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The Employment Tribunal and the Employment Court

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In the controversy that has accompanied the introduction of the Employment Contracts Act 1991, appreciation of the significant jurisdictional changes made by the legislation have understandably taken second place to the expression of wider concerns. The aim of this note is to examine aspects of the new Employment Tribunal and Employment Court within the overall framework of the 1991 Act. At the time of writing, the relevant Part of the 1991 Act has yet to come into force.

1. The options paper

When the Employment Contracts Bill was introduced into the House, the Government asked the Labour Select Committee to examine 3 "outstanding" issues. These were the application of the personal grievance procedures, the role of the Labour Court, and the role of the Mediation Service (Minister of Labour, 1991). Four "institutional options" were presented. First, that the Labour Court and Mediation Service be retained. Secondly, that there be a specialist lower tribunal with retention of the Labour Court. Thirdly, that there be a specialist lower tribunal with appellate rights to the High Court. Fourthly, that there be no provision for any specialist institutions.

The adoption of the second option in the Employment Contracts Act 1991 followed a recommendation by the Department of Labour to the Labour Select Committee, the Department commenting that:

> This option offers the advantage of continuity at the higher level and the opportunity to design a tribunal at the lower level to meet the dispute resolution needs of the parties in the new environment. With the appropriate structure at the lower level, the option could provide an adequate, flexible, and comparatively inexpensive dispute resolution process for employment matters. This option also addresses the perceived difficulties in having one person both mediate and then potentially arbitrate over the same matter (Department of Labour, 1991).

Given the partisan nature of the Employment Contracts Act 1991 it seems reasonable to suppose that the absence of any union submission expressing a preference for this option (Department of Labour, 1991) would also have been perceived - in the "new environment" - as being in its favour. The following note will focus on the new Employment Tribunal, contrasting its role and functions with the role of those people chairing committees under the Labour Relations Act 1987, and the contrast between the role of the Employment Court and that of the Labour Court. Part VI of the Employment Contracts Act 1991, which established the new institutions, comes into force on 19 August 1991. The Tribunal and the Court will have exclusive jurisdiction to hear and determine any proceedings founded on an employment contract, although the parties may

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agree to have their differences resolved otherwise than by reference to a court or tribunal (s.3). The intention was to create a single employment law and jurisdiction (Department of Labour, 1991).

The meaning of "founded on" on this context is obscure and will no doubt be tested in litigation in the near future. Would it, for instance, confer jurisdiction on the Court to restrain picketing which interfered with the performance of a contract of employment? The tort of nuisance, the tort usually invoked in picketing cases, is not one of the listed torts over which the Court has jurisdiction, and even then the jurisdiction is only for purposes of strikes or lockouts. Is there the jurisdiction for inducement of breach of contract outside the context of industrial action such as where employer A induces employees of employer B to break their contracts and join A's employ? Or for the tort of conversion by an employee of employer B in the last example if, as often happens in such cases, one or more of the departing employees takes employer B's files or computer records as an introductory gift for employer A)? It would not seem to be inconsistent with the general aim of creating a "single employment law" to remove such ancillary matters from the jurisdiction of the ordinary courts. Concurrent jurisdiction may seem unsatisfactory where related claims based upon the same set of facts must be pursued in different tribunals based upon the same set of facts, particularly when the choice of forum may affect significantly process and outcomes (Burrows, 1991). Yet the right of access to the ordinary courts would thereby be undercut without express statutory authority. Whether this is to be a significant aspect of the Act in certain respects remains to be seen.

2. The Employment Tribunal and mediation

According to section 76(c) of the Employment Contracts Act, the object of the creation of the Tribunal is to establish a "low level, informal specialist Employment Tribunal to provide speedy, fair, and just resolution of differences between parties to employment contracts, it being recognized that in some cases mutual resolution is either inappropriate or impossible". The Tribunal is also the source for "appropriate services" (i.e. mediation) to facilitate mutual resolution by parties to employment contracts of differences that arise between them (s.7(b)).

