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THE RIGHT TO MANAGE

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The Right to Manage

C O N T E N T S

INTRODUCTION

Under the Common Law, owners of business establishments possess certain freedoms of action, incidental to their legal status, which are commonly called management prerogatives, management rights, or are referred to generically as 'the right to manage'. The concept has been operationalized as "management's right to make the decisions and take the actions necessary to discharge the responsibility of conducting their enterprise."[1]

This paper aims to test the proposition that "there are actions or areas for action so essential to management that these must unilaterally remain the property of management if management itself is to exist".[2] It aims at analysing selected areas of 'the right to manage' and to examine how it remains extant , in fact, and in theory.

MANAGEMENT

Management is an abstract concept. It may be an association of employers, a private employer, a company, a firm. It may be a local authority or the state itself. Principally, it denotes an activity - to "plan and to regulate production and distribution, to co-ordinate capital and labour on the one hand, the activity to produce an to distribute on the other."[3] "Labour" too is an abstraction, and it is often not possible to separate it from "management". For instance, a production manager is "management" if seen from below and "labour" if seen from above. Such a phenomenon is an inevitable consequence of the growth of the units of enterprise and the separation of an organisation into a vertical conglomeration of specialists - accountants, personnel managers and so on, where decisions are based on the strength of agglomerative collegial decision.

The work of Fogelberg and Greatorex[4] has resulted in a profile of the 'typical' New Zealand manager. His average age is 51 years, commencing employment at age 18 and becoming an executive director at age 39. There are one in two chances that his father was a business manager similarly professionally oriented, and an equal likelihood his wife's father was in a similar position. One in four managers have university degrees and most have worked for no more than two companies. When these men commenced full time employment less than 10% of the New Zealand workforce was in this occupational classification. Most of them achieved success at an early age. The notion of an 'average manager' then, may have utility in it beyond mere rhetoric.

Management prerogatives tend to be self justified by claiming that the qualities needed to rise to high positions in the corporate structure are indicators of competence and business acumen. There is also a moral assumption that rule making should attach to management, and whilst not specifically justifying their rights vis-a-vis workers, (there are exceptions, for example, the incorporation of "reserved rights" of management in the Motor Holdings Limited Ports Warehouse

Employees Collective Agreement),[5] they imply that maximization of managerial goals maximizes workers well-being. In any case, there are responsibilities that are claimed to be peculiar to the realm of management. First and foremost is management's responsibility to the shareholders (owners) to operate the business in an efficient and profitable manner. Secondly, management has the responsibility to consumers to produce a useable, safe, and realistically priced product. Thirdly, management has the responsibility to employees to provide continued employment of safe jobs with the best possible wages and working conditions which are consistent with the first two responsibilities.

The theoretical underpinning of this justification is centred around the concept of property, and so this concept needs elaboration to determine the legitimacy of the right to manage.

PROPERTY

Ancient Rome did not have laws regarding the master-servant relationship, because the servant was regarded in the same light as the master's chattels. This view changed very little in the days of the Industrial Revolution. T.H. Green reflects the classic liberal view as:

> "This shall be mine to do as I like with, to satisfy my wants and express my emotions as they arise." [6]

Property was 'natural' because it was the external means of realizing and expressing that inner, free, and rational will "which is the distinguishing mark of man vis-a-vis other animals." So, nineteenth century economic thought was grounded in a laissez-faire philosophy: trade was to be free and uninhibited, prices were to be determined by the interaction to the most productive enterprises. The business enterprise was the creation of man's labour, effort and other resources. It was imbued with his personality and was in effect an extention of his persona. So, just as a man had control rights over his own body, so he had control rights in his property; to allocate; to produce; to manage how he perceived they should be. Since he took risks, he should be entitled to any reward. [7]

But business organisation goes hand in hand with technical advance. To make capital effective there was a greater gestation period between the time of the initial investment and the final emergence of a useable product. This inner logic led to the creation of the Joint Stock Company, and with it a clear separation between ownership and management. Therefore it is a crude assumption that all employers, in the sense of ownership of capital invested actually takes the risks of the enterprise. An actual distinction must then be maintained between the small privately owned company and its larger counterparts.

	Total Number Employed							
	Under 5	5-9	10-19	20-49	50-99	100-599	600-1000	1000 and over
Percentage of total establishments	22.3	28.9	20.4	16.8	6.1	4.9	0.3	0.2

Source: Census of Manufacturing 1978-79.

The figures indicate that the small enterprise has not disappeared but consolidation toward the medium to large unit is typical of the economy. It is encouraged not only by the state who exhort the need for more inputs to cater for the overseas market and less emphasis on small scale production for the domestic market, but also by the producers themselves, who view monopoly situations as countering the vagaries of the domestic market. The analysis of the legal status of enterprises demonstrates the extent of the ownership/management separation.

	No.	Persons Employed	Turnover $(000)	Capital Expenditure Minus Disposals $(000)
Individual Ownership	576	3 125	51,198	2,031
Partnership	562	3 767	76,653	3,437
Private Company	8 594	115 924	550,239	305,885
Public Company	563	53 327	2,199,291	100,676
Co-operative Association	158	11 063	839,514	51,469
Central Government	30	9 230	184,021	8,100
Local Government	32	728	23,221	3,263
Other	5	167	1,545	44
TOTAL	10 520	298 331	10,925,685	474,902

Source: Census of Manufacturing 1978-79

As the company (and therefore the management) expands the shareholders' exercise of shareholding rights dissipates. A stage is reached when:

> "...the typical shareholder...is not knowledgeable about the business of the firm, does not derive an important part of his livelihood from it, and neither expects nor has an incentive to participate in the management of the firm. He is a passive investor..." [8]

What has occurred in the latter part of this century is the transference of the employer's prerogatives to management, but without the employer's property incentive and individual initiative in private enterprise that was assumed to justify the employer's right, not only to trade freely but to be free from the constraints which labour sought to impose on the mobility of his resources. Power has been transferred without property.

Management, it is true, is ultimately accountable to the board of directors, but a survey by G. Fogelberg of New Zealand's twelve largest companies, each company having been involved in at least one takeover in the period 1962-74 concluded, inter alia.

(1) that "contrary to popular belief" directors of the large companies have a negligible ownership interest in the company (the aggregate holding of the directors in the companies surveyed amounting to only 1.2% of the total capital);

(2) that with the increasing dispersion of shareownership shareholders as a group "cannot influence the direction of their company";

(3) that only the large corporate investors, either individually or collectively, can assert influence over the company's decisions;

(4) that these developments are consistent with trends observed in other countries.[9]

Now if the composition of the board of directors is typically reflective of the pattern of ownership then accountability to the board renders any perspective on the separation of ownership from management more apparent than real. However, to the extent that such accountability is absent and the above figures suggest that accountability is to people other than owners of the company, the concept of residual management rights is weakened.[10]

However, management rights may be legitimized by a new perspective on property, one that focuses on the role of the state and the boundaries between the private and the public domain, and especially the extent to which the state impinges on private industry. This relationship views the state in three broad roles:

(1) The State as Developer

Strictly speaking there is no such thing as a laissez-faire capitalist state. At the minimum the state always facilitates the activity of private industry. By means of subsidies and grants the Government can encourage enterprises and developments in certain areas.

In New Zealand at the Turning Point [11] the Task Force noted that government, in devising a strategy for the future could take the part of "selective administrative intervention". This meant trying to "pick the winners" as between sectors and industries and encouraging chosen industries to re-organize and rationalize where this would contribute to wider economic and social development. Similarly, within the current CER regime there are provisions for the "rationalization" of industry to meet the obligations of the new competitive regime. [12]

The most pervasive example of state intervention is in its protection policy, especially import licensing and tariffs. Originally introduced to provide for equitable distribution of limited foreign exchange they have been retained to give protection to local industries and promote employment by redistributing income in favour of labour. Being insulated the protected sector tends to have less incentive to innovate and technical change is thwarted.

Artifically created industries have tended to develop outside spheres of comparative advantage and rely on government assistance for their continued existence. The Motor Industry, because of its size is the most pertinent example. It has been estimated that it costs $7.35 of domestically owned resources to save $1 of foreign exchange by assembling a Japanese 1300 cc car in New Zealand. [13] The heavy public investment must be traded off with the jobs created but it is inevitable when Government talks of "restructuring" such industries, management has little choice but to acquiesce.

Finally, the farming and fishing industries benefit from direct subsidies of development costs to assist with capital costs and equipment. In addition, the state itself is involved in exploration and development, either alone or in partnership with private industry, with, in turn, many other industries geared to producing inputs for these state funded projects.

(II) The State as a Regulatory Body

The state can regulate and control the entry of individuals and firms into certain economic activities by requiring those activities to be pursued only by holders of an appropriate licence. For example, the Air Services Licensing Act 1951 makes it unlawful to carry on any air services in New Zealand other than pursuant to a licence issued by the Air Services Licensing Authority. In addition, Trade qualifications and examination standards are conducted through Education Board authorities like the TCA. Under the Apprenticeship Act, the number of apprentices an employer can take is governed by an apprenticeship ratio, that is, a number of apprentices as a proportion of the number of tradesmen engaged. Each application for a contract is treated as a separate transaction in its own right, even if the employer has an established record in training apprentices, though a Bill at the time of writing currently before Parliament would enable an employer to take on apprentices to his own perceived maximum capabilities, and would not set any quantitative limits.

