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The "worker", the Labour Court and the common law in New Zealand: a holy trinity?

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The primary purpose of this article is 2 fold: firstly, to argue that not only have industrial tribunals in New Zealand incorrectly interpreted the statutory term "worker", but also that in doing so, they have assumed a jurisdiction which has never been conferred on them by statute; and secondly, to make some suggestions towards reform of Labour Court practice in this crucial area.

1. Introduction

Perhaps the most crucial condition precedent to the exercise of jurisdiction by the current New Zealand Labour Court is that the issue(s) before it must relate to, or affect, the interest(s) or conduct of a "worker" or a collectivity of "workers". "Worker" is a statutory term defined with minor variations in enactments including the Labour Relations Act 1987, (referred to in this article as "the LR Act" or "the Act") which confer jurisdiction on the Labour Court. In spite of the liberal definitions of the term "worker", the Labour Court and its predecessors have decided for reasons which are by no means clear, to limit the meaning of the term to the common law understanding of "servant" or "employee". One may object to this approach not only on the ground that it is contrary to certain long-observed rules of statutory construction, but also because of certain socio-legal developments which have so far characterised the exercise of jurisdiction by industrial tribunals in New Zealand.

Before going further, it is important to know that the current meaning has had a negative consequence for the size of the working population which has actually benefited from the jurisdiction of these tribunals. Instead of augmenting, the current meaning has diminished this size. If the policy behind modern industrial dispute legislation such as the LR Act can be said to be contrary to this development, then it is suggested that a serious problem exists in modern New Zealand regarding the current meaning of the term "worker".

In New Zealand, as in other countries, an institutional specialization in industrial relations and law is developing. Our age is witness to an increasing arrogation to industrial tribunals (at the present time, the Labour Court), of the competence to determine industrial relations issues, to either the total or partial exclusion of other tribunals in modern society. While the course of this development is yet to be charted fully in the academic literature, (Vranken and Hince, 1988, pp.112-113) it is clear that it is a product of certain recent legislative and judicial rationalisation. Recent legislative changes have effected, in particular, the abolition of certain well-entrenched industrial

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relations institutions, amongst which the Aircrew Industry Tribunal, the Agricultural Tribunal and the Waterfront Industry Tribunal are perhaps the most prominent (Szakats, 1980; 1989, pp.22-24). The consequence of this has been an unprecedented and accelerated expansion of the jurisdiction of the current Labour Court (Szakats, 1988, pp.311-314). Also, some recent decisions of the higher courts have accentuated and accelerated the rate of institutional specialisation in industrial relations and law. In *NZ Baking Trades Employees Industrial Union* v *General Foods Corporation (NZ) Ltd*, ([1985] 2 NZLR 110) and *NZ Labourers' Union* v *Fletcher Challenge Ltd*, ([1988] 1 NZLR 520), the Court of Appeal decided that although the regular courts and industrial tribunals may exercise certain concurrent jurisdictions, in a proceeding or cause in which there is a "serious" industrial issue to be tried, it will best serve the public interest if the regular courts abdicate their jurisdiction in order to enable an industrial tribunal to try the issue in at least the first instance (see also *Elgin* v *Newman*, High Court, 1989, CP 770/88). In *Auckland Shop Employees Union* v *Woolworths (NZ) Ltd* ([1985] 2 NZLR 372), and *Marshall Cordner & Co* v *Canterbury Clerical Workers Union* ([1986] 2 NZLR 431), not only did the Court of Appeal refrain from formulating certain implied terms in the contracts of employment in issue, it was also content to arrogate this responsibility to the then Arbitration Court to be exercised in appropriate cases.

What both legislative innovations and judicial pronouncements seem to have achieved in recent times is to recognise the current Labour Court, in particular, as the most competent institution in modern society to decide industrial law issues. The question, "who is a worker?" is essentially a question of industrial law, and as such the Labour Court is the most qualified institution in modern society to decide it. If, therefore, there is today, as we strongly suggest, a crisis in the meaning assigned to this fundamental concept of modern industrial law - the "worker" - by the Labour Court, it is of the most profound consequence for a significant section of New Zealand industrial law and relations. This alone will justify any effort to drag this issue out of the Labour Court room into the public arena for a wider consideration than is the case now.

