Interpretation *of the* EMPLOYMENT CONTRACTS ACT 1991

Dr Colin Howard

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Dr Colin Howard was educated at Prince Henry's Grammar School, Worcestershire, the University of London, and Melbourne University. He taught in the law faculties at the University of Queensland (1958-60) and Adelaide University (1960-64) before becoming Hearn Professor of Law at Melbourne University for 25 years (1965-90). He was awarded his Ph.D. from Adelaide University in 1962 and his Doctorate of Laws from Melbourne University in 1972. He is now a practising member of the Victorian Bar, being perhaps best known for his constitutional expertise, but specialising also in commercial and administrative law, and has published a number of texts for both lawyers and laypersons. During 1973-76 he was General Counsel to the Commonwealth Attorney-General. He is also a long-established commentator on public affairs.

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PRELIMINARY OBSERVATIONS

The brief I accepted in preparing this report was to comment on employment law developments in New Zealand since the Employment Contracts Act 1991 ('the ECA') commenced operation on 15 May 1991.

The ECA has major political, social, and economic, as well as legal, significance. It follows that although the main emphasis of this commentary will be on the legal developments, they cannot be usefully treated as if they occurred in a vacuum. Indeed, it would be difficult to do so, for the legal developments have become a political, social, and economic event in themselves.

The context is a perception that a main aim of the ECA, namely to restore contract as the central feature of the employment relationship, is being thwarted by judicial and quasi-judicial interpretation. It is said that there is a tendency in the Employment Tribunal ('the Tribunal'), the Employment Court ('the Court'), and even the Court of Appeal ('the CA') to interpret the ECA as if the changes it made to the law were minimal.

The minimalist approach is said to take the form of an unwarranted assumption that unless the ECA expressly changes a pre-existing rule of law, no change is intended. Therefore no change is to be implied, however consonant with the general purposes of the Act. It is further asserted that this disinclination to imply what is not expressed does not extend to the interpretation of contracts of employment. Terms are implied into such contracts which are contrary to the intentions of both parliament and the parties, or at least of the employer.

For the avoidance of misunderstanding, a fundamental point needs to be made clear at the outset. This is that what follows does not depend in any way on the idea that there is a mysterious something about a contract of employment which sets it apart from all other contracts. As far as this comment is concerned, that idea is not law but mysticism and is not improved if it turns out to be judicial mysticism.

At the time of writing, the most recent precedent which might be cited as illustrating the interpretational tendency referred to is the following passage in the unanimous

judgment of the Full Court of the Employment Court in *Kerry Lois Smith v. Radio i Ltd,* as yet unreported, 20 March 1995 (AEC 15/95) transcript p.34:

> In view of the combined effects of the judgment of the Court of Appeal in the *Actors Equity* (sic) case and the fact that Parliament, when it significantly altered employment law in this country, made no express change to the developed state of the law on fixed term contracts, it is not for this Court to legislate in default and depart from established and conventional wisdom although that might in other respects arguably be consistent with the general tenor of the current legislation.

The judgments in *Actors Variety etc v. Auckland Theatre Trust Inc.* [1989] 1 NZILR 463 were handed down on 28 April 1989. The case was concerned with events which occurred in 1984 and was litigated under the Industrial Relations Act 1973, not the subsequent Labour Relations Act 1987 which repealed that statute and was in turn repealed by the ECA. Both Acts were fundamentally different from the ECA, particularly in respect of the latter's emphasis on freedom of contract: see especially ECA s.19.

It follows that the *Actors Variety* case was decided in the context of a very different employment law regime from the one applicable in *Kerry Smith,* a regime indeed in essential respects antithetical to it. The court nevertheless went out of its way to apply to the case before it not only the majority judgments in the earlier decision but also, necessarily, the underlying doctrines upon which the earlier case proceeded. One would have expected such doctrines to be reconsidered in the light of the new regime rather than routinely applied merely because the ECA makes no express reference to them.

There are other noteworthy features of the style of reasoning adopted in the passage quoted. It is not usual to find a court referring to earlier judicial decisions as "established and conventional wisdom". The adoption of such an expression is particularly inappropriate when the purpose is to avoid implementing a legislative intention the obviousness of which is virtually conceded in the same sentence.

It is, moreover, self-contradictory for a court to regard the implementation of a legislative intention consistent with the plain words of an Act as requiring it to legislate in default. The converse is surely the case: that the court is legislating when it relies on earlier decisions which have been overtaken by events in order to obstruct or defeat the clearly expressed will of parliament.

Such an approach is not in the public interest because it is contrary to fundamental principle. In the parliamentary and common law tradition from which New Zealand's system of government derives, it is not part of the judicial function for the courts to take issue with policy decisions implemented in statutory form.

There is no presumption that an Act of Parliament is intended to make the minimum change in the law compatible with the express terms of the statute. Such are the limitations of language that so literal an approach to statutory interpretation would seriously interfere with the legislative function. Undue literalism is practically guaranteed to frustrate much of the purpose of any Act. The likely result would be the enactment of ever longer and more complex statutes which vainly sought to cover every eventuality.

Notwithstanding such considerations as these, the Court lost no time in emphasising that it took a different view. In *United Food and Chemical Workers Union of NZ v. Talley* [1992] 1 ERNZ 756, what a unanimous Full Court called the heart of the matter (p.778) was the meaning of ECA s.19(4). That subsection provides as follows for the situation where an existing collective employment contract expires without a new contract having been entered into by the parties:

> Where an applicable collective employment contract expires, each employee who continues in the employ of the employer shall, unless the employee and the employer agree to a new contract, be bound by an individual employment contract based on the expired collective employment contract.

Clearly the pivotal expression is "based on" and the task of a court is to give it a meaning in conformity with the ECA which assists in deciding which terms of the superseded award survive as terms of the statutory individual contract. In the context one might have expected a reasonably obvious meaning to be that only those terms which were individual to the employee survived. This was indeed the general understanding.

The Court did not see it that way. At pp.783-4 it had this to say:

> We conclude that 'based on' may be regarded as an equivalent in English of the convenient Latin phrase 'mutatis mutandis'. The expired collective document is to be amended to the extent necessary, but no more, to make it read sensibly as a contract between an individual worker and the employer or as a series of contracts and the employer or employers.