The Department of Labour runs PEP schemes of subsidized labour, provides information both to employees of the job market situation and to employees via a job screening and placement service. In 1982-83, 240 000 employees passed through the Department's books and into private employment . If a firm 'creates' a job in addition to the number of people currently employed and to the average number of employees during the past year it can claim a $65 per week subsidy, and if it is a small firm it may be eligible for a job suspensory loan. Subsidies are also paid for adult training and employing disabled people.[14]

(III) Direct Statist Intervention

Statist intervention into the industrial relations area is not new. In 1908-13 when unions voluntarily deregistered themselves and bargained with management outside the procedures of conciliation and arbitration, the government, through an adjustment to the formal rules

prevented the unions operating independently of the formal system. During World War 2 manpower planning directed labour to war related industries. Indeed, blanket coverage of awards may be seen as a form of state intervention. What is new, is the direct statist intervention in the role of management itself.

The first example arose during the 1977/78 award rounds and concerned a key trendsetting award, the Electrical Workers Award. In conciliation, the unions agreed to an increase of 9.4% but the next day, under prompting from the Ministers of Labour and Energy, the employers withdrew their offer. Eventually an increase of 7.4% in Auckland and 9.4% elsewhere was agreed to. Later in the year the Prime Minister and Freezing Worker unions met whilst conciliation was still in progress over the Freezing Workers Award. Regulations were promulgated with the state subsidizing wages to the tune of $3 million, with the unions to drop claims amounting to that sum, and the company involved to absorb the amounts.

In 1979 the Remuneration Act was passed which enabled the government to control both wages and conditions of employment and was justified by a Financial Statement in June of that year: "The Government will not stand by and see our prospects for growth in output and employment damaged by excessive wage settlements which could boost inflation, discourage investment, increase unemployment and make it harder to raise real rather than money incomes." [15] Employers in principle supported the state's 'right' to prevent excessive wage settlements, though the Employers Federation warned that they should not be innocent victims of the applications of the Act and should be consulted before regulations were promulgated. In fact, the four times the Act was used or threatened, this plea was ignored. [16] The Remuneration Act was repealed after a disastrous intervention in the Kinleith wage settlement of 1980 when a well prepared union, combined with employer recalcitrance, exposed the New Zealand government to its first public defeat in modern industrial relations history.

State power is the motivating force behind key wage settlements where union and management together cannot offer viable alternatives. Research indicates that wages have doubled in the last four years while the Consumer Price Index has increased by 78% suggesting that overvalued real wage rates are a major cause of New Zealand's current unemployment and this can be largely linked to power bargaining. Monetary and fiscal policies can only arrest the upward wage and price spiral by arresting expansion and growth, and hence employment, so the Government has resorted to incomes policies as an economic tool. Between 1971-77 a regime of Remuneration Authority, Wages Tribunal, Industrial Commission, and Wage Hearing Tribunal was established with the responsibility of approving all increases in remuneration contained in an instrument. In 1976 the Wage Adjustment Regulations provided that there was to be no increase in remuneration permitted unless union and management agreed on exceptional circumstances. The Wage Freeze Regulations 1982 put a ceiling on salaries and wages and paralyzed the dispute of interest procedure (and all negotiations in the nature of a dispute of interest), with the specific aim of restoring stability to the economy.

The 'New Property' and the Right to Manage

The term 'new property' was coined by C. Reich [17] after observing that the link between property and the human personality consists of the role of property as a buffer between individual and the State. At an individual level to control one's wealth is to have a degree of personal autonomy, and to forfeit such control is to forfeit autonomy. Multi-ownership of corporations has helped to separate personality from property and property from the power it wields. When the corporations began to stop competing, to merge, agree and make mutual plans, they become private governments. They have sought the aid and partnership of the State, and thus by their own volition have become part of a quasi-public government. Where this volition was not forthcoming the State has seized it for itself, or else ensured that a firm's wealth and administration is so bound up in the State, that any formal expression of union is otiose.

Individual firms are now accountable to the State who thus have a quasi-property interest in the firm and this grants the State the legitimacy to control management. Autonomy has been surrendered and rights that do exist are dependant on the largesse of the State.

This does not imply State ownership of property. In fact, the State is desirous of maintaining private ownership, but at the same time subjecting industry to a capitalist discipline. It thus subjects industry to a 'corporatist' scheme of laws which are underpinned by the following five themes.

1) Directive State Intervention. The conciliation and arbitration system is modified and maintained in accordance with changing perceptions of State interest.

2) Unity. Economic goals are argued to be best achieved by co-operative effort rather than by competitive processes.

3) Order. The State must order the relationships between parties to forestall any potential destabilizing influences in the system.

4) Nationalism. The national good is preserved by delineating certain rights in particular groups.

5) Success. The system is above all an ends-oriented system. [18]

This framework involves the filtering and transformation of customs and work rules to the status of legal norms, and the supervision of the exercise of managerial prerogative by legal institutions associated with the State. Recognizing the inevitability of conflict, the State is deliberately stepping in to stabilize industry and depoliticise conflict. How the right to manage is manifested within a state regulatory framework will be examined by discussing various aspects of claimed management rights and how these rights have been interpreted through the 'neutral' agency of the Court system.

MANAGEMENT RIGHTS

(A) The Right to Bargain

The legal basis of the employment relationship is the contract of service, though this bears little resemblance to the nineteenth century instrument which viewed a contract as a voluntary bargain, the terms of which were agreed by a free bargain between two citizens equal in law. In fact the concept has been vilified as another name for "freedom of coercion", a comment on the gross inequality of bargaining power on the side of the employer, and is seen by many as providing ineffective protection for workers. The contents of the modern contract of employment have largely been pre-determined by a collective instrument and by mandatory legislative rules that are incorporated into the contract. 'Free will' or consensus is only relevant at the time of the formation of the contract but still remains a basic prerequisite in forming and in ending the service compact, notwithstanding that the will of one party in certain circumstances may be negated by superimposed legal norms. The rule in Felthouse v Bindley [19] may afford some protection by requiring some positive act of acceptance but it must be realised that acceptance of the contract of employment is normally not much more than a matter of silent acquiesence in the terms stated by the employer.

Retention of the contract concept, both academically and in practice provides flexibility in maintaining management rights. At common law an employers' unilateral action is viewed largely in terms of nature of the substantive terms of the individual employee's contract of employment, that is, the type of job, its status, its level of pay, and the place of work. Where an employee acquiesces in such a change he may be viewed in contractual terms as having consensually varied his employment contract. It is interesting to note that the application of the test of consensual variation at common law often consists of an examination of whether the employee had knowledge of the change and rarely concerns itself with the question of whether in fact the employee had agreed to the change. (Marshall v English Electric Co. Ltd). [20]

If an employer insists on the employee working under new contractual terms and upon refusal is dismissed, the employee would have a valid claim for unjustifiable dismissal (infra). Where there is a non-repudiatory unilateral change introduced by management there is an implied common law obligation to work to the change. Common law provides support for management to change working conditions without prior consultation.

An award incorporated into a contract provides a minimum so that there is opportunity, for example, for an employee to bargain for higher wages than that prescribed by the award, but he may not make a bargain for lower wages in violation of the terms of the award. Such informal bargaining has been historically quite common and is warmly looked at by unionists pining for the halcyon days when 30% above award rates were the norm in New Zealand. The Industrial Relations Act has attempted to curb this by calling all such bargains "collective instruments" and, by s. 65, making them registrable, yet there are no sanctions for failing to register it. Voluntary collective bargaining (paralyzed by the current Wage Freeze Regulations 1982) has been used to great advantage by management. A voluntary collective agreement prevails over any award where this an inconsistency between the two documents and in the case of Inspector of Awards v. De Luxe Motor Services (1942) Ltd.[21] The Court suggests: "There does not seem to be any obstacle to reach an agreement reducing wage rates or bargaining conditions". This writer is unaware of any case that has tested this proposition but can point to developments such as a code of practice as outlined in the Hutt Valley and Porirua Basin Motor Assembly Plant Employees Agreement which outlined the rights and obligations of both unions and employers. Another interesting idea is found in the Kinleith Site Contractors Boilermakers Agreement. Appendix 1 deals with example of particular redundancy situations and whether workers so affected may qualify for redundancy payments and in what form.

Where an award or collective agreement is silent on any issue the Court subscribes to the "living document" thesis in that an instrument is not a static, restrictive document, but rather a dynamic set of ground rules that can be added to as the need occurs. The language of the dispute of rights procedure contained in s. 116

of the Industrial Relations Act provides this flexibility in that it is "...related to matters dealt with in [the] instrument and not specifically and clearly disposed of by the terms of [the] instrument" and the AHI v North Island Electrical Etc...IUW [22] case interpreted this section to include terms and conditions not even mentioned in the instrument. A "quick in - quick out" nature of money negotiations often reflects inadequate planning and insufficient coverage of problems of working and non-economic conditions, no doubt mainly because most formal bargaining takes place with a September/October to February/March wage round with pressure to settle documents as quickly as possible.

The principal difficulty facing employers is the established pattern of wage relativities which "impose a straightjacket by not allowing individual industry or company capacity to pay factors to be reflected in wage settlements, and by virtually eliminating the possibility of changing job content or responsibilities to be reflected in changing internal ... relativities." [23] The Artibration Court inevitably preserves relativities as providing some sort of certainty which both parties make allowances for. In the 1981-82 award round, 78% of national settlements showed a rise of between 9.5% and 10.5%, while only 11% were outside the range of 9.5% to 12%.

Most pay rates are therefore largely determined by ratios outside their own industries. Rigid relativities restrict the mobility of labour by preventing rates rising enough to attract labour to expanding industries. Above award rates of pay only go a limited way in ameliorating the problem. As a result, an ad hoc and unstructured bargaining structure has developed outside formal bargaining procedures and without formal dispute resolution mechanisms. However, even these negotiations are stultified by the occupationally based bargaining system. Employers have long called for a movement to industry based bargaining or bargaining centred on groupings of like industries, and point to demarcation infighting amongst the unions themselves as proof of the inherent inefficienty in the traditional system.

