

## **From there, to here, to where?**

### **Societal change and legal development**

A paper presented by Chief Judge Christina Inglis<sup>1</sup>  
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The focus of the next two days is change. I have no doubt that employment law, and those involved in it, will be subjected to a considerable amount of it in the short and longer term – both as to the substance of the law and how we practice it. That may well create a degree of discomfort for members of a profession known for its tenacious grasp on tradition, the reassuring presence of long-established practices and procedures, and an embedded dependence on precedent as an analytical tool. It may spark a frisson of excitement in others.

The organisers of the conference give every impression of falling within the latter category, keen to investigate the potential for digital communication, virtual courts and algorithmic decision-making. These things are all worth exploring (with a weather eye). But in terms of divining where we might substantively be heading with employment law, regard might also usefully be given to the sorts of issues which are arising in workplace relationships, how they reflect shifts in social values and how they might best be responded to. As Machiavelli wisely observed:<sup>2</sup>

Whoever wishes to foresee the future must consult the past; for human events ever resemble those of preceding times. This arises from the fact that they are produced by men who ever have been, and ever shall be, animated by the same passions, and thus they necessarily have the same results.

I also suggest that the path to the future may already be lit, at least to some extent, by developments in other aligned areas of the law – including the largely unexplored and/or unarticulated synergies with human rights and administrative law, and the developing thinking around conflict resolution, human relations and individual autonomy. First a disclaimer - this

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<sup>1</sup> The views expressed in this paper are my own personal views. I would like to acknowledge the contribution of Suzanne Innes-Kent and Yoav Zionov (Judges' Clerks) and Mizna Ahmed (Judges' Clerk – Intern) to the development of this paper.

<sup>2</sup> Niccolò Machiavelli *The Prince* (Penguin Classics, United Kingdom, 2011) (first published in 1532).

paper merely touches on these ideas – it does not seek to provide a crystal ball, the definitive answer or a road map for what is on the horizon. It simply seeks to provide some food for thought and further analysis.

**From there ...**

**(the path to the future is lit by the past)**

Employment law has been around for a very long time and has continued to reflect developments in society. Employment legislation in New Zealand was spurred by public concerns about sweatshops and industrial action, which developed in response to poor working conditions, long hours, low pay and an ineffective legislative framework.

The key relationship was a patriarchal one – the master (the employer) and the servant (the employee). The employee was to obey all lawful orders; the employer was to meet basic obligations as to pay. The employer could terminate the relationship at will, and the common law duties attached to the relationship were heavily weighted on the employee rather than the employer.<sup>3</sup> It might be said that the vertical structure of the relationship reflected the relative value accorded by the law (and society at the time) to each of the parties' interests – it was predominantly the employer's economic interests which drove the relationship and the way in which it was recognised by the law. It also reflected the way in which relationships were generally structured within society at the time.

Collectivism gained pace towards the end of the 19<sup>th</sup> century, fuelled by concerns about working conditions. As one commentator has observed:<sup>4</sup>

Wages fell, hours of work lengthened, boy and girl labour supplanted that of men, and there was a great deal of unemployment. Many abuses crept into working conditions. At first, the position of workers was weak through lack of organisation; strikes were of little avail where the small and isolated groups involved were readily replaceable from the ranks of men unemployed and very near destitution ... But the failure or fewness of strikes during the years immediately following 1876 did not imply an absence of discontent. Discontent was widely prevalent and rapidly spreading and it was only the fact that it remained temporarily separated into thousands of individually impotent particles that rendered it passive. As trade unionism developed these particles were

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<sup>3</sup> Such as the duty of fidelity.

<sup>4</sup> N S Woods "Industrial Conciliation and Arbitration in New Zealand" (Government Printer, Wellington, New Zealand, 1963) at 30-31.

gathered together into groups of steadily increasing magnitude and power. This organisation had a profound effect upon the early policy of trade unionism in New Zealand and upon the nature of New Zealand's approach to industrial relations problems.