In other words, the ECA was to be read as if it made as little change to the relation between employer and employee as was compatible with its express provisions. The

result in that instance, and no doubt in many others since, was to preserve considerably more union influence in the employment relationship than the ECA contemplated. After further proceedings, reported at [1992] 3 ERNZ 423, the case finally reached the CA, [1993] 2 ERNZ 360. That Court, at pp.369-371, mildly modified the *mutatis mutandis* approach, and reduced the effect of the Employment Court's decision in various particulars, but did not in principle depart far from it.

Such consequences offend against both the separation of powers principle and the supremacy of parliament. The former is not a one way track which operates only to protect judicial independence. It also supports the legal supremacy of parliament. Just as the courts have no constitutional authority to legislate, equally they have no authority to interpret legislation to make it accord more readily with their own policy conceptions than those of parliament.

Another case, as yet unreported, between the same parties was decided by Chief Judge Goddard at Court level on 1 August 1994 (WEC 40/94) and on appeal to the CA on 22 August 1995 (CA 174/94). That litigation too exhibited some extraordinary features.

At trial sworn evidence (an affidavit) by an officer of the plaintiff company was put in and read by the judge. The deponent was not cross-examined on behalf of the union because the union was not represented. Neither was he questioned by the judge, although there was an opportunity to do so. No other evidence was presented by either side. Nevertheless, the decision went against Talley on the basis that the judge disbelieved the affidavit.

Not surprisingly, the CA set the judgment aside and pointed out that it is a reviewable error of law for a court to make a finding of fact which is contrary to the only evidence before it. For good measure, the CA held also that it was a breach of natural justice for a court to reject a person's evidence as, among other things, "incredible" without giving him an opportunity to answer criticisms of it. Chief Judge Goddard has conceded that point.

It is not unreasonable to observe that if the senior judge of a superior court is capable of conducting a trial in that fashion, and committing such elementary errors, the situation is grave indeed. I learn from a newspaper report (*The Dominion*, 25 August 1995) that up to 1993 the CA had overturned 8 out of 11 of that particular judge's

decisions that went on appeal. That is hardly reassuring. He will figure again later in this report.

THE ECA AND IMPLIED TERMS

The object of the ECA as set out in the preamble is "to promote an efficient labour market". Subsidiary objects within that framework are: to provide for freedom of association, to enable employees to decide who should represent their interests, to enable employees to choose between individual employment contracts and collective contracts, to enable employers to make the same choice, to ensure that that choice is a matter for negotiation between the parties themselves, and to repeal the Labour Relations Act 1987.

The substantive provisions of the ECA are consistent with such objects. They are the result of a policy judgment that they would promote an efficient labour market. An efficient labour market benefits the economy and so advantages everyone. It should not be overlooked, therefore, that the New Zealand economy has expanded at an impressive rate during the four years that the ECA has been in operation. This means that if the Act is interpreted in an unnecessarily restrictive manner not only its intended but also its actual effects are impaired. This being the case, to the constitutional and legal questions should be added the consideration that parliament's expectations have proved to be correct.

A notable feature of the ECA, evident in both its objects and the substantive provisions which put them into effect, is the emphasis they place on the start of the employment relationship, the making of the contract. It is a fundamental aim of the Act that the explicit terms of the contract should regulate the employment relationship. This basic position is to some extent modified, as, for example, in the sections which deal with harsh or oppressive contracts or require dispute resolution procedures to be included. Such provisions only emphasise that the contract is otherwise to be given effect in accordance with its terms.

Implied Terms

As will be seen, the contractual emphasis of the ECA contrasts sharply with the readiness with which the Court departs from the terms of an employment contract to alter its effect in favour of the employee. The standard mechanism is the implied term which involves implying into a contract a term which is not there. In order to

understand what is happening to the ECA under the rubric 'implied term' some distinctions have to be drawn.

The first is between terms which are implied by statute or common law and terms which are necessary to give a contract business efficacy. Although customarily referred to as implied terms, the former are not actually contractual terms at all. They are part of the legal definition of the word 'contract' in the particular context. An example is an implied warranty in a contract of sale for the goods that the goods are fit for the purpose for which they are sold. Another is the duty of fairness, confidence and trust as between employer and employee which is implied into employment contracts. Such so-called implied terms are simply part of the definition of the particular type of contract in question.

The business efficacy term is not of that character. It is a genuine implied term in that what is implied is not a rule of law but a fact: an additional term peculiar to that particular contract which is implied in order that the rest of the contract may take effect according to its tenor. The standard description of this form of implied term is as follows:

> Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

That passage is taken from the majority judgment of the Privy Council in BP Refinery *(Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363, 376; (1977) 52 ALJR 20, 26. It has been accepted by the Court of Appeal: *Devonport Borough Council v. Robbins* [1979] 1 NZLR 1, 23; and in an employment context: *Attorney-General v. NZ Post Primary Teachers Assn* [1992] 1 ERNZ 1163, 1167. It has been accepted also by the High Court of Australia: *Secured Income Real Estate (Australia) Ltd v. St. Martins Investments Pty Ltd* (1979) 144 CLR 596, 605-606; *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 CLR 337, 347.

Another distinction that needs to be made is between implied terms properly so-called and mere interpretation of the contract. It is a well-settled principle that oral agreements cannot be adduced to "contradict, vary, add to or subtract from" the express words of a contract in writing: *Bank of Australasia v Palmer* [1897] AC 540,

545 (Privy Council). Nevertheless, extrinsic evidence which does not have the character of contradicting or varying the contract can be given to elucidate what the parties had in mind. An example is assumptions upon which they both proceeded but omitted to reduce to writing: c.f. *Elston v. State Services Commission (No.3)* [1979] 1 NZLR 281, 235.

All that is happening in that situation is that the court is inquiring into what the parties actually agreed upon and intended the written contract to express. It is an inquiry which in no way justifies adding to or subtracting from the terms of a contract so as to alter its effect. On the contrary, its purpose is precisely the opposite: to give it its intended effect.