The Tribunal, then, has both mediatory and adjudicatory jurisdiction. In performing its general functions the Tribunal may provide mediation assistance ("in order to facilitate agreed settlements of differences between the parties to employment contracts") or adjudicate a settlement of differences between those parties (s.78(3)). The rules relating to mediation are flexible. The provision of mediation assistance is not confined to matters within the formal jurisdiction of the Tribunal, neither is a formal application for such assistance a prerequisite to its being provided (s.78(4)). Nor is mediation a prerequisite to adjudication (s.78(6)). If an application is made to the Tribunal for adjudication, an officer of the Tribunal may determine that the parties be provided with mediation assistance before the application is set down for adjudication (s.80(2)) or the Tribunal may determine - after the matter has been set down for adjudication - that mediation assistance should be provided (s.80(3)).

The Department of Labour had identified a "perceived difficulty" with the old system as being the "combination of mediation and arbitration roles in a single process" (Department of Labour, 1991). The answer, under the Employment Contracts Act is a split in functions. Members of the Tribunal may be designated mediator members, adjudicator members, or members who are both mediators and adjudicators (s.81(1)). However, where the Tribunal is called upon in relation to any particular matter both to provide mediation services and to adjudicate, the same member of the Tribunal must not perform both services (s.81(5)). If nothing more was said, it could have been argued that the Act had met the central criticism of industrial mediation in New Zealand - that it has

always possessed an unsatisfactory "hybrid" quality of "mediation cum arbitration" (Howells and Cathro, 1986). Yet we read on to learn in section 88(2) of the Act that:

> Where a member of the Tribunal provides mediation services within the adjudication jurisdiction of the Tribunal, and as a result the parties conclude a settlement or agree to the member making a decision, the parties may request the member to sign the terms of settlement and in any such case those terms of settlement shall be final and binding on the parties.

Whilst no exception can be taken to the parties binding themselves to a mutually agreed settlement, the reference to the mediator "making a decision" immediately reinforces the New Zealand stereotype of the mediator as arbitrator, with all of the attendant difficulties which such a concept involves (Howells, 1984; Grills, 1985). The opportunity to separate mediation from arbitration, as is the case in other jurisdictions, has thus been lost once again. Option 2, as put into effect, does not fulfil the criterion of the "need to differentiate between facilitative and arbitral functions in disputes" (Department of Labour, 1991). The reference to the terms of settlement being "final and binding" will not, of course, preclude judicial review on established grounds, over which the Employment Court will have jurisdiction (s.105).

It remains to be seen how the new system of mediation will evolve, assuming outsiders will be allowed to observe or monitor it: the Official Information Act 1982 does not apply to information relating to mediation services (s.102). It can be expected that parties will be directed to mediation fairly firmly in many cases, at least at the outset of the scheme. A number of factors will contribute to this. There is a large backlog of cases yet to be dealt with under the Labour Relations Act 1987; due to the extension of the right to bring personal grievances and other disputes to all employment contracts, the Tribunal faces a possible increase in applications, as compared with grievance and disputes committees under the 1987 Act; and there is a lack of any demonstrated commitment to boost resources significantly at the adjudication level. Whether parties so directed will then agree to the mediator deciding the case will, as always, be a question of tactics, in which the relevant factors will vary from the personality of the mediator to the type of case in issue. Some sexual harassment cases, for example, might be seen as more appropriately dealt with in the more private and informal context provided by mediation. Inevitably, for some parties, the temptation to use the mediation hearing as a sounding board for obtaining in advance the other party's likely evidence and stance in the adjudication hearing will prove irresistible.

