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**THE CHANGING CONCEPT OF EMPLOYEE IN
MODERN EMPLOYMENT LAW AND
IMPLICATIONS THEREOF**

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ABSTRACT

This paper is an attempt to find out "who can conceptually be called an employee under the modern employment law and what are the implications thereof." What are the implied duties of an employee towards his or her employer? Relationship aspect of employer-employee has emerged as a pillar of strength in the recent development of employment laws. Current developments on this aspect in New Zealand, Britain and the United States have been described in this paper. The subject of workplace discrimination has also been discussed. With the changing face of industry from manufacturing to services, participation of masculine workforce in the labour market is on the decline. The increasing participation of women in the services sector is resulting not only in reduced employment opportunities for men and lower wage bills for the employers but in an overall low per capita income of the national economy. Is 'feminisation' of employment market an employer driven process to keep the operating costs lower and safeguard the business?

Another aspect that affects the modern employee is stress. A recent article on occupational hazards of commercial pilots has highlighted the issue of fatigue and stress at work. Can the new dimension of 'stress' be deemed life threatening 'at work' thereby enabling an employee to disobey the orders of his employer? When the orders become stressful and nerve wrecking, is an employee entitled to disobey to work beyond the point of risk to his health.

In an era of genome mapping it would be possible to measure the 'employee vulnerability to stress' and 'susceptibility to work pressures'. The topic of genetic science and its use in knowing employee attributes at the time of signing of an employment contract has been discussed at the end of the paper. This has been done to stimulate more reading on the subject. The implications of genome mapping on employee selection, anxiety level, personal grievance, and redundancy provisions in employment relationship are wide ranging and worth further research.

Word length:

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 15,000 words.

INTRODUCTION

The concept of employee and the law of employment revolve around the subject of 'human labour'. The question arises: Is labour a thing or a commodity that can be bought and sold? In an economic sense it may be. In the juristic sense, however, the seller of the labour sells nothing except making a promise to work in future according to the terms agreed with the person asking for that work.

Labour laws stem from the idea of 'subordination of an individual worker to the capitalist enterprise'; it is the law of the *dependent labour* and is specific to those categories of economic relationships, which in some way involve providing of *personal services* in exchange of remuneration.¹ An employment contract therefore is always a contract "to do" a task and not "to give" away labour. In brief the elements of 'labour' are fourfold:

- i. Human activity performed by a physical person.
- ii. The activity resulting in creation of a materially applicable utility.
- iii. The activity emerging from a legal employer-employee relationship under which a person renders, or is obliged to render, his work for the benefit of another person. This criterion emphasises the inherent contractual relationship element.
- iv. In order to restrict the notion to subordinate labour, such rendering of work should occur under the direction and dependence of the employer.

Under modern employment law, this human labour is sometimes classified as casual (temp), permanent, part-time, full-time, independent contractor, worker, employee *et al.* Such classification has its roots in master-servant relationship. Over its period of development, the employment law has defined this relationship in the form of implied duties of an employee towards his employer based on the nature of his work. This paper is an attempt to underline the legal implications of changing concept of human labour from 'servant' of the old time to modern day 'employee'.

¹ Hepple B A, *The Making of Labour Law in Europe* (Mansell, London 1986).

I THE CONCEPT OF LABOUR

The term employee has got its present day meaning after centuries of evolution, and is still a dynamic concept. This gradual process of evolution has had far reaching implications on the modern employment law. Over the centuries the word servant changed its meaning to accommodate the social changes in thought process of the legislature. The earliest formal statute, defining labourer as "a person who earns by providing physical human labour" was contained in the Ordinance of Labourers² and the Statute of Labourers.³ In the fifteenth century the business was known as trade and the labourer as 'serfs' who used to provide their skills to the owners of the trade. The relationship between them was essentially of feudalistic kind, and it was a time when the labour market was regulated by a 'corporative' system of prices, wages and labour mobility, the cornerstone of which was the Statute of Artificers.⁴ The corporative system purported to guarantee to the workers a certain degree of wage stability and occupational protection, but at the same time restricted labour mobility and effectively outlawed strikes and combinations of workers designed to maintain and improve their terms and conditions of employment. Such combinations constituted a criminal conspiracy at the common law. The criminal law also imposed sanctions on individual workers who quit their employment in breach of contract, by virtue of Master and Servant Act 1823. The term 'master and servant' itself portrayed a dependency relationship that existed between the work-user and the work-provider. Master-servant model embodied the concept of employer's implied powers of direction and control, and servant's humble acceptance of the same. The hostility of the common law to collectivist values is deep-rooted. It expressed itself in a number of legal doctrines such as 'doctrine of restraint of trade' for invalidation of work contracts, and the economic torts meant to protect the trade and livelihood of the traders as against direct or intentional interference by the servants. This feature of common law has been present, practically throughout the development of employment legislation, notwithstanding periodic changes in the attitude of the legislature.

² Ordinance of Labourers 1349 (Eng).

³ Statute of Labourers 1350 (Eng).

⁴ Statute of Artificers 1563 (Eng).

The growth of industrialisation in the nineteenth century brought with it the concept of workman into common parlance. The manufacturing sites, where people used to assemble and work together in a team were designated as factories. The people working there who were earlier known as artificers and journeymen were started to be addressed as factory workers. The servant got the status of equality before the law with his master during these times of *laissez-faire* philosophy and political egalitarianism. Industrial laws were enacted recognising the status of labourer as workmen, as suggested by the long title of Molestation of Workmen Act 1859 and Employers and Workmen Act 1875. The workingman, for the first time, was allowed to meet the employer on equal terms.

In the late twentieth century, the times changed further as the pattern of gainful employment changed from manufacturing to services in the sectors such as insurance, banking, education, computer software and consultancy. The worker is no longer a provider of human labour to his employer for a stipulated number of hours in a week, or for a specified period of time in a workday. Rather he has the flexibility of working from any suitable place for any convenient number of hours. End desired result is the concern of the beneficiary [the employer]. In the changed set up, due to relationship aspect with the employer the worker is popularly known as an employee. The changing facet of industry, the need for individual's respect together with the flexibility of terms of employment necessitated this change.

II EMPLOYEE DEFINED AND ITS IMPLICATIONS PER SE

The term 'employee' has been defined by a number of legislations all over the world but each of these definitions is different from the other. A comparison of the employee definition in the United States law [most advanced industrial nation] has been done with the New Zealand law to appreciate the policy intent behind it.

A United States Law

'Employee' as defined in the National Labour Relations Act of the United States includes:⁵

⁵ S 2(3) National Labour Relations Act 29 USCA § 203 Note 291-344 (1998) 88.

Any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labour dispute or because of any unfair labour practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural labourer, or in the domestic service of any family or person at his home, or any individual employed by his parents or spouse, or any independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labour Act...or by any other person who is not an employer as herein defined.

Thus a worker may fall outside the coverage of NLRA either because he is in a specifically excluded category (e.g., supervisors), or because he is employed by an excluded employer (e.g., railroad employees). Active employment status is not necessary for a person to be an employee within the meaning of the Act. For example, applicants for employment are considered employees and may not be discriminated against because of their union membership activities or sentiments. In addition, employees not working due to an ongoing labour dispute or unfair labour practice nevertheless retain their status as employees. Independent contractor is a notable exclusion from the definition. The exclusion of independent contractors is worth comparing with the New Zealand case law on the subject of employment relationship. In the United States, the Labour Relations Board applies a detailed common law agency test to determine whether a worker is an employee or a contractor.⁶

The exclusion of persons employed by their parents or spouse clearly apply to children and spouses employed by owners, sole proprietors and partners. An individual working on 'as and when needed' or non-regular basis is deemed to be a casual employee. He lacks *community of interest* with the other employees, and therefore is not an employee strictly speaking. He cannot be compared with a part-time employee who has *community of interest* with the other employees of the same unit. Very importantly number of hours worked by a worker is not a determining factor in casual or regular part-time status. The status of casual employees [temps] is worth noticing. Lack of protection of their interests has implicitly resulted in growing tendencies of the companies to use temporary employees to supplement their labour

⁶ Employment Law Desk Book *Labor Relations*, 1-17 EMPLDB § 17.02.

needs during peak business situations. This tendency in particular is similar to the growing trend of using temporary employees in New Zealand.

B New Zealand Law

Statutory definitions do assist in bringing out a clear meaning of the term 'worker' and the 'employee'. The Labour Relations Act [now repealed] defined the 'worker' as "any person of any age employed by an employer to do any work for hire or reward."⁷ The word 'hire' suggested a narrow construction, excluding independent contractors, but the full meaning expressly included home workers, and also the persons intending to work. The definition of employee in Accident Insurance Act is broad and it suggests "any person who has been engaged to work or works in New Zealand under a contract of service." The term 'contract of service' used in the definition was first coined in the English Court of law. Thereafter, it has been extensively used in the common law jurisdiction to ascertain the status of an employee as different from an independent contractor, and has been discussed later in this paper.

The word 'employee' in New Zealand law is slightly different from the United States law. The Employment Relations Act defines it as:⁸

- (1) In this Act, unless the context otherwise requires, employee –
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes –
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who
 - (i) does not expect to be rewarded for work as a volunteer

⁷ S 2(1) Labour Relations Act (New Zealand Statutes, Vol 2, 77-127, Brookers, Wellington, 1987) 646.

⁸ S 6 Employment Relations Act 2000 *Mazengarb's Employment Law* (3ed, Butterworths, Wellington, 2001).