For the sake of completeness there should be mentioned also a Supreme Court decision dating from 1907 which varied a contract on the basis of the custom of the bookbinding trade: *Whitcombe & Tombs (Ltd) v Taylor* (1907) 27 NZLR 237. It is clear that the custom in question (not to pay employees for public holidays) was not known to one of the parties (the employee), who came from England. Even though no mention was made of this custom in the contract, it was held to be incorporated. The decision seems to be insupportable at the present day on any ground.

The result of established principles of law is that employment contracts which have been entered into under the ECA regime should be altered only to the extent that they are inconsistent either with the business efficacy rule or with rules of law, themselves not inconsistent with the ECA which forms part of the legal definition of 'employment contract'. This proposition should now be set alongside some recent judgments to see to what extent they depart from it, if they do, and on what grounds.

Brighouse Ltd v. Bilderbeck [1994] 2 ERNZ 243 (CA)

Brighouse makes a good starting point because the judgments are recent (October 1994), the CA divided 3:2, and the case immediately provoked strong criticism from business.

- **Factual Analysis**

The appellant company had dismissed the four respondents for redundancy. It was not disputed that they were genuinely redundant. Their contracts of employment made no reference to redundancy. There was therefore no contractual right to compensation for dismissal on that ground. The contracts provided for termination

on one month's notice on either side. This had been given by the employer. There was, therefore, no breach of contract or lack of bona fides on his part. The employees nevertheless claimed compensation under ECA s.40, framing the claim as a personal grievance by way of unjustifiable dismissal under ECA s.27(1)(a).

If the fact that the employees were genuinely redundant is combined with the fact that their employment contracts did not extend to redundancy, there is obvious difficulty in regarding the dismissals as unjustifiable. To call a dismissal made in accordance with a lawful employment contract unjustifiable is a contradiction in terms. To frame a claim in that way is merely an attempt to evade the fact that an action for breach of contract, or for an order under ECA s.56 that the employer comply with the contract, cannot succeed.

There was no basis in *Brighouse* for implying a term to give the contract business efficacy. No such term was necessary, let alone obvious. Neither was it a case of mere interpretation. There was nothing obscure about the contract so far as redundancy was concerned. If redundancy occurred, it could be dealt with by dismissal on notice, which is what happened. Moreover, the whole court agreed that there is in New Zealand no general right to compensation for redundancy.

Under these circumstances, the only way in which the claim could succeed was for the court to modify the definition of 'employment contract' in a manner which turned a lawful dismissal into one which was so unlawful as to bring the remedies of ECA s.40 into play, particularly compensation. But to do any such thing would be a plain instance of judicial legislation to reach a conclusion obviously contrary to the statutory intention, the agreement between the parties, and the general law relating to implied terms.

It is irrelevant that the ECA itself acknowledges personal grievance claims by way of unjustified dismissals. The reason has been given already: to call a dismissal made in accordance with a lawful contract of employment unjustifiable is a contradiction in terms. It is unfortunate that the word 'unjustifiable' was ever adopted in a dismissal context. The older term 'wrongful dismissal' was, and remains, perfectly adequate and has the advantage of not lending itself readily to the creation of an idiosyncratic wilderness of single instances, which is a conspicuous feature of the 'unjustifiability' approach.

Whatever the proper content of the concept of unjustifiable dismissal under s.27(1)(a) of the ECA, it cannot rationally include a dismissal made in accordance with a lawful

employment contract. Case law principles which developed the content of such expressions as 'personal grievance' and 'unjustifiable dismissal' under earlier legislation cannot properly remain unmodified in the face of the clear intent of the ECA. The statutory intention can hardly have been that the ECA should seriously undermine its emphasis on contract by simultaneously providing a remedy in tort at the expense of contract. Provide appropriate remedies in tort by all means, but not in flat contradiction of perfectly lawful contracts.

- **The Judgments**

Straightforward analysis of the *Brighouse* situation, therefore, does not suggest any basis in law for the claim. Nevertheless, it succeeded before a single Member of the Tribunal, before the Chief Judge of the Court on appeal and by a 3:2 majority in the CA on further appeal. Merely to state such an extraordinary result is enough to arouse disquiet. The reasoning on which it depends does nothing to dispel that disquiet.

The leading majority judgment was delivered by Cooke P. In order to overcome the initial difficulty that the employer had merely fulfilled his contractual obligations and exercised his contractual rights, His Honour invoked the doctrine that "there is implied in a contract of employment a term that the employers will not, without reasonable and probable cause, conduct themselves in a manner calculated to destroy or seriously damage the relationship of trust and confidence between employer and employee" (p.252).

The point has been made already that a so-called implied term of this kind is not an implied term at all but part of the definition of "contract of employment". It does not need to be implied to make the contract effective or to elucidate any of its other terms. It is a duty placed upon employers as an automatic consequence of entering into a contract of employment and is judicially deemed to be incorporated into the contract. Unjustifiable dismissal is a breach of the duty which gives rise to an actionable personal grievance.

Whether such a duty is properly called an implied term or not is not a mere matter of words. To call a judicially imposed duty a term of a contract has the unfortunate consequence that in the guise of enforcing the contract the court may in fact be contradicting it in the pursuit of a different, unacknowledged, object. Even more seriously, if an Act of Parliament is involved the court may be contradicting that too. As will be seen, *Brighouse* is an instance of both.

- **Contradicting the Contract**

Invoking the trust and confidence doctrine did not in itself carry the matter any further. A breach of the duty had to be demonstrated. Since there was no doubt that the employer was entitled to dismiss the employees, the substance of the claim was that he had not been as considerate as he ought to have been in his manner of dismissing them and should pay by way of compensation more than an amount that he had already paid voluntarily.

Neither the Tribunal nor the Court had any difficulty in taking this view of the matter, although the Court varied the amount of compensation. Neither did they doubt that the main head of compensation should consist of substantial sums for loss of future employment. This is an extraordinary mode of thought. It first compels an employer who terminates employment in accordance with the voluntary agreement between the parties, and because of commercial necessity, to pay compensation for doing so. It then calculates the compensation by reference to, of all things, future employment to which it is conceded that no right exists.