3. The Employment Tribunal and adjudication

Apart from its jurisdiction to provide mediation assistance, the Tribunal has an extensive adjudicatory jurisdiction in relation to personal grievances, interpretation disputes, recovery of wages, penalty actions, compliance orders and actions for breach of employment contracts (s.79(1)). It has the now familiar jurisdiction to decide such matters in "equity and good conscience" (s.79(2)). For the purpose of any hearing, the Tribunal will consist of one member sitting alone (s.81(2)). Despite the heavily contractual emphasis of the Act, and the likelihood that many interpretation disputes and actions for breach of contract will involve technical contractual points, there is no statutory requirement that adjudicators be legally qualified. The recent appointment to the Employment Tribunal of 4 lawyers, 3 of whom have active experience in the labour law field, perhaps represents some indication that the potential problems are recognized.

Notwithstanding the purported object of providing an "informal" forum for the settlement of employment disputes (s.76(c)), it is a safe prediction that appearances before the Tribunal will be far more formal than those before grievance and disputes committees.

In part, this is dictated by the formal rules as to the appearance of parties (s.90), rehearings (s.91), the power to issue witness summons and hear evidence on oath (s.96), to prohibit publication of evidence (s.97), to award costs (s.98) and to dismiss frivolous cases (s.99). Greater formality will also be necessitated by the new rules relating to appeals from the Tribunal to the Court. Under the Employment Contracts Bill, such appeals would have been restricted to questions of law. The intention was to get the lower body to hear all the issues, avoiding the withholding of evidence at the lower hearing as a "tactical ploy", as occasionally occurred under the Labour Court's jurisdiction to hear cases *de novo* (Department of Labour, 1991). The restriction of appeals to questions of law was not a logical response to this perceived problem, however, and instead the Act adopts an approach previously set out in the Labour Relations Bill 1986 (but not subsequently enacted). In hearing appeals from the Tribunal, the Court must consider only those issues, explanations and facts that were placed before the Tribunal unless it is satisfied that other issues, explanations and facts are relevant to the Tribunal's decision and either that the party seeking to introduce them could not, by the exercise of reasonable diligence, have placed them before the Tribunal or that, because of exceptional circumstances, it is fair to consider them. The onus of establishing the former category lies on the party seeking to introduce the new material (s.95(4)).

It will thus be incumbent on the parties to establish the full facts at the Tribunal level, an exercise which traditionally has been felt to demand formal examination, cross-examination and re-examination of witnesses. This process, and the technical skills associated with supervising it, will require the application of techniques more closely akin to court hearings than to the committee hearings under the Labour Relations Act 1987. This will inevitably increase the length of such hearings as compared with, say, those of grievance committees, so that the Tribunal stage may well come to resemble the 2 to 3 day hearings which were once the usual province of the Labour Court when hearing grievances *de novo*. Nor does the new restriction on appeals seem likely to reduce the length of appeal hearings in the Employment Court (as would have occurred under the original proposal to confine appeals to questions of law). Even a fairly narrow ground of appeal, for example, an appeal against one or other of the remedies awarded, may involve extensive reconsideration of evidence.

Finally, proceedings may be referred or removed to the Employment Court by the Tribunal. The Tribunal may refer a question of law to the Court for its opinion, where such a question has arisen in proceedings before it for adjudication (s.93). Any party to proceedings before the Tribunal may apply to the Tribunal to have the proceedings, or part of them, transferred to the Court for the Court to hear and determine on the grounds either that an important question of law is likely to arise in the matter other than incidentally or that the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court. Leave of the Court may be sought to remove such a case to the Court where the Tribunal declines to so remove it (s.94).

