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SYMPOSIUM

The Specialist Institutions: the Employment Court and the Employment Tribunal

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Introduction

This issue of the *Journal* contains a symposium looking at number of features of the specialist institutions created by the Employment Contracts Act 1991. The issue contains papers written by both the Chief Judge of the Employment Court and the Chief of the Employment Tribunal. These papers provide a perspective from two persons at the centre of the day to day operations of the two institutions. There are also three papers by other commentators who examine a number of different aspects of the institutions, but particularly of the Employment Court.

Robertson's paper questions the need for a specialist court such as the Employment Court and argues that since the passage of the Employment Contracts Act there are no special characteristics of labour law that justify the continued existence of the Court. The paper examines a number of arguments put forward in 1991 and argues in turn that these are mistaken. Robertson's paper is of course extremely topical given the ongoing debate, generated primarily by the Business Roundtable[1] and the Employer's Federation, as to whether the Court should be abolished.

Skiffington's paper (written before the recent Court of Appeal decision in *Fire Service Commission v Ivamy*) concentrates on the manner in which the Employment Court has developed the law relating to collective bargaining since 1991. She makes the point that the Employment Contracts Act in fact provided very little guidance on this matter, and that as a consequence the courts were faced with having to develop the law from the very limited body of legislative indicators provided by Parliament, and were required to act within a less than certain or stable legal situation. Skiffington concludes that, contrary to what many argue, the

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1 For example in the Roundtable sponsored seminar held in late 1995. For a note on this seminar see Anderson, G. (1996).

the Court has managed to carry out this task in a way that has maintained a dynamic equilibrium where the scales of dissatisfaction are fairly evenly balanced.

The final paper by Morris reports on a project concerning potential gender bias in the decisions of the Court. Gender bias, and indeed the whole topic of women's access to justice, are issues that are currently of central concern in legal debate. Indeed the topic is currently one that is under active investigation by the Law Commission. On the basis of a study of decisions of the Court, Morris concludes that there is no apparent evidence of gender bias in decisions but that in some cases there may be concerns in the way compensation for humiliation is approached. She also makes the point that the mediation process is one that may have benefits for women and might better deal with the way in which women approach conflict.

The debate on the institutions

This issue of the *Journal* appears at a time when there is a strong and continuing debate over the role of the specialist institutions and in particular that of the Employment Court. The clearly stated intention of the new-right, articulated through the Business Roundtable and the Employers Federation, is to achieve the abolition of the Employment Court. The level of this debate and the nature of the debate are possibly without precedent in both the personal nature of much of the campaign and in the duration and intensity of the debate. One might pause to ask why the debate has reached this level of intensity. Given the focus of this issue it seems appropriate that some attempt should be made to consider the nature of the debate over the institutions and to comment on the future of the institutions.

The development of the institutions

Specialist institutions to deal with industrial disputes are of course nothing new in New Zealand; nor are they unique to New Zealand. Indeed specialist institutions, be they courts or some other form of tribunal, tend to be the rule in developed industrial societies. In the case of New Zealand there has been a separate court to deal with many industrial relations issues since the passage of the Industrial Conciliation and Arbitration Act 1894. As the industrial relations system evolved over time, both labour law and the institutions have themselves evolved in their structure and their functions as they adapted to meet changing economic and social circumstances. These changes have been particularly apparent, and increasingly common, in the years since the Industrial Relations Act 1973.

In retrospect, at least in legal terms, the Industrial Relations Act 1973 marked the beginning of the transition from the traditional conciliation and arbitration system to the current system. It was that Act that first drew a clear distinction between disputes of rights and disputes of interest. That Act also created three institutions, an Industrial Commission to deal with disputes of interest, an Industrial Court to deal with disputes of rights and the Mediation Service to aid the parties to industrial conflicts in resolving those disputes. The Mediation Service was also given a central role in the system of dealing with personal grievances, a new remedy introduced by that Act. Although the Court and the Commission were subsequently

recombined, for no particularly obvious reason, a few years later the division was reintroduced in the Labour Relations Act.

