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CAUGHT OUT ON JUDICIAL REVIEW: AN ANALYSIS OF JUDICIAL REVIEW AND EMPLOYMENT

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ABSTRACT

This research paper considers the role of judicial review in employment and in particular the availability of judicial review to challenge employer decisions in the Employment Court. It does this by looking at two broad issues: the nature of the Employment Court's judicial review jurisdiction including their approach to it, and the appropriate scope of judicial review of employment related issues.

An analysis of the nature of the Court's jurisdiction raise two main concerns. First, that while the Employment Contracts Act 1991 (ECA) confers "full and exclusive" jurisdiction on the Employment Court over judicial review the jurisdiction is nonetheless limited because it only relates to statutory powers exercised under the State Sector Act 1988 and the ECA itself. The second concern is that the Employment Court have fundamentally misunderstood the approach they should be taking to judicial review under the jurisdiction conferred on them.

The next chapter considers what approach the Employment Court should take. In considering this question it places the scope of judicial review of employment related decisions both in the context of developments in judicial review and of changes to the nature of public employment. In that context, the paper identifies the "private" nature of employment as an activity as underlying the problems faced by Courts in formulating a logical and coherent approach to the scope of judicial review in employment.

In looking at both these areas, the impact of the recent Privy Council decision in *Mercury Energy* v *Electricity Corporation of New Zealand* [1994] 1 WLR 521 is examined.

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 14,900 words.

I INTRODUCTION

Some of the most famous administrative law cases involve judicial review of employment related decisions. *Ridge* v *Baldwin*,[1] often referred to as heralding the beginning of the modern approach to judicial review,[2] concerned the termination of employment of a police officer. So too did the case of *Chief Constable of the North Wales Police* v *Evans*,[3] in which Lord Brightman set out the often quoted distinction between appeal and review.[4] And, it was another employment case, *Council for Civil Service Unions (CCSU)* v *Minister for the Civil Service*, [5] this time involving spies, in which Lord Diplock set out what he called the three main grounds for judicial review, illegality, irrationality and procedural impropriety.[6] It was also in this case that Lord Diplock, with others, argued that it was the nature and not the source of the power that was important in determining whether or not a particular administrative decision was susceptible to review.[7]

That these are landmark cases is perhaps a demonstration of the problem there has been in determining the scope of judicial review as an avenue for challenging employment related decisions of public bodies. Central to the Courts' difficulties is that employment has never been an activity limited to the public sector. These difficulties have been compounded by changes to the nature of public employment.

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1 [1964] AC 40.

2 See for example M Freedland "The emerging law of public employment" (1990) 19 ILJ 199, where he said "The problem of the application of public law to public employment had been posed at the very birth of modern administrative law when the House of Lords decided the case of *Ridge v Baldwin*. See also GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991) 4.

3 [1982] WLR 1155.

4 Lord Brightman said that unlike an appeal judicial review was not concerned with the decision but the decision making process. See above n 3, 1173 F and 1174 G.

5 *CCSU v Minister for the Civil Service* [1984] 3 All ER 935.

6 Above n 5, 950.

7 Above n 5, 949-950 per Lord Diplock; 948 per Lord Scarman; 956 per Lord Roskill.

In many ways it is a misnomer to talk about public employment as if this were a homogenous concept. As far back as last century there were significant differences between the way in which employment relationships of different groups of workers in the state sector were regulated.[8] These differences have been magnified over the last decade as a result of enormous changes to the nature and operation of the state sector.[9] The transformation of various state trading activities into State Owned Enterprises (SOEs) in 1986, many of which have subsequently been privatised is just one example. In addition to SOEs there are now literally dozens of crown entities, bodies established and generally funded by government. The organisational form of these bodies varies. Some, such as Crown Research Institutes and Crown Health Enterprises are incorporated companies. Others such as Boards of Trustees of primary and secondary schools are not.

The local authority sector has undergone a similar restructuring. For example, harbour boards have been replaced by port companies, electricity supply authorities have been privatised, and many traditional local authority services such as public transport and rubbish collection have been contracted out.

While local authorities' staff have traditionally been covered by private sector industrial relations laws, state sector employees were, until the passage of the State Sector Act 1988, covered by quite separate arrangements. The change to the nature of the public sector along with the erosion of the institutional distinction between public and private employment further exacerbates the difficulty of deciding when judicial review will be an appropriate mechanism to challenge employment decisions.

This paper concentrates on two broad issues which are dealt with in separate chapters. The first chapter concerns the nature of the judicial review jurisdiction

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8 For example railway employees were covered by the Industrial Conciliation and Arbitration Act 1894, whereas other servants were not.

9 For a description of the shape of the current public sector see J Boston et al *Public Management: the New Zealand Model* (OUP, Auckland, 1996) 58-67.

conferred on the Employment Court by section 105 of the Employment Contracts Act 1991 (ECA). The paper outlines the scope of that jurisdiction and argues it should be expanded so that the Court has jurisdiction over all judicial review cases concerning employment.

The paper then considers the approach taken by the Employment Court to that jurisdiction and argues that the approach of the Court is fundamentally flawed. The paper suggests that the Court does not recognise that section 105 is not the determinant of when judicial review will be available, but merely the determinant of when the Employment Court rather than the High Court will have jurisdiction to hear an application. Instead the Court approaches the section as though it confers a substantive right to judicial review, using the concept of statutory power to limit its availability in what it considers inappropriate cases. It is argued that not only does this lead to inconsistencies in the Court's treatment of the issues of what constitutes a statutory power but, in light of the Privy Council decision in *Mercury Energy Ltd* v *Electricity Corporation of New Zealand*,[10] the approach of the Court to the issue of statutory powers is wrong. The paper concludes that the real test of the availability of judicial review is not the issue of statutory power but the question of whether or not there has been an exercise of a public law power.

How a court should approach the scope of judicial review in employment is the subject of the next chapter. First, it considers the impact of the *Mercury* decision on this scope and suggests that *Mercury* leaves open the issue of whether or not employment decisions of public bodies will always be susceptible to judicial review.

The paper then goes on to consider when judicial review should be available. It does this by analysing the approach of English courts and the concerns that underlie that approach. While concluding that the Employment Court, in

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10 [1994] 1 WLR 521.

formulating its approach to the exercise of public law powers in an employment context, should not follow in the footsteps of their English colleagues, nonetheless the paper acknowledges that the issue is a complex one. The reason for the complexity is the tension that exists between the "private" nature of employment as an activity and the importance of ensuring that public bodies act properly. The more a public body resembles a private employer the more difficult it is to determine on what basis employment decisions should be subject to review.

In the end the paper argues that the policy arguments in favour of setting proper public standards outweighs the anomalies this would create between public and private sector workers and employers. It also says that the anomalies are lessened because of the incorporation of public law principles in the law relating to personal grievances and discusses whether there is any likelihood that the Court might expand its private law supervision of employment related decisions.

The last section looks at the the issue of judicial restraint. It argues that contrary to the interpretation of this issue in *Mercury* by some courts and commentators, the decision in *Mercury* does not, with respect to commercial decisions, limit the availability of judicial review to instances in which there has been fraud, corruption or bad faith. The limitations only applied where judicial review is being sought on grounds of unreasonableness. The paper goes on to discuss the issue of judicial restraint in an employment context focussing in particular on the issue of collective bargaining. While acknowledging this as an area in which judicial restraint may well be appropriate, the paper nonetheless makes suggestions as to when judicial review may be available. Lastly the chapter argues that when courts are considering whether or not to exercise restraint they should take into account that employment contracts and employment relationships are different from ordinary commercial contracts and commercial dealings.

The paper concludes by questioning Goddard CJ's comment that section 105 of the ECA requires a specialist adaptation of the principles of administrative law.[11] Instead, the paper suggests that a better understanding of adminstrative law is what is really needed.

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11 *Griffin and Teki v Attorney-General* [1995] 1 ERNZ 119, 140.

II SECTION 105: THE JURISDICTION AND APPROACH OF THE EMPLOYMENT COURT

A *The Jurisdiction of the Employment Court*

1 The Scope

Jurisdiction to hear applications for judicial review first passed to a specialist employment court under the Labour Relations Act 1987.[12] This jurisdiction continues under the ECA, section 105(1) of which states:

> [I]f any person wishes to apply for review under Part I of the Judicature Amendment Act 1972, or bring proceedings seeking a writ or order of, or in the nature or mandamus, prohibition, or certiorari, or a declaration or injunction in relation to the exercise, refusal to exercise, or proposed or purported exercise by -
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> (a) The Tribunal; or
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> (b) An officer of the Tribunal or Court; or
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> (c) An employer, or that employer's representative under this Act; or
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> (d) An employee, or that employee's representative under this Act -
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> of a statutory power or statutory power of decision (as defined by section 3 of the Judicature Amendment Act 1972) conferred by or under this Act or the State Sector Act 1988, the provisions of subsections (2) to (4) of this section apply.

Subsection (2) gives the Employment Court full and exclusive jurisdiction to hear any application for review or any proceedings of the type mentioned in subsection (1). Subsection (3) states that where a right of appeal is conferred under either the ECA or State Sector Act, the appeal must first be exercised before any application for review can be made. Subsection (4) confers on the Employment Court judges the ability to make procedural directions in such cases.

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12 Section 280.

The judicial review jurisdiction conferred by the ECA differs from that conferred by the Labour Relations Act in two main ways. The first simply reflects the difference in the two regimes. For example, reference to the Registrar of Unions has been removed because trade unions are no longer required or able register in return for representation rights. The second change represents a strengthening in the jurisdiction of the Employment Court under the Act.