4. The jurisdiction of the Employment Court

The jurisdiction and powers of the Employment Court, set out in section 104 of the Act, are extensive. For present purposes they may be divided into 4 parts. First, there is the Court's appellate and supervisory jurisdiction in relation to the Tribunal, discussed above. Second, the Employment Court retains the Labour Court's familiar jurisdiction over compliance orders and review proceedings, although each of these is modified under the Act, as well as tort actions and injunctions arising from strikes and lockouts. Third, the Court has general jurisdiction to hear and determine any action founded on an employment contract and to make any order in such proceedings that the High Court or the District Court may make under any enactment or rule of law relating to contracts. This power is subject to a significant restriction on the Court's ability to grant such

orders, discussed presently. Fourth, the Court has its much heralded new jurisdiction over "harsh and oppressive" contracts. I intend to concentrate on these last 2 aspects of the Court's jurisdiction in what follows.

Jurisdiction over employment contracts

The most significant addition to the Court's jurisdiction, as compared with that of the Labour Court, will be the cases based upon an alleged breach of the individual common law contract of employment. Of these cases, actions based upon breach of restraint clauses and breaches of the implied term as to fidelity and the duty not to disclose confidential information would appear to be the most significant numerically in New Zealand over recent years (Brown and Grant, 1989). It can confidently be anticipated that circumstances which might have given rise to actions for wrongful dismissal will now be subsumed under the more generous principles relating to unjustifiable dismissal, which is not hampered by the restriction on damages arising from the *Addis* rule (Law Commission, 1991) or the reluctance of the common law courts to reinstate dismissed workers.

At this point some significant jurisdictional questions arise. The Employment Tribunal, as we have seen, has general jurisdiction to adjudicate on all actions for breach of an employment contract. Each of the examples cited above would fall within that category. However, the Tribunal is not given the wider powers conferred on the Court to make orders that may be made by the High Court or a District Court under the general law relating to contracts. Its jurisdiction would therefore seem to be confined in such cases to awarding a penalty for breach (s.52) or a compliance order (s.55). Conversely, the Employment Court, whilst possessing the jurisdiction to make orders in such cases under the general law of contracts, possesses no original jurisdiction to enforce the contract by means of a compliance order (although it may hear appeals from non-compliance with orders made by the Employment Tribunal). The Court's original jurisdiction to order compliance is restricted to ordering compliance with any provision of Part I and Part V of the Act (dealing with "Freedom of Association" and strikes and lockouts respectively), or its own orders and directions (s.56).

The resulting jurisdictional problems can be illustrated by a typical action to enforce a restraint clause and non-disclosure of confidential information. Smith Ltd have contracted with their employee Brown that Brown will not work for a rival company in the same town for a period of one year after leaving Smith's employment. Brown leaves Smith Ltd and immediately begins to work with Jones Ltd, a direct rival in the same town. Smith Ltd wish to sue Brown to enforce the restraint clause and to prevent disclosure of confidential information acquired during the course of her employment.

Under the regime which preceded the Employment Contracts Act 1991, such actions would have been brought in the High Court, with the usual remedies claimed by Smith Ltd against Brown being an injunction and damages. The High Court also possessed power to modify the restraint clause under section 8 of the Illegal Contracts Act 1970 so as to make it reasonable. Jurisdiction over each of these remedies in the context of an employment contract is now expressly conferred on the Employment Court under section 104(1)(g)(h) of the Employment Contracts Act. There is no corresponding mention of such powers in section 79 of the Act, which establishes the Tribunal's jurisdiction. By plain inference, adopting well-established rules of statutory interpretation, the Employment Tribunal was not intended to possess those particular powers. It appears, then, that Smith Ltd will have to go directly to the Court in order to obtain the established remedies of injunction and damages. But supposing (as will usually be the case) that the company's main aim is to prevent the ex-employee from working with a competitor, damages being either of secondary importance or of no importance at all? In such a case, an application to the Tribunal for a compliance order might possess distinct

advantages for the company over the injunction process, in terms of issues such as standing, the "threshold requirements" and onus of proof (Hughes, 1989, ch.9).

