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**Symposium Session**

**The Good Employer - A Basic Building Block for Global Worker Rights**

**The Good Employer: The Image and the Reality**

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**1. Introduction**

The panel, of which this paper forms part, examines the potential of a new construct for regulating work in a globalized world- the Good Employer. The term good employer is of course one that is widely used, often with little discrimination as any Google search will show. This Panel seeks to give some substance to the concept of the good employer and in particular to explore whether employers should be a good employer, how the good employer fits with democratic societies and, most importantly, ways to encourage employers to become the good employer and to promote good employer standards and conduct. Essentially the Panel asks whether the Good Employer might provide an alternative model of employment to the currently dominant neoclassical model which is notorious for the extent to which it has promoted a massive imbalance of power in employment relationships and through which it undermines the nature of democratic citizenship.

This paper considers the good employer<sup>2</sup> from both an HRM perspective and a legal perspective emphasising the inter-relationship between HRM and the law. While the paper focuses New Zealand's particular experience with a legislative conceptualisation of the good employer it also has a general application as the problems it addresses are applicable to employers generally, all of whom to a greater or lesser extent seek to project a "good employer" brand. We are therefore intending to partly present a broad international perspective while using New Zealand's well-established model to evaluate both the strengths and weaknesses of an enhanced concept of the good employer and of the HRM-legal interplay in creating that model.

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<sup>2</sup> To avoid possible confusion it should be noted that this paper normally uses the term "good employer" in the generic sense that accords with the theme of this conference stream. The term "good employer" does however have a specific definition in the State Sector Act 1988 (NZ) but this limited use of the term should be apparent from the context of the paper.

## **The argument**

Companies, especially those dependent on a stable workforce, attempt to manage both commercial and employment expectations to maintain their image of being a good employer, itself a valuable corporate asset. This paper argues that the HRM concept of the good employer is constructed partly by the organisation itself: externally by ownership expectations and internally by management expectations that will reflect but may not always be contiguous with that of ownership. It will also be influenced by employee expectations and the expectations of society generally. However it will also be argued that HRM practice may well depart significantly from the brand image and in reality be a mask for achieving management goals with limited concern for employee outcomes.

For this reason it is also necessary to consider the extent to which the law recognises the concept of a good employer. It is a legal truism that there is no right without a remedy, so from a legal perspective an employer is not a good employer unless the obligations that characterise a good employer are legally enforceable. Even best practice HRM policies have limited value if employees can be unilaterally dismissed or lack effective legal remedies to enforce the application of the policies. From this perspective the boundaries of the good employer are those defined and enforced by the law.

The paper begins by considering the notion of a good employer first from an HRM and then a legal perspective. The paper suggests that the theory of instrumental decentred regulation assists in explaining a relationship between the law and HRM: legal obligations imposed on employers have led to self-regulation through the development of HRM policies which in turn have helped the law develop its own concept of what constitutes a good employer.

The paper concludes with a discussion of the strengths and weaknesses of New Zealand's statutory model of the good employer.

## **2. Conceptualising the good employer**

There is no one accepted definition of a "good employer" and the meaning given to the concept is likely to be a matter of perspective. A tentative definition for the purposes of this paper is that a good employer is one that fully complies with its legal obligations to its employees, that interacts with its employees in good faith, that maintains and develops good/best practice HRM policies and that recognises an employee's investment in their employment and takes steps to minimise the undermining of that investment<sup>3</sup>

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<sup>3</sup> One New Zealand attempt to define the concept is *A Quick Guide to the "Good Employer": Guidance from the EEO Commissioner* (New Zealand Human Rights Commission, 2008). See further <http://www.neon.org.nz/crownentitiesadvice/howtobeagoodemployer/>

### **(i) The HRM perspective**

It is generally accepted that HRM is concerned with practices to manage people and work in order to achieve the goals of the organisation<sup>4</sup>. Those goals generally relate to securing the on-going economic viability of the organisation. HRM practices aim to support this in a variety of ways including ensuring in the short and long term: effective and safe work design, supply of skilled employees, establishment and management of the employment relationship, rewards, performance management and development, and legal compliance of all HRM practices. Although in some industries HRM encompasses dealing with collective representation of employees by trade unions, in New Zealand this is the case mainly in the public sector,<sup>5</sup> in many industries there is no collective representation and HRM is essentially individualist in focus and unfettered in practice. In the latter situation employees are reliant on their employer acting acceptably, either as a matter of policy or because of the potential costs of not doing so.

It has been argued that employers not only pursue the economic goals of their organisations but also seek to ensure its social legitimacy<sup>6</sup>. This is a desire for the organisation to be seen as a law abiding, serious, productive business and thus a contributing, legitimate member of society. Societal concerns and expectations extend across the nature of the business, how business is conducted, and in the last twenty years this has included in some cases demonstrating commitment to economic, environmental and social sustainability. The minima of these expectations are conveyed in public policy, regulation and legislation, both locally and internationally<sup>7</sup>. A large component of social legitimacy is achieved by how employers manage their employees. HRM has an important role to play in the process. Indeed, in this regard the desire for social legitimacy is enmeshed with the imperative to be seen as a 'good employer' and thus attractive to employees as well as customers, suppliers, shareholders and other stakeholders.

Arguably from an HRM perspective a good employer is one that successfully attracts, manages and retains appropriate staff, and loses the inappropriate, in order to deliver on organisation goals, in a way that maintains the social legitimacy of the employing organisation. These goals are typically achieved by the employer's adherence to transparent and fair processes and by subscribing to some form of HRM best practice.