One of the features of developments in employment law from around this time was the engagement of public sentiment to drive legislative change, notably the parlous state of working conditions for vulnerable workers. The reforms also piggy-backed on concerns about the impact of industrial unrest. It was against a backdrop of growing industrial unrest and a public outcry against sweated labour that the Industrial Conciliation and Arbitration Act 1894 was born. The statutory language of the time centred around notions of privileges and rights and duties. The master and servant descriptors were statutorily replaced with employer and employee (terms which have now endured for over 100 years).

The perceived importance of employment *law* may be seen in the constitution of the first specialist court, which was to be presided over by a Judge of the Supreme Court. The perceived importance of employment *relations* may be reflected in the fact that two Board members – one representing employers, the other unions – sat with the Judge. Each was expected to be partisan.<sup>5</sup>

A suite of protectionist legislation was introduced from the mid-1930s, with the introduction of the minimum wage, compulsory unionism and the 40-hour working week. The economic imperatives of the war undermined these initiatives, marking a turning point for many of the protective reforms and culminating in the removal of compulsory unionism in 1961.

The next 30 years saw significant changes, with a move from a protected economy with a collectivist welfare state ethos underpinning industrial relations, to an open economy.<sup>6</sup> A discernible correlation emerged between the erosion of collective rights and the increase in individual rights at work.<sup>7</sup> Between 1984 and 1987, deregulation saw the Government taking a more hands-off approach to industrial relations. The Labour Relations Act 1987 reflected a

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<sup>5</sup> At 46. Members were appointed out of nominations from employers and trade unions respectively, and for a period of three years. Penalties for breach of an award were set at 500 pounds for unions or associations and, where a union or association could not pay, each member was individually liable for 10 pounds. The Court itself could settle its own procedure; hear any evidence it wished (whether strictly legal evidence or not). Contracts (industrial agreements) were filed in the Supreme Court. The Court had jurisdiction over all employers and the unions of workmen registered under the Act.

<sup>6</sup> I MacAndrew, A Geare and F Edgar "The Changing Landscape of Workplace Relations" in G Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, 2017) at 24.

<sup>7</sup> S Deakin & F Wilkinson *The Law of the Labour Market* (OUP, Oxford, 2005) at 347.

legislative preference for placing collective bargaining back into the hands of employers and unions without active court or ministerial involvement.

The passage of the Employment Contracts Act 1991 signalled a shift in emphasis. The statutory language changed, highlighting *contract* rather than *relationship* (most graphically illustrated in the short title to the Act itself).<sup>8</sup> While acknowledging the special nature of employment agreements, and the need to balance the competing interests of employers and employees,<sup>9</sup> the concept of contractual primacy is evident in many judicial and academic discussions of the time.<sup>10</sup>

**To here ...**

**(under the spotlight)**

The point that employment arrangements differ from commercial contracts received parliamentary endorsement with the repeal of the Employment Contracts Act and the enactment of the Employment Relations Act 2000. Linguistics again indicate that a seismic shift in thinking had occurred. The line between employer and employee was statutorily shunted further towards the horizontal position – the focus was to be on the employment *relationship*; the employment contract was replaced by the employment *agreement* and the concept of *mutuality* became embedded in the statutory language.<sup>11</sup> The inherent unequal bargaining strength between employer and employee was expressly recognised,<sup>12</sup> as was the

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<sup>8</sup> For example, “Labour Relations” to “Employment Contracts”; from “a framework to enable agreements to be reached” and “orderly conduct of relations between workers and employers” to freedom to “choose”, and “to establish that the nature of the contract” is “between the parties themselves to negotiate”; from the “right of workers to become members of unions” to “choice of representation” and “freedom to negotiate”. Also see A Knowles “The Employment Contracts Act 1991; an Employer History” 28 Cal W Int’l LJ (1997-1998) at 85. She reports that by 1998, a Department of Labour survey showed that 98 per cent of contracts lodged on the Department’s database were single-employer documents:

<sup>9</sup> See, for example, *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, [1991] 1 ERNZ 711 at 722.