Thus, at this initial stage, Smith Ltd might be able to enforce the restraint as it stands without modification. Only on appeal to the Employment Court, would the Court's general jurisdiction allow it to apply the Illegal Contracts Act 1970. Given the well-recognized use of widely-drafted restraint clauses to deter ex-employees from entering into activities which might be perfectly lawful, the consequent delay in consideration of the key issue from the ex-employee's point of view (namely the reasonableness of the restraint) seems unfortunate, to say the least. Compliance orders are, of course, discretionary and it may be that the Tribunal would take such issues into account in deciding whether to make the order.

The remaining issue - the prevention of disclosure of confidential information - raises a question as to the scope of the Tribunal's power to order compliance which is likely to arise in other contexts. In contrast to the Labour Court's power to order compliance under the Labour Relations Act 1987, under section 55 of the Act the Tribunal is empowered to order compliance with - amongst other things - "Any provision of ... Any employment contract". Since there is no requirement in the Act that individual contracts be in writing, it would arguably be unduly restrictive to confine the word "provision" to its usual legal context of a stipulation incorporated in a written document, although the the idea conveyed by the word "provision" is clearly narrower than the concept of "conditions" of employment which appears in section 28 of the Act. But is the word "provision" restricted here to agreed terms in the oral or written employment contract (thereby excluding implied terms, such as the duty not to disclose confidences) or is it wide enough to embrace implied terms? It might be that, even reading the word "provision" at its widest, as covering any requirement in a contract, the Employment Tribunal and the Employment Court would be reluctant to read the word "provision" so widely as to cover implied terms, although a number of the terms implied by law (such as the troubled concept of a "right to work") have been given tacit approval by the Court of Appeal and await a detailed indigenous stamp. If the parties to an employment contract are held able to use the compliance jurisdiction to enforce implied terms in the contract, the relevant jurisprudence will not be long in the making.

There remains the problem of jurisdiction (noted above) if, in the hypothetical, Brown has, say, physically removed information belonging to Smith Ltd on her departure, sabotaged her company car on being told to return it, or breached a fiduciary duty owed to Smith Ltd in her contractual capacity as an employee. There is "no difference, except of degree, between breaches of fiduciary and of other obligations imposed by contract".[1]

The Employment Court's restricted jurisdiction

We have seen that the Employment Court has inherited the jurisdiction to make any order that may be made by the High Court or a District Court in relation to contracts. This power is subject to a significant limitation. Under section 104(2) of the Act, where the Court thereby has the power to make an order cancelling or varying any contract or any term of any contract "it shall ... make such an order only if satisfied beyond a reasonable doubt that such an order should be made and that any other remedy would be inappropriate or inadequate". Whilst the statutory drafting is loose, it seems that the intention is that the "reasonable doubt" qualification should apply only where the Court is faced with a choice between variation or cancellation on the one hand and some other remedy (for example, damages) on the other. In some cases, of course, the Court might well wish to grant some other remedy as well as ordering either variation or cancellation.

1 Chief Judge Goddard in *Airline Pilots Association v Air NZ Ltd* (1991).

The reason for this restriction is not immediately apparent. I am unaware of any statutory counterpart in relation to other courts. In purely legal terms, applying the criminal standard of proof of facts to a judge's assessment of the appropriate remedy in civil cases seems little short of bizarre. However, confining the Court's jurisdiction closely is entirely consistent with the persistent campaign of criticism waged against the Labour Court in areas such as its decisions on redundancy by the Employers' Federation, the Business Roundtable and the current Minister of Labour whilst in opposition.

