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HOLLAND, J. Employees and independent contrators.

EMPLOYEES AND INDEPENDENT CONTRACTORS; EMPLOYMENT PROTECTION V FREEDOM OF CONTRACT.

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INTRODUCTION.

In TNT Worldwide Express (NZ) Ltd v Cunningham[1] the Court of Appeal reached the conclusion that Cunningham, a courier previously working under the direction of, and exclusively for TNT Worldwide Express, was unable to invoke a grievance procedure for unfair dismissal under the Employment Contracts Act. The reason being that such a procedure is only available for 'employees', and the court determined Cunningham to be an 'independent contractor'.

Both employees and independent contractors agree to do work and receive remuneration for it, however a contract for service (employment relationship) gives rise to several statutory and common law protective rights and duties that a contract of service (independent contract relationship) does not. Case law in the area generally involves a party to a work relationship trying to achieve a right or impose a duty by classifying the relationship as one of employment. The courts however, have been unable to provide a single comprehensive and conclusive test to distinguish the vast multiplicity of potential work relationships into either a contract of, or a contract for, service. Instead a balance of multiple factors and an analysis of the entirety of the facts has been used.

In this paper I will discuss the significance of the distinction between employees and independent contractors, the tests used to make the distinction, how those tests were applied in *TNT* as the most significant of recent New Zealand cases. I will then discuss , with particular reference to the writing of Collins[2], the advantages for an employer in having work relationships defined as contracts for service and the inadequacies of the present tests in determining who should obtain the protection of employment protection rights. I will then discuss the courts reference to 'freedom of contract' as justification in not inferring contracts of service and how this matches present parliamentary policy.

CONSEQUENCES OF THE DISTINCTION.

The distinction between employee and independent contractor carries significant consequences. These can be listed as follows:

a. Applicability of certain labour law statutes to "employees" only, in particular the Employment Contracts Act 1991.

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[1][1993] 3 NZLR 681.

[2]Collins, Hugh *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, Oxford Journal of Legal Studies vol 10, Autumn 1990, no3, 353.

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b. Industrial instruments such as awards and collective agreements apply only to employees and have no relevance to independent contractors.

c. The right to industrial action such as a strike exists only for employees, a "strike' by an independent contractor is a breach of contract.

d. Certain rights and duties implied under common law such as duties of fidelity and confidentiality exist only in the master, servant (employment) relationship[3]

e. The employers vicarious liability towards third parties for the torts of the employee arise only very rarely in the case of an independent contractor.[4]

f. Since the Accident Compensation Act 1982, compensation is paid to all earners whether employed or self employed (previously self employed earners had to arrange their own insurance). However it is significant that the employer must pay levies for employees, while independent contractors must pay their own levy

g. Certain superannuation schemes only allow employees to participate in.

h. The employer must deduct PAYE tax from the salary or wages of the employee but not the independent contractor, who must pay tax as an individual taxpayer. The independent contractor may therefore "write off" certain expenses as a self employed taxpayer that an employee can not.[5]

The consequences listed above are generally to the advantage of the employee, providing the worker with statutory and common law protection's for basic work conditions, such as minimum wages, holiday pay, sick leave, health and safety standards, maximum working hours, recourse for unfair dismissal, union membership (voluntary as it is), protection from tortious liability in the case of vicarious liability, and the removal of the responsibility for administering PAYE and ACC payments.

For the independent contractor the most obvious advantage of being so classified is in receiving payment of fees for work done without PAYE being deducted, thus allowing he or she to use or invest that money through the financial year, and also allowing

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[3]Szakats, *Introduction to Employment Law* , Butterworths Wellington, 1988 (3rd ed.) chs 16 and 17.

[4]Above n3, ch 18.

[5]Taxation Review Authority 92/159 (1996) 17 NZTC 7,405.

certain business expenses to be written off at the end of years tax return.

The independent contractor may have other advantages related to being free of the traditional workplace constraints and of not being tied to a single employer but these do not relate directly to the above listed consequences of classification.

If, therefore, the consequences of 'employee' classification is to provide certain 'rights' for employees, these rights must result in corresponding 'duties' on employers, such as the duty to pay the minimum wage or to comply with health and safety standards. It will therefore be to some advantage for an employer to have work done by independent contractors rather than employees. It would be for independent contractors to contract for the rights provided automatically under employer/employee relationship.

MAKING THE DISTINCTION.

STATUTES.

The Employment Contracts Act 1991 defines 'employee' as "any person of any age *employed by an employer* to do any work for hire or reward."[6] The use of the word "hire" suggests a narrow construction which would exclude independent contractors[7]. The definition does expressly include "homeworkers" and persons "intending to work" which extends the definition but into only very specific categories.[8]. Other statutes such as The Holidays Act 1981, the Wages Protection Act 1983, or the Minimum Wages Act 1983 define 'worker' for the purposes of that particular statute.

Statutes use of self referring definitions are of little assistance in determining just what is an contract of service, it is therefore necessary to look to the courts to provide a definition.

THE CONTROL TEST.