- (ii) receives no reward for work performed as volunteer

The definition is quite elaborate to adduce proper meaning to the term and is inclusive of home workers. Standing up to the promises made by the political parties in their election manifestos, in 1999 the policy of labour law shifted to place an emphasis on correcting the inequality in bargaining power of an employee and a contractor. The policy intent behind the enactment has been stated within the Act:⁹

The policy of the Act is to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship...by acknowledging and addressing the inherent inequality of bargaining power in employment relationships.

Homeworker is a noticeable inclusion in the definition of employee. The law has sought to protect homeworkers from exploitation and poor working conditions ever since the scandalous conditions in sweatshops were exposed in the late nineteenth century. Early measures to deal with the problem focussed on the manufacturing sector only. The factory regulations envisaged that the workers who were required to work outside the commercial premises should hold an annual licence. The number of homeworkers was limited to 10 percent of the regular workers. The legislation broadened its ambit to cover the workers not only in employment relationships but also in vendor-purchaser relationships. Homeworker is a deemed employee under the ERA and is defined as:¹⁰

A person who is engaged, employed, or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwelling house (not being work on that dwelling house or fixtures, fittings, or furniture in it); and includes a person who is in substance so engaged, employed, or contracted notwithstanding that the form of the contract between the parties is technically that of vendor and purchaser.

The leading case on the subject of homeworkers has been *Cashman v Central Regional Health Authority* that was decided by the Court of Appeal.¹¹ The case dealt

⁹ S 3 Employment Relations Act 2000 *Mazengarb's Employment Law* (3 ed, Butterworths, Wellington, 2001).

¹⁰ S 5 Employment Relations Act 2000 *Mazengarb's Employment Law* (3 ed, Butterworths, Wellington, 2001).

¹¹ *Cashman v Central Regional Health Authority* (1997) 1 NZLR 7.

with the issue of deciding whether professional homecare workers fell under the definition of homeworkers or not. The Regional Health Authority had hired these workers as independent contractors to provide home support and relief care to old and disabled people who were living in their homes. The Court of Appeal found that although the workers were not performing the work in their own homes, they nevertheless were covered under the definition.

The *Cashman* case illustrates how labour laws can adapt to the changing situations and work arrangements in context of overall shift of industry from manufacturing to services.¹² Though measures for protecting the homeworkers were originally conceived with the manufacturing sector in mind (particularly the clothing industry), the policy intent of the legislature had been to protect all workers including the appellants working in the health sector, who found themselves in a position 'vulnerable to exploitation'.

C Relationship of Employer-Employee

Employer-Employee relationship has its roots in the master-servant relationship of previous era. The essential difference between the expressions 'employer and employee' and 'master and servant' is that the first one denotes modern, a much wider relationship than the second one. The expression 'master-servant' carries an undemocratic implication and it is appropriate to replace it with 'employer-employee'. It is important, however, to understand that in juristic sense the latter term refers to the subordinate master-servant relationship only. The employer-employee relationship is essentially different from the contractor-employer relationship as discussed hereunder in detail.

1 How is a subordinate employee different from an independent contractor?

All systems of labour laws draw a fundamental distinction between the two types of employment relationships; one is categorised as 'dependent' or 'subordinate' and the other which is 'independent' or 'autonomous'. This distinction principally takes the form of classification of workers as employees on one hand, and self-employed independent contractors on the other. An employee is subject to employer's common

law powers of direction and control. He is in dependent or subordinate relationship with his employer. In most systems there is a conflict between the use of formal or personal subordination and the economic subordination. There is a lack of consensus on the appropriate criteria for identifying the subordination of the employees. The courts have had occasions to use many different and potentially contradictory tests to determine the same. These tests included 'control', 'integration', 'economic reality' and 'mutuality of obligation'.¹³

2 'Contract of service' as against 'contract for services'

The purpose of above-mentioned tests is to differentiate between an employee and a contractor by ascertaining whether he works under a 'contract of service' or 'contract for services'. Many characteristics are common in these two types of relationships. Both, an employee and an independent contractor agree to perform certain work for the employer, and both receive remuneration for it. From the employer's point of view both produce the same result but from legal standpoint one is an employee whereas the other, an independent contractor. What can be done to find out from judicial decisions, is the indicia that distinguishes between a 'contract of service' applicable to an employee as against 'contract for services' applicable to a contractor.

A century ago it was apparently easier for Bramwell LJ to make the distinction. In *Yewens v Noakes*, he defined the servant as "a person subject to the command of his master as to the manner in which he shall do his work."¹⁴ This dictum however needs to be treated with a good deal of care today, because the concept of 'servant' that Bramwell LJ was addressing is not the same as modern notion of 'employee'. Under the employment law in UK, an 'employee' is defined as an "individual who has entered into or works under a contract of employment."¹⁵ The expression 'contract of employment' in turn means "a contract of service or apprenticeship, whether express or implied, and (if express) either oral or in writing."¹⁶ No further definition is

¹² *Cashman*, above, 13 Blanchard J.

¹³ Simon Deakin and Gillian S Morris *Labour Law* (Butterworths, London, 1995).

¹⁴ *Yewens v Noakes* (1880) 6 QBD 530, 532-3 Bramwell LJ.

¹⁵ Employment Protection (Consolidation) Act 1978 (UK).

¹⁶ S 153(1) EPCA 1978 (UK).

offered. The scope of legislation, in effect, rests upon the common law tests as developed and applied over time by the courts. *Yewens v Noakes* itself was a tax case, in which the court decided that a clerk, earning a substantial yearly salary, was not a servant, any more than were “the manager of a bank, a foreman with high wages, persons almost in the position of gentlemen.”¹⁷ Following tests ascertain whether a person is or is not an employee in the legal sense.

D Common Law Tests to Ascertain Employment Relationship

It is important to ascertain the employee status because that is the starting point of legal implications involving his terms of employment. Relationship is the key to determining whether such status exists or not. Employee’s accountability towards his employer is the binding force of this relationship as evident from the following discussion on the evaluative tests.

1 The Control test

As a natural implication of the change from ‘servant’ to ‘worker’ the aspect of servant’s relationship with the employer shifted from ‘command’ to ‘control’. McCardie J, in the much-cited case of *Performing Right Society v Mitchell and Booker* emphasised the paramount importance of control in the following words:¹⁸

The final test, if there be a final test,....lies in the nature and degree of detailed control [by the employer] over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but is usually of vital importance.

The nature of relationship of an employer with an employee, and considerations regarding relevant terms of contract implied from the legislation, common law and customs were emphasised by the Court of Appeal in *Ferguson v John Dawson & Partners (Contractors) Ltd*.¹⁹ In this case, a construction worker was employed to remove scaffolding. Although he was paid at an hourly rate, no tax deductions were made. When working on the roof that had no guardrails, the worker fell and suffered injuries. He claimed damages for breach of statutory duty by the employer. The

¹⁷ *Yewens v Noakes*, above, 538 Thesiger LJ.

¹⁸ *Performing Right Society v Mitchell and Booker (Palais De Danse) Limited* (1924) 1 KB 762.

¹⁹ *Ferguson v John Dawson & Partners (Contractors) Ltd* (1976) 3 All ER 817.

contractor contended that he was a 'labour only' subcontractor, for whom they owed no duty of care. The Court of Appeal found that the presence of element of control among other considerations was most important and decided that the contract was one of service.

Difficulty arises when it is questionable whether control in theory and control in practice is at all present under the given circumstances. The situation occurred in the case of *Lee v Lee's Air Farming Ltd* that was decided by the Privy Council while reversing the decision of New Zealand's Court of Appeal.²⁰ Lee was the managing director of his company and owned 2999 shares out of 3000, and his wife held the remaining one share. He was employed as a pilot at an annual salary in his own company. While flying the service plane of the company he crashed onto the ground and died. His widow claimed compensation under the Worker's Compensation Act. The Court of Appeal expressed doubts as to how the deceased in his capacity as director could give orders to himself as pilot, and then in that capacity obey them as well. The Privy Council however, found that "the right to control existed even though it would be for the deceased in his capacity as an agent of the company to decide what orders to give."²¹

The possibility of control becomes illusory when the employee in question possesses specialised skills and qualifications, such as a physician or a surgeon. Whether, medical practitioners working in a hospital work under a 'contract of service' or 'contract for service' as hospital's vicarious liability depends on the nature of medical practitioner's contract. The early view of the Courts was that such professional persons were 'employed to exercise their profession to the best of their abilities according to their own discretion' and 'in no way were bound to obey the directions' of the employer. But in *Collins v Hertfordshire Country Council*, it was held that the Council as hospital authority had to accept liability for negligence of the resident house surgeon.²² The negligence consisted of ordering on the telephone a drug, procaine that was misheard as cocaine, and the error caused the death of the patient. The liability was not for the operating surgeon who carried on private practice

²⁰ *Lee v Lee's Air Farming Ltd* (1959) NZLR 393, CA.

²¹ *Lee v Lee's Air Farming Ltd* (1961) AC 12, PC.

²² *Collins v Hertfordshire Country Council* (1947) KB 598.

and whose status as employee could not be established but the Council itself for acting negligently by permitting a dangerous system to operate as it had the right to control the work of the house surgeon.

In *Cassidy v Minister of Health*, the learned Judge went a step further on the aspect of vicarious liability of the hospital as an employer of a surgeon. In his view liability did not depend on the question whether there was a contract of service but it had to be decided by asking the following questions:²³

Who employs the doctor or surgeon – is it the patient or the hospital authorities? If the patient himself selects and employs a doctor or surgeon ... the hospital authorities are, of course, not liable for his negligence, because he is not employed by them. But where the doctor or surgeon is employed and paid, not by the patient but by the hospital authorities, the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services.

