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JUDGES AND THE POLITICS OF EMPLOYMENT LAW

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CONTENTS

ABSTRACT

The main thesis of this paper is that the Court of Appeal and the Employment Court have taken divergent approaches to employment law issues since the New Right revolution and the passing of the Employment Contracts Act 1991. The Employment Court is more likely to apply principles which recognise inequality in the employment relationship and promote worker protection, while in general the Court of Appeal has adopted a stricter approach based on the rules relating to commercial contracts and has acted as a restraining influence on the development of employment law principles. This paper argues that the divergent principles applied reflect different political approaches by the judges.

Part I of this paper reviews the history and nature of the specialist employment law jurisdiction in New Zealand and the historical relationship between the specialist employment courts and the general courts. Part II describes three benchmarks against which the approaches of the Court of Appeal and Employment Court judges are assessed: Griffith's analysis of the politics of the judiciary; the extent to which judges resort to common law principles and methods of reasoning which historically have been hostile to workers; and the influence of the New Right revolution.

In Part III of the paper three cases are analysed in the light of these benchmarks: *Wellington Caretakers IUOW* v *G N Hale & Sons; NZ Post Primary Teachers' Assn* v *Attorney-General; and TNT Worldwide Express (NZ) Ltd v Cunningham*. Part IV of the paper recognises some exceptions to the trends discussed earlier in the paper, notes the Employment Court's recent emphasis on the right of freedom of association in a bargaining context, and queries the likely approach of the Court of Appeal on this issue.

The text of this paper (excluding contents page, notes and acknowledgements, footnotes, bibliography and appendix) comprises approximately 20,000 words.

NOTES AND ACKNOWLEDGEMENTS

A Books, Articles and Reports

Full references to material referred to in this research paper are contained in the Bibliography. The following abbreviations are used in the text:

Davidson *The Judiciary and Employment Law*	F Davidson *The Judiciary and the Development of Employment Law* (Gower Publishing Co, Hampshire, 1984)
Deeks et al *Labour and Employment Relations*	J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman Paul, Auckland, 1994)
Geare *Industrial Relations*	A J Geare *The System of Industrial Relations in New Zealand* (2 ed, Butterworths, Wellington, 1994)
Griffith	J A G Griffith *The Politics of the Judiciary* (4 ed, Fontana Press, London, 1991)
Hughes *Labour Law*	J Hughes *Labour Law in New Zealand* (The Law Book Co Ltd, Sydney, 1989)
James *New Territory*	C James *New Territory. The Transformation of New Zealand 1984 - 1992* (Bridget Williams Books, Wellington, 1992)
Kelsey *Rolling Back the State*	J Kelsey *Rolling Back the State. Privatisation of Power in Aotearoa/New Zealand* (Bridget Williams Books, Wellington, 1993)
Mancini	G F Mancini "Politics and the Judges - The European Perspective" (1980) 43 MLR 1
Mazengarb's Employment Law	R Mackay and R McArtney (eds) *Mazengarb's Employment Law* (Vol 1, Butterworths, Wellington, 1994)
Mathieson *Industrial Law*	D L Mathieson *Industrial Law in New Zealand* (Sweet and Maxwell (NZ) Ltd, Wellington, 1970)
Ryan and Walsh "Labour Law v Common Law"	R Ryan and P Walsh "Labour Law v Common Law: the New Zealand Debate" (1993) Aust J Lab L 230
Wedderburn *The Worker and the Law*	Lord Wedderburn of Charlton *The Worker and the Law* (3 ed, Penguin Books, Harmondsworth, 1986)
Wedderburn "Freedom of Association"	Lord Wedderburn of Charlton "Freedom of Association and Philosophies of Labour Law" (1989) 15 ILJ 1
Wedderburn et al *Building on Kahn-Freund*	Lord Wedderburn of Charlton, R Lewis and J Clark *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press, Oxford, 1983)

B Cases

Names of cases may be abbreviated in the text and in footnotes eg *Wellington etc Caretakers etc IUOW* v *G N Hale & Sons Ltd* becomes *Hale*.

C Judicial Bodies and Organisations

The following abbreviations are used for courts, tribunals and organisations in footnotes but not in the text:

CA	Court of Appeal
EC	Employment Court
ET	Employment Tribunal
HC	High Court
SC	Supreme Court
LC	Labour Court
BRT	Business Roundtable
NZLS	New Zealand Law Society
NZIIRR	New Zealand Institute of Industrial Relations Research
NZCTU	New Zealand Council of Trade Unions
NZEF	New Zealand Employers' Federation

D Legislation

The following abbreviations are used in both the text and in footnotes:

IRA	Industrial Relations Act 1973
LRA	Labour Relations Act 1987
ECA	Employment Contracts Act 1991

ACKNOWLEDGEMENTS

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I THE JURISDICTION AND APPROACH OF THE SPECIALIST AND GENERAL COURTS IN EMPLOYMENT LAW

A Introduction

Industrial relations and employment law are highly political matters and the specialist employment institutions are more vulnerable to political pressure than the general courts. Sir Owen Woodhouse recognised this in 1983 when he commented on the need to "guard against undue and even harmful pressure that could arise in some future economic or political climate" by protecting the work of the specialist institutions.[1] In 1992 and 1993 the Employment Court established under the Employment Contracts Act 1991 (ECA) was subjected to a sustained ideological and political attack.[2] In July 1992 for example Mr A Jones, Industrial Relations Manager for Fletcher Challenge,[3] called for the abolition of the court. He said that it was "in danger of abandoning longstanding legal principles for 'social policies' that are idealistic, theoretical, untested and impractical."[4] He said that the court's decisions showed a bias against employers and that its "long and complex" judgments would enable the court to obscure its real intention of giving itself "a licence towards judicial activism."[5] Jones also referred to the allegedly high rate at which the Court of Appeal was overturning Employment Court decisions.[6] The attacks echoed earlier criticism of the Labour Court[7] and were part of a campaign for the abolition of a specialised employment law jurisdiction.[8]

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[1] Sir Owen Woodhouse "The Judge in Today's Society" (Auckland Law School Centenary Lectures, Legal Research Foundation Inc, Law School, University of Auckland, Auckland, 1983) 87, 95. He considered that this may be better done "under the constitutional umbrella of the judicial branch rather than left so closely associated with and influenced by the executive government."

[2] This attack is documented by R Ryan & P Walsh "Common Law versus Labour Law: The Debate over the Future of the Specialist Institutions" (Industrial Relations Centre, Victoria University of Wellington, Working Paper 2/93, 1993) 13 - 15. In particular see New Zealand Business Roundtable/New Zealand Employers' Federation *A Study of the Labour/Employment Court* (NZBRT/NZEF, December 1992).

[3] Also a board member of the NZ Employers' Federation (Inc) and of the Business Roundtable.

[4] "Employer Wants Court Abolished" (*The Dominion*, 10 August, 1992).

[5] Above.

[6] "The Overturning of Employment Court Decisions" (*The Dominion*, 12 August 1993). Mr Jones said that over half of 48 appeals from decisions of the LC and EC to the CA had been upheld, and that decisions of the Chief Judge were particularly susceptible to overturning by the CA. Further analysis indicated that these figures were incorrect: R Ryan and P Walsh "Common Law v Labour Law: the New Zealand Debate" (1993) Aust J Lab L 230, 253 (hereafter Ryan and Walsh "Common Law v Labour Law"). In October 1993 the Minister of Employment, Hon W F Birch, said that the number of appeals from decisions of the EC was much smaller and that, given the dramatic nature of the changes brought about by the ECA, "one might have expected a much higher level of appeals": "Birch Defends Role of Labour Court" (*Evening Post*, 11 October 1993).

[7] In 1989 Hon W F Birch MP said that "[t]he Labour Court has not really discharged its responsibilities properly": (*New Zealand Herald*, 27 April 1989).

[8] Ryan and Walsh "Common Law v Labour Law" 248 - 250.

No other court in New Zealand's history has been subjected to such a direct and sustained ideologically-based attack nor received such little political support.[9] The attacks have subsided since the 1993 General Election, but they raised important questions of constitutional[10] and employment law which have not yet been fully explored. This paper looks at one of those questions: the nature and extent of divergence in the principles of employment law currently applied by the Employment Court and the Court of Appeal. Business Roundtable criticisms which implied[11] that the Court of Appeal was almost automatically overturning appeals from Employment Court decisions were exaggerated.[12] Nevertheless it remains true that the rate of successful appeals has increased[13] and that the Court of Appeal's traditional hands-off approach to employment law questions and deference to the specialist knowledge of the Employment Court's predecessors have all but disappeared.

Part I of this paper summarises the development of the jurisdiction of the specialist employment institutions and discusses their relationship with the general courts. Part II discusses the politics of, and judicial attitudes to, employment law and sets out the points of reference from which the different approaches of the Employment Court and Court of Appeal are later analysed. Part III analyses the judicial politics in three employment law cases in which the two courts reached different results by applying different legal principles. Part IV discusses the likely approach of both courts to employment law issues in the future.

B The Development of the Specialist Employment Law Jurisdiction

The Industrial Conciliation and Arbitration Act 1894 was intended to prevent strikes and lockouts by fostering the development of unions and setting up a system for resolving disputes through a specialist Court of Arbitration and wage-fixing conciliation councils, both with tripartite representation:[14]

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[9] G Anderson "The Judiciary, the Court and Appeals" [1993] ELB 90. As late as September 1993 MP and Chair of the Labour Select Committee Mr M R Bradford criticised the court for being "rather cavalier about its judgments in relation to its responsibilities to the wider judicial system" and said that "[t]he jury is still out on the future of the Employment Court": "Employment Court's Future 'Under Review' " (*The Evening Post*, 17 September 1993).

[10] Anderson, above, 90, argues that the attacks on the EC undermined the independence of the judiciary.

[11] Above, 90.

[12] Above n 2, 15.

[13] Department of Labour, Report to the Minister of Labour, 6 September 1993.

[14] J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand*(2 ed, Longman Paul, Auckland, 1994) 45 - 46 (hereafter Deeks et al, *Labour and Employment Relations*).

> [It] was Reeves's solution to the central problems of how to encourage economic development while protecting the interests of weak groups of workers and minimising the possibility of social disruption through strike activity ... a system ... designed to resolve industrial conflict without social disruption.

The main function of the original Court of Arbitration was to make awards which fixed wages and working conditions for unionised workers. The court also had jurisdiction to interpret awards and industrial agreements and to award penalties for breaches of awards, but was "difficult to regard ... as a true court in the sense of a body primarily created to resolve justiciable disputes. Economic disputes or disputes of interest can not be resolved by the normal techniques of judicial reasoning and legal logic."[15] Initially Judges of the Court of Arbitration were judges of the Supreme Court: "it was customary to appoint the most junior puisne judge to the Court of Arbitration."[16] This practice ceased in 1921 when Frazer J was appointed, although Supreme Court judges could still be appointed as temporary Court of Arbitration judges.[17] The Supreme Court (and later the High Court) have never been superior to the specialist courts in the judicial hierarchy, and neither court is bound by the decisions of the other.[18]

The Court of Arbitration became ineffective in the 1960s and early 1970s when direct bargaining outside the system grew and it gradually lost its status as an arbitral body on wages and conditions.[19] The Industrial Relations Act 1973 (IRA) created new institutions: an Industrial Commission, to deal with wage fixing matters ("disputes of interest") and an Industrial Court, to deal with "disputes of rights" including the interpretation and enforcement of awards and the new personal grievance action.[20]

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15 G Anderson "Specialist Employment Law and Specialist Institutions" (Paper presented to the NZ Institute of Industrial Relations Research Seminar on a Specialist Employment Law Jurisdiction: the Future of the Employment Court and the Employment Tribunal, Wellington, 23 April 1993) (hereafter NZIIRR Seminar) 2.

16 D L Mathieson *Industrial Law in New Zealand* (Sweet and Maxwell (NZ) Ltd, Wellington, 1970) 291 (hereafter Mathieson *Industrial Law*).

17 Above.

18 See Mathieson *Industrial Law* 297 - 298 on precedent in the C of Arb. In *In re New Zealand Harbour Boards' Employees' Award* [1944] NZLR 258 (C of Arb) Tyndall J refused to follow a decision of Myers CJ in *NZ Harbour Boards' IUOE* v *Tyndall* [1944] NZLR 43 (SC). Tyndall J's approach was essentially upheld by the CA in *NZ Harbour Boards' IUOE* v *Tyndall* [1944] NZLR 584. In *Wellington etc Clerical Workers IUOW* v *Greenwich* [1983] ACJ 965, Williamson J said (979) that "we were somewhat surprised to read what are possibly obiter dicta of the Court of Appeal in *Quality Pizzas Ltd* v *Canterbury Hotel Employees IUOW* [Unreported, 26 October 1983, CA 17/83] stating that the Arbitration Court is an inferior court of justice. We have hitherto regarded it as a superior Court of Industrial Relations exercising jurisdictions not possessed by the High Court, and not appealable on merit to any other Court, and consisting in part of the highest form of jurisdiction, namely legislative. The fact that no other Court has authority to exercise those jurisdictions would seem to make the Arbitration Court the superior court in respect of those jurisdictions."

19 Ryan and Walsh "Common Law v Labour Law" 230 - 235.

20 A Mediation Service, the forerunner of the mediation jurisdiction of the Employment Tribunal, was established in 1970: A J Geare *The System of Industrial Relations in New Zealand* (2 ed, Butterworths, Wellington, 1988) 62 - 63 (hereafter Geare *Industrial Relations*.

From 1894 jurisdiction over employment law matters was gradually concentrated in the specialist institutions.[21] The IRA continued this trend by removing the Court of Appeal's jurisdiction to hear appeals on questions relating to the construction of awards and agreements[22] and by giving the Industrial Court exclusive jurisdiction to deal with actions to recover statutory penalties.[23] Previously Magistrate's Courts had also had independent jurisdiction to deal with penalty actions and actions for breach of award, and thus had a role in interpreting awards and agreements.[24] Apart from a brief period from 1981 to 1987 when the District Court had power to award penalties in relation to certain strike activity,[25] complete jurisdiction over the making, interpretation, and enforcement of awards was given to the specialist institutions in 1973. The common law had very limited application in the conciliation and arbitration system. Lawyers were generally excluded from arbitration proceedings and conciliation councils where common law principles had little relevance.[26]

In 1977 a new Arbitration Court was established with "legal" and wage fixing roles once more combined in a single institution.[27] The Court had a "generally high degree of acceptance",[28] but the Labour Government's review of industrial relations in 1985 - 1986[29] resulted in further change. The Labour Relations Act 1987 (LRA) established a Labour Court which differed from its predecessors in that it was a court of record, not a court of conciliation and arbitration.[30] Tripartite representation was retained only for personal grievance, demarcation, and parental leave hearings.[31] The Labour Court was also given

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[21] Mathieson *Industrial Law* 333. The civil courts lost their exclusive jurisdiction over claims for arrears of wages in 1943: see *NZ Harbour Boards' IUOE* v *Tyndall*, above n 18, 592 - 593.

[22] D L Mathieson *Industrial Law in New Zealand. Supplement to Volume 1* (Sweet and Maxwell (NZ) Ltd, Wellington, 1975) 91.

[23] Although the power to delegate functions to the Magistrate's Court was retained: IRA s 49. The power to delegate was finally removed by the LRA 1987 .

[24] Mathieson *Industrial Law* 250.

[25] See A Szakats (ed) *Mazengarb's Industrial Relations and Industrial Law* (4 ed, Butterworths) s 147 commentary.

[26] IRA s 54(4) provided that no barrister or solicitor with a current practising certificate could appear or be heard before the Industrial Court in arbitration proceedings except by consent. McCarthy J in *NZ Printing etc IUOW* v *McKenzie & Willis* [1982] ACJ 653 (CA) noted (656) that "there has been a fairly consistent tendency to exclude barristers and solicitors in the absence of consent, from the disposal of substantive issues involved in industrial disputes ... ."

[27] Industrial Relations Amendment Act 1977.

[28] Ryan and Walsh "Common Law v Labour Law" 232.

[29] Minister of Labour *Industrial Relations: a Framework for Review Vol 1 and Vol 2* (New Zealand Government, Wellington, 1985) (the "Green Paper"); *Industrial Relations: A Framework for Review - Summary of Submissions* (Wellington, 1986); *Government Policy Statement on Industrial Relations* (Wellington, 1986).

[30] LRA 1987 s 278. See J Hughes *Labour Law in New Zealand* (The Law Book Company, Sydney, 1990) Vol I para 9.30 pp 5276 - 5277.

[31] An Arbitration Commission with jurisdiction over disputes of interest was also established under the LRA: see ss 147 - 151 and 259 - 277.

exclusive jurisdiction over a wider range of employment law matters,[32] including judicial review proceedings against statutory officers with industrial relations functions, proceedings founded on the industrial torts[33] and proceedings for the grant of injunctions against strikes or lockouts.[34] These matters had previously been subject to the jurisdiction of the High Court. Ryan and Walsh conclude:[35]

> In summary then, the historical development of the specialist jurisdiction in New Zealand has involved the gradual change from a tripartite structure dealing largely with wage-fixing matters to a system in which a number of issues involved in the employment relationship have come under the jurisdiction of an increasingly legally based Court.

In 1991 this trend culminated in the establishment of a specialist and mainly appellate Employment Court and a "low level, informal" Employment Tribunal "to provide speedy, fair and just resolution of differences between parties to employment contracts."[36] Both Court and Tribunal have "exclusive jurisdiction to hear and determine any proceedings founded on an employment contract."[37] The residual power of the general courts to deal with contracts of employment outside the system of awards and agreements disappeared almost entirely in 1991,[38] with jurisdiction over not only the industrial torts but also cases involving restraint of trade, the duties of confidentiality and fidelity, and wrongful dismissal being conferred exclusively on the Employment Court.[39] There is a right of appeal to the Court of Appeal on questions of law and from Employment Court decisions involving the industrial torts, contempt of court and applications for review.[40] However, there is no appeal to the Court of Appeal from Employment Court decisions on the construction of employment contracts.[41]

Despite the Court's "equity and good conscience" jurisdiction,[42] its discretion to admit evidence other than "strictly legal" evidence,[43] and its power to make its own rules

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32 LRA s 279(4). Previously these had been subject to the jurisdiction of the HC (see Part IC1 below).

33 The industrial (or "economic") torts are discussed in R Mackay and R McArtney (eds) *Mazengarb's Employment Law Vol 1* (Butterworths, Wellington, 1994) paras 1400 - 1447 pp B/401 - B/472 (hereafter *Mazengarb's Employment Law*).

34 ECA ss 280(1), 242(1) and 243(1) respectively.

35 R Ryan and P Walsh "Common Law versus Labour Law: the Debate over the Future of the Specialist Institutions" (Working Paper 2/93, Industrial Relations Centre, Victoria University, Wellington, 1993) 3.

36 ECA s 76(c).

37 ECA s 3(1).

38 The HC's residual jurisdiction in respect of certain tortious action is discussed in *Mazengarb's Employment Law* para V27 p A/822.

39 ECA s 4(1).

40 ECA ss 132 - 135.

41 ECA s 135(1). EC judges are appointed by the Governor-General and must be barristers and solicitors of not less than 7 years' standing of the High Court. They hold office during good behaviour, may be removed by the Governor General upon the address of the House of Representatives, and must retire at the age of 68: ECA s 113.

42 ECA s 194.

regarding practice and procedure,[44] an increasingly legalistic approach is taken by the employment institutions in employment disputes, and all trace of tripartite representation, even in personal grievances, has disappeared. Lawyers now appear (wigged and gowned) in most Employment Court proceedings and frequently appear before the Tribunal in both its adjudication and mediation jurisdictions.

C The Approach of the General Courts to Employment Law

1 The Supreme Court and High Court

Historically the Supreme Court and High Court had a limited influence on employment law except in cases involving non-unionised employees whose employment relationships continued to be regulated by the common law. This changed in the early 1970s with the rise of industrial militancy including strike action.[45] Until the LRA introduced a legal right to strike in 1987, "all strikes and lockouts were tortious acts or breaches of contract or both, although some were more unlawful than others."[46] Despite this, civil proceedings in respect of industrial action were rare until 1970.[47] Greenslade refers to "a long period starting with World War II and the subsequent 'full employment' when it was generally viewed as unacceptable for patriotic, humanist, socially sensitive, or simply "political", reasons to seek legal compensation for economic damage suffered in industrial disputes."[48] Writing in 1981, Reid said:[49]

> Very few strikes in New Zealand are legal, though most in the UK would fall within that "golden formula" which gives them legitimacy if they are called "in contemplation or furtherance of a trade dispute". The strike figures for the two countries are nevertheless comparable. Statutory control may have made unions weaker on the job in this country, but it has not stopped them from using those tactics which produce results. Thus those unions which have the ability to "go back to their members" will do so whether the rules of the game permit it or not, rather than ask the Arbitration Court to arrive at a settlement.