However, employers have material advantages in wage negotiation. For instance, the 'right' to strike is a modern bargaining tool, yet the 'right' has not been recognized in New Zealand, and strikes have been severely limited by Part IX of the Industrial Relations Act with regard to notice and penalty provisions, and a wide definition range of what constitutes a strike. Section 81 of the Act prohibits any discontinuation of the employment relationship, strike or lockout until the dispute has been finally disposed of by the the Conciliation Council or the Arbitration Court. As a result, workers who are unable to withdraw their labour have their bargaining power severely limited. It may be mentioned that the definition of "lockout" under s. 124 of the Act is much narrower than that of "strike" as it must occur "with a view" to compelling compliance to the employer's demands or to the terms of the contract. This makes it easier for the employer to take himself out of the section for instance by claiming, as was recently done, that the "lockout" was instigated to ensure FoL involvement, and hence was not a "lockout" by the terms of the section.[24] Management rights are therefore upheld by indirect means which limit scope for unions to impose their will on management. It is the result of state largesse rather than being intrinsic in the right to manage for by limiting an opposing group's right one does not enlarge or validate ones own right, but simply give it more scope for expression.

Having control over information is also a strong weapon in maintaining the right to manage. In a collective bargaining framework, the party with a monopoly on information has a distinct advantage when the question of 'ability to pay' versus 'willingness to pay' is an important factor in wage rounds. The Industrial Relations Act upholds managerial prerogative in this respect. Section 77(ii) states that "In Conciliation Council, no person is bound to give evidence with regard to trade secrets, profits, losses, receipts or outgoings in his business, or in respect of his financial position or to produce books kept by him in connection with his business." It then seems that unions can only rely on any or all of:

1) Information disclosed by formal agreement with the company,
2) Information disclosed in the course of bargaining,

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3) Stolen information, in which case the officials are liable to be exposed to legal action as in Bents Brewery Co. Ltd v Hogan [25]

4) If a public company, annual reports and prospectuses issued in accordance with the Companies Act. [26]

It is clear then that great lassitude is granted by the State in the area of negotiations with management apparently in the preferrable position. Yet despite these inherent advantages collective bargaining is said to be "the very mechanism by which organized workers may achieve control and exercise it jointly with management" [27], and again, "The primary mechanism by which unions may share managerial authority in the corporation is collective bargaining, including both contract negotiations and grievance procedures supported by the power of the strike." [28]

Management has been cautioned that the invasion of its rights through collective bargaining may be more far reaching than appears on the surface and that its rights are often given away unwittingly.

> Economist S.H. Glichter: [29] "In actual bargaining, the working rules of trade unions are built up gradually, one or two at a time. This leads to atomistic consideration of their effects, which may cause their effects as a whole to be overlooked."
>
> American Attorney R. Abelow [30]: "Rights are often given away - not taken away. Employers frequently negotiate away their responsibilities by accepting proposals which at the time seem innocuous or not immediately harmful. Being mainly concerned with the immediate problems at hand, employers are prone to make concessions on proposals, the effect of which they do not forsee, or if they do, seem too far off to worry about."

Whether the union succeeds in picking away at trivial rights such as opening times of the firm's cafeteria, or more substantial rights such as the right to hire (see infra) will depend primarily on the strength of the union negotiating. However, if the enterprise occupies a prominent position in the economy the state is bound to intervene to directly uphold management rights in the name of public interest. Itleads one to enquire whether rights which cannot be upheld other than by state power are rights at all, and this question will be addressed at the conclusion of the paper.

(B) The Right to Hire

The Common Law enabled the employer to disregard for hire any person, no matter how capricious or repugnant were his reasons. This generally remains the case though there are two major statutory exceptions which colour the 'right' by limiting some of its arbitrary nature.[31]

(1) Antidiscrimination Legislation

The combined effect of the Human Rights Commission Act 1977 and the Race Relations Act 1971 declares unlawful the refusal to employ or to give equal terms and opportunities when employed; and dismissal or detriment in employment in circumstances in which other people, equally qualified are not so treated or are given better terms and opportunities, and such unequal treatment is by reason of the sex, marital status, or religious or ethical belief, or colour, race, or ethnic or national origin of that person. In Human Rights Commission v Eric Sides[32] it was held that the phrase "by reason of" meant that the factor prohibited by the legislation must be a 'substantial and operative' one in the decision. In the Sides case the Equal Opportunities Tribunal held that though a religious issue was a factor in the defendant's refusal to hire the plaintiff, within the totality of reasons the application for a job was primarily refused because of the unfavourable impression the plaintiff conveyed during his interview. There is a statutory onus of proof placed on the plaintiff - the balance of probabilities standard - and the defendant is entitled to any benefit of the doubt.

Mr Sides and his co-defendants however, lost their case on the ground that newspaper advertisements for a "... keen Christian person..." breached s. 32 of the Human Rights Commission Act in that, to the "reasonable person", the advertisements were, or could be understood as being, discriminatory. The reaction to the case, not only by employers but also by the general public was unparalleled. In the wake of the controversy amendments were made to the offending s. 15 by s. 2 of the Human Rights Commission Act 1981 permitting preferential treatment based on particularity of religious or ethical

belief between coherents of that belief and the special circumstances of the particular job that make such preference reasonable. These changes were made to ostensibly cure similar situations to that which Mr Sides found himself in, yet it has been submitted by one writer[35] that the facts of the Sides case would be decided no differently if the new criteria was imposed. Notably, it is not "reasonable" for solely a Christian to be able to tend a petrol pump, to the exclusion of other non-believers in the same way as it is "reasonable" for a Roman Catholic teacher to be preferred in a Roman Catholic school. The Amendment can be viewed as a political sop to misguided public opinions, (it being an election year) and in no way an attenuation of the Act's basic aims.

"Discrimination" is permitted under s. 15 of the Human Rights Commission Act where sex is a bona fide occupational qualification, for example in modelling (s. 15(3)(a)) or where sensibilities or dignity are under threat, for example, a lavatory attendant (s. 15(3)(c)), and in domestic employment in a private household, with regard to sex and marital status, where a position requires a married couple or where separate facilities are impractical. A strange preferential treatment provision occurs in the s. 5(3) of the Race Relations Act concerning persons of a particular ethnic or national origin who have or are commonly found to have a particular qualification or aptitude. It is stated in positive terms but can it be said that Europeans have a special skill in professional positions? These provisions may provide an opportunity for some employers to usurp the legislation, yet the Arbitration Court in other areas has stressed its ability to look behind "form" and this may thus negate any such avoidance technicalities.

The employer may not claim that he simply complied with the terms of his relevant award, if any of these terms infringed the legislation (Human Rights Commission v Ocean Beach Freezing Co.)[34] However, the damages for non-observance of the Act do not appear to be onerous. In the Ocean Beach case (supra) women on a slaughter gang who were denied

positions to men of less seniority were granted damages in respect of pecuniary loss and expenses (s. 5 of the Human Rights Commission Act) but for damages relating to "humiliation, loss of dignity and injury to feelings" (which may not exceed $1,000; s. 40(1)(c)) the Tribunal was cautious because such allegations are easy to make but hard to rebut, much depending on the truthfullness of the person concerned. An order under s. 38(6)(b) was made to restrict the defendant from repeating the breach. It may be noted that in the U.S.A., companies have to produce evidence of policies of non discrimination (with tough sanctions for failing to do so), and job tests and interview criteria that have an adverse effect on a minority group have to be proved to be job related.[35]

At an optimistic level, antidiscrimination legislation is symptomatic of a wider humanitarian ethos where employers are merely seen as part, albeit an important part, of the wider public, and the legislation is imbued with an aim of achieving 'social justice' for victims of discrimination. Negative attitudes and stereotypes are are purposively desired to be eliminated. It necessarily impinges on the right to hire whosoever an employer pleases, but then this is a small price to pay for being a member of the community. In any case no enterprise can afford to not employ skilled employees simply on a whim of prejudice, so the legislation in fact may positively aid an enterprise. Modern technology, as noted in the Ocean Beach case (supra) is also reducing "physical aspects" of many jobs, and with it, plausible exclusionary excuses for women.

A more cynical, and, it is submitted, a more accurate view is that the legislation (with respect to the employment situation) is a paper tiger, more attuned to fulfilling the government's international obligations than to industrial realities. The dearth of cases on point highlight the problems of proving discriminatory motives in the hiring process, and the publicity given to the Sides case would no doubt make any employer wary about manifesting discriminatory motives in front of a potential employee. P. Spoonley[36] in a survey of 40 Auckland employers found that 62% of the respondents indicated, in open ended interviews, they would prefer not to employ Pacific Islanders. In

matched applications, even when the Pakeha was less qualified, a Niuean applicant was still offered 24% fewer interviews and a Maori applicant 20% fewer interviews. It is submitted that such discriminatory practices could be explained away by a wily manager by reference to legitimate hiring criteria, for example appearance, speech habits, manners and so on.[37] In any case, it is submitted that many job applicants, especially Pacific Islanders who are relatively new to the country, have little or no knowledge of their exact rights under the legislation, and if they do many would be too cynical of wasting their time and effort in following them up. Perhaps the legislation's greatest merit is in forcing managers to review hiring criteria and reassess their own prejudices and judgments to the extent that eventually such legislation will become unnecessary.