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<sup>4</sup> See Peter Boxall and John Purcell *Strategy and Human Resource Management* (Palgrave Macmillan, Basingstoke, 2008); J Bratton and J Gold *Human Resource Management: Theory and Practice* (4th edn, Palgrave Macmillan, Basingstoke, 2007); Keith Macky *Managing Human Resources: Contemporary Perspectives in New Zealand* (McGraw Hill, 2008).

<sup>5</sup> New Zealand has an overall union density of 21 per cent. Public sector density is 64 per cent and the private sector 14 per cent: *Unions and Union Membership in New Zealand, Annual Survey 2010* (Industrial Relations Centre, Victoria University of Wellington).

<sup>6</sup> Boxall and Purcell, above n 4..

<sup>7</sup> internationally see for example: ILO labour conventions, standards for decent work; WHO standards

Such goals overlap, but are not necessarily congruent with employee expectations of a good employer. Employee expectations would include opportunities for professional and skill development, a work environment that is psychologically safe, opportunities for personal advancement and a reasonable degree of employment security.<sup>8</sup>

Debates in the literature over HRM best practice have given way in recent years to discussion of high performance work systems<sup>9</sup>. The high performance models include several variations but in common they recommend bundles of specific HRM practices such as teamwork, employee involvement, skill development and functional flexibility in work design. The implication is that these employee productivity and commitment enhancing practices equate to the HRM behaviour of a good employer.

The business sense of being a good employer has largely been championed by the equal employment opportunities (EEO) and diversity movement with varying success which started its message on a justice and human rights basis but shifted to business case arguments in the 1980s and 1990s<sup>10</sup>. As we will discuss, along with good employer behaviour in the New Zealand public sector driven by the State Sector Act 1988, this business case approach has been an important catalyst in the more recent marketing inspired attempts at creating employer value propositions and employer brand around notions of being a good employer.

Thus, from an HRM perspective, the good employer utilises best practice HRM, obeys the law, and treats employees fairly in order to achieve organisational goals. The perennial tension for HRM is between the interests of the employee and the interests of the organisation. The strongest forces against good employer behaviour in balancing that tension are poorly skilled management, an overriding focus on organisational gain, poor or no HR policies and a lack of care for employees.

### ***(a) The image***

Having a reputation as a good employer is important for HRM purposes, most obviously for attracting new staff, retaining current staff<sup>11</sup>, and for achieving social legitimacy. Hence in recent years the discipline of marketing has been applied not only to purveying an organisational image to customers and potential customers, but also to employees, potential

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<sup>8</sup> See for example the discussion of the new work “contract in Katherine W Stone *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, Cambridge, 2004). This view is critiqued in a review by Charles B Craver “Continuing to Treat Workers Like Widgets and Digits” (2005) 7 University of Pennsylvania Journal of Labor and Employment Law 747.

<sup>9</sup> E Applebaum and others *Manufacturing Advantage: Why High Performance Work Systems Pay Off* (ILR Press, Ithaca, 2000)..

<sup>10</sup> A Konrad, P Prasad and J Pringle *Handbook of Workplace Diversity* (Sage, London, 2006). K Monks *The Business Impact of Equality and Diversity: The International Evidence* (National Centre for Partnership and Performance and The Equality Authority, Dublin, 2007).

<sup>11</sup> See Corporate Leadership Council *Rebuilding the Employment Value Proposition* (The Corporate Executive Board Company, 2011).

employees and the community at large. The notion of an employer brand is heavily used by some organisations for applicant attraction during recruitment processes.

In New Zealand, what started in the 1990s as statements on job advertisements<sup>12</sup> indicating the organisation as an EEO employer<sup>12</sup>, developed in the 2000s into more sophisticated approaches to building and projecting the image of the good employer in order to increase reputational value. A range of international research shows that the image of an organisation is an important factor in job applicants' evaluation of employers<sup>13</sup>. This evaluation is impacted by simple brand recognition or familiarity, through to evidence of corporate social responsibility, and perceptions of compatibility between personal and organisational values. The development of an employer brand and an employment value proposition is promoted to HRM practitioners as an essential underpinning to creation and delivery on organisational image<sup>14</sup>. Employer brand is described as "a clear view of what makes a firm different and desirable as an employer"<sup>15</sup>. However, a growing HRM literature on the notion of the psychological contract<sup>16</sup> reinforces the importance of ensuring the recruiting image of the organisation is an accurate one that can be delivered upon when an applicant becomes an employee. Non delivery of 'brand promise' can impact negatively on the organisation and its employees.

Increasingly organisations create, develop and maintain their good employer credentials through participation in nationwide competitions to rate the 'best places to work'. Arguably the publicity surrounding these competitions, and institutional membership of associated networks, pass as public signifiers of the good employer<sup>17</sup>.

### ***(b) Normality***

HRM is a practice area, and an academic discipline, which is steeped in rhetoric and image. It does not always say what it means. HRM practitioners want to be perceived as benevolent to employees, but in practice often they are not. Notably it is argued that HRM can be a powerful tool for employers to maintain a 'good' image by implementing "hard" HRM

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<sup>12</sup> A popular practice with public sector organisations due to the State Sector Act 1988 requirement for them to be 'good employers', and promoted in the New Zealand public and private sectors by organisations like the EEO Trust ([www.eeotrust.org.nz](http://www.eeotrust.org.nz))

<sup>13</sup> See F Lievens and D Chapman *The Sage Handbook of Human Resource Management* (Sage, 2009). [http://sage-ereference.com/view/hdbk\\_humanresourcemt/n9.xml](http://sage-ereference.com/view/hdbk_humanresourcemt/n9.xml).