When employers began to challenge strikes through actions founded on the industrial torts, they got a sympathetic response from the Supreme Court, which retained jurisdiction over such actions. The court had no difficulty in applying in a New Zealand context the

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[43] ECA s 126(1).
[44] ECA s 130(1).
[45] *Mazengarb's Employment Law* para V8 p A/808; Deeks et al *Labour and Employment Relations* 55 - 56.
[46] Chief Judge T G Goddard "Strikes, Lockouts, Pickets and the Remedies: New Directions Under the Labour Relations Act 1987 and the Common Law" [1990] ILB 41, 43 (Part I of a paper delivered to the Commonwealth Law Conference, Auckland, 1990).
[47] *Mazengarb's Employment Law* para V14 p A/812.
[48] B Greenslade "Strikes, Injunctions and Compliance Orders: the Labour Relations Act 1987 (1988) 13 NZJIR 69 n26.
[49] [1981] NZLJ 457, 459. Reid, a lawyer, was at that time Secretary of the Auckland Shop Employees' Union.

principles developed by the English courts to the industrial torts and labour injunctions.[50] Little or no consideration was given to whether New Zealand's statutory system could "readily receive a transplant of common law rules that have been developed essentially in the context of the British industrial relations system and in a foreign political and legal environment."[51] Nor, despite the absence of statutory immunities for New Zealand unions,[52] did the general courts consider whether an expansion of the defences available to unions in industrial tort cases was justified.

In 1987 Sir Ivor Richardson commented that "any intrusion by the High Court into industrial relations, even if there is jurisdiction, must undermine to some extent the legislative policies underlying the Industrial Relations Act 1973."[53] The High Court's decisions resulted occasionally in industrial relations disasters such as the gaoling of Drivers' Union Secretary Bill Andersen in 1974. He was subsequently released "to head a triumphal march down the centre of Auckland."[54] One commentator "doubt[ed] that the troubles at Marsden Point, Mangere Bridge or the BNZ could happen under the Labour Relations Act. They would all have been handled very differently and I venture to suggest that both employers and unions would have had full confidence in the Labour Court's ability to deal with those cases."[55] Hughes says:[56]

> [A]t common law, the practice adopted on applications for injunctions has heavily favoured strike bound employers. Recognition of these factors contributed to the widely held view in trade union circles that the common law courts have little understanding of, and little sympathy for, trade union objectives and was a central consideration in the transfer of jurisdiction to the Labour Court.

2 *The Court of Appeal*

The Court of Appeal has taken a "cautious approach"[57] to labour legislation. It has tended to endorse the principles developed and refined by the specialist courts, particularly in the

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50 G Anderson "The Reception of the Economic Torts into New Zealand Labour Law: A Preliminary Discussion" (1987) 12 NZJIR 89, 95 - 96.

51 Above, 90.

52 Above, 97.

53 "The Role of the Courts in Industrial Relations" (1987) 12 NZJIR 113, 114 - 115. See also G Anderson "Strikes and the Law: The Problems of Legal Intervention in Labour Disputes" (1988) 13 NZJIR 21.

54 Geare *Industrial Relations* 282.

55 D Clark "Do We Need a Labour Court?" (NZ Business, May 1990) 50 (the author was a tutor in Labour Relations and Human Resource Management at Auckland Technical Institute). The respective jurisdictions of the HC and LC where strikes or lockouts occurred is discussed by J Hughes*Labour Law in New Zealand* (The Law Book Co Ltd, Sydney, 1989) para 11.485 p 7206 - 7207 (hereafter Hughes *Labour Law*).

56 Hughes *Labour Law* para 11.895 p 7654.

57 Above n 53, 117. Compare Collins view that the English judiciary tried to subvert protectionist labour legislation (below n 150).

area of personal grievances,[58] and in some cases has extended principles of statutory employment law to the common law of employment.[59] Court of Appeal judges often deferred in courteous terms to the specialist knowledge and jurisdiction of the Arbitration Court:[60]

> It is not to be assumed that propositions of law, however prestigious and well established in the High Court or the Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for a specific field. In the matters directed by the statute to come before it, it has exclusive jurisdiction, and, when exercising it, it must take into account other considerations besides legal issues. It is concerned primarily with fairness. Thus it has been more than once said in this Court that legal technicalities or analogy of rules will not always be helpful in achieving the objects of a Court which has been given what Cooke J characterised as "unusual powers."

In 1987 Sir Ivor Richardson concluded:[61]

> All in all, my impression is that the Court of Appeal has had a distinctly limited influence on the interpretation and application of industrial relations legislation. That may reflect a particularly cautious approach on the part of the Court or, as some might say, unwillingness to respond to social change in this area. It may suggest that the specialist court arrangements are working particularly well. In any event it seems consonant with the scheme and policy of the legislation that a court functioning as an appellate and review body on matters of law only should have a low, non-activist profile.

However Court of Appeal judges seldom if ever developed rules which went beyond those already defined by the specialist courts[62] and when common law causes of action were considered, the Court of Appeal did not modify the anti-worker bias of the common law. In particular no judicially sanctioned right to strike or picket at common law was ever recognised. In *NZ Baking Trades IUW* v *General Foods Corp (NZ) Ltd* Richardson J recognised that "the grant of an interim injunction in industrial matters necessarily shifts the balance of advantage without resolving the underlying issues"[63] and said that in granting an interim injunction against a strike "the High Court concentrated on the contractual and property rights of the employer and the obligations of the workers and the

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58 See eg *Hennessey* v *Auckland City Council* [1981] ACJ 213 (AC); [1982] ACJ 699 (CA) and *Mazengarb's Employment Law* para III.29 p A/246 with respect to procedural fairness; *Wellington etc Clerical Workers IUW* v *Greenwich* [1993] ACJ 965 (AC) and *Auckland Shop Employees Union* v *Woolworths (NZ) Ltd* [1985] 2 NZLR 372 with respect to constructive dismissal; and *Wellington Road Transport IUW* v *Fletcher Construction Ltd* [1983] ACJ 653, 657 - 660 regarding burden of proof in personal grievance cases.

59 For example *Marlborough Harbour Board* v *Goulden* [1985] 2 NZLR 378. See also New Zealand Law Commission *Aspects of Damages: Employment Contracts and the Rule in* Addis v Gramophone Co - Report No 18 (Wellington, 1991) 16 - 18 and the comments (47) that *Goulden* "may be explained more narrowly in terms of administrative law rules relating to the observance of natural justice by public agencies", while the *Shop Employees* case "may be explained in the statutory context of 'unjustifiable' dismissal."

60 *Winstone Clay Products Limited* v *Cartledge (Inspector of Awards)* [1984] ACJ 1035, 1038 (CA, per McCarthy J).

61 Above n 53, 117.

62 See above n 59.

63 [1985] 2 NZLR 110, 122.

union and emphasised the financial losses accruing from the strike to the employer and the workers without giving any obvious weight to the fact that Parliament has established a system of law designed to settle industrial disputes outside the ordinary courts."[64] The other members of the Court of Appeal recognised the desirability of the High Court refusing to handle employment law matters where the Arbitration Court had jurisdiction over the substance of a dispute, but nevertheless refused to rule accordingly:[65]

> There is some attraction in the approach that ... even though a tort action has been brought properly before it, the High Court should wash its hands of all responsibility for the time being and withhold any remedy until any case which happens to be pending in the Arbitration Court and has some link with the subject-matter of the High Court action has been disposed of. But that would be a radical change, having the effect of altering existing rights quite radically.

A greater readiness to protect the rights of individuals acting alone rather than collectively is also discernible in judicial rulings.[66] The courts would not grant specific performance of an individual contract of employment to force an individual worker to work for a particular employer,[67] but would grant injunctions which had the effect of forcing striking workers back to work.[68] Even strike action, by its very nature a collective action, was individualised:[69]

> If acting within the scope of authority from the workers, [the union] may present argument on their behalf that they have the right to strike. But it should not be overlooked that, if there is a right to strike, it belongs to the workers, not the union.
>
> ... [W]hat the union cannot do, as the law stands, is to instigate the workers to strike in disregard of their individual lawful responsibilities to their employer.

The general courts instinctively gave common law principles imported from England greater weight than New Zealand's indigenous industrial relations system which was, by the time of the first tort cases, over 70 years old. They failed to take the opportunity of developing an indigenous jurisprudence in this area, particularly given the complexity and inconsistency in the law relating to the economic torts. After the transfer of jurisdiction over the economic torts to the Labour Court, Goddard CJ signalled that the court may well develop an indigenous jurisprudence in this area, referring to "the still developing state of the law of tortious liability:[70]

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64 Above.

65 Above, per Cooke J, 118: "In a controversial field where traditionally the legislature has been active, I think that major change is best left to the legislature." See Sir Ivor Richardson's comments on this case, above n 53.

66 Wedderburn *The Worker and the Law* 142.

67 A Szakats *Law of Employment* (3 ed, Butterworths, Wellington, 1988) para 29.5 p 292.

68 Hughes *Labour Law* para 11.895 p 7654.

69 *NZ Baking Trades Union* v *General Foods Corporation (NZ) Ltd* [1985] 2 NZLR 110, 118 (per Cooke J).

70 Chief Judge T G Goddard "Strikes, Lockouts, Pickets and the Remedies: New Directions Under the Labour Relations Act 1987 and the Common Law (Part 3)" [1990] ILB 72.

> The industrial scene is particularly apt for the assimilation of common law with common sense and, hopefully, some of the unanswered questions can be resolved. Does a defence of justification exist to all of the four torts and, if it does, what are its ingredients and its limitations in each case? Is proof required of an intention to injure the plaintiff, or is it sufficient that there is an intention to injure someone? Should the use of unlawful means make any difference?

Unfortunately by the time the specialist courts were in a position to address these questions, the New Right revolution[71] had reached the labour market. The subsequent decrease in the number of strikes[72] has largely removed the issue from judicial scrutiny since 1991.[73]

D The Context of Change: Reform of the Labour Market and the Employment Contracts Act 1991

1 The creation of a jurisprudential gap

A comparison of the treatment of employment relationships by the judges of the Court of Appeal and the specialist employment courts before 1990 does not reveal significant differences in approach.[74] Beginning with the *Hale*[75] decisions, however, a divergence became apparent in the rules and methods of reasoning applied by the two courts in some cases. With some exceptions[76] the Employment Court continued its traditional approach of applying legal principles which recognised the social and economic reality of the employment relationship and the need for worker protection against the operation of the

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[71] The nature of the New Right revolution is discussed in Part I D1. For a definition of "New Right" see J Kelsey *Rolling Back the State. Privatisation of Power in Aotearoa/New Zealand*(Bridget Williams Books, Wellington 1993) Chapter 22, 295 - 303 (hereafter Kelsey *Rolling Back the State*). For a definition of "revolution" see C James *New Territory. The Transformation of New Zealand 1984 - 1992* (Bridget Williams Books, Wellington, 1992) Appendix 4 340 - 343 (hereafter James *New Territory*).

[72] Deeks et al *Labour and Employment Relations* 376.

[73] In noting that the general courts readily adopted common law principles in employment law cases, the writer does not suggest that the specialist courts applied "pro union" or "worker protection" principles without exception. For example the matters unions could legitimately pursue and bargain over were narrowly prescribed by the C of Arb in *Ohinemuri Mines and Batteries Employees' IUW* v *Registrar of Industrial Unions* [1917] NZLR 829: "Wages, conditions and hours really embrace the whole objects of the existence of industrial unions" (per Chapman J, 836). This narrow view was endorsed 60 years later by the Industrial Court in *NZ Bank Officers IUW* v *ANZ Banking Group Ltd* [1979] ICJ 379, 384, when Jamieson J said that staff loans were not industrial matters, and consequently could not be the subject of the dispute of rights. On this point see Geare *Industrial Relations* paras 704 - 712 pp 189 - 195 and P A Joseph "The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand" (Legal Research Foundation, Publication No 17, 1979).

[74] R Ryan reported in "The Overturning of Employment Court Decisions" (*The Dominion*, 12 August 1993).

[75] See Part IIIB.

[76] These are discussed in Part IV.

market.[77] The Court of Appeal began to adopt a stricter contract law approach which paid little heed to market place inequality.[78]

Any political and ideological differences between judges which may have existed before 1990 had minimal effect on employment law because the comprehensive statutory regulation of industrial relations left little room for such differences to influence the outcome of cases. The removal of comprehensive statutory regulation left a jurisprudential gap which allowed the politics of the judiciary to have a discernible effect on the outcome of cases. By 1991 neo-classical or libertarian economic and social theories and ideologies had permeated intellectual thought, including, it is suggested, judicial thought, to an extent which was "unmistakable and deep."[79] It was not surprising, then, that the jurisprudential gap was filled to some extent by principles which reflected these theories and ideologies.

The political, social and economic context within which these changes took place is described below.

2 *The Introduction of the ECA*

Between 1984 and 1993 an economic and social revolution occurred in New Zealand. In the name of freedom and economic efficiency the interventionist welfare state which New Zealanders had lived in for the greater part of the century was dismantled. State support for health, education and welfare services was severely cut back.[80] Regulatory reforms included:[81]

> [T]he virtual elimination of government support for the agricultural sector, the removal of exchange controls, the floating of the dollar, substantial deregulation of capital markets, the conversion of import quotas to tariffs and tariff reduction, reform of state sector businesses to promote commercial performance and competition (and ultimately some privatization of these businesses), and reforms to the "core" state sector to enhance managerial performance and accountability.

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[77] This approach is, it is submitted, similar to that adopted by J Deeks et al *Labour and Employment Relations* (29 - 31) and set out in the Appendix to this paper.

[78] The same divergence in approach is apparent between the English Employment Appeal Tribunal and Court of Appeal: see N Fagan *Contracts of Employment* (Sweet and Maxwell, London, 1990) 52; F Davidson *The Judiciary and the Development of Employment Law*(Gower Publishing Co, Hampshire, 1984) 204 (hereafter Davidson *The Judiciary and Employment Law*).

[79] James *New Territory* 92.

[80] Analyses of the revolution are contained in Kelsey*Rolling Back the State.* and James *New Territory.* See also M Taggart "Corporatisation, Privatisation and Public Law" (1991) 2 PLR 77 and "The Legacy of Rogernomics" (*Dominion*, 14 July 1994, Wellington, New Zealand) 9.

[81] P Brook Cowen "Labor Relations Reform in New Zealand: The Employment Contracts Act and Contractual Freedom" (1993) 14 Journal of Labor Research 69, 77 - 78.

Until 1991 the labour market remained relatively unaffected by the free market revolution, largely because the Labour Party's political alliance with the trade union movement made radical reform of labour law electorally unpalatable.[82] The LRA, while encouraging site-based bargaining, did not remove the main protectionist elements of the old system: compulsory unionism and blanket (or industry) award coverage. The election of a National Government in 1990 enabled the revolution to be completed by deregulation of the labour market through repeal of the LRA and its replacement by the ECA.

The principles of freedom of contract incorporated in the ECA were not new, but brought about a partial return to the principles of employment law which had existed before 1894.[83] The Act's bargaining provisions reflected a neo-classical economic approach, in particular the theories of Hayek[84] that the market, private property and individualism are the natural social order and that any attempt to achieve social justice or to balance the interests of different groups in society by the state is an error. According to Hayek individual contracts of employment have no special character and should be governed by the principles of freedom of contract and the common law. The employee's freedom depends on choice between a great number and variety of employers, provided by a competitive market. Organised groups like trade unions create distortions in the market and should have no special legal status:[85]

> [The] real exploiters in our present society are not egotistic capitalists or entrepreneurs, and in fact not separate individuals, but organisations which derive their power from the moral support of collective action and the feeling of group loyalty.

Professor Richard Epstein of the University of Chicago developed these views into a legal philosophy in which there is no place for a specialist body of labour law or specialist institutions to apply that law.[86] In Epstein's theory of self-interest the best

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[82] Above, 73.

[83] See generally *Mazengarb's Employment Law* para pp A/1 - A/12.

[84] The influence on employment law of Professor Friedrich Hayek, the leading exponent of the Austrian school of economics, is discussed by Lord Wedderburn "Freedom of Association and Philosophies of Labour Law" (1989) 15 ILJ 1 (hereafter Wedderburn "Freedom of Association"). For a brief summary see James *New Territory*. Appendix 3 (The Intellectual Challenge to the Welfare State) 334 - 339. See also Deeks et al *Labour and Employment Relations* 82 - 84.

[85] F A Hayek *Law Legislation and Liberty* (1979) 89 - 90 cited in Wedderburn "Freedom of Association" 9 n28. As Wedderburn notes (12) this picture "may look rather antique in today's world of pyramid corporate groups, oligopoly and transnational capital."

[86] See eg R A Epstein "A Common Law for Labour Relations: A Critique of the New Deal Labor Legislation" (1983) 92 Yale LJ 1357; "A Common Law for Labor Relations and Reality: A Rejoinder to Professors Getman and Kohler" (1983) 92 Yale LJ 1435; "In Defence of the Contract at Will" (1984) 51 U Chi LR 947. Epstein's views are critiqued by N Wailes "The Case Against Specialist Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations" (1994) 19 NZJIR 1. See

system of labour relations is one where private property and personal liberty are maximised because in his or her own self-interest no employee would enter into an employment contract which was disadvantageous. The market will deliver appropriate levels of pay and conditions. According to Epstein the basic common law principles of property, contract and tort are the best legal foundation for employment contracts in a free market, and "the law should have no interest in or provision for fairness or equity in the content of contracts, provided there had been no misrepresentation, fraud or duress."[87]

The supremacy of the market and the common law and the need to abolish the specialist employment law jurisdiction were pushed relentlessly by the Business Roundtable from 1986.[88] The LRA reforms did not conform sufficiently to the freedom of contract ideology and by June 1987 the Business Roundtable launched a campaign against the new Act.[89] Greenslade,[90] then Legal Adviser to the New Zealand Employers' Federation (NZEF), attacked the notion of a separate labour law jurisdiction and claimed:[91]

> The reason there are any jobs at all, whether in employment or contracting, is that some people called "consumers" want, and are prepared to pay for, some goods and services. Such work is the *only* reason for jobs. All other so-called "work" is disguised welfare. It is the function (not the "right", but rather the "duty") of management to meet consumer demand, and to do so as efficiently and effectively as possible. One of the ways for management to meet consumer demand is to organise labour productively and strengthen its muscle and mind with capital and motivation.

These rather religious expressions of the primacy of the market were reinforced when the Business Roundtable invited Epstein to New Zealand to press the case for a general law model.[92] The Business Roundtable also commissioned a Heylen research poll in February 1988 which purported to show strong public support for enterprise bargaining, voluntary unionism, union contestability and politically independent unions:[93]

> Mr R Barker, Secretary of the Service Workers Federation, dismissed the figures as "rubbish" and entirely predictable, because asking the Roundtable to commission a poll on trade unions was equivalent to the Master Butchers Association sponsoring a poll on vegetarianism.

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also Ryan and Walsh "Common Law v Labour Law" 235 - 238; Deeks et al *Labour and Employment Relations* 82 - 84.

87 This summary of Epstein's view is contained in M Street "The Future of the Employment Court and Tribunal: the Labour Party's View" (NZIIRR Seminar) 3.

88 Ryan and Walsh "Common Law v Labour Law" 235.

89 *Freedom in Employment* (NZBRT report, June 1987) advocated decentralised wage bargaining and greater flexibility as an "urgent national priority". The then Minister of Labour, Hon S Rodger, described these views as "extreme": H Roth "Chronicle" (1987) 12 NZJIR 138 - 139.

90 B Greenslade "Strikes, Injunctions and Compliance Orders: the Labour Relations Act 1987" (1988) 13 NZJIR 63.

91 Above 76.

92 Ryan and Walsh "Common Law v Labour Law" 235.

93 H Roth "Chronicle" (1988) 13 NZJIR 107.

In 1990 Brook published *Freedom at Work*[94] criticising the then ideological basis of labour law. Brook's approach, modelled on Epstein's, recognised no inequality in bargaining power between employers and workers[95] and required the removal of statute-based employment law and specialist employment institutions to enforce it. Brook argued for a return to common law principles, which, she argued, were more flexible, effective, fair and practical than statutory systems of labour law:[96]

> An important aspect of the common law's success is its heavy reliance on ... 'adverbial' rules; prohibitions or procedures that tell individuals not *what* to do but how to do things. The emphasis is thus not on outcomes ... but on just process. Accordingly, 'equity' is, in the first instance, measured not by outcomes but by treatment.