<sup>10</sup> See, for example, *New Zealand Couriers Ltd v Curtin* [1992] 3 NZLR 562 (CA) at 415 per Richardson J; *Attorney-General v New Zealand Post Primary Teachers Assn* [1992] 1 ERNZ 1163 (CA) at 1168; *Sears v Attorney-General* [1995] 2 ERNZ 121 (CA) at 125. See also Roger Kerr “The New Zealand Employment Contracts Act: Its Enactment, Performance and Implications” 28 Cal W Int’l LJ 89 (1997).

<sup>11</sup> Including in relation to good faith, s 4.

<sup>12</sup> Section 3(a)(ii).

need to have regard to two specific international labour law Conventions.<sup>13</sup>

Despite the recalibration, it has been suggested that the weighting of obligations continues to rest more heavily on employees rather than employers.<sup>14</sup> While, for example, the ongoing obligation of confidentiality and fidelity has continued to be well explored in relation to employees (including post termination of employment), little has been said about the nature and scope of any ongoing obligations of an employer. A similar point might be made in relation to out-of-work conduct. The case law is dotted with references to the employee's obligation not to bring the employer into disrepute; few (if any) cases deal with the issue as to what employer conduct might give rise to a comparable claim in reverse. And while the Court of Appeal has recently held that the failure to advise an employer of a criminal charge the employee was facing was "plainly a breach of good faith",<sup>15</sup> what of an employer facing a police investigation on matters which might significantly impact on the company employer's reputation and thus the employee's reputation, or an investigation by the Commerce or Securities Commission into alleged malpractice? Does the employer owe any implied obligations to draw such matters to the attention of a potentially affected employee in these circumstances?<sup>16</sup>

It is probably fair to say that many regarded the Employment Relations Act as heralding in a completely new way of thinking about employment law. If viewed in isolation it may well have been seen in this way. However, it came well after a suite of other important legislative initiatives which signposted (if people were paying attention) the direction in which employment law might be expected to move. By way of example, the Employment Relations Act was pre-dated (by 10 years) by the New Zealand Bill of Rights Act 1990, and (by seven years) by the Human Rights Act 1993 and the Privacy Act 1993. Each of these Acts reflected a significant shift in the thinking of the time; the developing appreciation of individual rights and interests, and the relative value they might now be accorded as against other interests

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<sup>13</sup> Section 3(b). The Conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); and the Right to Organise and Collective Bargaining Convention, 1949 (No 98). Both these Conventions are regarded as "Core Standards": see ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998). See also New Zealand Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (Wellington, New Zealand, 2003) at 45.

<sup>14</sup> See, for example, G Anderson "Transforming Workplace Relations: the way forward" (VUW Legal Research Papers, Paper No 90/2018, Vol 8 Issue 17, 2018).

<sup>15</sup> *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289.

<sup>16</sup> See, for example, the discussion in *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20, [1997] 3 All ER 1, where the House of Lords held that damages for loss of reputation caused to an employee by breach of contract by the employer were available in principle, although the bar was high.

(particularly the relative value of individual rights as against the broader public interest). And while the express inclusion into the Employment Relations Act of the concept of good faith received considerable attention, including a degree of consternation amongst employment practitioners as to what the statutory term might mean in practice, it is notable that the concept had already found statutory expression elsewhere.<sup>17</sup>

As this brief foray into history reflects, times, issues and values change and evolve, and the law responds to those changes, often lagging behind and needing to catch up.

It may be said that the Employment Relations Act, and the statutory indicators as to the way in which employment relationships were to be approached, can be viewed as part of a general progression that had already unfolded in other areas of the law. If that is so, what might a sideways look at the current state of play in related disciplines tell us about what the future may hold in this jurisdiction?