In New Zealand, in *Cunningham v TNT Express Worldwide (NZ) Ltd*, the ‘interpretation of the contract’ approach was taken by the Court of Appeal under the ECA in deciding whether the person was a contractor or an employee.²⁴ The TNT case has been noteworthy for its emphasis on the terms of written contract between the parties and its rejection of the notion that the degree of control exercised by the alleged ‘employer’ was a decisive factor in determining the true nature of the contract.

As we moved from the ‘terms of contract’ to the ‘nature of relationship’, the legislature in New Zealand incorporated innovative changes in the employment law by enacting Employment Relationship Act 2000. The ERA brought with it the new concept of employee relationship to see “whether the person has engaged himself to perform the service as a person in business on his own account?” A negative answer means the person is indeed an employee. In *Smith v MMM Proprietary Ltd*, there was a much weaker control. The Authority found that Ms Smith had a considerable degree of autonomy in her business. Despite a profit sharing arrangement she was “not in the

²³ *Cassidy v Minister of Health* (1951) 2 KB 343, Denning LJ.

²⁴ *Cunningham v TNT Express Worldwide (NZ) Ltd* (1993) 1 ERNZ 695; (1993) 2NZLR 681 (CA).

business on her own account." Control was determinative in this case because only the owners decided the overall direction of the business.²⁵

2 *The Integration test*

It is important however to determine whether the work done by an employee is an integral part of the business or is an accessory to it. If the answer is yes, no matter whether the contract is 'of service' or 'for services' the person is an employee. The test is called the integration test, sometimes referred to as organisation test. The test represents a step further in stretching the extent of control by making it an element of general managerial powers of the employer. Denning LJ formulated the organisation test as follows:²⁶

The test of being a servant does not rest on the submission of orders. It depends on whether the person is a part and parcel of the organisation. Under a contract of service a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services his work although done for the business is not integrated into but only accessory to it. The test appears to be deceptively simple and logical but courts rarely applied it and it has not been regarded as a decisive test.

In New Zealand, the Employment Authority has never used the integration test conclusively although it has been referred to in conjunction with the other tests. In *Rathbun v Tan t/a Accord Maintenance* an office employee was said to be an integral part of the business in context of the control test.²⁷ Similarly, the Court of Appeal in *Challenge Realty Ltd v CIR* found that the real estate salespeople were under the control of the real estate agents and as such formed an integral part of the business.²⁸ The Court of Appeal adopted the approach of combining the control test with the integration test to assess the 'economic reality' of the relationship. Although the decision did look at the tests for independent contractors, the Court preferred to find

²⁵ *Smith v MMM Proprietary Ltd*, Employment Relations Authority AA99/02.

²⁶ *Roe v Minister of Health* (1954) 2 QB 66.

²⁷ *Rathbun v Tan t/a Accord Maintenance*, Employment Relations Authority WA 60/01.

²⁸ *Challenge Realty Ltd v CIR* (1990) 3 NZLR 42 (CA).

that "the nature of contractual relationship was largely dictated by the statute", i.e. the real estate salespeople were held to be employees under the Real Estate Agents Act.²⁹

3 *The Mixed test*

The tendency of the Courts to look for more factors instead of one decisive criterion resulted in the development of mixed test, labelled as the common sense approach of the reasonable man. In *Wood v Dobson*, the Compensation Court of New Zealand examined a verbal agreement for painting of a house.³⁰ The painter fell down from a ladder, suffered injuries and claimed compensation. Blair J found that the Painter at no time worked under the supervision of his employer, and was his own boss, as regards hours of work. Payment was not at an hourly basis, but the method of payment "was simply a convenient way of arriving at a fair price for the work." The learned Judge held that the contract was one for services and said:³¹

The Court should look broadly at all the circumstances, relating to these kinds of relationships and should not be precluded from finding that there was a contract of service simply because there was little direct control by the employer if other factors (such as the integration of employee into the employer's business) indicated that the essential nature of the relationship was one of the master and servant... This is a case where the various tests, when applied, point strongly to a contract for services. It is a case where lack of direction and control by the employer is dominant and its effect is not lessened to a material extent by evidence, which in other circumstances might afford support for a contract of service.

The decision illustrates that the Courts in New Zealand adopted a more adventurous 'common sense' approach than their counterparts in Britain, where the *Ready Mixed Concrete* case developed a new mixed test.³² The company for policy reasons had introduced an owner-driver system for cartage of concrete. After entering into delivery contract with the company, one Mr Latimer acquired a truck on hire purchase that was meant for concrete carrying, and had to be painted in the company's colours. Latimer was responsible for maintaining the truck and paying the

²⁹ S 2(1), Real Estate Agents Act (New Zealand Statutes, Vol 1, 1-62, Brookers, Wellington, 1976) 76(1).

³⁰ *Wood v Dobson* (1969) NZLR 60, Comp Ct.

³¹ *Wood v Dobson*, above, 61 Blair J.

³² *Ready Mixed Concrete* (1968) 1 All ER 433.

running expenses. He had to wear the company's uniform and carry out all reasonable orders. He could employ substitute drivers but only with the company's approval. Payment was calculated in accordance with the concrete carried, subject to a minimum sum. Lastly, the contract expressly declared Latimer to be an independent contractor. It was decided that the contract was for the services and Latimer actually was an *independent contractor*.

4 *The Intention of the Parties*

The intention of the parties is still regarded as important in deciding the character of the contract. The parties may seek to make an expressed contract of a particular kind. But it does not bind the Courts to hold that they have succeeded. The Court considers it only as a factor in determining the nature of the contract. In *Ferguson v John Dawson & Partners (Contractor) Ltd*, the majority of the Court of Appeal held that the intention of the parties declaring a worker, a self-employed independent contractor under the terms of employment, ought to be wholly disregarded if the remainder of the contractual terms governing the relationship show a contract of service.³³

The intention of the parties at the time of contracting the service may be relevant to the Court in deciding the fairness of dismissal of an alleged employee. In the case of unfair dismissal in *Massey v Crown Life Insurance Co*, Ferguson's case was distinguished by the Court of Appeal holding that when a situation is ambiguous "so that it can be brought under one relationship or the other, it is open to the parties by agreement to decide what the legal situation between them shall be."³⁴ Massey originally was employed as a branch manager, but later the parties expressly changed the contract in such a way that he changed his identity to "John L Massey & Associates", and continued to perform the managerial duties as self-employed independent contractor. The arrangement was terminated and Mr Massey claimed compensation for unfair dismissal. The Court unanimously held that he was not employed under a contract of service, Lord Denning said:³⁵

³³ *Ferguson v John Dawson & Partners (Contractor) Ltd* (1976) 3 All E R 817.

³⁴ *Massey v Crown Life Insurance Co* (1978) 1 WLR 676.

³⁵ *Massey v Crown Life Insurance Co*, above, 681 Denning J.

In the present case there is a perfectly genuine agreement entered into at the instance of Mr Massey on the footing that he is self-employed. He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as self-employed, he must lie on it.

The ERA provides that in determining the real nature of the relationship, the Court or authority must consider all the relevant matters (including the intention of the parties), but should not treat the 'label' contractor or employee as determinative.³⁶ The full bench of Goddard CJ, Travis and Colgan JJ considered the statutory provision in *Koia v Carlyon Holdings Ltd*. The Court stated that while intention is still relevant it is no longer decisive. The Court held that intention is only one of the several matters that the Courts must consider. Such matters may include control of working or evidence of carrying on business on one's own account. Relying on the 'label' of relationship, the Court noted that the real nature of relationship evolves in a way that is different from the nature of relationship at the time of its formation. The Court stated "while the Court or authority will be slow to overrule the intention of the parties...it is more concerned with the substance than form."³⁷ Therefore, the way the relationship works in practice is relevant when determining its real nature.

5 *The Totality test*

The test was developed and applied in determining the employee status in a case where the Court examined the total situation by adopting a common sense approach. In *Market Investigations Ltd v Minister of Social Security*, Cooke J combined the key element of control with the employee's duty of providing personal services. According to him 'control' can no longer be regarded as the sole determining factor. The factors that might be of importance are whether the man performing the services 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

³⁶ S 6(3) Employment Relations Act 2000 *Mazengarb's Employment Law* (3ed, Butterworths, Wellington, 2001).

³⁷ *Koia v Carlyon Holdings Ltd*, Employment Court Auckland AC 56/01.

he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.³⁸

In New Zealand, in *Perry v Satterthwaite*, the company employed interviewers for short periods. They worked when they wished; but they visited specific persons, and asked only prescribed questions on the format given by the company. It was held on balancing the weight of control as against capital risk or management involvement, that they were employees. Blair J said "the Courts should not be overawed by the control or lack of control, but should look broadly at the whole transaction."³⁹ Applying the totality test, he set out the indicia of contract of service as:⁴⁰

- a. The master's power of selection
- b. Payment of wages and other remuneration
- c. Master's right to control the manner of doing work
- d. Master's right of suspension or dismissal

And, the fifth indicatum

- e. The worker is integrated into the employer's organisation as a part and parcel of it and not as an accessory to it.

