992, p. 142). Decentralization is an instrument of control within the world of contract work. It is a method by which firms or institutions introduce market competition in a particular service they no longer wish to directly supply. Outsourcing is described by Beck as "hiving off" of services to the open market (1999, p. 54), by Ryan and Herod as the "exteriorization of economic relationships" (2006a, p. 428) and in the Minimum Standards Review as the "dis-integrating" of a business (2001). It is where the market, that was once in competition with the firm, is brought into the business thus allowing the "old rigid boundaries between inside and outside [to] crumble and fall away" (Beck, 2000, p. 54). The "hiving off' of a business through contracting out is one way that flexibility is embedded through the structure of the labour market.

The decentralization of a business, through the contracting out, sale or transfer of a business, enables the delegation of liabilities in a process of redistribution of risk (Beck, 1999, p. 12). Teubner describes the flexibility associated with contracting out as "a euphemism for evasion" in the sense that any failure of service performance becomes the contractor's liability (1993, cited in Minimum Standards Review, 2001, p. 16). The practice of evading responsibility through decentralization is highlighted by the Minimum Standards Review (2001) which notes the process of divesting part of the business renders the enterprise free of responsibility for service delivery.

Collins pointed out that contractual allocation of risk from the firm to the worker has been a reality since the industrial revolution, however, vertical disintegration through contracting out provided an efficient, and increasingly common, mechanism to achieve this (1990, p. 362). Losses in the competitive tendering process can be redistributed, or absorbed, by the workers, in the form of redundancies or changes to terms and conditions. A study by Allen and Henry captured the culture of contracting out in their description of

contract firms as "hollow entities" composed of multi-site fragments, employing staff who are "socially distant" from those around them (1997, p. 191). The transfer of risks to the shoulders of individuals means "new trapdoors can lead to exclusion" for workers, families and their communities (Beck, 2000, p. 53). The quality of life for the contract worker is contingent upon distant commercial decisions made between principal enterprises and their contractors. Those service agreements, and the consequences in the workplace, are beyond the reach and control of the workers, who make decisions about their futures without the necessary knowledge of the consequences (Beck, 1999, p. 75). These are the trapdoors to disadvantage located between the opportunities of the law and the reality of the frontline.

3.9 Contested options in the second modernity

Individualization, flexibilization and decentralization are useful concepts underpinning risk society that support a greater understanding of the world of contract work. Beck uses the "side-effect principle" (Beck, 2007, p. 692) to explain the inequalities that arise for the workers as a result of the decisions and structures imposed by others. Beck (2007) says all risks presume decisions: there are those who have greater power to define, contest, and profit from risks than others and there are those who are "assigned to them" - those who bear the "unforeseen side effects" of the decisions of others. In effect, some players have the power to minimise their own risk while maximising risk for others (Beck, 2006, p. 5). Finding solutions to inequalities is challenging because risks are, by their nature invisible; they are dangers waiting to happen (Beck, 1992). The challenge about where responsibility should lie is the political theme of the risk society (Beck, 1999, p. 6).

The "side-effect principle" applies to the history of debate around the legislation designed to protect contract workers. It is a history of contested allocation of responsibility between the principal enterprise, the contractor, and the worker, as illustrated by the parliamentary debates at the time (Employment Relations Amendment Bill: First Reading, 2006, February 23; Employment Relations Amendment Bill: Second Reading, 2006, August 30; Employment Relations Amendment Bill: Third Reading, 2006, September 7).

Continuity of Employment legislation signalled the state re-defining the parameters of risk in order to minimise the unintended consequences of competitive tendering on workers. The principal enterprise, for instance, was captured in the regulatory net for the first time and issued a portion of the risk associated with its decisions to divest of services. The new law reflected the capability of contract service workers and their advocates to enter the political contest to define both the risks associated with competitive tendering and the way those risks would be allocated.

Beck's vision of the future starts with risk society and his analysis of the world of work. Contract workers represent the workforce of the future - the second modernity. Here freedom is accompanied by constraint and insecurity and the risk of under-employment, unemployment and poverty are part of working life. This is an environment in which "progress and immiseration interpenetrate each other in a new way" (Beck, 1992, p. 144). Beck explores solutions that take into account democracy beyond the nation state, and the traditional territorially-bound support systems, such as trade unions (1999, p. 10). He advocates that in a transitory world of work the law must recognise the "synthesised" nature of employment and unemployment, through protection of workers' incomes (Beck, 1992, p. 149). Both Beck and Giddens look to new coalitions and alliances around problems (Beck, 1992; Giddens, 1994) to address the "damaged solidarities" of the new social democracy (Giddens, 1994, p. 12). Beck says these are "pragmatic alliances in the individual struggle for existence and occur on the various battlefields of society" (1992, p. 101), while Giddens refers to a "dialogic democracy" for resolving controversial issues through social groups and movements (Giddens, 1994, p. 17). These are expressions of the dynamism inherent in a pluralist society and the possibilities for change that are opened up through the theory of risk society.

3.10 Conclusion

The focus of this chapter has been the emergence of contractualism in the labour market as part of an economic transformation of New Zealand society in 1990's. One decade later, the new social democracy provided a softer neo-liberal stance but individualism persisted

in employment relations. The ERA aimed to achieve a balance between efficiency and equity and between the interests of capital and labour, in an approach reflective of the British third way. The New Zealand Government sought a new cooperative approach to employment relations, where good faith behaviour would deliver productive employment relationships. However, aspiring to such a balance also accepts that tensions will exist between individualism and collectivism; between freedom and constraint. The ERA acknowledges the inequality of power in the employment relationship but at the same time it nurtures the active citizen who is both free to choose and responsible for the outcomes. Inevitably for some there are risks in this formula and this will be the subject of later chapters.

Against a background of the rise of neo-liberalism and the new social democracy, the world of work is explored through the theoretical lens of risk society. Contract service workers exemplify the workforce of the second modernity, subject to individualization of employment relationships, flexibilization of the employment agreement and decentralization of the workplace. Decisions made through the commercial arrangements between principal enterprises and contractors result in contract workers carrying the risks of under-employment, insecure employment and unemployment. However, in New Zealand Continuity of Employment legislation has been introduced to provide employment protection for specified contract service workers in an exercise of reallocating the risks associated with competitive tendering. Policy solutions may now bridge the divide for workers between one contract for service and the next but the question remains as to whether the new law has successfully converted a social risk position into a secure place for workers to be. In exploring this issue, I now turn to the stories of contract service workers transferred under the new law and a description of the research methodology underpinning this study.

Chapter Four

Methodology

Canalising a river
Grafting a fruit tree
Educating a person
Transforming a state
These are instances of fruitful criticism
And at the same time instances of art. **Brecht**[9]

4.1 Introduction

This chapter introduces the methodological approach to the thesis, which combines theoretical considerations with qualitative research design in order to bring to life the employment protection policy for contract service workers. Giving the microphone to workers so they can reveal the secrets of working life is both a strategy and an outcome. Kitchen workers and cleaners are seldom heard above the clatter and crash of the market place and so I aim, through this study, to open a door for their voice to be recorded without interference. However, it is also a strategic move to graft the real world experience of contract service workers onto a theoretical understanding of employment protection law. These workers are the purpose for beginning the journey; they are the anchor ensuring reality is close at hand; and I hope they are ultimately the beneficiaries at journey's end. Located within the critical social science world view, I seek to "uncover

[9] Brecht, B. *On the critical attitude* [Poem].

the real structures in the material world in order to help people change conditions and build a better world for themselves" (Neuman, 2003, p. 81).

4.2 Theoretical perspective

The topic of this thesis is viewed through a theoretical lens. Ulrich Beck's theory of risk society becomes an "orienting lens" (Cresswell, 2009, p. 62) for the study of a marginalised group, contract service workers. Other theoreticians feed into the analysis including Anthony Giddens, as one of the architects of the British version of the third way. I have also drawn on Michel Foucault's theory of neo-liberal governmentality, in particular the concept of the "active citizen" in an individualistic and entrepreneurial world (Miller & Rose, 1990). These theories have assisted the analysis of the social, political and historical context of current labour policy in New Zealand, in particular, the challenges of regulating for contract workers in an individualized social democracy. Finally, I draw on the capability approach of Amartya Sen to consider the ability of contract workers to transform their legal rights into the kinds of freedoms envisaged for them in the creation of employment protection legislation.

I have approached the thesis from an interpretive critical orientation in the sense that I seek to go beyond understanding a particular aspect of society to a critique of social policy and recommendations for future legislation that will enhance the outcomes for the workers who are the subjects of the thesis (Patton, 2002, p. 131). Motivating the thesis is a concern with issues of power in society and, more specifically, in the workplace. In line with critical thinking, the thesis is connected to a desire to confront injustice in relation to the "society" of contract service workers (Kincheloe & McLaren, 2005). The policy topic is current, political and in a state of flux following a change of government in 2008 and so I aim to contribute to debate by shedding light on both the specific amendment impacting on contract workers and the wider legislative nest in which it sits. I hope this thesis is able to enrich the discussion about legal protection for low waged contract workers and draw attention to policy implications for the immediate and longer term industrial relations environment.

4.3 Methods of information collection

My interest in this study is to assess the impact of a new law providing contract workers with continuity of employment protection. Exploring the degree to which the new law reduced disadvantage to workers requires a focus on the experiences of contracting out from the perspective of the workers. This study generates information from interviews, primarily in the form of a focus group, to uncover the different perspectives of individual service workers on the transfer of a contract for service. All the workers interviewed were involved in a recent transfer process and this brought an emotional and intellectual immediacy to the observations.

Patton says "the power of focus groups resides in their being focused" in topic, target group, and facilitation (2002, p. 388). The workers who came together for this study shared a common work environment, a common union bond and in some instances they had met before, or worked together. This homogeneity assisted the ease with which they engaged in the group and with the facilitator. Focus groups are also a useful method of generating information from those who are often powerless and isolated in their working lives. The group context can offer the safety of numbers and increase the confidence of participants to tell their stories. As feminist researcher Esther Madriz says "by creating multiple lines of communication, the group interview offers participants…a safe environment where they can share ideas, beliefs, and attitudes in the company of people from the same socio-economic, ethnic, and gender backgrounds" (2003, p. 364). The environment stimulated the workers to share ideas, to support each other's experience, to elaborate on issues, and explore and contest views. As one of the interviewees, Carol said "who knows better than the workers themselves" and so it is their voices that I draw on to paint pictures of the reality behind the legislation.

4.4 An emerging design

The original objective was to hold two focus groups of four to six participants from commercial cleaning buildings. This proved an ambitious goal for the researcher, the union organisers, and the participants. Transport problems, an unexpected family illness, a car break-down, and an urgent meeting with the manager were some of the many obstacles sent to test the organisation of the focus group process. The timeframe extended from a one-month interview period in February 2009 to a five-month period between February and June 2009. The research design was re-shaped as the challenges presented themselves including a decision to extend the sample group from commercial cleaners to hospital kitchens workers.

The emergent design was a product of pragmatism and appropriateness but unexpectedly, delivered a richness of material through increased sector diversity. From a pragmatic perspective involving more union organisers spread the resources in a time-stretched organisation and sped up the difficult exercise of getting delegates to the union office for the discussions. From a strategic perspective, the sector diversity contributed to a wider variety of experiences of the Continuity of Employment legislation, enabling comparison between different workplace histories and practices under a common regulatory regime. In the ensuing sections, I elaborate on the methodology: the nature of the participants in the study, the orientation of the researcher and the process of engagement.

4.4.1 Participant selection

I applied 'purposeful sampling' for the selection of participants who were defined, in part, by the research question which addressed the impact of a legislative amendment on contract service workers. The participants were all employed by contracting companies in sectors covered by the Continuity of Employment law and were all members of the Service and Food Workers Union Nga Ringa Tota (SFWU). The criteria for selection within the occupational categories were limited to two factors: a requirement for the

participants to have experienced their work being transferred between contractors during the previous 12 months; and, a requirement that the workers spoke sufficient English to be able to engage in the conversation. Six of the participants were cleaners in commercial buildings and three worked in hospital kitchens, most were union delegates and some were also employed in a supervisory capacity as "working supervisors". Of the nine workers interviewed there were seven men and two women; and a range of cultural backgrounds indicative of the diversity of the sector, including Maori, Pacific Island and European/New Zealand.

4.4.2 The researcher orientation

As a researcher from "outside" the workforce being researched, gaining the trust of the participants was important if I was to generate information for analysis. My interest in understanding the reality for contract workers stems from my own historical commitment to the issues under study. This section discloses the researcher's background, for as Garnham says, "it is important that the researcher reflect on his or her position, including the values, assumptions, and theoretical views that he or she brings to the study" (2008). My employment with the SFWU from 1989 to 2004 provided background knowledge and a natural link to the industrial world of contract workers. My roles within the union included coordinating a project to raise the profile of contract cleaners and promote employment protection legislation. A photographic exhibition that formed part of that project was called "For the Love of the People" - a title that was drawn from the participants themselves. The pride and passion for work and life, unveiled in this exhibition, once again infused the conversations with kitchen workers and cleaners during this research. Throughout the interviews they expressed their joys, grief, frustrations, humour and, above all, their respect and "love of the people". My orientation shifted during the six ensuing years with the Department of Labour, where I was employed as a mediator, manager, and policy advisor. Combining my politically active and politically neutral working lives, I hope to give voice to the experience of contract workers at the

same time as shedding light on policy options that might enhance the security and well-being of these workers in the future.

4.4.3 The conversations and challenges

While coming in to this study from the "outside", a strong link to the SFWU, its history and its current staff provided a solid foundation for building the trust of the workers. I was transparent at the outset about my prior involvement in the SFWU. The Union supported me by selecting members with recent experiences of contracting out, inviting them to participate and assisting with setting up the venue and transporting them to the union office. In spite of my past association, the conversations presented challenges, in particular, for the three participants who had English as a second language. Holstein and Gubrium (1995) urge researchers to be reflexive not only about *what* the interview accomplishes but *how* the interview is accomplished, thereby uncovering ways in which we go about creating a text (Fontana & Frey, 2005, p. 697). Informality, flexibility and empathy capture the *how* of the interviews. A conversation style belied the deep listening, active memorising, open questioning and constant reframing required in uncovering the "story". It is important to acknowledge that there were different levels of engagement in the conversations and in one instance this was likely to be attributable to an English language barrier. However, this variance for others was more likely to be related to the immediacy and emotional intensity of the experience. While the participants may have decided to trust the researcher, the researcher as facilitator also has to trust that, in the midst of an unstructured conversation, the participants will reveal the perspectives, patterns and stories that inspire analysis.

The familiarity of people and place played an important role in setting up the focus group environment. The interviews were conducted in the union office, which was familiar to all the workers and the organiser introduced the participants before leaving the room. A meal and $20.00 petrol voucher was provided at the conclusion of each session to cover transport costs and for some this was a real bonus associated with attending. Each focus group was expected to have between four and six participants but each time, owing to the

previously mentioned crises, fewer workers arrived than planned. The interviews took place regardless, respecting the time and effort that was required to get to the meeting. Two groups of three workers, one group of two, and a one-to-one interview formed the basis of the information generated during the course of the hour or so spent in each conversation.