2. Dressing the "worker" in the garb of the "servant"

Industrial tribunals and the literal rule of statutory construction

It is surprising to see how quickly our industrial tribunals' acceptance of tried and trusted canons of statutory interpretation evaporate into thin air when they are called upon to interpret the statutory term "worker". In New Zealand, courts have accepted the literal or plain meaning rule as the "elementary and fundamental principle" of statutory construction[1]. That the Labour Court and its predecessors have also accepted this rule is now beyond all reasonable doubt (see e.g. *Auckland Hotel, Hospital, etc. IUW* v *Air NZ Llt* [1986] ACJ 218, 222). Judge Palmer of the Labour Court, recently summarised the Labour Court's position in the following words:

1 As Davison CJ, observed in *Higgs* v *Vibrapac Masonry (Wellington) Ltd* Unreported, High Court, Wellington, M100/82, 6 August 1982, "It is an elementary and fundamental principle that the object of the court, in interpreting a statute, 'is to see what is the intention expressed by the words'... It is only by considering the meaning of the words used by the legislature that the court can ascertain its intention. And it is not unduly pedantic to begin with the assumption that words mean what they say ..." See, also, *McClenaghan* v *BNZ* [1978] 2 NZLR 529.

> It is, of course, a fundamental ... precept of construction of the provisions of a statute or instrument that the intention of the provision/s in contention should be discerned from their plain ordinary meaning. It is trite to comment in this setting that 'It is not unduly pedantic to begin with the assumption that words mean what they say' ... (NZ Public Service Assen (Inc) v SSC 1989, CLC 52/89).[2]

The learned judge on this occasion applied the plain meaning rule as he did in 2 other decisions (1989, CLC 37/89; 1989, CLC 53/89).

However, there are recognised considerations which will justify a departure from the plain or ordinary meaning approach to statutory construction. In *Post Office Union (Inc)* v *NZ Post Ltd* (1989, CLC 5/89) Judge Palmer of the Labour Court "re-emphasized" that the plain or ordinary words approach is not an "absolute" rule of statutory construction. He held that a court will refuse to apply it when in its view the result would lead to an absurdity or irrationality, for instance. Thus in *Auckland Hotel, etc, IUW* v *Air NZ Ltd* ([1986] ACJ 218), Judge Williamson declined to apply the rule after he came to the conclusion that its result would be "so irrational that it [was] unlikely to have been the intention of the negotiating parties" (p.222). Instead, the learned judge decided to apply the so-called "mischief" rule. He asked and attempted an answer to the question: "what mischief was the clause intended to remedy?" Judge Williamson's approach in the latter case represents the well-treasured rule that the plain or ordinary word approach must be observed unless there exists an obviously necessary reason to depart from the words of an Act.

It is against this background that we shall argue that whenever Parliament has chosen the term "worker" as opposed to the term "employee", it has defined the former broadly to include a limitless category of working people. Statutory definitions of "worker" mean what they say. They have not sought to limit the identity of the "worker" to a person who is engaged for work under a contract of service.

Statutory definitions of "worker"

The thesis that "worker" is broadly defined in New Zealand statutes is supported by the definitions proffered in Section 2 of both the Minimum Wage Act 1983, and the Wages Protection Act 1983, for example. According to the former:

> 'Worker' -
> (a) Means any person of any age employed by an employer to do any work for hire or reward; and
> (b) Includes a homeworker.

The Wages Protection Act's version is:

> 'Worker', means any person in any manner employed in any service or work for wages, and, in relation to any employer, means any worker employed by that employer.

None of these definitions has sought to limit the meaning of the term to any contractual classification of a person's work.

The definition of "bush worker" is similarly broad. It means "any person engaged, whether on his own account as a contractor, or as an employee in a bush undertaking" (s2(1), Bush Workers Act 1945). The inclusion in this definition of the word "employee" has not placed any limitation on the meaning of the term for 2 main reasons. First, it is

2 Unreported Labour Court decisions bear either a CLC or WLC reference.

clear that the definition embraces both the common law "independent contractor" and "employee". Second, as we shall argue below, whenever statute uses the term "employee", as opposed to "worker", it has defined the former in terms of a contract of service.