(2) Unqualified Preference Clause

If an unqualified preference clause is inserted in an award a union may request a worker to join that union and the worker must comply within 14 days of that request. If the employee still refuses to join he must be dismissed, and an employer will be proceeded against for breach of an award if he continues to employ the recalcitrant worker unless an exemption from membership is granted on conscientious grounds. This has been variously described as "union shop", "post-entry closed shop", and "state negotiated compulsory union membership" and has prompted one prominent union official, Pat Kelly, to exclaim "[the union] has just as much say as he who will be employed and who will not be employed as the ... manager has. The absolute right to hire and fire does not apply in the Trade Union movement."[38]

The Kelly claim may be exaggerated for New Zealand certainly does not approach the "pre-entry closed shop" which involves some 17% of United Kingdom workers and where the union has an absolute say as to who they admit into their union. By s. 104 of the Industrial Relations Act a New Zealand union can only refuse admission to a person of "general bad character" and any inconsistency in union rules are null and void. Discriminatory provisions are subject to the Human Rights Commission Act.

By virtue of s. 98A(1) of the Industrial Relations Act "No member of a union shall be entitled to preference in obtaining employment for any work by virtue of his membership of that union." In its recent JV II [39] decisions it was demonstrated that the Court strictly observes this section. Evidence in the case that the Boilermakers Union had refused membership to certain welders and only relented under threat of court proceedings, was noted with a great amount of disapproval by the Court.

The Court went on to suggest that refusal to employ a workman because he has worked on other projects in which there has been some industrial disruption is not legitimate hiring criteria for "a good unionist will and should go along with the decisions of his union, democratically made." However, if it was proved that the worker capriciously ignored the collective agreement or disturbed progress on the work site then this would be a ground for non-hiring. The decision clearly illustrates that the modern employee owes allegiances to bodies other than his immediate employer, and that, in the interests of industrial harmony, some concessions of management discretion is warranted. [40]

MERRITT, A.J. The right to manage.

(C) The Right to Fire

The right of management to unilaterally terminate an employment relationship is often regarded as the most fundamental of management's prerogatives and so the extent to which this 'right' exists in the present day is an indicator of the extent to which management rights as a whole retain their vitality.

Under the common law, if an employer had been given due cause by a worker the worker may be dismissed without notice. Reasons include wilful disobediance of any lawful order by the employer, gross moral misconduct which is inconsistent with the contract of employment, negligence or malicious and damaging conduct in business, incompetence or permanent disability caused by illness. In addition, any worker can be dismissed, not necessarily for any reason, simply by giving the required notice.[41] A worker can take action against wrongful dismissal but is only able to recover damages equivalent to the wages that would have been earned during the period of notice, since the dismissal would have been lawful if notice had been given. Payment of wages in lieu of notice does not make a dismissal lawful but it precludes any action being taken.

Obviously, the employer in such a situation is in an omnipotent position, more so because the dismissed employee has no chance of obtaining an order of reinstatement because the doctrines concerning the equitable remedies of specific performance and injunction are rigorously opposed to the positive implementation of employment relationships. In response to this state of affairs and to comply with international standards, New Zealand has incorporated "unjustifiable dismissal" into the Personal Grievance procedure outlined in s. 117 of the Industrial Relations Act. The procedure is not universal in its application: subject to subs. (3A) the grievance must be brought by the workers union on behalf of the worker; the worker must be a union member and must be covered by an award or collective agreement. The Arbitration Court may only investigate a matter under this section when the grievance machinery, outlined in subs (4) and implied by subs (2) and (3) into every award or collective agreement, has failed to settle the matter.

The key word in s. 117 is "unjustifiably" yet this is not defined in the Act, and the Arbitration Court has refrained from "laying down too early or too rigidly defined principles." [42] As far as claims of managerial prerogative are concerned, the Court has preferred not to articulate any notion of reserved managerial rights, or the absence of them. Instead, the Court has tended to see the unjustifiable dismissal jurisdiction as an extension of administrative law principles to private employment, tending to view the employer as an administrative agency over whom the Court has review powers comparable to those of the High Court (Administrative Division). The dismissal function is viewed as quasi-judicial, so the Court must see that the employer remains within his powers, does not abuse his powers and applies the principles of natural justice.

The Courts emphasis has been on procedural fairness, rather than scrutinizing the decision itself. The judges have in effect worked out a six-fold classification of dismissal situations: (a) misconduct; (b) incompetence; (c) ill health; (d) redundancy; (e) contravention of statute if the employment is continued; (f) a general residuary category. They have envisaged these situations as fundamentally different from one another, and have seen the demands of procedural justice as being of a different kind in each case. For example, where employee misconduct is deteriorating a warning, preferrably written, is seen to be sensible, as procedural justice in these cases can be viewed as a trial process, and the procedural criteria applied are the principles of natural justice familiar to administrative lawyers generally. Thus in cases of alleged theft [43] and sexual harrassment [44] where the police have been called in, the justice of the dismissal must be judged at the time the action was taken, and on the evidence brought before and relied on by the employer. Later discoveries may be relevant to questions of remedy but not to the justice of an action already taken. As a general rule however, it appears that in a dismissal situation an employer must ideally be able to show:

(a) a systematic gathering of relevant facts,
(b) a conscious process of assessment of those facts,
(c) a consideration of the possibilities of alternative employment within the enterprise, and
(d) consultation with the employee about the matter.

These demands of procedural justice place a heavy burden on the employer yet there are indications that the Court is beginning to concern itself with issues of substantive justice, especially in the areas of redundancy (see infra), whilst the occasional decision involving misconduct may be viewed as taking account of substantial notions of fairness. These demands may be viewed as increasing the burden on the employer, that is, the employer will be seen as having dismissed the employee justifiably only if he both gave the employee the full benefits of fair procedure and accorded him his just deserts or established a functional necessity for dismissal.

But, broadly speaking, the Arbitration Court has tended to pursue the ideal of rigorous professionalism in the matter of personnel management. It sees the imposition of high procedural standards as the means of improving the quality of employers' decisions; thus minimizing their arbitrariness and thereby realizing the ideal of fairness. The one unjustifiable dismissal case to appear in the Court of Appeal has upheld this approach.[45]

Although there is no statutory onus of proof, in principle the employer must prove the fairness of the dismissal on the balance of probabilities.[47] In practice the Court appears to vary the 'quantum' of proof according to the nature of the case. That is, where the issue is viewed as having a high factual content, with a corresponding increase in the employer's 'quantum' of proof, but where the dismissal is based upon the employer's operational requirements, managerial discretion will be perceived to predominate over factual content. The greater the employer's attention to correct procedure, the lower will be the perceived factual content of the issue, and hence the smaller the employer's burden of proof of facts.

A brief mention on this issue must be made of victimization[46] proceedings brought under s. 150 of the Industrial Relations Act, and s. 15 of the Equal Pay Act, where there is a defence to show that the dismissal

was due to some activity other than initiating proceedings under the legislation. As a matter of law, all the employer need prove is that he dismissed the worker, whether lawfully or not, for a reason independent of the worker's industrial action. There is a factually high presumption on the employer to discharge his burden, but the approach of the Court seems to be to focus on the employer's state of mind whereas in the unjustifiable dismissal area, it is on the nature of the act.

Remedies are prescribed by s. 117(7) of the Industrial Relations Act and include wage reimbursement and/or compensation and/or reinstatement. The latter remedy appears on its face to be highly provocative to an employer but the case law suggests that it is only practicable where confidence in the employee has not been totally destroyed.[48] Obviously the size of the enterprise and the potential hostility of the environment are the most important factors to consider. The manner in which the dismissal was carried out is compensatable.

The impact of the unjustifiable dismissal laws has clearly been to abrogate the previously unassailable free hand that management wielded. The law has forced management to adopt a pluralistic outlook; that they should not remorselessly pursue their own interests to the exclusion of 'industrial justice'. Managers are encouraged to be better managers, with the obvious advantage going to larger firms with specialized personnel functions. Strangely though, a study[49] based on the equivalent United Kingdom legislation in 1978 noted that the managers of smaller firms felt the least impact of the laws, probably reflecting the lower pervasiveness of Trade Union activity within the firm. Comments made to the study reflected a need to be aware of managerial responsibility by making managers more "people conscious" and inhibiting the worst excesses of personal eccentricity. It also seemed to encourage foreman discussions with personnel and higher management. On the negative side it was stated that some managers became more tolerant of poor performance and breaches of discipline. Management authority was often undermined, and the increased workload often proved irritating and inconvenient.

An interesting insight is provided by a practitioner. Judith Reid[50] claims that the grievance procedure is only taken by middling to

weak unions who have no other recourse than the law. Militant unions who receive a complaint will first establish the extent of support for the dismissed worker and if it exists the worker will be reinstated "for obvious reasons." [51] Often there is a six month delay before the case comes before the Arbitration Court and reinstatement is made more difficult as the employee is under duty to mitigate damages, (that is, find another job). The question whether a dismissal is justifiable thus often turns on whether the issue is cost efficient to the union. An employee is able to take his grievance to the Arbitration Court and omit the usual procedure if the union, employer or any other person has failed to act, or act promptly (s. 117(3A) Industrial Relations Act) but this avenue is heavily slanted against the employee. He must prove on the balance of probabilities of the failure to act [52], and hence must be convinced of, and able to persuade the Court to, the reasonableness of his case - all of which involves expense and practical difficulties if the employee is unaware both of why his union refused to handle the case or, indeed, why he was dismissed in the first place.

Again, it must be reiterated that the unjustifiable dismissal procedure is only open to workers covered by an award and so excludes 57% of the workforce. [53] There is a palpable incentive then for more workers to be drawn under the ambit of the state's umbrella, and to increase the state's control over smaller enterprises who appear to employ the majority of the 'unprotected' workforce.