The manner in which this aspect of the matter was dealt with by Cooke P in the CA was not less remarkable. In His Honour's view no error of law was involved in the following sentence which he quoted (p.250) from the judgment of the Chief Judge in the court below:

> The assessment in this case needs to focus primarily on the amount that should be paid to the respondents to make good the unjustifiable action of the appellant in dismissing them for redundancy without paying them adequate compensation.

The circularity of this reasoning seems to have escaped attention at all levels. Why does the employer have to pay compensation? Because he has made an unjustifiable dismissal. Why was the dismissal unjustifiable? Because he omitted to pay compensation. This is not rational law, but the defect is concealed behind the moralistic language of unjustifiability and mutual trust, language which is particularly ill-adapted to redundancy situations.

As one of the two dissenters in the CA, Richardson J, observed (p.259), the "concept of redundancy is essentially concerned with the disappearance of a job rather than the termination of the employment of an individual worker". This brings out well the weakness of the implied term reasoning in *Brighouse* and the injustice of the outcome. To impose a sanction on the employer for doing something that he was entitled to do,

and the need for which was not his fault, should have been held an error of law as a matter of elementary principle.

There is no avoiding the conclusion that the courts in *Brighouse* arbitrarily altered the contract of employment to give it an effect quite different from its terms and did so because the contract as it stood did not conform with some of their ideas about employment relations. Yet, to quote Richardson J again (p.258), "... it is not open to the Courts to construct an extra-statutory concept of social justice applicable in redundancy situations." In this respect *Brighouse* demonstrates clearly the first danger of false implications: that in the guise of enforcing a contract the court may well finish up contradicting it in the pursuit of a different, unacknowledged, object. Such a process is well outside the judicial function.

- **Contradicting the Act**

The *Brighouse* case is also a clear instance of the second danger of false implications: if an Act of Parliament is involved, the court may be contradicting that too. The major question of law was whether the personal grievance jurisdiction could be extended to redundancy consistently with the ECA. The manner in which Cooke P approached this question suggests a determination to answer it in the affirmative if he possibly could.

He first identified (pp.251-252) a number of particular features of the ECA, including specific references to redundancy, which in his view revealed a legislative intention not only not to curtail the personal grievance jurisdiction but indeed to extend it. This he saw as a balancing exercise to offset the ECA's "emphasis on efficiency and market forces" (p.251).

He himself placed emphasis on the absence from the ECA of any provision which expressly reversed the ultimate outcome in *G.N. Hale & Son Ltd v. Wellington etc Caretakers etc IUW*, reported in its CA stage at [1991] NZLR 151. In that case the then Labour Court, acting on principles laid down by the CA, awarded $5,000 compensation to an employee dismissed for genuine redundancy: [1990] 3 NZILR 836. Cooke P regarded the absence of any express provision in the ECA reversing the decision as indicating either a positive intention not to do so or that the question was not considered (p.252).

This is not cogent. *Hale* was decided under a very different legislative regime, the Labour Relations Act 1987. It is beyond argument that the purpose of the ECA was

to radically reshape the operation of the labour market. Against that background, for the highest court in the land to base a major decision, the tenor of which is contrary to the whole thrust of the ECA, on the absence of an express provision overruling one particular authority is not an exercise which inspires confidence.

Cooke P adverts to the possibility that *Hale* was overlooked. It is at least as likely that, in common with much other case law, it was regarded as no longer relevant. The ECA has numerous provisions dealing with personal grievances and several on redundancy. None of them provides any ground for supposing that the legislative intention was to preserve a redundancy jurisdiction so at odds with the objects of the Act. (Indeed, one of them, s.46(3), specifically removes jurisdiction from the Tribunal and the Court where the employment contract deals with redundancy but omits either the level of compensation or a formula for fixing it.) Even if so unlikely an intention were present, it strains credulity to believe that it would have been manifested with the degree of tortured obscurity attributed to the legislature by Cooke P.

The common argument that if X was what was intended, it would have been easy enough for the legislature to say so, leads nowhere, for it would have been just as easy for the legislature to say the opposite: that X was not intended. Surely a more constructive approach, if any ambiguity appears, is to choose the meaning in closest conformity with the general objects of the statute, not strive with ingenuity to deduce a meaning at the furthest remove from those objects. Particularly is this so where, as in the ECA, the objects have been spelt out with care and accurately describe the substantive provisions.

By conditioning their approach on the unacknowledged assumption that the ECA should be read as making the smallest change in the law in any way compatible with the express provisions of the statute, and using that approach as a means of introducing a false implied term into the employment contract, the majority in *Brighouse* succeeded in contradicting the Act as well as the contract. In so doing the CA exceeded the judicial function and placed itself above parliament in the formulation of social policy.

Kerry Smith, unreported, 20 March 1995 (Employment Court)

The *Kerry Smith* case has been referred to already and a passage from the unanimous judgment of the Full Court commented upon adversely as exceeding the judicial function. The plaintiff Smith had been employed as a television broadcaster by the defendant for a one year term. Negotiations for a new contract were unsuccessful, the

term expired and Ms Smith's employment ceased. She then sued on the alternative grounds of personal grievance and breach of contract. She failed on the facts, the Court deciding that her predicament was her own fault.

In the present context the significance of the case lies in the reasoning applied to a fixed term contract as a matter of law. It has much in common with the *Brighouse* approach and accordingly is open to the same criticisms. It is similarly remarkable for the lack of importance it attaches to the most relevant feature of the contract: that by voluntary agreement between the parties it expired after a fixed term, a common arrangement in the media world.

In this case too the question arose whether the ECA had modified the previous law. Again the Court was able to answer it in the negative by relying on authorities decided under the previous employment regime and finding nothing in the ECA which overruled them: "We conclude that there has not been any substantive change in the established law of fixed term employment contracts as a result of the passing of the 1991 Act" (T/S p.32).

There then follows (T/S pp.32-33) this arresting statement:

> It will be a question in each [fixed term contract case] of determining whether such a contract is indeed for a fixed term at the conclusion of which either party may elect not to continue with or renew the contract without repercussions and, if so, whether that amounts to a personal grievance or an actionable breach of the contract.