In *McMullin Holdings Ltd v Auckland Clerical Workers Union*, Blair J reviewing the preceding cases on the subject reaffirmed his earlier view by saying:⁴¹

It does seem to me that in the type of case with which we are now concerned the correct approach is to look broadly at the whole transaction and apply various tests, which the Courts have from time to time suggested should be used, in deciding the category.

The growing tendency of the companies to source out work to manpower supplying agencies in peak situations has fuelled the demand for temporary workers. In agency assignment, it was held in *Montgomery v Johnson Underwood Ltd* that a person engaged by an employment agency for a long-term with one client was not an

³⁸ *Market Investigations Ltd v Minister of Social Security* (1968) 3 All ER 732.

³⁹ *Perry v Satterthwaite* (1967) NZLR 718.

⁴⁰ *Perry v Satterthwaite*, above, 720 Blair J.

employee of the agency, as it exercised little or no control over her work.⁴² In New Zealand, the Taxation Review Authority held that an employment agency, which introduced certain specialists to its client and took responsibility for paying their fees, was not their employer, as they were not integrated into the agencies' business.⁴³ In contrast however, in *Drake Personnel Ltd v Commissioner of State Revenue* where an employment agency provided temporary workers for its clients, the agency was held to be their employer according to the ordinary common law concepts.⁴⁴ The workers were held to be the casual employees of the agency, notwithstanding that the client exercised day-to-day control over them.

As a natural implication, the rights of such employees working under the relationship of employment are protected. In New Zealand, apart from the ERA, the rights of the employees are protected under the local laws and international covenants and conventions. These employee rights range from wages, benefits, holidays, wrongful dismissal, and discrimination protection onto the individual's human rights.

III LEGISLATIVE PROTECTION TO EMPLOYEES IN NEW ZEALAND

In New Zealand, the Wages Protection Act provides, subject to certain exceptions that the payment of wages must be made to the employees in money.⁴⁵ Wages include salary, overtime, time and piece wages, bonus and other special payments paid to an employee. The Act covers all employees but excludes independent contractors. The payment to an independent contractor, in contrast, represents a price paid to him for rendering certain professional services. An independent contractor can perform the work through his servants, while an employee under the Act must do it in person, and must bind himself to do so for wages. As an exception to the general rule that all wages must be paid in money, an employee may give his consent to the employer allowing him to make the payment by cheque, postal order, money order or electronic transfer at the bank. The Act provides that the entire amount of wages due to the employee must be paid when it becomes payable. In no circumstances it is lawful for

⁴¹ *McMullin Holdings Ltd v Auckland Clerical Workers Union* (1969) NZLR 530, Art 16 Ct.

⁴² *Montgomery v Johnson Underwood Ltd* (2001) TLR 212 (CA).

⁴³ Case M122, Taxation Review Authority, TRA No 89/76; Dec 108/90. Decision: 12 Oct 1990.

⁴⁴ *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635 (CA).

⁴⁵ S 7 Wages Protection Act 1983.

the employer to require the employee to spend his or her wages or any part of it in any particular way. In consonance with wage protection, the Minimum Wages Act prescribes the minimum rate of wages payable to each class of employees – including homeworkers. The rate is prescribed by the age of the employee. The protection applies to statutory wages and every worker is entitled to receive not less than the minimum applicable wage rate.⁴⁶

Now looking at the legislative protection against wrongful dismissal from work in New Zealand. In case of wrongful dismissal from employment a worker has two legal avenues to approach. Either, to look for the support of his union to try and gain reinstatement in his job and apply for compensation, or to take a common law action for wrongful dismissal against the employer.⁴⁷ The subject of wrongful dismissal is covered under Convention 158 of the ILO. Although New Zealand has not ratified it, the Convention sets out the standards for protecting the employees against unjustified termination from their employment. In *Eketone v Alliance Textiles (NZ) Ltd*, the Court of Appeal endorsed the use of international conventions in appropriate circumstances.⁴⁸ Another area of significance that concerns an employee is discrimination at workplace. In the circumstances of perceived discrimination at workplace an employee has a choice of forum, he can seek remedy either under the ERA or the HR Act. The subject has been discussed in a separate section in detail later in the paper.

IV THE CHANGING CONCEPT OF EMPLOYEE

Whilst discussing the 'employee' in the common law countries including New Zealand, one aspect comes to light that as the law becomes more inclusive in ascertaining as to 'who is' an employee to protect his individual rights, so does the employer in rephrasing the meaning of the term to safeguard his business interests. The aim of every employer is to protect his business more than protecting the rights of an individual employee. This he does by limiting his liability under the legal

⁴⁶ Minimum Wage Act 1983, ss 4(1) and 6.

⁴⁷ Gordon Anderson *The Origins and Development of the Personal Grievance Jurisdiction in New Zealand* (1988) 13 NZJIR 257.

⁴⁸ *Eketone v Alliance Textiles (NZ) Ltd* (1993) 2 ERNZ 783 (CA)

implications of labour law without losing the actual control over the employee's terms of employment.

The employer makes it convenient to sub-contract the work to an individual rather than engaging him as an employee in his enterprise. This according to Hugh Collins is termed as vertical disintegration. Firms using vertical integration are avoiding the employer-employee relationship in favour of subcontracting, franchising, concessions and outsourcing.⁴⁹ The practice of subcontracting has nearly defied all attempts of classifying the employees and has given rise to new implications of how to devise duties that are implied on an employee but not on a sub-contractor. The Courts have been trying to do the balancing act to a very refined degree by looking at the entire contract and examining all pertinent obligations of an employee towards his employer. A classification of the employee's implied duties in essence are the ramifications of servant's basic obligation to serve his master faithfully.

A The Common Law Implications of Employee Duties

The relationship of employment expects from an employee a set of duties that he owes to his employer similar to what a servant used to owe to his master. Batt in his classic work has set out the duties of an employee:⁵⁰ duty of personal service, faithful service, careful service, to indemnify the master, obedience, disclosure, secrecy and to account. It is obvious that faithful service means duty to disclose certain facts to the master, and not to disclose the master's affairs to outsiders. Careful service and indemnification are the instances of degree of fidelity that is expected from an employee.

1 Personal and faithful service, duty of fidelity

The employee must be present at his workplace during his stipulated hours of work, ready and willing to perform all the duties required by his contract. Personal service is an essential element in most employment contracts, implied by law. Under the contract an employee can be absent for illness but cannot send another person to

⁴⁹ Hugh Collins *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws* (1990) 10 Oxford JLS 353.

⁵⁰ G J Webber Batt, *Law of Master and Servant* (5 ed, Pitman, 1967).

perform his duties. In his absence a substitute employee works but under a separate contract and not as a depute on his behalf. Similarly, a master cannot transfer any of his employees to another employer without their consent. The principle in *Nokes v Doncaster Amalgamated Collieries Ltd* is a strong authority against the transfer of 'right to service' and the corresponding obligation to carry on with the employment as a worker, in case the employer is changed by reason of takeover or transfer of enterprise.⁵¹

In modern employment context, especially when the employer is a corporation, personal relationship looses bond, and personal performance is expected from an employee. The card access system at the place of work and prohibition to swipe another employee's card purports to ensure personal presence and personal service. The employee must devote stipulated working hours, whether working during the day or night, to his employer's business but in his spare time can do what he wishes. He can do such duties, which do not interfere with the performance of his duties for the principal employer or else it would constitute a breach of confidence.

An exception to 'implied duty to work exclusively for one master' is part-time or casual work where the time of an employee is divided among several employers. However, it does not affect the principle that the contractual hours of work in the service of one particular employer must be exclusively reserved for his job. When an employee takes up another job in his spare time that adversely affects the interests of his primary employer it may amount to breach of faithful service. The dividing line between the employee's freedom to use his spare time and employer's right to protect his business from harm from such use of time by his employee, and to decide what conduct constitutes breach of fidelity is a question of fact that is decided by the court on merits in each case. The case of *Hivac Ltd v Park Royal Scientific Instruments Ltd* discusses the issue of spare-time principle:⁵²

Five employees of Hivac Ltd obtained spare-time jobs with Park Royal Ltd. Both the companies were manufacturers of deaf aids, and had business in direct competition. The work was highly skilled, and the workers applied the skill and experience gained

⁵¹ *Nokes v Doncaster Amalgamated Collieries Ltd* (1940) AC 1014, HL.

⁵² *Hivac Ltd v Park Royal Scientific Instruments Ltd* (1946) Ch 169, Greene J.

in the primary employment. But there was no evidence that any of the employees used confidential information or trade secrets learned at the primary employment.

Despite this the Court held that as the workers agreed to work with Park Royal, which they knew will harm their employers, they committed a breach of fidelity. Injunction to employ these workers was granted against the Park Royal Company. The reason for the decision was not the mere fact that the workers were having a spare time job. The reason was that they were in a position where they could – though there was no evidence that they actually did – misuse confidential manufacturing processes. Another reason was that by giving the benefit of their skill to a competitor they abused their duty of *faithful service*.

The decision in *Hivac's* case may be regarded as an exception to the freedom of spare time principle, based not on the fact of employee working for another employer outside the normal hours of work with the primary employer, but on the identical nature of enterprise and the consideration of potential disclosure of confidential information. In *Seaboard Airlines Inc v TGWU* it was held that working even for a competitor would not necessarily breach the implied obligation of faithful service if the work were of such a different character that there would be no conflict of interest and no damage to the primary employer.⁵³

In *Evening Standard Co v Henderson*, a contract of employment contained a clause requiring the employee to give a year's notice of termination, together with an express agreement not to work for a competitor while the contract was in force. He quit to work for a rival firm on a month's notice. The Court of Appeal upheld an injunction in the case. The employees' action was a repudiatory breach of contract from his side, but the employer had not accepted the resignation and the contract was therefore still in force.⁵⁴ As the employer undertook to pay the employee's normal salary and to allow him to work during his notice period, the employee was not starving. It was decided that he was not in an urgent need of another job.