In advance of the interviews, the workers received an information sheet about the purpose of the research and the conditions associated with participating, such as confidentiality and withdrawal from the process. This information was reiterated at the start of each interview and, on the advice of the union, consent was recorded, rather than written. Written consent may not have been an obstacle for some but where English was a second language this was seen as a less threatening approach. "They don't do things in writing" was one organiser's comment. The identities of each of the workers are protected with their names substituted by the researcher. Further, the digital recordings were wiped on completion of the information analysis. I met with the participants when their contributions to the thesis were finalised to share the information and had the pleasure of seeing some of these workers recognise their own experiences in the contributions of others.

The interviews were semi-structured with a set of broad open questions as a prompt for the discussion. The questions covered key areas such as the most important issues in their work; the events at the point of the transfer of a contract; the information, communications and support systems; and the effect on a range of relationships, within and beyond the job. The categories were initially developed out of the themes that emerged in both the literature review and the theoretical texts but became simplified following each discussion as it became apparent that some topics would not emerge, such as the impact of contracting out on the family. The questions needed to be open and capture the issues of material impact on entitlements and well as the psychological impact of contracting out. Allowing workers time and supporting their story to unfold in its own space in an informal environment uncovered the unexpected narrative. Workers shared their stories, their reflections on current issues and their opinions about the people and world around them. An example of this was my discussion with two hospitals workers who expected to be asked about their "problems". They began by saying they would probably be a

disappointment to me because they didn't have any problems. Instead I asked them about their role as delegates, of which they were proud and passionate. By the end of the discussion they had revealed a fascinating story about the experience of being transferred under two contrasting regulatory regimes from the perspective of the "guardians" of the workplace collective.

An outcomes/process matrix developed prior to the last two interviews, provided a useful interim organising tool and bedded in a series of themes that served as a framework for the remaining conversations. As Patton says a matrix is only a tool; "the data from participants themselves and from field observations provide the actual linkages between processes and outcomes" (2002, p. 476). This matrix identified behaviour, feelings, attitudes, knowledge, and material outcomes, and processes such as problem solving, accessing support and the smooth transfer of employment. This was valuable in that it created links between process themes and the issue of material and psychological disadvantage that underpins the subject of the thesis.

To retain the full impact of the conversations, I transcribed the material within three days of each interview, noting themes and highlighting particular quotations. These key comments, or part thereof, and a code to identify the person and the event, were transferred to an excel sheet and allocated to one or more themes, such as "disruption to lives", "being valued", "support systems" and "getting their due". The way these themes were expressed were adjusted over time but formed an essential basis for organising the information. Patton describes the themes of qualitative research as "golden threads in a royal garment" enhancing the quality of the product but also, potentially, distracting from the basic material that provides strength and shape to the garment (2002, p. 432). That, Patton determines, comes from the garment maker; "their skill, knowledge, experience, creativity, diligence and work" (p. 432). The purpose of this qualitative study is not to establish statistically reliable results that can be generalised to the wider population of contract service workers but rather it is to add texture, richness and vitality to the theoretical fabric of my thesis.

4.5 Conclusion

Weaving together theoretical concepts and personal stories, the methodology of my thesis grew out of both the nature of the subject being studied and my own beliefs and values. A qualitative approach using semi-structured interviews enabled me to develop themes generated from the experience of the workers themselves and those themes in turn informed the analysis. Organising conversations with the nine participants was challenging and required flexibility in form and timing but persistence paid dividends because it was the feelings and reflections of these workers that finally informed the heart of the text. The point of qualitative research is to understand the people studied because "what people actually say and the descriptions of events observed remain the essence of qualitative inquiry" (Patton, 2002, p. 457). The rich illustrations are divulged by the men and women in the next chapter and provide a critical dimension to the exploration of the effectiveness of Continuity of Employment legislation.

Chapter Five

Conversations with contract workers

5.1 Introduction

In this chapter workers present their account from the frontline of contracting out. Following a series of conversations with contract cleaners and kitchen workers four themes emerged to guide the narrative. These themes captured the impact of contractual rights on the material and psychological well-being of the workers, the significance of the relationships between managers and staff, the value placed on recognition for the work done, and the search for a degree of participation and control over working life. During the interviews workers revealed the problems they faced during the transfer to a new contractor around payment of correct wages, making informed decisions and engaging in constructive communications with their managers.

All the workers in the focus groups expressed pride in the work they did as kitchen workers and cleaners, with their frustrations preserved for the way that the contracting out process was managed. They told of financial insecurity and disruption to their work and to their lives as a result of the contracting out process. Their experiences of a change of contractor were recent, such that for some the wounds were still raw and legal action over the transfer was pending. The language of the workers is largely unchanged, with bracketed notes to assist clarity of meaning. The names of the participants have been replaced with pseudonyms and other identifying elements are removed.

The stories of the nine workers have been classified into four broad themes, as follows:

Of rights and obligations

The tyranny of indifference

Recognition and opportunity

Industrial democracy

> When you're enjoying what you're doing it becomes your strength. When you've been ruined, when you've been robbed of your joy, it becomes your destruction, you become nothing.
>
> Joseph

The first section, Of Rights and Responsibilities, addresses the issues of material survival for workers: the wages, the hours, and the continuation of the contract of employment at the point of transfer. In the second section, The Tyranny of Indifference, I look at issues of information, knowledge and authority associated with the process of the transfer itself. I focus on the relationship between managers and workers and the challenges the workers face trying to bridge the gulf between the delivery of one contract for service and the next. In the third section, Recognition and Opportunity, the attention shifts to the value placed on the work done through descriptions of sustained pressure in the workplace to improve productivity. In the fourth and final section, Industrial Democracy, I explore the issue of participation and engagement in the workplace and the search for constructive dialogue during the process of contracting out.

5.2 Of rights and obligations

In this section I examine the theme of rights and obligations in relation to pay, the hours of work, and continuous service during the transfer of a contract. Collective agreements govern the employment conditions of all the workers involved in the interviews, which alongside the rights and obligations

> They do the hours, they do the time, they do the work to their best ability and then their wages are wrong.
>
> Sally

of the Employment Relations Act 2000 ("ERA") give some written clarity to the parties about conduct during the transfer between contractors. In addition, the ERA requires that parties deal with each other in good faith which means that they must not do anything, directly or indirectly, to mislead or deceive each other (s. 4(1)). Specifically, the right to continuity of employment requires that an employee must make an "election" to transfer to a new employer (s. 69(i)). If they choose to transfer, they must be employed on the same terms and conditions as immediately preceding the transfer

5.2.1 Exercising choice in law

The point of transfer of a contract is a time when the employment relationship is both legally continuous and in a state of flux. During this time many decisions are made about the nature of the ongoing work: where work will take place; to whom workers will report; and what tasks will be undertaken. One focus group of commercial cleaners talked about the choices they were confronted with at the time of transfer of the contract:

> I know when we first rolled over to [the new company] we had a choice of going with [the new company] or staying with [the old company] so the supervisor, he says to me, 'well, come with us to the [new site], we'll look after you over there', so thinking I'll be looked after, eh, eh, I rolled over [to a new company]. *Ivan*

Ivan made an election to follow the supervisor to the new company because he felt secure in the knowledge that his supervisor would look after him. Ivan made a decision to go with the new company even though many of his colleagues chose to stay with the old cleaning company. However, for this participant everything changed at the interview with his new employer:

> They asked me what hours did I work for [the old company], what days off do I have. Then they told me that when we rolled over to [the new company] our hours would

> be reduced. I got no say in that myself. So they said 'you're going to be working thirty seven-and-a-half hours.' I can't tell them I don't want to work 37, I want to work 40, I can't tell them that, so I just roll over and, even though I am not happy, what can I do? They have promised us a shoe allowance – shoes (*he looks at his colleague)* – you know those shoes? And now we're not getting them -

The new job was going to entail changes to the number of hours Ivan would work, the benefits he would receive and the new roster being implemented. Ivan worked nearly 60 hours a week for his employer across six days a week and this was dropped to 37.5 hours across five days with the new contractor. Ivan had worked out he could sustain a drop to 40 hours a week and still pay his mortgage but no further. He was asked what difference the adjustment in hours made to his life:

> A big difference to me - I have a mortgage to pay and that's why I work all these extra hours and my mortgage is not paid off 'til I am 65. I am now 53 years old so I have a long way to go 'til I am 65….I've always been a worker all my life – most of the money I get goes toward my mortgage, it comes into my bank account and every week the bank checks to see if there's enough money for the mortgage and if there's not enough money for the mortgage they will send a reminder out saying 'you didn't pay the amount of $250 a week – can you make it by next week?'

The consequence for Ivan was that he would have to find another cleaning job to make up for the loss of hours so that he could pay his mortgage. Ivan believed the company could eventually provide him with the hours he needed but there was no guarantee and he was not in a position to wait:

> I have been advised to go to another cleaning company to work extra hours - to build up the time I have lost with [the company], which will be classed as secondary employment. That's the only way – until [the company] gives me extra hours - we

> don't know how long before [they] might give me extra hours so from here (*referring to the focus group)* I'll be going out to look for part time work.

In a one-on-one interview, Ivan was encouraged by his supervisor to transfer to the new company but after he made an election he was told the hours would be reduced.

A large group of cleaners on Ivan's worksite chose not to change company because they were told by their employer that they would be better off financially, if they remained. He describes what happened:

> [The company] promised them $13.00 an hour. They thought they could get $13.00 an hour at the same job they were doing, so they all decided to roll over [with the same contractor]…I was the only one that went to the [new contractor] - so when the workers rolled over they thought they were getting a good deal until they got their first pay. When they got their first pay, $12.55 - what happened to their $13.00? Nothing – so they all had to work under $12.55 – they were thinking they would get $13.00. They tricked us to lure us over to save them hiring more cleaners.

The legislation entitles an employee to bargain alternative arrangements at the time of transfer and, therefore, to choose not to transfer to the new employer. Any such agreement must be recorded in writing (s. 69H (3)). The workers on Ivan's site negotiated away their right to transfer because they were offered a pay rise. Subsequently they left the company, without jobs to go to because, in Ivan's words, "they were tricked".

5.2.2 Treating service as continuous

The conversations took place with workers who were either in the process of being transferred or who had recently transferred and so the stories they told were fresh memories and often stirred strong emotions in the telling. This was the case when workers relayed the struggle they faced in getting their service entitlements correctly

transferred. The ERA specifies that continuous employment applies for the purpose of all service-related payments (s. 69J). Liabilities that accrue around leave entitlements follow the worker to the new employer because "the period of employment of an employee with the employer that ends with the transfer must be treated as a period of employment with the new employer" (s. 69J). However, there is no specific obligation in law to transfer those liabilities and the flexibility afforded business creates a mine field of confusion at the point of transfer. In this section, a hospital kitchen worker illustrates the consequent break-down in delivery of service entitlements.

Sally talked about an on-going dispute about casuals taking paid holidays. She said the out-going contract company had held six percent of the earnings of casual workers in a separate bank account so the workers could draw on it for their annual leave but the money had not been transferred when the contract changed. She also spoke of a worker, who took long service leave, which she had applied for in advance of the change of contract.

> [Company A] took [the long service leave] off her annual leave [allocation] and it still hasn't been given back because they say [Company B] haven't transferred it. Personally, myself, I've got days in lieu owing and they haven't been transferred. We don't know who's lying – somebody is – either [company A] or [company B]. You go to [company B], they say they haven't got them from [company A] and you ring [company A] and they say they've sent them. Nothing's been sorted and we're nearly in to six months after the transition.

The problems of non-compliance were common complaints amongst the participants, who described contractors pointing the finger of responsibility at each other while the workers waited for their entitlements. Sally expressed her frustration:

> Why should we have to fight for what's rightfully ours to start with? You know, even our days in lieu and our service leave - we had to wait for 15 years to get the

> long service leave – I've got another two weeks coming up next year and I'm a bit concerned that I'm not going to get it all as well.

5.2.3 Underpayments, overpayments and no payments

Getting wages right was a common theme among all the workers interviewed and while emotions ran high and morale in the workplace could be correspondingly low, most of the workers interviewed were prepared to confront their employers to rectify the problems. In this section, the issues confronting the workers range from underpayments, to overpayments or, in some instances, no payments at all. One worker in a hospital talked about a gratuity payment that was owed and paid out by the new contractor at $2000 less than the contractual entitlement. In another discussion, a commercial cleaner, Tom, spoke about the workers on his site being owed over $7.00 per night in meal money since the change of contract two years previously. While Tom and his union lawyer were pursuing the claim through legal channels, others were active on their jobs in trying to rectify inaccurate payments. Nik, a hospital cook, explains:

> It's just a frustration – I'll use myself as an example – my pay used to come from two different arms of the company but to correct it I battled for three weeks solid just to get that correction done – and that was just me, there was others putting up with the same thing.

The frustration expressed around inaccurate payments reflects both the emotional distress and the financial cost to workers of the non-compliant practices. Cleaners and kitchen workers received hourly rates of $12.55 to $14.50 and so the incidents, while numerically small, had a material impact on their lives. This is articulated by Carol, who relayed a conversation she had about overpayments with her manager:

> ‘If we’ve been over paid, we’ve been over paid; we know we have to pay it back but you get your communication right because some people will be needing that money that you’ve deducted from their wages this week’. I said, ‘look, I’ve got a payment coming out of my bank and its now going to cost me $25.00 because the money wasn’t there and if you’re going to do that there should have been a letter with our pay and we still haven’t had, individually, a letter [to say] that we’ve been over paid.

A worker in Sally’s kitchen was not paid correctly for two weeks and felt she had to be at work, regardless of the circumstances, to be certain she would be paid:

> We’ve got people that have mortgages to pay…she was sick and she came in to work – she was so, so sick I had to send her home. That’s what people do – if she’d been paid correctly…she wouldn’t have [come in to work].

Sally found the transfer to a new contractor stressful and she took annual leave to recover from it. She highlighted the effect of non-compliance on the morale of the workplace:

> People are getting brassed off. They do the hours, they do the time, they do the work to their best ability and then their wages are wrong. Nearly every week somebody’s wages are wrong. We try to talk to people at head office but we don’t get any joy. It makes everybody wonder why they’re working there – everybody works as a team except the bosses – they don’t work as a team. They say when they’re going to take over ‘we won’t be as bad as [the other company]’ and ‘you’ll never have problems with your wages’ – I’d like to talk to the person who said that!

5.2.4 Varying the hours to meet the needs of the business

The conversations with commercial cleaners revealed that hours of work were subject to constant change at the time of restructuring as the business settled in. At the first reading of the Employment Relations Amendment Bill in 2006, the intent of the law was described

as providing stability to the specified groups of workers and clarity and certainty to the employers and employees (2006, February 23, p. 1473). While the law provides clarity of intent, a transfer to a new employer did not guarantee stability or certainty for any of the cleaners working in commercial premises and this section gives voice to the experiences shared in two different groups of cleaners.