E MERRITT, A.J. The right to manage.

(D) Redundancy

The management's decision on whether to instal new technology with consequent shedding of excess labour, or the closing down of an enterprise, or changing of methods or production, or any other sort of re-organisation that reduces the number of workers employed has still been upheld as definitely within the prerogative of management. This view was confirmed in a 1980 Arbitration Court decision where the issue was whether the establishment of new technology or new machinery which may result in fewer jobs is an "industrial matter" within the meaning of S. 2 of the Industrial Relations Act. After examining a number of Australian and New Zealand decisions on the narrow point of "industrial matter" the Court by majority held "that the introduction of new machinery or method into a work place is a decision for the employer and not regarded as being subject to collective bargaining".[55] Consultation with the union was highly advised.

Avoidance of redundancy is the most difficult issue as economic necessity on the employer's part has always been recognized as a legitimate reason for terminating employment. As a general rule, once a genuine and objectively palpable decision has been made, for instance by referring to past trading losses, the Court will not look into employer policy decisions as to who or how many fall victim to retrenchment policies. The principle of "last on, first off" is to be generally followed, but is not an overriding consideration as against the need, say, to maintain an efficient workforce. The Courts have defined their task as to find "a genuine reorganization and not some trumped up excuse to dress up financial stringency in the form of redundancy"[56] and has led the Court to decide on one occasion that an alleged redundancy was brought about by a lack of planning[57], and in other, was the result of the proprietor's conduct leading to the business running out of work[58], and that what really occured were unjustifiable dismissals. This general trend may be viewed as a serious encroachment on management rights for there now appears to be a rebuttable presumption emerging that an alleged redundancy resulting in dismissals is not strictly within the purview of the employer.

The issue was mentioned in Canterbury Hotel ... etc IUW v. Fabiola Fashions Ltd [59] where the Court held that it was entitled to ask whether "the decision was one which a competent businessman might reasonably have made." The decision need not be the best one, the Court concedes, but it must not be unreasonable in the circumstances. The Court granted itself licence to investigate the company, its policies and practices, and to overturn a management decision and bring s. 117 remedies into play (supra). This may include reinstatement, as a recent case displayed the Court willing to reinstate an unjustifiably dismissed employee [60] to what it regarded as her previous 'temporary' position as it was satisfied there was sufficient work available to so warrant it.

It is clear that though not an "industrial matter" at the policy stage, once jobs are lost it becomes one. It places a premium on management to fulfill the corporatist ideal. It places a strong incentive on consultation with unions over redundancy matters to avoid an open airing of its work site policy.

Nevertheless the Court upholds managerial prerogative with respect to the issue of compensation for redundancy. In Cornhill Insurance Company v New Zealand Insurance Guild [61] the Arbitration Court held that if an award imposes no obligation to pay redundancy pay "there is no jurisdiction to enquire into the merits or otherwise of a failure to reach an agreement on redundancy, nor to make an award in this respect, nor to order the parties to continue consulting until agreement is reached". In doing so it ignores an argument put by D. Mathieson [62] that the inclusion of a term in a contract providing for redundancy payments may in any case not be valid because the obligation to perform arises when the contract has been terminated. Fortunately, for the Court, there has not been a case on point, and it is unlikely there ever will be, especially with the spectre of the Mangere Bridge Dispute, the longest running dispute in New Zealand industrial history, which was fought on the issue of redundancy agreements, in the back of employers' minds.

Respective union - employer power relationships and the quality of dialogue between the groups will dictate to what extent management rights

in this area will remain extant. C. Taylor [63] postulates that powerful unions prefer not to have full redundancy agreements in an award so that they can assess the employer's situation at the time of the redundancy - the old maxim being "the minimum becomes the maximum". Ultimately, the increasing number of redundancy situations occurring in the country, and the size of some redundancy payments (for example $2 million at Mosgiel in 1981) may necessitate legislative intervention similar to the Redundancy Act (UK). The only positive action in the area to date has been to make redundancy payments no longer deductible from unemployment benefits, thus taking pressure off the need to increase the scale of payments. The Severance and Re-Employment Bill, first introduced in 1975 has lately re-emerged before Parliament.

(E) Right to Suspend Workers

As a general rule, the Court, under the personal grievance procedures of s. 117 of the Industrial Relations Act, is not concerned with disciplinary proceedings, except and insofar as the administrative duties imposed by the award or agreement are adhered to. The Court has been loathe, however, to create a right of suspension without pay, though suspension with pay is recommended as an interim measure where investigations of employee dishonesty are being carried out.

There is however, in s. 128(1) of the Industrial Relations Act which provides that where there is a strike, and as a result of the strike any employer is unable to provide for any of his non striking workers, work that is normally performed by the workers, the employer may suspend their employment without pay, until the strike is ended. In Elston v State Services Commission (No. 3) [65] it was warned that the relevant instrument must precisely define the nature and limits of the right, the preconditions so set out must be rigidly adhered to, and a requisite warning should be given when all pre-conditions are satisfied, but before actual suspension takes place. The evidential onus is on the employer to show that available work was insufficient to keep his workers in employment but this should not be difficult to discharge since the facts relating to the employer's operation would be mainly within the knowledge of the employer.

E MERRITT, A.J. The right to manage.

(F) The Right to Manage and Employee's Due Process Rights

Employer estimates suggest that as much as 20% of total compensation costs derive from benefits and allowances not specified in awards[66] yet the infrequent use of the procedure outlined in s. 117 of the Industrial Relations Act for actions of an employer that "disadvantage" the employee suggests that management have been granted an unchallenged hand in areas where some limitation would be appropriate. For example, there have been very few challenges to the reasonableness of rules. Absenteeism control programmes unilaterally initiated by an employer, or the search of a person or personal property on the employer's premises have also gone unchallenged under s. 117.

The Arbitration Court has purposely avoided entangling itself in promotion matters, wisely being wary of it ending up as a selection committee. However, it has shown its capability to interfere in other areas. A pertinent example is New Zealand Airline Pilots Association IUW v Air New Zealand where an international pilot who had previously voluntarily sought treatment for an alcohol problem was required to sign an undertaking to summarily terminate his employment in the event of his resuming his drinking habits. He was suspended from employment after refusing to sign it as well as a slightly amended version. The Court, after being given evidence of an American scheme where pilots were reinstated after undergoing treatment for alcoholism considered that the undertaking was too harsh, and ordered reinstatement subject to the pilot undergoing some professional treatment and his undertaking to notify the company of any alcohol consumption.

It is not contrary to management rights to ensure a worker's due process rights for the alternative would be increased worker dissatisfaction manifested in work stoppages and low productivity. Consequences also spread throughout the economy. For instance, it has been conservatively estimated in The Employer[68] that 5% of employees have alcohol and drug problems similar to the Air New Zealand pilot, costing the economy, in 1981, some $100 million and so the Court's decision may be an expression of corporatist policy to attempt a rehabilitative ideal starting from within the individual firm.

E MERRITT, A.J. The right to manage.

(G) The Right to Manage and the Employees Duty of Loyalty

In the U.S.A., there has emerged what is known as a 'whistle blower' who is described as a "muckraker from within, who exposes what he considers the unconscionable practices of his own organisation." [59] Having decided at some point that the actions of the organisation are immoral, illegal, or inefficient, he acts on that belief by informing legal authorities or others outside the organisation. This 'right' is obviously very different from the traditional role of the employee whose pre-eminent virtue is loyalty to his master. Whilst those in management see the genre as contrary to the unifying value of co-operative effort, other theorists stress the idea that employees in a free society should not be obligated to restrict their loyalty to only one institution or cause. It is one thing to expect employees to commit themselves to pursuing broad organisational objectives; it is quite another to see the contract of employment as a "Faustian bargain in which employees suspend all critical judgment to serve their superiors." [70]

The action of Breach of Confidence may be relied on by the employer to protect confidential information in an employment situation, though the employer must come to court with clean hands for "there is no confidence as to the disclosure of iniquity." However, case law in the area suggests the Courts are willing to allow disclosure if it is in the public interest. In Woodward v Hutchins [71] it was held that if a group of entertainers seek publicity over certain facts, which is to their advantage, they cannot complain if an employee afterwards discloses the truth about those facts. Unsupported dicta of Lord Salmon in the case of British Steel Corporation v Granada Television [72] suggests that where a public corporation is in a financially parlous condition and shareholders are unable to hold investigations, the corporation is fair game for an employee who comes across any information to expose it publicly. Both cases cited are recent and have only indirect application in the employment field, though they instruct employers that harmonious work relations may be achieved by tempering profit maximization in favour of keeping communication and grievance procedures open to all employees. 'Whistle Blowing' is often a manifestation of management not being willing to entertain their employee's grievances at an early stage.

(H) The Right to Manage and Women

The Maternity Leave and Employment Protection Act 1980 provides that a pregnant employee who at the expected date of delivery has been employed by the same employer for the preceding 18 months (for at least 15 hours a week) is entitled to 26 weeks maternity leave from the date of confinement or from a date not more than 6 weeks before the expected date of delivery or earlier if medically advised. There is a presumption that the position can be kept open until the end of the leave and the burden of proof to the contrary lies on the employer. If the employer cannot guarantee the job on her return, he is bound to give the employee preference for any alternative employment that occurs.