In 1880 Bramwell LJ stated the test quite simply by defining a servant as "a person subject to the command of his master as to the manner in which he shall do his work"[9]. Since that time employment situations have changed greatly, in modern industry the employer has to rely on the specialised knowledge and skills of the employee, and variation in types of employment arrangements is far greater than it was in the previous centaury. Today emphasis has shifted from command to merely the "possibility of control"[10]

> The fact that the control is not exercised does not negate a contract of employment provided there is the right in one party to say both what shall be done and how it shall be done."[11]

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[6]Employment Contracts Act 1991, s2(1) emphasis added.

[7]Above n3, 21.

[8]The courts have had some difficulty in defining 'homeworker,' note the differing approaches of the Employment Court in, *Cashman and others v Central Regional Health Authority* [1996] 2 ERNZ 1, and the Court of Appeals more expansive approach in *Cashman v CRHA* unreported Court of Appeal, 26 August 1996, C.A. 34/96.

[9]*Yewens v Noakes* (1880) 6 QBD 530, 532-3.

[10]R Blanpain, B Brooks, C. Engels, Eds *Bulletin of Comparative Labour Relations* Bulletin 24 (Deventer, he Netherlands: Kluwer) 1992, Vranken article 128. *Short v J and W Henderson Ltd* (1946) 62 TL/R 427,429.

[11]Brian Brooks *Contract of Employment: Principles of Australian Employment Law*, (CCH, Australia Ltd, 4th ed, 1992) 20.

The control test seems ineffective when an employee possesses some special skill or qualification. In a case concerning a circus trapeze artist where there was "little room for direction or command in detail" the court avoided the problem of lack of direct control by suggesting there remained the lawful authority to command "if only in incidental or collateral matters"[12]. In another case concerning the vicarious liability of a hospital for the actions of surgeons, Denning LJ extended the control test by suggesting that the hospital "have in their hands the ultimate sanction for good conduct, the power of dismissal"[13]

While its is agreed that control is an essential factor for the determination of a contract of service, with the increasing specialistion of employee skills, the courts have found it necessary to also look to other elements in the contractual arrangement and apply new tests.

THE INTEGRATION or ORGANISATION TEST.

This test, devised by Denning LJ, asks whether the person is "part and parcel of the organisation"? The test suggests that if "work although done for the business is not integrated into but only accessory to it" then a contract for service exists.[14]
The meaning of "organisation" and "integration" has been questioned as it is unclear from Dennings' LJ formulation. It has been suggested that without a clear definition the test is meaningless or if the meaning is variable, the test becomes merely "a cloak for discretion"[15]

The courts have since rarely relied on or found the organisation test to be conclusive, however they have referred to it in their decisions.[16]

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[12]*Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561, 571. and Above n11.
[13]Above n3 24 citing *Cassidy v Minister of Health* [1951] 2 KB 343.
[14]*Bank voor Handel en Scheepvast NV v Slatford* [1952] 2 All ER 956, 971.
[15]Above n3, 26, citing RW Rideout, *Principles of Labour Law,* 3rd ed (Sweet & Maxwell, London, 1979) 8.
[16]*Inspector of Awards v Pacific Helmets (NZ) Ltd,* WLC 87/88,22 September 1988, see also the Privy Council decisions of *AMP v Chaplin* (1978) 52 ALJR 407, and *Narich Pty Ltd v Commissioner of Payroll Tax* (NSW) (1983) 50 ALR 417.

THE MIXED AND THE TOTALITY TESTS.

These test have developed separately yet both reflect a tendency to look at several factors rather than one determining criterion. Both have been described as a "common sense approach", the mixed test looking at 'multiple factors', the totality test looking at 'the total situation', the tests are therefore "hardly distinguishable"[17]

Factors to be taken into account from early developments of the 'mixed test' include: (a) control, (b) the employers power to select his servant, (c) the employers right to dismiss, (c) method of payment, (d) ownership of tools, (e) opportunity for profit, and (f) the risk of loss.[18]

In the *Ready Mixed* [19] case McKenna J developed a new 'mixed test' by setting out a threefold test;

> A contract of service exists if the following three conditions are forfilled; (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's controlling a degree to make that other master. (iii) The other provisions of the contract are *consistent* with its being a contract of service.[20]

The dictum in the judgement was approved by the English Court of Appeal[21] and the case has been widely cited in cases in New Zealand.[22] However the judgement has also been criticised in that McKenna J concentrated too heavily on the third element, which is a negative requirement (sometimes referred to as the "consistency test"). It is argued that the contract may just as easily contain elements that are inconsistent with a contract for service, and that the test is circular in that it does not in the first place identify the contract of employment.[23]

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[17]Vranken article, Above n10, 128.

[18]Above n 2, 26, citing *Performing Right society Ltd v Mitchell and Booker* [1924] 1 KB 762, and, *Short v J and W Henderson Ltd* Above n10.

[19]*Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 1 All ER 433.

[20]Above n 19, 439 - 440, emphasis added.

[21]*Massey v Crown Life Insurance Co* [1978] 1 WLR 676.

[22]Above n1.

[23]Above n3, 27, Above n11, 24.