⁵³ *Seaboard Airlines Inc v TGWU* (1973) ICR 458.

⁵⁴ *Evening Standard Co v Henderson* (1987) ICR 588.

2 *Careful service, aspect of incompetence*

In carrying out his tasks an employee is under a duty to exercise reasonable care and skill. This obligation has two aspects: first, not to cause damage to the employer's property and business; and second, not to cause bodily harm to the master, fellow-employees, third parties or to himself. The common law implies a warranty that a person accepting a particular job possesses the required skill and competence, and by the mere fact of acceptance he impliedly promises the exercise of reasonable care. Willes J formulated the law on this aspect in *Harmer v Cornelius* as:⁵⁵

When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. An express promise or express representation in the particular case is not necessary.

Lord Viscount Simonds restated the legal basis of servant's duty of care in *Lister v Romford Ice and Cold Storage Ltd* as:⁵⁶

The servant owes a contractual duty of care to his master, and the breach of that duty finds an action for damages for breach of contract...It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in performance of his duty is a clear example.

Occasional lapses of attentive service or simple acts of carelessness do not necessarily amount to negligence, but depending on the degree of carelessness the employer may be entitled to summarily terminate the contract. In *Baster v London County Printing Works*, where as a result of the careless handling of a printing machine by the machinist damage of £30 occurred, Darling J discussed the matter of degree as follows:⁵⁷

It was argued ...that mere forgetfulness could not amount to neglect; but...to forget to do a thing which is of great importance, you should remember, may well show such a careless regard to your master's interest as amounts to neglect. Neglect often arises from forgetfulness as from anything else; and, if the forgetfulness is with

⁵⁵ *Harmer v Cornelius* (1858) 5 CBNS 236, Willes J.

⁵⁶ *Lister v Romford Ice and Cold Storage Ltd* (1957) AC 555.

⁵⁷ *Baster v London County Printing Works* (1899) 1 QB 901.

respect to an important thing it may be good ground for dismissal...though not in every case.

The learned Judge went on to say that while some trivial acts might not even justify complaint, others may cause considerable damage, and amount to serious neglect of duty. As an example he mentioned the railway signalman forgetting to give the required signal. He concluded by saying:⁵⁸

It was argued that forgetfulness was not a neglect unless it was habitual, but how can any rule be laid as to how many times - once, twice or more - a man may forget before his conduct amounts to neglect justifying dismissal? The line cannot be drawn; the question must depend upon the particular circumstances of each case.

3 *Indemnification of loss caused by carelessness*

It follows from the duty of care that the servant must indemnify his master for loss, damage and expenses consequent to the employees' negligent conduct. Employees entrusted with their employers' property must guard it against theft. In *Superlux v Plaisted*, fourteen vacuum cleaners were stolen from the van of Mr Plaisted, a supervisor-representative. The Court held that he was in a responsible position and owed a duty to exercise care to safeguard the equipment in his charge against the possibility of theft.⁵⁹ The decision followed the principle of duty of care that if the goods were in custody of the servant he was prima facie liable unless he could prove that he used reasonable care on his part. Thus the supervisor had to pay the indemnity.

In *Lister's* case also, the House of Lords held that the driver was liable to indemnify the employer company for the sum paid out as damages by it under its vicarious liability, and the duty of indemnification arose from the breach of contractual obligation to use reasonable care.⁶⁰ In fact not the employer but its insurers sued Lister on the doctrine of subrogation, in the name of the employer. After the judgment was made, some fears were expressed that insurance companies would enforce their rights in an unfair manner but in England the British Insurance

⁵⁸ *Baster v London County Printing Works*, above, 903 Darling J.

⁵⁹ *Superlux v Plaisted* (1958) CLY 195.

⁶⁰ *Lister v Romford Ice and Cold Storage Ltd* (1957) AC 555.

Association undertook that such rights would be exercised only when there was an evidence of collusion or wilful misconduct.

4 *Obedience and co-operation*

The employee owes an implied obligation to obey lawful and reasonable orders of the employer. This is a condition essential to the contract of service. What is reasonable depends in part on the substance of the terms of contract, and the employee's job title and description. Rank and professional status may also be relevant. The two words used as one expression 'lawful and reasonable' in relation to orders given by the master to his servant connotes that the orders:⁶¹

- (a) Are not illegal in the sense of requiring the servant to perform any act contrary to law,
- (b) Are within the scope of servant's contractual obligations, and
- (c) Do not demand the performance of any dangerous task.

All the three requirements should be present at the time of giving the orders. An order, though lawful, if unreasonable may be disobeyed but whether or not the employee's decision to do so was correct depends on the subsequent findings of the court. Refusal to carry out the work may not be justified on general grounds unless pointing to some specific aspect that renders the execution of the order unsafe. In general, an employee is justified in refusing to obey an order that might expose him to physical injury, infectious disease, or danger of life, unless the very nature of the employment indicates that he has undertaken the peril of the work. Miner, policeman, explosives expert, nurse in a fever hospital, lion tamer, or animal keeper in a zoo are the examples of accepting such peril at work.⁶²

On the subject of lawful orders, in *New Zealand Bank Officers IUW v Bank of New Zealand*, the Arbitration Court held that the Bank, subject to the terms of employment contract had the right to direct the employee to work anywhere it wished.

⁶¹ A Szakats *Law of Employment* (3 ed, Butterworths, Wellington, 1988) 171.

⁶² *James v Wellington City* (1972) NZLR 70 SC.

The bank had such transfer rights under the transfer policy, and any transfer by way of demotion could be reviewed separately under the grievance procedure.⁶³

Disobedience without just reason may give grounds to summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service. The condition that, unless he does so, relationship so to speak is struck down fundamentally. A single act of refusal to obey an order in the light of surrounding circumstances was held to be an unjustified dismissal. Lord Evershed, in *Laws v London Chronicle (Indicator Newspaper) Ltd* said:⁶⁴

One act of disobedience...can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract...the disobedience must at least have the quality that it is 'wilful': it does connote a deliberate flouting of the essential contractual conditions.

In the case of *New Zealand Printing Union v Clark and Matheson Ltd*, dismissal was justified when the employees returned late from a lunch break contrary to an express instruction and with knowledge that dismissal had already been threatened.⁶⁵ An unlawful order, which the employee is always entitled to disobey should be an immediately threatening danger by violence or disease to the person of the servant and nothing less as said by the Privy Council in *Bouzouru v Ottoman Bank*.⁶⁶ It is, however, not clear why the danger should be 'immediately threatening' to life. In principle, there seems to be no reason why, if long hours could be shown to induce a stress related illness. Why an employee should not be entitled to disobey the orders to carry on working beyond the point of risk to his health, although the impact on his health may be cumulative rather than immediate.

B Post-Contractual Restraints on Employees to Enter Competition

An employer perceives the gain in knowledge and skills of his employee as a threat to his own business in case the employee quits. No employer wants that the employee should use such gains of learning to create a competition to his business.

⁶³ *New Zealand Bank Officers IUW v Bank of New Zealand* (1980) ACJ 155.

⁶⁴ *Laws v London Chronicle (Indicator Newspaper) Ltd* (1959) 2 All ER 285.

⁶⁵ *New Zealand Printing Union v Clark and Matheson Ltd* (1984) ACJ 283.

Legal safeguards in this respect are known as post-contractual restraints. An agreement by the employee not to compete after the contract is over may be struck down unless the employer can point to a more specific 'proprietary interest' that the agreement has designed to protect. This proprietary interest has to be some confidential information, details of customer base, or skill bank of its existing employees. In *Herbert Morris Ltd v Saxelby*, a term under which an employee agreed not to compete in the relevant trade for a period of seven years after leaving his employment was struck down.⁶⁷ Where an employee acquires specialist knowledge of customers through his or her contacts with them, the employer may legitimately restrain the employee from soliciting them for business after he or she has left the employment, as it happened in *Fitch v Dewes*.⁶⁸

In the matters of confidential information, the courts draw a distinction between specific trade secrets, such as secret designs or recipes, and general know-how. The employer can restrain the use of the former after the employment has ended, but not the latter. An express term may help in clarifying the kind of information that is sufficiently precise to fall into the category of trade secrets. In *Faccenda Chicken Ltd v Fowler*, the defendant employee resigned as sales manager of the plaintiff and stood in competition to it, taking on many of his former colleagues with him. His contract did not contain any express term governing the use of confidential information, or any express agreement not to compete post-contract. Neill LJ refused to grant an injunction and his views were upheld in the Court of Appeal. The information used by the defendant was in the nature of work, which he had picked in the course of his employment and did not rank as a trade secret. Even if there had been an express non-competition clause, it would not have led to granting of an injunction. According to Neill LJ "a restrictive covenant will not be enforced unless the protection sought is reasonably necessary to protect the trade secret or to prevent some personal influence over customers being abused to entice them away."⁶⁹

However, in *Roger Bullivant Ltd v Ellis*, an employee while still employed, acquired a company for the purpose of competing with his employer, and on leaving

⁶⁶ *Bouzouru v Ottoman Bank* (1930) AC 271.

⁶⁷ *Herbert Morris Ltd v Saxelby* (1916) 1 AC 688.