The 1990 National Party manifesto did not overtly endorse the Business Roundtable view that the specialist employment institutions were unnecessary, but did promise a review of the need for those institutions.[97] In the period between National's 1990 election victory, and the passing of the ECA on 7 May 1991, an "intense policy debate",[98] largely between government officials, took place on the need for specialist institutions. While the Business Roundtable view on freedom of negotiation prevailed, the battle over the need to retain both the specialist institutions and the personal grievance and dispute resolution procedures was won by Justice and Labour Department officials.[99]

3 *The Ideology of the ECA*

Initially both supporters and opponents of the ECA tended to portray it as one-dimensional, recognising only the principle of freedom of contract[100] and eschewing protectionist principles:[101]

> The agenda of the new right, as expounded by the Business Round Table has been implemented almost in its entirety in the Employment Contracts Act. In implementing this agenda the [A]ct uses terms such as freedom of association and freedom of contract with which lawyers will no doubt feel familiar and comfortable. However in order to really understand the [A]ct it must be understood that terms such as

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[94] Oxford University Press, Auckland, 1990. Brook was at that time an economist with the NZBRT.
[95] Above, 17 - 20.
[96] Above, 97 - 98.
[97] Ryan and Walsh "Common Law v Labour Law" 243.
[98] Above.
[99] Above, 244. Ryan and Walsh analyse the reasons why the Government decided to retain the specialist institutions at 254 - 255.
[100] *A Study of the Labour/Employment Court* (NZBRT/NZEF, December 1992) (i). See also New Zealand Law Society Seminar *Employment Contracts Act Revisited* (NZLS, April/May 1992, Leaders P Churchman and W Grills) 5.
[101] New Zealand Law Society Seminar, above, 3. A submission based on this view was rejected by Goddard CJ in October 1993 in *Service Workers Union of Aotearoa* v *Southern Hotel Corporation (NZ) Ltd* [1993] 2 ERNZ 513, 526 - 527: see Part IV.

> these are no longer legal terms of art but must be interpreted embracing the neoclassical nuances which are integral to the working of the [A]ct itself.

Recent analyses have emphasised that the ECA is more complex. While the bargaining provisions of the ECA are extremist[102] in terms of their failure to provide expressly[103] for any sort of "good faith bargaining" requirements on employers, employees, and unions, Parliament recognised the need for an element of protectionism in labour laws[104] by retaining a specialist court and tribunal, a broadly available personal grievance procedure, and a "minimum code" of wages and employment conditions, with a statutory enforcement system (the Labour Inspectorate).[105] Thus the ECA is a compromise "between an acceptance of the ideology of market regulation and the realities of the employment relationship",[106] between freedom of contract and the requirements of fairness and protection for workers. Wailes' analysis emphasises freedom of association:[107]

> The division of the ECA into a "neo-conservative" section (Parts I & II) and a pluralistic section (Parts III and IV) seems to have gained currency because of its neatness in analytical terms. However, this approach is misleading. In fact the emphasis on freedom of association rather than freedom of contract in Part I of the Act represents a substantial moderation to Epstein's model which has not attracted any attention in the critical literature.

Brook Cowen agrees that "[t]he Act places primary emphasis on freedom of association - its role in promoting freedom of contract is implicit rather than explicit."[108] In 1991, however, this emphasis was not so clearly perceived. There had been little academic discussion in New Zealand or in other common law jurisdictions of the common law of employment, which had developed little since 1894. The judges were faced with a radical departure from previous statute law and new legislation which incorporated conflicting policy principles.

The failure to make the underlying principles of the ECA explicit in the wording of the legislation meant that the courts were deciding cases in a jurisprudential and theoretical vacuum. This meant that the political and ideological climate which existed when the

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[102] Even South Africa adopted laws against unfair labour practices in 1979: see C Thompson "Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisprudence" [1993] Int J Comp Lab L & Ind Relations 183. See also ILO Conventions 87 (Freedom of Association and Protection of the Right to Organise) 1948 and 98 (Right to Organise and Collective Bargaining) 1949.

[103] See Part IV.

[104] *Mazengarb's Employment Law* para 1018 pp B/28 - B/30.

[105] ECA ss 141 - 145. See also P Brook Cowen, above n 81, 75 - 79.

[106] Deeks et al *Labour and Employment Relations* 88.

[107] N Wailes "The Case Against Specialist Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations" (1994) 19 NZJIR 1, 2 n1.

[108] Above n 81, 76.

ECA came into operation greatly influenced early judicial interpretations of the Act.[109] In the first two years of the ECA's operation the National Government reactivated the New Right revolution and accelerated the deregulation process which had been temporarily stalled by the call in 1988 of the Prime Minister, Rt Hon D Lange, for a "cuppa."[110] In 1991, then, the political values of the New Right permeated public life. For this reason the principle of freedom of association was given little prominence by the courts until late in 1993, when the political and ideological climate changed.[111]

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109 New Zealand Law Society Seminar, above n 100, 1 - 6.

110 James *New Territory* 276.

111 See the comments of Colgan J in *NZPSA* v *Designpower NZ Ltd* [1992] 1 ERNZ 669, 681 - 682, that s 5 was an interpretative or objects section and its effect was not substantive and the commentary in *Mazengarb's Employment Law* para 63.8 pp A/919 - A/924. See also *NZ Meat Workers Union* v *Richmond Ltd* [1992] 3 ERNZ 643. This point is discussed further in Part IV of this paper.

II JUDGES AND THE POLITICS OF EMPLOYMENT LAW

A Measuring Judicial Politics: Three Benchmarks

1 Introduction

In 1908 miners at Blackball went on strike to get longer crib (meal time) underground. At other collieries crib was 30 minutes. At Blackball it was only 15 minutes. In his account of the rise of the United Federation of Labour, *Red Fed Memoirs*, Pat Hickey, one of the strike leaders, describes the manner in which a fine of 75*ll* (75 percent of the maximum penalty) was imposed by the Arbitration Court on the union for striking:[112]

> I have a vivid recollection of the Court scene. About thirty miners attended as witnesses, each with a red ribbon in his coat and the majority wearing red ties as well. I well remember the gleam in "his Honour's" eye and the frown upon his face as the witnesses entered the box. To this day I feel convinced that the severity of the fine was due as much to the prevalence of our red ties and ribbons as it was to the crime.
>
> An interesting incident occurred during the hearing of this case, which we afterwards used with much effect. Our solicitor, the late Sir A R Guinness, in addressing the Court, referred to the "crib" time allowance of fifteen minutes as being altogether too short; his Honour remarked with a frown that he thought fifteen minutes ample time. He then glanced at the clock, noticed that the time was 12.30, and stated that the Court stood adjourned for lunch till 2 p.m.

Compare the more recent description of Italian judicial militancy by Professor Mancini, and in particular the left-wing current of Italian judges, *Magistratura democratica*:[113]

> Take the division of the Milan Tribunal handling labour disputes. For years it has been a fief of *Magistratura democratica*. Its liege lords were perfectly decent and hard-working people under whose sway the length of cases from complaint to decision was kept down - a miracle in Italy - to a period of three to six months. For an employer, however, to emerge from their hands as winner was harder than for a camel to go through the eye of a needle.

Between these two extremes, establishing points of reference from which judicial politics can be analysed is problematic. In presenting a European perspective on the politics of judges,[114] Professor Mancini had to leave English judges out of his analysis:[115]

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112 P H Hickey *"Red" Fed Memoirs* (Wellington Media Collective, reprint undated) 13.

113 Professor G F Mancini (Professor of Law, University of Bologna) "Politics and the Judges - The European Perspective" (Eighth Chorley Lecture, 13 June 1979, London School of Economics and Political Science) (1980) 43 MLR 1, 17. Note also the recent dispute between the Italian Prime Minister, S Berlusconi and the Milan Magistrates over their role in corruption cases: "Judges Blasted by PM" (*The Evening Post*, Wellington, 16 July 1994) 7.

114 In this paper the term "politics" refers to a world outlook or ideology, rather than party political views. This paper discusses the politics of judges of the CA, EC and HC only.

115 See Mancini 2.

> Like anywhere else, English judicial decisions may be politically motivated; but their authors, I take it, would never dream of publicly acknowledging this fact or acting in such a way as to make it explicit in the eyes of even lay observers. In other words, all the researcher is left with is cogent or loose, but definitely cool legal reasoning and *obiter dicta*: not much, let us face it, to warrant the formulation of sharp political conclusions in a system where the words of the law are not empty vessels for the judge to fill.

Mancini's observation applies equally with respect to the attitudes of the New Zealand judiciary to employment law issues; with little or no hard data there is room for not much more than "inklings and hints."[4] For this reason the divergent political approaches of the Employment Court and Court of Appeal are considered through an analysis of the "cool legal reasoning and *obiter dicta*" in the three cases discussed in Part III of this paper. The judicial politics apparent in those cases are discussed with reference to three benchmarks. The first benchmark is Griffith's analysis of the judiciary as the supporters of the economically and politically powerful in society rather than as the upholders of right against might. The second benchmark is the extent of judicial promotion of the essentially anti-worker principles of the common law of employment. The third benchmark is the degree of judicial enthusiasm for the New Right revolution and its free market ethos. It is recognised that these points of reference, described below, can be criticised. However for the reasons noted by Mancini any measure of judicial politics in New Zealand will of necessity involve the adoption of somewhat arbitrary and subjective benchmarks.[116]

2 *Protecting the powerful: Griffith's analysis*

(a) Griffith's analysis

According to Professor Griffith's case-based analysis of the English judiciary[117] the principal functions of judges are firstly to maintain law and order and secondly to protect individuals against governmental power.[118] Griffith says that in determining the limits of governmental powers and individual rights, judges make decisions on the basis of their perception of the public interest. What is or is not in the public interest is "a political question which admits of a great variety of answers."[119] Griffith says that judges, in tailoring their views to take account of the public interest, promote certain political,

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[116] On the difficulties of analysing judges and judicial politics see Davidson *The Judiciary and Employment Law* 3 - 5.

[117] J A G Griffith *The Politics of the Judiciary* (4 ed, Fontana Press, London, 1991) (hereafter Griffith). J A G Griffith is Emeritus Professor of Public Law in the University of London. His analysis was first published amidst great controversy in 1977.

[118] Above, 270.

[119] Above, 275.

conservative views, including the promotion of certain general economic aims.[120] They do so not in any conscious or deliberate way[121] but perceptibly:[122]

> [T]heir interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society; ... this position is part of established authority and so is necessarily conservative and illiberal. From all this flows that view of the public interest which is shown in judicial attitudes such as tenderness towards private property and dislike of trade unions, strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests, the avoidance of conflict with Government policy even where it is manifestly oppressive of the most vulnerable, support of governmental secrecy, concern for the preservation of the moral and social behaviour to which it is accustomed, and the rest.

In Griffith's view the perception that judges are "alert to protect the individual against the power of the State" is a myth.[123] Although they will intervene to help the weakest members of society, for example in immigration cases, "minority groups, especially if they demonstrate or protest in ways which cause difficulty or embarrassment"[124] are unlikely to be supported by the judges. Rather than being neutral in the conflicts which arise between those who control the existing institutions and those who challenge those institutions, the judiciary has always supported the powerful in society:[125]

> Law and order, the established distribution of power both public and private, the conventional and agreed view amongst those who exercise political and economic power, the fears and prejudices of the middle and upper classes, these are the forces which the judges are expected to uphold and do uphold.
>
> In the societies of our world today judges do not stand out as protectors of liberty, of the rights of man, of the unprivileged, nor have they insisted that holders of great economic power, private or public, should use it with moderation.

(b) The New Zealand judiciary

Little has been written about the politics of New Zealand's judges.[126] "[T]he good manners characterising the British intellectual debate"[127] also tend to preclude open discussion of the politics of the New Zealand judiciary.[128] The politics of judges in other

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120 Above, 327.
121 Above, 317.
122 Above, 319.
123 Above, 282.
124 Above.
125 Above, 328.
126 One of the few articles is G H Rosenberg "The Politics of the Judiciary" (1971 - 1973) 6 VUWLR 141. See also "Judging the Judges" (*LawTalk*, Newsletter of the New Zealand Law Society, No 422, 19 September 1994) 3.
127 Mancini 2.
128 A short paper by Sir Thomas Eichelbaum "Political Influences in the Legal Profession. Judicial Independence - Fact or Fiction" (NZ Law Conference Papers Vol 2 (March 1993, Wellington) 120 - 123) notes (122 - 123) with approval that there is no overt party political involvement in judicial appointments.

jurisdictions are discussed, analysed, disapproved of, endorsed and taken for granted.[129] The unspoken, conventional wisdom is that New Zealand judges do not have political views; or if they do, they do not let those views influence their decision-making. The writer accepts the accuracy of this conventional wisdom with respect to the party politics of judges, but not with respect to their world view.

Griffith says that judges of the higher courts in England have "by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represent the public interest.[130] Mancini says that "English judges seldom make decisions of a nature to challenge a universally received notion of the public interest; and ... when they happen to do it, their decisions are a result of strictly individual options."[131] It is submitted that these comments are also true of New Zealand's High Court and Court of Appeal judges. Certainly New Zealand judges tend to have similar backgrounds:[132]

> [T]he person appointed to be a Judge in New Zealand in the years since the Second World War is a middle aged Caucasian male; he is well-educated; and he is a successful and prominent member of the legal profession and, as such, is almost certainly wealthy, a member of the upper-middle class, and lives in an urban environment.

This analysis made in 1974 appears to remain largely true today, notwithstanding the appointment of one woman judge and one judge from an academic background to the High Court.[133] In contrast to the English judiciary, however, of whom only 1.3 percent could be said to have a working class background, in 1974 "approximately 25 percent of New Zealand judges could be assigned to the 'working class', ie their fathers were craftsmen or unskilled workers."[134] The general picture is unlikely to have changed significantly since 1974. The views of the New Zealand judiciary are not the same as those of their English counterparts, as shown by the development of an indigenous jurisprudence in many areas.[135] It seems fair to say that the New Zealand judiciary has been influenced by the more egalitarian nature of New Zealand society and the position of Maori as tangata whenua, but in the writer's view Griffith's analysis remains largely true of New Zealand's Court of Appeal and High Court judges.

The 1993 New Zealand Law Conference had as its theme "The Law and Politics" yet there was almost no discussion of the politics of the New Zealand judiciary.

[129] See eg S Lee *Judging Judges* (Faber and Faber Ltd, London, 1988) 182 - 194. A recent example of judicial politics is T Morrison (ed) *Race-ing Justice, En-gendering Power. Essays on Anita Hill, Clarence Thomas, and the Construction of Reality* (Chatto and Windus, London, 1993).

[130] Griffith 275.

[131] Mancini 2.

[132] J E Hodder "Judicial Appointments in New Zealand" [1974] NZLJ 80, 85.

[133] Cartwright J (initially appointed 22 June 1993) and Hammond J (appointed 14 July 1991).

[134] Above n 132, 84.

[135] See eg S Baldwin "New Zealand's National Legal Identity" (1989) 4 Canterbury LR 173.

While judges of the Employment Court have similar backgrounds to judges of the general courts,[136] their specialist jurisdiction gives them a broader and deeper appreciation of the nature of the employment relationship, the inequality present in that relationship, and the differences between employment contracts and other commercial contracts: "it may be that the factual nature of employment disputes is such that those deciding such cases require a specialist knowledge of the area and a practical experience that can best be achieved by wide and continued exposure to cases in the area."[137] A Ministerial briefing paper prepared by the Department of Labour in January 1991 noted that "[b]y contrast, the average occupants of the judicial bench ... have little knowledge of the realities of the workplace and the on-going nature of the employment relationship."[138]

(c) The limits of Griffith's analysis

Griffith's critics have portrayed his analysis as "destructive"[139] and a simplistic "nightmare" in which the outcome of cases can be automatically predicted by assessing the class background of the presiding judge.[140] This portrayal is not accurate; Griffith accepts that in cases where the law is certain judges simply decide disputes in accordance with the law and impartially.[141] Griffith's rejection of the notion of an impartial judiciary is the result of an analysis of cases in which judges must determine what the public interest is, or what policy principles should apply, because statutes or the common law give inadequate or imprecise guidance. The ECA is such a statute; it contains broad, conflicting principles which require judges to be law-makers. The politics of New Zealand judges may be measured by the extent to which, in making law, they apply principles which reflect the conservative views summarised by Griffith.[142]

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136 M Lambert (ed) *Who's Who in New Zealand* (12 ed, Reed Books, Auckland, 1991). Almost all the EC judges practised employment law to some extent before appointment. Some were leading industrial lawyers. There are no women judges of the EC. Goddard CJ said in 1993 that the next three appointments to the EC should be women ("The Role of the Employment Court", NZIIRR Seminar, 6).

137 G Anderson "Specialist Employment Law and Specialist Institutions" (NZIIRR Seminar) 5. This paper argues that a divergent approach is now apparent in the decision-making of the CA and EC. The question *why* CA and EC judges take divergent approaches is an interesting one. However, beyond acknowledging the nature of specialist courts, for the reasons noted by Mancini, any answers can be speculative only.

138 Department of Labour *Employment Contracts Bill: Outstanding Policy Decisions* (Paper to the Minister of Labour, 29 January 1991) 3. The paper also noted (6) that "[i]n past years, when some of the jurisdiction which the Labour Court now possesses was exercised by the courts of general jurisdiction, there were examples of injunctions issued by the court being ignored, thus exacerbating the disruptive influence of the initial dispute."

139 S Lee *Judging Judges* (Faber and Faber Ltd, London, 1988) 199.

140 Above, 4 and 33 - 39.

141 Griffith 269 - 271.

142 Above, 274 - 275. Mancini (2) says: "I am not overly sympathetic to the philosophy which Mr Minogue displays in reviewing Professor Griffith's book for the *Times Literary Supplement*; but his suggestion that it

3 *Upholding the Common Law*

(a) The English judiciary and the common law of employment

The second benchmark used in the case analysis in Part III is the extent to which judges have resorted to common law principles in deciding cases, because "the common law is the creature of the judges, and has always been able to be identified with a distinctive political view of the world."[143] Modern judicial attitudes to workers cannot be analysed without regard to development of the common law of employment in England. The fundamental principles of the common law of employment are part of "an unbroken line of evolution from the medieval institution of villeinage through to the employment relationship of the present day ... ."[144] "A master had a proprietary interest in his servant - the *servitium* - and could sue a third party for wrongful injury to the servant on the basis of injury to that proprietary interest."[145] The Master and Servant Acts made a servant's breach of the contract of service eg by leaving employment without permission a crime punishable by imprisonment.[146] Although the last of these Acts was repealed in the 1870s, and employment as a status relationship was gradually replaced by employment as a contractual relationship, the inequality inherent in the master and servant relationship did not disappear, but was adapted judicially to a new legal form. Victorian judges simply incorporated the status concept of service into "the empty boxes of the contract clauses".[147] As Wedderburn points out:[148]

> Even in the heyday of *laissez-faire*, the substantive content of the relationship reflected the extensive obligations of the pre-industrial servant and the command power of the master. As Fox has argued: 'contract, as the pure doctrine defined it, could not be seen by the property-owning classes as an adequate foundation for governing the employment relation. Their needs were met by infusing the employment contract with the traditional law of master and servant, thereby granting them a legal basis for the prerogative they demanded.'

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would be improper to put a conservative label on a given court because of a string of anti-union decisions, seems to me entirely correct. Much depends, of course, on just how long the string is. If its length is reasonable, the stance taken by the court may well result from the fact that union claims were faulty in law. My English colleagues have pointed out to me that this particular piece of string is about 200 years long; and I leave it to them to decide its reasonableness."

143 Davidson *The Judiciary and Employment Law* 203.

144 Above, 8.

145 Lord Wedderburn of Charlton, R Lewis and J Clark (eds)*Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press, Oxford, 1983) 148 (hereafter Wedderburn et al *Building on Kahn-Freund.*

146 *Mazengarb's Employment Law* para 1.1 p A/1; Wedderburn et al, above, 148 - 149.

147 A Fox *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber Ltd, London, 1974) quoted in Lord Wedderburn *The Worker and the Law* (3 ed, Penguin Books, Harmondsworth, 1986) 111 (hereafter Wedderburn *The Worker and the Law.*

148 Wedderburn et al *Building on Kahn-Freund* 146.

The hostility of English judges to trade union organisation and collective action has been analysed by many writers.[149] The judiciary has been accused of "subverting legislative measures which favour the interests of labour in order to protect the interests of capital."[150] For example when the UK Parliament decriminalised collective action and trade union organisation in the second half of the nineteenth century, the judges responded by imposing civil liability on individuals and trade unions involved in industrial action.[151] When Parliament provided statutory immunity from civil action for industrial action "in furtherance of trade disputes",[152] the judges undermined this statutory immunity at intervals throughout the twentieth century through the revival of the economic torts of intimidation, conspiracy, and inducement of breach of contract.[153] Thus "with less than a handful of exceptions English judges - certainly the Law Lords - have not during two centuries delivered any judgments encouraging the spread of trade unionism and thereby collective bargaining."[154]

Perhaps because of judicial hostility to collective organisation, industrial relations and collective bargaining in England this century have existed largely outside any statutory legal framework; wages and working conditions have been set by collective agreements.[155] Wedderburn's statement that "[m]ost workers want nothing more of the

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149 Davidson *The Judiciary and Employment Law*; P Davies and M Freedland *Kahn-Freund's Labour and the Law* (3 ed, Stevens and Co, London, 1983); Griffith; Wedderburn *The Worker and the Law*; M J Klarman "The Judges Versus the Unions: The Development of British Labor Law 1867 - 1913" (1989) 75 Virginia LR 1487.