The "totality test" more expressly declares that a balancing of elements is required in the determination of a contract for, or of, service. In *Market Investigations*[24] Cooke J. stated:

> [C]ontrol will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing his service provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has the opportunity of profiting from sound management in the performance of his task.

The analysis of capital risk or management involvement has also been known as the "economic reality test".[25] What Cooke J is suggesting is balancing it against control and looking broadly at the whole transaction. It has also been said that "no list of tests is exhaustive and the weight to be attached to particular criteria varies from case to case."[26]

The "totality" or "economic reality" test has been adopted by both the Privy Council[27] and the New Zealand Court of Appeal[28] as the most definitive method of determining just what is and what is not a contract of service. However a test that relies on a case by case weighing up of any number of factors suffers greatly form not providing certainty in the law. Employers, workers, and agencies such as Inland Revenue and Accident Compensation Corporation are left unsure of which category any particular work relationship falls under[29]. Further, such an approach is open to the same criticism as levelled at Denning's "organisation test", that it is merely a "cloak for discretion."[30] It has been suggested that the courts assessment of the true nature of any work relationship is not an objective assessment of the facts of the case in light of the above mentioned

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[24]*Market Investigations Ltd v Minister of Social Security* [1968] 3 All ER 732, 738.

[25]Above n11, 22..

[26]*Construction Industry Training Board v Labour Force Ltd* [1970] 3 AllER 220.

[27]*Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374.

[28]Above n1.

[29]As evidenced in Inland Revenues pamphlet IR186, which provides workers with two list of questions relating to control, integration and risk elements of their arrangement, and then declares that depending on your 'yes' or 'no' answers "it will usually mean you are self employed" or "you are probably an employee"

[30]Above n15.

tests, but in fact, "depends on why the question is being asked"[31] It has been suggested that if the question before the court is whether a worker should be allowed a certain tax deduction, then the court is likely to find the worker to be an independent contractor, however if the question is whether the person who engaged the worker should be vicariously liable in tort the court may well answer otherwise. A full investigation of the validity of this suggestion is unfortunately beyond the scope of this essay.

INTENTION OF PARTIES.

The McKenna J 'consistency' decision raised some concerns that it would be too easy for parties to introduce inconsistent clauses into an agreement. This raises questions as to the intention of the parties. However if the parties to an arrangement expressly state what the arrangement is (ie employment or independent contract) this does not bind the court[32]. In *Simpson v Greary*[33] Stringer J stated:

> ... we have to disregard particular expressions in the agreement, such as "employer" and "contractor" and look at the agreement as a whole for the purpose of ascertaining what was the real intention of the parties.

It has been suggested that in cases of ambiguity "so that it can be brought under one relationship or other" that the parties stipulation as to the type of contract must be given weight.[34] It is clear, however, that the intention of the parties is but one factor to be taken into account by the court and that "the court always reserves the right to declare an arrangement to be that of employer and employee despite the clear expression of the parties"[35]

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[31]A.S. Brooks, '*Myth and Muddle - An Examination of Contracts for the Performance of Work.*' (1988) 11 Vol 2 UNSW Law Journal, 48, *Borg v Olympic Industries Pty Ltd* (1984) AILR 363.

[32]Note; the express intention of parties as to the form of their agreement is also not seen as conclusive in cases distinguishing lease and licence arrangements. Here also, the courts are prepared to look at the entirety of the agreement to determine its true form. see *Street v Mountford* [1985] 1 AC 809. *Radich v Smith* (1959) 101 C.L.R. 209.

[33][1921] NZLR 285.

[34]*Massey v Crown Life Insurance Co* [1978] 1 WLR 676, 680, see also *Solomon v The King* [1934] NZLR 1 CA

[35]*Ferguson v John Dawson and Partners Ltd* [1976] 3 All ER 817.

TNT AND THE CURRENT POSITION IN NEW ZEALAND.

The current approach of the New Zealand courts is expressed in *TNT Worldwide Express (NZ) Ltd v Cunningham.*[36] The case is notable for many features not least that the decisions of both the Employment Tribunal and Employment Court was overturned on appeal to the Court of Appeal. In that unanimous decision Cooke P described the case as "a test case or a case having extensive influence and repercussions" and that "these can be quite difficult cases".[37]

The Facts.

Cunningham, the respondent, was engaged by TNT Worldwide Express (TNT), the appellant, as an owner-driver to conduct a courier service for the company. The contract between the parties was a written standard form contract, used by the company for all its owner-drivers. TNT terminated the respondents contract. The respondent claimed that the termination was unjustified and procedurally unfair and sought to invoke the personal grievance procedure under the Employment Contracts Act 1991. This procedure is only available to employees, not independent contractors. The issue, therefore, was whether Cunningham was engaged in a contract of service or a contract for service.

The terms of the agreement required Cunningham to:

- conduct a courier service over such routes and servicing such customers as TNT directed,
- assist in the handling of goods in transit as required by TNT,
- provide and maintain a vehicle of a type a colour scheme approved by TNT at his own expense (including fuel),
- to install an approved radio telephone at his own expense,
- to affix any signs or advertising to the vehicle that TNT may require but at TNT's expense.
- to provide and wear a company uniform,
- to maintain in full force a goods service licence,
- to take out company approved insurance for his vehicle and goods carried by him or by any person employed by him
- conduct the courier service in accordance with the directions of the company
- be exclusively tied to the company, and not conduct any other goods or passenger service,

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[36]Above n1.
[37]Above n1, 683.