> They chop the hours back and then they give them back, then they had to drop them again because they said they had too many staff. *Marcus*

> We were working six days a week for [the old company] now when we changed over to [the new company] we were working five days. They changed my day off as well. *John*

> Some of the day shift or night shift they change to the afternoon - or the day shift they change it to night shift…. A lot of them [cleaners] used to have Saturday and Sunday off and they looked forward to working Monday to Friday and having Saturday and Sunday off but now [the new company] has not given Saturday and Sunday off to those workers. *Ivan*

The conversation reflects the contractor's approach to the allocation of hours which entailed flexibilities that were unwelcome but often accepted with resignation, as Joseph explained: "You groan but what do you do – it's up to you whether you're going to stay or you leave."

Hours were reduced because of roster changes but this also occurred as a result of a re-location of worksite, typical of practices in the mobile commercial cleaning environment. Marcus transferred to a different commercial building which meant a change to the number of hours he could work because of the availability of public transport:

> I was doing 40, 50, sometimes, 60 hours - if they're lucky - and then now I'm down at [the new company] I'm only doing 5-11 [o'clock] because of transport… I get the train in to work and then I get the last bus home just after 11 and then I have to walk up to [the bus stop] to get to the bus, then transfer to [another bus] to get home.

5.2.5 Severing the relationship

The termination of employment was the most severe consequence of contracting out experienced by the participants. In this section Sala, a commercial cleaner and supervisor, tells her story. Sala said she expected some disruption to her job when her company lost the contract but she did not expect events to transpire as they did. She was given a week's notice that her job as a supervisor would be terminated and her worksite and role would change:

> Instead of transferring me, as they said they would transfer all my files to [the new company], instead of transferring me like the [other] staff, my boss removed me, wanted me to go in and sign the termination form.

The transfer involved a demotion from cleaner/supervisor to cleaner, a pay cut and cuts in hours. She said:

> I have to learn things, start again from the bottom; yeah, being removed from [my old worksite], I lose my rate and I am back down to where I started. They told me when I go to [the new worksite] my rate stays the same, the [new] managers can't touch my rate but it's a different story altogether. They did touch my rate – I am back down to where I started, to the cleaner's rate now - that really upsets me.

Sala described the day she finished her job:

> So I went that morning, I got the uniform and that - they said – 'you got everything?' They checked everything and then I had to sign the form for the phone and the uniform being returned back, and then he got me the termination form to sign. That's it, no 'thank you for that year,' 'good job that you done', or anything like that – no, nothing.

The impact of this was profound and Sala was visibly upset as she described the events:

> I was hurt. I didn't talk much that day because I was hurting inside. The day that he told me that I am going to [the new workplace], that's the day I started grieving. Facing my staff – it's very hard for me to hold my tears because I got to know them very well, so it's hard to tell them that I am going but I don't know the reason why - until today they [the staff] still don't know, they're still texting me 'why do you have to go', and I said 'I don't know', 'I've got no idea.' That's all I want to know, why?

Sitting with Sala in the focus group, another cleaner, Joseph, talked about the importance of providing information and the value of communication in the employment relationship:

> There are some hidden treasures up there they don't tell you [and] you need to know. You are shut off, yeah? To know those hidden treasures will bring you joy, that would knock your grief out to be honest. *Joseph*

> That's what I've been saying. *Sala*

> You need them to open the door, to know what is inside - but the door is shut - you can't enter - no one is going to get in if the door is locked. *Joseph*

For these cleaners the transition was conducted by an indifferent management and the process of her termination was a vivid illustration of the disempowerment and material and psychological disadvantage that could accompany contracting out.

5.3 The tyranny of indifference

> They were basically onlookers. It was the workers themselves that kept the place functioning.
>
> Carol

The Continuity of Employment provisions were designed to codify employer responsibilities during the sale or transfer of a business, including the transfer of workers terms and conditions. In return the new employer could be assured of continuity of service delivery through the retention of current staff: workers gain protection and the

business gains efficiency (Mazengarb's Employment Law (NZ), 2009b). However, conversations with hospital workers revealed a management vacuum in which the responsibility for ensuring the continuity of service largely fell to the workers on the job. The incoming managers maintained their distance. Commercial cleaners experienced the indifference as a vacuum in effective communication where information was incorrect, insufficient or altogether absent. This section is about the tyranny of indifference at the time of transfer.

5.3.1 Maintaining a functioning service

Workers in hospital kitchens all talked about the management vacuum that accompanied the change of contract. Sally, the cook and supervisor, explains the transition to a new contractor and the sense of responsibility she felt to maintain continuity of service:

> It was just absolutely diabolical because there was nothing set in place before they actually took over. It took me nearly six weeks to get orders – and just to try and get things settled [down] to run the kitchen. They came out and gave you papers but none of them were any good to us – you know, they changed suppliers which we didn't really realise they were going to do and we couldn't get any goods we wanted, the size that we wanted. We had the people come out and say this is what they're going to supply and it sounded good but when it was put in place it was absolutely useless. We didn't have any order forms, we had to try and fill in everything ourselves. We're kind of left with the changeover– no one was interested – it's very difficult to run a kitchen and not have any information.

In another hospital Carol relayed a similar experience of the change of contract

> [The company] was very lucky because like the other contractors, when they came in, they didn't know a hell of a lot about what went on and how the work was done – it was the workers that carried them through. They didn't know how the kitchen ran, they didn't know how the tray line ran, the timeframes when the meals should be

> served up – they were basically onlookers. It was the workers themselves that kept the place functioning.

5.3.2 The tipping point in the transfer

Contract changes bring with them new ideas, commitments, systems, and relationships in the workplace and, from all accounts, the stable hospital workforce provided a continuity that the new companies could depend upon. Carol and Nik worked in a hospital kitchen where the transition to a new contract was so smooth it was likened to a fine romance compared with a previous experience of a change of contract many years earlier.

> We went through a honey moon period there. It was so relaxed that basically you got on to do your own work - no pressure. One could say it was just a lovely marriage - a newlywed marriage scenario. *Nik*

However, behind this new relationship there was an indifferent management, in respect of both the contractor losing the tender to deliver services and the incoming contractor. The staff appeared to play a big role in managing the transition, as Carol explains:

> There was no supervisory thing – people would just do what they felt they needed to do, that was it - and because things were let go from the time [our employer] found out that they'd lost the contract – there was three months went by and no one was really made accountable. People just started doing whatever they wanted to do, pretty much, and then it just tipped over. *Carol*

A change in the menu signalled a tipping point for the workers when the behaviour of the new management toward staff changed as another worker from the same kitchen explains:

> The way they spoke to you, I mean it was very blunt - it was almost like [yelling] at a kid if you were annoyed with them –I found it was really stand-over tactics. We

> went through quite a long period when there used to be yelling matches in the kitchen – there wouldn't be a day that wouldn't go past that somebody wouldn't be arguing with management. It created a stressful environment and, I had never seen, in all my 13 years working there, people walking round with their heads down - it was a real unpleasant place to be working at. *Nik*

Carol and Nik were both employed in the kitchen when a change of contract took place some years prior to the introduction of Continuity of Employment legislation and on that occasion the transfer was tumultuous, there were redundancies and it was "really strange and really stressful". According to Carol,

> when [the last company] came in it was actually the opposite; when they took over the contract from the DHB they came in all guns blazing, right from day one. Then what we then did is start talking, consulting, 'this is how we can do things better.' We got better and better until the stage that we both had respect for each other and they knew what we were about – we fought hard for it.

The differences between these experiences for Carol and Nik were stark. The recent change of contract had been smooth and it was only after three months of stability that the atmosphere changed, triggered by the arrival of a new menu. They reflected on the behaviour of the current contractor and the impact on the workplace:

> This is the other way around; they came in all smoochy and lovely and now they've drawn a line in the sand – and said "this is what we expect of you" and "this is what we're going to do." We just have to keep everybody together and go down this path and say "well, you might put the line in the sand but this is what we're about." *Carol*

> Maybe it's just their true colours coming out, maybe that's how [the company] operate truly as a company, as opposed to the way they came in all luvy duvy etcetera. *Nik*

> I think deep down people feel a bit betrayed. At the beginning it was pretty much equal and everyone was getting on – they [the company] led them into a false sense of security. *Carol*

The consequences of this betrayal were strongly felt and Nik was pessimistic about the future of working relationships at the hospital kitchen:

> It wasn't just our managers on site with [the old company] – we had a good relationship with the HR manager and people like that, whereas with [the new company] there's not that relationship there and I don't think there ever is going to be one– it's not going to be that easy to build it. *Nik*

The workers experienced a relatively smooth transfer of employment with the most recent change of service contract, even though there were disruptions to payment of wages for some. This, however, did not exempt the workers from the pressures of the contracting cycle, which would come to bear on the workforce, later rather than sooner in this instance.

5.3.3 The knowledge gap

Communication was the key to understanding the nature of the indifference experienced by commercial cleaners. The obligation of good faith was to be "infused" through the employment relationship (Mazengarb's Employment Law (NZ), 2009a) and specifically extended to "a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business" (s. 4(4d)). The Employment Court referred to a new philosophy of "honesty and co-operation in employment relations" in the ERA[10]. This was the behaviour expected of managers and their employees in situations of contracting out. However, competitive tendering was likened to a game of winners and losers by one commercial cleaner, Joseph, who relays his experience of the breakdown in communication associated with the loss of a contract:

[10] (*Meat and Related Trades Workers Union of Aotearoa Inc v Te Kuiti Beef Workers Union Inc*, unreported, AC71/01)

> If we lose the contract, the attitudes change. You know, recently, when we lost the contract the attitude changed, from good to bad. If you lose your wife, your attitude's different, from good to bad, that's exactly what happened to this. You are working good with the company, then when it comes to a change, or you lose the contract, it's different [*sic*]. They don't want to know you, you know? You ask them something, they don't want to know, they walk away. That's my experience of losing the contract - the attitudes change, just because they didn't get what they want.

The Continuity of Employment provisions specifically required that prior to any restructuring, employers would provide their workers with "information sufficient for the employees to make an informed decision about whether to exercise the right to make an election" to transfer, including the name of the new employer, the nature and scope of restructuring, the date it will take effect, and how to make an election (s. 69G).

Making informed decisions was difficult when information was sparse and responsibility was attributed to distant others: Ivan said the cause of the problem at his worksite was being presented to the workers as "overseas" referring to the large multi-national company that employed them and he said this lack of clarity caused confusion for the workers. He also talked about the failure of the company to communicate with the multi-racial workforce so that many workers were unaware of what was happening:

> A lot of the people are confused with [the transfer of] contracts at the moment, they don't understand, especially the Polynesians – Samoans, Tongans - they don't understand because no one translates for them what's going on.

The cleaners in one focus group were interviewed individually by their employers, prior to the transfer of the contract and John describes his understanding of the situation:

> All I knew is that [our company] lost the contract and [the new company] has taken over – that's it - until the interview. *John*

Ivan explained to John that the change of company meant that they were now going to be subject to the 90-day trial period - a new law for enterprises with less than 20 employees when they employed new staff.

> I don't know anything about that - *John*
>
> that's the government - *Ivan*
>
> who talked to you about that? *John*
>
> [the company] told our workers on the morning shift - some of the workers get scared; they're frightened they might get sick, they might come late. *Ivan*

While a lack of clarity from the local managers was common among those interviewed, all the workers were employed by large multi-national companies who appeared as distant players in the workplace, from the point of inspection during the tender process, to the severing of the relationship at the conclusion of the contract. One worker Marcus, describes an interested company coming to his place of work to assess a potential cleaning contract:

> The manager from that company and all the hierarchies come down and they hide; they hide and they watch you and they're there all day - and then they have a meeting with the retailers and tell them what they think of the workers, which I don't like - them talking behind our backs.

The need for good communication was highlighted by Joseph who described this as the single most important aspect of the job:

> To me the top priority in cleaning is the relationship between the management and the cleaners - that is my key issue, the relationship between me and him.

5.4 Recognition and opportunity

> It's productivity – get more out of you in less time.
>
> Nik

Workers interviewed had a strong sense of the value they added to their employer's business at the time a new contract was bedding in. Opponents of the legislation voiced their concerns about being forced to take on under-performing workers (Employment Relations Amendment Bill: First Reading, 2006, February 23, p. 1475). However, arguments in favour of the bill to amend the law promoted the legislation as encouraging businesses to "utilise existing talent" and "facilitate productive employment relationships that are built on good faith" (Employment Relations Amendment Bill: First Reading, 2006, February 23, p. 1473). The subject of this section is the "productive employment relationship," in particular, the value that the business places on the work and the workers themselves; the utilisation of existing talent on the job; and, the pressure placed on workers for increased productivity.

Conversations revealed the contract companies' lack of knowledge, or interest, in the work that was being performed or the workers who were performing it. Three commercial cleaners described their experiences of being required to carry the responsibility for service delivery:

> A thing that is very interesting is that a boss should know better than their staff, yeah? A boss should know everything that their staff [do]...what's happening sometimes is the boss doesn't know nothing [*sic*] and they rely on the cleaners to do the work. *Joseph*

> Every time I ring [my boss] I tell him what I need and he says 'yeah that's ok', 'I'll do that for you' and 'I'll ring that', and 'ok, bye.' You know, he never gives me time to explain what I need, what needs to be done and when I need it. Every time I needed something in the weekend, if I ring him, he tells me 'ring me on Monday' - that problem on the weekend has to wait until Monday - it's my problem concerning the work. *Sala*

> We've been told no one rings [the supervisor], only the supervisor rings you and I had an incident and I said to her I know that we're not allowed to ring you but I have to ring you. *Marcus*

5.4.1 Lost opportunities

Throughout the conversations a strong theme was the lack of appreciation for the knowledge the workers brought to their jobs and the opportunities lost as a result. Sally describes how she supported a new contractor at the hospital and the response of the contractors:

> I gave them all the rates of every staff and all the staff got paid different rates – they didn't take any notice of my personal time filing out each sheet. I fill out all these evaluation sheets on suppliers and I never hear back so to me it seems to be a waste of time because nothing ever changes.

Contracting out separates off parts of a business and yet within the hospital environment the workers have the stability of a single workplace, with a network of relationships that are retained, despite the transfer of contractor. This network includes the contract workers, hospital patients, managers and other staff and is part of the intellectual and organisational knowledge that ensures continuity of service. Sally talks about her commitment and loyalties:

> I'm there for the patients. That's basically what it comes down to. You can take all the crap from everybody else – we're there for the patients – and you know, like, the old people don't get much and I think, if you can give them a decent meal [long pause] - you get to know the people - makes you wonder why they [the contractors] don't have the same view about being there for the patients.

Symptomatic of the lack of care for the staff, Sally described how she came to work on her day off to try on new uniforms for a new contractor and to contact all the other kitchen workers who were off-duty to do the same. The uniforms were made for men and not the

women that made up the bulk of the staff and they did not fit. The workers were required to make the adjustments themselves if they wanted the uniforms to fit properly. She sounded tired of the routine:

> Everybody that takes over, they come down and say 'we'll be there for you; we'll be out every week." I've heard it so many times before – I'm up to the seventh contractor now – I've been there and done that, it never happens.

> It's really stressful – very stressful. You know you start thinking you're too old for the job after you've been there so long – I don't think I am – but you think, do I need all this stress at this age in life? [Long pause] I love the job and I love the people and I love the community.