150 H Collins "Capitalist Discipline and Corporatist Law" (1982) 11 ILJ 78, 80.

151 Wedderburn *The Worker and the Law* 17.

152 The Trade Disputes Act 1906 (and later amendments: see Wedderburn *The Worker and the Law* 35 - 47.

153 This process is discussed in Wedderburn *The Worker and the Law* Chapter 1. In 1979 and 1980 even as the House of Lords reluctantly reaffirmed the protections of the immunities for action taken in furtherance of a trade dispute, (Lord Diplock commented in *Express Newspapers Ltd* v *MacShane* [1980] 1 All ER 65, 73 that the correct application of the law on immunities "tended to stick in judicial gorges") they called for reform of the law. In *Duport Steel Ltd* v *Sirs* [1980] 1 All ER 529 Lord Scarman (at 554) even gave some drafting instructions to assist with the passage of the 1980 Employment Act which Parliament was at that time deliberating on: "If the law is unacceptable, the remedy lies with Parliament, not the judges. And if Parliament is minded to amend the statute, I would suggest that, instead of seeking to close what Lord Wilberforce has aptly called "open-ended expressions" ..., the draftsman should be bold and tackle his problems head on. If he is to put a limitation on the immunities in s 13, let him do so by limiting the heads of tortious liability where immunity is conferred; if he is to strengthen the availability of interlocutory relief in industrial relations, let him include clear guidelines in the statute. And, if he is to limit secondary or tertiary blacking or picketing, the statute must declare whose premises may, or may not, be picketed and how far the blacking or picketing may extend. 'Open-ended expressions' will bring the judges inevitably back into the industrial arena exercising a discretion which may well be misunderstood by many and which can damage confidence in the administration of justice."

154 Wedderburn et al *Building on Kahn-Freund* 170, 171. Wedderburn says that English judges conformed to the spirit of statutes governing labour law in England only when the legislation became overtly hostile to unions and collective bargaining following the election of a Conservative Government in 1979. See also Wedderburn "Freedom of Association" 28.

155 *Mazengarb's Employment Law* para 1.1 p A/2 notes that this is still the case.

law than that it should leave them alone"[156] summarised the attitude that the success of English labour law could be measured by the extent to which industrial relations could be kept out of the courts.[157] In New Zealand, by contrast, it was the comprehensive nature of statutory regulation of industrial relations which made any significant judicial departure from the protectionist principles of the legislation impossible. Within these different systems of industrial relations the common law of employment did not develop markedly in either New Zealand or England between the late nineteenth century and the passing of the ECA.[158]

(b) The ideology of the common law of employment

Statute-based labour law proceeds on the basis that worker protection is essential to deal with the disparity in bargaining power between the individual worker and the employer.[159] Judges have built the common law of commercial contracts on the principle that the parties are in a (relatively) equal bargaining position.[160] Likewise the common law of employment recognises no such inequality of bargaining power:[161]

> The common law ... ignores any disequilibrium of power which results from normal social relations, as distinct from abnormal personal conditions (infancy, mental disorder). It ignores the realities of social constraint and of economic power: it did so even at a time when the employer was and the worker was not in a position to invoke the aid of the criminal law, to say nothing of the threat of the workhouse; the worker's obligation to obey the lawful commands given by management and the employer's obligation to remunerate the worker are contractual obligations freely incurred among individuals.

Kahn-Freund described the individual contract of employment as "a command under the guise of an agreement" and an "act of submission", because "the individual worker brings no equality of bargaining power to the labour market and to this transaction central to his life whereby the employer buys his labour power."[162] Although, as Kaufman J said in *Foley* v *Interactive Data Corporation*,[163] he could think of "no relationship in which one party, the employee, places more reliance upon the other, is

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156 Wedderburn *The Worker and the Law* 1.

157 Above, 9.

158 *Mazengarb's Employment Law* para 1.1 p A/2.

159 P Davies and M Freedland *Kahn-Freund's Labour and the Law*, above n 149, 34.

160 D Kairys (ed) *The Politics of Law: A Progressive Critique* (Pantheon Books, New York, 1982) Chapter 8 "Contract Law as Ideology" 172 - 184; New Zealand Law Commission *Unfair Contracts* (Preliminary Paper No 11, Wellington, 1990) paras 42 - 45 pp 15 - 16. See also P S Atiyah "Contract and Fair Exchange" in P S Atiyah *Essays on Contract* (Clarendon Press, Oxford, 1986); J F Burrows, J Finn and S M D Todd *Cheshire and Fifoot's Law of Contract* (8 ed, Butterworths, Wellington, 1992) 23 - 24.

161 P Davies and M Freedland *Kahn-Freund's Labour and the Law*, above n 149, 35.

162 Wedderburn *The Worker and the Law* 5.

163 254 Cal Rptr 211, 253 (Cal 1988, Supreme Court of California) cited by R Wilson (Vice President, NZ Council of Trade Unions) "Employment Contracts Act: Do the Courts Need to Act to Protect Workers?" (1993 NZ Law Conference Papers, Vol 2, 2 - 5 March 1993, Wellington) 378.

more dependent on the other, or is more vulnerable to abuse by the other, than the relationship between employer and employee ...", judges also consistently refused to extend the law of unfair and unconscionable bargains to the area of employment law.[164] The courts are reluctant to "pierce the veil of equality" and no court has ever invalidated a contract of employment by reason of gross exploitation:[165]

> Nothing is more misleading than the ambiguity of the word "freedom" in labour relations. By restraining the power of management over the individual worker the law limits the range of the worker's duty to obey rules made by management. Protective legislation thus enlarges the worker's freedom, his freedom to give priority to his own and his family's interests over those of his employer. Yet paradoxically, such liberating legislation must appear to the lawyer as a restraint on freedom, on the "freedom of contract" which in this context is the term the law uses for the subjection of the worker to the power of management ... .

To the extent that the common law of employment treats people in unequal positions as equals, it is an essentially partisan law, favouring the interests of employers over workers. But the common law goes beyond simple ignorance of this inequality; it further disadvantages workers through the judicially implied terms of the employer's right to manage and the employee's duty to obey. Paradoxically these implied terms incorporate inequality into a contract which is ostensibly between equals. Attempts to redress the inequality inherent in the employment relationship through collective organisation have met with judicial hostility[166] even though collective bargaining is generally recognised as being the most effective method of redressing this power imbalance.[167] From a market perspective, group activity "disturb[s] the order of the market and of the property relations ... seen as sacrosanct by the common law."[168] Discussing the statutory "tilt" against union organisation in the United States, Weiler notes:[169]

> Actually, that tilt has its roots in the common law background of the NLRA: the tacit legal assumption that the "natural" status for a workplace is nonunion, with management exercising on behalf of the shareholder-owners the prerogatives of property and contract law to establish the

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164 J J Macken, G McCarry and C Sappideen *The Law of Employment* (3 ed, The Law Book Co Ltd, Sydney, 1990) 435. See also Wedderburn *The Worker and the Law* 142 - 144; J Cartwright *Unequal Bargaining: A Study of Vitiating Factors in the Formation of Contracts* (Clarendon Press, Oxford, 1991). See also *Davies* v *Dulux (NZ) Ltd* [1986] 2 NZLR 218.

165 P Davies and M Freedland *Kahn-Freund's Labour and the Law* above n 36 and 24.

166 See Part IC2.

167 This is recognised in Conventions of the International Labour Organisation (ILO), including Convention No 87 (Freedom of Association and Protection of the Right to Organise) and Convention No 98 (Right to Organise and Collective Bargaining). See also P C Weiler *Governing the Workplace. The Future of Labour and Employment Law* (Harvard University Press, Cambridge, Massachusetts, 1990), especially the summary at 184 - 185.

168 Wedderburn "Freedom of Association" 12.

169 P C Weiler *Governing the Workplace. The Future of Labor and Employment Law* (Harvard University Press, Cambridge, Massachusetts, 1990) 228.

> firm's terms and conditions of employment, constrained only by the parameters of an unorganised and unfettered labor market.

A legal framework which ignores the inequality between employer and employee and proceeds on the assumptions of the inviolability of private ownership, the prerogative of management to organise and distribute work, and the subordinate status of the worker,[170] shows "a certain bias"[171] and will produce outcomes which are disadvantageous to employees generally.[172]

(c) The Common Law: a secret umpire

Several writers have placed this bias in employment law in the context of a more general bias of the common law. Wedderburn says that "[t]he rights of private property are the natural base of the common law, just as they are the core of Hayekism. Both treat its legitimacy as an indisputable foundation of the core of the social order."[173] Sachs and Wilson, in their 1978 study *Sexism and the Law*, put the view that the common law is a tool through which judges engage in social engineering:[174]

> The main instrument that the judges had been using to assert the interests of men against women and of employers against workers was the common law. The common law tradition has so frequently been associated with concepts of fundamental right and justice that it is at first startling to find that it was used as the main doctrinal justification for preventing the advancement of working people of both sexes, notably in conspiracy cases, and of women of the middle and upper classes, primarily in the male monopoly cases. ...
>
> What maintained continuity between the idea of the common law over the centuries was that it continued to be the instrument of the judges and to express in a vigorous if indirect form the interest of the social group with whom the judges were associated. The fundamental rights of the English people thus amounted to little more than the fundamental rights of the judges, and chief amongst these was the right to determine how social claims should be legally classified and what procedures should be followed for their enforcement.

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[170] Ryan and Walsh "Common Law v Labour Law" 240 quoting Lord Wedderburn of Charlton "Labour Law: Autonomy from the Common Law?" (1988) 9 Comp Lab LJ 219.

[171] The origin of this phrase is explained in J Hughes "Personal Grievances" in R Harbridge (ed)*Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 89, 128.

[172] H Collins discusses the nature of power in employment relationships in "Market Power, Bureaucratic Power and the Contract of Employment" (1986) 15 ILJ 1.

[173] Wedderburn "Freedom of Association" 12. The Webbs pointed out what some judges have never accepted: "To men dependent for their daily existence on continuous employment, the protection of this means of livelihood from confiscation or encroachment appears as fundamental a basis of the social order as it does to owners of land" (S and B Webb *Industrial Democracy* 566, cited in B Reiter and J Swan (eds)*Studies in Contract Law* (Carswell, Toronto, 1987) 315).

[174] A Sachs & J H Wilson *Sexism and the Law. A Study of Male Beliefs and Legal Bias in Britain and the United States* (Law in Society Series, Martin Robinson, Oxford, 1978) 43 - 44.

Wedderburn says that the vision behind the statutory removal of protections for workers and unions in the UK between 1980 and 1988:[175]

> [F]its hand in glove with that mixture of individualism and artificially enforced, spontaneous social order which has often characterised the dominant strain of philosophy propounded by English common lawyers, with the "half-conscious belief," as Laski put it, that the "Common Law provides, so to say, a law behind the law which is enacted by Parliament" - a secret umpire in place behind the bench to protect its version of the social equilibrium.

(d) Alternative principles

Judges can make decisions based on fairness and justice in employment law only if they move beyond the strict confines of the rules of the common law of commercial contracts and recognise that employment is more than a contract; it is also an economic and social relationship.[176] The process of producing just outcomes in employment law requires the development and application of legal principles which recognise inequality and the importance of collective organisation in redressing that inequality. The extent to which judges contribute to the justice, or injustice, of industrial relations outcomes may be measured by the extent to which they are prepared to move beyond a common law contract framework in appropriate cases. This is the second benchmark against which the politics of judges is measured in this paper.

4 The New Right revolution: supporting the free market

The third benchmark for measuring the political attitudes of New Zealand judges towards workers is the degree of enthusiasm with which they embraced the underlying principles of the economic and social revolution which occurred in New Zealand between 1984 and 1993. Because the changes tended to benefit the more powerful,[177] views on the desirability of the process of "rolling back the state" are an important indicator of politics. Griffith says that "[i]n both democratic and totalitarian societies, the judiciary has naturally served the prevailing political and economic forces. Politically, judges are parasitic."[178] Consistently with this thesis, judges in the general courts did not just recognise the changes brought by the free market revolution, they also embraced the principles of the new order with enthusiasm. Kelsey argues that the hands-off approach of the judiciary to the reforms indicated support for those reforms. Taggart's analysis of the Court of Appeal decision in *Auckland Electric Power Board* v

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175 Wedderburn "Freedom of Association" 35.
176 H Collins "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15 ILJ 1.
177 James *New Territory* 223 - 229 and 287 - 288; Kelsey *Rolling Back the State* 9 - 12, 333 - 346.
178 Griffith 328.

Electricity Corp of NZ Ltd[179] supports this thesis. Referring to Richardson J's comments that the balancing of social responsibility and profitability under s 4 of the State Owned Enterprises Act 1986 was "inherently unsuitable for judicial decision",[180] Taggart concludes:[181]

> If this minimal supervision of the statutory requirement that SOEs are to have regard to the interests of the relevant communities is considered too intrusive then I suggest that objection has less to do with non-justiciability and more to do with ideological preference.

During the 1980s there was much comment on increased judicial activism, based on mainly extra-judicial statements by some judges, notably the President of the Court of Appeal.[182] In 1989 Sir Robin Cooke was able to describe "a tendency to judicial glasnost" in New Zealand as follows:[183]

> There is now a more open acknowledgement that deciding a new point may not be primarily a process of deduction; and that *the search is rather for the solution that seems fair and just after balancing all the relevant considerations*. Some lawyers, possibly many lawyers, find this disturbing. It affronts their sense of hope or ideal that the law exists apart from the individuals who make it. Probably lawyers of that school of thought would accept that at some stage the law was made by judges, but at least subconsciously they hold the belief that the time of all that has now very largely passed. They find plausible support for their position in the appeal to certainty.

With hindsight these comments have an air of unreality about them. At the same time as Sir Robin Cooke felt able to say that in New Zealand "the ideal of fairness and a sense of what it requires in particular cases is quite strongly evident,[184] the Business Roundtable was calling for the removal of protectionist labour laws. And as he commented that "employment, however created, is increasingly seen as a relationship involving status; and the parties to the relationship owe duties to each other reflecting the status of each, which are at least very largely summed up as duties of fairness",[185] the NZEF was calling for a return to the principles of freedom of contract in employment law. Kelsey concludes that the rhetoric of judicial activism "performed the important ideological and legitimating function of showing that the courts, or some of their members, were prepared to meet the challenges of the changing times. But it was the actual decision-making of the courts that was the real indicator of where the judicial

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[179] 8 September 1993, Court of Appeal, CA 45/93 (Richardson, McKay & Robertson JJ); [1993] BCL 318.
[180] Above, 15 - 16.
[181] M Taggart "State-Owned Enterprises and Social Responsibility: A Contradiction in Terms" [1993] NZ Recent LR 343, 355.
[182] See the papers collected in M Taggart (ed) *Judicial Review of Administrative Action in the 1980s. Problems and Prospects* (Oxford University Press, Auckland, 1986).
[183] "Fairness" (1989) 19 VUWLR 421, 422 (emphasis added).
[184] Above, 423.
[185] Above, 428.

system stood."[186] Kelsey chronicles the failure of those who attempted to challenge judicially the progress of the revolution.[187] She concludes that the rise of judicial activism in the 1980s was "largely confined to judicial dicta" and that there is "little evidence of substantial judicial intervention in the restructuring process:"[188]

> For all the talk of judicial activism, the courts maintained a largely formal, hands-off approach to government and executive power.
>
> ... [T]here was very little evidence that the New Zealand courts were prepared actively to restrain the executive. They were as timid as they always had been.

It is also no coincidence that the development of the fairness principle in administrative law took place before deregulation, during a period of extensive state involvement.[189] The containment of state power is, of course, consistent with neo-classical economic and social theories. Once the process of "rolling back the state" was underway, the judges made it clear that new administrative law principles may need to be developed which would make for less judicial intervention in decision making processes of a public nature.[190]

In employment law the politics of the judges may be measured by the extent to which their "ideological preference" has led them to promote the principles of free market economics beyond what is required by either statute or common law principles. This is the third point of reference for the following analysis of cases.

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186 Kelsey *Rolling Back the State* 199.

187 Above Chapters 13 - 15.

188 Above, 199, 200, and 204. According to Kelsey the Treaty cases fit this analysis also. Although in the Treaty cases the CA forced the Government to consult more fully in the process of privatisation and corporatisation of state assets, judicial decisions in no way challenged the merits of the process itself. This view is also shared by Sir William Wade; see the discussion of Wade's view and of the issue generally in P A Joseph *Constitutional and Administrative Law in New Zealand*(The Law Book Company Ltd, Sydney, 1993) 656 - 660. See also J Fogarty "David v Goliath: The State of the Play of Judicial Review in the '90s" [1991] NZLJ 338.

189 P A Joseph *Constitutional and Administrative Law in New Zealand*(The Law Book Company Limited, Sydney, 1993) 657.

190 Kelsey *Rolling Back the State* 206.

III THREE CASES

A Introduction

This part of the paper contains an analysis of three cases dealt with by the Labour and Employment Courts and the Court of Appeal between 1990 and 1993 with reference to the three benchmarks described in Part II. During this period the Business Roundtable criticised the Employment Court repeatedly for being "judicially activist".[191] As noted in Part IID3 the underlying principles of the ECA were not made explicit in the wording of the legislation. Thus the "inconsistencies and deficiencies"[192] in the ECA made substantial judicial development of employment law principles inevitable. Anderson points out that the Business Roundtable's criticism stemmed less from its concern about the role of judges as law-makers and more from the perceived ideological direction of the Employment Court's decisions:[193]

> Claims of judicial activism are usually a complaint about the direction and not the process. Judicial "activism" may also just mean statutory interpretation. When a statute is drafted in broad general terms ... judicial development of the broad principles is inevitable and necessary for the law to operate.

Contrary to the Business Roundtable/NZEF view the Employment Court's approach remained reasonably consistent with the traditional approach of its predecessors. The Court of Appeal was more judicially active because its judgments incorporated into the jurisprudence the ideological and political changes of the New Right revolution. The cases discussed below are *Wellington Caretakers etc IUOW* v *G N Hale & Sons Ltd*,[194] where the courts were faced with a choice between two conflicting lines of authority; *Attorney-General* v *NZ Post Primary Teachers' Assn*,[195] where the Employment Court could be said to have been "judicially active"; and *TNT Worldwide Express (NZ) Ltd* v *Cunningham*,[196] where the Court of Appeal made new law.

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191 All judges are required to make law from time to time. S Lee *Judging Judges* (Faber and Faber Ltd, London, 1988) categorises those who criticise the process as being prone to "fairy tales, dreams and nightmares" (3).

192 P Brook Cowen, above n 81, 81.

193 G Anderson "Further Reforms to Employment Law?" [1993] ELB 2. Anderson also said of the BRT: "They say the whole thing should be regulated by the common law, but the only reason you've got common law at all is because you've had judicial activism. What they presumably mean is that they think the judicial activism should have stopped when they thought the law was right": "Will the Employment Court Survive a Re-elected National Government?" (*The Independent*, 26 March 1993, 6, 8).

194 See below n 197.

195 [1991] 3 ERNZ 641 (EC); [1992] 2 NZLR 209 (CA).

196 [1992] 1 ERNZ 956 (ET); [1992] 3 ERNZ 1030 (EC); [1993] 3 NZLR 681 (CA).

B Hale: *The Right To Manage* v *The Right to Employment Security*

The *Hale*[197] cases examined the extent to which the courts could review the substantive justification for redundancy dismissals. Although they predate the ECA the decisions are suitable for analysis because they were made in the period leading up to the 1990 General Election during which reform of the labour market, the underlying principles of labour law, and the future of the employment institutions themselves were under intense debate, as was the future of the whole deregulation process. The decisions revealed a clear divergence in principle between the extent to which the Employment Court and the Court of Appeal respectively supported the competing principles of social justice and freedom of contract. The Court of Appeal decision also marked a clear break between its previous "hands off" approach to questions of labour law and the beginning of a more critical approach to the decisions of the specialist institutions.

1 The first Labour Court judgment

In 1989 G N Hale and Sons Ltd, a manufacturer of canopies for trucks and vans with 3 plants in Auckland, Christchurch and Petone, suffered a decline in turnover and decided to introduce various cost-cutting measures. The cleaner, Mr Shrubshall, was made redundant.[198] The Labour Court was required to determine whether his dismissal was justified. Mr Shrubshall's union argued that the test for justification in these circumstances was whether dismissal was "necessary to ensure the continuing viability of the respondent's business",[199] rather than simply being desirable from the point of view of the employer. The employer argued that, so long as it acted from genuine commercial motives in making an employee redundant, the court should not interfere in the decision.

The employer's argument, based on the right to manage, was that the Labour Court could consider only whether the decision to dismiss was reasonable having regard to the commercial information available at the time and the result the employer was trying to achieve, and that the Court had no jurisdiction to decide whether the respondent could have

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[197] *Wellington etc Caretakers etc IUOW* v *G N Hale & Sons Ltd* [1990] 1 NZILR 752 (LC 16 May 1990), hereafter referred to as LC 1 where necessary); *G N Hale & Sons Ltd* v *Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079 (CA) (11 September 1990); and *Wellington etc Caretakers etc IUOW* v *G N Hale & Son Ltd* [1990] 3 NZILR 836 (LC) (LC 11 December 1990, hereafter referred to as LC 2 where necessary). The case was appealed from the LC to the CA then, following the CA's clarification of the relevant principles, remitted back to the LC for reconsideration. See the general discussion of these in *Mazengarb's Employment Law* para 1205 pp B210 - B 217.