- be allowed 20 days sick or holiday leave, but ensure that his duties are performed by a relief driver at his own expense and,
- be prohibited from carrying any goods for TNT's clients for 12 months from the termination of the contract.

TNT was to remunerate Cunningham mainly on a per trip bases, subject to a guaranteed minimum of $2750 per month for months other than December and January. The contract also contained a clause expressly stating the relationship to be of an independent contractor and not an employer and employee.

The Decision

The court found that the fact the parties expressly defined the relationship they entered into as a contract for services was not determinative[38]. McKay J stated:

> The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates and not by the label the parties put on it....at most the label is an indication of the intention of the parties.[39]

The Court of Appeal unanimously found that the arrangement was that of an independent contractor. Cooke P noted *Ready Mixed*[40] to be the closest authority. That case concerned a company's arrangements with certain owner-drivers of concrete trucks, Cooke P noted some difference in detail (for example the *Ready Mixed* case contained no restraint of trade clause) however, the finding of a contract for service was significant.[41] McKay J found the present case to be "much clearer than *Ready Mixed*"[42]

More significant was the decision of the Privy Council in *Lee Ting Sang v Chung Chi-Keung*[43] which Casey J declared as providing "authoritative guidance."[44] That case cited Cook J of the English Court of Appeal in *Market Investigations Ltd v Minister of Social Security* [45]and laid down as a fundamental test the question:

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[38]See text at above n32 -35.
[39]Above n1 699.
[40]Above n19.
[41]Above n1, 685.
[42]Above n1, 700.
[43][1990] 2 AC 374.
[44]Above n1, 697.
[45][1969] 2 Q.B. 173.

> Is the person who has engaged himself to perform these services performing them as a person in business on his own account?.[46]

Cooke J noted that there is no exhaustive list of factors to consider in determining the question and then gave a list of potential factors[47] Cooke P stated that this case, as with *Ready Mixed* "appears naturally to meet the test.."[48]

In discussing the lower 'courts' decisions, and the weight they applied to the element of control that TNT had over Cunningham, Cooke P acknowledged that it is right to attach weight to such factors but emphasised that it is no longer the sole determinant.[49] Casey J stated that both the Employment Tribunal and Employment Court placed too much emphasis on the control factor, and that such a "degree of control was inevitable for the efficient running of such a business." Casey J citing *Ready Mixed;*[50]

> A man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence.

Hardie Boys J agreed that such controls are necessary in such a "competitive industry" for reasons such as "cohesion", "efficiency", and "a high public profile" and then went further to suggest that the "voluntary assumption of such controls in order to gain entry to the industry should not be seen as a reason for treating the contract as other than what on overall consideration it truly is." And that such controls benefit both the 'contractor' and the employer.[51]

Cooke P noted factors pointing to a contract for service, while expressing them as "inconsistent" with a contract of service in a similar manor to McKenna J in *Ready Mixed*[52]:

> Particular weight must attach to the provisions for the contractor obtaining a goods and service and insurance and employing relief drivers: these are substantial obligations *inconsistent* with a contract of service, and they are of such obvious importance that they can not merely be put aside in analysing the true effect of the contract as a whole.[53]

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[46]Above n43, 382.
[47]See note at 24 for list of factors.
[48]Above n1, 685.
[49]Above n1, 687 citing above n43, 382.
[50]Above n1, 697 citing above n42, 447.
[51]Above n1 698.
[52]Above n42,
[53]Above n1, 689 emphasis added.

McKay likewise found that the contracts provision for a situation where the contractor is a limited liability company inconsistent with an employer/employee relationship.[54] As discussed above the "consistency test" has been criticised for relying on circular logic[55]

The court also noted that while it was possible for a contractual relationship to evolve with the introduction of new factors, there was no evidence of such here. In such a case, where the terms of the contract are set out in writing, which is not a sham[56], the nature of the contract must be determined from the obligations so defined. Such a determination is a question of law and not of fact. In cases where the contract is not written (which the court notes to be the majority of cases in the area) it will be a mixed question of law and fact.[57]

Casey J. noted the "indivisible and consistent nature" of whatever relationship is found to exist between parties, that the relationship "cannot be a contract *for services* for some purposes and contract *of services* for others."[58] Casey J also noted as significant that parliament had included "homeworkers" in its definition of an "employment contract" in the Employment Contracts Act 1991 as the only concession extending employment protection rights to cases of contracts for services[59]. And moreover that the Government had failed to accept the recommendations of the 'Gerbic Committee' for the recognition of a new class of "dependant and labour only contractor[s]" within the Employment Contracts Act.[60]

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[54]Above n1,700.

[55]See text at above n23.