**To where ...**

**(beacons of light from other areas of law?)**

The procedural requirements attaching to employment matters (such as disciplinary and redundancy processes) continue to receive something of a bad rap in some quarters. These requirements found statutory expression in amendments to s 103A of the Employment Relations Act. The complaints about procedural complexity may be said to mirror those which have historically been raised in relation to challenges to administrative decision-making. What can be discerned in administrative law generally, however, is a growing acceptance of the benefits of due process, as supporting good substantive decision-making.<sup>18</sup> The bedding in of the Bill of Rights Act and the jurisprudence emphasising the importance of process, including in criminal matters, have assisted in that broader understanding. Procedural issues are matters of natural justice, and natural justice is enshrined in the legislation.<sup>19</sup> Many would regard as self-evident the importance of natural justice where a person's livelihood is at stake.

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<sup>17</sup> See, for example, the discussion of s 115 of the Privacy Act 1993 in *Ilich v Accident Compensation Corporation* [2000] 1 NZLR 380, (2000) 5 HRNZ 636-640; and the "good faith" obligations of a company director under s 131 of the Companies Act 1993.

<sup>18</sup> See, for example, *R v Taito* [2001] UKPC 50, [2003] 3 NZLR 577 at [19]-[20].

<sup>19</sup> New Zealand Bill of Rights Act 1990, s 27(1).

Developments in administrative law suggest a shift from a traditional approach to a more nuanced approach to assessing the ultimate decision arrived at. An example of this is the *Wednesbury* standard of unreasonableness. As was observed in *Ngati Te Ata v Minister for Treaty of Waitangi Negotiations*:<sup>20</sup>

[66] Ordinarily a decision will be unreasonable in a public law sense if it is so unreasonable that no reasonable decision-maker could ever have reached it in the circumstances. This test is known as the *Wednesbury* unreasonableness test. However, the *Wednesbury* reasonableness test has been doubted, particularly in cases involving fundamental rights. The courts tend to be less tolerant of Crown interference with such rights.

The so-called sliding scale of review reflects an emphasis on the importance of context in administrative law, and indicates that decisions involving human rights may well receive greater scrutiny than those that do not engage such interests.<sup>21</sup> Concepts of proportionality and intensity have received little attention in employment matters, including in cases engaging significant human interests, although the statutory language of the applicable test (namely whether what the employer did and how they did it was what a fair and reasonable employer could have done in the particular circumstances) suggests that context very much drives the inquiry.

It is perhaps interesting to note that one of the most prevalent remedies in administrative law, namely referral back for reconsideration, is not one which features within s 123 of the Employment Relations Act.<sup>22</sup> Where, for example, a decision to dismiss for redundancy is found to have been made following a flawed process, the employment institutions may order reinstatement and/or compensation. Directing the employer to re-make the decision following a proper process (for example, by considering correct financial information, but perhaps leading to the same ultimate result) is not an available option. Rather, the Authority/Court must engage in a counterfactual inquiry, assessing whether (but for the procedural defect) the employee would likely have been dismissed for redundancy.

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<sup>20</sup> *Ngati Te Ata v Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058. (footnotes omitted)

<sup>21</sup> *Wolf v Minister of Immigration* (2004) 7 HRNZ 469 (HC) at [47]; *Quake Outcasts v The Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486.

<sup>22</sup> Judicial Review Procedure Act 2016, s 17.

It is true, as one commentator has recently observed, that care must be taken in drawing too many threads together across divergent areas of the law.<sup>23</sup> His particular focus was the quest by some to unify administrative and human rights law, and the conceptual difficulties he perceived with this. As he points out:

Whereas the primary function of human rights law is to afford strong protection to personal interests, the primary concern of common law review is the near-inverse: to ensure public powers are properly exercised according to basic precepts of good administration and in the interests of the *public*. The law's principal focus is on the exercise of power itself. This is not to say the law evinces no concern for the individual. It does. But the concern is subsidiary.