The jurisdiction thus curtailed by the Act might arise in a number of cases. Section 8 of the Illegal Contracts Act 1970, enables the Court to cancel or modify contractual terms which are in restraint of trade. Section 43 of the Fair Trading Act 1986 enables the Court to declare void, or vary, contracts which contravene Parts I to IV of that Act. Section 12 of the Fair Trading Act might assume particular relevance in the new bargaining regime. That section prohibits anyone (for practical purposes, employers and employment agencies) from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive, in relation to employment that is, or is to be offered, concerning the availability, nature, terms and conditions, or any other matter relating to that employment. Whilst few workers employed under an individual employment contract would seek cancellation under the Fair Trading Act, there may well be occasions on which the cancellation of a collective employment contract arising from misleading conduct could prove advantageous. Whilst little attention has been paid to this provision in New Zealand, the corresponding (and identical) Australian provision has attracted rather more litigation (Hughes, 1989). The remaining avenues for cancellation or modification are likely to be of slight significance in the employment context. The Minors Contracts Act 1969 enables the Court to cancel (but not to modify or vary) unconscionable or "harsh or oppressive" contracts of service. Notwithstanding the absence of a minimum wage for workers under the age of 20, this power is unlikely to be of any practical use to young workers. Finally, section 7 of the Contractual Mistakes Act 1977 enables the Court to cancel or vary contracts which have been entered into under mistake: plainly, this is a situation that is unlikely to arise in practice in the context of employment.

Overall, then, the emphasis is on restricting the Court's ability to intervene in the employment relationship to ensure a minimal level of fairness. This emphasis is heightened by the removal of reinstatement as the primary remedy for unjustifiable dismissal (s.26) and removing from the ambit of the law of illegal contracts any breach of the bargaining provisions in Part II of the Act (s.25). Nowhere is it more obvious than in the provisions of section 57 of the Act, which can now be examined.

"Harsh and oppressive" contracts

Section 57(1) of the 1991 Act states that where any party to an employment contract alleges-

> (a) That the employment contract, or any part of it, was procured by harsh and oppressive behaviour or by undue influence or by duress; or
> (b) That the employment contract, or any part of it, was harsh and oppressive when it was entered into,-

that party may apply to the Court for an order setting aside the contract or directing any party to the contract to pay such sum by way of compensation as the Court thinks fit. It is noteworthy that the remedy likely to be of most use to an exploited worker - that of variation of the offending term or terms - is not expressly available to the Court. In the absence of an express power to this effect, it seems doubtful whether the Court's power to make an order "on such terms and conditions as it thinks fit" (s.57(6)) could be used to this effect.

The sting in the tail of this allegedly "protective" provision is contained in subsection 7. Under that subsection, except as provided in section 57 (that is, the grounds set out above) "the Court shall have no jurisdiction to set aside or modify, or grant relief in respect of, any employment contract under the law relating to unfair or unconscionable bargains". The law thus excluded is a body of common law (judge-made) principles which considers contractual enforcement in terms of bargaining power. The ordinary courts have developed a doctrine of unfairness - or "unconscionability" - relating to issues such as relative bargaining power, "one-sided" contracts, unfair standard form contracts and lack of independent advice, all subsumed under the general question whether the stronger party to a contract has taken advantage of the weaker (Burrows, 1991). Legislative embodiment of these principles in the form of an "unfair contracts" statute was under active consideration at the time the Employment Contracts Bill was introduced (Law Commission, 1990). Whilst the common law principles had not been applied to employment contracts under the more regulated conditions provided by the Labour Relations Act 1987, they were clearly ripe for application to the minimalist bargaining regime introduced by the 1991 Act which, taken in conjunction with the benefit cuts under the Social Security Amendment Act 1991, could scarcely have provided a more fertile environment for the exploitation of vulnerable workers. Nevertheless, at the very time when they were arguably of most practical relevance, the Employment Court has been precluded from applying them except to the extent that they fall under the rubric "harsh and oppressive". What does this phrase mean in the context of section 57?