[198] A 5-week strike in support of a claim for a redundancy agreement followed; Mr Shrubshall's dismissal and a proposal to cancel the provision of free transport for workers were also probable factors in the decision to take industrial action: *Hale* [1990] 1 NZILR 752, 759 (LC 1).

[199] Above, 763.

done better in the circumstances.[200] The Labour Court began by emphasising the specialist nature of its personal grievance jurisdiction, citing the Court of Appeal decision in *Wellington Road Transport Union* v *Fletcher Construction Co Ltd*:[201]

> [D]espite the absence of any explicit statutory enlargement of the rights of workers in relation to dismissal the Arbitration Court in New Zealand has put a benevolent construction upon s 117 both as to the circumstances which might be recognised as supporting a worker's grievance related to a claim of unjustified dismissal and also the point at which the grievance should be resolved in his favour. And taking into account that the Industrial Relations Act has the important purpose of improving industrial relations ... I would not wish to derogate in any way from that general approach. Indeed s 117 does not describe a process aimed at producing cut and dried answers to allegations which in the conventional Court setting would be the subject of pleadings together with formal claims and counterclaims. ... [W]ithin reasonable limits the Arbitration Court ought to be left, I think, to develop its own methods and processes in order to find the just and fair solutions intended by the Act. For such reasons recourse to technical legal language or the analogy of rules developed in the conventional courts will not always be particularly helpful in the present context.

The Labour Court rejected any suggestion that a general appeal to "the right to manage" automatically prevented it from examining whether a dismissal for redundancy was justified:[202]

> [A]n argument based upon the employer's "right to manage" begs the question. The Court, in determining whether a dismissal has been unjustifiable, is concerned not with the undisputed existence of the right to manage but with the manner of its exercise in a particular case.

The Labour Court emphasised the competing principle of job protection, referring to the Arbitration Court's decision in *Maidstone Hardware*,[203] in which the AC discussed its own earlier decision in the *Northland Office & School Supplies Limited*[204] case and said:[205]

> We expressly did not say that because a worker becomes costly he or she is entitled to be dismissed and we said that "this Court should not be slow in pursuing job protection."

After noting[206] that there were lines of authority which supported both the union's argument that, to be justified, redundancy must be genuine and unavoidable, and the employer's argument that the court should not interfere in an employer's commercial decisions, the Labour Court said[207] that the Arbitration Court had in many cases insisted

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200 Above, 763.
201 [1982] ACJ 663, 666 (per Woodhouse P, discussing the Arbitration Court).
202 *Hale* [1990] 1 NZILR 752, 767 (LC 1).
203 *NZ Shop Employees IUOW* v *Maidstone Hardware Ltd* [1983] ACJ 585.
204 *Auckland & Gisborne Amalgamated Society of Shop Employees Union* v *Northland Office & School Supplies Limited* [1981] ACJ 169.
205 Above n 203, 591.
206 LC 1, above n 202, 763.
207 Above, 769 and 776.

upon evidence of a threat to the employer's survival or of severe financial losses which could threaten survival to justify dismissal for redundancy and concluded:[208]

> [T]he weight of the authorities which we have cited supports the view that, generally speaking, a dismissal for redundancy will be justifiable only if, at the time of dismissal, the dismissal is proved to have been commercially necessary in the interests of the viability of the employer. *The expression "viability" is sometimes used loosely or metaphorically; we wish to make it clear that we are using it in its precise or narrow meaning of capacity for survival.*

The Labour Court determined that Mr Shrubshall's dismissal was unjustified, in the sense that it was "not persuaded that the redundancy was unavoidable. His dismissal was not, at the time, commercially necessary to ensure the ongoing viability of the respondent."[209] The Court also found that the way in which the dismissal was handled was unsatisfactory and ordered that Mr Shrubshall be reinstated.

The decision was roundly criticised by employers. The Business Roundtable said that the decision was an "extension of legal principles in the manner of legislation.[210] Another commentator noted, however, that the decision "appears not to have deviated in any significant respect from existing authorities."[211] An examination of the cases reviewed by the Labour Court in *Hale* bears out this view, as do the comments of Mr Shouler, the employers' representative[212] on the Court, that he was "constrained by the facts and by the law ... to agree with the other members of the Court as to the correct decision in this case."[213] Mr Shouler considered that this "encroachment" on the right of employers to manage their businesses efficiently was a shortcoming, but one which it was not within the power of the Court to remedy effectively. The Labour Court's support for the principle of job protection was not a sudden extension of principle unsupported by authority, but a clarification of the law based on the weight of authorities.

2 *The Court of Appeal judgment*

The Court of Appeal decided that the courts were unable to examine the commercial justification for redundancy dismissals. It rejected the Labour Court's findings of principle which limited the right to manage and gave weight to the need for job protection. Cooke P said:[214]

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208 Above, 777 (emphasis added).
209 Above, 779.
210 NZ Business Roundtable/NZEF *A Study of the Labour/Employment Court* (NZBRT/NZEF, December 1992) 25.
211 I Adzoxornu [1990] ILB 44.
212 LRA s 217(2) provided for tripartite representation in personal grievance proceedings.
213 Above n 202, 780.
214 *G N Hale & Sons Ltd* v *Wellington etc Caretakers etc IUOW* [1990] 2 NZILR 1079, 1084 (CA).

> In my opinion this Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable business activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have a right to continued employment if the business can be run more efficiently without him. The personal grievance provisions of the Labour Relations Act, and in particular the existence of remedies for unjustifiable dismissal, should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or expediency of the employer's decision.

Two judges queried whether even the limited concept of procedural fairness was appropriate in a redundancy context.[215] Richardson J said that "[i]t may well be that consideration of the best means of implementing planned cost savings and of the feasibility of redeploying workers should be viewed as matters of business judgment, not procedural fairness."[216] Somers J and Bisson J observed that justification in a redundancy context may depend on whether reasonable compensation was paid.[217]

3 *The second Labour Court judgment: procedural fairness*

The Court of Appeal remitted the case back to the Labour Court for reconsideration. The Labour Court determined that Mr Shrubshall's dismissal was unfair on procedural grounds, including the inadequacy of the redundancy compensation offered, and awarded him compensation. The Labour Court declined to accept the view that procedural fairness had no place in the context of redundancy dismissals "in the absence of a clear direction from the Court of Appeal that we should do so."[218] The requirements of procedural fairness set out in the second Labour Court judgment in *Hale* went some way towards ameliorating the effects of the Court of Appeal's decision.[219] The Labour Court's second decision was not appealed, because, it is suggested, lawyers and judges are more comfortable with the concept of procedural unfairness than substantive unfairness and with the concept of compensation rather than reinstatement. Substantive justification for dismissal, as the Court of Appeal noted in *B W Bellis* v *Canterbury Hotel etc Employees IUOW*, is "an elastic and novel concept for the lawyer"[220], in that a dismissal may be lawful but not justifiable. "The law of unfair dismissal ... inhabits an entirely different universe from that of the common law."[221] As Collins notes in discussing unfair dismissal law in England:[222]

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215 Per Somers J, 1087.
216 Above, 1086.
217 Above, 1087 and 1088.
218 *Wellington etc Caretakers etc IUOW* v *G N Hale & Son Ltd* [1990] 3 NZILR 836, 845 (LC 2).
219 *Mazengarb's Employment Law* para 1205 p B/217.
220 [1985] ACJ 956, 959.
221 Davidson *The Judiciary and Employment Law* 33.
222 H Collins "Capitalist Discipline and Corporatist Law - Part I" (1982) 11 ILJ 78, 88.

> The attention to procedural matters was perceived as less of an intrusion into industrial relations than the invasion which was threatened by a full-scale judicial review of the substantive merits of the managements decision to dismiss an employee. ... At the same time as fulfilling the legislative aim of restoring order to industrial relations, the emphasis on procedure avoided the introduction of more penetrating interventionist reviews of managerial discretion to test whether their decision accorded with broader ideals of industrial justice. Thus the corporatist type of labour legislation was greeted only half-heartedly by the judiciary. Whilst they accepted the need for discipline and order in industry, they were unwilling to enforce such a profound alteration in the range of activities of the state.

The law of unfair dismissal in England has been retained despite the repeal of many other legislative protections for workers and has become "the bedrock of our labour law."[223] In Collins' view this is because it apparently reduces the intensity of the contradiction of liberal theory "between a belief in freedom of contract as an aspect of individual liberty and the opportunity to use that freedom to dominate others by means of contracts between parties of unequal bargaining power."[224] According to Collins:[225]

> The principal reservation which judges are bound to feel at both the conscious and unconscious levels is a sense that corporatist legislation oversteps the boundary between matters which are suitable for state control and those which are not. ... Even though judges may be in full agreement with the aims of the legislation, they may feel unhappy about meddling in affairs which they have always regarded as matters best left to individual citizens to sort out for themselves. Thus we may anticipate that, in the interpretation of corporatist legislation, on the one hand the judges will be able to conceptualise conflict in appropriate terms and to further the main stabilising purposes of the law, but on the other hand they will constantly hold back from a complete endorsement of the method adopted by the law to achieve those ends. Thus a tension will emerge between a substantial agreement with the policy of the legislation and an unwillingness to put it into effect.

4 The politics of Hale

(a) The right to manage

All the Court of Appeal judges stressed the inviolability of "the right to manage" in a redundancy context. Cooke P said that "[a] reasonable employer cannot be expected to surrender the right to organise his own business."[226] Somers J did "not think that an honest assessment of his commercial needs by an employer can be subjected to objective tests of fairness, reasonableness or necessity by the Court ... ",[227] while Bisson J said that "a dismissal for redundancy is in a class of its own ... ."[228] Casey J wished to "emphasise that ... the only question to be asked is whether the employer made that decision for genuine

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223 Above.
224 Above.
225 Above, 83.
226 *Hale* [1990] 2 NZILR 1079, 1084 (CA).
227 Above, 1087.
228 Above, 1088.

commercial reasons, and the employer is the best judge of what is in the commercial interests of the business or enterprise."[229] A feature of the judgments is the lack of authority or principle cited for these propositions. In particular the view that redundancy dismissals are subject to different principles than other dismissals is based on no clear authority and scant logic or legal reasoning. Richardson J purported to justify this view by making reference to "award provisions" (of which no examples were given) which, he said, specifically recognised the right of the employer to manage its business[230] and Bisson J stated:[231]

> In my view a dismissal for redundancy is in a class of its own as it falls very much within the usual Award provision entrenching the right of an employer to manage the business in which the worker is employed.

It is submitted that this perception of award provisions relating to redundancy is incorrect. Such provisions do not expressly "entrench the right of an employer to manage the business in which the worker is employed." They simply recognise the de facto power of an employer to dismiss and impose consequent restrictions on that power. They do not recognise the right of an employer to dismiss unfairly, any more than, for example, a contractual provision providing for a series of warnings to be given before an employee may be dismissed for misconduct entrenches the right to dismiss unfairly. These judges converted provisions negotiated into awards to shield employees into swords against them.

Contrary to the view that the substantive fairness of redundancy dismissals could not be judicially examined, the very purpose of the unjustifiable dismissal jurisdiction was to enable the specialist institutions to examine, and if necessary to limit, the substantive reasons on which employers could base decisions to dismiss.[232] The Court of Appeal judges did not explain why substantive justification could be examined in cases of, for example, theft or assault at work, but not in redundancy situations. The examination of *any* dismissal is an encroachment upon the employer's "right to manage"; statutory labour law has never conceptualised redundancy dismissals as a special class of dismissal to be fenced off from examination for substantive justification. In attempting to fence off redundancy dismissals, the Court of Appeal elevated the right to manage into a "super principle", an overriding consideration which could be outweighed by other considerations. This approach is similar to that taken by judges in administrative law that certain areas of

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229 Above.

230 Above, 1086. Only some awards and agreements contained redundancy provisions. The content of these provisions varied considerably.

231 Above, 1088. There was no such thing as "a usual Award provision" dealing with redundancy.

232 G Anderson "The Origins and Development of the Personal Grievance Jurisdiction in New Zealand" (1988) 13 NZJIR 257, 260 - 261 and 267.

Government activity (eg security) are "non-justiciable" on policy grounds.[233] In the context of unjustified dismissals, however, there is neither previous authority nor statutory basis for effectively making the commercial decisions of employers "non-justiciable".

(b) Common law, statute law and social justice

Hale is an example of the reluctance of the general courts to make statutory provisions which limit employers' actions effective. The Court of Appeal effectively gave precedence to a common law principle - judicial recognition of a right to manage by employers - over the plain words of the statute. Yet Richardson J implied that it was the Labour Court, rather than the Court of Appeal, which was going beyond the requirements of the LRA:[234]

> [I]t is not the function of the courts to construct an overriding extra-statutory concept of social justice applicable in redundancy situations.

In so doing His Honour relegated the right to job security to a secondary status, rather than being a competing and equally valid consideration to be weighed alongside the right to manage. Richardson J's claim that the concept of social justice is "extra-statutory" is puzzling, since the concept of unfair dismissal is founded unequivocally on the principle of job protection and protection of employees from the capricious exercise by employers of the power to dismiss.[235] Far from being an "extra-statutory" concept, social justice is one of the objects of the personal grievance provisions.

As a matter of principle if an employment contract is indeed a contract between two equal partners, there is no reason why the employer's business judgment should be seen as automatically the more deserving of judicial support. The employer's ownership of the assets and right to make a profit obviously require that the employer's business judgment be given weight. However a worker's right to job security, a right protected by statute and international convention,[236] is a competing and, it may be argued, an equally compelling interest which requires that weight be given also to the worker's, and the worker's union's, assessment of the economic state of the employer. Indeed Richardson J subsequently

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[233] G Taylor *Judicial Review* (Butterworths, Wellington, 1991) paras 1.24 - 1.43 pp 18 - 30; P A Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993) 657; Professor D G T Williams "Justiciability and the Control of Discretionary Power" in M Taggart (ed)*Judicial Review of Administrative Action in the 1980s. Problems and Prospects*(Oxford University Press, Auckland, 1986).

[234] Above, 1086.

[235] ILO Convention No 158 on Termination of Employment (1982). Although Convention 158 has not been ratified by New Zealand, its provisions have often been invoked as relevant by the specialist courts: see *Wellington Clerical Workers Union* v *Greenwich* [1983] ACJ 965.

[236] Above.

articulated these two competing interests in a much-cited passage from *Telecom South* v *Post Office Union*:[237]

> Clearly Parliament has departed from the common law approach not only in relation to procedures and remedies but also in formulating the basic concept of unjustifiable conduct within the employment relationship under the Act. The 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 confidence, trust and fair dealing. The statutory enquiry necessarily involves a balancing of competing considerations. Those mutual obligations must respect on the one hand the importance to workers of the right to work and their legitimate interest in job security, and on the other hand the importance to employers of the right to manage and to make their own commercial decisions as to how to run their businesses.

(c) A helping hand for the free market

Judicial support for the free operation of market forces is essentially incompatible with the judiciary's view of itself as the protector of the weak against the irresponsible use of economic, social or legal power, and with the notion that fairness is an overriding principle in contemporary judicial decision-making. Faced with the opportunity to develop the law along lines which recognised either the principles of the free market and the right to manage, or the need for employee protection and a recognition of the economic inequality in the employment relationship, the Court of Appeal and the Employment Court took divergent paths. In *Hale* the Court of Appeal judges treated the interests of *employers* and the *public* interest as meaning the same thing, particularly employers' interests in a deregulated economy. One reason why the Court of Appeal judges cite little authority for their definitive declarations of "the right of the employer to manage its business" may be that in the political and economic climate of 1990, this right had become such a touchstone for those who supported deregulation that legal authority seemed scarcely necessary.[238] The particular flavour of judicial perception of the public interest in 1990 is encapsulated best in Bisson J's judgment which reflects the economic view that fetters on the right to dismiss inhibit economic growth:[239]

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237 [1992] 1 ERNZ 711, 722.

238 Employer prerogative in the case of dismissal for misconduct was considered by the CA in *Northern Distribution Union* v *BP Oil* [1992] 3 ERNZ 483, 487 - 488: "In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the circumstances" (per Hardie Boys J).

239 *Hale* [1990] 2 NZILR 1079, 1088 (emphasis added). This view is not based on any empirical evidence: J Hughes "Personal Grievances" in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 89 says (126) "recent evidence published by the OECD suggests the opposite. A scientific study of New Zealand business attitudes identifying mandatory personal grievance provisions as a bar to hiring workers has yet to be published." However this view seems to have gained currency among lawyers. S Kaminski, an industrial lawyer, is "firmly of the view that the inequities which employers perceive as being in the personal grievance jurisdiction have a 'chilling' effect on employment in this country": ("Employment Contracts Act. Commentary on Paper by Ross Wilson" (NZ Law Conference Papers Vol 2, Wellington, March 1993) 392, 395).

An employer must be free to exercise his own judgment of market trends, *even to act on intuition.*

The progress of *Hale* from the Labour Court to the Court of Appeal and back again was driven by the NZEF, not by a small employer's fight for survival. It took place against the background of the Business Roundtable's vigorous promotion of the concept of "employment at will", the principle that, in the interests of economic growth through the unfettered actions of the market, employers should be able to dismiss at will and their actions should not be open to judicial scrutiny.

The Court of Appeal's judgment sent a clear message to employers that the judiciary would not interfere in their decisions to make workers redundant. It also sent the message that the courts would not review the justification for commercial decisions generally. Many employers, including large and influential ones, took this as being *carte blanche* to operate industrial relations policies on the basis of a legally sanctioned and unfettered right to manage.[240] By the time the ECA was passed in May 1991[241] employers were increasingly asserting and acting on an assumed right to unilaterally vary employment contracts based on the "super principle" of the right to manage. If this right could trump statute, employers acted on the basis that it could also trump the express terms of employment contracts. Subsequently the Employment Court upheld union challenges to these unilateral variations of individual employment contracts,[242] but by the time these cases were determined the damage, for many employees, had already been done.

C *Attorney-General* v *NZ Post Primary Teachers' Association: Implying Terms - For Whose Benefit?*

Contractual terms implied by law (ie by judges) are a type of judicial law-making. Implied terms play an important part in defining the political framework of employment law; they enable the views and values of judges to influence the content and nature of the employment contract. The content of implied terms and the ease with which they can be implied can alter the power relations in the employment contract. Who benefits from this

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[240] See P Kiely and A Caisley "The Legal Status of Bargaining under the Employment Contracts Act 1991: A Review of Recent Cases" in R Harbridge (ed) *Employment Contracts: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 55 - 57.

[241] And for some employers before then: see *United Food and Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756.

[242] The EC in *NLGOU* v *Auckland City* [1992] 1 ERNZ 1109 held that *Hale* did not establish a general defence of commercial justification to breach of contract, which breach was unlawful. *Hale* concerned the justification for a *lawful* decision: J Hughes "Personal Grievances" in Harbridge (ed) (above) 115. In *NZPSA* v *Electricity Corp* [1991] 2 ERNZ 365, 379 the EC made it clear that "the various observations about the employer's right to manage are not available as a general pretext for avoiding legal obligations voluntarily entered into but which it is no longer convenient to fulfil."

process is a political question determined by judges. The *NZPPTA* case concerned the correct test to be applied for the implication of terms into employment contracts, in this case a collective contract covering secondary teachers, in the light of Budget cuts to secondary education funding.

1 Implied contractual terms

(a) Terms implied in employment contracts

Historically terms implied by judges in employment law worked to the disadvantage of employees. They tended to perpetuate the old concepts of master and servant law, reinforcing the subordinate status of the employee through the implied duty of obedience and the implied right to manage, and worked to the disadvantage of employees.[243] A well-known example is the decision in *Lister* v *Romford Ice & Cold Storage Co Ltd*[244] that an employer's insurance company could sue the employer's negligent employee, a lorry driver, to recover damages paid to a third party, based upon the employee's implied contractual obligation to use proper skill and care in his employment.[245] The implied duties of employers to pay wages, provide work (in some circumstances) and to provide a safe system of work were comparatively far less onerous.

Implied terms of more recent development have tended to limit managerial prerogative, in particular the implied terms that the employer will not behave in such a way as to destroy or seriously damage the relationship of trust and confidence between employer and employee and of fair and reasonable treatment.[246] The corresponding refinement of the

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[243] Lord Wedderburn "Labour Law: From Here to Autonomy?" (1987) 16 ILJ 1, 9 - 10.

[244] [1957] AC 555 (HL); [1957] 1 All ER 125. There was no corresponding implied term that an employee should be entitled to be indemnified by his or her employer's insurance; such a term was not a "necessary condition of master and man" (per Viscount Simonds) 132 (cited to All ER). Another example is the doctrine of common employment which removed an employer's vicarious liability where an employee was killed or injured by the negligence of another employee on the basis that the worker "knew when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill, but also from the want of it on the part of his fellow-servants; and he must be supposed to have contracted on the term that, as between himself and his master, he would run this risk": *Hutchinson* v *York, Newcastle & Berwick Ry Co* (1850) 5 Ex 343, 351.