<sup>14</sup> See J Sullivan and W Wong *Deal or no deal? An exploration of the modern employment relationship* (The Work Foundation, London, 2009).

<sup>15</sup> Lievens and Chapman, above n 13..

<sup>16</sup> For discussion of this notion of (unwritten) mutual expectations and reciprocal obligations between employer and employee generated through the recruitment process, See D Rosseau "The Individual-Organization Relationship: The Psychological Contract" in Zedeck (ed) *APA Handbook of Industrial and Organizational Psychology* (American Psychological Association, Washington DC, 2011).

<sup>17</sup> See for example in New Zealand: <http://www.kenexa.com/Best-Workplaces>; <http://www.eeotrust.org.nz/awards/awards.cfm>; <http://www.sustainableawards.org.nz/>

practices while using the language of ‘soft’ HRM”.<sup>18</sup> That is for example, “practices such as work intensification or downsizing, which may lead to ‘bad’ experiences and material outcomes for employees, can be enacted because the convergent, benevolent identity of HRM will conveniently construct them as an ideologically good thing”.<sup>19</sup>

Hence when we examine the evidence of ‘normality’, that is day to day employer practice, a different picture from the ‘image’ emerges. For example, accompanying more active attraction and recruitment methods are also more intrusive selection practices. These processes often expect candidates to reveal considerable information in online tests, application forms, reference checks, interviews and submit to extensive questioning of competencies and background. In New Zealand the protections offered by the Human Rights Act and the Privacy Act have been shown to be ignored by a variety of recruiters.<sup>20</sup> The high levels of intrusion by recruiters and employers have made international headlines recently with reports of job applicants being asked for personal login details for social media sites, and the resulting storm of blog comment indicated this practice is not isolated to the United States but is widespread including in New Zealand.<sup>21</sup> In another example some Australian employers, supported by the state government of New South Wales, are trialling a new system ‘BullyCheck’ which allows them to confirm confidentially with schools whether young job applicants, aged 17 to 22 years, were bullies. It is reported that “these job applicants would not be informed as to why they had been rejected”<sup>22</sup>. These examples illustrate employers’ expectation of access to a wide range of personal information about prospective employees and an absence of natural justice or employer accountability for decisions made on the basis of access to that information. There is, of course, little if any reciprocation of this level of disclosure by the employer. For instance, how many employers are willing to share with job applicants their statistics on numbers of personal grievances or informal complaints in the organisation over the last five year period?

Employers justify all manner of HRM practices on the basis of their need to reduce the risk of employing employees who do not perform well in the job or do not fit in the organisation. Bad employees are bad for business. Hence the 90 day trial period legislation introduced in 2010 provided New Zealand employers with the ultimate penalty-free buyer’s remorse clause<sup>23</sup>. Invariably bad work situations are seen by employers as the fault of the incompetent, lazy or difficult employee, and inflexible employee-friendly legislation. Seldom

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<sup>18</sup> B Harley and C Hardy “Firing Blanks? an Analysis of Discursive Struggle in HRM” (2004) 41 *Journal of Management Studies* 393.

<sup>19</sup> Harley and Hardy, above n 18.

<sup>20</sup> See J Burns *Recruiting talent: a research report, Auckland: EEO Trust* (EEO Trust 2000).

<sup>21</sup> See “Job Applicants Asked to Share Facebook Passwords” *New York Daily News* (20 March 2012); J Hartvelt “Job Seekers Asked to Provide Facebook Access” *Dominion Post, New Zealand* (10 May 2012).

<sup>22</sup> “Bullycheck Job Tests Mooted in Oz” *New Zealand Herald* (25 May 2012).

<sup>23</sup> The Employment Relations Act 2000 ss 67A and 67B (inserted in 2010) allows the parties to agree to a 90 day trial period of employment during which protections against dismissal do not appl.

does an employer acknowledge their own processes may be at fault. Recent research, however, demonstrates that, to the contrary, New Zealand employers are very weak at people management, and yet tend to overrate their firms' management performance. Internationally this same research found that labour market flexibility correlated with superior people management but the findings in New Zealand, with a highly flexible labour market, did not support this<sup>24</sup>.

Indeed one could argue that HRM promotes flexibility in employment arrangements in order to increase responsiveness to business environment change, seasonal fluctuations, and recovery from poor management decisions while maintaining social legitimacy. The appeal of contingent and non-standard employment arrangements, let alone outsourcing, allows the exemplar or good employer to only be good to some employees or to only be good some of the time.

Family run and smaller firms tended to underperform larger New Zealand organisations in their management practices<sup>25</sup>. Many small and medium sized businesses do not have HRM departments or specialist staff, let alone a set of HRM policies. Hence one could argue that as a result, combined with the general decline in levels of unionisation, employees are left to the mercy of employers, often without even the protection of an HRM advisor or policy.

Although larger organisations tend to have better management practices and may feature an organisation development focused HRM specialist (as opposed to an administrator), much of HRM practice emphasises standardisation and compliance in order to manage risk for employers and institutionalise a strange kind of fairness across the workplace. Recent Dutch research explores the role and agency of HR managers as translators of legislation into workplace practice<sup>26</sup>. It found a tendency to managerialist interpretations emphasising employee control/compliance and reinforcing unequal relationships within the organisation.