5.4.2 The pressure for productivity

The persistent theme in the conversations of workers not feeling as though they were recognised for the value they added to the business was often associated with the companies' explicit push for productivity gains. They described how the pressure of time affected the quality of the cleaning in commercial premises and the quality of the meals in hospitals. Nik talks about an occasion when the new manager at the hospital observed his work, looking for efficiencies:

> I was pouring jellies and the executive chef asked me why am I pouring with one hand when I have two hands – and my reply to him was "because if I was to pour with two hands the spillage would be greater and I am trying to keep it nice and tidy and clean for our patients" and with that he walked away – somebody else might have just got another jug and started pouring with two hands.

He goes on to explain:

> It's productivity – get more out of you in less time – even though we only work eight hours - trying to push at least 10 hours work on to you in eight hours.

Sally talked about the constant pressure of the contractors' focus on profit at her workplace:

> I know that the new law has come out that they can't threaten you with not having a job - that was really good, but then – they may not be able to threaten you with it but you still have that sense of – well, it's the way the contractors ask you stuff, 'we want your rosters' – 'we want the hours that you work' – surely if they've taken over the contract they know what you do... but you always are concerned because they need to make this profit… all you hear about is the budget – you're always over budget in your wages [even if] you're under budget in the food line - but you're always over in your wages.

In real terms this focus on costs was not just about the labour costs. More than one participant talked of supplying their own tools because they wanted to do a quality job and the company did not provide the necessary means. When the food processor broke down one of the participants was unable to get either the hospital or the contractor to take responsibility for fixing it:

> I had to go home and get my own food processor because we had nothing to mouli up anything and we've still got my food processor there a week down the track and they're saying they can't fix [the old equipment]. This isn't the first time it's happened either I have to admit.

In the commercial cleaning sector the workers talked about the constant adjustments of hours including additional hours where there were insufficient workers. Marcus said he tried to get the work completed in the allocated time:

> I'm a bit slower than the average person and they were just taking advantage of me. One particular time I worked nearly two months with no time off work - every day - and they said they were looking for a staff member and I said 'well give me a day off' - and I had to fight for it - I shouldn't have to fight for it.

Safety was Marcus' top priority as a cleaner but he had difficulty capturing the attention of his manager when it came to repeated requests for protection against an allergic reaction to chemicals:

> I've told the manager there's a particular chemical I am having a reaction from it. She knows, but she said 'wait till I take over the [whole site], I'm having a big clean out and I'm going to order some new chemicals.' I'm still waiting.

This issue was of such importance to Marcus that when he was asked what mattered most to him as a cleaner, he responded that he wanted the company

> to listen to us, and get chemicals that specialise in sensitive skins, spend the money and get the gloves they use in the hospitals and St John's people use.

5.5 Industrial democracy

> We said "we're always here to talk to." We talked about our consultative clause in our collective agreement and said "that's what we're about."
>
> Carol

Support for the existence of union delegates in law is confined to the Part 7 of the ERA that grants a system of education leave on the basis that "workplace delegates and organisers, need to be well-versed in union matters, and therefore should attend union education courses" (Mazengarb's Employment Law (NZ), 2009a). Delegates are otherwise dependent on the behaviour guidelines enshrined in the good faith obligations of the ERA that require the parties to an employment relationship to be "active and constructive in establishing and maintaining a productive employment relationship" including being "responsive and communicative" (s. 4(1A)). The focus of this section is the voice of workers on the job

and the variances between the experiences of workers in the two different sectors represented in the conversations. This is about the role of constructive dialogue with workers who are in the process of being contracted out.

Each of the workers interviewed was a union member and some had roles as union delegates so that their awareness of their right to representation, and many of the rights associated with being contract workers, was greater than might be expected across the workforce as a whole. There was, nevertheless, a difference between the degree of collectivization experienced by the interviewees based on whether they were hospital workers or commercial cleaners. The hospital kitchen workers tended to be surrounded by union members and have internal workplace structures or well-trodden paths of communication with management. The commercial cleaners employed in smaller groupings on scattered worksites, experienced low levels of worker identification with unions, even if their colleagues were union members. On these workplaces, unions were more commonly "tested" - the value of unions was likely to be the subject of negative comments by the supervisors, managers and workers themselves. In this section, the comments of the strongly collectivized hospital workers are juxtaposed with those employed in commercial premises.

5.5.1 Testing times for the union

The commercial cleaners interviewed were covered by a collective agreement with a limited provision to support union representation. This agreement said the employer "shall recognise and respect the authority of union delegates"[11]. Some of the participants were proud of their union strength and they valued unions as the only way they could ensure their protection, while others described the disputes fought alone and the conversations that never took place for fear of the consequences.

[11] (Service and Food Workers Union Nga Ringa Tota and OCS Ltd, 1st July 2007 - 30th June 2009; Spotless Services Ltd & Service and Food Workers Union Nga Ringa Tota, June 30 2007 - July 1 2009)

In the following exchange Tom and Ivan talk about the silence of the cleaners on Tom's workplace at the time of the change of contract:

> They have mixed feelings at the moment about the [change of] contract – a lot of them are keeping it to themselves, they don't say anything to anybody, I'd say - *Ivan*
>
> because they just wouldn't keep their job; as long as they work that's it - *Tom*
>
> they've got a job – because they all want to work. *Ivan*
>
> as long as they got their job they're happy. *Tom*

The union was involved in legal action against some of the participants' employers and these workers were sure that, as Ivan put it, not having a union "would stuff them up" but nevertheless, the experience of union intervention was mixed, as evidenced in the conversation below:

> With [the new company] taking over, the hours have been chopped and because the union has not helped us with the [change of] contracts, a lot of them are pulling out – that's what has happened. Because of that situation, on my morning shift, I only have three union members under me, the rest have all pulled out - only the faithful are staying. *Ivan*
>
> I think the reason being that the supervisors told them that 'what's the use of being in the union if the union not backing them' – that's one of the reasons and the reason that they don't want to spend $6 – they don't want to lose $6 a week joining the union. *John*

> They can buy other things with it, bread, milk, sugar, tea, with the $6.25 they get a week – so they pull out – they get to be richer if they pull out – more wages in the packet when they pull out of the union, that's how I see it. *Ivan*

> Some of them don't really understand that all this stuff they supply like milk, sugar, coffee, tea – the union is the one that makes the company supply those – but they don't understand. *John*

The lack of union reach in commercial cleaning workplaces was felt by the unionised workers no matter what their commitment to collectivism and this was in contrast to the contract workers in hospital kitchens.

5.5.2 Cementing trust in the collective

All hospital delegates employed by contractors enjoy recognition through their collective agreement which provides for a range of benefits, including time off on ordinary pay to conduct union business[12]. Historically, hospital workers have benefited from a "Management of Change" clause in their workplace agreements which provides for consultation during restructuring. The culture of engagement was noticeably different from the experience of commercial cleaners, to which this comment from Carol attests:

> When [the contractors] came in we went and introduced ourselves, who we are, who we represent and what we do. We said we're always here to talk to. We talked about our consultative clause in our collective agreement and said 'that's what we're about – that's how we work' - and they were quite appreciative.

Carol describes the power of this kind of engagement:

> You consult with people - and it doesn't matter if you've got an idea of how it should work – who knows how it works better than the workers themselves? We can either

[12] (Service and Food Workers Union Nga Ringa Tota, 2006)

> say this is what we should be doing, or we can dig our toes in and say we don't want to do that.
>
> I think a lot of it is sitting down and being on a level playing field – if they treat us no different than anybody else, at least you get the feeling that they are listening to what you say, regardless of the outcome.

During the transition period Carol and other delegates were active in managing the staff through a time of uncertainty, ensuring a smooth transition. She describes the role they played:

> I think our key role was to take away any fear that anybody had with the change of contractors, to reassure them that their jobs would be safe, that they would still be working, they would still get their weekly pays – that worked extremely well. It goes back to when we had negotiations, we became a very strong unit and we built up a lot of trust with each and every one of our people, they trusted us and we trusted them. If we needed something all we did was go to them – we'd built up that great trust – so whatever we said they would come in behind us and they supported us and we supported them – so it was quite an easy transition.

New contractors, however, bring in new relationships and expectations. For many years the consultative committee had been a bridge between the contract workers and the hospital management but these ties were now being severed as the new contractor installed an on-site manager. Carol and Nik discuss this change:

> We used to have a consultative committee where we used to sit with the hierarchy of the site– and that was always good but, see, now we have a site manager whose very naïve and I think she's on her own wave – when she's not sure, the first port of call is the regional manager and basically the regional manager will give her the direction and that's the direction she takes – whatever the regional manager says is law. *Nik*

> It doesn't matter what we say. It might only be that the union gets involved or something has come up big time and [the contractors] get a wrap over the hands [from the hospital] that they want to talk to us a bit more – otherwise they just seem to think that they know it all. *Carol*

In another hospital, Sally tries to make sense of the same exclusion from the decision-making process in the hospital:

> I was left out of the meeting – and our boss was in on the meeting but he doesn't know the running of the hospital so I think that that was wrong to start with. They had the household supervisor, they had her boss, they had my boss, and they had the manager of the DHB – but we [the cooks] weren't invited – we didn't have a say.

Hope of contributing their knowledge to a more productive workplace through participation in decision-making may have been a fading dream for some of these workers but their union activism nevertheless gave them a self confidence with which to handle the uncertainties of the contract cycle:

> They know that nine times out of ten we're right because we know what our contracts are all about, we know what we're all about and we know what the workers are all about and they don't. They still don't know what's going on.

5.6 Conclusion

The purpose of the ERA was to create stability and certainty for both workers and business during the transfer of a contract for service. However, the conversations presented in this chapter revealed a complex picture. The nine hospital kitchen workers and commercial cleaners were all union members but all shared experiences of statutory non-compliance and an indifferent management. For many, the transfer was characterised by a vacuum of information, knowledge and support. Nevertheless, the commitment these workers made to ensure a smooth transition was evident in many of the conversations. Where fears were expressed in parliamentary debates that employers would be forced to

carry poor performing employees, these conversations revealed workers were central to an effective transfer, such that, in some instances, employers competed to retain their employment.

The material and psychological consequences of the transfer process were vividly illustrated in the interviews. Terms and conditions were commonly reduced, information was inadequate or incorrect and contractors often evaded responsibility for liabilities, such as leave and gratuities. The workers described the emotional consequences for themselves, and for other workers, speaking of fear, frustration, grief, anger and resignation. None of those interviewed felt valued for their contribution, particularly during the difficult period of transition to a new contractor. The transfer was often accompanied by a vacuum of direction and knowledge that left workers isolated, compromised or in conflict. Each of the participants wanted to engage with their employer to work through the process of change and to resolve problems on the job. They aspired to the recognition and acknowledgement that would accompany effective communication, relevant information and consultation. This often did not materialise or was insufficient, resulting in some instances, in legal action or the pursuit of new jobs.

The greatest difference between the two occupational groups was in the way the non-compliance was addressed. Those who presented as most well-equipped to manage the transition were the hospital workers who were in stable work sites, where there was a strong sense of collectivism and a history of consultation. It was also where workplace agreements substantially supplemented their statutory rights. The hospital workers possessed more confidence, hope and, in the end, options, in the face of the uncertainties of the contract cycle. Cast across disparate sites, with contractual flexibilities that served the needs of the business and with union monitoring at a distance, the cleaners were often involved in discussions for which they were unprepared and experienced outcomes that were unexpected or detrimental to their well-being.

Prior to the new legislation, the change of a service contract provided employers an opportunity to reshape the employment relationship to meet the demands of the tender. However, the pressures of the contract cycle endured following the introduction of the new amendment. For the commercial cleaners, the hours and wages remained susceptible

to change at the time of the transfer. In one instance, a worker lost her job while in another the employers competed to retain staff only to reduce terms and conditions after the workers' election process was completed. In commercial cleaning, employers could cut the wage coat according to the tender cloth, away from the watchful eye of the union. Contractors in hospitals more readily adjusted to the demands of the new law. For some, the point of vulnerability shifted beyond the transfer of the contract to later pressures, experienced by the workers as the reorganisation around a new menu and the restructuring of the business.

The conversations with kitchen workers and cleaners suggested that Continuity of Employment law provided a bridge for workers between one contract and the next but how ably they could make the journey across it, depended on a range of contractual and behavioural factors. Furthermore, crossing the bridge safely did not guarantee certainty on the other side. The potential for material and psychological disadvantage endured for these workers and is the topic of the next chapter.

Chapter Six

Bridging the divide: The effectiveness of a law to transfer workers

6.1 Introduction

This chapter is an analysis of the effectiveness of Continuity of Employment legislation for contract service workers, drawing on the themes of Ulrich Beck's theory of risk society and the findings from conversations with contract service workers. I argue that disadvantage to workers persisted following the introduction of the law, although this occurred to varying degrees and in different ways, depending on the workplace context. At the core of this disadvantage are the tensions inherent in the new social democracy, between the role of the state and the role of the market. This is expressed through the legislation as a tension between individualism and collectivism.

The capability approach of economist Amartya Sen provides a valuable tool for insight into the source of the disadvantage experienced by these workers. Sen (1987) developed a method of measuring inequality by taking into account both the means to attain well-being and the end result or "functioning" in life. He recognised that "the value of the living standard is given by the capability to lead various types of life" (p. 36). Therefore, the focus for the measurement of well-being should be on what people do with the resources they have available, recognising that individual circumstances will vary and therefore their requirements will also vary (Clark, 2005). This approach is being applied in the evaluation of European social protection programmes, which focus, in particular, on the collective resources available to workers to control their working lives (Bartelheimer, Moncel, Verd, & Vero, 2008). Sen's approach is helpful to this policy analysis in two ways: it focuses on the "resources", or entitlements, available in a particular context and it

captures the ability of people to transform those resources into effective freedoms (Verd & Miguelez, 2009).

The chapter is divided into four sections. The first is called Workplace Rights and I address the disadvantage that arises for workers from the preference in the legislation given to process over outcome and to equity over efficiency. The subject of the next section, Workplace Voice, is the challenge workers face exercising real choice in an environment of institutionalized individualism. In the next section, Workplace Systems, I consider the risks of disadvantage through the vertical disintegration of a business, where the pressures of the market prevail and disrupt workers lives. The last of the four themes is Workplace Behaviour. In this section, I reflect on the challenge of building long-term productive employment relationships through the duty of good faith, when workplaces are fragmented and businesses are competing for short-term contracts for service. The conclusion draws together the political and economic context of the legislation with the themes of risk society and the conversations with interview participants. I conclude that the new amendment has failed to provide the envisioned protection for contract workers because it was lodged within an Act that was instrumental rather than distributive, providing "freedoms" that ultimately supported efficiency of business over equity for workers.