[245] *Mazengarb's Employment Law* para 1026, p B/44.

[246] These terms are summarised in *United Food & Chemical Workers Union of NZ* v *Talley* [1992] 1 ERNZ 756, 770. Although the CA decisions in *Auckland Shop Employees Union* v *Woolworths (NZ) Ltd* [1985] 2 NZLR 372 and *Marlborough Harbour Board* v *Goulden* [1985] 2 NZLR 378 are usually cited as authority for the recognition of these terms in NZ, the Arbitration Court had long recognised the need for procedural fairness: see above n 58. See also the decision of the English Employment Appeal Tribunal in *Woods* v *WM Car Services (Peterborough) Ltd* [1981] ICR 666. As the Law Commission noted, "the Goulden case may be explained more narrowly in terms of administrative law rules relating to the observance of natural justice by public agencies; and the earlier *Auckland Shop Employees* case may be explained in the statutory context of 'unjustifiable' dismissals." (New Zealand Law Commission *Aspects of Damages: Employment Contracts and the Rule in* Addis v Gramophone Co - *Report No 18* (Wellington, 1991).

employee's duty of fidelity, to act with good faith towards the employer, has also tended to impose more onerous standards of behaviour on employees.[247] While more recently developed implied terms are potentially advantageous to employees, the continued application of terms such as the employee's implied duties to obey all lawful and reasonable orders of the employer and to work honestly and faithfully still operates "largely ... to control the range of actions of employees and to reinforce the power of employers."[248]

Terms implied by law into employment contracts in Victorian England reflected a master and servant mentality. In contemporary New Zealand changed attitudes mean that new terms implied by law should, and are more likely to, reflect the interests of employees to a greater extent.[249] Given the power imbalance in the employment relationship, the express terms of many employment contracts may not adequately reflect the interests of employees. Attempts to establish terms implied in fact are therefore likely to be made by employees seeking to protect their conditions rather than by employers. The flexibility of the tests for implying terms as a matter of fact is therefore an important indicator of judicial politics. If it is easier for judges to imply terms into employment contracts, employees are more likely to benefit. If more rigid tests are retained, the status quo will benefit employers.

(b) Implied terms in commercial contracts

In *Vickery* v *Waitaki International Ltd*[250] Cooke P noted that implied terms in contracts generally are "categories or shades in a continuous spectrum ... "[251] rather than falling into rigid groups. Terms may be implied by law. Terms implied as a matter of fact in commercial contracts must meet the tests restated by the Privy Council in *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings*.[252] Under this test no term will be implied unless it is necessary to give business efficacy to the contract; the term contended for will be implied only if the contract is ineffective without it. Terms may also be "deduced by implication or interpretation from the express terms of the contract"[253] or implied by custom.[254]

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247 See eg *Tisco* v *Communication and Energy Workers Union* [1993] 2 ERNZ 779 (CA); *NZ Air Line Pilots Assn* v *Air NZ Ltd* [1992] 1 ERNZ 353 (CA).

248 *Mazengarb's Employment Law* para 1027 p B/45.

249 For example the implied term of fair and reasonable treatment.

250 [1992] 2 NZLR 58.

251 Above, 64, citing the comments of Lord Wilberforce in *Liverpool City Council* v *Irwin* [1977] AC 239, 253 - 254 (HL).

252 (1977) 16 ALR 363 (PC).

253 Above, 64.

254 *Attorney-General* v *New Zealand Post Primary Teachers Assn* [1992] 2 NZLR 209.

(c) A more flexible approach for employment contracts?

The *BP (Westernport)* approach is a strict one, which may be appropriate for commercial contracts between businesspeople. However in 1991 the Labour Court began to develop a broader approach to the implication of terms in contracts of employment based on the special nature of those contracts. The new approach was first suggested in *NZ Merchant Service Guild IUOW Inc* v *NZ Rail Ltd,*[255] when the court considered whether provision for separate dining rooms for officers and ratings on the *Arahura* was a term or condition of employment of the officers. The court held that such a term fitted within the *BP Refinery* tests. In the course of the judgment, however, Goddard CJ also suggested that the rule that a term could not be implied simply because a court thought it reasonable "might not be applicable literally to a contract of employment or at least that the test of necessity might have to be measured against the nature of the modern contract of employment and its underlying need for a basis of trust and confidence."[256] His Honour said:[257]

> It may also be that the prohibition against the variation by one party to a contract without the consent of the other ... of the terms and conditions of the contract receives, in the case of the employment contract, a broad or broader view of what amounts to a term or condition by reason of the personal nature of the contract of employment. ...
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> Some flexibility in the breadth of what is generally comprehended within the terms and conditions of employment may be needed according to the purpose for which the definition is required. When it has been a question of whether some variation of duties falls within the ambit of the particular employment relationship so that the employer is entitled to expect the employee to accept a unilateral variation, the Courts have sometimes viewed the content of the employment relationship very broadly.

It appears that His Honour was referring to the manner in which the courts have sometimes interpreted the employee's implied duty to obey as requiring the employee to agree to unilateral variations in working conditions eg changes to the place of work or hours of work or to the nature of duties.[258] If a broader approach can be taken in that type of case, and in favour of employers' interests, then Goddard CJ appeared to suggest that there is no reason in principle why a broader approach should not also be taken in employees' interests. This approach was raised again in *United Food and Chemical Workers Union of NZ* v *Talley*[259] in which a Full Court of the Labour Court held that it was an implied term of a contract of employment (either a separate term or as part of the obligation of fair and

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255 [1991] 2 ERNZ 587.
256 Above, 596.
257 Above, 600.
258 This aspect of the contract of employment is discussed by H Forrest "Political Values in Employment Law" (1980) 43 MLR 361 and B Napier "Judicial Attitudes Towards the Employment Relationship - Some Recent Developments" (1977) 6 ILJ 1. See also Wedderburn et al *Building on Kahn-Freund* 146 - 147. The memoranda issued in the *TNT* case, below, are an example of these types of terms and conditions.
259 [1992] 1 ERNZ 756, 771.

reasonable treatment) that neither party would act to defeat the right of employees to approach their employers with grievances and to expect that those grievances would be settled by the employer or adjudicated on by the Employment Tribunal.

In so deciding the Labour Court cited with approval the statements of the English Court of Appeal in *Mears* v *Safecare Security Ltd*[260] that an industrial tribunal may have to imply and insert missing terms in contracts of employment without being tied to the tests for commercial contracts, "but can and should consider all the facts and circumstances of the relationship between the employer and the employee concerned, including the way in which they had worked the particular contract of employment since it was made ... ". These observations were *obiter*. However, three months later the broader approach referred to in the *NZ Rail* and *Talleys* cases led the Employment Court to find an implied term in *NZ Post Primary Teachers' Assn* v *Attorney-General (on behalf of Ministry of Education (No 2)*,[261] upholding a union challenge to funding cuts in secondary education.

2 *PPTA* in the Employment Court

The *PPTA* case concerned Ministry of Education funding of secondary teachers' salaries under a Guaranteed Minimum Formula Staffing (GMFS) arrangement made up of nine "functional components" including Teacher Non-Contact Time Allowance (TNCTA) and Teacher Development Time Allowance (TDTA). TNCTA was introduced as a permanent scheme in 1985 to enable teachers to carry out administrative duties, preparation and marking, and other matters such as counselling students. TDTA was to enable teachers to undertake professional training and development and to allow senior teachers to supervise and guide junior teachers. The allowances were not made available to each teacher individually, but were a funding mechanism. The amount of TNCTA available to individual teachers was determined from time to time by the board of trustees or principal. The TNCTA was not expressly provided for in the collective employment contract. However by virtue of section 94 of the State Sector Act 1988 and clause 12.9 of the collective employment contract, the terms and conditions of teachers' employment were required to be identical before and after 1 April 1988.[262]

In 1991 as a result of Budget cuts, the Ministry of Education, a party to the collective employment contract, decided to reduce the amount of TNCTA from 5 percent to 4 percent

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260 [1982] ICR 626, 648. See also *BBC* v *Hearn* [1978] 1 All ER 111.

261 [1991] 3 ERNZ 641.

262 Section 94(1) provides: "The terms and conditions of employment of every person who, at the commencement of this Act, holds any position in the State services shall, on the 1st day of April 1988 (and thereafter until varied) be identical with the terms and conditions of that person's employment in the State services immediately before the 1st day of April 1988."

of each school's classroom teaching hours, and the amount of TDTA as a result of a flow-on effect. The practical effect of this cut was a potential loss to the profession of 105 jobs or at least 105 salaries. The applicant union sought compliance orders to require the Ministry to maintain its funding at current levels on the basis that TNCTA was one of the terms and conditions of employment of teachers and could not be altered downwards because of clause 12.9 of the contract and s 94 of the State Sector Act. The Ministry argued that compliance orders could not issue because the GMFS (and the TNCTA and TDTA which were part of it) were not contractual in nature, but merely an administrative procedure which the Ministry had the power to modify.

The Employment Court held that the proposal to reduce TDTA funding was a breach of clause 2.5.1 of the contract, but that that clause did not expressly protect TNCTA. TNCTA could be protected only if the court found an implied term that:[263]

> [T]he Ministry will fund schools to an extent sufficient to enable them to employ teachers in such numbers that they will continue (as a body) to have available to them in effect five (and not four) weekly teacher half-days of non-contact time for every 100 such half-days of classroom teaching time.

The Court found that the GMFS was introduced by government policy and not contractually. However as a result of its introduction and the introduction of the non-contact time allowance:[264]

> [E]very teacher in a secondary school was entitled to expect to share equitably in the total teacher non-contact time available, in the knowledge that while the amount available to individual teachers from time to time would be determined by the board or its principal, it would be subsidised by the Crown to the extent of at least 5 percent of classroom time and available in this quantity to teachers as a whole.

The Court found that the reduction in the level of TNCTA funding would bring with it a substantial risk that some boards of trustees or principals may reduce established levels of teacher non-contact time because of the reduced Crown subsidy:[265]

> For all these reasons I find that whatever may be the status of the GMFS, the provision of teacher non-contact time or its equivalent in the present quantity is a term and condition of the employment of every teacher in a secondary school, for he or she has an opportunity to share equitably in the non-contact time available to the school. That is a right that cannot be taken away.

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263 Above, 650.
264 Above, 651.
265 Above.

In support of this broader meaning of the phrase "terms and conditions of employment" Goddard CJ referred to the Supreme Court decision in *Elston* v *State Services Commission (No 3)* in which Barker J said:[266]

> In my view the expression "terms and conditions of employment" in reg 64A(1) is wide enough to include the physical environment and the stress under which work is performed. I discern this meaning from the clear and normal meaning of the expressions used, applying the approach to the interpretation of clear statutory expressions approved by the House of Lords in*Stock* v *Frank Jones (Tipton) Ltd* [1978] 1 All ER 948; [1978] 1 WLR 231. Further, the decision of the English Court of Appeal in *British Broadcasting Corporation* v *Hearn* [1977] 1 WLR 1004; [1978] 1 All ER 111, makes it clear that the expression "conditions of employment" in an English statute should be defined widely so as to include the totality of the provisions of employment, not just those conditions articulated in a contract, but those terms which are understood and applied by the parties in practice.

The Employment Court held that the GMFS was such a term and had for a long time been "an important feature of the environment, landscape or texture of the employment relationship".[267] While the *Elston* analogy was limited, "it is another illustration of a situation in which a Department of State, while perfectly at liberty to adopt such policy as it saw fit, was not entitled in the course of so doing to vary or detrimentally affect the terms and conditions of employment of employees without their consent."[268] In issuing the compliance orders on 29 November 1991 Goddard CJ said:[269]

> The fundamental error which led to this case and its outcome was the Ministry's action in imposing a reduction of the TNCTA instead of negotiating for it. Nothing that I have said precludes the Ministry from now embarking on a process of negotiation aimed at securing the consent of the applicant and its members to some variation of their rights. In the meantime, however, those rights must be respected.

3 PPTA *in the Court of Appeal*

(a) A narrow test for implied terms

Less than a month later the argument for a broader approach to the implication of terms in employment contracts was dismissed by the Court of Appeal. Gault J delivering the Court of Appeal's judgment said that it was not clear whether the Employment Court had based the implied term on custom or "in some other manner as a result of having been understood and applied by the parties in practice."[270] Regardless, the Court of Appeal rejected any

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[266] [1979] 1 NZLR 218, 234 - 235. Reg 64A(1) of the Public Service Regulations 1964 allowed the State Services Commission to suspend employees who failed to "diligently and efficiently carry out ... their full duties in accordance with the terms and conditions normally applying to the performance of such duties."

[267] *NZ Merchant Service Guild IUOW* v *NZ Rail* [1991] 2 ERNZ 587, 601 (Goddard CJ).

[268] [1991] 3 ERNZ 641, 652.

[269] Above, 654.

[270] *Attorney-General* v *NZ Post Primary Teachers Assn* [1992] 2 NZLR 209, 211 (CA).

notion that different principles apply to the implication of terms in employment contracts than to other contracts:[271]

> It can be said immediately that the nature of employment contracts will affect the content of implied terms (such as duties of fairness, confidence and trust) but that does not call for any different test for implication in such contracts. Similarly the jurisdiction may justify a less rigid approach to evidence in satisfaction of the various tests but that should not detract from the tests.
>
> There is no established basis for the implication into employment contracts of terms that the parties have not agreed should be binding conditions of engagement for the reason simply that it would be reasonable to do so.

Before the Court of Appeal the union submitted that a binding obligation to maintain the quantum of the TNCTA was to be implied on one of 4 bases: business efficacy, custom, interpretation of the contract by reference to an underlying assumption based on the reasonable expectations of the parties, and the broader approach to implication of terms in employment contracts (either as a modification of the above tests or as a separate test). The Court of Appeal dismissed the custom and business efficacy arguments as not meeting the established tests.[272] With respect to the broader argument based on the principle in *Elston* that the mandatory continuance of the TNCTA was understood and applied between the parties in practice, the Court of Appeal did not address this ground separately but subsumed it into a general consideration of the class of implied terms invoked in *Vickery* ie terms deduced by implication or interpretation from the express terms of the contract. Cooke P said:[273]

> The [Employment Court] judgment does not contain reference to any express terms and conditions of employment operative prior to 1 April 1988 that are capable of carrying an implicit undertaking by the ministry to be bound to the TNCTA as a term or condition of engagement. Nor was Mr Dunning able to point to anything other than the adoption of the working party recommendation, implementation and continuation at the level of 5 % of the TNCTA up to 1988, as indicating that persons in the position of secondary school teachers and the respondent reasonably would have understood that the ministry was making a binding commitment to maintain the allowance at that level. More than those administrative acts would be necessary.

Barker J in the *Elston* case had gone far beyond the *Vickery* class of implied term. Had the Court of Appeal applied the *Elston* test, that terms and conditions of employment meant "the totality of the provisions of employment, ... those terms ... understood and applied by the parties in practice", or the approach taken in *Mears* of looking at the way the parties had worked the particular contract since it was made, the term contended for by the PPTA could have been upheld.

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271 Above, 213.
272 Above, 214.
273 Above.

(b) Terms "deduced by implication from the express terms of the contract"

Despite Cooke P's comment to the contrary the EC's judgment did refer to the PPTA's argument that the provisions in the collective employment contract dealing with redeployment of surplus staff and priority rights of reappointment had meaning only if based on an assumption that the GMFS would continue to operate.[274] The EC, however, did not think it necessary to determine whether the whole of GMFS was incorporated into teachers' contracts, but only the TNCTA component. The extent to which this argument was contended for in the Court of Appeal is not clear. However it appears that it would have been open to the Court of Appeal to "deduce" such a term from the express terms of the contract based on its own broad approach in *Vickery* v *Waitaki International Ltd*,[275] decided only a month earlier.

Mr Vickery had a contract with Waitaki to provide catering services at Longburn freezing works. Waitaki closed the works at the end of the 1986 season and following an industrial dispute never re-opened them. Vickery sought compensation from Waitaki in respect of an alleged breach of contract. The Court of Appeal decided that it was implicit in the contract between Waitaki and Vickery that the works remain open and that it was a breach of Waitaki's contract with Vickery to close the works. Damages were awarded accordingly. In the light of *Vickery* it is difficult to see why, even if the argument for a broader approach to implied duties was rejected, the Court of Appeal in the *PPTA* case did not accept the argument based on the express terms of the collective employment contract.

There is also a marked contrast in the tone of the judgments. The Court of Appeal was extremely sympathetic to Mr Vickery's loss of business, but totally ignored the potential effects of the cut in TNCTA funding on teachers. For individual teachers the Court of Appeal's decision meant that a significant part of their working duties, the provision of teacher non-contact time, was open to unilateral variation by Boards of Trustees at any time following the funding cuts, with potentially detrimental effects on teachers' working conditions and the quality of education.

(c) Appeals on the construction of contractual terms

The Court of Appeal's traditional deference to the specialist jurisdiction and expertise of the judges of the employment institutions[276] has decreased markedly in recent years. The

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274 Above, 649.

275 Above.

276 See *Winstone Clay Products Ltd v Cartledge (Inspector of Awards)* above n 60 and *Wellington Road Transport Union* v *Fletcher Construction Co Ltd* above n 201.

PPTA and *Hale* cases are examples of this.[277] Goddard CJ in the *PPTA* case said that his decision was based "solely upon the meaning of the contract as disclosed by the language used in it in the context in which it appears ...".[278] Section 135(1) of the ECA precludes the Court of Appeal from deliberating on appeals from decisions on the construction of employment contracts. However Cooke P said that this did not preclude the Court of Appeal dealing with appeals, such as the *PPTA* appeal, where "general principles" and "general implied terms" in employment contracts were at issue.[279] A year later in *Tisco Ltd* v *Communication and Energy Workers Union*[280] Cooke P, referring to Goddard CJ's interpretation of an express term in an employment contract as "surprising", said that section 135 was "a relic of the times when it was thought that the terms of industrial awards might be construed over-legalistically by the ordinary Courts. Whether that limitation on the rights of appeal on questions of law should survive today is a matter for the Legislature, not this Court."[281]

4 The politics of the PPTA decision

In a sense the *PPTA* case was never any contest. The cuts to the TNCTA were but one small part of the cuts introduced in Hon R Richardson's 1991 "mother of all budgets" which consolidated and extended cuts to public funding in social welfare, housing, health and education, a process started by the Labour Government, accelerated by Richardson's economic statement in December 1990, and effectively endorsed by the Court of Appeal in several cases.[282] The Court of Appeal decision reflects a view that the principles of the New Right, including cuts to state provision of education, are in the public interest. Notwithstanding the effect of its decision on professional standards, the conditions of

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277 See also *Air New Zealand* v *Johnston* [1992] 1 ERNZ 700, 706; [1992] 1 NZLR 159, 165 - 166.

278 [1991] 3 ERNZ 641, 648 (EC).

279 [1992] 2 NZLR 209, 215 (CA).

280 [1993] 2 ERNZ 779, 781. Space precludes an examination of the *Tisco* case, another CA decision in which the concept of implied terms is used to the benefit of employers and to the detriment of employees, and in which the rights of workers are subordinated to the rights of employers. Mr Reilly was a Tisco technician who set up a business repairing dilapidated TV sets in his spare time. The EC said that employees may engage in spare time activities which did not have the potential to harm the employer's business; Mr Reilly's activities did not breach the general duty of good faith and fidelity. Nor did they breach an express term in the contract prohibiting employees from pursuing "electronic trade practices for monetary reward", since Mr Reilly was retailing not servicing and there was no direct competition. This was overturned by the CA which failed to consider "what limits may be reasonable on an employee's spare time activities ...": G Anderson [1993] ELB 107, 108. See also M Gundesen [1993] ELB 103.

281 Above, 781. Anderson (and, impliedly, Gundesen) agree with Cooke P that the restriction in s 135(1) is outmoded. For an example of a case where the CA reached a different conclusion on the interpretation of an express term in an employment contract, see *Radio NZ* v *Clark* [1993] 1 ERNZ 270. It is not clear why s 135(1) was not applied in this case.

282 These are discussed by Kelsey *Rolling Back the State.* 199 - 207. See in particular the discussion (206) of *Maddever* v *Umawera School Board of Trustees* (Unreported, September 1992, High Court, Whangarei).

teachers, and the learning situation of children, the Court of Appeal backed the more powerful.

5 *A "new" law of contract: judicial reality or rhetoric?*

Measured against the benchmark that the adoption of common law rules is an indicator for an outcome disadvantageous to workers, the *PPTA* case supports the thesis that the Court of Appeal is developing employment law along a different, and less just, path to that taken by the Employment Court. The Employment Court's more flexible approach to the implication of terms in employment contracts gave scope for a significant shift away from the traditional use of implied terms by judges to reinforce the subordinate status of workers. This approach had the potential to lead not only to fairer outcomes, but also to greater restriction of the right to manage by limiting employer discretion to unilaterally alter "terms and conditions" in the workplace. To the extent that the Court of Appeal rejected this approach, it reinforced the common law view that a contract of employment is indeed a command in the guise of an agreement.