We here find yet another of the self-contradictory non sequiturs which seem to abound in New Zealand employment case law. How can the expiration of the term of a fixed term contract conceivably be a breach of that contract? All that the Smith judgment does by way of explaining this oxymoron is cite *Ogilvy & Mather (New Zealand) Ltd v. Turner* [1993] 2 ERNZ 799 (CA). But what that case decided was that the Court had jurisdiction to hear actions for breach of employment contracts. It was not concerned with fixed term contracts in particular and said nothing about them.

Similarly with personal grievance. Notwithstanding the quite extraordinary scope attained by the personal grievance concept under earlier statutory regimes, how can the mere expiry of the duration of a fixed term contract possibly be in itself a grievance of any kind? How can it possibly be a dismissal, constructive or otherwise, let alone an unjustifiable one?

In the case of personal grievance the answer is, of course, that the Court has no intention of allowing any fixed term contract to take effect according to its terms unless it accords with what can only be called the Court's own social agenda, however incompatible with the objects of the ECA. This becomes obvious from the Court's statement of no less than five grounds on which a fixed term contract will not expire against the will of the employee at the end of its term (T/S p.35). They are a remarkable collection.

Three of them take out of the hands of the employer the power to make his or her own business decisions. Anything more contrary to the ECA would be hard to imagine. If the employer wants the contract to take effect according to its tenor he or she must demonstrate that the fixed term "genuinely" relates to "operational requirements", that there was a "genuine" reason for a fixed term in the first place, and that the question of whether that need still existed on the expiry date has been considered.

A fourth ground relates to promises, express or implied, of renewal and legitimate expectations of the employee. The fifth is another oxymoron: termination brought about by wrong motive or unfairness. Expiry of a fixed term contract has nothing to do with motive or fairness. It has everything to with the calendar.

The Lesson

The decisions in *Kerry Smith* and *Brighouse* stand well together as illustrations of the manner in which a judiciary which is manifestly out of sympathy with the policy of a statute can blunt its effect and frustrate at least some of its purposes. They illustrate also the disconcerting extent to which, in the process, reliance can be placed on arguments which are demonstrably in error.

RELATED ISSUES

Brighouse and *Kerry Smith* alone would justify disquiet about, and dissatisfaction with, the trend of interpretation of the ECA in the Court and the CA. They are, however, by no means the only evidence that all is far from well.

A joint report by the New Zealand Business Roundtable and the New Zealand Employers Federation in December 1992 ('the Joint Report') undertook a detailed survey of the course of decisions up to that date in the Labour Court, the Employment Court, and the CA. The results are notable, particularly if one bears in mind that the

ECA had been in force for a mere 18 months and that initially the employment jurisdiction was mostly taken up with litigation started under the previous Act.

The picture which emerges is one of continuity of approach in spite of the sharp change of statutory policy. This is consistent with a judicial policy of minimising the impact of the ECA. In abbreviated form, the report's main conclusions and recommendations were as follows.

- The need for the Employment Court, as opposed to the High Court, should be reviewed.

- The ECA should be amended to give proper weight to contractual provisions in unjustifiable dismissal personal grievance cases.

- Compensation for procedural irregularity in otherwise justifiable dismissal should be limited.

- Non-contractual redundancy compensation should be abolished.

- The ECA should be amended to confirm the validity of fixed term contracts.

- The ECA should be amended to validate dismissal on contractual notice.

(i) Separate Employment Jurisdiction

Although specialist courts can be argued in theory to have advantageous special skills, the countervailing disadvantage is their tendency to take too narrow a view of the issues that come before them. One obvious reason for this is that their members are more likely to be appointed from among people who have already established themselves in that particular field. A quite clubby atmosphere usually surrounds the process of appointment.

Also, precisely because its membership is specialised and its jurisdiction correspondingly limited, such a court is likely to have difficulty in attracting persons of the highest judicial quality because they do not want to be so restricted in their work. Such influences unduly limit both the range of potential appointees and the court's frame of intellectual reference. Employment courts, or labour or industrial courts, have proved to be vulnerable in these respects.

A further problem to which a specialist court may give rise, and certainly will give rise if, as in the case of the Employment Court, its jurisdiction is exclusive, is the judicial version of a demarcation dispute. This is litigation which raises the question whether the facts or the remedy sought fall within the jurisdiction of the specialist court or the primary court of general jurisdiction.

In the case of the Employment Court and Tribunal, s.3(1) of the ECA provides that their exclusive jurisdiction comprises any proceedings "founded on an employment contract". This creates artificial distinctions because by no means every circumstance relevant to an employment situation is founded on the employment contract. Particularly prominent examples are protection of confidential information and restraint of trade.

As Hammond J observed in the High Court in *Laser Alignment (NZ) 1984 Ltd v. Scholz* [1993] 2 ERNZ 250, 257, "the present law protects confidential information and business advantages in various ways in contract, tort, equity and (perhaps) as property interests." In that case the agreement between the parties included a restraint of trade clause which the plaintiff was seeking to enforce by interlocutory injunction. The objection was raised that the High Court lacked jurisdiction because the application was founded on an employment contract.

The objection failed because the defendants were not employees of the plaintiff but independent contractors. Nevertheless, the case illustrates the hazards imposed on litigants by the divided jurisdiction. Had the trial judge come to the opposite conclusion, the defendants would have won on a technical point which had nothing to do with the merits of the case. As Hammond J further observed (p.257), the present situation produces "a result unhappily redolent of 19th century concerns, so far as the development of the law is concerned."

Medic Corporation v. Barrett [1992] 2 ERNZ 1048 was another High Court restraint of trade case. The same objection was advanced before Temm J and similarly failed, although on a different ground. His Honour held that the action was not founded on the employment contract but on confidential information. That finding enabled him to put the restraint of trade clause in the employment contract aside and proceed instead on the protection of confidential information in equity. This meant incidentally that he had no need to consider the employee/independent contractor distinction.

These cases illustrate yet another aspect of the undesirability of divided jurisdictions. Although the legal character of an employment contract makes it necessary from time

to time for a court to decide whether the claim before it stems from that source or from some other cause of action, it is obviously in the public interest that all related issues should be decided in the same proceeding.