## **(ii). The legal perspective**

The law can play two major roles in constructing the good employer: first it can lay down a set of principles and rules that define what constitutes a good employer in the eyes of the law. More importantly the law provides the mechanism for the enforcement of those rules, either by laying down minimum standards of conduct expected from employers or by prescribing standards of behaviour that employers are expected to meet. Regulating employers is not, however, the natural inclination of the common law and modern labour law regimes are thus primarily statutory.

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<sup>24</sup> See R Green and R Agarwal *Management Matters in New Zealand: How Does Manufacturing Measure Up?* (11/03 Ministry of Economic Development 2011).

<sup>25</sup> *Ibid*, p.iv

<sup>26</sup> N van Gestal and D Nyberg "Translating National Policy Changes into Local HRM Practices" (2009) 38 *Personnel Review* 544.

### ***(a) The employer at common law***

The legal default in all common law based countries is that continued employment is at the will of the employer. The classical common law position is that employment is a matter of contract and an employee is employed purely for the purpose of promoting the employer's commercial interests.<sup>27</sup> The employer's only obligation is to comply with the terms of the contract of employment and, subject to any express obligation to the contrary, this includes the employer's power to dismiss its employee at any time, for any reason, or indeed for no reason at all: a position encapsulated by Lord Reid in the United Kingdom case of *Malloch*.<sup>28</sup>

At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid.<sup>29</sup>

The ability to dismiss without reason has the consequence that, legally, the notion of a good employer is meaningless as any legal rights which might in principle exist may be immediately negated by dismissal.

The common law's contribution to employment law has not been the good employer, but rather a highly developed concept of the good, or loyal, employee!<sup>30</sup> While the common law courts may not have entirely overlooked employer obligations, for example the obligation to provide a safe place of work and more recently the mutual implied term of trust and confidence,<sup>31</sup> the notion that an employer owes any positive obligation to be "good" is anathema to the common law.<sup>32</sup> The New Zealand Court of Appeal for example has held that to require an employer to conform at all times to the highest standards of good management practice "would be an unlikely obligation for any employer to accept."<sup>33</sup> For a legal contribution to the notion of the good employer one must look beyond the common law to statutory law.

### ***(b). Beyond the common law: decentred regulation***

Most developed countries have now enacted limits on employer discretions and the ability of employers to take arbitrary actions detrimental to employees. These changes typically came in two phases.<sup>34</sup>

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<sup>27</sup> Humphrey Forrest "Political Values in Individual Employment Law" (1980) 43 MLR 361.

<sup>28</sup> *Malloch v Aberdeen Corporation* WLR 1578 (gb HL) at 1581.

<sup>29</sup> Unlike the United States, in countries such as the United Kingdom, Australia and New Zealand an employer is required to give either the contractual period of notice, or a period of reasonable notice. Alternatively it may make payment in lieu of notice. In all cases employment is at the will of the employer.

<sup>30</sup> See Gordon Anderson "Employment Rights in an Era of Individualised Employment" (2007) 38 VUWLR 417 at 424. Employer dominance is established largely through such implied terms as the obligation of fidelity and the obligation to obey all lawful orders, all enforced through the right to dismiss.

<sup>31</sup> A term that's origins lie more in statutory than the common law.

<sup>32</sup> For a detailed analysis of good faith in employment relationships see Symposium "Good Faith and Fair Dealing in the Individual Employment Relationship" (2011) 32 Comparative Labor Law & Policy Journal.

<sup>33</sup> *Anderson v Attorney-General* CA 292/91.

<sup>34</sup> Anderson "Employment Rights", above n 30, at 428.



The first did not impinge significantly on the so-called right to manage but rather were concerned with developing a minimum code of employment: such things as a minimum wage and minimum annual holiday entitlements. The concern was not so much with the good employer as the minimum standard for the acceptable employer. Such reforms took classic legal form of regulating the outcome desired, for example the amount of the minimum wage, and providing both a sanction and a recovery mechanism if the provision was breached.

It is the second phase of reforms that is of importance to the theme of this paper as those reforms had the explicit objective of overriding the common law and constraining the right to manage and the employer's discretionary powers. Their most typical manifestation is unfair dismissal laws which require employers to justify dismissals, both substantively and procedurally. Such legal constraints do provide a sanction, damages if a dismissal is found to be unjustified, but they also have the indirect consequence of obliging an employer to develop processes that enable it to demonstrate to a court that appropriate procedures were followed when investigating and carrying out a dismissal. While such legal requirements do not expressly impose a developed good employer obligation, they have been important in laying the foundation for such an obligation.

Legislation of this type can be characterised as one form of *instrumental decentred regulation*: that is regulation intended to achieve public policy objectives through the encouragement of private systems of self-regulation, such as internal management processes: "to infiltrate the firm's decision-making matrices and erect signposts that direct decision-makers towards the state's desired course of action."<sup>35</sup> There are various methods of achieving this result, one of which is the use of risk as a regulatory tool. If an employer perceives risks such as reputational or brand risk, legal risk, financial risk or, in the case of their managers personal risk such as non-promotion or poor evaluations, it can be expected to act to minimise that risk. Ideally the legal structures adopted to inject risk will both encourage self-regulation, by rewarding its use, and sanctioning non-compliance.