6.2 Workplace rights

The employment relations' framework in New Zealand emphasizes principles of fair process through the practice of good faith, freedom of association, the promotion of collective bargaining and the protection of the integrity of individual choice (ERA, s. 3). This is an enabling framework that recognises and enshrines the rights of individuals to determine their life path, previously referred to in this thesis as third way "subsidiarity". Labour MP, Pete Hodgson, captured the spirit of the Labour Party's industrial relations policy prior to the 1999 election: "It is an investment model rather than a deregulatory model. It is a model which actively promotes partnerships throughout the economy. It combines enterprise with equity" (1999). Continuity of employment legislation also

demonstrates the new vision of "enterprise with equity", with its combination of minimum standards and rights to freedom of choice. The focus of this section is the risk of disadvantage for contract workers in the domain of workplace rights in the new social democracy.

6.2.1 Negotiating an alternative arrangement

Continuity of Employment law aimed to eliminate the disadvantage which arose with the automatic termination of employment agreements at the sale, transfer or contracting out of a business. By creating an entitlement for workers to elect to transfer it achieved this goal because a change of contract would no longer "a priori lead to the cessation of employment contracts for employees" (Minimum Standards Review, 2001, p. 21). However, it fell short of achieving the vision of a new minimum standard that would protect all the specified contract workers. The reason for this can be traced back to the goal of the ERA as an "investment model" that promoted partnerships and enterprise. Employment would be continuous as long as workers elected to transfer. However, parties could also freely negotiate alternative arrangements at the point of the transfer of a business. The law, therefore, would not guarantee continuity. Within the regulated freedoms of the ERA the protections of the new minimum standard could be undermined by bad faith behaviour in either the process or implementation of the transfer. Further, the adequacy of information and rights to engagement could curtail the capability of workers to effectively access their rights.

The centrepiece of the ERA is the duty of good faith (Mazengarb's Employment Law (NZ), 2009a) and with it came an expectation that poor behaviour could be modified (Haworth et al., 2009). However, the ERA falls short of ensuring compliance with these ideals. Collins refers to a modern third way emphasis on "instrumental" rather than "distributive" regulation saying,

> the rights are not accorded to workers out of respect for basic values or to ensure compliance with ideal standards of fairness and justice. Instead, the legal rights are

> justified primarily because it is believed they will contribute to the enhancement of efficient business (2001, p. 302).

Good faith is about good process and process, the Employment Court noted, is the "practical manifestation of 'the inherent inequality of bargaining power in employment relationships'"[13]. Continuity of Employment law preserves the integrity of individual choice by enabling workers to choose the outcome of a transfer in a good faith bargaining process that is mediated less by regulation than by the market. The inequality of bargaining power is exposed during this process and so, as Anderson pointed out in 2007, the most vulnerable workers need more effective protection than is afforded by the current law (p. 12).

The vulnerability of workers in the current regime is illustrated through the conversations with commercial cleaners. These workers are given a choice in law between staying with their current company and moving to the new company. Ivan chose to transfer to the new company because he was told he would be looked after, while others chose to stay with their employer because they were offered 45 cents more per hour. In the language of the capability theory, there is no intrinsic value in this kind of freedom (Clark, 2005, p. 1343). Well-being for Ivan is neither the existence of choice nor the presence of entitlements but rather it is dependent upon his capability to achieve a particular functioning (of employment security). The desired result of ongoing employment on the same terms and conditions was unavailable to Ivan, or at least it was not available in the presenting circumstances. The freedom to negotiate alternative arrangements is a "risky freedom" (Beck, 2000); the "'freedom' of someone who is compelled to make decisions without being aware of their consequences" (Beck, 1999, p. 78); freedom without the requisite resource for it to be effectively realised.

The story of Ivan's choice also illustrates the extent to which business can benefit from decisions being made at the level of the workplace. Ivan did not challenge his employer. He said: "I just can't tell them that", "I just roll over" - and consequently his hours were cut. Ivan symbolises the entrepreneur of governmentality, who must shape his own life

[13] New Zealand Amalgamated Engineering Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd [2002] 1 ERNZ 597, para 3 (EC) Judge Colgan.

and assume responsibility for failure (Lemke, 2001). Beck uses the metaphor of the individual as "the planning office" of risk society, constructing his/her own biography (1992, p. 135) to illustrate the neo-liberal rationality.

Ivan's well-being depends on his capability to achieve the "functioning" of employment security and this requires a "bundle of resources" (Clark, 2005, p. 1361), such as the strength of a workplace collective, the availability of representation, and sufficient information. These resources support making the right decision and the enforcement of that decision. Instead, the current regulation supports the market to mediate the process without a safety net of adequate resources and workers, like Ivan, are exposed to the risk of disadvantage.

6.2.2 The flexible collective agreement

The market encroaches on the workplace through the "informal" arrangements but it also embeds disadvantage through the formal workplace agreement. Workplace agreements are described by Beck as documents of consent and they reveal the social risk position of contract workers through the flexibilities contained within them (1992, p. 23); they reveal the unequal "possibilities and abilities to deal with risks, avoid them or compensate for them" (p. 35). The collective employment agreements of hospital workers and commercial cleaners reflect different modernities, represent different levels of risk and, consequently, result in different degrees of disadvantage. The agreement for hospital kitchen workers reflects the large traditional collective groups of the first modernity, where workplaces are fixed, and hours are relatively standardised. The kitchen workers have ready access to representation and systems for communicating with the business. By contrast, the commercial cleaners are employed on a collective agreement that provides for flexible hours, an hourly rate marginally above the minimum wage and few systems for monitoring compliance. This latter agreement reflects the fluid, risky workplace of the second modernity.

The workplace rights, through the collective agreement, reflect the ability of the workforce to achieve certain functionings, or what capability theory describes as "beings" and "doings" (Clark, 2005, p. 1343). The comparison between commercial cleaners and hospital kitchen workers, in the interviews, provides an insight into this. Marcus's agreement entitles the employer to control the hours of work, as he says "they chop the hours back, then they give them back, then they had to drop them again because they said they had too many staff." By contrast, Carol's hospital agreement embeds consultation, and she approaches her employer on the basis that 'that's what we're all about'." The combination of functionings available to hospital workers through standardised hours, a union presence and contractual rights to consultation greatly enhances the capability of hospital workers to achieve the benefits provided for by Continuity of Employment legislation. While both groups relay stories of material disadvantage arising from the employers' non-compliant practices, the quality of the entitlements provided by the workplace agreement are a critical factor in the degree of disadvantage experienced by the two groups.

6.3 Workplace voice

The importance of resources to support the capability of workers to access their rights was noted in the previous section. Trade unions provide one such resource through their role in building collective organisation and this section considers the role of unions in giving voice to the concerns of workers. Enshrined in the International Labour Organisation (ILO) Decent Work Agenda, collectivization is a key mechanism whereby the worker's voice is heard in the workplace and the right to freedom of association is upheld (International Labour Organisation, 2009). For the first time labour law gives statutory recognition to the core ILO Conventions 87 and 98 (Mazengarb's Employment Law (NZ), 2009a) through the objects of the ERA (s. 3), including the right to organise and bargain collectively (s. 3 (b)).

Since 1990 industrial relations has institutionalized individualism in employment relations. The ERA establishes the right to the power of the collective through the

exercise of individual choice, or in Beck's words, "the addressee of these (basic) rights and reforms is the individual and not the group, the collective" (2007, p. 682). This is the message in the explanatory note to the Employment Relations Bill which records that the best means of redressing power imbalances is through "the voluntary organisation of employees via unions and collective bargaining" while "giving individuals the choice as to how their terms and conditions are negotiated" (Mazengarb's Employment Law (NZ), 2009c). The ERA exemplifies what Beck describes as the state imposed individualization of employment relationships in risk society (2007, p. 681).

The tension between rights to collective organisation and individual choice is palpable in the conversations with contract workers. Cleaners in the focus groups were unionised and covered by a collective agreement but the role of the union in giving voice to these workers was compromised. The union was a distant player in the contract transfer where individual workers represented themselves. The interviews indicated that self-representation left them feeling at best, discomfort and at worst, defeat. Many eschewed the support of their colleagues for fear of the consequences of visible collectivization. Workers left the union as a result of the transfer process and worksites were de-unionised. For instance, in one focus group, John described supervisors who were vocal in their opposition to the union and workers who would say nothing at the time of the transfer of the contract for fear of losing their jobs, such that in the final count, only "the loyal" remained.

Trade unions are a vehicle of collectivization and, in fact, the sole means by which a collective agreement can be secured under the ERA (s. 40(1)). In capability theory, collectivization is a "conversion factor" that transforms weak bargaining power into effective freedoms; the freedom to make real choices and, therefore, the freedom to exercise real voice (Verd & Miguelez, 2009). If unions are not accessible to workers, then there is an argument there is not a genuine chance to be collectivized or, through that mechanism, for workers to have a voice. The exercise of voice is a critical factor in transforming rights into desired results (Sen, 1987, p. 36). The evident failure of unions to reach into the workplaces of the private sector, illustrated in the struggle of commercial cleaners in this study to maintain their union presence, raises questions about the

effectiveness of the current law in promoting the right to organise and bargain collectively where vulnerable workers are concerned.

The mantra of the third way, "no rights without responsibilities" (Eichbaum, 2006, p. 51) captures the spirit of enterprise within the ERA but equally exposes a flaw in the new approach for vulnerable workers. Capability theory notes that "individuals cannot be held responsible if they didn't have real freedom to select a valuable option" (Bartelheimer et al., 2008, p. 25). Contract workers arguably do not have that freedom; they are largely left to call upon their own resources to make an election to transfer. The resources of those individual workers are limited, in part, by a lack of access to union representation. Yet these workers bear personal responsibility for the outcomes; outcomes which are the product of the delegated risks of a commercial transaction. Beck refers to the "direct relation between crisis and sickness" where "social crises appear as individual crises which are no longer (or only very indirectly) perceived in terms of their rootedness in the social realm" (1992, p. 100).

This "sickness" was illustrated in the psychological impact of the transfer process on workers in the study, where images of death and broken marriages reflected the personal humiliation, inadequacy, and loss associated with their experience of contracting out: Carol talked of "betrayal", Sala was "grieving" at her change of circumstances; and Joseph talked about "the loss of a wife". The ERA provides employees with rights to freedom of association and rights to good faith negotiations but the evidence suggests there is insufficient attention to the conversion factor of collectivization to ensure those freedoms become a reality. Without the real freedom to select a valuable option workers should not bear personal responsibility for the consequences and the fact that they do is indicative of evident psychological disadvantage in the contracting out process. It also exposes the flaw in a third way approach to legislation for vulnerable workers.

6.4 Workplace systems

Once Taylorism sub-divided work processes to drive efficiencies in production, now new efficiencies could be achieved through dis-integration of workplaces, opening the door to

new ways to exploit workers (Beck & Willms, 2004, p. 165). Contracting out provides one of many means of organising labour, on a continuum from the visible factory to the invisible cyber space/home-based workplace symptomatic of risk society (Beck, 1992, p. 142). Continuity of Employment law places restrictions on the flexibilities available to business by aligning employment contracts with fixed term contracts for service. The pressures endemic in the system of competitive tendering and the ongoing risks of disadvantage to workers arising from flexibilization of the workplace system, are the subjects of this section.

Continuity of employment legislation re-integrated workers into the workplace, forging new links between contract workers and the principal enterprise, severed during the vertical disintegration of production. The principal enterprise is required under the legislation to inform the contractors about future restructuring so they can, in turn, inform employees (s. 69G (3)). Furthermore, contractors are required to take over existing staff that elect to transfer so that downward pressure cannot be brought to bear on their terms and conditions. Workers are, in effect, placed at the heart of the service, as the substance of its continuity. Continuity of Employment law prevents employers and principal enterprises delegating, or evading, responsibility for their workforce. It ensures that fixed term contracts for service do not trigger fixed term employment agreements and the cyclic re-negotiation of employment terms every time service contracts are renewed. The lawful transfer of a contract for service can no longer be a point of vulnerability for workers.

This law was not, however, designed to stop contracting out but rather to protect workers and support greater efficiency in the market. In effect, the law aspires to a third way role for the market in "working for the social good" (Giddens, 2000, p. 84). The ERA sought to balance the needs of the market with the needs of the workforce just as its subsequent amendment for contract workers sought to balance business efficiency with job security. However, without a change to the nature or quantum of competitive tendering activity, the demands of the market remain and any opportunity to maximise competitive advantage will be scrutinised by businesses seeking to survive in a competitive market.

In this context, the effect of the legislation can be likened to a safety valve that is inserted to control market behaviour at the point of transfer. Under the sustained pressure of

competitive tendering, the market eventually finds it relief elsewhere in the system. An interview with workers from a hospital kitchen illustrated the challenge of applying regulatory controls in this way. Carol and Nik were union delegates during a contract transfer, prior to the law coming into force, when there was no statutory safety valve. They likened the experience to a war zone with "all guns blazing" - and people lost their jobs. However, after the introduction of the amendment, they were again transferred and, safety valve intact, they experienced a "newly-wed marriage scenario". The "luvy duvy" behaviour only lasted until the principal enterprise asserted pressure on the company for new efficiencies with the consequence that workplace dialogue broke down. Soon after, the company embarked on a review of staffing levels. For these workers the law delivered a smooth contract transfer but the pressures of the market remained and were re-channelled in a new and different way.

The new rights presented opportunities for continuity of employment for workers but at the same time the persistence of the contract cycle exposed workers to ongoing pressure in the workplace. The hospital kitchen resembled the traditional workplace - stable, visible, and accessible. This study indicates the law provided some certainty at the time of transfer for such workers even though the pressures would re-emerge within months of the change of contract. By contrast, workers in the fluid workplaces of the cleaning sector were ill-equipped to defend their hours and jobs during the transfer. Flexible agreements and weak monitoring and enforcement meant changes of worksite, new hours, new bus timetables, and new private arrangements to match the demands of the business. Continuity of employment was designed for vulnerable workers yet it could, at best, only deliver to those who were less at risk in the traditional workplaces of the first modernity, where collective representation forms the building blocks of workplace organisation and voice. It could less easily deliver to its target audience: the fluid, individualized workplaces, preferred as Beck (2000) noted, by the second modernity. Decentralization of workplace systems opened the door for the material and psychological disadvantage of those workers the new law aimed to protect.

6.5 Workplace behaviour

The object of the ERA is to build productive employment relationships through the promotion of good faith and is based on the understanding "that employment is a human relationship involving issues of mutual trust, confidence and fair dealing" (Mazengarb's Employment Law (NZ), 2009b). The duty of good faith applies to bargaining, to any matter arising in relation to an individual agreement, consultation processes, and proposals to restructure (s. 4 (4)). The Court of Appeal noted that the statute "is seeking to promote good employment relationships. It seeks to have the parties embrace that objective and to deal openly and fairly to that end"[14]. With individualized rights to information and negotiation over a contract transfer, workers are dependent on the duty of good faith to protect them from disadvantage.

The ERA requires parties are "active and constructive" and "responsive and communicative" in establishing and maintaining a productive employment relationship (s. 1A). These principles are reinforced by the Court of Appeal which said good faith "connotes honesty, openness and absence of ulterior purpose or motivation"[15]. It also concluded the parties "must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that still realistically can influence outcomes"[16]. It is because of good faith, founded on the "human relationship in employment", that individuals can be expected to make real choices in the workplace and achieve equitable outcomes.