The present situation harks back, as Hammond J pointed out, to the old forms of action mentality in which procedure tended to prevail over substance. This is against the whole trend of legal development in the 20th century. Plaintiffs should not be required to take the risk that they have chosen the wrong court. Defendants should not be encouraged to engage in forum shopping, which is trying to shop around for the most favourable court.

Both cases illustrate also an incidental, but nonetheless undesirable, feature of the separate employment jurisdiction. This is the evident tension to which it has given rise between the High Court and the Employment Court. It is hardly surprising that each is quick to find reasons why a proceeding that comes before it is within jurisdiction. Unfortunately, it is also no surprise to find the two courts in open disagreement about the scope of the Employment Court's powers: see *Medic Corporation* at pp.1062-1065, and *Diamond Advertising Ltd v. Brunton* [1992] 2 ERNZ 777 (HC).

Neither is there anything odd about the fact that employers will take any opportunity that presents itself to sue in the High Court rather than the Employment Court. For historical reasons, an employment jurisdiction can be expected to be much more receptive to the employee or trade union case than to an employer's commercial concerns, although the latter are more likely to be economically beneficial to society at large, including employees. This only exacerbates the other unfortunate consequences of the exclusive employment jurisdiction.

The difficulties of interpretation of the ECA which are being encountered at the Employment Court level undoubtedly owe much to over-specialisation. It is perhaps understandable that a court which has for so long, under one name or another, presided over a jurisdiction heavily weighted in favour of employees and trade unions, at the expense of employers and the economy, should find it difficult to adapt to a change as radical as the ECA. But the present situation can hardly be the result only of difficulty or even lack of ability. The interpretations now being made of the ECA are so improbable as to suggest outright unwillingness to adapt.

In this situation there are at least two reasons why the jurisdiction of the Employment Court should be removed to the High Court. One is the disadvantages common in greater or lesser degree to all specialist courts. The other is the way in which the

Employment Court has exercised, and continues to exercise, its jurisdiction under the ECA. In order to establish and maintain a more balanced judicial accommodation than is the case at present between commercial considerations on the one hand and labour relations on the other, the employment jurisdiction should be transferred to the civil jurisdiction of the High Court and not placed in a separate division.

The view taken in the Joint Report is that the Employment Tribunal should be retained. No doubt there are useful non-legal functions that it can perform. Mediation and arbitration by consent are examples. Some or all of its adjudicatory powers, however, should be reconsidered in order to remove any appearance of its operating in a manner equivalent to a trial at first instance in the High Court.

There is no reason why the Tribunal should not be subject to judicial review in the High Court. But if New Zealand opts for an Appeal Division of the High Court, with a further appeal by leave to the CA on questions of law, an application to the High Court from the Tribunal should not count as an appeal for the purposes of the two-appeal debate.

I understand that a practical obstacle to abolishing the Employment Court is the strength of feeling about what provision to make for its current personnel. This is not a matter on which I should comment beyond expressing reluctance to accept, as I have been given to understand, that personal feelings may render the problem insoluble. The public interests at stake are of an order which require generous, but nevertheless firm, action.

Similarly, I do not think I should express an opinion about the impact of abolition of the Employment Court on High Court resources beyond the observation that to a large extent one would expect the matter to be covered financially by the money saved from the Employment Court.

(ii) Personal Grievance: Unjustifiable Dismissal

The Joint Report recommends (pp.43-45) the addition of six subsections to ECA s.27, which defines "personal grievance".

The effect is to make considerably more explicit the significance the courts are intended to attach to the text of employment contracts. This would be an important reform. Unjustifiable dismissal is by far the most frequent complaint in personal grievance actions.

Since the Employment Court is as sympathetic to such claims under the ECA as the Labour Court was under the previous Act, the personal grievance jurisdiction makes the dismissal of an employee in accordance with a contract financially hazardous. The inevitable result is that employers are put under pressure to pay money they do not owe in order to avoid a grievance action. This impedes flexibility in employment and so diminishes the economic benefits intended to be conferred by the ECA.

(iii) Procedural Fairness

The concept of procedural fairness requires the employer to exercise substantive rights, typically to dismiss, in a fair and reasonable manner, as opposed to simply exercising them. It is not illogical in theory for actionable fault of this description to co-exist with substantive justifiability. The weakness of the concept in practice, however, is that it can be readily used, and has been so used, as a basis for awarding liberal compensation even though substantive fault cannot be proved. This makes a mockery of the law.

The position taken in the Joint Report, on the basis of a survey of relevant cases (pp.8-13), leads it to recommend (p.45) amendments to ECA s.40 which would have the effect in dismissal cases of limiting procedural compensation to injury caused by the manner of dismissal as opposed to the fact of dismissal. They would also direct the Court or Tribunal's attention to matters which were the fault of the employee and to material facts whether they were known to the parties at the time or not.

The latter provision seeks to inhibit ad hoc judicial imposition of duties on the employer to convey to the employee apparently immaterial items of information. Retrospective imposition of such duties provides a convenient peg on which to hang compensation not otherwise available. The popularity in both the Employment Court and the CA of the doctrine that procedural fairness cases turn on their own facts is explained by its usefulness in facilitating such devices. The normal process of reasoning requires the outcome of a case to be determined by a comparison of the facts with applicable rules of law and similar past cases. If it is only the particular facts that matter, the court can do what it likes, free of legal restraint.

Such amendments would undoubtedly improve the position considerably, but they do not remove scepticism about the whole procedural irregularity situation. The vocabulary of personal grievance, unjustifiability, distress damages, humiliation and the like has become so familiar in the employment jurisdiction that it arouses no

surprise. Nevertheless, it is the language of a socially judgmental sentimentality which would not be amiss in a Dickensian novel. No one, it now seems, should so much as have feelings hurt without generous compensation - an odd state of affairs in so forthright a nation as New Zealand.

Procedural unfairness should be dispensed with altogether in this context because it is too readily misused and undermines the concept of substantive fault.

(iv) Redundancy

The Joint Report's recommendation that non-contractual redundancy compensation should be abolished is covered by the proposed additional subsections (7) and (8) to ECA s.27. These have been mentioned already under point (iii) above on personal grievance. Commentary on the present position appears above in the discussion of *Brighouse*. Non-contractual redundancy compensation by way of procedural unfairness is a truly remarkable perversion of both principle and logic.