[56]For a discussion of a sham like situation see *Agricultural Pilot's Association of New Zealand v Southland Aerial Cooperative Society Ltd.* (1985) ACJ 330. Although the court do not make it clear in *TNT* what is meant by a sham, it is assumed to refer to arrangements which are primarily intended to avoid employee protection rights. It may be argued that determining whether an arrangement is a sham is in fact the function of the courts in such cases.

[57]Above n1, 686, 687, 695

[58]Above n1, 694.

[59]Above n1, 694. see also above n8.

[60]Above n1, 694, see text at below n81 for analysis of the Gerbic Committees report.

THE "COLLINS ARTICLE"

Three of the five justices in the *TNT* decision made special reference to "the Collins article".[61] Cooke P spending some time discussing the article and noting that the results of both the Employment Tribunal and Employment Court were only attainable "if the present law is developed by a change as advocated in the Collins article"[62]

Collins is concerned with the recent trend in the United Kingdom of "vertical disintegration" in production, with the increased use of methods of acquiring labour by means such as sub-contracting, concessions and out-sourcing. Casey J notes[63] a similar trend in New Zealand in part fostered by Part II of the Employment Contracts Act, and notable in the courier industry as evident in *TNT* and *New Zealand Couriers v Curtin*.[64]

Collins notes that regulation of employment relationships (including employee protection) evolved alongside vertical integration, and that the recent changing trends leaves many workers beyond the range of employment protection laws. Collins argues that such workers are often subject to the same social subordination and economic dependence as other employees and therefore in need of employment protection rights.[65]

ACQUISITION OF LABOUR POWER AND TESTS OF CONTRACT STATUS.

Collins analysis is based on the employers efficient acquisition of labour power, for which there are two primary methods;

> (1) by contractual allocation of risk, whereby the risk of inefficiency (caused by; the worker not working diligently, unforseen contingencies hampering the completion of the task and, the risk of unavailability of work).is on the worker to give him or her an incentive to provide fair returns, and
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> (2) through bureaucratic control.

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[61]Above n2.
[62]Above n1, 689.
[63]Above n1, 694.
[64][1992] 3 NZLR 562.
[65]Above n2, 353-354.

Collins argues that the courts use of the three major tests is, in fact, an analysis of the efficient acquisition of labour and criticises each as;

> 1] indeterminate as they do not provide clear criteria for settling borderline cases, and
>
> 2] 'dysfunctional' as they deprive workers of needed employment protection rights.[66]

RISK.

When the owner assumes all the risk it is a *time service contract* and the employee is paid an hourly wage for a fixed number of hours worked. When the worker assume all the risk it is a *task performance contract*, the contract specifies both the task to be completed and the fixed remuneration for it An employer may choose a mixture of the two.

Collins suggests that "the inherent flaw in the economic risk analysis ... lies in its assumption that task performance contracts rule out the possibility of an employment relationship"[67] Collins notes examples of task performance contracts such as piece work and commission sales which have been classified as employment relationships.[68]

Further Collins suggests that "there is no reason why this link of pay to productivity should necessarily determine the workers entitlement to employment protection"[69] and that an analysis of how the standard risks are allocated in a contract does not assist in the determination of the workers "degree of economic dependence or social subordination"[70] and in fact may be an indication of the parties relative bargaining strength rather than the true nature of their economic relationship.

If Collins approach to the*Lee Ting Sang* "risk" or "business in your own account" test is to be applied in *TNT,* it suggests that where TNT arranged a contract that required large capital investment and risk by Cunningham, that this also removed Cunningham's employment protection rights.

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[66]Above n2, 371.

[67]Above n2 374

[68]*Airfix Footwear Ltd v Cope* (1978) ICR 1210, *Peter F. Burns v Commissioner of Stamps* (1980) 24 SASR 283, *Narich Pty Ltd v Commissioner of Pay-Roll Tax (NSW)* (1983) 50 ALR 417.

[69]Above n2, 373, see also *Muollo v Rotaru* [1995] 2 ERNZ 407, 424.

[70]Above n2, 365.

CONTROL

Collins looks at the use of bureaucratic controls, and the varying costs of such as determined by factors of organisation and the costs caused by distancing work from direct supervision. He notes that non bureaucratic controls resulting from a particular configuration of transactions may, once again, not reveal real relations of economic subordination. The presence of bureaucratic controls may betray the presence of staggering profit, an imperative for quality control or a strong labour movement.

Collins criticises the control test as; 1] indeterminate as it has never established just what type of control will suffice, noting that you can not control a skilled crafts person.[71], and 2] dysfunctional, being both under- and over- inclusive. It is underinclusive for skilled and professional workers and by assuming that those on a task performance contract are not included in employment relationship yet many are such as piece workers and commission sales people. It is over inclusive in including dependant entrepreneurs such as suppliers of parts to an automobile manufacturer.[72]

ORGANISATION

The organisation test is criticised as; 1] indeterminate because there may be a 'badge of membership' for some purposes, such as discipline, but not others such as pensions or taxation.[73] and, 2] dysfunctional in that it assumes that in the absence of normal badges of membership the worker is an independent contractor. which "reveals a naivete with respect to the plentitude of mechanisms through which an employer may acquire labour power" and that if an employer can acquire labour power without incurring the cost of bureaucratic controls, and when there decision is influenced by the lower costs of limiting protection rights "it seems to make little sense to judge the need of an employees protected rights by reference to (the employers) decision"[74]

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[71]Above n2, 370, above n12.
[72]Above n2, 372.
[73]Above n2, 370.
[74]Above n2, 373.