As noted earlier, subsection 7 states that "except as provided in [s.57]" the Employment Court may not employ the law relating to unfair or unconscionable bargains. Presumably one can derive from this wording the proposition that section 57 is intended generally to narrow the ambit of the Court's inquiry as compared with the approach that might have been taken under the general law relating to unconscionability. It would probably not be open to the Employment Court to adopt the approach of Australian industrial courts and to hold that the word "harsh" can be read as a synonym for "unfair" or "unconscionable".[2] This throws us back on an examination of the phrase "harsh and oppressive", an examination that is not helped by contrasting assumptions in the Credit Contracts Act 1981 that "oppressive", "harsh" and "unconscionable" are synonyms (s.9 of the Act, defining "oppressive") and in the Minors Contracts Act 1980 that the words "harsh" and "oppressive" have different meanings (s.5 of the Act employs the formula "harsh *or* oppressive").

Semantically, the phrase "harsh and oppressive" might be seen to embrace a contract, or term, which is unjustly burdensome to the point of being cruel or repugnant. In an area where judicial instinct on a case-by-case basis is likely to count for more than a purely semantic inquiry, it may be that the matter cannot be pursued further with any profit. Judicial interpretation of the phrase "harsh and oppressive" seems so far to have been confined to matrimonial legislation where - so far as seems relevant in the present context - the Australian courts have held that each of the words in the phrase must be given its meaning, that the phrase as a whole connotes some "substantial detriment" and that the interpretation issue is not satisfied by arguments based on generalities or social philosophy (*McDonald v McDonald*, 1965).

The area in which any meaningful "unconscionability" jurisdiction was most likely to be of practical use - that of economic exploitation - is thus considerably undercut. Not only is the Court's power restricted but in other steps the Government has established a floor of minimum standards which the Court will be unable to ignore. These include the new provision for a non-transferable 5 days annual paid sick leave and the controversial announcement by the Minister of Social Welfare that - for those under the age of 20 - the

2 *Re Loty* (1971) construing the phrase "harsh, unjust or unreasonable" in the context of reinstatement.

weekly unemployment benefit rate for a young person, plus $15, is the cut-off point for reasonably declining work

The remaining concepts in section 57 - the use of "undue influence" and "duress" are more settled. "Undue influence" bears the connotation of excessive or disproportionate pressure by which a person is induced not to act of their own free will (*Engineers Union v Hoyne*, 1988). Duress entails illegitimate coercion of the will so as to vitiate consent (Burrows, 1991), thereby opening the way for employers (who given overseas examples, are likely to be the exclusive users of this power) to use this as an avenue for reversing the outcome of negotiations where a settlement is achieved, say, by unlawful strike action. That this sweeping new statutory addition to the employers' arsenal should find its way into a section wrongly heralded as providing significant new protections for employees seems entirely appropriate to the general thrust of the 1991 Act.

References

Brown, A and Grant, A. (1989) *The law of intellectual property in New Zealand.* Wellington, Butterworths.

Burrows, J.F.(1991) *Update on contract 1991*. Law Society Seminar Papers.

Department of Labour (1991) *Report of the Department of Labour to the Labour Select Committee*. Mimeo.

Grills, W. (1983) *The use of mediation in industrial and non-industrial disputes*. Mimeo.

Howells, J.M. and Cathro, S. (1986) *Mediation in New Zealand: the views of the mediated*. Dunedin, Dunmore Press.

Howells, J.M. (1984) Mediation in New Zealand: A mild case of schizophrenia?" *International labour review* **123**:753-763.

Hughes, J. (1989) *Labour law in New Zealand*. Sydney, Law Book Co.

Law Commission (1990) *Unfair contracts*. NZLC PP 11. Weilington.

Law Commission (1991) *Aspects of damages: employment contracts and the rule in Addis v Gramophone Co Ltd*. NZLC R 18. Wellington.

Minister of Labour (1991) *Employment Contracts Bill: options paper*. Mimeo.

List of cases

Engineers Union v Hoyne [1988] 2 NZELC 96,280.

McDonald v McDonald [1965] ALR 166.

New Zealand Airline Pilots Association v Air NZ Ltd, unreported, Labour Court, 10 May 1991, WLC 40/91.

Re Loty [1971] AR (NSW) 95.