The Holidays Act 1981 has also chosen liberal words to define the term for its own purposes. "Worker" in section 2(1) of the Act means:

> Any person of any age of either sex employed by any employer to do any work for hire or reward; and includes an apprentice and any other person whose contract of employment requires him to learn or to be taught any occupation ...

From this definition, it is clear that the meaning of the term "worker" is unfettered by any ambiguous words; rather it extends, wherever possible, to include an apprentice or any other person whose contract requires him or her to learn a trade or an occupation (see section 2, Agricultural Workers Act 1977).

Some repealed statutes went further than this to provide an extended definition of the term. The purpose of such an extended definition was to expressly expand, rather than to restrict, the categories of persons that may be regarded as "workers". For example, "in order to remove any doubt" as to the meaning of the term, section 2(3) of both the Industrial Conciliation and Arbitration Act 1954 (hereafter referred to as the IC&A Act), and the Industrial Relations Act 1973 (hereafter referred to as the IR Act), expressly went on to state that the term applied regardless of whether a relationship was that of "master and servant" or "employer and employee". The current Holidays Act 1981 has continued this tradition by providing in its section 2(3) that:

> For the purposes of the definition of the term "worker" in sub-section (1) of this section, every person who is wholly or mainly engaged in procuring proposals or contracts of industrial life assurance or in collecting industrial life assurance premiums for any person, firm, company, society, association, or corporation carrying on industrial life assurance business and is remunerated wholly or partly by fees or commission shall be deemed to be a worker employed by that person, firm, company, society, association, or corporation, whether or not the relationship between them is that of master and servant.

This extended definition also has not limited the meaning of "worker" to a person engaged under a contract of employment or service, or who is engaged as a "servant" or "employee". It would appear, therefore, from the plain or ordinary meanings of the statutory definitions examined so far that the statutory concept of "worker" is much broader than the common law servant or "employee".

The most proximate New Zealand legislation under which the Labour Court exercises its specialist jurisdiction is the LR Act. This Act, like its predecessors the IC&A Act and the IR Act, has defined the term "worker" very liberally. Under section 2(1) of the LR Act, "worker"

> (a) Means any person of any age employed by an employer to do any work for hire or reward; and
> (b) Includes -
> (i) A homeworker; or
> (ii) A person intending to work.

Unlike its predecessors, the LR Act has not given the term any extended definition. As we have already observed, the extended definitions provided in the predecessor Acts expressly included in the meaning of "worker" relationships outside those of the common law "master and servant" or "employer and employee". A case may therefore be made that the absence of an extended definition of the term in the LR Act may convey the intention

of Parliament to limit the meaning of the term to the common law concept of a "servant" or "employee". However, this argument can only be sustained if the plain or ordinary meanings of the words of the statute have failed to indicate the real intention of Parliament. It would appear that the words of the statute are clear enough to bring out the parliamentary intent.

In spite of the absence of an extended definition of the term "worker", the LR Act is innovative in two respects. First, it has defined the term to include "a homeworker". To belong to this category, a person must be:

> engaged, employed or contracted by any other person (in the course of that other person's trade or business) to do work for that other person in a dwelling house (not being work on that dwelling house or on fixtures, fittings or furniture in it); and includes a person who is in substance so engaged, employed, or contracted notwithstanding that the form of the contract between the parties is technically that of vendor and purchaser (Section 2(1).

The inclusion of "homeworker" in the definition of "worker" expands, rather than contracts the categories of those who may be regarded as workers for the purposes of the Act.