Section 105(2) gives the Employment Court "full and exclusive jurisdiction" in judicial review proceedings covered by the Act. This change was made because there was uncertainty as to whether, under the provision in the Labour Relations Act, the High Court retained a residual jurisdiction. In *Elgin* v *Newman*[13] Greig J said that jurisdiction may also still lie with the High Court because the Labour Relations Act conferred "full and exclusive jurisdiction" in some proceedings but in respect of judicial review, simply stated that proceedings "shall be made or brought to the Labour Court." While the new wording under the ECA is probably sufficient to ensure jurisdictional exclusivity for the Employment Court, there is still one potential problem given the reasoning of Greig J. Sections 73 and 74 of the ECA, which relate to proceedings in relation to certain torts and for injunctions in strike and lockout situations, go further than just conferring "full and exclusive jurisdiction" on the Court. They also state that no other court shall have jurisdiction to hear these proceedings.[14] The question therefore arises, does the failure to state, with respect to judicial review, that no other court has jurisdiction mean that they do? Whether the difference in wording, between sections 73 and 74 on the one hand and section 105 on the other, will be interpreted as leaving a residual jurisdiction in the High Court remains to be seen. In practice it may never be a real issue given the Court of Appeal decision in *NZ Couriers Ltd* v *Curtin*.[15]

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13 [1989] NZILR 609.
14 Sections 73(2) and 74(2).
15 [1992] 2 ERNZ 541.

In this case the Court made it clear that where general and specialist courts both have jurisdiction, the matter should be heard in the specialist court unless persuasive considerations or policy suggest otherwise.

Even if the "full and exclusive jurisdiction" provisions of section 105 were held to confer exactly that, there remain serious limits on the scope of this jurisdiction. The jurisdiction under section 105 applies only in respect of statutory powers or statutory powers of decision conferred by or under either the State Sector Act or the ECA itself. The Court does not have jurisdiction in respect of employment related matters where the source of the power is non-statutory. And, with the exception of powers under the Police Act 1958,[16] nor does it have jurisdiction where the power is conferred under other legislation, such as the Local Government Act 1974.

In *Northern Local Government Officers Union* v *Auckland City*[17] Rodney Harrison QC tried to persuade the Employment Court to adopt a liberal interpretation of its own judicial review jurisdiction. He argued that the Employment Court had jurisdiction to hear the application for judicial review even if the employer was exercising powers under the Local Government Act 1974. His first argument was that such an approach was in line with the "well established principle" that where serious issues of labour law arise, the High Court (which undoubtedly had jurisdiction) should defer to the specialist jurisdiction of the Employment Court. His second argument was that the Court had jurisdiction under section 104(1)(g). This provision gives the Employment Court jurisdiction "[t]o hear and determine any action founded on an employment contract." The application for review before the Court was, Harrison claimed, founded on an employment contract.

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16 Section 96.

17 [1992] 1 ERNZ 1109.

The Court was not persuaded. In a decision of the full Court, Goddard CJ suggested that the omission of any reference to Acts such as the State Owned Enterprises Act or Local Government Act was probably unintended and likely to be short lived. Nonetheless, in light of the specific reference only to the State Sector and Employment Contracts Acts, he held that it was not open to the Court, under section 105, to review the exercise of a statutory power conferred by the Local Government Act 1974.[18] Goddard CJ also dismissed Harrison's second argument, holding that no jurisdiction lay under section 104 either:[19]

> It is only necessary to recall the references in s105(1) to such remedies as mandamus, prohibition and certiorari and the definition of what is an application for review contained in s 4 Judicature Amendment Act 1972 for it to become apparent that if the present application for review is founded on an employment contract or relates to an employment contract (s104(1)(h)) that is purely coincidental and does not represent the true nature of the proceeding.

2 *A need for reform?*

Irrespective of whether the omission in section 105 was deliberate or unintentional, the scope of the jurisdiction as presently enacted lacks logic. Coherency could be achieved either through expanding the Employment Court's jurisdiction or removing it altogether. It might be argued that removing the judicial review jurisdiction does not interfere with the principle of deferring to the specialist expertise of the Court, since judicial review is primarily concerned with principles of administrative and not employment law. However there are very real advantages to the judicial review jurisdiction staying with the Employment Court.

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18 Above n 17, 1136-1137.

19 Above n 17 1137.

The first advantage is that it stops various causes of action arising from the same dispute from having to be pleaded in separate courts. Not only are separate pleadings both time consuming and costly, the divide between public and private law in employment is difficult to determine, as the analysis of the English decisions discussed in the next chapter shows. The English experience also highlights another "undesirable consequence" of a divided jurisdiction: it encourages what Deakin and Morris describe as opportunistic litigation.[20] An example of this is the approach taken by the Crown to the issue of whether civil servants have contracts of employment. In *R* v *Civil Service Appeal Board ex parte Bruce,*[21] the Crown argued that judicial review was inappropriate because the relationship was contractual. However, in *McLaren* v *Home Office*[22] the Crown took the opposing view, arguing that the matter could not be litigated in private law because there was no contract of employment.

Dividing the jurisdiction would also limit remedial flexibility such as occurred in the case of *Fahey* v *Attorney-General.*[23] In *Fahey* the applicants sought judicial review of an appointment process. At a late stage in the judicial review proceedings, the relief sought was changed from a declaration to damages. The reason for this change was the adverse effect a declaration would have on the employment of the successful appointees who were currently in post. Although the ability to grant such relief in judicial review proceedings was questioned by the Crown, the Employment Court had no hesitation in doing so. Amongst the reasons why damages were held to be available was that separate damages actions could have been filed in conjunction with judicial review application; that the Court should facilitate rather than impede the plaintiffs obtaining all the remedies; and that rules of procedure should be the servant and not the master in the field of

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20 S Deakin and G Morris *Labour Law* (Butterworths, London, 1995) 377.

21 [1988] ICR 649; [1989] ICR 171.

22 [1989] ICR 550; [1990] ICR 824.

23 *Fahey v A-G* [1993] 2 ERNZ 164.

dispensing justice.[24] Goddard CJ noted that the specialist Employment Court has a long tradition of adopting "a practical approach to the rules of procedure."[25] Were the Employment Court to lose its judicial review jurisdiction, the beneficial effects of this kind of remedial flexibility would be lost. Leaving the jurisdiction unchanged within its present limitations is also not ideal since not all workers have access to this remedial advantage. Local authority or health service employees, for example, will miss out, since the Employment Court does not have jurisdiction over the exercise of statutory powers under either the Local Government Act 1974 or the Health and Disability Services Act 1993.

B The Jurisdiction Misunderstood

1 JAA procedural only

The Judicature Amendment Act 1972 (JAA) was intended to eliminate the procedural difficulties associated with the traditional administrative law remedies. The Court described it thus in *Re Royal Commission on the Thomas Case*.[26]

> The intention of the 1972 legislation was not to widen the grounds on which the Court could grant relief, but to extend the nature of the relief that could be granted once those grounds were established, and then to improve the procedure by which that relief could be obtained.

Section 4(1) of the JAA provides:

> ... the Court may by order grant, in relation to the exercise by any person of a statutory power... any relief that the applicant would be entitled to, in any one of more of the proceedings for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings.

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24 Above n 23, 191-198.

25 Above n 23, 194. His comments were intended to refer also to the Labour Court.

26 [1980] 1 NZLR 602, 616.

An application for review under the Act may be made provided the applicant would be entitled to relief in proceedings for a writ or order of mandamus, certiorari or prohibition, or would be entitled to an injunction or declaration against that person in any such proceedings. Key to the availability of review is that a remedy must first be available in public law.[27] The JAA is merely procedural. An application for review can be made under that Act rather than under the High Court Rules if the matter relates to the exercise, or proposed or purported exercise of a statutory power.

In 1977, there was a major amendment to the JAA. Amongst the changes was an amendment to the definition of statutory power. Included within the definition was powers or rights conferred "by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate."[28] While this amendment expanded the definition of statutory power, it was not intended to expand the situations in which a remedy would be available in public law.[29]

2 *Jurisdiction misunderstood*

The Employment Court have misunderstood the nature of the Judicature Amendment Act. They have failed to appreciate that the JAA does not determine the scope of judicial review.

The approach of the Employment Court to the JAA is clearly evidenced by a recent decision *O'Neill* v *Wellington Free Ambulance Service Incorporated*.[30] In *O'Neill* it

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27 See *Daemar v Gilliand* [1979] 2 NZLR 7, 16; [1981] 1 NZLR 61, 63-64.

28 JAA section 3.

29 Above n 27.

30 Unreported, Employment Court, Wellington Registry, WEC 38/96, 2 July 1996.

was conceded that the decision in question fell within the definition of a statutory power of decision since it was a decision taken under the constitution of the incorporated society. Goddard CJ then said:[31]

> [T]hat being so, the plaintiff has surmounted the first hurdle of showing that a jurisdiction in administrative law exists. The next hurdle that the plaintiff faced was to show that that jurisdiction in relation to employment matters had been transferred to this Court.

The Chief Judge could not be more wrong. The first hurdle in showing that jurisdiction in administrative law exists is for there to have been the exercise of a public law power. This was made clear by Lord Diplock in *CCSU* when he said: [f]or a decision to be susceptible to judicial review the decision maker must be empowered by public law (and not merely, as in arbitration, by agreement between private parties)".[32] It is the existence of that power that is the touchstone to the availability of public law remedies. This view was reinforced in *R* v *Take-over Panel ex parte Datafin*[33] where, in considering the various factors which had resulted in bodies being subjected to review, Sir John Donaldson MR said:[34]

> it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.

To be fair to the Employment Court they are not alone in misunderstanding that the source of the power merely affects the procedure by which the remedy can be

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31 Above n 30, 8.
32 Above n 5 949.
33 [1987] 1 QB 815.
34 Above n 33, 838.

sought. Graham Taylor in his book on judicial review seems to make the same mistake. He also fails to recognise the purely procedural nature of the JAA.[35]

The effect of the Employment Court's approach is that they use the concept of statutory power as a gate by which the review jurisdiction is activated. The unsuitability of using the exercise of a statutory power as an automatic trigger for judicial review is illustrated by the inability of the Employment Court to formulate a consistent approach to the issue of what constitutes a statutory power.

3 Statutory powers under the JAA

Statutory power is defined in the JAA as "a power or right conferred by or under any Act or by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate".[36] Two related issues arise in determining the nature of a statutory power under this definition. First, what is meant by a power or right and the second, what is meant by the phrase "conferred by or under".