⁶⁸ *Fitch v Dewes* (1921) 2 AC 158.

his employment took with him an index of customer's names. His contract contained an express term under which he undertook not to enter into similar employment for a period of one year after his employment ceased. The employer sought an injunction to enforce this term. The information concerning customers was precise in nature and had been illicitly acquired, and therefore the injunction was allowed.⁷⁰

In *Bullivant*, the purpose of the injunction was to prevent the ex-employee from making unfair use of the information he had acquired, but after a period had elapsed competition would be permitted. This was an application of the 'springboard doctrine'. In essence the doctrine provides that the person entrusted with information while still employed should not get a start over others by using the information he received in confidence. He should not get a start without paying for it. It may not be a case for an injunction or even an account (of profits), but only for damages, depending on the worth of confidential information in saving him time and trouble.

C Legal Principles of Equality of Treatment at Workplace

Of all the concepts pertaining to employee interactions, development of the concept of equality of treatment at workplace has been most significant. It has enhanced the level of dignity of the employees apart from raising the level of awareness about their employment rights. Equality of treatment at workplace means 'like must be treated alike' in the sense that access to benefits must not be based on an individual's sex or race. In the legal sense it entails an examination of the effects of policies, practices, and requirements, which while facially neutral, may result in institutionalised disadvantage to the members of one sex or a particular racial group. The two types of inequality of treatment based sex or race, and policies or practices are known as 'direct' and 'indirect' discrimination.

It is rather surprising that legislation in this area is relatively recent and dates back only to 1965. The principle of equal treatment at workplace is heavily reliant on the model first established by the US Civil Rights Act.⁷¹ The principle of equal pay for equal value of work was first ratified at the ILO Convention No 100 in 1951. The

⁶⁹ *Faccenda Chicken Ltd v Fowler* (1986) ICR 297.

⁷⁰ *Roger Bullivant Ltd v Ellis* (1987) ICR 464.

⁷¹ US Civil Rights Act 1964.

anti-discrimination legislation across Europe borrowed directly from the model established in the US Civil Rights, Title VII. The Civil Rights Act was the federal legislature's response to the civil rights movement and its campaign for equality of access to facilities and jobs and for equal treatment within the employment. The main target of the Act was discrimination based on race and colour. Opponents of the measure who initially thought it might discredit it added a prohibition on sex discrimination at a later stage. In other respects though, the addition of sex discrimination was a natural extension of an earlier measure, the Equal Pay Act.⁷² The Act provided equal pay for work of equal value to both the sexes.

1 Equal pay for work of equal value

The principle of equal treatment to employees of any race and sex at the place of work takes a distinctive form in the context of pay. In New Zealand, the EPA implies into the employment contracts an equality clause.⁷³ This has the effect of modifying the terms of the contract to ensure that they are no less favourable than those of comparable person of the opposite sex in the same employment, though the equality clause affects all contract terms and not simply those governing pay. Apart from EPA, the circumstances giving rise to a complaint of pay discrimination on gender basis may also be proceeded with as an unlawful discrimination under the Human Rights Act 1993.

In terms of employment law, a female worker (for example) is permitted to compare her pay and conditions with those of a man who is employed on either 'like work', or work 'rated as equivalent' under a job evaluation scheme. The law in UK does not provide for enforcement of equal pay based on comparisons between different kinds of jobs. The comparison is essentially based on the concept of equal pay for work of equal value.

On the issue of economic equality, article 119 of the EC treaty requires the member states to 'maintain application of the principle that men and women should receive equal pay for equal work'; for this purpose it defines pay as "the ordinary basic or minimum wage or salary, whether in cash or in kind, which the worker

⁷² Federal Equal Pay Act 1963.

receives, directly or indirectly, in respect of his employment from his employer.” In *Dugdale v Kraft Foods Ltd*, women quality control inspectors who were employed on day shifts compared their pay with those of men doing the same job on a regular night shift because.⁷⁴

The men received a higher basic rate of pay. All employees received shift premia of some kind, but the women were restricted from working at nights by the legislation, which was in force at that time. The Employment Appeal Tribunal held that ‘the time at which the work is performed should be disregarded when considering the differences between the things which the woman does and the things which the man does’. Nor was this unjust, since ‘where the work done is same, and the only difference is the time at which it is done, the men will be compensated for the extra burden of working at night or on Sundays by the shift payment or premium. There seems no reason why the women should not have equality of treatment in respect of the basic wage.

The second basis upon which a claim for equal pay occurs is; when an employee and her comparator are employed on ‘work rated as equivalent’ by a job evaluation scheme. The assumption is that the employer has carried out a voluntary job evaluation. Following the ruling of ECJ in *EC Commission v United Kingdom* the concept of job evaluation came into prominence. The Court held “the British legislation did not permit the introduction of a job classification system without the employer’s consent. Workers were therefore unable to have their work rated as being equal in value with comparable work if their employer refused to introduce a classification system.” The argument of the defendant that “the criterion of work of equal value was too abstract to be applied by the courts” was brushed aside.⁷⁵ The Act was then amended to incorporate the head ‘work of equal value’.

In *Rummler v Dato-Druck GmbH* the ECJ was called to consider the position under a job evaluation process in which high weightings were attached to the factor of muscular effort in particular jobs. The Court ruled that a job evaluation process has to operate ‘objectively’ and ‘must not be organised in such a manner that it has the practical effect of discriminating against workers of one sex.’ It held that the use of

⁷³ S 3 Equal Pay Act 1972.

⁷⁴ *Dugdale v Kraft Foods Ltd* (1976) IRLR 368.

⁷⁵ *EC Commission v United Kingdom*, Case 61/81 (1982) ICR 578.

criterion of muscular effort should be done with reference to the job classification system. While comparing jobs, the classification system should take into account the factors in relation to which women workers may have a particular aptitude. The use of criterion favouring one sex was justifiable only by reference to "the nature of the job when such a difference is necessary in order to ensure a level of pay appropriate to the effort required by the work and thus corresponds to a real need on the part of the undertaking."⁷⁶

2 *Discrimination at workplace*

Under common law, direct discrimination denotes unequal treatment based on sex, marital status or racial grounds of a person, while indirect discrimination describes inequality resulting from common application of a rule or practice which is neutral on its face, but has disadvantageous effect upon the members of one sexual or racial group as opposed to other. A person is taken to discriminate against a woman if "on the ground of her sex he treats her less favourably than would treat a man."⁷⁷ This provision applies equally to discrimination against a man on the grounds of his sex. Discrimination on the ground of a person's marital status is also prohibited.

Direct discrimination therefore rests on what in the United States is known as 'disparate treatment' and indirect discrimination on 'disparate impact'. The Supreme Court in *Griggs v Duke Power Co* [discussed later] arrived at the concept of disparate impact, where the use of aptitude test tended to exclude the members of racial minorities from access to particular grades or occupations.⁷⁸ The first case that reached the higher courts in England was *Peake v Automotive Products Ltd*, where Mr Peake challenged his employer's practice of allowing female shop floor workers to leave five minutes earlier than their male colleagues at the end of the work shift. The employer claimed that this was done on the grounds of safety. The Employment Appeal Tribunal held that he had been unlawfully discriminated against. However, the Court of Appeal allowed an appeal, and Lord Denning MR thought that "it is not discrimination for mankind to treat womankind with the courtesy and chivalry [by

⁷⁶ *Rummler v Dato-Druck GmbH*, Case 237/85 (1986) 2101.

⁷⁷ S 1(1)(a) Sex Discrimination Act 1975 (UK).

⁷⁸ *Griggs v Duke Power Co*, 401 US 424 (1971).

allowing them to leave the workplace five minutes early] which we had been taught to believe is right conduct in our society.”⁷⁹

This was not a very convincing argument, since the five minutes extra working time per day, which the men had to complete, took a different dimension when it was translated into an extra half-hour of work each week. This dictum did not stand the test of time, and the *Peake* is now probably best regarded as based on misreading of the Act. Some of its effects were undone in *Ministry of Defence v Jeremiah* in which Lord Denning repudiated his earlier comments about chivalry, and attempted to justify the outcome in *Peake* on *de minimis* grounds.⁸⁰

In *Jeremiah*, male employees in an ordnance factory were obliged, as a condition of doing overtime, to undertake dirty and uncomfortable work in the factory's colour bursting shop. This condition was not imposed on their female colleagues, partly because they objected to undertaking such work. The Court of Appeal upheld a complaint of sex discrimination and implicitly accepted the views presented in *Peake*, namely the motives were irrelevant and that a simple test of causation should apply.

Under the EC Law, Directive 76/207 on equal treatment in employment expressly prohibits ‘any discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status’ subject only to certain exceptions. Special treatment in favour of pregnant workers was exempted from the scope of equality principle at European level, under the grounds that such protection might otherwise be classified as a form of unlawful positive discrimination in favour of women. In *Dekker v VJV Centrum*, ECJ held that ‘a refusal to employ because of financial consequences of absence due to pregnancy must be deemed to be based principally on the fact of pregnancy. Such discrimination can not be justified by the financial detriment suffered by the employer during employee's maternity leave.’⁸¹ Direct discrimination occurs where the ground relied on by the perpetrator for its action [in *Dekker* the employee's impending absence on account of pregnancy] is an

⁷⁹ *Peake v Automotive Products Ltd* (1977) QB 780.

⁸⁰ *Ministry of Defence v Jeremiah* (1980) ICR 13.