Employment law is something of a hybrid, spanning both private and public. It certainly engages private interests, both for the employee and the employer, although particular categories of case (such as strikes, lockouts, collective bargaining, and minimum wage claims pursued by the Labour Inspector) also engage much broader public interests. The public interest component of the work of the employment institutions is also seen in the limited appeal provisions contained within the Employment Relations Act (including on matters of public interest) and can also be seen in the relatively high proportion of employment-related cases dealt with by the Supreme Court.<sup>24</sup>

This conveniently segues into my next point, namely what might be drawn from developments in human rights law. Much has been written about the integrity and autonomy of the individual. These values are progressively seeing more attention in the jurisprudence, both in New Zealand and overseas. As the Bill of Rights Act provides, wherever a statutory enactment can be given a meaning consistent with the rights and freedoms contained within the Act, that meaning should be preferred to any other.<sup>25</sup>

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<sup>23</sup> Jason NE Varuhas “Should the common law of review and the law under the Human Rights Act 1998 be ‘synthesised’?” UK Constitutional Law Assoc, 28 April 2014: <<https://wp.me/p1cVqo-GR>>. See too the discussion in M Groves “Judicial Review and Human Rights” (2018) 25 AJ Amin L 64.

<sup>24</sup> For the year 1 July 2016 to 30 June 2017 the Supreme Court delivered 27 substantive judgments (Court’s webpage Annual Statistics), of which just under 25 per cent were employment-related.

<sup>25</sup> See New Zealand Bill of Rights Act 1990, s 6 and, for example, the discussion in *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449. Note that the Chief Justice has expressed the view that New Zealand has not gone far enough in bringing the Bill of Rights Act into the common law, stating that: “Sir Robin Cooke’s view that the New Zealand Bill of Rights Act was intended to be woven into the fabric of New Zealand law is not yet realised, despite early authorities which showed promise.” S Elias “Human Rights in Middle Age” (Catherine Branson Lecture Series, Adelaide, April 2018) at 16.

The difficult issues that inevitably arise where rights and interests collide, and which have been played out in such diverse matters as criminal process, immigration, privacy, and medical procedures, have yet to be fully explored in the employment setting.<sup>26</sup> How far can an employee go in expressing concerns about the workplace, expressing political views and opinions, or venting workplace frustrations? How far can an employer go in inquiring into what is going on in an employee's personal life or limiting how an employee may express themselves? What is the sphere of proper inquiry, and where should the relative rights and interests of each party lie in the uncomfortable grey area where the right to a personal life and freedom to express one's views grates against the right of the employer to protect its business? What value is to be placed on competing rights and interests and how are they to be reconciled? Much thinking about such complex issues has been done elsewhere and might usefully inform an analysis in this jurisdiction.

We are likely to see a developing focus on issues relating to gender identity and gender expression in the workplace. It may be, too, that sexual harassment, which seldom comes before the Employment Relations Authority and/or the Court for reasons which are not well understood, will see an upsurge. And it may be that the focus on sexual harassment will devolve more broadly to a focus on gender-based discrimination.<sup>27</sup> With an ageing workforce, increasing issues are also likely to arise in relation to age-related conditions, illness and disease, including dementia and physical capacity.

Familiar questions will likely arise, but within a somewhat different context and viewed through a somewhat different lens: what will the fair and reasonable employer be expected to do? What supports might reasonably be expected to be put in place? What level of accommodation might be made?

More generally, it is evident that our approach to dispute resolution is evolving. In this regard, the concept of restorative justice emerged over 40 years ago as a means of responding to

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<sup>26</sup> The increased focus on protecting individual privacy interests has been reflected in the awards for damages for breach of privacy in other jurisdictions: see *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66; *Dotcom v Crown Law Office* [2018] NZHRRT 7. See too the discussion in C Inglis, "The Intersecting Lines: Business interests and personal autonomy", (paper presented at University of Waikato, Hamilton, September 2018).