(v) Fixed Term Contracts

The aim of the Joint Report's recommendation with respect to fixed term contracts was to ensure their validity and protect them from unjustifiable dismissal claims (p.46). In the light of *Kerry Smith* the proposed amendments may have to be extended to protect them from procedural unfairness compensation. This would not be necessary if procedural unfairness claims were abolished, as they should be.

(vi) Dismissal on Notice

Here again one encounters a direct contradiction of concepts. At one and the same time it can be lawful for a contract of employment to provide for termination on notice and yet unjustifiable dismissal for an employer to so act. The situation is nonsensical. Provided that the contract is not vitiated by fraud or coercion, and the employer complies with the contract when giving the notice, there cannot possibly be a breach of the mutual trust obligation. It is blatant judicial legislation to hold otherwise.

The Joint Report (p.46) proposes a new section for insertion into the ECA to compel the courts to accept the obvious. An amendment to that effect is highly desirable.

NEGOTIATION AND COMMUNICATION

This report was virtually complete when Chief Judge Goddard published his now notorious judgment in *Ivamy v. New Zealand Fire Service Commission,* as yet unreported, 14 July 1995 (WEC 44/95). At the time of writing the case is on its way to the CA and the New Zealand Employers Federation has applied to be joined as a party. Neither the fact of the appeal nor the application can have caused any surprise. Even the Chief Judge himself felt obliged to attempt an explanation of some of his observations two weeks later in *Ford v. Capital Trusts Ltd,* as yet unreported, 28 July 1995 (WEC 50/95) (T/S pp.18-19).

Ivamy arose from an incident during negotiations for new employment contracts for professional firefighters. The employer was the defendant Commission. Negotiations had been under way for about a year. The employees had authorised their union to represent them in the negotiations in accordance with Part II of the ECA. The Commission suspected that the union was not keeping the employees properly informed about the course of the negotiations. It decided, therefore, to make a direct approach to the employees by circulating its own account. It also sent material to the media.

In order, presumably, to prevent the union from intervening, the Commission devised a carefully timed but rather complicated scheme of distribution which would not have disgraced the *Fawlty Towers* television programme. It duly broke down catastrophically. Litigation ensued aimed principally at preventing the Commission from making any further attempt to communicate with its employees about the negotiations, either directly or through the media.

There is much in Chief Judge Goddard's 56-page judgment with which one could take issue, not least his consistent willingness to find against the Commission on almost every question that arose. Certainly the Commission had done nothing to help itself by devising the ludicrous distribution plan, but surely there was no need to look beyond conspiratorial incompetence to explain it, still less to attribute unworthy motives. Similarly, the astonishing disapproval expressed of the very idea that an employer should regard a union "as an opponent of notions that it wanted its staff to accept and, therefore, as an obstacle to the acceptance of those notions" (T/S p.14). What on earth, one asks oneself, is wrong with that?

Notwithstanding disquieting oddities like these, and resisting the temptation to take issue also with much of the judgment's legal content, the main point is easily stated.

The relevant ECA provision is s.12(2):

> Where any employee or employer has authorised a person, group, or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall ... recognise the authority of that person, group, or organisation to represent the employee or employer in those negotiations.

That subsection unambiguously refers to the conduct of negotiations through a representative. Its obvious meaning, consistent with the philosophy of the ECA, is that if either party chooses to negotiate through a representative, the other party is not entitled to ignore that choice and seek to negotiate directly.

The subsection says nothing whatever about communication. In particular, subject to standard safeguards against undue pressure (eg ss.8, 57), neither here nor anywhere else does the ECA evince the the slightest intention to constrain communication between employer and employee merely because negotiations are in train which involve one or more representatives. Having regard to the length of time that negotiations sometimes take, any other course would be wholly impractical.

Yet in *Ivamy* Chief Judge Goddard managed to decide that for the Commission to seek to put its point of view directly to its own employees instead of through the union was a failure to recognise the authority of the union in the conduct of the negotiations. The judgment aroused an immediate storm of protest, and rightly so. Such a finding effectively confers on the employee representative, usually a union, a power of censorship or veto over information relating to the negotiations reaching the employees from the employer.

A situation in which one side is gagged renders the use of the word 'negotiation' derisory. It is also impossible to reconcile with the ECA otherwise than by treating the Act as a caricature. Further, there are freedom of speech implications, particularly under ss.14 and 29 of the New Zealand Bill of Rights Act 1990. The Court's attention was drawn to these sections, but they receive mention in the judgment (T/S pp.30 and 47) only in aid of the plaintiffs.

It comes as no surprise to read towards the end of the judgment (T/S p.50), in the context of the media releases, the following typically dismissive, not to say speculative, observations:

> There is no force in the complaint that it is somehow unfair that the union can make [public] statements about the negotiations but the employer cannot. The

> answer, of course, is that the union may have the employees' consent to make the disclosure, while the employer does not.

The word "disclosure" proceeded upon an incorrect understanding of the law of privacy in New Zealand which produced a correction by the Privacy Commissioner, reported in the press generally on 14 August 1995. This was what led to the attempted explanation in *Ford v. Capital Trusts Ltd,* referred to above (T/S p.18).

In *Ivamy* Chief Judge Goddard argues that his decision is a natural extension of a line of cases on s.12(2) traceable through *Adams v. Alliance Textiles (NZ) Ltd* [1992] 1 ERNZ 982; *Service Workers Union of Aotearoa Inc v. Southern Pacific Hotel Corporation* (NZ) Ltd [1993] 2 ERNZ 513; *Eketone v. Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783; and *New Zealand Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1994] 2 ERNZ 93. But in truth it goes well beyond them.

The *Ivamy* judgment takes misinterpretation of the ECA in the Employment Court to a new level, a level at which it does tangible harm to the legal system itself and very probably consequential harm to the economy and to society generally. It is a level also at which legislation is ceasing to have meaning, which strikes at the very operation of government.