The second innovation introduced by the LR Act is the inclusion in the definition of the term "a person intending to work". Before the LR Act came into operation, the Labour Court and its predecessors limited the meaning of the term to persons who were in "actual employment." Because of this, access to the tribunals was denied persons whose contracts of employment were terminated before they could actually commence work (*Wilson* [1980] ACJ 357; *Raeburn* [1984] ACJ 757; *Jackson* v ([1987] NZILR 883). Judge Goddard (as he then was) of the Labour Court, had the occasion in the *Elms Mother Lodge Ltd.* case (1989, WLC 59/89) to rule on the new definition when he held that:

> It would be quite wrong, in view of the altered definition in the statute, for this court to continue to countenance a situation under which an employer could resile with impunity, so far as personal grievance remedies are concerned, from a concluded contract of employment, on the sole ground that the performance of the contract has not yet commenced. The law should not work in a capricious fashion. There is obviously a defect in the earlier statutory position which has now been cured by Parliament, and deliberately so.

Insofar as this decision has sought to recognise the expanded meaning of the term "worker", it is commendable.

The contrast in the definition of "employee:

It would be difficult to sustain from the statutory definitions of "worker" examined so far that Parliament intended the term to reflect a movement away from the socially unacceptable and discredited expression "servant". It has been suggested in some sections of the academic literature that because the terms "master" and "servant" carry undemocratic and slavery connotations, it seems more appropriate to replace them with "employer" and "employee" (Szakats, 1988, pp.3,9; Mathieson, 1970, p.1). This switch in terminology will not, however, affect the common law test of an employer and employee relationship; which is a determination that a person worked or works under a contract of service.

It is important to note that the definitions examined so far are concerned with the "worker", not the "employee". It cannot be argued that Parliament lacked the sophistication to distinguish between the 2 terms. Not only has Parliament, in some

other statutes, clearly preferred the term "employee" to "worker", but whenever it has preferred the former term, it has been consistent enough to limit its definition to a person who works under a contract of service, as opposed to a contract for services. Two examples will suffice here. Section 2 of the Accident Compensation Act defines "employee" in part as "any person who has engaged to work or works ... under a contract of service or apprenticeship". In the Equal Pay Act 1972, an "employee" is:

> [A]ny person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or any other work or effort whatsoever ...

These definitions are consistent with Court of Appeal authority in the *NZ Educational Institute* case ([1981] 1 NZLR 538) that in order to determine who is an employee, the test to apply is whether or not the person works or worked under a contract of service.

Industrial tribunals and the meaning of "worker"

We have already demonstrated that the Labour Court and its predecessors have accepted the policy position that words in a statute should be given their ordinary meaning unless this would lead to absurdity, injustice, irrationality, hardship, etc., or would be inconsistent with the intention of Parliament. It would also appear, from at least Judge Goddard's decision in the *Elms Motor Lodge* case, that the LR Act has used "clear words" to define the term "worker". It would follow logically from these considerations, therefore, that industrial tribunals should, at least initially, derive the meaning of the term from the plain meaning of the words. This, however, has not been the case. In the case of *Jarden*, Judge Thompson of the Court of Arbitration held that:

> The appellant to succeed in her action must be a "worker" under the ... Act ... . "worker" is defined as any person ... employed by any employer to do any work for hire or reward. Mr Finlay [for the appellant] conceded that a person to be a worker must be a party to a contract of employment and we think that this concession was rightly made ... ([1970] BA 4982).

It is not in the least clear from the definition quoted by the learned judge how the notion of a "contract of employment" found its way into that definition. Although judges of New Zealand industrial tribunals have stated the problem differently in the cases, the effect has remained the same: that is, in order to determine whether a person is, or was a worker, the relevant question is whether the person works or worked under a contract *of* service, as opposed to a contract *for* services, or, whether there was between the parties a master and servant relationship, or an employer and employee relationship (see, e.g., the *Dyer* [1980] ACJ 291; *Uncle's Foodbar* [1981] ACJ 571; and *Tony Chimes* [1986] ACJ 387, cases). The overall purpose of this exercise has been to exclude from the benefit of the tribunals' jurisdictions, persons who work or worked under contracts *for* services, or as independent contractors.

There is no judgement on record in which either the present Labour Court or any of its predecessors has purposively explored the possibility, if not the desirability, of introducing a divergence in the meanings of the statutory "worker", and the common law "servant" or "employee". Instead, they have all proceded on the basis that the terms mean one and the same thing. According to Szakats (1988, p.21) the word "hire" in the definition "suggests a narrow construction excluding independent contractors." This view is hardly defensible.