The approach to be taken in determining what constitutes a power or right was discussed by the Court of Appeal in *Re Erebus Royal Commission (No 2)*.[37] It was held that a narrow concept of rights or of what affected rights was not in accord with the general purposes of the Act. Instead, the Court said that a "broad, realistic and somewhat flexible approach would enable the Act to work most effectively".[38] Similarly, in *Lemmington Holdings Ltd* v *Commissioner of Inland Revenue*,[39]

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35 GDS Taylor *Judicial Review* (Butterworths, Wellington, 1991). See in particular paras 1.02 and 1.06.

36 Section 3.

37 [1981] 1 NZLR 614.

38 Above n 37, 627.

39 [1984] 2 NZLR 214.

Eichelbaum J said the provisions should not be "read down ... so as in some way to limit the liberalising concepts embodied in it."[40]

The second issue, what is meant by the phrase "conferred by or under", requires that consideration be given to the proximity or nexus that must exist between the action or decision and the statutory provision. Michael Taggart describes the Privy Council decision in *Mercury Energy Ltd* v *Electricity Corporation of New Zealand Ltd* as resolving a decade-long difference of judicial opinion in New Zealand over the issue.[41] This difference of opinion was reflected in two Court of Appeal decisions. The first was the decision in *Webster* v *Auckland Harbour Board*[42] in which the Court held that it was sufficient for the decision maker to be acting under a general empowering provision. The other decision was *New Zealand Stock Exchange* v *Listed Companies Association*[43] where the Court said that the particular power in question had to be statutorily conferred. When *Mercury* came before the Court of Appeal, the Court adopted the *Stock Exchange* line of reasoning. They held that "[t]o attract judicial review the impugned action must amount to the exercise of a particular statutory power."[44] By overturning their decision, Taggart argues that the Privy Council are by implication preferring the approach in the *Webster* case and those based on it.[45]

4 Employment Court view of statutory power

The first comprehensive discussion by the Employment Court of what constitutes a statutory power or statutory power of decision occurred in the leading case of *New*

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40 Above n 39, 221.

41 M Taggart "Corporatisation, Contracting and the Courts" [1994] PL 351, 355.

42 [1983] NZLR 646.

43 [1984] 1 NZLR 699.

44 Above n 43, 560.

45 For example, *New Zealand Optical Ltd v Telecom Corporation* (1990) 5 NZCLC 66,457; *Budget Rent a Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414.

Zealand Association of Inspectors in Schools and Education Officers & Ors v *Minister of Education & Ors*.[46] This case concerned the ability of, and consequent refusal by, the Director-General of Education, under the terms of a redundancy agreement registered under the Labour Relations Act, to recognise past teaching service for the purposes of calculating severance payments. The Association of Inspectors in Schools and various of its members sought judicial review of this refusal.

Relying on the decision in the *Stock Exchange* case, the Director-General of Education argued that a public body is not amenable to judicial review when they are either exercising a contractual right or exercising a function merely because the power to exercise those rights or functions stems from statute. While the Labour Court acknowledged that not all acts of employers under the Labour Relations or State Sector Acts would be reviewable,[47] Goddard CJ nonetheless rejected the idea that the exercise of a contractual power automatically ousted the administrative law jurisdiction of the Court. The Chief Judge clearly preferred the view of the Court of Appeal in *Webster* v *Auckland Harbour Board* where, in a joint judgment, Cooke and Jeffries JJ said:[48]

> The issues of invalidity and statutory power of decision are interconnected. They cannot satisfactorily, we think, be considered separately. Undoubtedly a public body which has, as here, lawfully entered into a contract is bound by it and has the same powers under it as any other contracting party. But in exercising the contractual powers it may also be restricted by its public law responsibilities. The result may be that a decision taken by the public body cannot be treated as purely in the realm of contract; it may be at the same time a decision governed by some extent by statute.

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46 [1990] 2 NZILR 960.
47 Above n 46, 994.
48 Above n 42, 650.

Goddard CJ also said that the distinction made in the *Stock Exchange* case between powers and functions could give rise to confusion if it was extended into other contexts. He argued that it was used only as a way of describing the finding in that case that the Stock Exchange had not exercised a power conferred on it by statute or under its own constitution. It was not authority for saying that a public body is not exercising a statutory power merely because the decision was made in the course of the public body going about its statutory business.[49] The Stock Exchange decision, Goddard CJ said, should be limited to its own facts.[50]

The Court held in the *School Inspectors* case that the Director-General had been exercising a statutory power of decision, both because the agreement had been registered and therefore became secondary legislation and, because of the general statutory underpinning, through the State Sector Act, of public employment provisions.[51] In so finding, Goddard CJ said that the phrase "by or under" meant both direct and derivative powers or rights.[52]

This same approach was followed and expanded on in other decisions relating to powers under the State Sector Act. In *Fahey,* for example, a decision made under personnel management policies was held to be statutory power of decision because the State Sector Act required the promulgation of a personnel policy. Therefore the decision was indirectly authorised by that Act.[53] Similarly in *Griffin and Teki* v *Attorney-General,* Goddard CJ described a derivative power as one which owed its existence to an activity authorised or underpinned by the Act.[54]

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49 Above n 46, 994.
50 Above n 46, 994.
51 Above n 46, 996.
52 Above n 46, 996.
53 Above n 23, 188.
54 Above n 11, 141.

5 *Approach inconsistent*

While statutory underpinning by the State Sector Act may be sufficient for the Employment Court to consider there has been the exercise of a statutory power,[55] statutory underpinning by the ECA is not treated in the same fashion, especially when it involves private sector employers. This difference is most clearly in evidence in *Davis* v *Ports of Auckland*,[56] a case concerning an application for interim relief following a decision by the employer to contract out work and consequently terminate staff. Redundancy notices had been issued based on a procedure contained in a registered but expired agreement which had been incorporated into individual contracts by section 19 of the Employment Contracts Act. Despite describing the case as being "hard to distinguish" from the *School Inspectors* case, Travis J nonetheless expressed sympathy to the employer argument that the matter involved the exercise of a contractual and not a statutory power.[57] The issue of whether or not issuing notices of termination constituted a statutory power of decision was never finally determined. However, amongst the reasons why interim relief was declined was that the plaintiff's case lacked real strength.[58]

A similar reluctance to find that there had been the exercise of a statutory power also arose in *Hyndman* v *Air New Zealand*.[59] The facts in this case are very similar to that in *Ports of Auckland*. Redundancy notices had been issued subsequent to a decision to contract out work. The procedure governing the redundancies was contained in an expired registered agreement, the provisions of which had been incorporated into individual contracts through the operation of section 19 of the

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55 See, for example, *Fahey v A-G* [1993] 2 ERNZ 164; *Tawhiwhirangi v A-G* [1993] 2 ERNZ 64; *Clark v Housing Corporation* Unreported, Employment Court, Wellington Registry, WEC 19/93, 17 August 1993; *Griffin and Teki v A-G* [1995] 1 ERNZ 119; *Armstrong v A-G* [1995] 1 ERNZ 43; *Leslie v A-G* Unreported, Employment Court, Wellington Registry, WEC 52/95, 4 August 1995.

56 [1991] 3 ERNZ 475.

57 Above n 56, 482.

58 Above n 56, 489.

59 [1992] 1 ERNZ 820.

Employment Contracts Act. Although Colgan J acknowledged that the decision in the *School Inspectors* case provided the plaintiffs with a good argument for there being the exercise of statutory power, his decision seemed to suggest that he was not convinced.[60] The matter was not finally determined since interim relief was declined for other reasons.

Both these judgments are inconsistent with the decision in the *School Inspectors* case, and they also stand in stark contrast to a later decision of the Court in *Clark* v *Housing Corporation.*[61] With the exception that *Clark* involved public employment, the facts of are similar to those in the *Air New Zealand* and *Ports of Auckland* cases. The power of decision arose under a registered but expired agreement which had been incorporated into an individual contract through the provisions of the ECA. Goddard CJ held that this constituted a statutory power of decision under the ECA, as well as under the State Sector and Labour Relations Acts.[62]

The *Air New Zealand* decision is also interesting because Colgan attempts to restrict the concept of statutory powers. The judge said that while the existence of a contractual relationship may not preclude judicial review, this was different from saying that there has been the exercise of a statutory power "merely because the Act governs aspects, albeit important ones, of that relationship."[63] This sounds remarkably reminiscent of the requirement for there to be the exercise of a particular statutory power in the *NZ Stock Exchange* decision, despite Goddard CJ expressing the view in *School Inspectors* that it should be confined to its own facts.

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60 Above n 59, 844. Colgan J uses the phrase "if that it is" after referring to the alleged statutory power.

61 Unreported, Employment Court, Wellington Registry, WEC 19/93, 17 August 1993

62 Above n 61, 13.

63 Above n 59, 832.

Colgan J then makes a distinction between a power recognised by statute and a power conferred by or under a statute, holding that powers arising either from contract or the common law are not reviewable even if they are statutorily recognised. There are real problems with this distinction. First, many of the powers under the State Sector Act, including powers acknowledged to be reviewable, would on this approach not be reviewable. The reason is that the Crown has a power under the common law to contract[64] and therefore many provisions of the State Sector Act are only recognising existing powers at common law. Admittedly it is less clear that chief executives have an independent contractual capacity,[65] but it would not seem sound to suggest that the availability of judicial review would be contingent on this issue.

The second problem with Colgan J's approach is that there appears to be no authority for it. Making such a distinction hardly seems in tune with the "broad, realistic and flexible" approach advocated by Woodhouse P and McMullin J in *Re Erebus (No 2).*[66] Arguably it is also inconsistent with the approach taken to the phrase "conferred by or under" in other Employment Court cases. In those cases, "conferred by" was held to mean created and "conferred under" was held to mean that the power was derivative, that it owed its existence to an activity authorised or underpinned by the Act.[67] Authorisation, used in this sense, includes the concept of sanctioning the use of a power. Recognition involves an acknowledgment of its legality. There is a difference between these concepts but it is small and it would not be in keeping with the spirit of the general approach to the JAA to exclude statutory recognition from the concept of statutory power.