PROBLEM OF CHOICE.

Collins sees a major problem of the three tests arising from the fact that it is the management that initiates the search for labour power and generally determines the model of contractual relationship that exists. It is the management that decides on the demarcations of boundaries of organisation through deciding on badges of membership, selection of payment mechanisms (risk component) and the forms of control.

Collins sees the courts respecting the parties 'freedom of contract' as in fact allowing the employer "the choice to contract into or out of the normal incidents of the role of the employer." Collins notes, however, that "given ..asymmetry's of bargaining power ...the courts are bound to find reasons in some cases for *paternalistic* interventions which involve ignoring the apparent choice of the parties"[75]

These rival strands of legal reasoning are considered a "crisis of basic legal concepts"[76] where the courts try both to respect the choice of the parties and to defeat that choice for reasons of public policy.

Collins Suggested Test.

Collins argues that the solution to determination of the distinction between types of contract lies not in referring to the wishes of the parties but by purely an act of public policy. He further argues that it is for the courts to "shoulder the principal burden"[77] The legislature being of only minimal assistance as any absolute declaration would also become dysfunctional as there are always exceptions. Further if parliament declared a standard pattern of service arrangement it would only lead to more elaborate contractual arrangement to avoid the definition of employee.

Collins suggests that the courts apply the following test:[78]

> Employment exists for the purposes of employment protection law if the worker performs services for another, referable to a contractual agreement unless that contract satisfies two conditions: that it is a task performance contract and that no badges of membership of the firms organisation apply.

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[75]Above n2, 375, emphasis added.

[76]Above n2, 355, 375 citing Lord Wedderburn, R Lewis and J. Clark(eds), *Labour Law and Industrial Relations* (Oxford, 1983) 144, 152.

[77]Above n2, 377.

[78]Above n2, 379.

The Collins approach has a presumption in favour of employment, that ignores the express wishes of the party where badges of management push toward employment and that deminishes the importance of the allocation of risk.

Collins Test Criticised.

Collins suggests that the British governments "quest for labour market flexibility"[79] (which is clearly a quest held in common with the New Zealand legislature as evident in the Employment Contracts Act.), and that the declining coverage of employment protection legislation "represents in some respects the goal of the Governments policy of labour market flexibility"[80]

Ironically this suspicion, if true, only weakens his contention that it is for the courts to change the present situation, as it is not for the courts to go against the intention of parliament.

With the courts being so restrained, it is therefore for parliament to make any changes.

THE GERBIC COMMITTEE.

In 1987 the Minister of Labour set up a committee to enquire into "dependant contracting"[81]. The committee identified 'dependant contractors' as falling within the employee and independent contractor distinction, and as being characterised by a;

> substantial degree of dependence upon a principal employer such as to give rise to the presumption that there is an inappropriate balance of bargaining abilities and equity between the parties to the contract"[82]

Union submissions called for a change to the Labour Relations Act 1987 and considered 'dependant contracting' as "the manifestation of a deliberate policy of some employers, the aim of which is to deny people the right to award wages" and that a feature of these contracts is the ' all or nothing', 'take it or leave it' method of

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[79]Above n2, 361.
[80]Above n2, 361.
[81]*Committee Enquiring into Dependant Contracting (Gerbic Committee)* (1988) Dept of Labour.
[82]Above n81, 2.

negotiation where the employer transfers the risk of employment onto the employee.[83]

Employer submissions were based upon "utilitarian concepts of freedom of choice, freedom of contract and the rights of the individual".[84] Employers stated that contractors have the choice of becoming a contractor with the inherent potential for profit or risk of loss and that there is no place for protection of the weak contractor in an open environment. Employers noted concerns about any arbitrary definition of dependant contractors as being unfair and unequitable, in being likely to capture those who are not dependant and leave out some who are.

The Commission also received submissions from 'dependant contractors' such as owner-drivers who generally were in favour of changes, such as; greater equality of bargaining power, greater ability to enforce contracts, and more effective methods of dispute resolution.

For policy reasons the committee wished to impose minimal changes to the operation of the labour market and to avoid prescriptive or peremptory solutions. The committee wished to provide 'dependant contractors' with access to dispute resolution and grievance procedures of the labour Relations Act. as well as strengthen their bargaining position by allowing them to underpin the negotiated contract rate with the award rate for the type of work.

The committee's proposal involved an extension of the definition of "worker" to include a "permissive definition" of labour only and dependant contractors under the then Labour Relations Act. The committee did not favour a substantive definition of 'dependant contractor' to be included in the Act, instead favouring the issue to be a matter to be negotiated between the parties.