Given the changes in the industrial relations system and especially the move to direct collective bargaining, the changed nature of the institutions seems both obvious and inevitable. The new industrial relations system left interest matters largely to the parties to an award to settle collectively, but rights matters became the subject of new procedures designed to avoid work stoppages and to allow the legal rights of the parties to be tested through a judicial process. Clearly this required judicial institutions. The Employment Contracts Act brought about a further reform in the approach to industrial relations. The old award system, industry bargaining and the central role of unions were repealed and replaced by a more contract oriented legal structure with a focus on the individual contract of employment and on enterprise bargaining. The nature of these changes is well known and does not need elaboration here. The coverage of the Act also widened significantly as all employees were brought within its scope and as a consequence the jurisdiction of the Court and Tribunal were expanded to give them jurisdiction over the bulk of employment based disputes.

The debate on the abolition of the Court

At the time of the passage of the Employment Contracts Act there was considerable debate over whether the specialist employment institutions should be retained. That particular debate was eventually settled in favour of retaining such institutions. Nevertheless the debate over the future of the institutions appears to continue with undiminished vigour. In considering this debate it is important to note that the changes in the Employment Contracts Act were not only contentious, but the nature of the changes are still subject to considerable debate. This is especially so when considering the extent to which the changes gave effect to the extreme new-right position advocated by the Business Roundtable. It seems apparent, however, that the new-right failed to achieve all they would have wished when the Employment Contracts Act was passed, they were unable to accept that the Act was the result of political compromise and the need to adapt to political realities. This appears to have been particularly so in relation to the Government's unwillingness to abolish the specialist institutions and to enact an employment at will regime - understandably as employment at will would have effectively destroyed whatever bargaining power and employment security workers have continued to enjoy since 1991.

Instead of accepting the nature of the legislation that was passed the new-right have chosen instead to blame the messenger and to see the Employment Court in particular as actively undermining the legislation. The Employment Court has therefore been forced to interpret the new Act in an extremely political and increasingly hostile atmosphere and one dominated by unjustified attacks on the Court. The attitude of the new-right was summarised by one of its advocates Howard (1995) in the following terms:

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.

The nature of such new-right arguments, and the fallacies they contain has been noted by the present writer on several occasions (Anderson, 1995, 1996) and there is little point in repeating them in detail. What is worth repeating is that whatever faults there were in the drafting of Parts I and II of the Act they were not the responsibility of the courts. Both the Employment Court and the Court of Appeal have struggled to give content to those provisions. In doing so they have taken into account that, while the overall object of the Act is the promotion of an efficient labour market, that object is qualified by a number of subsidiary objects in both the objects clause, and in the objects clauses to the various parts of the Act. These include in particular the promotion of freedom of association and allowing various choices in relation to contractual negotiations, including that of collective bargaining. In labour law, freedom of association has a clear meaning that has long been accepted internationally and of which Parliament was presumably aware. If the law is to be changed, it is for Parliament to do so and not for the courts to implement the political agenda of one vocal interest group.

Conclusion

With an election looming and the attack on the Employment Court continuing, it is not a good time to attempt to predict the future of the institutions. What can be said with confidence is that over the years the institutions have served the country as well as they were able in an area that always has been, and no doubt always will be, highly politically charged. Often the institutions have had to carry out their functions in an environment where governments have been unwilling to act. For this they must be commended and, perhaps most importantly, so must the members of those institutions who over the years have had to personally bear the brunt of the attacks on the institutions. The institutions deserve to continue; they have worked well and efficiently. If they are abolished it will be because of politics, not because of their own qualities.

References

Anderson, Gordon (1996), *Specialist Courts and the Interpretation of the Employment Contracts Act*, Employment Law Bulletin, 10-13.

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Howard, C. (1995), *The Interpretation of the Employment Contracts Act*, Wellington: Business Roundtable.