In the context of this paper it is assumed that the state's policy objective is to encourage a model of the employment relationship that is based on at least some conception of a good employer. In the particular case of New Zealand the government, in 2000, had the explicit goal of establishing co-operative employment relations as a central part of its overall economic and social goals.<sup>36</sup> The problem faced by legislators was summarised as:

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<sup>35</sup> David Doorey "Good Employer, Bad Employer: Insights from Decentred Regulation for Improving Employment Standards Compliance" [2012] Osgoode Hall Law Journal Available at SSRN: <http://ssrn.com/abstract=1965685>. Doorey, and the references therein, provide a detailed discussion of this regulatory model in an employment context.

<sup>36</sup> See Margaret Wilson "The Employment Relations Act: A Framework for a Fairer Way" in Erling Rasmussen (ed) *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004). Wilson was New Zealand's Minister of Labour during the passage of the Employment

[critics] are correct that legislation cannot change individual values or beliefs. It can, however, influence and change behaviours. Whether legislation successfully changes behaviours depends on whether it is sufficiently practical in its application to enable those affected to conduct their affairs in an orderly and mutually productive manner.<sup>37</sup>

If society accepts that employers should be good employers the boundaries of the good employer must first be put in place legislatively including with a range of sanctions or rewards that will encourage or force behavioural changes by employers. The degree of change is likely to be determined by the strength of the legislative sanctions applied and the degree of employer resistance to change. However, if such behavioural change is to occur it is likely to be seen best in changing HRM policies and processes.

### **3 The HRM-legal interface**

A substantial component of the argument developed in this paper is that instrumental decentred regulation can be used to achieve policy outcomes through the encouragement of private systems of regulation. This regulatory technique has the advantage of avoiding detailed prescriptive legislation and allowing employers to develop and administer their own internal processes which are in turn ‘audited’ as cases come before the courts. To be effective such regulation must also actively encourage the development of internal processes either by incentives or imposing costs if the regulatory objectives are not met. It might be noted that New Zealand employment law has long encouraged the low level resolution of disputes,<sup>38</sup> an objective that at least in part can be achieved through the encouragement of the development of robust internal HRM policies.<sup>39</sup> Employers have a number of incentives to develop robust HRM practices. The most obvious is to attempt to settle matters in-house and to avoid both the risk of legal action and of unfavourable publicity. In addition the failure to develop such practices significantly increases legal risk and the consequential financial risk.

As such policies have been developed a reflexive relationship has begun to develop between the law and HRM. While HRM practitioners must ensure that their policies are legally compliant and reduce legal risk the courts are increasingly looking to HRM practice to inform them of the contemporary standards of good employer practice. This development was initially somewhat tentative, partly because of judicial conservatism but also because the courts were somewhat nervous of the legal value of such standards. An increasing acceptance of the validity of HRM practice as an input into legal decision-making has required both a willingness to constrain an employer’s right to manage as well as confidence that HRM had

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Relations Act 2000. Even with a new, centre-right, government that objective remains largely correct although the model now envisioned is less robust.

<sup>37</sup> At 13.

<sup>38</sup> Employment Contracts Act 1991 s 76; Employment Relations Act 2000 ss 101 and 143.

<sup>39</sup> It is also achieved through a strong emphasis on government supported mediation: Employment Relations Act 2000s 143.

developed to the stage that it could be properly relied on as a factor in developing standards such as justification for good-faith conduct.<sup>40</sup> In 1992, at the peak of the neo-classical revolution in employment law, the Court of Appeal was extremely reluctant to accept that employers should be subject to an obligation of good management but even then conceded that practice was changing and that there was "much good sense" in the expert evidence on good practice and that the awareness of such matters had been much less a decade earlier at the time the complaint arose.<sup>41</sup> A decade and a half later the Court has accepted that the statutory good-faith obligation had become such an integral part of New Zealand employment law that it held this to be a reason for the New Zealand courts retaining jurisdiction in an employment dispute.<sup>42</sup> Additionally, over the last decade, the Employment Court has increasingly indicated both that professional HRM managers might be expected to be aware of appropriate standards and practice in their field<sup>43</sup> and has been critical of employers who fail to meet such standards or fail to take professional legal or HRM advice.<sup>44</sup>

#### **4. The Good Employer in New Zealand**

Over the last five decades New Zealand law has evolved a statutory model of the good employer built on three legs: the personal grievance procedure introduced in 1973, the state sector good employer obligation enacted in 1988 and the statutory duty of good faith enacted in 2000. The first of these two legs were introduced at a time the common law had little influence in New Zealand employment law, the third when employment had come to be dominated by the common law and was largely a reaction to the classical common law concept of employment.

The origins of the contemporary model of a good employer can, however, be found in the arbitration system, introduced in 1894. This system strongly encouraged pluralistic and agreed solutions to employment related matters both at an industry/occupational level and within individual enterprises. By the time the arbitration system was finally repealed in 1991 the foundations of the contemporary notion of a good employer had been further reinforced by the enactment of the personal grievance procedures first enacted in 1973.<sup>45</sup>

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<sup>40</sup> Gordon Anderson and Jane Bryson "Developing the Statutory Obligation of Good faith in Employment Law: What Might Human Resource Management Contribute?" (2007) 37 VUWLR 487.

<sup>41</sup> *Anderson v Attorney-General*, above n 33.

<sup>42</sup> *Haig v Edgewater Developments Ltd* [2009] New Zealand Court of Appeal 390.

<sup>43</sup> See *Association of University Staff Inc v The Vice-Chancellor of the University of Auckland* [2005] 1 ERNZ 224 (nz EmpC) at [41]; *Maddern v Worldxchange Communications Ltd* [2011] New Zealand Employment Court 21 at [45].

<sup>44</sup> *Clarke v AFFCO NZ Ltd* [2011] New Zealand Employment Court 17 at [32].