There is only one decision in which the attempt was made to consider the meaning of the words "hire or reward". The unusual facts of the *Jarden* case ([1970] BA 4982) which

made this possible were that Mrs Lipsham (the appellant), worked as a telephonist for the respondent's taxi business, in consideration of her husband being given some shares in the business after the respondent had acquired and paid for 3 more taxis. The appellant's husband was at the time the only driver and manager of the business. Her husband was dismissed before he could acquire any shares in the business. An action was brought on behalf of Mrs Lipsham for unpaid wages under the relevant award.

Judge Thompson of the Court of Arbitration held that there was no enforceable contract of employment between Mrs Lipsham and the respondent. Rather it was a condition of Mr Lipsham's contract of employment that Mrs Lipsham should attend to the telephone; and that the performance of this duty was a domestic arrangement between the Lipshams, which could not be enforced against the respondent. Mrs Lipsham was not, therefore, in the ordinary use of language, employed for "hire". Judge Thompson went on to hold that to be employed as a "worker" under the IC&A Act, a person must be engaged or employed for "hire or reward". According to His Honour, these words suggested consideration in the form of money, or something which could be readily translated into money. Furthermore, this monetary consideration must be payable to the employee and not to a third party. His Honour was prepared to hold so although he observed that a valid contract could assign benefits under it to a third party. He, however, held that "we are [here] not concerned with contracts generally but with the question whether a contract of this type can create the status of "worker" in a person who herself takes no benefit". According to His Honour, injustice would arise if the general principles of contract law were extended to employment contracts under the Act. For present purposes, one other remark made *obiter* by His Honour, which was totally inconsistent with the main decision in the case, requires our attention. He said at one stage that:

> [T]here may be a contract of service creating the relationship of master and servant which does not create the relationship of "employer" and "worker" under the Act. This is not an unreasonable conclusion (p.4985).

If His Honour's conclusion in this respect is correct in law, then there is support for the view that the term "worker" under the Act is not synonymous with the term "servant" or "employee". "Worker" under the Act may include, but it is by no means confined to, the common law "servant" or "employee". This will be so even if the words "hire" and "reward" are construed to mean monetary consideration for work payable only to the person engaged to work.

It is not the contention of this article that the term "worker" is not capable of being construed as a person employed under a contract of service. It is rather that there is nothing in the LR Act in particular to justify the narrower construction which New Zealand industrial tribunals have placed on the term. There may exist some policy considerations which justify the narrower construction of the term. However, it is regrettable to observe that our industrial tribunals have not spelt these out. It is desirable in the face of the liberal definition of the term that any decision of the courts to limit the term to the common law servant must be supported by some sort of explanation. So far, our industrial tribunals have not explained to us why "any person of any age employed by an employer to do any work for hire or reward" should mean "any person employed under a contract of service". Such an explanation is needed urgently in order to convince some working people why Parliament has excluded them from the enjoyment of certain rights and protection provided under modern labour protection legislation such as the LR Act. Such an explanation will also bring the procedures and practices of our industrial tribunals closer to those normally applied by courts of justice in the interpretation of statutory provisions.

If the view that the Labour Court and its predecessors have for all these years incorrectly construed the statutory term "worker" is sustainable, then it will be difficult

to understand why some academic writers have given their tacit recognition, if not acceptance, to this practice (Geare, 1988, pp.65-74; Brooks, 1978, pp.172-174). Although Mathieson has hit the nail on the head when he notes that there is virtually no authority in New Zealand law for the fundamental proposition that "a man or woman not working under what the common law would recognise as a contract of service is not a "worker" for the purposes of [the statutory] definition", he nevertheless comes to the conclusion that the proposition is implicit in New Zealand law (Mathieson, 1970, p.3).

What these writers have succeeded in doing is to condone the confusion which our industrial tribunals have created between the statutory "worker" and the common law "employee". This academic condonation of a statutory construction which is patently incorrect is inconsistent with the views expressed by overseas writers about the understanding of the modern day "worker" in jurisdictions such as Australia (Merrit, 1982, p.59) and England (Rideout, 1983, pp.16-17; Elias *et. al*, 1980, p.337; Hepple and O'Higgins, 1989, pp.1-42).