The practical effect of such legislation on management was subject to a survey of the equivalent English legislation, the Employment Protection Consolidation Act 1978 (UK).[73] Caution must of course be expressed about transferring data across cultures, yet the English legislation appears to be more onerous than the New Zealand Act (for example by authorizing payment to the employee by her employer during her absence) and this, it is submitted would counteract much of the bias. Significantly, 93% of those surveyed said that no changes had been made in their establishments because of the legislation and of the remaining 7%, such changes that did occur involved provision of information of staff rights, pension scheme modification, or simply more interest being taken in pregnant employees. The evidence did not support the contention that employers were reluctant to hire women of childbearing age, in any case, no more than a certain reluctance in particular fields of work that occured even before the legislation. Reinstatement mostly provided problems in jobs where there are specialized skills and specific knowledge of workplace operations. Few women are in positions of this sort and those that are are not usually of childbearing age. The Act therefore appears to be ineffectual in its practical application.

In the same substantial situation is the Equal Pay Act 1972, the underlying principle of which is that employees of either sex should receive the same rate of remuneration for the same, or substantially

similar work. But the Act can only apply to women who are exactly like men and can replace men on the job, and only to those women who are exactly as deserving as men receive their due to the same extent as men. The fact that in February 1982 the average female's gross weekly wage was 73% of her male counterpart [74] illustrates that parity will be almost impossible to enforce because sexes tend to be employed in particular industries (for example, few men are employed in the clothing industry whilst few women are involved in heavy industry), and no case has been brought before the Court to test inter-industry parities. The Act may be beneficial to professional women, but these are comparatively few in number and there has been a customary tendency to grant equal remuneration in any case. Those in the Government service have had equal pay since 1960 and benefit from rigid classification and status guidelines and rules to enforce their status.

(I) Hours of Work

Hours of work and related questions are heavily prescribed by legislation. The Industrial Relations Act provides that in every award the Arbitration Court shall fix at not more than 40 hours maximum number of hours to be worked in any week by any worker bound by the award. Overtime is excluded from the maximum. The Court, however, has the discretion to decide whether normal working hours are impracticable in any particular industry. Workers in industries where 'irregular' hours are the norm are covered by special legislation, for example the NursesAct 1977, or have deviations in the hours incorporated in their award, for example, the New Zealand Musicians Award.[75] In addition, the Arbitration Court has the power to extend work beyond ordinary hours, in other words, overtime. Collective instruments merely provide for overtime payment, but do not make the working of overtime compulsory either for the employer or the worker.

Through this framework, the manager is left with considerable scope to negotiate hours of employment with the relevant unions. Two cases illustrate the Arbitration Court's interpretation of management rights in this area. In Woolworths (NZ) Ltd v Shop Employees IUW[76] the employer proposed to be open for two late nights a week. The award declared that staff could be directed to work one late night a week. The Court, interpreted a proviso added to it as entitling the employer to employ staff on a second late night in each week subject to the consent of the workers concerned. The employer was entitled to operate on that second optional night, notwithstanding that workers voluntarily refused the offer of voluntary overtime. If all existing workers individually declined the option the employer had the right to open the shop engaging new staff for the purpose.

The Court's position was left in no doubt by the New Zealand (except Canterbury and Westland) Electrical etc IUW v NZ Steel Ltd.[77] The affirmative language used by the Court was that "the employer always has the right to manage [underlining was by the Court] unless the collective agreement clearly specifies otherwise." In that case the right to change rosters was debated, the Court holding that the right is solely the employer's if the nature of the operations requires changes or makes them desirable.

Both cases neatly illustrate the Court's reluctance to intervene in what is essentially decisions affecting the welfare of the enterprise. Limits, if any, should be arrived at in negotiation with the unions. The only derogation of the principle is that changes should be made with reasonable notice given by the employer.

(J) Safety, Health and Welfare

An employer must take reasonable care to provide and maintain a reasonably safe place of work, plant, and equipment, appliances and tools, and carry out the production process in a way which minimizes risks and the possibility of injury. At common law, the employer is not required to provide a watertight protection system, merely to exercise the standard of care of an ordinary, prudent employer, and guard against abnormal risks according to the custom in that particular industry. In contrast, legislation, for example, The Factory Act, Boilers Lifts and Cranes Act, Machinery Act, Mining Act, impose an absolute statutory duty on the employer to ensure actual safety. As a rule, legislation is enforced by penal sanctions, and it is clear that an action for breach of statutory duty may be brought under them.[78]

O. Kahn-Freund[79] states that such legislation serves a "creative function" operating through the law of tort emphasising that the employer is only the controller of material and not human resources. The question of management rights is neatly sidestepped by imposing the duties on the employer, not as a party to the contract, but as an occupier of the premises. Minimum standards can then be maintained without any necessary reference to an employment relationship. Beyond that minimum however, the discretion lies purely with the employer and his sense of morality and industrial relations. In 1980, 58 of the 352 total stoppages concerned conditions of work, involving 17,587 workers and the loss of 33,104 working days suggesting that it is in the employer's best interests to create a safe place to work.[80]

A novel corporatist intrusion in this area is provided by ss 38-46, 57 of the Accident Compensation Act 1982. Every employer is required to pay a levy calculated as a percentage of income earned by his employees. If an employee is injured in the course of his employment, the employer must compensate the employee with 80% of earnings in respect of total time lost during the first week of his incapacity, after which the Accident Compensation Corporation takes over responsibility for compensation. An accident arising out of an

employee ignoring or disobeying a legal regulation or a specific warning or instruction about the correct method of doing his job would not remove the employer's liability. The underlying philosophy recognizes that because management seek merely to minimize costs in complying with legislative standards they pay little attention to the wider social costs of injury. The Accident Compensation Scheme (and its Worker Compensation predecessor) attempts to internalize these social costs after an injury has occured, to thus give greater incentive for management to responsibly exercise rights by making job safety, training and dissemination of information a matter of self interest.

(K) The Employees Right to Work

Opponents of management rights claim that even if management have a property interest in both the capital assets of the enterprise as well as its flow of income, it is argued that workers equally have a property interest in their labours and thus the property interest of management should be accorded no special status. The aforementioned minimum standards of employment imply that a job is a valuable asset, not only to the employer as an element of his factors of production, but, more obviously, to the individual employee. The essential elements of life and status within our capitalist society are all dependant on ability to derive income. C. Reich [81] goes further to suggest that "...the protection of this means of livelihood from confiscation or encroachment appears as fundamental a basis of the social order as it does to the owners of the land. What both parties claim is security and continuity of livelihood - that maintenance of the 'established expectation' which is the 'condition precedent' of civilized life." In support of this claim is a quote by Lord Denning in Edwards v SOGAT [82] that a "right to work" is "now fully recognized by the law." (This is in comparison to Lord Davey's classic dictum in Allen v Flood [83] that "A man has no right to be employed by any particular employer and has no right to any particular employment if it depends on the will of another.") It may then be claimed that the modern worker has a countervailing property interest.

This argument is fallacious for two reasons. Firstly, Lord Denning's decision in Edwards v SOGAT (supra) was based on a narrower proposition that a union has no right to expel even a temporary worker arbitrarily, and his wider dicta has received no judicial support in England. Secondly, in many modern, capital-intensive industries the quantitative importance of labour is outweighed by capital invested.

A more supportable proposition is the "right to be given work" despite the well established rule, as reiterated in Langston v AUEW (No.2) [84] that the ordinary employee has no right to insist on being given work within the scope of his general duties which he finds most satisfying.

Halsbury's Laws of England states "It now seems probable that all contracts of employment by implication give to the employee the right not merely to be paid his agreed wage, but also the right to have his work when it is available." [85] Such an approach can be justified by an implied term in the contract of service.

This view has not found much academic approval. [86] Implications of terms into contracts is to a great extent determined by changing social and industrial standards, and the obvious difficulty is an evidential one of such changes; usually the basis is the normal practice of employers and employees. Moreover evidence must be tangible, for example, unsupported dicta by Lord Denning in the Langston case relied on Paragraph 9 of the Code of Practice (UK) which urges recognition of "the employees need to achieve a sense of satisfaction in the job." The English Courts, on the whole, have showed an unwillingness to make such a difficult value judgment.

There are exceptions: where the nature of the contract is such that the employee expects to seek enhancement of reputation or publicity, [87] where the employee is paid partly or wholly by commission, or, by analogy, on a piece work basis, [88] where the contract contemplates appointment to a specified office for the entirety of the contract and, more dubiously, where there is an obligation to provide a reasonable amount of work for him to develop and enhance his skills. [89] However, it is unlikely that there will be a complete extention of the right for it would impinge on industrial re-organization and mobility, policy considerations generally upheld by the Courts.

(L) Industrial Democracy

The lynch-pin of expressions of management prerogatives is a theme of authoritarianism, and a siege-mentality that awaits inevitable conflict which seek to limit the prerogative. It leads to self-fulfilling stereotypes where management behaves in one particular way, employees in another and 'hever the twain shall meet". However, with changing social and technological conditions and attitudes, many industrialised countries have experimented with arrangements by which employees contribute to the functioning of the organisation within which they work.[90] An attempt to gauge New Zealand involvement in this generalized trend was attempted by the Department of Labour[91] who in 1973 surveyed over 2000 firms employing 20 or more people to ascertain the level of worker participation in the company and what forms it took. Only 12.5% of the firms indicated they operated some kind of worker participation of the following forms:

(i) Joint Consultation A mode for bringing employers and employees together to discuss topics of mutual interest. (60% of the instances of participation involved this category, either by itself or in association with some other scheme.)

(ii) Autonomous or Semi-Autonomous Work Groups Within a pre-determined production plan the employees work out the detail as to how a particular job will be performed. (24%).

(iii) Profit Sharing Under a pre-determined agreement employees who satisfy age or service related qualifications share in the net profits of the employer company. (15%).