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64 P Craig *Administrative Law* (3 ed, Sweet & Maxwell, London, 1994) 678.
65 Above n 64, 679.
66 Above n 37, 627.
67 Above n 11, 141.

Whether or not judicial review was appropriate in either the *Ports of Auckland* or *Air New Zealand* cases is not the issue here. What is being questioned is the method by which the appropriateness of judicial review was called into question. In both cases the judges sought to limit the concept of statutory power in a way that was inconsistent with the approach outlined in the *School Inspectors* case, a decision expressly followed in other cases involving state sector employers. The judicial gymnastics engaged in by the Employment Court over the concept of statutory power was almost inevitable since it was seen as an automatic trigger for judicial review. If the Court wished to exclude private employers from the scope of judicial review, as appeared to be their underlying motive in both the *Air New Zealand* and *Ports of Auckland* cases, a better basis to have done so was to argue there was no public element involved. Only if there is a public element is there a need to ask whether there had been an exercise of a statutory power. The answer to that question is of procedural importance alone.

Using the presence of a public element as the touchstone for the availability of judicial review means that the Employment Court is free to take a more liberal approach to the concept of statutory power, without opening the jurisdiction to all employment disputes, public and private alike. Taking a broad view also makes it easier for the Court to achieve consistency in its approach.

C Powers and Freedoms

1 Powers and freedoms distinguished

Another area of concern over the Employment Court's treatment of statutory powers is the distinction they make between powers and freedoms. The effect of this distinction is that many if not most decisions taken in respect of collective bargaining fall outside of the supervisory jurisdiction of the Court.

Rodney Harrison identifies two major categories of acts by an employer that are potentially reviewable under the ECA.[68] He characterises the first category as acts taken in reliance on the enabling regime introduced by the Act, in particular the negotiation of employment contracts. The second is described as relating to decisions taken pursuant to or at least as a consequence of the existence of an employment contract. Cited examples of acts in this second category include decisions to terminate employment, for reasons of redundancy or otherwise or to vary conditions.[69] The Employment Court has held that acts falling within the second category constitute a statutory power, albeit only in one instance a statutory power under the ECA.[70] The rest have involved powers under the State Sector Act. The Employment Court has never, however, believed that actions by employers falling into Harrison's first category could ever be subjected to judicial review under either Act.

Their position was first made clear in the *School Inspectors* case. There the Court used as an example of the kind of decision that would not be subject to judicial review, the conduct of negotiations. The reason for this was that the conduct of negotiations involved purely contractual powers or freedoms which were not, they considered, reviewable.[71]

This matter was more fully discussed in *Northern Local Government Officers Union* v *Auckland City*.[72] In this case the old award governing the terms and conditions of employment of staff employed by the City Council had expired and no new agreement had been reached. Staff were consequently on individual

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68 R Harrison "Judicial Review of Administrative Action: Some Recent Developments and Trends (II)" [1992] NZLJ 246, 253.

69 Above n 68.

70 Above n 61.

71 Above n 46, 994.

72 Above n 17.

contracts of employment based on the provisions of the old award. The Council advertised several vacancies. Existing staff were told that the conditions attaching to the new positions would be different to what they were currently enjoying. Amongst other causes of action, the Union sought judicial review of the Council's decision.

The Union argued that various of the sections in Part II of the Employment Contracts Act constituted a statutory power or statutory power of decision. They pointed to the objects section for Part II, section 9, which sets out the right to negotiate a collective contract and to be represented by a person or an organisation for that purpose. The Union also argued that section 18(1) empowered the parties to negotiate over the question of coverage by an individual or collective contract and that section 19(1) gave the right to enter into an individual contract where no collective contract was applicable. The Union also submitted that both the Long Title of the Act, which is expressly enabling, and the objects section for Part II clearly illustrated that the cluster of powers in question were conferred by or under the Act.[73]

The Employment Court disagreed. In a decision of the full bench, the Court said that while section 9 did confer a right, it was an absolute right to make an election between a collective and an individual employment contract. Similarly, section 18, entitled "Freedom to Negotiate", was just that, a freedom, not a reviewable power or right. And again, section 19(1) was described as empowering at the election of employers and employees. The Court said that nowhere amongst the provisions referred to were there any powers.[74]

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73 Above n 17, 1134-1135.

74 Above n 17, 1137.

2 *Is the distinction valid?*

Rodney Harrison questions the validity of the distinction made by the Court between a liberty or freedom established by the Act and a power or right conferred by it. He suggests that either Part II of the Act is enabling of employers or it is not. If it is, then what has been characterised as a freedom must necessarily be the exercise of a statutory power.[75]

In considering the nature of the right to negotiate, parallels can be drawn with the right to a job. As Ellis J said in *Lambie* v *Poutasi*,[76] the right to a job is really more of an opportunity to gain a benefit. There is no real right to a job but there is a power to apply for it, and decisions taken in respect of that application might affect that power.[77] The same applies to the negotiation of an employment contract. There may not be a right to a collective contract (or any particular provisions within it) but there is an opportunity or power under the ECA to seek one. Decisions taken by public bodies in respect of that power should, in principle, be reviewable on public law grounds. It is hard to justify why decisions to appoint should be subject to review when decisions relating to the terms of that appointment are not. The degrees of empowerment and discretion would appear to be similar under each.

Further inconsistencies arise from the distinction, in particular, that it treats powers of negotiation differently to other powers under the State Sector Act. The Employment Contracts Act is not the only source of statutory empowerment for collective bargaining. Statutory empowerment also arises under the State Sector Act. Section 7 of that Act states that the State Services Commissioner shall have all the powers necessary to carry out the functions and duties imposed on them. One

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75 Above n 68, 254.
76 [1993] 1 ERNZ 398.
77 Above n 76, 402-403.

of their express functions is to negotiate conditions of employment of employees in the public service.[78] The Commissioner is therefore directly empowered by the State Sector Act to negotiate conditions of employment. It makes no difference that this function is now generally delegated to chief executives, since this delegation is expressly authorised by the Act.[79] The high degree of statutory underpinning of collective bargaining in the state sector brings it squarely within the concept of statutory power as articulated by the Court in the *School Inspectors* case and subsequently.

Holding decisions taken in respect of collective bargaining to be non-reviewable also creates inconsistencies over the treatment of the good employer principle in the context of statutory powers. When the State Sector Act was introduced, the Minister of Labour said that the good employer provision was introduced to make it clear that the State should continue its traditional function of setting a good and progressive example to private sector employers.[80] Part of this tradition, it is argued, includes a commitment to the concept of collective bargaining.[81] The requirement to be a good employer therefore incorporates a commitment to collective bargaining. Since in other circumstances the duties and obligations created by the good employer provision have been treated as giving rise to the exercise of a statutory power,[82] decisions taken in respect of collective bargaining should be similarly treated.

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78 State Sector Act section 6(e).

79 Section 23.

80 NZPD, vol 487, 2786, 16 March 1988.

81 P Boxall "Would the good employer please step forward? A discussion of the 'good employer' concept in the State Sector Act 1988" (1991) 13 NZJIR 211.

82 See for example *Armstrong v A-G* [1995] 1 ERNZ 43, 72.

3 *Is unfettered freedom appropriate?*

There is another objection to statutory provisions relating to negotiations being classified as non-reviewable freedoms. While concepts of absolute freedom may be appropriate in a private law context, the whole purpose of administrative law is to ensure that public bodies act in accordance with the law. In the words of Sir William Wade:[83]

> The powers of public authorities are ... essentially different from those of private persons. A man making his will may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do neither unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. ... The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

These views were echoed by the Privy Council in *Mercury*. Despite their seeming acknowledgment that the decision to terminate the contractual arrangements derived from contract and not statute,[84] the Privy Council nonetheless said that commercial decisions of State Owned Enterprises were reviewable. Their starting point was that judicial review was an invention by the courts to ensure that decisions made by the executive or public bodies were made according to the law, even if the decision was not otherwise actionable.[85]

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83 HWR Wade *Administrative Law* (7th ed, Oxford University Press, Oxford, 1994) 391.

84 Above n 10, 526.

85 Above n 10, 526.

D Statutory powers after Mercury

The decision of the Privy Council in *Mercury* that a general empowerment by statute is sufficient to ground jurisdiction under the Judicature Amendment Act should force the Employment Court to rethink its approach, not least because the subject matter of that case, the termination of a contract following an inability to agree to new terms, bears a close similarity to the facts in both the *Air New Zealand* and *Ports of Auckland* cases. That said, the Court still needs a mechanism by which to immunise purely private law concerns from judicial review. The appropriate mechanism is to ask whether or not there has been the exercise of a public law power.

Mercury also makes it clear that commercial decisions will not be immune from review. This too should make the Employment Court rethink its approach to the concept of non-reviewable freedoms. While commercial decisions should in principle be subject to judicial review, nonetheless the Privy Council makes it clear that there will be instances in which the Court should exercise restraint.[86] This is a matter which is discussed more fully in the next chapter.

While it is possible to be critical of the approach of the Employment Court, deciding who is subject to judicial review and in respect of what is a question that has often taxed the minds of judges. No simple solution has been forthcoming. The public law element is in many ways as elusive as the holy grail.

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86 Above n 10, 529.

III THE SCOPE OF JUDICIAL REVIEW

A *Mercury: Does it Define the Scope?*

It is one thing to say that the key to the availability of judicial review is the exercise of a public law power; it is another thing to determine what constitutes a public law power in the employment arena, as the experience of the United Kingdom (UK) shows. Described as "unpredictable and controversial",[87] English courts have not found it easy to determine on what basis a public body is susceptible to judicial review in respect of its employment decisions. The underlying problem is that employment of staff is not an exclusively public activity.