<sup>27</sup> See too the recent Domestic Violence – Victims' Protection Bill (2015-2), which will come into force on 1 April 2019. It will insert a new part into the Employment Relations Act 2000, and requires employers to make flexible provisions for employees dealing with domestic violence. The employee can make a request at any time and the request can only be refused in limited circumstances.

criminal offending that focused on emotional, relational and material repair more than on conviction and punishment.<sup>28</sup> Its principal innovation was the practice of using a facilitated victim-offender dialogue to explore the harm perpetrated by the offending and to determine what should be done to demonstrate accountability and promote healing. This approach has become an established form of jurisprudence, sometimes described as “therapeutic jurisprudence”, which is marked by non-adversarial approaches to legal problem-solving.<sup>29</sup> As one academic has recently pointed out, there is potential scope for a much broader application of restorative justice principles.<sup>30</sup> Indeed it can now be seen in schools, families, social service agencies, voluntary associations, community groups, businesses and regulatory bodies. Restorative justice practices are also popping up in workplaces, particularly overseas.<sup>31</sup> It has been suggested that in any part of law where the issues have a significant *relationship* element, including in particular family, criminal, environmental and employment laws, there is increasing scope for non-adversarial approaches.<sup>32</sup>

Some may regard restorative justice practices in the workplace as a natural progression, given the emphasis in the Act on building ongoing co-operative working relationships, the mutual obligation to be responsive and communicative and to act in good faith, and the focus on early (and direct) engagement between the parties to resolve disputes. It might also be said to sit comfortably with reinstatement as a remedy (perhaps soon to be the primary remedy).<sup>33</sup> And it is interesting to note that in criminal matters, restorative meetings are undertaken prior to sentencing, to enable the Judge to have regard to the outcome of the process (including the views of both the victim and offender) when deciding on an appropriate sanction.<sup>34</sup>

The developing emphasis on the role of restorative justice is based on a perceived value in acknowledging what wrong was done and repairing, if that is possible, the relationship. While the employment institutions have been involved in mediation, both formal and informal, for a number of years, including being statutorily provided for since at least 1973, might the current

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<sup>28</sup> As reflected in s 24A of the Sentencing Act 2002, which applies, where certain criteria are met, to all charges, requiring sentencing judges to refer the offender to restorative justice, including in cases involving domestic violence.

<sup>29</sup> See, for instance, W Brookbanks “Non-adversarial Justice: re-imagining law as a healing profession” [2016] NZLJ 337.

<sup>30</sup> Chris Marshall “The Evolution and Meaning of the Restorative City Ideal: An Introductory Essay” (unpublished paper, 2016).

<sup>31</sup> At 12, 38ff.

<sup>32</sup> Brookbanks at 339.

<sup>33</sup> See Employment Relations Amendment Bill (13-1), cl 39 “Reinstatement to be the primary remedy”.

<sup>34</sup> Sentencing Act 2002, s 8(j).

thinking underlying restorative justice practices in the criminal law filter through to the employment sphere?

As one commentator has recently observed:<sup>35</sup>

... it has become routine in the literature to speak not only of restorative *justice* but also of restorative *practices* and restorative *organisations*, and to view them as different faces of the same diamond, as varied applications of the same values, principles and relational philosophy, as distinct manifestations of an eclectic, global social movement for a more inclusive, peaceful and participatory democracy. On this understanding, restorative justice is more than just a novel approach to crime control or a new set of victim-sensitive justice practices; it is the tip of a very large iceberg, a project aimed at *the creation of interpersonal relationships and societal institutions that foster human dignity, equality, freedom, mutual respect, democratic engagement and collaborative governance.*

(emphasis added)

Finally, what of the role of good faith? The concept has received a considerable amount of attention in the context of collective bargaining, but what of individual obligations of good faith?

In relation to personal grievances, good faith has variously been described as the obligation to act “honestly and with no ulterior motive”<sup>36</sup> and as requiring “fair and reasonable treatment”,<sup>37</sup> although the statute now makes it clear that the obligation has a wider span.<sup>38</sup> In 2005 it was characterised as being more about the “spirit than the letter of the law”, and about “notions of honesty and frankness”.<sup>39</sup>

What might good faith mean in a workplace of much more individuated rights in 2020? One commentator recently suggested that good faith “includes recognising ... the rights of workers to privacy, personal dignity, personal and family life, and rights as a citizen whether at work or outside work.”<sup>40</sup> As the Court of Appeal’s observations in relation to obligations of good faith in *ASG* underscores, it will be important for employees and employers to understand what good faith might mean in practice going forward.<sup>41</sup> That may well require a fresh look.