<sup>45</sup> For a detailed discussion of the precursors to the contemporary notion of the good employer and of the legal foundations for good faith employment see: Gordon Anderson "Good Faith in the Individual Employment Relationship in New Zealand" (2011) 32 Comparative Labor Law & Policy Journal 685.

### **(i) The New Zealand Model**

Space does not permit a detailed description of each of the elements so only the more salient characteristics are noted.<sup>46</sup> The most important question, of course, is whether this relatively sophisticated legal model has achieved positive results for employees—does it mean that employers will act as good employers especially in situations where there may be conflicting interests.

#### ***(a) The personal grievance procedures***

New Zealand's personal grievance procedures, unlike the equivalent procedures in many other countries, provide protection not only against an unjustified dismissal but also against other actions that disadvantage an employee in the course of their employment.<sup>47</sup> Courts are thus able to review employer decisions made throughout the course of an employee's employment, not just decisions terminating the employment. The standard of review is an objective one; that of whether the employer's actions were "what a fair and reasonable employer could have done in all the circumstances at the time."<sup>48</sup>

Personal grievance provisions were first enacted in 1983 and initially applied only to union members until extended to all employees in 1991. By that time, the concept of justification had been well developed, including both the need for procedural fairness as well as the parameters of acceptable substantive reasons. There was thus a substantial body of law in place to guide the development of HRM processes by the time this became a necessity following the enactment of the Employment Contracts Act 1991 and the resulting individualisation of employment relationships.<sup>49</sup>

#### ***(b) The good employer***

The State Sector Act 1988 requires the chief executive of a government Department to operate a personnel policy that complies with the principle of being a "good employer", to ensure compliance with the policy and to report on the extent of its compliance with the policy. The Act defines a good employer as one who:

.. operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—

- (a) good and safe working conditions; and
- (b) an equal employment opportunities programme; and

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<sup>46</sup> See Anderson "Good Faith", above n 45. for a more detailed description.

<sup>47</sup> Employment Relations Act 2000 s 103.

<sup>48</sup> Employment Relations Act 2000 s 103A. A statutory definition was first introduced in 2004. The test of justification has been controversial: see John Hughes "Interpreting the New Justification Test" [2011] ELB 13 and 25.

<sup>49</sup> Prior to 1991 non-union employees had no protection from dismissal while dismissal of union members was dealt within a collective context. After 1991 union density plummeted to about 20 per cent overall and to a much lower figure in the private sector.

(c) the impartial selection of suitably qualified persons for appointment; and

(e) opportunities for the enhancement of the abilities of individual employees;<sup>50</sup>

The definition also requires the policy to recognise the employment requirements of groups such as Maori, ethnic and minority groups, women and persons with disabilities. There is also a requirement that the chief executive ensure that all employees maintain proper standards of integrity, conduct, and concern for the public interest.<sup>51</sup>

As can be seen this definition is essentially an empty vessel for which contents must be provided. It does of course require compliance with “generally accepted” personnel provisions but is silent on what these provisions might be or how they are to be evaluated.

It is however important to place these provisions in their historical context. The main object of the State Sector Act was to repeal the separate state sector industrial relations and personnel systems that had existed since 1912 and to bring state employment within the same legislative framework as the private sector.<sup>52</sup> The repealed legislation had contained extremely detailed personnel provisions relating to virtually all employment related matters, a system that was considerably more pro-employee than that which replaced it. Essentially the good employer obligation required state sector employers to operate personnel policies consistent with good private sector practice but also to meet some additional obligations that reflect the particular character of state sector employment, a requirement that may mandate a higher standard than that expected in the private sector:

The policy behind the legislation is clear. The relationship between the Crown and employees is of necessity one of high trust and confidence. Exemplary conduct is required of State employees and in return they can expect exemplary treatment.<sup>53</sup>

While the good employer obligation probably adds little of general substance to the other two legs of the good employer it does reinforce those provisions. The more directive aspects of the obligation, for example the need for EEO policies and to recognise the employment requirements of specific groups are subject to monitoring. Government agencies report annually to Parliament and the Human Rights Commission has published reports on Crown Entities as good employers.<sup>54</sup>

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<sup>50</sup> State Sector Act 1988 s 56. A similar provision is found in s 118 of the Crown Entities Act 2004 which governs a wide range of Crown bodies outside the core state sector including the educational sector.

<sup>51</sup> The definition above is also contained in the State Owned Enterprises Act 1986 s 4(2). However those elements mentioned in this paragraph are not repeated in that Act. That Act is concerned with the structure of state owned commercial operations who are required by s4(1) to “operate as a successful business”.

<sup>52</sup> See generally Jane Bryson and Gordon Anderson “Reconstructing State Employment in New Zealand” in Marilyn Pittard and Phillipa Weekes (eds) *Public Sector Employment in the Twenty-First Century* (ANU e-Press, Canberra, 2007) 253.

<sup>53</sup> *Rankin v Attorney-General (No 2)* [2001] ERNZ 476 (EmpC) at [123].

<sup>54</sup> *Crown entities and the Good Employer: Annual Report Review 2011* (Human Rights Commission 2012).