The Court of Appeal decision in the *PPTA* case is also incompatible with Sir Robin Cooke's conceptualisation of New Zealand law as being fundamentally about the search for a fair and just solution.[283] It also suggests that employment law is excluded from the development of a "new" law of contract in New Zealand.[284] McLauchlan has argued that "we in New Zealand have a more liberated and adventurous judiciary. ... I detect a greater recognition of the realities of the contract making process and willingness to adapt and change the law accordingly; more awareness that people do not read standard-form contracts and often do not reduce the whole of their agreement to writing."[285] As an example of the "new" law of contract McLauchlan refers to the *Blackpool Airport*[286] case in which the English Court of Appeal changed the law relating to tendering processes by importing contractual obligations into the process of calling for, and submitting, tenders. McLauchlan says that this approach, based on considerations of commercial convenience and fairness, is an example of the "new" law of contract and rejects criticism of the *Blackpool Airport* case as being contrary to commercial expectations:[287]

> My judgment is that commercial men and women would welcome the imposition of the kind of limited legal obligation imposed by the court in the *Blackpool* case. Such a result tends to enhance, not undermine, the utility of the tendering process. Of course, this disagreement goes to show once again that the reasonable outcome will often be a matter on which careful minds, weighing all

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283 Sir R Cooke "Fairness" (1989) 19 VUWLR 421, 422.
284 D W McLauchlan "The 'New' Law of Contract in New Zealand" [1992] NZ Recent Law Review 436.
285 Above, 447.
286 *Blackpool and Fylde Aero Club* v *Blackpool Borough Council* [1990] 1 WLR 1195.
287 Above n 284, 461.

> relevant considerations, may differ. One's judgment as to what is reasonable is dependant on one's life experience, philosophical starting-points, and moral values.

Given the special nature of the employment contract, employment law should have been a launching pad for the "new" law of contract. As the Court of Appeal noted in the *Telecom South* case, "the 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 confidence, trust and fair dealing."[288] A broader approach to the implication of terms in employment contracts seems fair and reasonable given the special nature of employment contracts, their ongoing nature and need for flexibility, and the fact that the detail of employment arrangements often cannot be spelled out in a written contract. The concept of terms of employment "understood and applied by the parties in practice" is no more vague and difficult to apply than legal concepts such as the requirement that administrators must act "fairly, reasonably and in accordance with the law"[289] or the concept of "legitimate expectation" in administrative law.

As McLauchlan points out "it is trite learning that one of the major purposes of the law of contract is to protect the reasonable expectations of the parties."[290] The result of the *PPTA* case seems particularly unfair because any individual secondary teacher would almost certainly have had a reasonable expectation that teacher non-contact time would have continued on the same basis as it had prior to 1988, and, it is suggested, if asked, would have said that it was "part of my terms and conditions of employment".

D TNT Worldwide Express (NZ) Ltd *v* Cunningham:[291] *Workers and Contractors*

The decision to apply a rule of commercial law rule may be a political one. Judges are able to manipulate the point at which such rules are imposed to suit their perception of the public interest. In the *PPTA* case the rule related to implied terms. In *TNT* v *Cunningham* where the issue was the status of one of the parties to the contract, a similar approach by the Court of Appeal led to a similar outcome. In *TNT* v *Cunningham* the Court of Appeal held that Mr Cunningham, a courier driver, was an independent contractor rather than an employee employed under a contract of employment. In so deciding the judges denied Mr Cunningham access to the personal grievance procedures in the Employment Contracts Act and the protection of the "minimum code of employment". The Court of Appeal's decision departed from established legal principle and endorsed an ideological perspective which

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288 *Telecom South* v *Post Office Union* [1992] 1 NZLR 275, 285.
289 Sir Robin Cooke "Fairness" (1989) 19 VUWLR 421, 426.
290 Above n 284, 440, referring to *Corbin on Contracts* (1963) vol 1, 2.
291 [1993] 3 NZLR 681 (hereafter *TNT v Cunningham*).

favours the free market and freedom of contract over the need to protect workers in an environment where inequality of bargaining power often leads to unfair outcomes.

1 Workers and independent contractors: the traditional tests

The distinction between workers and independent contractors has consequences in taxation, tort and employment law. In employment law the issue is usually whether a person has access to protective statutory provisions.[292] Workers, but not independent contractors, are entitled to the benefit of the provisions of the Wages Protection Act 1983 (which provides for wages to be paid in money and without deduction), the Holidays Act 1981 (which provides for statutory and annual holidays, as well as "special leave" for sickness and in other circumstances), the Parental Leave and Employment Protection Act 1987 and the Minimum Wage Act 1983. A worker, but not an independent contractor, also has access to the personal grievance procedure in the ECA.[293]

The distinction has always been problematic for the courts, which developed various tests to assist them in analysing the relationship at issue. The earliest test was the "control test." Historically control was an important indicator of a contract of service (as discussed in Part I). The judicially implied term of obedience by servants to lawful and reasonable orders of their masters meant that employers still retained considerable control over their employees. The control test requires the courts to assess whether the employer has the right to control what work the employee does and the manner in which he or she does it. At one stage the control test was determinative, but gradually it became only one of several tests to be applied. While the test was simple to apply to relationships such as the employment of agricultural or domestic servants, it became more difficult when the "servant" possessed greater skill than the "master", for example in the case of a hospital surgeon.[294]

The increasing complexity of organisations and employment relationships led judges to develop other tests.[295] These included the "integration" test (was the person "part and parcel of the organisation"?); the "business" or "fundamental" test (was the person engaged to perform the services as a person in business on his or her own account?); the "view of the ordinary person" test (would an ordinary person categorise the relationship as one between worker and employer or as one between two independent contractors?); and the

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[292] Wedderburn et al *Building on Kahn-Freund* 145 - 167.

[293] By way of exception the definition of "worker" in s 2 of the ECA includes "homeworkers" whether such workers are engaged, employed or contracted to do work for another person.

[294] *Mazengarb's Employment Law para 2.8 pp* A/31 - A/34.

[295] These tests are discussed in *Mazengarb's Employment Law* paras 2.7 - 2.20 pp A/30 - A/52. See also *NZ Workers' Union* v *Dyer* [1980] ACJ 291 (AC).

'balancing all the factors' test.[296] For many years in New Zealand the courts favoured a pragmatic and broad 'balancing all the factors' test, as Blair J confirmed in *McMullin Holdings Ltd* v *Auckland Clerical Workers Union*:[297]

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

2 The TNT arrangement

In 1989 Mr Cunningham (C) started work as a courier driver for TNT. He had previously worked as an owner/driver for ASC Flowers under an arrangement whereby he had purchased a business, could take on other clients, and had eventually sold his business. The Employment Tribunal found[298] that these were "three key distinctions" between C's arrangement with ASC Flowers and the TNT arrangement. A few days after C started work for TNT he was given a copy of a deed of agreement and was given only a few minutes to peruse it before he signed it. The Tribunal found that the contract was presented to C as a *fait accompli*: "The company representative indicated no amendments would have been permitted."[299] The contract labelled the relationship as "that of independent Contractor" (clause 7), but the labelling of such contracts is not decisive in determining the true nature of the contract.[300] The Employment Tribunal and Employment Court[301] concluded that the contract was one of employment. On appeal the Court of Appeal reversed these decisions unanimously.

It was accepted by the decision makers at all levels that there were factors which supported the view that C was an independent contractor and factors which supported the view that he was an employee. C was required to provide and maintain his own car, to rent a radio telephone from the company, to procure a goods service licence in his own name and certify that he was the owner of his business. Couriers were required to take out their own independent insurances and prepare their own tax returns. They paid ACC levies and were taxed as independent contractors. GST invoices were prepared by TNT at the couriers' request. All of these factors pointed towards an independent contractor. On the other hand TNT exercised a considerable degree of control over the couriers. The contract provided:

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296 See eg *Wood* v *Dobson* [1969] NZLR 60 (Compensation Court).
297 [1969] NZLR 530, 531 (AC).
298 [1992] 1 ERNZ 956, 964.
299 Above, 965.
300 *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions & National Insurance* [1968] 1 All ER 433, 439 (per MacKenna J).
301 [1992] 3 ERNZ 1030.

> 1. That the contractor will conduct for the company a courier service over such routes and servicing such customers as the company may from time to time direct and will for such period and in such places as the company may require and assist with the handling, sorting and consolidating of customer goods in transit.
>
> 2. The contractor shall:
> (g) Conduct the courier service in accordance with the directions of the company and at all times be courteous and cooperative to the company's customer, the company, its servants and other couriers.
> (h) Not commit nor omit any act which may jeopardise or otherwise adversely affect the earnings of the company or its reputation as a courier operator.

The company also issued memoranda to the courier drivers from time to time.[302] For example in January 1991 they were advised that the company direction and philosophy would revolve around "one team."[303] Other memoranda included:

> 21 November 1990
>
> TIME OFF:
>
> I find that I am increasingly aware of contractors having **time off** when your relief driver turns up on the morning you are first away.
>
> I would like to remind you that official policy is: All relief drivers should be approved prior to taking over your van and that **time off** should be arranged at least two working days before your **time off**.
>
> ---
>
> 30 April 1991
>
> 5. Image. A very important part of the TNT growth strategy and a pet project of Dennis's. This includes vehicles inside and out, uniforms, clean and correct. ID tags to be worn at all times, no dogs to be carried with you, no children, wives etc except in unusual circumstances. Should any of you still be waiting on parts of the uniform from the original issue please see myself as soon as possible.
>
> **UNIFORMS**
>
> The above uniform is to be worn at all times when on duty. No other garments are acceptable. ... The uniform remains the property of the company and is to be surrendered should the employee leave the company.

Couriers had to operate within a strictly regulated system of work, reporting at the depot at 7.30 am, being ready to leave at 8.00 am, back from their first "run" at 10.30, and so on. The Employment Court noted[304] that "this mimics the standard employment situation of clocking in, clocking out and three spells in the smoko room or cafeteria." C had to wear a uniform and include the company logo on his car, which was to be painted in the company's colours. Couriers were not able to accept work from TNT's competitors or

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302 These are set out in the EC's judgment at 1040 - 1044.
303 Above, 1042.
304 Above, 1049.

directly from clients. They could not refuse to service a particular client of TNT and could arrange for a substitute driver for a maximum of 20 working days per year, and then only if the relief driver was approved by the company. Couriers did not generate a business which could be sold.

3 *The Employment Tribunal decision*

The Tribunal emphasised that the case concerned "access to a Tribunal for the remedy of an alleged injustice"[305] and commented on an article by Collins in which he discussed the deficiencies of the traditional tests for determining whether a person was a worker or an independent contractor and proposed a simplified rule as follows:[306]

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

The Tribunal did not specifically approve the Collins approach, but adopted a "threshold" approach in considering whether C had access to the personal grievance procedure:[307]

> If there are sufficient attributes of an employer/employee relationship which justify employment protection for the individual driver, then irrespective of there being a greater number of factors which suggest an independent contractor relationship then the right of access to justice for a personal grievance should not be denied. Accordingly, my task is a multi-factor assessment of the circumstances of this case, but one in which greater weight can be applied to certain factors than others.

Despite the reference to a "threshold" approach, the actual reasoning process applied by the Tribunal was the traditional "balancing all the factors" test, which has never been a simple process of arithmetic, but has always involved some factors being given more or less weight than others.

4 *The Employment Court decision*

On appeal the Employment Court was quick to dismiss a complaint that the Employment Tribunal "devoted considerable space to an article advocating what the law should be rather than describing what it is, because the terms of the decision leave me perfectly clear in my mind that [the Tribunal] recognised the article for what it was."[308] The Court also

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305 [1992] 1 ERNZ 956, 962 (ET).

306 H Collins "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws" (1990) Ox JLS 353, 378.

307 Above n 305, 963 - 964.

308 [1992] 3 ERNZ 1030, 1033 (EC).

rejected the appellant's argument that the Tribunal had incorrectly applied the "threshold" test. It noted that arguments about the onus of proof were "largely foreign to the personal grievance jurisdiction"[309] but that to the extent that it was an appropriate consideration, and in cases where the employer was asserting that contract was something else than what it appeared to be, the onus was on the employer to prove that the person concerned was a contractor not a worker.[310] The Employment Court said that in considering whether a contract was an employment contract or a contract for services:[311]

> The Court gives effect to the intention of the parties (which means the intention of both parties) and whatever relationship they have meant to adopt is the relationship which the Court will recognise. ... Sometimes it can be unclear what the parties' intention is and then the Court resolves the doubt by applying certain tests or criteria which are said to be indicia of the existence (according to the intention of the parties) of one or other of the two relationships.
>
> When speaking of intention, the Court's inquiry is not limited to the intention expressed in any written contract but can be deduced from all the circumstances and an examination of the history of the contract in operation because, as it is important to recognise, the Court is dealing not with a contract governing a single transaction but with a contract governing a continuing contractual relationship.

Goddard CJ emphasised that the terms of any written contract were not wholly determinative of the status question:[312]

> ... [I]n cases involving a dispute about the nature of the contractual relationship between the parties, it is in my opinion just as important to look at how the relationship works in practice as at how it is theoretically supposed to work according to the written document. One reason for that is that a written agreement cannot possibly set out all the detailed terms of the arrangement and may not, in some cases, disclose its true nature but rather camouflage it.

The Court went on to note that the 2 criteria currently enjoying the most widespread vogue were the control test and the fundamental (or "business") test. The control test was most recently given prominence by the Court of Appeal in *Challenge Realty Ltd* v *Commissioner of Inland Revenue*[313], upholding the Commissioner's decision that real estate salespersons employed by real estate agents licensed under the Real Estate Agents Act 1976 were employees rather than independent contractors. The Real Estate Agents Act provided for effective control of salespersons by the licensee or branch manager. The Court of Appeal recognised the importance of control, following the decision of the Privy Council in *Australian Mutual Provident Society* v *Chaplin*:[314]

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309 Above, 1036.
310 Above, 1038.
311 Above, 1033.
312 Above, 1046.
313 [1990] 3 NZLR 42.
314 (1978) 18 ALR 38.

> The second principle is that, while all relevant terms of the contract must be regarded, the most important, and in most cases the decisive, criterion for determining the relationship between the parties is the extent to which the persons, whose status as employee or independent contractor is in issue, is under the direction and control of the other party to the contract with regard to the manner in which he does his work under it.

The second "in vogue" test was the "fundamental" or "business test" applied by the Privy Council in *Lee Ting Sang* v *Chung Chi-Keung*.[315] Their Lordships approved the test as described by Cooke J in *Market Investigations Ltd* v *Minister of Social Security*:[316]

> The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service.

Applying these tests to the relationship between C and TNT, the Employment Court said that control was very tight and, after reviewing the terms of the contract, found that "it would be a nonsense to suggest that the respondent was in business on his own account."[317] The TNT contract, according to Goddard CJ, failed both of the most important tests. C was therefore an employee, and had access to the personal grievance procedure in the ECA.

5 The Court of Appeal decision

(a) Analysing the relationship or interpreting the contract?

The Court of Appeal reversed the decisions of the Tribunal and Court. The 2 leading judgments were delivered by Cooke P and Casey J, but, as with the *Electricorp* case, the true flavour of the Court of Appeal's decision is encapsulated in the dicta of Hardie Boys J, who said that "[t]here are many reasons why both employer and contractor prefer the independent contractor arrangement. They should be free to exercise their choice without paternalistic intervention by the Courts."[318] Unfortunately as Davies and Freedland point out:[319]

> Nothing is more misleading than the ambiguity of the word "freedom" in labour relations. ... To mistake the conceptual apparatus of the law for the image of society may produce a distorted view of the employment relation. This in turn may lead to the uncritical and undiscriminating application to it of rules developed for relations of real co-ordination (where the parties are "at arms length") such as most commercial contracts ... .

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315 [1990] 2 AC 374.
316 [1969] 2 QB 173, 184 - 185.
317 [1992] 3 ERNZ 1030, 1054 (EC).
318 [1993] 3 NZLR 681, 698 (CA).
319 *Kahn-Freund's Labour and the Law* (3 ed, Stevens and Co, London, 1983) 24 - 25.

This is precisely what the Court of Appeal did. If the Court had adopted the usual approach of looking broadly at the whole transaction, including any written contract, and applying the recognised tests, particularly the control test and the fundamental test, it must have found that the relationship was an employment contract. The Court of Appeal was able to find that C was an independent contractor only by adopting a different framework for analysis and careful selection of material facts.[320] The Court of Appeal treated the case as one of pure interpretation of a commercial contract. This was a new approach and one which contradicted its own approach in the *Challenge Realties* case and the Privy Council decision in *Chaplin*. Cooke P emphasised the importance of the written contract:[321]

> When the terms of a contract are fully set out in writing which is not a sham ... the answer to the question of the nature of the contract must depend on an analysis of the rights and obligations so defined. ... In the end, when the contract is wholly in writing, it is the true interpretation and effect of the written terms on which the case must turn.

This purely commercial law approach begs the question whether the contract was wholly in writing and departs from the hitherto settled "balancing all the factors" test, in which the terms of any written contract would be an important factor, but set against a broader consideration of what the parties actually did and how they actually behaved. In making the written contract the sole test of whether a relationship was one of service or one for services, the Court of Appeal was making new law. In *Lee Ting Sang* v *Chung Chi-Keung* Lord Griffiths said:[322]

> Whether or not a person is employed under a contract of service is often said in the authorities to be a mixed question of fact and law. Exceptionally, if the relationship is dependent solely upon the true construction of a written document it is regarded as a question of law: see *Davies v Presbyterian Church of Wales* [1986] 1 WLR 323.

Cooke P referred to this extract, and the *Davies* decision, in support of the view that the question was simply one of interpretation of the contract.[323] However the *Davies* decision had nothing to do with the distinction between independent contractors and workers. It was about *whether* there was a contractual relationship at all between a minister of the Presbyterian Church and the Church itself, not what type of contract may have existed.[324]

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320 G Anderson "Recent Case Comment" [1993] ELB 68, 70.
321 [1993] 3 NZLR 681, 686 (CA).
322 [1990] 2 AC 374, 384 (PC).
323 Above n 321, 687.
324 See also the discussion in *NZ Couriers* v *Curtin* [1992] 2 ERNZ 541 (CA). There have always been special rules relating to the "employment" of ministers of religion: J J Macken, G McCarry and C Sappideen *The Law of Employment* (The Law Book Co Ltd, Sydney, 1990) 42.

The supremacy of contract approach is usually appropriate and fair in a commercial law context. In *Masport Limited* v *Morrison Industries Ltd*[325] the Court of Appeal dismissed an argument that a written agreement for sale and purchase had been varied or added to by a subsequent letter.[326] Robertson J said:[327]

> ... I am not satisfied that two substantial public companies, transferring a business involving many millions of dollars which was effected by senior members of the commercial community with the assistance of legal advice, after determining that their arrangements should be contained in a written form, would make such fundamental and radical variations (or collateral arrangements) without a formal record in writing.

Robertson J referred to similar comments by Kirby P in *Austobel Pty Ltd v Franklins Self-Serve Pty Ltd*:[328]

> We are not dealing here with ordinary individuals invoking the protection of equity from the unconscionable operation of a rigid rule of the common law. Nor are we dealing with parties which were unequal in bargaining power. Nor were the parties lacking in advice either of a legal character or of technical expertise. The Court has before it two groupings of substantial commercial enterprises, well resourced and advised, dealing in a commercial transaction having a great value.

In his book *Judging Judges* Lee discusses the importance of precedent in commercial cases:[329]

> [E]ven when commercial cases come to court, there are powerful reasons why the judges should usually defer to the past law even if they think that a fairer solution could be achieved by some innovation. *Commercial organisations on all sides of a problem will have been legally advised at all stages of the drafting of a contract, for example, and will have budgeted for the contract to be construed according to established legal techniques.*

The facts of *TNT* v *Cunningham* expose the utter inappropriateness of a pure "interpretation of the contract" approach to C's relationship with TNT. C and his courier van were worlds away from the types of commercial enterprises and arrangements described above. C had no independent legal advice, was in a substantially weaker bargaining position than TNT, and had to sign a contract which the company presented to him as a *fait accompli* and which was effectively non-negotiable. While Cooke P recognised the "exacting and rigorous"[330] nature of the TNT contract and said that the TNT memoranda "have a bureaucratic and disciplinary air and bring out how extensive are the

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325 31 August 1993, Court of Appeal, CA 362/92 (Cooke P, Richardson & Robertson JJ); [1993] BCL 318.

326 Above. "Businessmen and their lawyers are often loud in their stress on the need for certainty in commercial law. When it seems expedient, however, many are ready to destroy certainty by contending that an apparently written bargain was not what it seemed" (per Cooke P, 2).

327 Above, 13 (per Robertson J).

328 (1989) 16 NSWLR 582, 585.