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<sup>35</sup> Marshall, above n 30, at 1-2.

<sup>36</sup> *Ilich*, above n 17, at 639.

<sup>37</sup> *Wellington Road Transport Union v Fletcher Construction Co* [1983] ACJ 653, (1983) ERNZ Sel Cas 59 at 89 (fairness being equated with natural justice).

<sup>38</sup> Employment Relations Act 2000, s 4(1A)(a).

<sup>39</sup> *National Distribution Union Inc v Carter Holt Harvey Ltd* [2001] ERNZ 822 (EmpC) at [77].

<sup>40</sup> G Anderson, above n 14, at 7.

<sup>41</sup> *ASG v Hayne*, above n 15, at [30]-[32].

## Conclusion

The way in which work is done is changing. The way in which people regard work, and regard the workplace, is also changing. These changes present, and will continue to present, challenges for the current legal framework, and the extent to which it is flexible enough to accommodate the pace of change that is happening within society. The bi-lateral employment relationship is no longer a given. Increasingly complex models are being adopted and will continue to sprout up like seeds in a garden as technological advances, and society's way of thinking about work, develop.

It is unlikely that the traditional way of pursuing issues of concern within the workplace will remain static. It may be that an upswing in recourse to a different sort of voice – individuated interests being pursued under a collective spear-head, perhaps most recently seen in relation to concerns about behaviour within the legal profession – is emerging. To some extent this may reflect the way in which many individuals are now engaging in business on their own account, under umbrella organisations: Uber and AirBNB are well-known examples. Different ways of collectivising also appear to be emerging (reflected, for example, in the MeToo movement).

Societal values have led developments in all areas of the law, and employment law has not been immune from such pressures. Things have moved on since the master/servant days, linguistically and more fundamentally. We do not now talk about masters and servants. Rather, the cases, texts and commentary are peppered with references to obligations and duties. The developing discourse in employment law and more generally suggests an ongoing move towards the horizontal – the mutuality of obligations between employer and employee. But it may also be that the discussion morphs away from obligations and duties, towards mutual respect, rights and interests and a greater emphasis on human rights.

These issues will get played out in an increasingly diverse workforce, including as the result of greater levels of immigration. This cultural diversity runs alongside continuing struggles to give voice to indigenous rights both at work and in the employment problem-solving institutions.<sup>42</sup> There is increasingly clamorous demand for living wages and pay equity for

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<sup>42</sup> For an example of such demands in the criminal justice area, see V Toki *Indigenous Courts: Self-Determination and Criminal Justice* (CRC Press, 2018): [www.waikato.ac.nz/news-opinion/media/2018/indigenous-courts-the-way-of-the-future](http://www.waikato.ac.nz/news-opinion/media/2018/indigenous-courts-the-way-of-the-future).

workers. Increasingly 'flexible' work arrangements are being sought, mostly by employers, but to some extent by workers; this is partly as a response to advances in technology and consequential 'threats' to traditional forms of work and labour relations. These are significant examples of a number of emerging human rights issues which employment law, employment lawyers and employment institutions will need to be equipped to address.

We will all need to grapple with new norms as they emerge. That is not a daunting thought. It is, after all, what the law (and society more generally) has been doing since time immemorial. The comforting news is that solutions will not need to be plucked out of thin air – much thinking and analysis has been done and continues to occur, including in related disciplines which can usefully (I suggest) inform what is going on, and is likely to go on, in our specialist jurisdiction. That is a good thing, as it will enable practitioners and the employment institutions to approach the upcoming challenges with a breadth of understanding, and in a way which acknowledges the complex intersection of interests when they inevitably arise and to reflect on how they might appropriately be reconciled in a way which supports the underlying objectives of the Employment Relations Act.