### ***(c) The statutory obligation of good faith***

The statutory obligation of good faith in the Employment Relations Act has three facets: a general obligation that the parties to an employment relationship deal with each other in good faith and in particular do nothing to deceive or mislead each other; a requirement that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of employment provide affected employees with access to relevant information and an opportunity to comment on that information; and an obligation to bargain in good faith.<sup>55</sup> It should be stressed that the general obligation applies equally to both collective and individual employment. The statute makes it clear that the good-faith obligation is a proactive one that requires the parties to be "active and constructive" in establishing and maintaining productive employment relationships and to be responsive and communicative. The courts have also given a clear signal that a failure to observe good faith has legal consequences:

A fair and reasonable employer must, if challenged, be able to establish that he or she or it has complied with the statutory obligations of good faith dealing in s4 including as to consultation because a fair and reasonable employer will comply with the law.<sup>56</sup>

To date the most important influence of the general duty of good faith has been apparent in personal grievance cases, including redundancies, but its full consequences have yet to be worked through<sup>57</sup> and developments are likely to be incremental.

### **(iii) Assessing the New Zealand model**

The New Zealand legislation provides a firm foundation for developing a robust legal concept of the good employer. Unlike many countries the protection against unjustified treatment begins when employed and the good faith obligation applies to all facets of the employment relationship and has become strongly embedded legally. Moreover the model has become strong embedded politically. At the height of the neoliberal reforms in 1991, and in spite of strong political pressure from the new-right for the introduction of at-will employment, the personal grievance procedures were not only retained but extended to all employees. Again, with a return to a conservative government in 2008, neither the personal grievance provisions or the duty of good faith have been repealed or restricted.<sup>58</sup>

This legal foundation has been widely built on and given substance by HRM policies and processes that at least on paper have developed a more substantive construct of the good

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<sup>55</sup> This paper will comment only on the first two facets of the obligation as bargaining in good faith is not directly relevant to the theme of this paper.

<sup>56</sup> *Simpsons Farms Ltd v Aberhart* [2006] 1ERNZ 825 (EmpC) at [65].

<sup>57</sup> For the perspective of the Chief Judge of the Employment Court see Graeme Colgan "Good faith Obligations in Practice: When, What, by Whom and to Whom?" (paper presented to Employment Law in the Public Sector, Wellington, 22 May 2008).

<sup>58</sup> The one exception is that the parties may agree to a 90 day trial period during which a dismissal cannot be challenged.

employer reflecting community expectations. However a realistic picture can only be ascertained by looking at the model in a little more detail. The following identifies a number of issues that suggest that there are still considerable advances that need to be made before a fully credible model of a good employer can be said to be in place. However in general the problems that can be identified spring from a common cause, that in a period dominated by neoliberal political philosophies and a strongly unitary managerial and government ethos there is very limited room for the pluralist developments necessary if a more employee-balanced notion of a good employer is to develop.

### ***(a) Legal issues***

On its face the legislative framework appears robust but as with any legal model it is important to look at its practical impact and effectiveness and at least two significant legal weaknesses can be identified in the current model.

The first relates to the test of justification when alleging a personal grievance. A personal grievance is by far the most common action brought when an employer takes an action detrimental to an employee and involves a claim that the employer's action constitutes either an unjustified detriment in the employee's employment or is an unjustifiable dismissal. Such allegations may include that the employer has not acted as a good employer or has acted contrary to good faith. The meaning given to "justification" is therefore pivotal to the legal effectiveness of the good employer model. Originally this term was interpreted in a broad, pluralistic and pragmatic manner but this changed in the late 1980s as the Court of Appeal began to exert its influence in employment matters and to override the specialist Employment Court. The consequence was that the test became increasingly legalised and increasingly employer centred focussing on the decision a reasonable employer might have made.

A strong underlying factor in these developments was the common law mindset that restraining the right to dismiss was an interference with the employer's common law rights and with the employer's right to manage its business. Over the time the courts increasingly widened what they regarded as the legitimate range of responses available to the employer and hence of course whittled the protection afforded employees. A Labour government made attempts to reverse these developments in 2004 but these reforms have been partially reversed by the current conservative government.<sup>59</sup> The current test does, however, remain that of the objective employer and did not move to that advocated by employers: that once an employer could demonstrate that an employee had received a fair hearing the court had no further function and that the substantive decision was purely one for the employer.

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<sup>59</sup> Employment Relations Act 2000 s 103A, which sets out the statutory test, was first enacted in 2004 and amended in 2010. Prior to 2004 there was no statutory guidance on how the term "justification" was to be interpreted.

The second “control” exercised by the courts relates to the remedies awarded to successful employees. Personal grievances are resolved at two levels: first confidential mediation supervised by Department of Labour mediators. Something in the order of 80 per cent of grievances do not proceed beyond this point.<sup>60</sup> Of those that do proceed only 59 per cent are decided in favour of the employee, a relatively low figure given the filter of mediation. And even successful employees are likely to receive relatively modest compensation. Reinstatement is awarded only in an insignificant number of cases and the Court of Appeal has imposed a rigid policy of “moderation” on the levels of compensation awarded by the lower courts. It is rare that more than three months lost wages is awarded and general compensation rarely exceeds \$6,000.

To put this in perspective, an employee on the median wage of \$42,000 might at best receive say 2 months wages and \$5,000 compensation, a total of \$12,000 plus some costs, typically about 30 per cent. This employee would probably receive a net benefit of \$5,000 once actual costs are taken into account and even this may be reduced if the employee has found to have contributed to the grievance. There is of course a 40 per cent chance of losing and having to pay a costs award, typically about \$4,500. Compounding this situation is that the wages component of an award is taxable and, unlike the case with an employer, costs are not tax deductible. Moreover, in a small country such as New Zealand, the successful employee is also likely to find their future employment prospects highly compromised either in the short or longer term.<sup>61</sup> It is for good reason that payments to dismissed employees are often referred to as “piss-off” money!