However, conversations with contract workers about an indifferent management reveal a sense that the human relationship at work was absent. Joseph said when a company loses a contract "they don't want to know you"; "they walk away"; "the attitudes change just because they didn't get what they want." The experience of the hospital workers was that the new contractors were absent, or "onlookers", while workers managed the transition in the hospital kitchen. The human relationship, on which the ERA is constructed, seemed

[14] [25] *Auckland CC v NZPSA Inc* [2003] 2 ERNZ 386; [2004] 2 NZLR 10 (CA)
[15] *Carter Holt Harvey Ltd v National Distribution Union Inc* [2002] 1 ERNZ 239 (CA)
[16] *Auckland CC v NZPSA Inc* [2003] 2 ERNZ 386; [2004] 2 NZLR 10 (CA)

an aspirational goal for Sala, who said of her supervisor "he never gives me time to explain what I need"; for Marcus, who said "we've been told no one rings [the supervisor]"; and, for Sally who said "we try to talk to people at head office but we don't get any joy". The "good relationship" was often subverted in the interests of the business.

Good faith behaviour is fundamental to the success of the ERA because it is the means by which the object of productive employment relationships is achieved (Anderson, 2006) and it is equally integral to the management of any proposal to contract out (s. 4 (4) (d)). Yet stories of good faith in the transfer of a contract are rare amongst the participants and the consequences are often to their material disadvantage. John was not paid meal money for two years following a transfer; Ivan worked for 65 hours a week which he described as being unilaterally reduced to 37 hours following the change of contract; Sally talked about a $2000 underpayment of retirement gratuities; and, Sala had her hourly rate cut, her hours reduced and she was demoted without apparent consultation. Ivan's description of workers being "tricked" to stay with the company was far from the absence of ulterior motive required by good faith. While good faith is the "oil" of the ERA approach, there are indications its impact is marginal, a fact Anderson attributes to employer and judicial resistance (2006, p. 1).

The duty of good faith is a "risky freedom" for these contract workers and the breaches described in the workers' stories can be likened to the "side effects" of contracting out in risk society (Beck, 1992, p. 61), where the priority is the creation of a competitive market of short-term contracts "within the walls of the business" (Beck, 2007, p. 54). Disadvantage in this context is an unfortunate consequence of that competition. The poor workplace relationship, described by the workers in this study, is what Beck might refer to as an invisible risk of the second modernity, in which "the race between perceptible wealth and imperceptible risks cannot be won by the latter" (1992, p. 45). The duty of good faith is a response to the acknowledged inequality of power in the employment relationship; it is designed nourish the "human relationship" of employment. However, short term competitive contracts for service are not human relationships but commercial relationships and the workers are not a long-term investment but a redistributed risk for the duration of the employer's contract for service. The behaviour experienced by the

workers in this research illustrates that material and psychological disadvantage is the invisible side-effect of instrumental legislation for an efficient market.

6.6 Conclusion

In this chapter I have woven together the strands of modern social democracy in New Zealand for a deeper understanding of Continuity of Employment legislation. The ERA was developed by a government seeking a new social democratic model to replace the neo-liberal regime of the 1990s. It was described as "relatively conservative and cautious" when viewed in an international context (Mazengarb's Employment Law (NZ), 2009a). Evidence suggests a workforce has emerged which is increasingly individualized, flexibilized, and decentralized; where the market is well-positioned to focus on efficiency. The approach to the law reflected third way assumptions of the state as an enabler, rather than a provider; where rights are accompanied by responsibilities in a new citizen contract; and, where economic and social justice goes hand in hand (Eichbaum, 2006, p. 52). The Government aimed for a new balance between the market and the state, between efficiency and equity.

The tensions that arise in seeking such a balance are highlighted in this study of contract workers. Continuity of Employment legislation was designed to eliminate the downward pressure on wages from the contracting cycle. However, these workers are at the centre of a competitive market where labour costs are one of the primary means of competing for business. On the one hand the new law placed constraints on the behaviour of the principal enterprise and the contractor during the tender process; on the other hand, the ERA and its amendment provided freedoms that enabled the market to mediate relationships.

The ERA is "instrumental" in nature and as such its aim is market efficiency. It emphasises the preservation of the integrity of individual choice, enables workers to negotiate arrangements at the point of transfer and depends on the duty of good faith to ensure the smooth functioning of the employment relationships. Stories in this study reveal disadvantage to workers through non-compliance, diminished entitlements,

frustrated exercise of choice, and compromised good faith practices. Continuity of Employment legislation provides workers a right to transfer but it does not eliminate their vulnerability, which re-emerges as a phoenix from the ashes in new and different ways. It is illustrated by the stories of productivity pressure in the kitchens and commercial buildings of this study; in the sense of "betrayal" in Carol's kitchen as pressure is exerted on the workforce some months after the transfer. Continuity of Employment law assumes a balance can be achieved between protecting workers and supporting the market, lubricated by the oil of good faith. The evidence suggests that the intrinsic value of their new freedoms is limited and the duty of good faith on its own, insufficient. Ironically, the law may provide certainty for business but, the conversations in this study suggest it leaves workers exposed to the ongoing risk of unemployment and financial insecurity.

The "human relationship of employment" governed by good faith requires a level of expertise in a competitive tendering environment. The capability of contract workers to access that expertise in order to convert their rights into the freedom of secure employment reflects the degree of risk of disadvantage they experience. Workers in the traditional hospital kitchen, where there is ready access to representation and standardised employment terms, have an enhanced ability to make informed choices and enforce compliance with the law. Workers in the fragmented commercial cleaning sector are mobile and isolated. Here, unions are less accessible, the employment agreement is highly flexible, and they are at greater risk of disadvantage. In the next chapter, I will look at the factors that contribute to addressing disadvantage and consider the policy implications for the future.

Chapter Seven

Transforming the world of contract work: Policy implications

7.1 Introduction

In this chapter, I explore policy implications in the light of persistent disadvantage for contract workers. In the previous chapter, I identified four domains of potential disadvantage for workers: workplace rights, workplace voice, workplace behaviour and workplace systems. Traversing these domains are the three defining concepts of the labour market drawn from Ulrich Beck's theory of risk society: individualization, flexibilization, and decentralization. These concepts continue to inform the policy implications considered here; policy implications that extend beyond the employment protection amendment to the legislative nest that envelops it. The volatile competitive tendering process, individualized employment relations and non-compliant practices of employers present important inter-related constraints on the goal of protecting contract workers during restructuring. In this chapter, I offer some thoughts on how these constraints might be addressed in the future.

Drawing on Anthony Giddens' phrase "damaged solidarities", in the first section I will look at the rebuilding of collectivism in the workplace and beyond, so that union reach and representation is enhanced. In the second section, I will address the theme of "distanced authority" that arises out of the contracting process itself. The policy implications encompass internal workplace structures and networks beyond the workplace that connect the key players together in the delivery of cleaning and catering services. Finally, I will consider options that could counter the "diminished rights" of contract workers in an environment of institutionalized individualism.

7.2 Repairing "damaged solidarities"

The collapse of unionization in New Zealand and the individualization of employment relations paint a picture of what Giddens refers to as "damaged solidarities" (2000, p. 12). This is illustrated by the stories of commercial cleaners who navigate their way through business transfers on the basis of limited information and representation regardless of the legal protections in place. The traditional workplace solidarities have been broken down as unions have retreated to the margins of the labour market and workers are forced to become their own experts in the field of employment relations. The policy implications explored in this section lie in what Giddens describes as the reordering of the conditions of individual and collective life (2000, p. 13). The purpose of introducing continuity of employment protection was to address the downward spiral of terms and conditions arising from the limited bargaining power of vulnerable workers. However, the evidence of disadvantage suggests that the ERA and its amendment fail to provide the material conditions and organisational frameworks that enable workers to "make things happen" themselves rather than have things happen to them (Giddens, 1994, p. 15).

7.2.1 Regulating to "make things happen"

Giddens describes the third way as presenting three key areas of power: government, the economy and the communities of civil society, all of which need to be constrained in the interests of social solidarity and social justice if government is to be effective, economic prosperity assured and communities flourish (2000, pp. 51-52). The question for contract workers is whether economic interests have been sufficiently constrained to deliver social justice outcomes. Giddens looks to "generative politics" for the answer where the focus is to reduce the problem rather than repair the damage after the consequences are felt (1994, p. 155). I have argued the problem is that workers are disadvantaged because they have unequal bargaining power in a regime of institutionalized individualism. The solution must, therefore, lie in addressing the power imbalance in the workplace.

If workers are to "make things happen" then the state, in Giddens' view, needs to facilitate people to be autonomous and responsible (2000, p. 165). The state has a role to play directly, through its power to regulate standards, and indirectly, through the empowerment of third parties to intervene in the employment relationship. Trade unions are one lever by which workers can assert control over their lives. However, the findings of this study suggest the right to negotiate alternative arrangements enables the employer to elude the power of the union with consequences of material disadvantage to the workers. Workers are dependent on the duty of good faith, which had limited influence on the outcomes for workers in this research, perhaps reflecting Anderson's comment that the government under-estimated the degree of employer resistance to the behavioural change required by good faith (2006, p. 27). The law in the United Kingdom provides for extensive and explicit consultation obligations towards unions and elected representatives (Department for Business Innovation & Skills, 2009). Regulating a stronger role for unions in the workplace in general and for the management of contracting out in particular, is necessary to support workers to be autonomous, to "make things happen" and also to place a check on subsequent non-compliance. The third way "citizen contract" requires regulatory teeth if workers are to be expected to take responsibility.

7.2.2 Democratizing workplaces

A history of "damaged solidarities" has implications for policy beyond external third party intervention in the workplace to notions of internal industrial democracy. The idea of the state facilitating and setting limits on the power of industry was explored by an early architect of German labour law, Hugo Sinzheimer, who used the phrase, the "constitutionalization of industry" (Dukes, 2008). Constitutionalizing industry involved state intervention to facilitate collective organisation (through unions and European Works' Councils) so that workers and employers participated as equals in the regulation of the economy (Dukes, p. 343). According to Dukes the term constitution implied the substitution of workplace despotism by workplace democracy. She described a balancing act in which managerial power was constrained by the presence of representative bodies

and participatory processes (Dukes, p. 363). For Sinzheimer, workplace agreements were an expression of democracy that protected human dignity and enabled flexibility - in the sense that there was flexibility to negotiate strategies together (Dukes, p. 363). Re-conceiving of labour in terms of constitutionalizing workplaces assists to elevate the place of work in a pluralist democratic society.

Regulating for what Weil refers to as "common workplace institutions" (2007, p. 137) to solve the problem of damaged collectivism is a project of democratization of workplaces. The collective voice in the New Zealand workplace is expressed through unions, which have been described in this thesis as a "conversion factor" that enables workers to transform rights into effective achievements (Zimmermann, 2006, p. 478). Unions are the conduit for information, collectivization, bargaining and representation and therefore the means to enhance the freedom of individuals in the workplace to access their rights and participate in decision-making. Trade unions support the realisation of the ERA objective of the integrity of individual choice. Protection against diminished rights requires a policy focus on defining and integrating third party representation into decision-making processes so workers can make informed decisions and contribute to the future of their workplaces and the long-term economic well-being of the country.

7.3 Re-wiring employment relationships

The process of contracting out entails risk distribution, characteristic of decentralized production. The existence of risks and the distribution of risks are "mediated through argument" in the second modernity making allocation of accountability a cause of political debate (Beck, 1992, p. 27). This is illustrated in the argument about responsibility for redundant labour in contracting out which variously could belong to the principal enterprise that pays for the service, the contractor who employs the workers, or the workers who own their labour. This presents a challenge for the development of policy that aims to build trust and nurture collective responsibility. In this section I explore the policy implications for rewiring workplace relationships in a decentralized work environment.

Osborne and Gaebler (1992) first used the image of the state steering rather than rowing to describe the transformation of the state in a third way social democracy. This concept of an enabling, facilitative state raises questions about accountability and compliance within the new regulatory state; a state in which Braithwaite says "the sovereign is not dead but it is just one source of power" (1999, p. 90). He advocates solutions that recognise the multiple sources of power in a pluralist society and "communities of dialogue where each is accountable to every other" (1999, p. 93). Beck too, envisages coalitions forming to manage risk conflicts or social consequences that are no longer constructed along solely class lines but take shape according to the emergent risk (1992, p. 100).

In the New Zealand employment environment communities of dialogue are exemplified by an agreement forged between the government, the building owners, the contractors, and the Service and Food Workers Union Nga Ringa Tota. This agreement aimed create sustainable jobs for cleaners in the core public service through responsible procurement practices in the building services industry (Department of Labour, 2009b). It is further illustrated by a multi-union tripartite health sector agreement that establishes rights, responsibilities, and accountabilities for all workers, including contract catering and cleaning staff in the health sector[17] (2007). These multi-party agreements were not the product of regulation (although do not preclude it) and may be subject to the political winds of change. However, they provide examples for future engagement in sectors where workers, like Ivan and Sala, have few defences against the vagaries of the market. As Beck says, the risk society demands the opening up of the decision-making process beyond that of the state to private corporations (1999). New communities of dialogue provide a mechanism for decision-making in an environment of manufactured uncertainty where responsibilities associated with risks are debated, and allocated, in the political arena (Beck, 1992, 1999). This serves as an opening for individuals and their associated coalitions to adjust the balance between the roles of economy, civil society and the state so that appropriate constraints are applied. Regulating dialogue is about providing a base upon which trust can be built but that trust is dependent upon everyone being the guardian of everyone else (Braithwaite, 1999, p. 92).

[17] Health Sector Relationship Agreement: A tripartite framework for constructive engagement in the New Zealand public health and disability sector, 14 November, 2007

The decentralization of workplaces that results from the contracting out process reflects what Beck describes as "temporal and spatial decoupling of labour and production processes" (1992, p. 147). Establishing regulated dialogue at the level of the workplace is one way the state can facilitate renewed solidarities and re-wire workplace relationships toward collective, as opposed to individual, responsibility for outcomes. Precedent exists in the statutory rights of representation and participation in the Health and Safety in Employment Act 1992 (Part 2A). No such strategic engagement was incorporated into the ERA even though the distinction between health and safety and employment relations as workplace "issues" is an artificial one. As the hospital kitchen worker, Carol, reflected in her story, even where agreements provided for consultation the practice of "sitting down and being on a level playing field" was rapidly disappearing, as new managers looked outside the hospital walls for the answers instead of engaging the workers who delivered the service. Regulated dialogue may rebuild bridges in the "production process", enable renewed solidarities, and facilitate the collective responsibility that is fundamental to the "good relationship" at work.

7.4 Re-framing a minimum code

The Continuity of Employment provisions are about establishing rights for workers - rights to transfer on the same terms and conditions they enjoyed with their previous employer. The law was introduced to protect workers with limited bargaining power from having contractual rights reduced during restructuring. However, stories of diminished rights illustrate the ongoing pressure that many workers experience because they lack the capability to secure and retain basic conditions of employment during a period of change. The indications are that the diminished rights of contract workers are a product of the ERA in general and, to a lesser extent, of the special protections of Continuity of Employment law. In this section, I explore the policy implications for employment rights within both the framework of the ERA and the broader protections of the minimum code.