Before turning to consider the difficulties faced by the English courts in trying to determine an overriding test as to when judicial review of employment decisions will be appropriate, it must be asked whether the Privy Council decision in *Mercury* has made such a discussion redundant. Is *Mercury* authority for the proposition that all public bodies (including those established as companies) are susceptible to judicial review in respect of all their commercial decisions, including decisions relating to employment? This is one interpretation of *Mercury*. However it is also possible to take a more restrictive view.[88]

In *Mercury* the decision being challenged was the termination of an agreement for bulk electricity supply. As such, it was a matter which was at the centre of Electricorp's very existence. So too was the subject matter of the dispute in *Napier*

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87 S Fredman and G Morris "Public or Private? State Employees and Judicial Review" (1991) 107 LQR 298.

88 The Courts' interpretation of *Mercury* is still evolving. Compare for example the decisions in *Napier City Council v Health Care Hawkes Bay* Unreported, 15 December 1994, High Court, Napier Registry, CP 29/94 and *New Zealand Private Hospitals Association v Northern RHA* Unreported, 7 December 1994, High Court, Auckland Registry, CP 440/94

City Council v Health Care Hawkes Bay[89] at the centre of the Crown Health Enterprise's reason for being. In this case the dispute concerned the decision of the Crown Health Enterprise to establish one regional hospital in Hastings and down grade services currently provided in Napier. That the matter "went to the heart of HCHB's undertaking" was an important consideration as to the availability of judicial review.[90]

On this interpretation, what makes a decision an appropriate matter for judicial review is the degree of correlation between the nature of the decision being challenged and the general activity of the body. The problem, then, with using judicial review to challenge employment decisions is that it is debateable whether or not a sufficient correlation exists. Employment of staff is often, and perhaps even usually, incidental to the main purpose of the body. Employment of staff is not even always necessary, as the increasing use of contract labour illustrates.

John Fogarty QC has commented that the real lesson from *Mercury* is that the courts will look beyond name and form to function.[91] The fact that a body may be incorporated as a private company will make no difference to the availability of judicial review provided the nature of the activities undertaken are a proper subject for such review. This kind of approach is supported by Lord Woolf, who has suggested that even fully privatised companies such as British Telecom and British Gas may be subject to judicial review in respect of their duties to the public as a whole.[92] On this view, *Mercury* still leaves open the question of whether or not employment decisions are an appropriate subject for public law remedies. Interestingly, Lord Woolf generally thinks not, arguing that employment issues are essentially of a domestic and not a public nature.[93]

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89 Unreported, 15 December 1994, High Court, Napier Registry, CP 29/94.

90 Above n 89, 29.

91 J Fogarty QC "Legal Accountability in all its Guises: Where to after Mercury?" *Hot Topics in Administrative and Public Law* (New Zealand Law Society Seminar, 1995) 6.

92 Woolf LJ "Judicial Review in the Commercial Arena" (1987) The Denning Lecture to the Bar Association for Commerce Industry and Finance, 10.

93 See discussion of Woolf LJ's position below.

The scope of judicial review in employment is not an issue that has been directly or systematically tackled in New Zealand. Part of the reason for this is that the concept of statutory power has incorrectly been seen as largely determining that scope. Conversely, the scope of judicial review in employment has been examined in a number of key decisions and academic writings, particularly in the UK. An analysis of the issues grappled with by the English courts and commentators therefore provides a useful place to start looking at the scope of judicial review of employment related decisions in New Zealand.

B Judicial Review in the UK: the Search for the Public Law Element

1 Employment by a public body

In the UK, mere employment by a public body has never been sufficient to bring an action in judicial review. This was clear from the early employment cases such as *Ridge* v *Baldwin* which made distinctions between ordinary employees and those who were deemed to "hold office", such as chief constables. It was only the latter group who were entitled to public law remedies. The termination of an ordinary employment relationship only gave rise to remedies in contract.[94]

The streamlining of judicial review procedures which took place with the introduction of Order 53 of the Supreme Court Rules (the equivalent to our Judicature Amendment Act) was held to make no difference to that general proposition. Woolf J, as he was then, said in *R* v *BBC ex parte Lavalle*:[95]

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94 Above n 1, 65.

95 [1983] ICR 99, 106.

> The prerogative remedies of mandamus, prohibition and certiorari ... had not previously been available to enforce private rights and ...were not appropriate and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not, and should not be extended to a pure employment situation.

2 *Scope further defined*

Whilst the Courts were clear that disputes arising out of an employment contract did not give rise to a remedy in public law, the scope of judicial review was still far from settled. First, there was considerable debate over whether or not the employment of civil servants was contractual.[96] Secondly, even if there were a contract, it was common for employment in the public sector to also be partly governed by statute or regulation.

(a) Statutory/contractual dichotomy

The first attempt to "clarify" the availability of judicial review of employment related decisions arose in *R* v *East Berkshire Health Authority ex parte Walsh.*[97] The issue in this case was whether statutory underpinning of contractual provisions was sufficient to give rise to a remedy in public law. The National Health Service (Remuneration and Conditions of Service) Regulations 1974 provided that negotiated conditions, other than remuneration, that received approval from the Secretary of State were to apply automatically to all employees.[98] In Walsh's case, the negotiated dismissal procedures had received such approval. Walsh argued that breaching these procedures, which were recognised by regulation, was an infringement of his rights protected by public law.

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96 See for example S Fredman and G Morris "Civil Servants: A Contract of Employment?" [1988] PL 58.

97 [1985] 1 QB 152.

98 Regulation 3(2).

The Divisional Court agreed but the decision was overturned on appeal. The Court of Appeal held that although the public law element could be injected by the existence of statutory provisions underpinning the employment relationship, the Regulations in this instance did not constitute such an underpinning.[99] According to Donaldson MR there were two ways in which Parliament could underpin the position of public employees. The first was by directly restricting the freedom of the authority to dismiss.[100] The second was by requiring the public authority to contract with its employees on specified terms. If the authority then failed to honour those terms, the employee acquired rights in private law.[101] Had the Health Authority failed to incorporate the dismissal procedure into Walsh's contract, he would have had an action in public law. However, since they had, his remedy was held to arise only in contract for a breach of those incorporated conditions.[102]

The decision in *Walsh* has not been without its critics.[103] Bernadette Walsh argues that the meaning given to "statutory underpinning" in *Walsh* is novel. She says there is no authority to support the view that the requisite statutory underpinning is absent if a public body is required to contract on specific terms with its staff.[104]

The case of *R* v *Secretary of State for the Home Department ex parte Benwell*[105] soon showed that the decision in *Walsh* did not provide a coherent basis for determining the scope of judicial review. With one major exception the facts in *Benwell* and *Walsh* were alike. The distinguishing feature was that Benwell, as a prison officer, was a Crown servant rather than a local authority employee.

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99 Above n 97, 164.

100 According to Donaldson MR, this was the situation arising in the cases relied on by the divisional court judge ie: *Ridge v Baldwin* above n 1, *Vine v National Dock Labour Board* [1957] AC 488 and *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578.

101 Above n 97, 165.

102 Above n 97, 165.

103 See for example S Fredman and G Morris above n 87 and B Walsh "Judicial Review of Dismissal from Employment: Coherence or Confusion" [1989] PL 131.

104 Above n 103, 141.

105 *R v Secretary of State for the Home Department ex parte Benwell* [1985] 1 QB 554.

Because he was a Crown servant it was considered there was no contractual relationship and, therefore, the code was enforceable in public law.[106]

(b) Nature not source: the approach of Lord Woolf

The *Benwell* case highlighted the practical problems with the *Walsh* test. But there were also more fundamental concerns. Courts were generally moving away from a consideration of the source of the power as a basis on which to ground judicial review, to a consideration of its nature.[107] In line with this trend, Woolf LJ attempted to further clarify and refine the scope of judicial review in the employment context.

Underlying Lord Woolf's approach was the distinction between public and private law, an issue he had already discussed extra-judicially.[108]

> I regard public law as being the system which enforces the proper performance by public bodies of the duties which they owe to the public. I regard private law as being the system which protects the private rights of private individuals or the private rights of public bodies. The critical distinction arises out of the fact that it is the public as a whole ... who are the beneficiaries of what is protected by public law and it is the individuals who are the beneficiaries of the protection provided by private law.

This reasoning was applied in *R* v *Derbyshire County Council ex parte Noble*[109], a case involving the dismissal of a deputy police surgeon. Woolf LJ held that it was

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106 Above n 105, 572-573. This anomaly has now largely been overcome as a result of the decision in *R v Lord Chancellor's Department ex parte Nangle* [1991] ICR 743, which held that there was no constitutional bar to civil servants having contracts of employment. Whether or not there was a contract was said to depend on the parties intentions.

107 For example the approach of the Court in *R v Panel on Take-Overs and Mergers ex parte Datafin* above n 33.

108 "Public Law - Private Law: Why the Divide" [1986] PL 220, 221.

109 [1990] ICR 808.

not an appropriate subject for judicial review because the complaint referred to the way he and he alone was treated.[110]

His approach was further developed in *McLaren* v *Home Office*.[111] Here Lord Woolf said "[i]n relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees."[112] It made no difference whether or not the employee was in a contractual relationship or whether or not they "held office". Whatever rights they had would usually be enforceable only by ordinary action. Judicial review was considered both unnecessary and inappropriate.[113]

While saying that judicial review would not normally be appropriate, Lord Woolf outlined in both *Noble* and *McLaren* circumstances when the subject matter meant it was. The first of these was initially discussed in *Noble* and referred to the kind of situation that arose in *CCSU*. According to Lord Woolf, judicial review was appropriate in *CCSU* because the case was not about the factual terms of employment of one particular officer, but was about a policy decision by the Minister which affected all employees. Its broad application was what made it appropriate for judicial review.[114] A further condition was added in *McLaren*. The employee must also contend that the decision which has this general application is flawed on *Wednesbury* grounds.[115]

The second major situation where Lord Woolf considered that judicial review would be appropriate was in relation to the operation of some disciplinary or other body established under statute or the prerogative, since the supervision of inferior tribunals had always been part of the public law role of the Courts.[116] The Civil

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110 Above n 109, 820.
111 [1990] ICR 824.
112 Above n 111, 836.
113 Above n 111, 836.
114 Above n 109, 819.
115 Above n 111, 837.
116 Above n 111, 836.