Gerbic Criticised

The flaw in the Committee's suggestion is the failure to recognise two features of the current trend toward increasing use of independent contract relationships. One being the absence of employment relationship consequences being a motivation for employers in seeking such relationships, the second being the

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[83]Above n81, 3.
[84]Above n81, 3.

dominant bargaining position of employers. Leaving the "matter to be negotiated between the parties" will be most ineffective in cases that are in the greatest need of protection. It is unlikely that a worker who is unable to negotiate such protective provisions will be able to negotiate that their relationship be defined as that of "dependent contractor."

DISCUSSION

Advantages of Classification.

Hardie Boys J decision in *TNT* declared that "there are many reasons why both employer and contractor prefer the independent contractor arrangement".[85] These advantages are worthy of consideration.

Advantage for the Contractor.

Cooke P noted that "the witness Mr Mabin, evidently lik[ed] the earning opportunities"[86], Hardie Boys J himself did not offer any reference to actual advantages. Advantages seem to be securing a job and its associated returns that would be otherwise unavailable. It is not imagined that the court is suggesting that a workers desire for work with reasonable income should deprive him or her of employment protection rights.

Advantages for the Employer/Owner.

McKay J notes advantages of independent contractors being responsible for their own income tax and GST returns, as well as being outside the ambit of labour law regulations.[87] Further to these advantages, much of the companies potential capital outlay is transferred onto the independent contractor, including; vehicle, fuel, radio and uniform costs, as well as certain administration costs involved in training and providing replacement drivers, which the courier him or her-self must provide and pay for.

Collins suggests other advantages such as; independent contractors providing a buffer for employers from market fluctuations, allowing greater flexibility in raising and lowering the size of the workforce, possibly allowing lower wage costs,[88] and avoiding long term contractual relationships and therefore providing bargaining power to the employer who may impose stricter contractual control.[89]

Collins argues that the advantages for the employer of having work performed by independent contractors is in fact the reason for

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[85]Above n 1, 698.
[86]Above n 1, 689.
[87]Above n 1, 699, see also "List of Consequences" pages 3 and 4.
[88]See for example *Cashman*, above n8, where caregivers were receiving around $4 per hour.
[89]Above n2, 356

'vertical disintegration' rather than merely a consequence of it.[90] He suggests that employers in dominant bargaining positions are favouring independent contract relationships to avoid obligations under employment contracts.

It is acknowledged that contracts for service generally have low levels of control or direct supervision imposed on the worker, and that if too much direct control is exerted the courts are likely to find that an employment relationship exists. However the test seems to ignore that the independent contract arrangement may impose greater control than employment when, as in *TNT*, the work is done away from direct supervision.[91]

In *Muollo v Rotaru*[92] the appellant, the owner of a fishing boat, contended that the respondent, a fisher, was an independent contractor. As evidence to support the fishing industries use of independent contract arrangements the appellant gave six economic reasons why such arrangements are used. Among these were a recognition of the intermittent and uncertain duration of work, and that the employer did not want the liability of an employee when work was not available, further the appellant did not want to be liable for holiday or sick pay, and enjoyed the encouragement of "proper work attitudes" that a independent, commission based pay arrangement provided. These are clear examples of the advantages for employers envisaged by Collins under a contract for service. Interestingly Goddard CJ found these advantages to be "forceful arguments" to legitimise the industries use of independent contract relationships rather than indicating that the industries use of such arrangements was 'sham'[93] like, being primarily motivated by the desire to avoid standard employer obligations.

FREEDOM OF CONTRACT.

The courts decision in *TNT* ultimately relies on the concept of freedom of contract, that the contract was not a sham, and that the

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[90]Above n2, 356.

[91]Above n2, 375, Collins notes that in *Ready Mixed* the task performance contract was functionally the same as a time service contract that created even superior control when the nature of the work prevented constant supervision.

[92]Above n69, 426.

[93]See above n56.

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court must honour the parties free choice "without paternalistic intervention"[94]

In *TNT* Cooke P noted that "the fact the company enjoyed economic bargaining strength ..(can not be) .. treated as evidence that he is not an independent contractor"[95] In comparison Collins treated an owners bargaining strength as evidence of an inequality that allowed the owner to contract into or out of employment protection rights.[96]

As noted above there are times when the court has gone against parties express wishes and declared a contract to be other than what it is stated to be.[97] There are times, therefore when "paternalistic intervention" of the courts is required. Collins suggests that the courts should intervene to declare contract to be 'for services' when there is a need for employment protection rights, the courts however see it as necessary when the worker is not in business on his or her own account.

<u>CHANGE?</u>

Cooke P suggested in *TNT* that the result arrived at by the Employment Tribunal and Employment Court was only possible if the approach of Collins was adopted, and stated;

> In my opinion the Courts should not shrink from such a development should a reconsideration of common law decisions show them to be untenable or unsatisfactory in principle, provided however that the development is not contrary to legislative principle.[98]

Any change in approach therefore requires a change in legislative policy. Clearly a legislative change will not then require the courts to be satisfied that common law decisions have been "untenable or unsatisfactory in principle". However, achieving such a change will require the legislature to be so satisfied.