Such sanctions of course provide a strong deterrent to employees challenging an employer and only a limited deterrent to employers avoiding their legal obligations and certainly not one that has any impact when the employer sees its own interests at risk. This is perhaps exemplified by employer tolerance of unacceptable management behaviour from poor disciplinary decisions through to behaviours such as bullying when employers are prepared to spend very significant amounts effectively to defend management prerogatives and their claimed unfettered right to manage. However, whatever the law states on paper, it is the law in action that determines its regulatory impact.

### ***(b) HRM issues***

This paper has discussed the influential role of HRM practices as self-regulation. The increasing presence of an educated HRM profession and the consequent focus on its development has raised awareness of good versus poor HRM practices. Recently greater

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<sup>60</sup> Very approximately the Mediation Service resolves about 6,500 cases a year (at least this number again are not further pursued or withdrawn) and the Employment Relations Authority about 1100. Personal grievances make up about 60 per cent of these figures. A little over 100 cases go beyond the Authority to the Employment Court. Non-dismissal grievances are relatively uncommon beyond mediation.

<sup>61</sup> See: <http://www.stuff.co.nz/business/money/6516333/Odds-stacked-in-personal-grievance-cases>



attention has also been paid to the ethics of HRM and employment by both academics and practitioners.<sup>62</sup> However, there are three on-going issues for HRM in facilitating good employer practice. The first relates to the prevalence of small to medium sized enterprises without HRM staff, advice or practices. This serves to highlight that the good employer requires good managers and supervisors in all organisations – with or without the presence of HRM advisors – and essentially that means improving management skills.

The second issue is the best practice HRM focus on creating good employees which is equated, rightly or wrongly, with being a good employer. Of course the employer wants employees who are skilled, engaged, committed and exerting discretionary effort to achieve organisational goals. But growing income inequalities, work intensification and job insecurity seem to also be an accepted part of the modern employment contract. HRM needs to be vigilant (and morally courageous) in defence of fair and equitable treatment of workers at all times, and especially when things go wrong. This leads to the third issue which is HRMs own role confusion, on the one hand strategic business partner, on the other hand welfare worker, and the safe ground that many retreat to of practice standardisation and compliance champion.<sup>63</sup>

## 5. Conclusion

The New Zealand model outlined in this paper illustrates that in principle there is no reason why a developed and robust foundation for a good employer cannot be developed in law. However law alone will not create a good employers, that will only be achieved if employers themselves are prepared to modify their conduct to meet societal expectations expressed through legislation. Decentred regulatory theory suggests such an outcome can be achieved by the legislative injection of risk into employer organisations. The expectation is that organisations will attempt to avoid risk by modifying behaviours in line with the legislative objective.

In the particular case of the good employer there is evidence that HRM practices do respond this way-the reaction of organisations to initiatives such as the regulation of unjustified dismissal, equality laws, anti-harassment laws and health and safety laws is to develop internal policies and processes to manage the risk factors associated with such initiatives. If HRM best practice is sufficiently robust and broadly accepted then a strong symbiotic and reflexive relationship can develop between HRM and the law. However such developments do not necessarily mean that there has been underlying change. New HRM policies may be

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<sup>62</sup> A Pinnington, R Macklin and T Campbell *Human Resource Management: Ethics and Employment* (Oxford University Press, Oxford, 2007). See also ethical codes of HRM professional associations, eg [www.hrinz.org.nz](http://www.hrinz.org.nz)

<sup>63</sup> M Brown and others “Irreconcilable Differences? Strategic Human Resource Management and Employee Well Being” (2009) 47 *Asia Pacific Journal of Human Resources* 270.

more an indicator of paper compliance than real change and the existence of a policy or process does not ensure that an appropriately balanced set of outcomes are achieved.

This paper identifies at least some weaknesses that need to be overcome if the good employer model is to be sufficiently robust to be a building block for worker rights. First, experience indicates that even with relatively strong legislation there will be strong resistance to change, especially by a conservative judiciary imbued with a classical common law perspective of the employment relationship. The common law, essentially a reflection of the unitarist managerialist position, is that property owners have the right to manage their property in their own interests and that workers are a resource for that purpose. Notions of citizenship or democratic participation form no part of the legal equation.

HRM practices, behind the rhetorical facade, also share this perspective. Their function is to minimise legal and reputational risk but not where this conflicts with organisational goals or organisational cohesion. The obvious consequence is that the good employer will rapidly become the pragmatic employer where such conflicts arise—the bullying victim will be sacrificed rather than the embedded manager. This characteristic is likely to be particularly prevalent in the current neoliberal business environment which has promoted strong unitary attitudes among employers. This is only likely to dissipate if there are very strong legal consequences for a failure to change behaviour to meet regulatory objectives. If the notion of a good employer is to have a future it must be constructed on an extremely firm legal foundation that imposes sufficient costs on employers who fail to meet the necessary standard. However strong employment protection invites an employer backlash, indeed any employee protection invites such a reaction. In the current global political environment, in New Zealand as elsewhere, the rhetoric advocating employment flexibility drowns out that for decent work or worker rights.

Probably the most important lesson to be drawn is that if the good employer is to have genuine substance there need to be much stronger incentives for employees to take legal action while minimising disincentives such as loss of employment, blacklisting and the like. In a de-unionised world that is very difficult. As always, workers are most likely to enjoy effective rights when they are backed by strong representative organisations.