Service Appeal Board was an example of such a body.[117] In contrast, informal tribunals or those of a wholly domestic nature were considered to be outside the ambit of judicial review.[118]

Woolf LJ's discussion of the *Walsh* case in *Noble* points to two further instances when judicial review may be available. The first was where there was an invalid delegation of power,[119] and the second where powers were used for improper purposes.[120]

Lord Woolf's approach has also come in for criticism, particularly from Sandra Fredman and Gillian Morris. Central to their criticism is that, to use their words:[121]

> it assumes that public law elements are exceptional and separable in an essentially private law relationship. This is turn puts great emphasis on a clear-cut definition of 'public law'. Yet it is not clear what it is about the subject matter of a decision that makes it public.

They are also critical because, as with the contractual/statutory dichotomy, the subject matter approach also leads to anomalous outcomes. The cases of *R* v *Secretary of State for the Home Department ex parte Attard*[122] and *McLaren* provide one such example. Both those cases arose out of an industrial dispute by prison officers involving suspension without pay. The situation in *McLaren* was held to be appropriate for a private law action whereas the very similar facts in *Attard* left the Court of Appeal in no doubt that it was a public law matter.[123] Fredman and Morris also point to anomalies between *McLaren* and *CCSU*. Why, they ask, were

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117 Above n 111, 836. See also *R v Civil Service Appeal Board ex parte Bruce* [1988] ICR 649 and *R v Secretary of State for the Home Department ex parte Attard* The Times 14 March 1990.

118 See *R v BBC ex parte Lavalle* above n 95, 106-107.

119 Indeed it was the possibility that there had been an invalid delegation of the power to dismiss in *Walsh* that led Lord Woolf to make that comment. See above n 109, 815.

120 Above n 109, 820.

121 Above n 87, 306.

122 See above n 117.

123 Above n 87, 307.

changes to conditions of employment in *CCSU* a public law matter, but in *McLaren* a private law matter?

The distinction made by Woolf LJ in relation to *CCSU* between decisions of general application and those affecting individuals was also criticised as arbitrary. How many individuals does it take to turn a private law issue into a public law one?[124]

Lord Woolf has subsequently acknowledged the validity of these criticisms. Referring to his attempts in *Noble* and *McLaren* to try and clarify the boundary between public and private law he said: "I myself tried to draw attention to indicators which would penetrate the gloom but I do not suggest I have been wholly successful."[125] He went on to say that any overriding test should have two primary requirements. To be suitable for public law it should be an issue about which the public has a legitimate concern as to its outcome and should be one which is not is already satisfactorily protected by private law.[126]

C *English concerns and the New Zealand context*

The UK experience shows how difficult it is to formulate a precise basis on which to determine the scope of judicial review in employment that is both logical and coherent. That experience alone suggests that the Employment Court would be better to take a broader approach to the issue of public law powers. An analysis of the rationale underlying the approach of both the Court of Appeal in *Walsh* and Woolf LJ reinforces that view.

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124 Above n 87, 307-308.

125 Woolf LJ "Droit Public - English Style" [1995] PL 57, 64.

126 Above n 125.

1 Underlying concerns

Bernadette Walsh contends that the test articulated in *Walsh* masks the real concerns motivating the decision.[127] The first of these concerns was the availability of an alternative remedy. The applicant had a remedy in the statutory unfair dismissal procedure which was clearly considered a more appropriate procedure in the circumstances.[128] The second was that it created the potential for there to be a large number of applicants. The Master of the Rolls actually said in his judgment that he was not sorry to have come to the conclusion he did because "a contrary conclusion would have enabled all national health service employees ... to seek judicial review."[129] In addition to stated concerns, Walsh argues that because the dispute in question was similar to one which might arise in the private sector, the Court believed the available remedies should be the same.[130] As can be seen from his decisions and extra-judicial writings, Woolf LJ shares these concerns, particularly those relating to the availability of alternative remedies and similarity with private law disputes.[131]

To the extent that the Employment Court has a concurrent jurisdiction in public and private law the availability of alternative remedies is not an issue which should influence the scope of judicial review in New Zealand. The concurrent jurisdiction means that causes of action can be pleaded simultaneously in both public and private law and will be heard by a court with specialist employment law expertise, a factor weighing particularly with May LJ in *Walsh*.[132] It also means that where the Court considers that private law remedies are more appropriate it can give effect to this in either (or both) of two main ways. The Court can exercise its

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127 Above n 103, 141.

128 See in particular the judgment of May LJ who raised a number of reasons as to why this was a preferable alternative to an action in judicial review. These included: the political or ideological overtones of employment disputes that industrial tribunals were more expert in handling, and that actions before industrial tribunals were both cheaper and faster.

129 Above n 97, 166.

130 See B Walsh above n 103, 142.

131 See for example "Public Law-Private Law: Why the Divide" above n 108.

132 Above n 97, 169-170.

discretion not to give a remedy in public law where it considers a private law remedy more appropriate, or, it can award what might normally be regarded as private law remedies in public law proceedings, for example, by awarding damages.[133]

The "floodgates" argument is also more apparent than real in the New Zealand situation. The scope of employer actions able to be challenged under the personal grievance provisions of the ECA is far wider than that covered by the UK Employment Protection legislation which only provides a remedy for unfair dismissal. Not only can dismissals be challenged under the Employment Contracts Act but also unjustifiable action, discrimination, sexual harassment and duress on the grounds of union membership.[134] Therefore, while the public law cause of action may be open, the actual numbers utilising it instead of the cheaper and speedier personal grievance procedure would not be great.

Concerns over the availability of alternative remedies and "floodgates" may be dealt with by demonstrating that they are far less problematic in the New Zealand context. The issue of whether or not public employment is fundamentally a private law issue cannot be explained away on the same basis. The same issues arise in New Zealand. One of the reasons for arguing that public law should be available to challenge employment decisions by public sector employers is that, despite the similarities between employment in the public and private sectors, there are also fundamental differences.

2 *Public employment and the State Sector Act 1988*

The State Sector Act 1988 is the main, but not the only piece of legislation relating to public sector employment.[135] When introduced it radically altered the nature of

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133 See, for example, *Fahey v A-G* above n 23.

134 Section 27.

135 Generally the legislation that sets up the body also deals with employment matters. Employment provisions are therefore contained in such legislation as the State Owned

employment in the state sector in two main ways. First, it changed the nature of employment. Instead of being employed in the public service generally, public servants are now employed by departmental chief executives.[136] Secondly it changed the nature of industrial relations. The Labour Relations Act 1987, which regulated industrial relations in the private sector was to also apply to the state. Although some differences remained,[137] for the first time public and private industrial relations operated under common rules.

The passage of the ECA has seen these differences virtually disappear. The right to final offer arbitration has been repealed,[138] although arbitration still exists under separate legislation for workers in the police and defence forces. And, in line with the enterprise nature of bargaining under the ECA, the State Services Commissioner has delegated their negotiation function to departmental chief executives.[139]

Despite being brought under the same legislative framework, statutory differences remain between state and private sector employment. State sector employment is governed by statutory provisions not applying to the private sector. The obligation on chief executives to establish a process by which departmental employees can challenge appointments is one.[140] The obligation to operate a personnel policy that complies with the principle of being a good employer is another.[141] In addition to statutory differences, there are aspects of the state's role as employer which is

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Enterprises Act 1986, the Health and Disability Services Act 1993 and the Crown Research Institutes Act 1992.

136 Section 59.

137 The main differences were that the State Services Commission and not the employer would negotiate collective agreements and, if negotiations broke down, there was a choice between final offer arbitration and the right to strike.

138 The right to arbitration was repealed by section 13 of the State Sector Amendment Act 1991.

139 Section 23 of the State Sector Act permits such delegation. The only group of state sector employees whose terms and conditions of employment are still negotiated by the Commissioner (excluding Commission staff) are employees in the Education Service - State Sector Act section 74.

140 State Sector Act section 65.

141 See for example State Sector Act sections 56 & 77A; SOE Act section 4.

fundamentally different than that of private sector employers, and which give public sector employment distinct characteristics.

3 The difference between public and private employment

Sandra Fredman and Gillian Morris argue that there are two related and immutable factors which mean that no matter how hard governments may try to replicate private sector industrial relations practices, state employment will always be unique.[142] The first is that the state has a dual role, that of government and employer. This not only means that an employer is accountable to Parliament but that it can, through legislation, endow its managerial decisions with the force of law. The second uniquely distinguishing factor is the source of revenue to employ staff and carry on operations. Unlike private employers whose source of revenue is profit based on the output of its staff, the state largely derives its income from taxation. The state, as employer, is therefore subject to political and macroeconomic constraints, rather than to market led considerations.

There are numerous examples of governments in New Zealand legislating to give legal force to what, in the private sector, are managerial decisions. The first is in the area of coverage by individual or collective employment contracts. Despite the provision in the ECA permitting employees to choose between being covered by an individual or a collective employment contract,[143] this right to choose is overridden in the State Sector Act for members of the Senior Executive Service.[144] They are all on individual contracts. Similarly, in the middle of a dispute with the Post

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142 See, for example, S Fredman & G Morris "The State as Employer: Is it Unique?" (1990) 19 ILJ 142, 143 and S Fredman & G Morris "Is there a Public/Private Labour Law Divide?" (1993) 14 Comparative Labor Law Jnl 115, 123.

143 Section 9(b).

144 See generally Part IV and in particular section 52 which states that except for conditions laid down in the Act, conditions of employment were to be determined by negotiation between the chief executive, in consultation with the Commissioner, and the individual concerned.

Primary Teachers Association in the 1989, the Government legislated to place secondary teachers on individual contracts.[145]

The Government can also use legislation to impose mandatory terms and conditions of employment into an employment contract, even though it is not a party to it, since individual departments and not the Government are the employer. There are many examples in the State Sector Act of statutorily imposed terms, covering things from the employment of casual workers to conditions for workers who are transferred. Another example of the imposition by law of standards is the right of the State Services Commissioner under section 57 of the State Sector Act to issue a code of conduct covering the minimum standards of integrity and conduct that are to apply to the public service as a whole.[146] Included in this code are provisions which impinge on a worker's freedom of expression, for example by limiting an individual employee's ability to comment politically on Government actions or openly support or criticise political parties.[147] A private sector employer would not be able to justify such political gagging. The Police also have limitations placed on their political activities. Section 31 of the Police Act 1958 states that no police officer shall take any part in any Parliamentary or local authority election, as a candidate or in any other manner, other than by voting.