7.4.1 Regulating for capability and outcome

In drawing on capability theory, I have focused on two different ways in which rights can function for workers: they can support the capability of workers to achieve certain "freedoms" or outcomes; and, they can embed those outcomes through fundamental minimum standards. Both are relevant to the prevention of material and psychological disadvantage of contract service workers. The research illustrated, for example, that inadequate legislative support for collectivization compromised compliance in relation to the transfer of wages and conditions and to the duty of good faith during the negotiation of alternative arrangements. The failure to provide minimum standards that guaranteed the transfer compromised the right to continuous employment for commercial cleaners in the study. Inadequate rights reflect insufficient constraints on the role of the market, or alternatively insufficient attention to the role of civil society and government and point to policy implications for the future.

Evidence suggests that Continuity of Employment law failed to establish a minimum standard for all contract workers, given the option was available to negotiate alternative arrangements. Legislation in the United Kingdom recognises the risks of such freedoms and, according to McMullen, heavily circumscribes the terms for any variation, even where the employee consents (2006, p. 125). Far from being a limitation on the freedom of workers, such a policy resource recognises the limits on the negotiation capability of contract workers and guarantees ongoing employment. The establishment of a minimum standard for all contract workers depends on constraining managerial prerogative to a greater extent than current legislation provides.

The challenge for future policy that regulates relationships within the contracting cycle is to ensure the triangular relationship is not a means to undermine labour standards. Collins argued in 1990 that the failure of the British law to provide tools to ensure the observance of employment rights in the vertical disintegration of production meant that employers influence on the choice of the form by which the relations of production are organised, should be reduced (1990, p. 380). It is clear that in the New Zealand context the

employer's influence is not sufficiently controlled through the current Continuity of Employment law. Policy implications lie in ensuring there is a greater influence for a wider range of players in employment relations: the state as a third party monitor of compliance; unions as the vehicle for a collective voice in the workplace; and the principal enterprise as the beneficiary of the service.

7.4.2 Building the workplace community

Workplace agreements are an expression of the diminished rights of workers under the ERA. Beck describes the workplace contract as a means by which control of work, including working conditions and workloads, is handed over to the employer as the "'purchaser' of human capacities" (2000, p. 162). The collective agreement for commercial cleaners captures the flexibility of working hours that place cleaners in a social risk position, having forfeited control over their hours and, therefore, control over their incomes. Ivan told the story of his house being placed at risk because of the reduction of working hours following his transfer to a new contractor. This exemplifies the labour market dependency of workers in risk society with its flexible employment contract, and individualized employment relationships that weaken bargaining power and the monitoring of employers' practices.

There are many international models of regulating collective bargaining but recent Australian labour law provides a new approach to supporting collective outcomes, in particular, amongst the low paid. The Fair Work Act 2009 establishes bargaining rights (with associated protections such as good faith rights and "first contract arbitration") based on majority employee support. This support for a collective agreement is determined through a range of different mechanisms such as ballots, membership records, and petitions (Forsyth, 2009, November). In addition, workers can seek a "low paid authorisation", through Fair Work Australia. This institution can hold a compulsory conference of all or any parties with an interest in the bargaining and make a "low paid workplace determination", including arbitrating the outcome (Cooper & Ellem, 2009). The potential to include a range of players with influence extends the net of accountability

beyond the parties to the agreement (for instance, the principal enterprise) and may support more effective collective bargaining in an era of decentralized production. One of the Australian unions expressed high hopes for improvements for 20 percent of the workforce through the new low paid bargaining stream (LHMU, cited in Cooper & Ellem, 2009).

In his exploration of effective regulation, Weil proposes a broad set of basic labour standards, including hours of work, overtime compensation and mechanisms for effective worker representation and voice in the workplace (2007, p. 127). Beck (1992) also argues for a greater role for the state in providing stability and security in an increasingly fluid work environment as flexibilities of contract, workplace, and hours break down the distinctions between work and non-work. He looks to stem poverty through a "de-commodified system of basic security", independent of the labour market (1992, p. 83). He uses the example of a legally guaranteed minimum income to liberate workers from this dependency (p. 149), developed later into a more radical model of "civil labour" as an alternative form of self-organised activity and identity that could foster the democratic spirit (2000, p. 126). The purpose of such policy is to establish a workplace "community" that genuinely acts as a dynamic and democratic counterbalance to the power of the state and the economy.

7.5 Conclusion

The ERA seeks to address the inherent imbalance of power in the employment relationship through the objects of good faith and the promotion of collective bargaining. However, it is arguable that these objectives are inadequate for the protection of vulnerable workers. Evidence suggests real protection will require adjustment to both the existing amendments and the policy nest in which those amendments sit. Future policy direction requires a focus on the minimum standards for workers and the means by which those standards are enforced.

Resurrecting the notion of "constitutionalizing industry" shifts the focus to the rights for workers to engage collectively in the future of their workplaces and in the economic

direction of the country. Instead of unions retreating to small, isolated pockets of the economy, they have a critical role in ensuring citizens, as workers, are integrated into decision-making at the level of the workplace and the wider economy. Constitutionalizing industry transports social democracy into the workplace through the regulated representation and participation of workers in multiple layers of decision-making in industry.

The ongoing material and psychological disadvantage to workers in contracting out presents a challenge to ensure that legislation provides for the result of continuous employment as well as ensuring that the workers have the capability to convert their rights into a reality. If the capability rights to unionise and participate in the workplace are absent, then the rights to freedom of association and negotiation are of little value. If capability rights are not assured, then the right to negotiate alternative arrangements presents a high risk strategy for the protection of vulnerable workers. Conversations with hospital workers shed light on the importance of basic standards and capability rights for contract workers, such as access to unions, to industrial democracy, to financial security and to employment stability. The experiences of contract workers highlight the emerging issues in the future of work where fluid and fragmented work patterns reveal social risk positions in which workers have little control over their lives. Policies that recognise the whole of working life can assist to liberate workers from labour market dependency at the same time as enhancing democracy in a pluralist society.

Chapter Eight

Conclusion

Through this study I have explored the effectiveness of a policy designed to protect workers during the process of contracting out. In 2001, evidence suggested that workers were materially and psychologically disadvantaged as a result of the contracting out of their jobs and the government of the day acknowledged that further steps had to be taken to protect the most vulnerable of workers. Laws had been in existence in other countries for many decades and provided models for the development of local legislation in 2004. New Zealand law expressly sought to protect workers' employment and enhance business productivity and in so doing presented both a challenge to the prevailing ideology of the free market and an opportunity for market efficiency. I have argued that the legislation did not provide the envisioned protections for workers and that disadvantage persisted in proportion to the employment risk position of those workers.

The limitations of the law rest with the challenge of delivering regulation in a neo-liberal social democracy. The two purposes of employment law according to Collins are "to ensure that they function successfully as market transactions, and at the same time, to protect workers against the economic logic of the commodification of labour" (p.5, 2005, cited in Anderson, 2007, p. 3). The Continuity of Employment provision envisaged a social justice outcome in which labour could be de-commodified. Instead of workers being sold to the lowest bidder in the contracting out process, the law would treat employment as continuous and in so doing place a constraint on the role of the market and the reign of managerial prerogative. At the same time the law sought to enhance the efficiency of the market. The result was twofold: firstly, many workers reaped the benefits of continuous employment at the point of the transfer of a contract for service when otherwise they would have been terminated; and secondly, workers remained subject to the pressures of the market place as competitive tendering continued unabated.

The balance between equity and efficiency could be described as precarious with the risk of disadvantage persisting for many workers.

The law was introduced with the intention of balancing economic transformation with employee protection (Employment Relations Amendment Bill: First Reading, 2006, February 23). However, if by balance there was an expectation that the legislation would "keep in equilibrium" (Oxford English Dictionary, 2009) the interests of capital and labour, then the policy product was a far cry from its stated intent. The stated purpose of the Employment Relations Act 2000 reflected the sentiments of Kahn-Freund that the function of labour law was to act as a countervailing force to the inequality of power in the employment relationship (Anderson, 2007, p. 4). However, lodged within a third way model of social democracy, its role appeared more instrumental than distributive. The goal of providing continuity of employment for contract workers would require constraining managerial power with greater rigor in both the ERA and its subsequent amendment.

Set against a backdrop of institutionalized individualism, the New Zealand workplace is a domain of high risk for many, where the emphasis on managerial prerogative constrains workers' capability to access employment protection laws. The capability that workers need is to collectivize, as Anderson says:

> The most effective protection for employees is, and always has been, through collective organisation. Collective representation provides the strength for employees to influence their terms of employment, the strength to ensure some joint management of the relationship day to day, and most importantly the resources to effectively enforce their rights (2007, p. 12)

The policy solution, however, is not straightforward and incorporating into the ERA objectives promoting good faith and collective bargaining is not the panacea for damaged solidarities.

A history of decline in union reach across both public and private sectors over the last 20 years illustrates that the current provisions designed to address the imbalance of power in

the employment relationship are insufficient. Converting the rights to collective organisation and bargaining into a collective voice for workers requires levering unions into the workplace and workplace players into dialogue. Policy responses to protect marginalized workers would wisely look beyond Part 6A and the current legislative framework. They would envision new solidarities for workers that entail multiple layers of dialogue that provide an alternative to the institutionalized individualism of working life and reflect the dynamism of political debate in a pluralist society. They would look to minimum standards in law that protect against the immiseration of an increasingly fluid and precarious workforce. Finally, they would address the monitoring and enforcement capability and tools that minimise the risk of non-compliance in a highly decentralized labour market.

Research is designed to reveal the unexpected. This journey began with an exploration of an amendment to the ERA that was new to this country; that challenged the right of employers to enter into new employment relationships with staff when a business or service was purchased. On first encounter the law appeared to set itself apart from its parent statute; it established a new standard for the protection of some of the most vulnerable in the workforce. Instead, it is apparent that Continuity of Employment law is a well-crafted child of the ERA that seeks to both protect workers and nurture business. In essence it is instrumental rather than distributive; it enshrines the integrity of individual choice, fundamental to its parent statute. The assumptions of the ERA, highlighted by Waldergrave et al in 2003, that good faith would offset some of the consequences of inequality of bargaining power; remain problematic for vulnerable workers 10 years after its introduction.

It is the experience of contract service workers in this study that suggest the pursuit of a balance between labour and capital can prove futile for vulnerable workers – it is, arguably, a convenient mantra in the political contest about accountability. This research suggests vulnerable workers are expected to walk a tightrope to justice and the result is a high risk of calamity. The principle of the active citizen, critiqued by Beck and Foucault, is designed most appropriately for those with the capability to access their rights in the individualized society. A vision to protect workers, like Ivan and Sala, can only be

realized by supplying the requisite resource (such as unions, consultation and participation), regardless of arguments about freedom of choice and the efficiency of the market.

In approaching this thesis, I aimed to consider whether the new Continuity of Employment provisions provided a bridge strong enough to carry some of society's most marginalized workers between one contract for service and the next and whether on arriving at their destination the psychological and material well-being of those workers was intact. It concludes by acknowledging that the bridge has been built but that the foundations are fragile; that many workers may travel across unharmed but many others are likely to be less fortunate. Far from this being a tale of a controversial amendment and its consequences, it is a tale about the limitations and possibilities of the new social democracy in which we live. Continuity of Employment law is the progeny of the ERA; it is its philosophical soul-mate and its destiny is intimately tied to the economic and political future of labour law in New Zealand and inevitably to those who are most successful in ensuring they have their voices heard.

Bibliography

Abelson, P. (2005). Outsourcing of public services in Australia: Seven case studies [Electronic Version], 33. Retrieved 28 August, 2007 from http://www.econ.mq.edu.au/research/2005/OutsourcingPublicServices.pdf.

Adnett, N., Hard, S., & Painter, R. (1995). Business transfers and contracting out: Compulsory competitive tendering in tatters? *Employee Relations, 17*(8), 21-28.

Allen, J., & Henry, N. (1997). Ulrich Beck's risk society at work: Labour and employment in the contract service industries *Transactions of the Institute of British Geographers, New Series, 22*(2), 180-196.

Anderson, G. (2006). Transplanting and growing good faith in New Zealand labour law. *Australian Journal of Labour Law, 19*(1), 1-29.

Anderson, G. (2007). Employment rights in an era of individualised employment. *Victoria of University Law Review, 26*.

Bartelheimer, P., Moncel, N., Verd, J. M., & Vero, J. (2008). *Towards analysing individual working lives in a resource/capabilities perspective*. Paper presented at the seminar, Sen-sitising life course research? Exploring Amartya Sen's capability concept in comparative research on individual working lives. Retrieved 9 October, 2009, from http://www.capright.eu/digitalAssets/46680_Net-Doc-50-1.pdf#page=25.

Beck, U. (1992). *Risk society: Towards a new modernity* (S. P. Ltd, Trans.). London: Sage Publications Ltd

Beck, U. (1999). *World risk society*. Cambridge: Blackwell Publishers Ltd.

Beck, U. (2000). *The brave new world of work*. Frankfurt: Polity Press.

Beck, U. (2006). Living in a world risk society. *Economy and Society, 35*(3), 329-345.

Beck, U. (2007). Beyond class and nation: reframing social inequalities in a globalizing world. *The British Journal of Sociology 58*(4), 679-705.

Beck, U., & Willms, J. (2004). *Conversations with Ulrich Beck* (M. Pollak, Trans.). Frankfurt: Polity Press in association with Blackwell Publishing Ltd.

Blackwood, L., Feinberg-Danieli, G., & Lafferty, G. (2005). *Annual review results 2005 unions and union membership in New Zealand*. Wellington: Victoria University of Wellington.

Braithwaite, J. (1999). Accountability and governance under the new regulatory state. *Australian Journal of Public Administration, 58*(1), 90-97.

Brookers Online. (2007). Employment Relations Act 2000. Retrieved 30 March, 2007, from http://www.brookersonline.co.nz.

Charlwood, A., & Haynes, P. (2008). Union membership decline in New Zealand, 1990-2002. *Journal of Industrial Relations, 50*(87), 87-110.

Churchman, P. (2002a). Transfer of undertakings and employment. *New Zealand Law Journal*(June), 203-206.

Churchman, P. (2002b). Transfer of undertakings: International comparisons. *The New Zealand Law Journal*(August), 294-297, 304.

Churchman, P., & Roth, P. (2000). *New Zealand Law Society Seminar: Employment Relations Act 2000*: NZ Law Society.

Clark, D., A. (2005). Sen's capability approach and the many spaces of human well-being. *The Journal of Development Studies, 41*(8), 1339-1368.

Collins, H. (1990). Independent contractors and the challenge of vertical disintegration to employment protection laws. *Oxford Journal of Legal Studies, 10*(3), 353-380.

Collins, H. (2001). Is there a third way in labour law? In A. Giddens (Ed.), *The global third way debate*. Cambridge: Polity Press in association with Blackwell Publishers Ltd.

Cooper, R., & Ellem, B. (2009). Fair work and the re-regulation of collective bargaining. *Australian Journal of Labour Law, 22*(3), 284-305.