3. Policy considerations and the construction of "worker"

As intimated in the preceding section, judicial ingenuity has succeeded in indicating the limits of the application of the plain or ordinary meaning rule of statutory construction. There is the well-recognised position that some instances will justify a departure from this rule. One of the residual rules of statutory construction is what is known in both the judicial and academic jurisprudence as the "mischief" rule, or the rule in *Heydon's* case ((1854) 3 Co Rep 7a). We have already seen an application of this rule in *Auckland Hotel, etc., IUW* v *Air NZ Ltd.* ([1986] ACJ 218). Briefly, what the rule demands of the court is for the latter to go behind the ordinary words of the statute in order to discover the "mischief" which the Act of Parliament sought to remedy. It requires a search for parliamentary intent through an investigation of the object of the Act of Parliament. The rule proceeds on the assumption that every Act of Parliament was purposively introduced to rectify an undesirable social state of affairs; that is, all Acts of Parliament are remedial in one way or the other. After the object or objects of the Act has or have been discovered, the court is then required to construe the provisions of the Act so as to suppress the mischief and/or advance the remedy. The Acts Interpretation Act 1924 of New Zealand has codified this rule in its section 5(j) in the following terms:

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit.

Thus, in *Hellaby Shortland Ltd* v *Weir* ([1976] 2 NZLR 355), a very strong Court of Appeal held that since the Factories Act 1946 was introduced for the protection and benefit of factory workers, Parliament was, therefore, more likely to have intended the more generous construction of its provisions from the point of view of workers.

The major thesis to be argued in this section of the paper is that aside from the legitimate observation that industrial tribunals in New Zealand have decided to read into the definition of "worker" words which clearly do not exist, they have also failed, regrettably, to allow the rationale behind the LR Act, in particular, to influence the meaning of the term.

The "mischief" behind modern New Zealand protective labour legislation

Opinion is divided amongst commentators on the question of whether the IR Act made any changes to its predecessors, the IC&A Acts. While writers such as Seidman (1984) were prepared to observe that the IR Act was "the first major revision" since 1894, others such as Woods (1974) and Geare (1976), were of the view that the Act was nothing but a rehash of the previous Acts. However, in another context, Geare (1988) was of the opinion that the 1987 LR Act represented "at the very least a significant improvement over the past legislation". We shall avoid taking sides in this debate. The primary concern in this section is to determine the extent (if any) to which either stability or change in the rationale for modern industrial legislation has particular consequences for the definition, if not the meaning, of the term "worker" in the LR Act.

"Individual" labour legislation

Before the Industrial Conciliation and Arbitration Act 1894, there were some pieces of legislation which recognised or protected the "individual" but not the "collective" interests of workers. Among these were the Master and Apprentice Act 1865 (No 45); Contractors' Debt Act 1871 (No L); Employment of Females Act 1873 (No LXXI); Employers' Liability Act 1882 (No 20); Truck Act 1891 (No 11); Coal Mines Act 1891 (No 46); and Workmen's Wages Act 1893 (No 52).

Even in those early years, New Zealand legislation avoided the use of the term "servant", preferring instead the term "workman". There was no uniform definition of this term, although 2 contrasting definitions were dominant. Section 2 of the Truck Act 1891, typified the first. A "workman" was:

> any person in any manner employed in work of any kind or in manual labour, whether under the age of twenty-one years or above that age.

The second type of definition appeared in the Employers' Liability Act 1882, New Zealand's first industrial accident compensation legislation. This Act limited the meaning of the term to persons employed under a "contract of service or contract personally to execute any work or labour". The Employers' Liability Act was the only exception; the others merely required that a person be employed either "in any manner" or "in work of any kind". The Employers' Liability Act carried this definition through to 1982. The preferred term in the Accident Compensation Act 1982 is "employee"; however, the requirement that a person be employed under a "contract of service" has remained.