Differences also arise in the area of collective bargaining. While the rules applying to collective bargaining may be the same, the operation of them can be very different. With the exception of police and defence force staff, state workers might have the right to strike over the negotiation of their collective contracts. However, a strike of these workers is usually very different from a strike of workers in the private sector. Strikes in the public sector generally have political rather than

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145 P Walsh "Conditions of Employment in Tomorrow's Schools: Industrial Relations and Personnel Policies in the Education Sector" a speech to the Second Research into Education Conference, NZCER, Wellington, 31 August 1990.

146 State Services Commission *Public Service Code of Conduct* (1995).

147 Above n 146, 13.

economic effects since a strike by public sector workers invariably affects the user of their services, such as patients, pupils and ordinary members of the community. Striking workers look for sympathy to their cause from amongst the very groups who are affected by their actions. They aim to hurt their employers politically rather than economically.

Another area of difference is over the conduct of industrial disputes and the resources open to state employers. This was clearly in evidence during the recent strike by prison officers. During the strike, the army and police were brought in to cover, an option in an industrial dispute not generally available to private employers.[148] Moreover, the wages of defence force personnel employed in prisons during the strike were not even met by the Department of Corrections, the employer of the prison officers.[149]

Private sector employers are largely influenced by economic considerations in the conduct of an industrial dispute about wages and conditions. In the public sector, however, is hard if not impossible to separate the fiscal from the political. In the face of Government policies that seek to lower levels of public expenditure, even if the employer is willing, there is often no money with which to give staff a pay rise.[150] That pubic employees have to persuade the Government rather than their employers to give them a pay rise was clearly illustrated by lengthy industrial negotiations in the last two years over primary and secondary teachers pay.

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148 Section 6 Defence Act 1990 enables defence force staff to be deployed to assist a public service or civil power. They are not able to be used during an industrial dispute except with the express written approval of the Minister.

149 There is an agreement between Defence and the Department of Corrections for reimbursement of some costs incurred, for example, transporting staff to the prisons from other areas in the country. Wages of staff so deployed remained the responsibility of the Defence Forces.

150 All money needed by departments to operate must be voted for by Parliament on the recommendation of Cabinet - s22 Constitution Act.

Governments may also choose to ride out industrial disputes for political reasons. Private sector employers, on the other hand, are primarily motivated by pragmatic decisions based on the cost of the dispute versus the cost of the claim.

It is not just over the level of wage rises that political considerations hold sway. The number of workers employed in public services is not determined by market-led considerations as it would be in the private sector. The issue of what level and standard of service are provided is determined by political and macroeconomic factors. And finally, the authority for state employers to employ staff is itself sourced in legislation, a prerequisite not applying to the private sector.

Referring to the decision by the Government in 1983 to introduce legislation to derecognise the Public Service Association (PSA) and seize its assets because of an industrial dispute, Jim Turner, Deputy General Secretary of the PSA said:[151]

> there was a clear recognition - a convention if you like - that there was a difference between the public sector and the private sector. An employer who had the power to tax, to print money and to change the law was a peculiar sort of employer. Also there could only be one of them. Now that sort of employer is a different sort of employer, and their relationship with their employees is different from any other.

Despite the passage of the State Sector Act, this comment remains true today. It may be that the concept of a career public service, in place since 1912, has now fundamentally changed, and it may be that the rules relating to state pay fixing arrangements have largely been brought under the private sector umbrella. However, this has not completely changed the nature of public employment. So long as the source of revenue for employment in the state sector comes from

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151 As quoted in P Walsh "The State Sector Act 1988" in Boston et al *Reshaping the State* (Oxford University Press, Auckland, 1991) 77.

taxation, so long as the employer can also legislate, and so long as the employer wants to win elections, public employment will never be just like that in the private sector.

4 Judicial review and public employment

The availability of judicial review does not just rely on there being differences between public and private employment, or that these differences are not always able to be separated. There is another reason which relates to one of the fundamental functions of judicial review itself, namely that the public have an interest and the courts have a role in ensuring that public authorities act within the law. The Divisional Court judge in *Walsh* articulated this argument well when he said:[152]

> The public may have no interest in the relationship between servant and master in an 'ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them.

This traditional function of judicial review combined with the differences between public and private employment mean that the Employment Court should be encouraged to take a liberal approach to the question of what might constitute the exercise of a public law power in a core state sector employment context. The difficulties that the English Courts have had over formulating precise boundaries plus, the lack of problems arising in New Zealand over the issues of alternative remedies and floodgates must only confirm the Court in that approach.

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152 As referred to in the decision on appeal, above n 97, 162.

The same arguments support a broad approach being taken to the exercise of public law powers in an employment context by local authorities. In other employment situations, however, the distinction between public and private becomes more blurred. Take for example the position of State Owned Enterprises (SOEs). SOEs may be under a statutory obligation to be a "good employer" but this is the only statutory distinction between them and private sector employers that bears directly on employment. Nor can their position as an employer be described as unique. They have no power to legislate, derive their funding to employ staff from profit not taxation and, arguably like private employers, are motivated by economic rather than political concerns.

Whether or not judicial review should be available to challenge employment related decisions of SOEs is not an easy question to answer. The similarity in employment terms between the position of SOEs and private employers might be thought to be the critical consideration. If so, the decision in *Mercury* to subject SOEs to judicial review could be distinguished on the basis that employment decisions do not go to the heart of an SOE's activities. On the other hand, the fact that a SOE is a public body required to carry out its business in the interests of the public and with a statutory obligation to be a good employer may be considered a sufficient basis on which to ground judicial review, even though the public interest may not be an issue in decisions relating to individual employees.

Another situation in which the availability of judicial review is far from clear cut is in a "contracting out" situation, for example the contracting out of cleaning or pathology services by a Crown Health Enterprise (CHE). For the purposes of this example, lets assume that the CHE, as a public funded body who is required to act in the public interest has been found to be susceptible to judicial review, including in respect of their employment decisions. If the availability of judicial review is based on the nature of the activity undertaken, does the fact that the work has been contracted out mean that judicial review is available in respect of decisions taken by a private contractor?

Less clear also is the position as relates to employers such as port companies. In 1988 the Labour Government passed the Ports Companies Act. This Act required all Harbour Boards to set up registered companies whose principal objective is to operate as a successful business.[153] Being required to act as a good employer is not expressly part of this objective. Ports of Auckland is in fact a listed company, but the majority of shares are held by the Auckland Regional Authority. Does the fact that the Port Companies Act required the establishment of such companies affect the availability of judicial review? What effect does a majority shareholding by a local body have?

These examples show that while it is possible to argue that a broad approach to the availability of judicial review should be taken in respect of employment in the core state sector and local authorities, the arguments supporting such an approach do not have the same force when applied to the public sector generally and are even less clear when applied to what may be described as the quasi-public sector. Two related issues underscore this lack of clarity: what is a public law element or function, and how does the public element test fit with the source of the power test?[154]

The concept of a public element goes further than the public having an interest in the result. This was made clear by Simon Brown J in *R* v *Chief Rabbi of the United Hebrew Congregations ex parte Wachmann,*[155] who said that to attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest. This governmental interest was to be determined by whether, "but for" the existence of the body, the government would have moved to regulate the area over which the body had control.[156]

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153 Port Companies Act 1988 section 5.

154 See for example: N Bamforth "The Scope of Judicial Review: Still Uncertain" [1993] 239; D Pannick "Who is Subject to Judicial Review and In Respect of What?" [1992] PL 1.

155 [1992] 1 WLR 1036.

156 Above n 155, 1041-1042.

Despite the seeming simplicity of this test, it does not shed much light on the question of the scope of judicial review of employment matters. It was made in the context of non-statutory bodies who nonetheless were regulating a significant area of public life. It does not say what constitutes a public element when the body is a statutory one. Nor does it deal with situations where, despite regulating an important area of public life, employment decisions are incidental to that function. What is clear from the *Wachmann* test is that it would be difficult to use as a basis for expanding judicial review of employment decisions to purely private employers.

Lloyd LJ in his judgment in *Datafin* attempts to place the source of the power and the nature of the power tests in some kind of joint context. He said:[157]

> I do not agree that the source of the power is the sole test whether a body is subject to judicial review... Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.
>
> But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to bring the body within the reach of judicial review.

The difficulties of applying the nature of the power test to employment related decisions make this approach of Lloyd LJ an attractive one to follow. It must of course be read subject to the decision of the Privy Council in *Mercury* where, it was held that the exercise of a contractual power did not per se oust judicial review if the body was generally empowered by statute.[158] Adopting such an approach

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157 Above n 33, 847.

158 Above n 10, 526.

would arguably mean that all bodies required by statute to be good employers are subject to judicial review. For such bodies, this statutory underpinning is sufficient to injection a public law element into their employment related decisions. Left in the middle between public and private will be employers such as port companies or contractors for public services. Whether their employment related decisions will be reviewable might in the final analysis depend on a range of factors such as the nature of the business or activity and the nature of the decision in question.

5 Judicial supervison and private law

Given the similarity between public and private employment, does the availability of judicial review as a method of challenging employer decisions in the public sector but not in the private sector create an unfair anomaly? I suggest not. The first reason is the importance, in policy terms, of ensuring that public bodies act within the law and conform to proper standards. This consideration outweighs any unfairness to private sector workers. The second reason is that although private sector workers cannot bring an action in judicial review they can, in many circumstances, invoke public law principles in private law. The influence of public law on the law of employment can be seen most clearly in the law relating to dismissals under the personal grievance provisions of the Employment Contracts Act and its predecessors.[159]

In order to justify a dismissal an employer must be able to show that there were genuine reasons for the dismissal and that it was procedurally fair. In the words of Goddard CJ " ... a dismissal which is substantively justified will be vitiated if, in the process, the minimum standards of fair and reasonable dealing are ignored or neglected."[160] Procedural fairness requires that the worker be informed of the nature of the problem or the allegations of misconduct, that the worker is given an

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159 See generally ECA Part III.