A.S. Brooks[99]suggests that the contract of employment; can not be defined, is indistinguishable from other contracts for the

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[94]Above n1, 698.
[95]Above n1, 685.
[96]Above n2, 375.
[97]Above n32, n38 and n76.
[98]Above n1, 687.
[99]Above n31.

performance of work, and has no indispensable part to play in the allocation of statutory benefits. She suggests that the distinction between contracts for and contracts of service be abandoned and there be only "contracts for the performance of work" to which the present statutory rights and duties for employment contracts should apply. She suggests that while costs in industries that presently use independent contracts may rise, such a social cost would be less than the social cost of leaving such workers unprotected.[100]

Right wing proponents of labour market flexibility, ironically may agree with Brooks that the distinction between contracts of and for service is meaningless. However, such proponents will differ by wishing to treat all employees as independent contractors, removed from all statutory protection and subject to work conditions determined by the free market.

It is contended here that neither approach is appropriate. The Brooks approach is highly unlikely in the current 'free market' political climate. Further, the imposition of statutory burdens upon two truly independent business people may be unreasonable. Collins notably saw the inclusion of even dependant entrepreneurs in the definition of employees as undesirable.[101] It is also notable that the Brooks approach would require a definition that distinguishes "contracts for the performance of work" from other contracts such as "contracts for the supply of goods." It may be difficult to distinguish contracts for the supply of a completed product to an industry and contracts for work to complete that same product.

A completely free market approach is also undesirable as there is a clear need for statutory protection of workers. Employee protection was developed to counter potentially harsh results caused by the power imbalance in the labour market. Statutory protection of those in weak bargaining positions is not unusual, examples being found in consumer and tenancy protection legislation.[102]

The law recognises that often an agreement will be legitimately reached with one party enjoying "economic bargaining strength".[103]

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[100]Above n31 100.

[101]Above n2 372.

[102]Consumer Guarantees Act 1993, Fair Trading Act 1986, and Residential Tenancy Act 1986.

[103]Above n1 685.

However the law also recognises that for certain arrangements, inequities in bargaining strength need to be balanced through statutory protection of the weaker party.

The greatest need for some form of protection in the independent contract relationship is that of the dependant contractor, as recognised by the Gerbic Committee. Such relationships are defined by the employer, the worker accepting the standard arrangement, having little or no bargaining strength and being solely dependant on the employer for work.

Changing Legislative Policy.

Casey J noted in *TNT* the comments of the Chief Judge in *New Zealand Dairy Workers Union v Southern Milk Co Ltd*[104] that the most significant thing about the Gerbic Report was the failure of the Government to accept its recommendations. The Employment Contracts Act 1991 ignored the Gerbic recommendations, being greatly motivated by free market and freedom of contract ideals. There may be however, an increased potential for change in Employment Law in general under the up coming MMP system.

Form of Change

Creating new division(s) for work relationships may suffer from difficulty in providing conclusive definitions for the scope of such divisions. Presently such divisions exist with the statutory inclusion of "Homeworkers" in the definition of employees under the Employment Contracts Act 1991. As noted earlier the Employment Court and the Court of Appeal have differed in their approach to defining homeworker in the recent case of *Cashman v CRHA.*[105] While this may point to further uncertainty in the area, alternatively the case can be seen as a test case with the Court of Appeal extending protection to those "vulnerable and susceptible of manipulation".[106]

Further difficulty may also arise from employers use of more elaborate contractual arrangements in an effort to evade such a statutory division. However, any such evasion will be more

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[104][1989] 1 NZLR 865, 873.

[105]Above n8.

[106]Above n8 C.A. 34/96 at 12.

difficult for employers than merely evading the employment definition. Moreover, where the division is defined by a lack of bargaining power or a form of subordination, employers efforts to avoid such a classification will necessarily involve increasing the workers bargaining power, or removing forms of subordination.

CONCLUSION.

The decision in *TNT* was described by Cooke P to be in a "difficult area" of the law. Common law courts have had great difficulty in formulating a consistent approach in distinguishing contracts of service from contracts for service. Statutes are of no real assistance and the common law tests are each open to criticism. The courts are left to make (some would say discretionary) decisions based on how the specific factors of each case point to the parties intentions. In *TNT* this saw the court uphold an "established status in the transport industry"[107] by finding the respondent to be an independent contractor and therefore unable to invoke certain grievance procedures.

The current trend toward contracts for service is in part motivated by the advantage to employers of avoiding statutory protection and of transferring some liability onto the independent contractor who would otherwise (if an employee) be a liability. Given the common the use of 'standard form', 'take or leave it' contract negotiation by employers as evidenced in *TNT*, employers have the ability to mould the labour market to their advantage. It is recognised that the courts will not accept a contract that is an obvious "sham". However where the practice of using independent contractors within an industry has achieved an "established status", the courts are clearly willing to accept it. This may disregard that the development of such a practice was motivated by the same anticipated advantages as those that motivate the employer who creates an individual sham contract.

The decision in *TNT* may well reflect current legislative free market policy. It is suggested here, however, that there is a need for statutory protection to be extended to "dependant contractors" who are disproportionately vulnerable and in need of a balancing of their bargaining power with that of their "employers".

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[107]Above n1 689.

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