Crawford, A., Harbridge, R., & Walsh, P. (2000). *Unions and Union Membership in New Zealand: Annual Review for 1999* (Working Paper 1/00). Wellington: Victoria University

Cresswell, J. (2009). *Research design: Qualitative, quantitative, and mixed methods approaches* (Third ed.). Thousand Oaks: Sage Publications Inc.

Department for Business Innovation & Skills. (2009). *Employment rights on the transfer of an undertaking: A guide to the 2006 TUPE regulations for employees, employers and representatives*. Retrieved 2 November, 2009. from www.bis.govt.uk.

Department of Labour. (2009a). The effect of the Employment Relations Act 2000 on collective bargaining. Retrieved July 20, 2009, from http://www.dol.govt.nz/publications/research/collective-bargaining/collective-bargaining-report_01.asp

Department of Labour. (2009b). Principles for the property services industry. Retrieved 28 October, 2009, from http://www.ers.dol.govt.nz/procurement/industry.html

Department of Labour. (2010). *Review of part 6A: Continuity of employment - A discussion document seeking submissions on Part 6A of the Employment Relations Act*. Retrieved 14 February, 2010. from: www.dol.govt.nz/consultation/tor-review-part6a.

Dukes, R. (2008). Constitutionalizing employment relations: Sinzheimer, Kahn-Freund, and the role of labour law. *Journal of Law and Society, 35*(3), 341-363.

Easton, B. (1997). *In stormy seas: The post-war New Zealand economy*. Dunedin: Otago University Press.

Eichbaum, C. (2006). The Third Way. In R. Miller (Ed.), *New Zealand Government & Politics* (Fourth ed., pp. 47-62). Melbourne: Oxford University Press.

Employment Relations Amendment Bill: First Reading. (2006, February 23). *New Zealand Parliamentary Debates (Hansard) Weekly Hansard*. Retrieved October 10, 2009. from www.hansard.parliament.govt.nz/hansard.

Employment Relations Amendment Bill: Second Reading. (2006, August 30). *New Zealand Parliamentary Debates (Hansard): Weekly Hansard. 5013-5033.* Retrieved December 5, 2009. from www.hansard.parliament.govt.nz/hansard.

Employment Relations Amendment Bill: Third Reading. (2006, September 7). *New Zealand Parliamentary Debates (Hansard): Weekly Hansard,*. Retrieved October 10, 2009. from www.hansard.parliament.govt.nz/hansard.

Eur-Lex. (2001). Council Directive 2001/23/EC. Retrieved 8/09/09, 2009, from http://eur-lex.europa.eu/smartapi/cgi/sga_doc?

Fair Work Ombudsman. (2009). Your Employer Sells the Business? *Fair Work Online* Retrieved July 19, 2009, from http://www.fairwork.gov.au/Pay-leave-and-conditions/Conditions-of-employment/Pages/Your-employer-sells-the-business.aspx

Foley, K. (2002). Local economies and the impact of the privatization of public services. *Local Economy, 17*(1), 2-7.

Fontana, A., & Frey, J. H. (2005). The Interview. In N. K. Denzin & Y. S. Lincoln (Eds.), *The Sage Handbook of Qualitative Research* (Third ed., pp. 695727). London: Sage Publications.

Forsyth, A. (2009, November). *Good faith bargaining: Australian, United States and Canadian comparisons*. Paper presented at the Chairman's lunch seminar, US National Labor Relations Board.

Fudge, J., Turner, E., & Vosko, L. (2002). The legal concept of employment: Marginalizing workers [Electronic Version]. Retrieved September 2, 2009 from https://dalspace1.library.dal.ca/dspace/bitstream/handle/10222/10303.

Garnham, B. (2008). Data generation. *The Sage Encyclopaedia of Qualitative Research Methods* Retrieved April 22, 2009, from http://sage-ereference.com.ezproxy.massey.ac.nz/research/Article_n97.html?searchQuery=quickSearch%3DGarnham%252C%2BBridget

Giddens, A. (1994). *Beyond left and right*. Cambridge: Polity Press.

Giddens, A. (1998). *The third way: The renewal of social democracy*. Cambridge: Polity Press.

Giddens, A. (2000). *The third way and its critics*. Cambridge: Polity Press.

Giddens, A. (2003). *The progressive agenda*. London: Policy Network.

Giddens, A. (June 07, 2004). Did they foul up my third way? : New Statesman.

Harland, C., Knight, L., Lamming, R., & Walker, H. (2005). Outsourcing: Assessing the risks and benefits for organisations, sectors and nations. *International Journal of Operations & Production Management, 25*(9), 831-850.

Harris, P. (1999). Rogernomics, the Washington consensus' and New Zealand economic policy In *The new politics: A third way for New Zealand* (pp. 19-33). Palmerston North: Dunmore Press Limited.

Haworth, N., Rasmussen, E., & Wilson, M. (2009). *Radical employment relations reforms: Their influence on New Zealand's economic performance*. Paper presented at the 15th World Congress of the International Industrial Relations Association.

Haynes, P., Boxall, P., & Macky, K. (2006). Union reach, the 'representation gap' and the prospects for unionism in New Zealand. *Journal of Industrial Relations, 48*(193).

Health Sector Relationship Agreement: A tripartite framework for constructive engagement in the New Zealand public health and disability sector. (2007).

Herod, A., & Aguiar, L. L. M. (2006). Introduction: Cleaners and the dirty work of neoliberalism. *Antipode, 38*(3), 425-434.

Highfield, L., & Towner, R. (2002). *Contracting out - law and policy*. Paper presented at the Employment Law Conference.

Hodgson, P. (1999). Labour's labour relations [Electronic Version]. *New Zealand Journal of Industrial Relations, 24*. Retrieved 11 October, 2009 from http://www.commerce.otago.ac.nz/mgmt/nzjir/feature2402-04.html.

Hunt, J. (1997). The court of justice as a policy actor: the case of the acquired rights directive [Electronic Version]. *Legal Studies, 18*, 336-359. Retrieved July 18 2009 from www.http://heinonline.org.

International Labour Organisation. (2009). Rights at Work. Retrieved November 25, 2009, from http://www.ilo.org/global/About_the_ILO/Mainpillars/Therightsatwork/lang--en/index.htm

Kelliher, C. (1996). Competitive tendering in NHS catering: a suitable policy? *Employee Relations, 18*(3), 62-76.

Kelsey, J. (1995). *The New Zealand experiment: A world model for structural adjustment?* Auckland: Auckland University Press with Bridget Williams Books.

Kiely, P. (2006). Employment agreements: Bargaining trends and employment law update 2005/2006. In L. Blackwood, G. Feinberg-Danieli, G. Lafferty & P. Kiely (Eds.). Wellington: Victoria University of Wellington.

Kincheloe, J. L., & McLaren, P. (2005). Rethinking critical theory and qualitative research. In N. K. Denzin & Y. S. Lincoln (Eds.), *The Sage handbook of qualitative research* (Third ed., pp. 303-342). London: Sage Publications.

Lemke, T. (2001). 'The birth of bio-politics': Michel Foucault's lecture at the College de France on neo-liberal governmentality. *Economy and Society, 30*(2), 190-207.

Madriz, E. (2003). Focus groups in feminist research. In N. K. Denzin & Y. S. Lincoln (Eds.), *Collecting and interpreting qualitative materials* (second ed., pp. 363-389). Thousand Oaks: Sage Publications Ltd.

Marchington, M., Cook, F. L., Earnshaw, J., & Rubery, J. (2004). For better or for worse: Transfer of undertakings and the reshaping of employment relations. *International Journal of Human Resource Management, 15*(2), 276-294.

Marchington, M., Cook, F. L., Earnshaw, J., & Vincent, S. (2000). Transfer of undertaking and reshaping work: some empirical evidence from the service sector. *Management Research News, 23*(9/10/11), 104-105.

Mazengarb's Employment Law (NZ). (2009a). The development of New Zealand employment law. Retrieved February 6, 2009, from http://www.lexisnexis.com.ezproxy.massey.ac.nz/nz/legal/results/docview/docview.do?docLinkInd=true&risb=21_T8492779476&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T8492779479&cisb=22_T8492779478&treeMax=true&treeWidth=0&csi=274491&docNo=9

Mazengarb's Employment Law (NZ). (2009b). Employment Relations Act 2000. Retrieved 10/09/09, 2009, from http://www.lexisnexis.com.ezproxy.massey.ac.nz

Mazengarb's Employment Law (NZ). (2009c). Introduction to the Employment Relations Act. Retrieved December 6, 2009, from http://www.lexisnexis.com.ezproxy.massey.ac.nz/nz/legal/search/homesubmitForm.do

Mazengarb's Employment Law (NZ). (2009d). Personal grievances (NZ). Retrieved 3/01/10, 2009, from www.lexisnexis.com/nz

McLaren, E., Firkin, P., Spoonley, P., Dupuis, A., Bruin, A. d., & Inkson, K. (2004). *At the margins: contingency, precariousness and non standard work*. Auckland: Massey University.

McMullen, J. (2006). An Analysis of the Transfer of Undertakings (Protection of Employment) Regulations 2006. *Industrial law Journal, 35*(2), 113.

Miller, P., & Rose, N. (1990). Governing economic life. *Economy and Society, 19*(1), 1-30.

Minimum Standards Review. (2001). *Minimum employment standards review: Report of the advisory group on contracting out and sale and transfer of business to the Minister of Labour*. Retrieved June 5, 2009. from http://www.executive.govt.nz/minister/wilson/advisory_groups/employment.pdf.

Neuman, W. L. (2003). *Social Research Methods: Qualitative and Quantitative Approaches* (5th ed.). Boston: Pearson Education Inc.

New Zealand Cleaning Contractors Multi-Employer Collective Agreement. (May 1 2008 - 30 April 2009).

Osbourne, D., & Gaebler, T. (1992). *Reinventing Government*. New York: Addison-Wesley.

Oxford English Dictionary. (2009). *Oxford English dictionary*. Retrieved 20 June 2009, from http://dictionary.oed.com.

Painter, R., & Hardy, S. (1999). Business transfers, employers' strategies and the impact of recent law. *Employee Relations, 21*(4), 378-388.

Patton, M. Q. (2002). *Qualitative research and evaluation methods* (Third ed.). Thousand Oaks: Sage Publications Inc.

Polivka, A. E., & Nardone, T. (1989). On the definition of "contingent work". *Monthly Labor Review*(December).

Quiggin, J. (2002). Contracting out: Promise and performance. *Economic and Labour Relations Review, 13*(1), 88-204.

Rees, G., & Fielder, S. (1992). The services economy, subcontracting and the new employment relations: Contract catering and cleaning. *Work Employment and Society, 6*(3), 347-368.

Roper, B. S. (2005). *Prosperity for all? Economic, social and political change in New Zealand since 1935*. Southbank: Thomson Dunmore Press.

Rose, N. (1996). Governing "Advanced" Liberal Democracies In A. Barry, T. Osborne & N. Rose (Eds.), *Foucault and Political Reason: Liberalism, neo-liberalism and rationalities of government* (pp. 37-65). London: UCL Press.

Roth, P. (2001). Enterprise transfer regulations: Overseas reality - New Zealand possibility [Electronic Version]. *Employment Law Bulletin, 42*. Retrieved 07/09/09 from www.lexisnexis.com.

Ryall, J. (2006). UK study tour report. In Department of Labour (Ed.). Wellington: Service and Food Workers Union Nga Ringa Tota.

Ryan, S., & Herod, A. (2006a). Introduction: Cleaners and the Dirty Work of Neoliberalism. *Antipode, 38*(3), 425-434.

Ryan, S., & Herod, A. (2006b). Restructuring the architecture of state regulation in the Australian and Aotearoa/New Zealand cleaning industries and the growth of precarious employment *Antipode 38* (3), 486-507.

Seifert, A. M., & Messing, K. (2006). *Cleaning up after globalisation: An ergonomic analysis of work activity of hotel cleaners*. Retrieved August 28, 2009.

Sen, A. K. (1987). The standard of living: Lecture 11. Lives and capabilities. In G. Hawthorn (Ed.), *The Standard of Living*. Cambridge: Cambridge University Press.

Service and Food Workers Union Nga Ringa Tota. (2006). *Submission of Service & Food Workers Union Nga Ringa Tota to the Transport and Industrial Relations Select Committee on the Employment Relations Amendment Bill*. Wellington.

Service and Food Workers Union Nga Ringa Tota, & Liquor Hospitality and Miscellaneous Union. (2006). A clean start for the property services industry [Electronic Version] from http://www.sfwu.org.nz/files/ACleanStart_Web.pdf.

Service and Food Workers Union Nga Ringa Tota and OCS Ltd. (1st July 2007 - 30th June 2009). Service and Food Workers Union Nga Ringa Tota and OCS Ltd Collective Employment Agreement.

Sharples, P. (2006). *Employment Relations Amendment Bill*. Retrieved. from www.maoriparty.com.

Simmers & Associates Limited. (2008). *Conditions affecting health and safety in the cleaning sector and ways and means to address the causes and solutions of the identified issues* (Discussion Paper): Department of Labour.

Sjoholt, P. (1998). *Outsourcing of services and socio-economic and regional impacts on employment*. Paper presented at the 38th Congress of the European Regional Science Association. from http://www-sre.wu-wien.ac.at/ersa/ersaconfs/ersa98/papers/395.pdf.

Spotless Services Ltd & Service and Food Workers Union Nga Ringa Tota. (June 30 2007 - July 1 2009). Spotless Services Ltd & Service and Food Workers Union Nga Ringa Tota Collective Employment Agreement.

The Employment Relations Bill: Explanatory note. (2000). Retrieved February 9, 2010, from http://www.executive.govt.nz/minister/wilson/erb/note.htm

Tucker, D. (2002). *Precarious non-standard employment: A literature review*. Retrieved July 12, 2009. from www.dol.govt.nz.

Verd, J.-M., & Miguelez, F. (2009). *Social protection and non-standard individual working lives. A combined approach using the capabilities model and the life course perspective*. Paper presented at the 15th World Congress of the International Industrial Relations Association

Waldergrave, T., Anderson, D., & Wong, K. (2003). *Evaluation of the short-term impacts of the Employment Relations Act 2000*. Wellington: Department of Labour.

Weil, D. (2007). Crafting a progressive workplace regulatory policy: Why enforcement matters. *Comparative Labor Law and Policy Journal, 28*(125), 125-154.

Weil, D. (2009). Rethinking the regulation of vulnerable work in the USA: a sector-based approach. *Journal of Industrial Relations, 51*(3), 411-430.

Wilson, K. (2004). *Report of exploratory case study research into precarious employment*. Wellington: Department of Labour.

Wilson, M. (2001). The Employment Relations Act: A statutory framework for balance in the workplace. *New Zealand Journal of Industrial Relations, 26*(1), 5-11.

Yeatman, A. (1995). Interpreting contemporary contractualism In J. Boston (Ed.), *The state under contract* (pp. 124-240). Wellington: Bridget Williams Books Ltd.

Zimmermann, B. (2006). Pragmatism and the capability approach: Challenges in social theory and empirical research. *European Journal of Social Theory, 9*(4).

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