160 *New Zealand Food Processing Union v Unilever New Zealand Ltd* [1990] 1 NZILR 35, 45.

opportunity to comment and that their comments are given unbiased consideration, free from pre-determination and uninfluenced by irrelevant considerations.[161] Fairness in employment law incorporates the two public law principles of natural justice: the right to be adequately informed and an opportunity to be heard, and the right to an unbiased hearing.

With respect to the requirement for reasonableness, the approach here too is remarkably reminiscent of that adopted in administrative law. Cooke P said in *BP Oil NZ Ltd* v *Northern Distribution Workers Union*[162] "[t]he question is essentially what it was open to a reasonable and fair employer to do in the particular circumstances".[163]

If public law principles are applicable in private law to the conduct of parties to an employment contract, should the pre-contractual phase also be subject to the private law supervision of the court? After all, many of the reasons such as protection of the "right to work" which led courts, even at common law, to hold that public law principles should apply,[164] are equally applicable. Dawn Oliver argues private non-contractual supervision by the courts is an important and neglected area of the law.[165] She also suggests that the assumption that the pre-contractual activities of public authorities cannot be reviewed is no longer justified in light of *Datafin* and the developments in private law supervision.[166]

The question of whether the Court can exercise a private law supervisory jurisdiction over pre-contractual matters takes on an added significance given the recent changes to labour relations in this country. For nearly one hundred years the regulation of the employment relationship was subject to significant controls

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161 Above n 160, 45-46.
162 [1989] 3 NZLR 580.
163 Above n 162, 582.
164 See for example *Breen v AEU* [1971] 2 QB 175.
165 D Oliver "Is ultra-vires the basis of judicial review?" [1987] PL 543, 558.
166 Above n 165, 561.

through the operation of legal support for trade unions and collective bargaining. These laws were designed to counteract the inequality in bargaining power inherent in the employment relationship. The legal supports were swept away by the Employment Contracts Act, which is largely premised on the exact opposite, that the parties to an employment contract are equal.[167] The lack of regulation over collective bargaining has had a devastating effect both on the wages, working conditions and consequent well-being of large numbers of workers, and on the long term viability of trade unions as institutions of social protection.[168]

Oliver contends that Courts, when exercising their supervisory jurisdiction, are increasingly concerned not just with issues of vires but also with the need to control an abuse of power.[169] There is no evidence of this trend in New Zealand employment law as the approach of the Court to the issue of harsh and oppressive conduct demonstrates. Section 57 of the ECA provides that a contract procured by harsh and oppressive behaviour can be set aside. The Court said this meant that if there was no contract there was no basis on which to intervene, even if the employer's behaviour was harsh and oppressive.[170] The introduction of a concept of "good faith" bargaining, as promised by several of the parties in the 1996 General Election, might however create the impetus for a fresh approach and provide an opportunity for the import of public law principles into collective bargaining.

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167 See generally G Anderson et al Butterworths Employment Law Guide (Butterworths, Wellington, 1995) 13-16.

168 See for example R Harbridge and A Honeybone "The Employment Contracts Act and Collective Bargaining Patterns: A Review of the 1994-95 Year" in R Harbridge and P Kiely *Employment Contracts: Bargaining Trends and Employment Law Update 1994-95* (Victoria University Industrial Relations Centre, Wellington, 1995); *Short Changed: Retail Workers and the ECA* (National Distribution Union, Auckland, 1996).

169 See generally Oliver above n 165.

170 See *Adams v Alliance Textiles* [1992] 1 ERNZ 820.

D The intensity of review

While the employment decisions of many or even perhaps all public bodies should in principle susceptible to judicial review, there may nonetheless be occasions in which the Courts will nonetheless exercise restraint. John Fogarty QC has commented that the Privy Council decision in *Mercury* "clears the way for insisting on legal accountability of any body entrusted with a public function."[171] He went on to say that "[a]t the same time it was important to appreciate the limits of legal accountability. ... The common law will not adjudicate on the merits of any policy which is a lawful option."[172]

The principles that permitted a court to interfere, including interfering in decisions relating to contracts were, according to the Privy Council in *Mercury*, set out in the "definitive judgment" of Lord Greene MR in *Associated Provincial Picture House Ltd* v *Wednesbury Corporation*.[173] This judgment has come to be associated with "unreasonableness" as a ground for judicial review. In fact, the decision also makes it clear that decisions are challengeable on various bases that would now be considered as falling under the general rubric of "illegality".

While the Privy Council held that Electricorp was open to judicial review in respect of its commercial decisions, the actual application for review was declined. In so doing they said:[174]

> [it] does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.

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171 Above n 91, 1.
172 Above n 171.
173 [1948] 1 KB 223.
174 Above n 10, 529.

Michael Taggart argues that this obiter comment by Lord Templeman narrows considerably the "definitive" Wednesbury grounds earlier held to be the grounds on which judicial review would lie. This, Taggart claims, at best means there is still uncertainty around the scope of judicial review and at worst, renders the decision internally inconsistent and hollow. [175]

It is possible, however, to view Lord Templeman's comments as referring only to review on grounds of "unreasonableness" - that review on that ground will be unlikely in the absence of fraud or bad faith. If so, then the decision is not internally inconsistent. It is simply reflecting the reality that when making commercial decisions a wide range of options are open. Whether one option is better than another is not normally an appropriate subject for judicial review. This was the position of Lord Diplock in *CCSU* where he said that although he could see no a priori reason to rule out "irrationality" as a ground of review, decisions involving the application of government policy were unlikely to be open to attack on this ground. [176]

Other cases turning on decisions in which there have been a high policy content have been likewise decided. In *R* v *Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council,* [177] the decision by the Secretary of State to cap the community charge levied by the Hammersmith and Fulham Borough Council was challenged. Lord Bridge delivered the judgment of the House of Lords. He held that while the Court could intervene if the Secretary of State had acted illegally by, for example, taking into account irrelevant considerations, or acting for improper purposes, given that the case concerned the

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175 Above n 41, 357.
176 Above n 5, 951.
177 [1991] 1 AC 521.

economic policy of the Government, the Court should be wary of intervening on grounds of irrationality in the absence of manifest absurdity or bad faith.[178]

If the Court changes its position and agrees that decisions relating to collective bargaining are in principle reviewable, it is nonetheless likely to be cautious in its approach. The size of wage offers is one area in which the Court is likely to exercise restraint. However, that does not mean that the Court never should or would intervene over the issue of wages. Since it is illegal to discriminate, a public employer should not be able to insist on the inclusion of discriminatory wage rates in an individual or collective contract. Other areas related to collective bargaining may also be open to challenge. If, for example, the good employer provision was held to incorporate a commitment to collective bargaining, which it is argued it does, then decisions related to the conduct of negotiations may also be able to be challenged on grounds of procedural impropriety.

The Courts, when assessing whether or not to exercise restraint should bear in mind the comments of Richardson J, as he was then, in *Telecom South Ltd* v *Post Office Union*[179] where he said: "[t]he contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of trust, confidence and fair dealing."[180] The underlying power imbalance inherent in an employment relationship and the consequences of a decision to an employee have been used to justify granting a remedy which otherwise would have been refused because of serious and inexcusable delay in bringing proceedings.[181] These kinds of concerns should also influence a court in deciding whether or not to exercise restraint.

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178 Above n 177, 597.

179 [1992] 1 NZLR 275.

180 Above n 179, 285.

181 *Carter v Attorney-General* Unreported, 24 November 1994, High Court, Wellington Registry, CP781/87, 11.

IV CONCLUSION

Goddard CJ said in *Griffin* that an application for review under section 105 of the ECA "involves a specialist adaptation of the principles of administrative law to employment law situations."[182] In so far as section 105 requires administrative law principles to be applied in an employment context Goddard CJ is undoubtedly correct. Whether this involves an adaptation of the principles is open to question. In any respect, this paper suggests that the Employment Court has misunderstood the principles of administrative law rather than adapted them to the employment context.

The fundamental flaw in the approach of the Employment Court is that they treat the exercise of a statutory power as the touchstone for the availability of judicial review. The inclusion of decisions taken by private companies within the definition of statutory power in the JAA has compounded this problem. The need to exclude private actions from the scope of judicial review has meant that the Court has not been able to take a logical or consistent approach to the concept of statutory power.

The cases show that two main situations arise where the Court considers judicial review to be inappropriate. The first is in respect of employment decisions by private employers. The second is in respect of decisions relating to negotiations. The response of the Court in both areas is to attempt to narrow the definition of statutory power or narrow the circumstances in which a power is said to have been exercised. The paper suggests that a more appropriate and orthodox way of excludng purely private employers from the Court's public law jurisdiction would be to use the exercise of a public law power as the touchstone for judicial review. With respect to collective bargaining, the concept of judicial restraint rather than non-reviewable freedoms allows the high levels of discretion involved in the

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[182] Above n 11, 140.

collective bargaining process to be acknowledged without suggesting that some activities of public bodies will be completely beyond the scrutiny of the courts.

While it is possible to be critical of the approach taken by the Employment Court, the proper scope of judicial review of employment related decisions is not a straightforward issue. Underlying the difficulty are two issues. First, employment is not exclusively or even predominantly a public function and second, the changed nature of state means that public functions are carried out in private forms. Despite the complexity of the problem the Court is urged to take a robust approach to it. Statutory underpinning of employment decisions, including the obligation to be a good employer, should be sufficient to meet the public law requirement.

Goddard CJ commented in *Griffin* that administrative law has been in a rapidly developing state over the past two decades.[183] The challenge for the Employment Court is to keep better abreast of those developments. But it is not just the approach to the jurisdiction that needs to change. The scope of jurisdiction conferred on the Court is itself inadequate. It needs to be extended to cover all employment related decisions.

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183 Above n 11, 141.

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