329 S Lee *Judging Judges* (Faber & Faber, London, 1988) 196 (emphasis added).

330 [1993] 3 NZLR 681, 689.

powers of control exercisable by the company under the contract"[331], he failed to give any consideration to the actual effect of these provisions on Mr Cunningham. By finding that "a considerable degree of control" was compatible with contractor status, the Court of Appeal gave contractors the worst of both worlds: without the freedom available to a truly "independent" contractor, but without the benefit either of the protective provisions in the ECA:[332]

> The Courts must recognise the increasing use of contracts for services in many business activities, of which courier and other owner-driver operations are but one example. Where there is a large organisation and a competitive industry, a considerable degree of control may be required to ensure cohesion and efficiency, and a high public profile. This will be for the benefit of the contractors as well as of the owners of the business. The voluntary assumption of such controls in order to gain entry to the industry should not be seen as a reason for treating the contract as other than what on an overall consideration it truly is.

The Court of Appeal's determination to adopt a pure freedom of contract approach in *TNT* v *Cunningham* appears to stem from ideological preference rather than legal principle. One commentator has categorised the approach of the Court of Appeal as "entirely orthodox"[333] and another as a "decision to support the status quo."[334] The writer disagrees. The Court of Appeal, in abandoning the "balancing all the factors" approach and in introducing a test in which the written terms of the contract are the most important factor, has altered the law.

(b) The use of precedent

Judicial consideration of the independent contractor/employee distinction in New Zealand has tended to emphasise facts, rather than precedent, within an established framework of well-known tests.[335] Having categorised the decision as one purely of law, the Court of Appeal, however, was able to give greater emphasis to precedent, notably the *Ready Mixed Concrete* case,[336] which supported the conclusion that C was an independent contractor. Thus, while Goddard CJ said that it was "a nonsense"[337] to suggest that C was in business on his own account, Cooke P said that the *Ready Mixed Concrete* case and the Australian judgments mentioned therein,[338] and Mr Cunningham's arrangement "appear naturally to meet the test whether a person has engaged himself to perform services and to do so in

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331 Above, 687.
332 Above, 698.
333 J Hodder (1993) 16 TCL 25/1.
334 [1993] ELB 70.
335 See, eg, *Canterbury & Westland Stores etc IUOW* v *Tony Chimes (Soft-Freeze) Ltd* [1986] ACJ 387.
336 Above n 300. This point is noted by G Anderson [1993] ELB 68, 70.
337 Above n 317, 1054.
338 *Queensland Stations Pty Ltd* v *Federal Commissioner of Taxation* (1945) 70 CLR 539 (HCA); *Humberstone* v *Northern Timber Mills* (1949) 70 CLR 389 (HCA); *Stevens* v *Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16 (HCA).

business on his own account ... ."[339] These precedents were able to be invoked only by emphasising particular aspects of the TNT arrangement rather than others. Anderson says:[340]

> The TNT case is an excellent illustration of how a Court's selection of the material facts influences the outcome. ... The Employment Court concentrated on the detailed control over the drivers and the apparently limited ability to have any real or significant influence over the level of earnings. The Court of Appeal stressed such matters as the ownership of capital, the method of payment and the holding of the Goods Service Licence.

The decision makers also disagreed on the importance of precedent in the sense of practice in the industry. It was accepted by all decision makers that courier drivers were treated generally in the industry as independent contractors. A change would have considerable impact in the industry. On this point the Employment Tribunal said:[341]

> Mr Ford urged me to have regard to the risks of a finding against the respondent which would have consequences for a very large number of people and organisations. On that issue I merely state that I am required to apply the law as I find it, to the facts of this particular case even if reluctant because to do so might fly in the face of an established commercial practice.

The Court of Appeal took a different view:[342]

> It was said that this case stands on the application of facts and relevant law in respect of him alone. But this is to ignore or minimise the effect of the decision as a precedent. The respondent's proceeding may be seen as an attempt to change an established status in the transport industry.

The Court of Appeal's reluctance to overturn accepted practice in the courier industry in *TNT* v *Cunningham* contrasts with its decision in the *Challenge Realty* case, which affected the tax status of many real estate agents. The effect of this decision was subsequently reversed by legislation.[343]

6 *The politics of TNT* v *Cunningham: worker protection or paternalism?*

Although neither the Employment Tribunal nor the Employment Court relied on the Collins article, the Court of Appeal judges devoted considerable discussion to it. Cooke P concluded:[344]

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339 Above n 321, 685.
340 [1993] ELB 70.
341 [1992] 1 ERNZ 956, 958.
342 Above n 321, 689 (per Cooke P).
343 Real Estate Agents Amendment Act 1992 (as to the future).
344 Above n 321, 689.

> In truth the result arrived at by the Employment Tribunal and the Employment Court is attainable only if the present law is developed by a change such as advocated in the Collins article. In my opinion the Courts should not shrink from such a development should a reconsideration of common law decisions show them to be untenable or unsatisfactory in principle, provided however that the development is not contrary to legislative policy. In the end I am not satisfied on either head here. As to legislative policy, s 2 of the Employment Contracts Act 1991 appears plainly intended to preserve existing principles, for it provides that "Employment contract" means a contract of service; and includes a contract for services between an employer and a homeworker. Only the latter type of contract for services is brought within the framework of the Act. As to past common law decisions, I am unable to fault the conclusions of McKenna J and Dixon J, despite some small differences in some of their reasoning.

The Court of Appeal also quashed any notion that "policy considerations favouring worker protection" might apply in an employment context, despite the fact that neither the Employment Tribunal nor the Employment Court had relied on such considerations. Robertson J referred to what he considered to be Goddard CJ's "predisposition for the ability to obtain relief under the Employment Contracts Act."[345] Casey J concluded that the ECA recognised the distinction between contracts of employment and independent contracts and that section 2 "may be taken as reflecting a deliberate choice by the legislature militating against the adoption of policy considerations favouring worker protection when interpreting the nature of employment contracts."[346] With respect it is submitted that this view is incorrect. The definitions of employer and employee in the ECA are almost identical to the corresponding definitions of employer and worker in the Labour Relations Act. This indicates an intention by the legislature to retain the legal principles relating to workers and contractors which applied before 1991, not to introduce new principles.

As noted in the analysis of *Hale*, above, there is no reason in principle why "worker protection" should not be a factor which the courts should take into consideration in interpreting employment contracts. Changes in the nature of employment relationships (more outwork, casualisation, part-time work, removal of award protections, supply of temporary labour through employment agencies) and economic factors also indicate that a "worker protection" principle could be judicially developed. In any case, contrary to Casey J's observations, the ECA does recognise the principle of worker protection by retaining the personal grievance procedure itself and extending it to individual contracts as well as collective ones. This point was given some emphasis by the Minister of Labour in his second reading speech on the Employment Contracts Bill. He noted that the ECA was "a major improvement on the Labour Relations Act where only union members are guaranteed access to grievance procedures"[347] and said that "underpinning the

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[345] Above, 701.
[346] Above, 694.
[347] Hon W F Birch, Minister of Labour, Second Reading Speech Notes, Employment Contracts Bill, 10.

[Employment Contracts] Bill's principles of choice are the statutory minimum protections available to employees."

The *TNT* decision replicates the features of *Hale* and the *PPTA* decision: a disregard for the consequences of its decision on workers with little bargaining power, reliance on common law principles of commercial law which are inappropriate in an employment law context, a distaste for the principles of social justice and worker protection, and the championing of the interests of the powerful over the powerless. *TNT* discloses (again) the Court of Appeal's ideological preference for free market economics and a deregulated labour market. As the endorsement of the right to manage in *Hale* was relied on by employers to support unlawful attempts to unilaterally alter employment contracts, the decision in *TNT* v *Cunningham* has the potential to encourage wholesale contracting out in areas where employment contracts have been the norm. As Anderson points out:[348]

> The impact of the TNT decision may take some time to emerge. ... It is unfortunate that in its decision to protect the status quo in an established contractual arrangement the Court of Appeal did not consider more fully the possible abuses of the mythical freedom of contract in employment relationships and the actual economic and power reality of employment relationships.

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348 [1993] ELB 70.

IV ENDING

The differing approaches to employment law of the Court of Appeal and the Employment Court are trends or tendencies rather than a predictable and invariable pattern of decision-making. Obviously not all cases decided since the ECA came into force fall neatly within an analysis in which the Employment Court takes greater account of the need for justice, fairness and worker protection, while the Court of Appeal applies stricter principles consistent with commercial contract law. Although these differing approaches characterise many decisions, the Court of Appeal has not invariably overturned Employment Court decisions which benefitted employees.[349] Nor, in the initial period after the ECA was passed, did the Employment Court accept arguments which might have shielded workers from the aggressive bargaining tactics adopted by employers intent on utilising the "freedom of contract" principles in Part II of the ECA to the maximum extent possible. Unions attempted unsuccessfully to challenge these tactics in a series of cases in 1991 and 1992, arguing that the Employment Court should interpret the ECA bargaining provisions so as to include requirements to bargain in good faith, to show a willingness to compromise, and not to seek to undermine the employees' choice of a union bargaining agent.[350]

In *Adams* v *Alliance Textiles*[351] the Employment Court held that in the absence of undue influence, employers were able to pressure employees over their choice of bargaining representative and to go behind an authorised representative's back to negotiate directly with employees. In *Hawtin* v *Skellerup Industrial Ltd*[352] the Court said that the term "negotiation" included presenting the workforce with a contract on a "take it or you'll be locked out" basis and (obiter) that a single employee could be locked out.[353] In *Paul & NZ Community Services Union* v *Society for the Intellectually Handicapped*[354] the Court accepted the employer's argument that its advice to its employees that it would no longer observe or perform certain provisions of their collective employment contract, in order to compel them to agree to a new collective contract, was a breach of that contract and was a

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349 For example in *Hobday* v *Timaru Girls' High School Board of Trustees* [1993] 2 ERNZ 146 the CA confirmed the EC's decision, following its own earlier decision in *X* v *Y & NZ Stock Exchange* [1992] 1 ERNZ 863, that it could grant an interim injunction reinstating an employee pending a hearing on the merits of a personal grievance application.

350 These cases are discussed by P Kiely and A Caisley "The Legal Status of Bargaining Under the Employment Contracts Act 1991: A Review of Recent Cases" in R Harbridge (ed) *Employment Contract: New Zealand Experiences* (Victoria University Press, Wellington, 1993) 53.

351 [1992] 1 ERNZ 982.

352 [1992] 2 ERNZ 500.

353 Above, 539.

354 [1992] 1 ERNZ 65. Castle J (85) also rejected a good faith bargaining submission.

lawful "partial lockout." The resulting unilateral wage cuts, therefore, were not technically unilateral variations of the employment contracts.[355]

The Vice-President of the NZ Council of Trade Unions, Mr R Wilson, expressed "quite bitter disappointment" that the Employment Court had taken what he called a narrow, conservative approach to the interpretation and application of the Act, particularly the bargaining provisions.[356] His comments suggest that unions were anticipating that the Court would apply more protectionist principles. Walsh says that the Employment Court was simply moving with the political times: "It has to take account ... of the political whims and the political balance. The political message they took out of the passage of the Employment Contracts Act was for an entirely deregulated bargaining environment."[357] However during 1992 and 1993 the debate over the future of the Employment Court was at its height.[358] Wilson suggests that the Court's conservative approach over bargaining matters was prompted by self-preservation: "Had the court taken a more creative and liberal approach to the Act it would have jeopardised its very existence as an institution."[359]

Certainly in the more moderate political climate following the 1993 General Election Employment Court decisions have reflected a return to a more traditional, protectionist approach. In *Service Workers Union of Aotearoa Inc* v *Southern Pacific Hotel Corporation (NZ) Ltd*[360] the Court said, in finding that the employer had breached the union right of entry provisons in section 14 of the ECA, that the Act's object of promoting an efficient labour market required efficient conduct of negotiations[361] and that the freedom of association provisions required free access between employees and their representatives in working hours and at the place of work. In a clear rejection of a broader appeal to the requirements of the free market, Goddard CJ said:[362]

> The aims of the Act can be ascertained by the Court only from the language that Parliament has chosen to use. If by referring to fundamental aims the respondents are thinking of some objectives that they imagine to exist outside the legislation, then I have to say that the Court has not means of divining what they could possibly be.

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355 Kiely and Caisley, above n 350, 64, explain the reasoning process.

356 R Wilson (Vice President, NZ Council of Trade Unions) "Employment Contracts Act: Do the Courts Need to Act to Protect Workers?" (NZ Law Conference Papers, Vol 2, Wellington, 1993) 377, 378.

357 "Will the Employment Court Survive a Re-elected National Government?" (*The Independent*, 26 March 1993) 6, 8.

358 See Part ID2.

359 Above n 357.

360 [1993] 2 ERNZ 513. See also A Sheriff "Right of Access" [1993] ELB 92; G Anderson "Recent Case Comment" [1993] ELB 97.

361 Above, 530.

362 Above, 526 - 527.

The Court of Appeal in *Eketone* v *Alliance Textiles (NZ) Ltd*[363] expressed, in cautious terms, doubts that an employer could bypass an authorised representative and negotiate directly with employees.[364] Hodge says that this " 'note of warning', sounded on 5 November 1993, was a tocsin in the Employment Court."[365] In February 1994 in *Mineworkers Union of NZ Inc* v *Dunollie Coal Mines Ltd*[366] Palmer J issued an interim injunction restraining a lockout by an employer who had bypassed the employees' authorised bargaining agent, their union, because firstly there was an arguable case of undue influence and secondly an employer cannot claim that a lockout relates to the negotiation of a collective employment contract (and is therefore lawful), when it deliberately bypasses an authorised bargaining representative. The partial lockout doctrine was overturned when the Court in *Witehira* v *Presyterian Support Services (Northern)*[367] refused to follow its earlier decision in *Paul & NZ Community Services Union* v *Society for the Intellectually Handicapped*[368] and awarded the employees arrears of wages in respect of their employer's unilateral and unlawful reduction of their pay rates.

This trend continued in *NZ Medical Laboratory Workers Union Inc* v *Capital Coast Health Ltd*,[369] in which the Court held that a "wide range of activities by both employers and employees *in the course of negotiations* may also breach the mutual obligations to maintain confidence and trust between employer and employee."[370] The comment that, in deciding whether one party had breached the mutual obligations, "the question of motive or the presence or absence of good faith may be decisive"[371] indicates that the Employment Court may be moving towards the judicial establishment of a "good faith bargaining" requirement in negotiations.[372]

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363 [1993] 2 ERNZ 783. For comment on *Eketone* see J Hughes "The Court of Appeal on 'Recognition' of Unions" [1994] NZLJ 164; G Anderson [1993] ELB 105; W Hodge "Future Directions in New Zealand Employment Law in the New Political Environment" (Paper presented to Institute for International Research Fifth Annual Employment Law Conference, 27 and 28 June, 1994, Wellington) Appendix C 2 - 3.

364 [1993] 2 ERNZ 783 per Cooke P (787) and Hardie Boys J (788). However the CA agreed with the EC's earlier decision that there was no presumption of undue influence in the employer/employee relationship and that the ECA does not require an employer to be union-neutral.

365 Hodge, above n 363, Appendix 3, 3. A tocsin is "[a] signal, especially an alarm-signal, sounded by ringing a bell or bells": *The New Shorter Oxford English Dictionary* (Vol 2, Clarendon Press, Oxford, 1993).

366 [1994] 1 ERNZ 78.

367 [1994] 1 ERNZ 578.

368 [1992] 1 ERNZ 65.

369 Unreported, 12 August 1994, WEC 45/94 (Goddard CJ and Travis J).

370 Above, 43, (emphasis added).

371 Above, 44. See also *Rasch* v *Wellington City Council* [1994] 1 ERNZ 367, where Goddard CJ said (372) that the employer's actions "amounted to an uncalled-for interference in and obstruction to the exercise of the employees' inherent freedom of association including the right to bargain collectively and to organise for that purpose, which is a part of that freedom, as is recognised by the Employment Contracts Act 1991."

372 Compare the approach in the *IHC* case, above n 354, 85. See also New Zealand Law Society Seminar *Employment Contracts Act Revisited* (NZLS April/May 1992, Leaders P Churchman and W Grills) 54.

The jurisprudential gap left in 1991 is filling slowly as the Employment Court consolidates a more protectionist approach based on the freedom of association and bargaining requirements of the ECA.[373] Hodge notes that this "sea change in attitude"[374] was reinforced by the report of the Committee on Freedom of Association of the International Labour Organisation in response to a complaint by the NZ Council of Trade Unions.[375] Consistently with Griffith's thesis, it gained momentum following the 1993 election in which New Zealand voters expressed strong disapproval of the excesses of the New Right revolution and support for a new political system.[376]

Gault J in *Eketone* v *Alliance Textiles (NZ) Ltd* indicated a cautious approach to the application of the freedom of association requirements in the ECA. His Honour noted that it was "appropriate to have reference to the terms of, and decisions upon, international instruments dealing with fundamental rights when interpreting the scope of those rights under our Bill of Rights and other relevant legislation"[377] but said there was nothing in the international instruments which required a broader prohibition than that contained in section 8 against undue influence regarding membership of an employees' association: "Indeed, any move to preclude all attempts to influence a person's choice would risk conflict with another fundamental right - the freedom of expression (s 14 Bill of Rights Act)."[378] As Wedderburn notes, "freedom of association" in the context of labour law has been interpreted judicially as having at least two quite distinct meanings:[379]

> To be meaningful in a purposive sense, the term connotes protection for the collective aims of the [union] association ... So too, the ILO regards the opportunity to bargain and some kind of right to strike as essential elements in "freedom of association" itself ... But others, including the Law Lords in 1970 and the Canadian Supreme Court in 1987, have held that a constitutional "freedom to associate" bears no such meaning. It is no more than a right to associate together, not a right to do anything at all in association ... It is significant that judges who take that second, emasculating view - that workers can exist in "association" without any industrial rights to bargain or to strike, without infringement of the right to "freedom of association" - always point out that they can still pursue "friendly society" objectives. Nor is it surprising to find that those propounding individualist philosophies interpret this freedom with emphasis, like Hayek, upon the right to*dissociate*. All these attitudes to freedom of association involve not legal interpretations but ideological assertions.

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373 See also *Bartle* v *Romano's Pizzas (Wellington) Ltd* (Unreported, 15 September 1994, WEC 49/94) in which Castle J issued interim injunctions restraining the employer from bypassing the employees' authorised bargaining representative.

374 Hodge, above n 363, Appendix 3, 2..

375 Case 1698, 292nd Report of the Committee on Freedom of Association to the Governing Body (GB.259/7/14, 20 March 1994, Geneva) paras 675 - 741. The complaint was filed with the Governing Body of the ILO on 9 February 1993.

376 See also Kelsey *Rolling Back the State* 211.

377 [1993] 2 ERNZ 783, 794.

378 Above, 794.

379 Wedderburn "Freedom of Association" 16. The view expressed in the 1992 NZLS seminar paper, above n 372, 4, that "[f]reedom of association is not longer a functional concept but little more than an abstract idea" can no longer be considered reliable.

While sections 60(a) and 64 of the ECA make express provision for the right to strike and Part II of the Act provides for the right to bargain collectively, the boundaries of these rights have only begun to be determined judicially. Whether in a changed political climate the Court of Appeal will continue to promote the principles of management prerogative and freedom of contract and the strict rules of the common law of contract, or whether it will endorse the Employment Court's purposive interpretation of the freedom of association requirements in the ECA, remains to be seen.

APPENDIX

A MODERATE/TRADITIONAL APPROACH TO LABOUR RELATIONS: EXTRACT FROM DEEKS, PARKER AND RYAN *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND*[1]

1 ***Individual Rights:***

- People should be free to join, or not to join, a trade union as they see fit, and free to choose the union or bargaining agent they wish to represent them; voluntary forms of unionism are therefore preferable to complusory forms.

2 ***Collective Rights:***

- Trade unions are necessary and useful organisations for the protection and advancement of the rights and interests of employees.
- Union rights to organise, to bargain collectively, and to strike are fundamental rights in a democratic society.
- Collective decisions made in a democratic manner may at times override individual interests; in such situations there should nevertheless be protections for individuals from victimisation by the group.

3 ***Workplace relationships***

- Given the nature of the employment relationship in a capitalist society, some degree of conflict of interests between employer and employee is inevitable.
- Employers and managements are the architects of labour relationships; they reap what they sow.
- Compromise, consultation and negotiation is a better basis for resolving conflicts at the workplace than the unilateral imposition of one party's interests on the other.

4 ***Participatory democracy***

- Individuals should have access to, influence over, and, through collective action, potential control of the decisions that impinge on their lives, whether in the workplace, the community or the state.
- There should be increased employee participation in the ownership and management of business organisations and state enterprises.

5 ***Role of the State***

- The public interest in labour relations lies in the maximisation of the autonomy of individuals and groups, whether in trade unions or in private or public sector enterprises, to control their own affairs.
- Government should act in labour relations to protect the disadvantaged and the rights of minority groups and to prevent exploitation.

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[1] J Deeks, J Parker and R Ryan *Labour and Employment Relations in New Zealand* (2 ed, Longman Paul, Auckland, 1994) 29 - 30. The approach set out in these points is expanded on by the authors at 30 - 31.

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