It is possible that even in the Employment Court, at all events in relation to s.12(2), there is some unease about Chief Judge Goddard's approach to the ECA. My latest information derives from *Couling and Others v Carter Holt Harvey Ltd,* as yet unreported, 15 September 1995 (AEC 83A/95), an application before Colgan J for an injunction to restrain communication with employees.

After taking into account the same line of authority as the Chief Judge, and adding *Ivamy* and *Ford* to it, His Honour found firmly in favour of the defendant company. He was assisted in doing so by the manifest reasonableness of the employer's conduct and what he rightly termed the "extraordinary factual situation" in *Ivamy*. The judgment comes nevertheless as a relief, albeit only a minor one. Let us hope that it proves to be a better guide to the future of the ECA in the courts than *Ivamy*.

CONCLUSIONS

There are at least two reasons why the ECA, although it clearly has made a considerable impact on the labour market and the New Zealand economy, is not

working as well as it could and should. This study has mainly concentrated on the most spectacular of them, the quite extraordinary resistance to implementation of the Act manifested by a section of the judiciary.

The best solution to that would be to abolish the exclusive employment jurisdiction and the Employment Court and modify the powers of the Tribunal. For such a measure to be effective and not a mere figleaf, care would have to be taken not to re-create the Employment Court in the guise of an employment division of the High Court.

The other reason why the ECA has not worked as well as it could is that, as a matter of drafting, the statute is capable of improvement. The use of unfamiliar and undefined expressions like "founded on" in s.3(1) and "based on" in s.19(4), intended no doubt to give flexibility to a provision, usually obscure rather than illuminate. Drafting improvements, whether of this kind or any other, could make judicial interventionism of the kind referred to in this review significantly more difficult.

ADDENDUM

After the foregoing analysis had been completed there were made available to me the CA judgments in *Capital Coast Health Ltd* v. *NZ Medical Laboratory Workers Union Inc* (CA 216/94), delivered on 26 October 1995, and *O'Brien* v. *Guardian Alarms (Auckland) Ltd* (WEC 67/95), delivered on 17 October 1995, before Goddard CJ.

Capital Coast (CA)

The main judgment in this appeal was delivered by Hardie Boys J, Cooke P and Gault J concurring. The Employment Court, constituted by Goddard CJ and Judge Travis, had granted an injunction against Capital Coast requiring it to comply with ECA s.12(2) when conducting negotiations with a union for a new collective employment contract. It was a curious document, for instead of enjoining particular conduct, in substance it merely restated the law. Not surprisingly the CA let it stand. The higher court could hardly set aside such an impeccable, albeit superfluous, order.

The Court had also made two declarations. The second one found Capital Coast to have been in contempt of court by failing to comply with an undertaking it had given. This too was a curious document. It consisted of two long sentences. By the first Capital Coast undertook not to engage in direct negotiation with its employees as long as they were represented by the union. That was merely an undertaking to obey the law, similar in character to the subsequent injunction.

The second sentence was a vague list of things that Capital Coast could nevertheless do, and hence was not an undertaking of any description. For the purpose of the appeal its importance was that the contempt finding was based on an aspect of Capital Coast's conduct which did not fall within any of the exceptions in the second sentence. As the CA observed (T/S p.23), that was not the point. The point was whether the relevant conduct amounted to direct negotiation, which in the opinion of the CA it did not.

The first of the two declarations was that an instruction given direct to the employees by Capital Coast to attend a meeting was unlawful as a breach of s.12(2). This was not challenged. In the result therefore, the contempt finding was set aside and on the face of things the decision of the Employment Court was left substantially undisturbed. The significance of the CA judgment, however, seems to be much greater than that.

In a remarkable passage (T/S p.2, judgment of Hardie Boys J) the CA comments with clear disapproval that the original dispute had been minor and unnecessary and had got out of hand. The passage continues: "The manner in which the Employment Court's judgment was expressed could only have exacerbated the situation." The existence of that Court, be it remembered, is said to be justified by its supposed expertise in labour relations. It was left to the CA itself to make the obvious suggestion that the parties accept mediation.

Later in the judgment (T/S p.20) the CA observes that the ECA "must be seen as essentially practical legislation designed to deal with everyday practical situations. It is not appropriate to subject it to esoteric analysis or to draw fine distinctions in its application ... it is a matter in each case of striking a balance between the competing rights of the parties - those of the employer under s.14 of the Bill of Rights Act, and those of the employee under s.12" of the ECA.

As the reference to the freedom of expression provision in s.14 of the Bill of Rights Act makes clear, that passage has to be read in context. Nevertheless, its general tenor is of wider application in ECA litigation. If the evenhanded common sense of the CA judgment in *Capital Coast* had been more in evidence in the wider labour law context over the past four years, many, and perhaps most, of the criticisms expressed in this report need not have arisen.

As applied to the particular communications at issue in *Capital Coast*, it arrives at a distinction between interference in the negotiating process, on the one hand, and disseminating factual information, on the other, which strikes one, with respect, as eminently constructive. Let it be hoped that in years to come this judgment will be seen as marking the beginning of a lasting change of direction in labour law.

Guardian Alarms

My attention has been drawn to this case by reason of the last paragraph of the judgment of Goddard CJ. Although the litigation does not bear directly upon any of the matters raised in this report, that paragraph is indeed worthy of note in passing. The case concerned holiday entitlements and the effect of s.7A(1) of the Holidays Act 1981, apparently another familiar labour law topic.

On the facts the Court was constrained to find in favour of the employer. Having done so, Goddard CJ then proceeded to mention an argument which in his view would have dictated the opposite conclusion but on which he did not rely because it had been put by neither side. This was that the employment contract in question was invalid by virtue of s.33 of the Act because it did not comply with s.7A.

That reading of the situation depended on the proposition that s.7A confers an absolute entitlement which cannot be varied in any particular by contract. It is hard to see as a practical matter (the approach approved by the CA in *Capital Coast* in respect of the ECA) how that could have been the statutory intention. It is just as difficult to follow how Goddard CJ was able to arrive at the conclusion, as he did, that his view of s.7A is supported by the CA decision in *Labour Inspector* v. *Telecom Networks & Operations Ltd* [1993] 1 ERNZ 492.