⁸¹ *Dekker v VJV Centrum*, Case 177/88 (1991) IRLR 27.

immediate consequence of the sex of the victim, so that 'but for' the victim's sex they would not have been subjected to unequal treatment.

In New Zealand Bill of Rights Act there has been no definition of direct discrimination. Rather than defining, the Human Rights Act lists certain behaviours and activities within particular area including employment that constitutes unlawful discrimination. In general, unlawful discrimination occurs if there is distinct or different treatment of an employee that results in burden, disadvantage, obligation, or detriment to that employee. The disadvantage, burden, or detriment complained about may be in any form e.g., financial loss combined with humiliation, loss of dignity and injury to feelings such as unfavourable terms of employment, refusal of employment, or dismissal. If a person is treated differently but has not suffered a detriment he will not be able to establish the elements of unlawful discrimination. The grounds of discrimination that are prohibited in the Act are; sex, marital status, religious belief, colour, race, disability, and sexual orientation.⁸² A ground of discrimination that is not listed under the HR Act is not a prohibited ground.

With the incorporation of aspect of employee discrimination in the ER Act, its effect has been extended to cover all the prohibited grounds of discrimination listed in the HR Act. The provisions in the ER Act largely mirror those in the HR Act including the exceptions. In addition, the ER Act also covers discrimination on the grounds of involvement in trade union activities. If there is discrimination in employment, then depending on the type of discrimination, an employee has a choice of using either the personal grievance procedure or the human rights procedures except his acts of involvement in the union activities.⁸³

3 *US Concept of 'Disparate Impact'*

The concept of indirect discrimination has its origins in the US Supreme Court case law. In *Griggs v Duke Power Co*, the apex Court held that the notion of discrimination also applied to a situation arising out of common application of a rule or practice which in itself was free of racial bias.⁸⁴ Prior to coming in force of the

⁸² S 21, Human Rights Act (New Zealand Statutes, Vol 2, 33-87, Brookers, Wellington, 1993) 1386.

⁸³ *Mazengarb's Employment Law* (3 ed, Butterworths, Wellington, 2001).

⁸⁴ *Griggs v Duke Power Co*, 401 US 424 (1971).

Civil rights Act, the employer had formally discriminated against black employees at *Duke Power* by offering jobs in grades with a higher level of pay and conditions to whites only. After the Act came into effect, this practice was discontinued, but as a condition of transfer to the jobs in higher grades the employer made it a policy that an employee should pass a standardised educational test. It was found that the employer had not introduced this test with any intention of perpetuating discrimination against blacks, but the test was unrelated to the requirements of the job in question. At the same time it tended to disqualify black applicants at a higher rate than the white applicants. The Court held that the use of such a test by the employer was prohibited. According to Burger CJ "the Act prescribes not only overt discrimination but also the practice that is fair in form, but discriminatory in operation. The touchstone of such practice is business necessity. If an employment practice operates to exclude members of one racial group and is unrelated to job performance, the practice is prohibited."⁸⁵

However, in *Wards Cove Packing Co v Atonio*, the Supreme Court reversed its earlier stance and held that statistical evidence of a racial imbalance between job grades did not, in itself, raise a *prima facie* case of adverse impact. The alleged victim shall point out a particular employment practice that is responsible for producing the effect in question.⁸⁶ More importantly, the Court also held that once a case of adverse impact was made out, the defendant then had the burden of providing a justification for the practice in question and as against this the burden of showing that this justification was inadequate rested with the plaintiff. This prompted the US Congress to pass a further measure, the Civil Rights Act 1991, which amended Title VII and introduced for the first time in the US law a statutory definition of 'adverse impact'. This now provides:

a An unlawful employment practice based on disparate impact is established under this title if a complaining party demonstrates that the respondent uses a particular employment practice that causes disparate impact on the basis of colour, religion, sex or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

⁸⁵ *Griggs v Duke Power Co*, above, 428 Burger CJ.

b With respect to demonstrating a particular employment practice that causes disparate impact...the complaining party shall demonstrate that each particular challenged employment practice causes disparate impact.

4 *Prohibited Grounds of Employee Discrimination in UK*

In UK – sex, marital status and race are the only grounds upon which employment discrimination is generally prohibited. UK has not ratified the ILO Convention No 111 on Discrimination in respect of Employment and Occupation. The convention refers to discrimination as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin.” Whereas New Zealand has gone beyond this list and have the legislative provisions in place regarding equal treatment based on age, disability and sexual orientation. The harassment of sexual or racial kind depends on how far the victim can show that she would have been treated differently but for her sex or race. The implications involving sexual harassment can be best understood in the light of *Porcelli v Strathclyde Regional Council*:⁸⁷

The applicant worked as a laboratory technician with two male colleagues who were found to have ‘pursued a policy of vindictive unpleasantness towards the applicant for the deliberate purpose of making her apply for a transfer.’ This included sexual insults and physical intimidation. The employer argued that the two employees would have behaved in the same way towards a male colleague whom they had disliked, but the Court rejected this analysis; their treatment of her ‘was a particular kind of weapon, based upon the sex of the victim which, as the industrial tribunal recognised would have not been used against an equally disliked man.

The decision in *Porcelli* is in sharp contrast with *Stewart v Cleveland Guest (Engineering) Ltd*, which illustrates the inherent difficulty in using the principle of equal treatment in cases of sexual harassment, that is the ‘conduct in question might be equally offensive to members of both the sexes’:⁸⁸

Miss Stewart, who was employed as an inspector in an engineering company, was required as a part of her responsibilities to visit the factory floor where a large

⁸⁶ *Wards Cove Packing Co v Atonio*, 460 US 642 (1989).

⁸⁷ *Porcelli v Strathclyde Regional Council* (1986) ICR 564.

⁸⁸ *Stewart v Cleveland Guest (Engineering) Ltd* (1994) IRLR 440.

number of calendars displaying nude women were on view. She complained to the works manager and asked for the calendars to be removed. At first he refused on the grounds that the complaint was trivial, but when Miss Stewart raised the matter with her trade union, the works manager changed his mind and ordered the calendars to be removed. It became known that Miss Stewart had made the initial complaint and, when some of the women employees informed management they did not share her view, she resigned on the grounds that the employer was unable to protect her from embarrassment and distress. An industrial tribunal found that she had been constructively dismissed on the grounds that the employer was in breach of the duty of mutual trust and confidence, and found her dismissal unfair, but it also concluded that there had been no sex discrimination: 'the display itself was neutral. A man might well find this sort of display as offensive as the applicant did'.

The Employment Appeal Tribunal refused to overturn the ruling of the tribunal on the narrow ground that the decision was not perverse. The dismissal was unfair but it was not on the grounds of sex of the employee.

D New Zealand Court's Approach to Cases Sexual Harassment

There have been only a few reported cases of sexual harassment brought by the employees in New Zealand. A number of earlier cases created an impression that the Court may not have treated sexual harassment cases with the seriousness they deserved.⁸⁹ But a recent case shows a different approach taken by the Court. In the case of *Z v A*, Chief Judge Goddard with a strong condemnation of sexual harassment at workplace held: "It is wholly unacceptable and entirely devoid of any redeeming features. It follows that its occurrence can never be met with matters of justification, excuse or mitigation."⁹⁰

V LAWFUL WITHDRAWAL OF EMPLOYEES FROM WORK – INDUSTRIAL ACTION

The introduction of this paper described the corporative system of workmen combinations in the fifteenth century. The combinations were formed to improve wages and labour mobility of workers, but it constituted a criminal conspiracy at the

⁸⁹ *Mazengarb's Employment Law* (3ed, Butterworths, Wellington, 2001).

⁹⁰ *Z v A* (1993) 2 ERNZ 469.

common law. The development of modern employment law saw the freedom of employees to withdraw their labour from work as a fundamental human right, complimentary to freedom from forced labour. The purpose of freedom of withdrawing labour was to balance the inequality of power of an individual worker as against the employer's right to terminate the employment. Kahn-Freund introduced the study of lawful withdrawal of labour or freedom to strike with the following question:⁹¹

Why is it that in all democratic countries the 'freedom to strike' or, as it is sometimes put, the 'right to strike' is considered to be fundamental freedom, alongside the freedom to organise, to assemble peacefully, to express one's opinion? Why is the strike or, potentiality of a strike, that is, of an event which of necessity entails a waste of resources, and damage to the economy, nevertheless by general consent an indispensable element of a democratic society?

The collective withholding of labour is a vital weapon in the hands of the employees, which imposes costs on both the parties: disrupted production on one hand, and lost wages on the other. At the international level, the right to strike is guaranteed in treaties covering socio-economic rights. The International Covenant on Economic, Social and Cultural Rights and the European Social Charter guarantees the right to strike subject to the national laws of the country. Curiously though, there is no reference to right to strike in the ILO Convention No 87 on Freedom of Association and Protection of the Right to organise, or Convention No 98 on the Right to Organise and Collective Bargaining.⁹² The reason perhaps is 'procedural difficulties, political differences and worker's fears that specifying a right to strike would also lead to its restriction'. The industrial action by the employees is not an absolute right and may incur liabilities in certain cases.

The decision in *Tranz Rail v Rail and Maritime Transport Union*, where the Court of Appeal held that taking part in a lawful strike was a protected activity is no longer a good law. There is now little protection for victims of such activities including refusal to re-employ a worker who has been engaged in union activities.⁹³ Law in

⁹¹ Otto Kahn-Freund *Labour Relations Heritage and Adjustment* (The British Academy, Oxford University Press, 1979).