(iv) Employee Shareholding These may be labour shares, which have nominal value but permit holders to attend shareholders meetings and share in company profits, or tradeable shares where employees are provided with the opportunity to purchase or be allocated shares in their company. (20%).

A follow-up in 1976[92] discovered that consultation was predominant in larger firms where the need for formal consultation was held to be greater than small concerns where more informal avenues of communication existed. Autonomous work groups usually were found in firms with less

than 100 employees, while the other two categories were found mainly in medium to large concerns.

The researchers commented that the majority of the firms involved were progressive in their approach to economic welfare. This was correlated with safety training and a package of welfare benefits and accorded with managers' views of seeing the industrial democracy issue as central in maintaining or improving industrial relations. Interestingly, 41% of the schemes were introduced without officially notifying the union. However, the study found that company finance and policy, and award matters and personal subjects relating to individuals were usually excluded from discussion. Most autonomous work groups had limited authority to make decisions, management being responsible for setting production targets.

Several factors contribute to the slow development of industrial democracy in New Zealand. A ready access to conciliation and arbitration has atrophied employer readiness to negotiate with unions. More importantly, and especially since New Zealand has relied extensively on legislation for the creation and upkeep of its industrial relations, the Legislature has not been vocal in the area. It was only in the 1975 election that both political parties mentioned the subject in their election manifestos, yet till 1978 the National Party only instigated minor legislative amendments to existing profitsharing schemes. Section 233(1)(a) of the Industrial Relations Act which empowers the Governor-General to "provide for the voluntary establishment of works committees representative of workers and employers, in order to promote and maintain harmonious industrial relations, at the level of the individual undertaking" goes no way to implementing a statutory requirement of worker participation assessed by a pre-determined ratio of workers to management in the boardroom, as recommended by the Bullock Report,[93] and appears trivial compared to comprehensive participation principles enunciated in the West German Co-Determination Act 1951 and the Constitution Act 1952.

Attitudinal barriers present the greatest stumbling block. Legal orthodoxy finds it difficult to forget the duty of the servant to obey his master, and social orthodoxy that workers and managers belong to

different worlds. Often asserted by managers is that employees do not want a management role as it could alienate workers who, with good reason, fail to understand it, for the suspicion may grow that behind all the complexities of a new power block, made up of managers, shareholders, a workers elite will be created. Unions themselves are naturally cautious of employer motives in instituting participation schemes. Historically, their greatest gains have been made in confrontation, rather than co-operation, with management, and there is the fear that, where situations such as a redundancy arise, worker representatives who would probably be senior employees and thus less susceptible to being laid-off, would support management policy, or at least, be indecisive as to where loyalties would lie.

It seems then that deep seated beliefs and mutual mistrust will hinder any further development in this area. A booklet published by the Employers Federation [94] enshrines the view that the issue should be seen in terms of employee involvement rather than worker participation. It emphasises means for promoting greater employee invovlement and identification with his/her company. Here the main thrusts are seen in better communications (with special emphasis on joint consultation) and direct schemes designed to improve job satisfaction, encourage involvement in job restructuring and acceptance of a wider span of responsibility. Matters normally subject to collective bargaining, selection procedures, promotion procedures and personal grievances are held to be unsuitable for joint consultation. Direct bargaining outside formal structures is the best proponents of industrial democracy can currently look to to achieve their goals.

CONCLUSION

The management rights investigated are not exhaustive, and, in any case, it would be impractical to delineate all rights for they change with, or are modified by, changing social and technological conditions.[95] For a right to be valid it is submitted it must satisfy the following requisites:

(1) The right must be reasonable;
(2) The right must be clear and unequivocal;
(3) The right must be brought to the attention of the employee if it is not a recognized custom, before the company can act on it;
(4) The employee must be aware of the consequences of ignoring the right;
(5) The right must be exercised consistently;
(6) The right must be capable of forming the subject matter of union-management negotiation;
(7) The right must be consistent with legislation.

The last requisite is, of course, the most important, because within the corporatist scheme any right that does not fit with or is inadequate to promote state interests, is modifiable by statute. Conversely, a right can be created or a recognized right encapsulated by statute though this is rare, an exception being s. 32 of the Maternity Leave and Employment Protection Act which states - "Nothing in this Act shall affect any right of an employer to dismiss..."

Underlying the expression of management rights is a power substrata that governs particular industries and is often not manifested in tangible ways. Powerful unions may force management to negotiate away a substantial proportion of their rights[96] or, more usually a powerful management structure faced by a patchwork of disjointed unions may unilaterally claim dictorial powers. Even the most diligent shop steward or factory inspector can do little if no one complains.

Similarly, if the employer occupies an important niche in the economic structure the state may intervene to uphold what it considers important rights in the public interest, notably the right to

bargain if a powerful union renders any wage settlement involuntary. This can be justified at two levels. Firstly, the state in its role as trustee of the country's economic well-being must limit any destabilizing influences which may threaten stability. Secondly, since the state has a quasi-property interest in a company, logically, it is both the state and management who claim a right to manage, the latter by its historic ideology, the former by its "new property" interests. It is not inconsistent then if only one "partner" has the moral and political power to enforce the right, since the right accrues to management as a whole.

Inevitably, employment related legislation will be hinged upon the conception as to the position that a party is to occupy in the economic and social structure. It is in the interests of the state and of industrial harmony that a strict divide must be maintained between employers and employees, and with it a permissible set of behaviours ascribed to each. These behaviours may be prescribed by legislation conducive to the general aim but if this legislation lacks practical application it does not derogate from the intention behind it. It must accept the difficulty of manipulating age-old attitudes and behaviours, and endeavour to change them by education or by appealing to notions of self-interest rather than by direct coercion.

The Common Law incidents of the right to manage have therefore given way to a status created by and supported by the state. The unitary ideology that espoused the notion that workers' well-being would be guaranteed by following the management plan - the result of a historical empirical growth - has been modified along with the basic assumptions of property that legitimized it. The result is an "ideology of no ideology - the notion of an "average" manager who pragmatically justifies his 'right to manage' within a corporalist framework and who exercises it in a capitalistic - authoritarian, but reasonable manner. 97

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Consequently, the proposition posed at the introduction of this paper may be answered with a qualified affirmative. Qualified, because at the rhetorical level, if collective bargaining is admissible in certain aspects of management then it is difficult to justify, on the grounds of incursion on the legal rights of owners, its exclusion from any aspect of management. Ultimately, however, management authority will be justified on functional grounds. If sharing of responsibility with employees, co-operating with trade unions, entering into collective bargaining and collective agreements are necessary in order that the organisation can pursue its objectives, then sharing of responsibility, co-operating with unions and bargaining become integral parts of the management function.

In any organisation someone has to decide what to do, how it is to be done and ensure that it is done. The practical necessity of this management function remains no matter what the nature of the corporatist legal framework, the extent of the divorce between ownership and control, or the social, economic or political system within which the organisation exists.

FOOTNOTES

1. R. Metcalfe "Management and Union Rights and Responsibilities" (1969) Canadian Personnel and Industrial Relations, 32.

2. A. I. Marsh and E. C. Evans The Dictionary of Industrial Relations (Hutchins, London, 1973).

3. O. Kahn-Freund Labour and the Law 2nd Ed. (Stevens, London, 1972) 4.

4. Education of New Zealand's Managerial Elite (1975) Research Paper 5 Dept. of Bus. Admin. V.U.W.

5. (1978) 78 B.A. 5089, cl 2(a).

6. Works edited by L.R. Nettleship, (Longway, London, 1906).

7. This view is illustrated by Barton ACJ in the Union Badge Case (1913) 17 C.L.R., 680, 680 "...the decision what to do with his own property and therefore the conduct of it belongs to the employer who takes the risks of the enterprise."

8. R. Posner. Economic Analysis of Law 2nd Ed. (Little Brown, Boston, 1977) 301.

9. Changing Patterns of Shareownership in New Zealand's Largest Companies (1978) Research Paper no. 15. Dept. of Bus. Admin. V.U.W.

10. A relatively recent phenomenon, that of multinational corporations which are wholly or partly owned by overseas concerns, for example, the American giant IBM, has further changed the traditional notion of the firm. Such enterprises have global perspectives with any autonomy granted to local companies liable to be overridden by the Head Office. Transnational reality makes the corporations almost invulnerable to economic sanction. These firms create issues unique to them, but for present purposes, whilst not attempting to minimize their impact on the industrial relations scene (see the JV II case (1982) Arb. Ct. 597) this paper will treat them as any other employer.

11. Wellington 1976.

12. Hon. H. Templeton warned the New Zealand Textile and Garment Manufacturers Federation Conference in September 1980 of "...excessive and perhaps distorted responses to the new competitive environment if freer competition was granted."

13. See generally R.S. Deane, P. Nicholl and M. Walsh External Economic Structure and Policy (Reserve Bank, Wellington, 1981).

14. One senior Labour Department Official believes employers are an "endangered species". He states that an employer "is now looking at central and local government demands on his time and money. He is looking at the degree to which the paper war has intruded into his workplace..." [J. Hastilow, Blenheim District Superintendent; Dept. of Labour - Address to Rotary Conference Blenheim February 1983).

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15. Financial Statement in June 1979 (House of Representatives pp 9-10).

16. Remuneration (Auckland, Canterbury, Westland, and Hawkes Bay Bulk Freight Forwarders (Stores) Employees Award) Regulations 1979;
Remuneration (NZ) Engine Drivers, Boiler attendants, Firemen and Greasers Award) Regulations 1980;
Remuneration (NZ Forest Products) Regulations 1980.
In addition, Regulations were threatened to be used in the General Drivers' Award by the Government eventually undertook to abide by the Court's award, (5th October 1979).