⁹² New Zealand has yet to ratify the conventions 87 and 98 of the ILO.

⁹³ *Tranz Rail v Rail and Maritime Transport Union* (1999) 1 ERNZ 460.

New Zealand does not permit an effective right to strike and currently prohibits sympathy strikes by the unions.

VI MODERN EMPLOYEE AND ITS IMPLICATIONS IN EMPLOYMENT LAW

A Contractual Relationship

In response to the criticism of the initial draft of s 6 of the Employment Relations Bill, the then Minister of Labour stated in the Parliament "No one is forced to change his or her employment status"; that was to say the contractors were not forced to be the employees against their will. However, notwithstanding the policy intent, it appears that even if a contractor does not want to be an employee, and does not apply (or consent) for such a determination to be made, the Authority may still rely on the aspect of his relationship with the employer in deciding the contractual relationship. In *Stubbs v Kimihia Home and Hospital*, the Authority had regarded the way in which employer-employee relationship had evolved.⁹⁴ Similarly in *Holmes v Telecom New Zealand Limited*, the Authority held that one of the sales assistants of the company who was claiming to be an employee as an alternative to costly arbitration proceedings was actually a contractor.⁹⁵

B Increasing Participation of Women in Employment Market

The increasing participation of women in the labour force has been one of most significant employment trends in the post World War period. Demographic developments including declining fertility and delayed childbearing, along with changing structure of New Zealand's economy have resulted in fundamental shifts in labour force participation among women.⁹⁶ The 'feminisation' of employment market has provided increased opportunities to women in the tertiary [services] sector. But this 'feminisation' has downgraded the jobs in terms of employee salary and wages. Many of the new jobs created in this sector require a single skill and mediocre

⁹⁴ *Stubbs v Kimihia Home and Hospital* Employment Relations Authority AA11/01.

⁹⁵ *Holmes v Telecom New Zealand Limited* Employment Relations Authority AA189A/01.

⁹⁶ *Women's labour force participation grows* <<http://www.stats.govt.nz/Zealand/domino.../4b6f098f1a2bbc1acc256b180009282c?open document>> (Last accessed 2 September 2002).

knowledge. This trend is particularly true in respect of part-time female employees and is set to grow. Due to growing trend of part-time female employees [in places like call-centres where the job is considered routine] men may account for the majority of complaints about sex discrimination in recruitment. Women still may be discriminated against in the jobs with better promotion prospects and relatively high rates of pay such as medical and legal profession.

Analysis of real incomes (inflation adjusted to base period) shows that women's incomes have changed little in the last ten years. In 1996, the median income of women in New Zealand was \$12,600. This is equivalent to 57.2 percent of the median annual income received by men (\$22,000).⁹⁷ The report from Statistics New Zealand shows gender bias in favour of women at the place of work. This has dual implications. It is for the betterment of business as it benefits the businessman who runs the business at lower operating costs. But in the long run, lower wages may affect the bargaining power of the employees as a whole. Also the trend of discrimination that so far was against the women at workplace may gradually shift against the men in the form of reduced employment opportunities for them.

C *Workplace Stress*

The modern employment conditions are getting stressful due to difficult working postures and challenging delivery schedules at workplace. An employee accumulates stress, both physical and mental, while working under time pressure. The dimension of workplace stress has peculiar implications. Physical syndromes such as CTD due to repetitive body motions, deafness due to noise and forgetfulness with the growing age are some of its manifestations. In a recent magazine article "*Is flying fatal?*", author Stephen Wilkinson has written about the occupational hazards of commercial pilots.⁹⁸ Long hours of flying at night cause fatigue and stress. In one case, a Pilot has been flying 12-13 hours at a stretch from East Coast to Far East and he is doing this routine for months. People who are not able to keep up with the pressures of workplace sometimes are forced to quit. Therefore job stress should be considered

⁹⁷ *Women's incomes lower than men's* <<http://www.stats.govt.nz/zealand/domino.../28dd7f5221783764cc256b180009139b?open document>> (Last accessed 2 September 2002).

⁹⁸ Stephen Wilkinson *Is Flying Fatal* in *Air & Space*, Issue June/July 2002.

equally threatening to the person of the employee as any other imminent danger at work. It is not clear why the danger should be 'immediately threatening' as it was in the case of *Bouzouru v Ottoman Bank* to entitle an employee to disobey the orders.⁹⁹ In principle if very long hours could be shown to induce a stress related illness, an employee should be entitled to disobey an order to carry on working beyond the point of risk to his health, even if the risk to his health is cumulative rather than immediate. One criticism of this argument is that there cannot be a uniform standard of 'susceptibility to stress' for all individuals. But in near future, theory of genome mapping may help in identifying the employee attributes including vulnerability to stress. The question then would be on issue of having control limits on the use of genome mapping under the employment law.

D Implications of Genetic Mapping on an Employee

The day is not far when the psychometric profiling of an employee will be replaced by a standard genome profile. At present, the tests such as MBTI, Social-Inventory Self Test and MBTI are being used to assess the personality attributes of a prospective employee at the time of his selection, but these tests have a limited use. Modern employer intends to know much more than mere attributes of his prospective employee. The employer is interested in plotting the genome map of the employee before signing an employment contract with him. The idea is to know all the pertinent attributes of the employee such as ability to work under pressure, stress, analytical aptitude, task and behavioural inclinations in order to decide his wages, career progression, and skill retention for the benefit of the company. In a forthcoming article, "Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace" on the concept of genome mapping, legal researcher Pauline T Kim has published the abstract in the following words:¹⁰⁰

Recent successes in mapping the human genome have raised both hopes for medical breakthroughs and fears of the misuse of genetic information. Motivated by the spectre of a "genetic underclass," advocates and policy makers have called for legal protections, including a ban on genetic discrimination in employment, analogous

⁹⁹ *Bouzouru v Ottoman Bank* (1930) AC 271.

to existing prohibitions on race and sex discrimination. Unlike race or sex, genetic information may be relevant to predicting an employee's future job performance. In addition, the anti-discrimination model may be ineffective in preventing employers from making use of genetic information. The employer's use of genetic information primarily threatens the value of individual autonomy, and that a privacy rights paradigm therefore offers a more appropriate model for addressing these concerns. Developing an effective set of privacy protections for employees will involve certain practical challenges and difficulties. However, sustained attention to these challenges is more likely to produce policies capable of protecting employees from the misuse of their genetic information.

Each new technology breakthrough brings with it the opportunity of generating business. The breakthrough in genome mapping can have adverse business effects on the interests of the employee. Legal safeguards are therefore required to protect the employee from misuse of personal information so gathered. The situation can be compared with genetic engineering of seeds and crops. Demands from the legislature are being made to either limit the use of such GE seeds or ban them altogether. Medical fraternity in the United States is taking a lead in the field of human genome mapping. As a natural consequence of application of this science in the associated area of employment relations it will not be long before legislature is forced to address the issue of protecting the employees from misuse of their genetic information. Such information may be used in deciding employee's anxiety level, obedience, performance, work pressure, stress, personal grievance attributes, and redundancy.

VII CONCLUSION

The subject of human labour is in existence since time immemorial, but the governing of the same has been a relatively new phenomenon. The period of last 125 years can be considered relatively modern in the development of industrial law and more recently the employment law. The implications of master-servant relationship, faithful service, duty of obedience, unlawful combinations and lawful strikes and the

¹⁰⁰ Pauline T Kim *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace* (Northwestern University Law Review, Vol. 96, No. 4, 2002).

legal remedies pertaining to these issues have stood test of time over its period of development.

The modern employer runs the business enterprise on a lean concept. He is more interested in getting the work done to run his business than the person who does it. That is why there has been an increasing trend of getting the work done either by an independent contractor or the part-time employees instead of permanent employees. A work done by an independent contractor is free of liability to the employer. The changing concept of employee is raising new issues of work ethics, restraint on competing with the ex-employer, stress, work-life balance, prospects of determining employee's personal attributes through genetic testing before signing an employment contract, and redundancy provisions. Under modern employment law it seems relevant now to borrow the concept of occupational stress threshold, influence of gender proportion in employee selection, and the possible misuse of genome mapping on employee status. Instead of facing a controversy like GE-GM crops, the employment law needs to be proactive to address the issues discussed in this paper to create timely safeguards for employee protection.

BIBLIOGRAPHY

A Szakats, *Law of Employment* (3 ed, Butterworths, Wellington, 1988).

Aileen McColgan, *Just Wages for Women* (Clarendon Press Oxford, 1997).

Anderson, Gordon *Model Contract of Employment* (Victoria University Library, Wellington, 1988).

George J. Webber, *Batt, Law of Master and Servant* (5 ed, Pitman, 1967).

Hepple B A, *The Making of Labour Law in Europe* (Mansell, London, 1986).

Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws* (10 Oxford JLS 353, 1990).

Mazengarb's Employment Law (3 ed, Butterworths, 2001).

Otto Kahn-Freund, *Labour Relations Heritage and Adjustment* (The British Academy, Oxford University Press, 1979).

Pauline T Kim, *Genetic Discrimination, Genetic Privacy: Rethinking Employee Protections for a Brave New Workplace* (Northwestern University Law Review, Vol 96, No 4, 2002).

Robyn Mackay, *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001).

Simon Deakin and Gillian S Morris, *Labour Law* (Butterworths, London, 1995).

Tim McBride, *New Zealand Civil Rights Handbook* (Legal Information Service Inc, 2001).

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