17. "The New Property" (1964) 73 Yale L.J. 733.

18. J. Winkler "Corporatism" (1976) Archives of European Sociology 17.

19. (1862) 11 CB (NS) 86a.

20. [1945] 1 All. ER 657.

31. (1980) Arb. Ct. 189.

22. (1977) Arb. Ct. 21.

23. M. Bradford "The Future of Wage Fixing" in P. Brosnan (ed) Unemployment and Inflation (1983) Seminar Working Paper No. 9 Ind. Rels. Centre V.U.W.

24. New Zealand Engine Drivers etc. IUW v Gear Meat Processing Ltd (1982) Arb. Ct. 111.

25. [1945] 2 All ER 5701.

26. The English legislature have created a duty on employers to disclose information where it would accord with good industrial relations practice to do so, and/or without which the unions would be materially impeded during collective bargaining. The employer is under no obligation where the information is against national security or the law; or would substantially injure the employer or materially impede collective bargaining (s. 17 of the Employment Protection Act 1975 (UK). In an empirical study of the Act, Gospel and Williams in (1981) Industrial Law Journal 10 found that the disclosure provisions were seldom used, probably stemming from union wariness of the doubled edged nature of negotiating argument, especially with regard to employer ability to pay wage demands. Most unions who used the provisions were concerned with widening their knowledge of the determinants of their own working conditions. The unions who utilized the provisions the most often were white-collar and professional unions who lacked industrial muscle but had the research facilities to appreciate the full nature of the information.

27. N. Chamberlain The Union Challenge to Management Control (Archon Books, New York 1948) 105.

28. Ibid. at 105.

29. Union Policies and Industrial Management (1941) 578.

30. "The Challenge to Management Rights" Symposium on Labour Relations Law (1961) 260, 263.

31. "An employer may refuse to employ... for the most mistaken, capricious, malicious or morally reprehensible motives..." Allen v Flood [1898] AC 1 per Lord Davey. At common law, there has been a reluctance to create a head of public policy against racial discrimination - see re Lysaght [1965] 3 WLR, 391, 402 - and it is unlikely that an implied term of non discrimination would be read into a contract of service.

32. (1981) 2 NZAR 407.

33. M. Jones Questions of Religious and Ethical Belief, (1982) Legal Writing LL.B (Hons) VUW

34. (1981) 2 NZAR 415.

35. Grigg et al v Duke Power Co. (1971) US Supreme Court.

36. The Role of Gatekeepers in the Employment of Migrant Groups (1980) Paper presented to Annual Conference of the N.Z. Demographic Society.

37. When the Human Rights Commission Bill was before Parliament, the Employers Federation saw it as another infringement of employers' rights. It said that discrimination "can be necessary and valid in employment." giving an example of conflict they know will arise in a work place "if they take on a person from an island group that traditionally does not 'get on' with a group already represented in the work place" The Employer April 1977.

38. Auckland Freezing Works and Abbatoir Employees IUW in a comment to P. Hanna noted in J. Katz "The Right to Hire and Fire" (1970) 2 Auck. ULR 35, 41.

39. Badger Chiyoda Joint Venture and Refinery Contractors Joint Venture v N.Z. FoL, Auckl. Boilermakers etc IUOW (1982) Arb. Ct. 597 and 608.

40. The Arbitration Court (at 603) also opined that the right of selecting prospective employees on a preferential basis could be an industrial matter to be inserted into an award.

41. If the period was not specified in the contract then it is determinable by custom, for example, a week for a weekly paid employee.

42. Auckland LA Officers IUW v Watemata City Council (1980) Arb. Ct. 35

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43. Auckland Grocers' Assistants IUW v Turangi Supermarket (1981) Arb. Ct. 429.

44. Northern ... Food Processing, etc Factory Employees IUW v J Wattie Canneries Ltd (1982) Arb. Ct. 393.

45. Auckland City Council v Hennessy unrep. CA 1981/178.

46. See for example, Cornhill Insurance Co. v New Zealand Insurance Workers IUW (CA) (1981) Arb. Ct. 467.

47. Scholes v AA Mutual Insurance Co. (1975) 75 BA 5515.

48. There are no explicit time constraints but "the more time that elapses the more difficult it is for the Court to order reinstatement." Otago and Southland Shop Assistants IUW v D. Hubber (1976) Ind. Ct. 161, 163.

49. Daniel W and Stilgoe E. "The Impact of Employment Protection Laws" (1978) 44 PSI.

50. "Lawyers in the Industrial Arena" (1981) NZLJ 457, 460

51. Subs (5) makes any worker who goes on strike rather than use the procedure in breach of s. 117. This can be penalized but in practice it rarely happens. See Wellington etc. Clerical IUW v Barraud and Abraham (1970) 70 BA 347,349.

52. Bowley et al v G R Stevens (1980) Arb. Ct. 15, 16.

53. The 1980 NZ Official Yearbook records that in 1976 only 43% of wage earners were on the roll of a registered union.

54. A definition of redundancy is:
"An excess of manpower resulting from mechanisation, rationalisation, or from a decrease of business activity, including the closing down of an enterprise or changes in plant, methods, materials or products for re-organisation or other like course requiring a permanent reduction in the number of workers employed on other than a casual, temporary, or seasonal basis." An Analysis of Redundancy Provisions in Awards and Collective Agreements Dept. of Labour, Research and Planning Division 1975, p. 5.

55. Re a Dispute of Interest Relating to the New Zealand (excluding Northern and Taranaki Industrial Districts) Law Practitioners Award (1980) Arb. Ct. 267

56. Wilson v Underhill House School (1977) 12 ITR 165, 167.

57. N.Z. Insurance Guild v Guardian Royal Insurance (1980) Arb. Ct. 433.

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58. N.Z. Engineers etc IUW v Burm (1980) Arb. Ct. 309

59. (1981) Arb. Ct. 439.

60. Wellington etc Clerical Administrative and Related IUW v Wellington Dairy Farmers Co-op Assoc. Ltd (1982) Arb. Ct. 163.

61. (1981) Arb. Ct. 443.

62. Industrial Law in New Zealand Supplement (Butterworths, Wellington 1975).

63. "Redundancy Pay" (1981) National Business Review 32.

64. Wellington Amalgamated Shop Assistants Union v. Wardell Bros. and Co. Ltd (1977) Ind. Ct. 13

65. [1979] 1 NZLR 218.

66. R. L. Miller The Resolution of Disputes and Grievances in New Zealand (1983) Ind. Rel. Research Monograph No. 8 Ind. Rels. Centre V.U.W.

67. (1981) Arb. Ct. 249.

68. September 1981.

69. C. Peters and T. Branch Blowing The Whistle: Dissent in the Public Interest (Proser, New York, 1972) 4.

70. K. D. Walters. "Your Employees Right to Blow the Whistle" in Individual Rights in the Corporation A.F. Westin and S. Salisbury (eds) (1980). They further argue that the defense of "just following orders" was rejected at Nuremberg.

71. [1977] 1. WLR 760.

72. [1980] 3 WLR 774.

73. W. Daniel "Maternity Right - The Experience of Employers" (1981) 59 PSI.

74. $301.38 per week gross for males cf $219.97 for females.

75. (1978) BA 4743.

76. (1981) Arb. Ct. 455.

77. (1982) Arb. Ct. 179.

78. See generally A. Szakats. Law of Employment (Butterworths, Wellington 1981) 279-318.

79. Supra footnote 3 at 113.

80. NZ Official Yearbook (1982).

81. "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965) 74 Yale L.J. 1245, 1255.

82. [1971] Ch. 354, 376.

83. Supra, footnote 31 at 173.

84. [1974] 1 CR 510.

85. 4th ed. Vol. 16 para. 557.

86. e.g. J. McMullen "A Right to Work in the Contract of Employment" (1978) 128 New L.J. 848

87. Fechter v Montgomery (1863) 33 Beav. 22.

88. Bauman v Hulton Press Ltd [1952] 2 All ER 1121

89. Re Rubal Bronze and Metal Co Ltd [1918] 1 KB, 315, 324. Cf Smith M R in Turner v Sawdon [1901] KB 653, 657 that there is no obligation to enable the employee "to become au fait" at his job.

90. As long ago as 1924 the Companies Empowering Act introduced labour shares. Similarly, joint consultation has existed since at least 1927 with the workshop committees of the New Zealand Railways.

91. Worker Participation in New Zealand An Interim Report Wellington 1973.

92. Worker Participation in New Zealand: A Study of Worker Participation in 65 Manufacturing Firms Wellington 1976.

93. Report of the Committee of Inquiry on Industrial Democracy. Cmnd 6706 (1977). The formula recommended was 2x + y. That is, 2x is the number of shareholders representatives and employee representatives; the y component would consist of an uneven number of directors co-opted by agreement of the "2x", those to comprise an uneven number of appointees and to form no less than 1/3 of the total board.

94. Employee Involvement in the New Zealand Workplace Wellington 1977.

95. Other examples are the right to determine wage payment systems which are abrogated only by basic contractual principles and the Wages Protection Act 1964 or specialized categories of workers e.g. miners.

Holidays and holiday pay are made mandatory by the Annual Holidays Act 1944, The Factories Act 1946 and old English Statutes e.g. Sunday Observance Act 1677 and 1780.

96. Even the rights to hire and fire may be limited by agreement. The former is illustrated by the JV II cases (supra) footnote 39, and the latter by the House of Lords decision in McLelland v Northern Ireland General Health Services Board [1957] 1 WLR 594.

97. J. Deeks. "Ideology and Industrial Relations in New Zealand" (1976) 1 NZ Jo of Ind. Relations 26,29.

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