Distinctive characteristics of Workers' Compensation legislation

Why did the legislature limit the meaning of the term in the Employers' Liability Act 1882 to a contract of service, but expand it in the other laws? The explanation is not hard to find. It lay in the earlier common law's preparedness to understand the master and servant relationship in terms of a domestic arrangement (see e.g., Blackstone, 1978, p.422; Kahn-Freund, 1977) and also, in the rights and duties which this scheme of things imposed on the parties (Selznick, 1983, Chap 4).

Certain incidents flowed from this earlier master and servant relationship. The master enjoyed the right to chastise the servant (Blackstone, 1978, p.426). The master had the right to command the servant, and the servant to obey. The contract could be specifically enforced and the servant was liable to be punished if he or she left the employment prematurely. The master also had a proprietary interest in the servant's services

(Blackstone, 1978, p.429). In return for all these, the master was under a legal duty to ensure the moral and physical well-being of the servant (Selznick, 1983, pp.128-129).

The master was under a duty to provide the servant with medical, surgical and nursing treatment if the servant became ill or injured in the course of employment (Morris, 1946, p.18; Schouler, 1870, pp.616-618). As a general rule, the master could not discharge a servant for an incurable illness, and in some jurisdictions, the law penalized a master who turned away a servant who had not completely recovered from illness. Selznick suggests that this obligation of the master derived from the common law right of the master to chastise the servant or apprentice. He also suggests that this common law obligation applied where the relationship between the master and servant was "more intimate", "more enduring", or "close and lasting" (1983, pp.128, 129).

What is not clear from the authorities is whether the master's responsibility for the general welfare of the servant embraced also a duty to compensate the servant for injury sustained by the latter in the course of the employment. It would appear this was not the case in England, although there was a limited legal enforcement of such an obligation under one 1846 Act (9 & 10 Vict.). The operation of this law was limited because it was restricted to compensation for "persons killed" through a "wrongful act, neglect or default" of the "wrong-doer". Dissatisfaction with this law led to the introduction in 1880 of the Employers' Liability Act (Cap 42, 43 & 44 Vict.), which sought to make payment of compensation to injured servants or dependants of servants killed in the course of their employment compulsory, because it was the "magnanimity and liberality" of employers, rather than any enforceable legal obligation, which underwrote the whole gamut of industrial accidents compensation at the time (NZ Parliamentary Debates, 1882, p.338).

This was one of the mischiefs which the New Zealand Employers' Liability Act 1882 sought to remedy; that is, to make the payment of compensation for industrial accidents compulsory on the part of employers. It also sought to abolish the doctrine of common employment - "that repulsive law, one so contrary to every feeling of natural justice" (NZ Parliamentary Debates 1882, p.339), and to limit the amount of compensation to be paid to the sum which the servant would have earned in 3 years.

The New Zealand legislation followed closely the English Act of 1880. Because compensation for injury or accidents suffered by servants in the course of their employment could not be divorced from the old common law obligation of the master to care for the servant in both sickness and health, the law became applicable to a strict construction of a master and servant relationship. It therefore became imperative for legislators in both England and New Zealand to create the "workman" in the image of the "servant" (Cap 90 38 & 39 Vict.). The restriction of industrial injury compensation to the "servant" in modern legislation is, therefore, historically informed. If this explanation is tenable, then the view that industrial injuries compensation is limited to "servants" or "employees" because "it would be impossible to detect abuse or fraud where a person was self-employed" would be largely discredited (Cane, 1987, p.327). The better view would be that no such duty was owed to the self-employed at common law.

Legislation providing for compensation for industrial accidents may be differentiated from some other protective labour legislation in order to advance the understanding that in the latter class of legislation, the nature of protection and the recipient of this, are likely to vary and embrace categories other than the "servant" or "employee". The Wages Protection Act 1983 (or its historical ancestors the Truck Act 1891 and the Workmen's Wages Act 1893) is primarily concerned with the wages which the worker has earned. The policy justification of wages protection legislation is to recognise and enforce the proprietary interest of a person in his or her wages. A person has a proprietary interest in his or her wages not necessarily because he or she has been employed as a servant or employee, but mainly because the wages have been earned by the person as a result of having been engaged for work (Blackstone, 1978, p.428). The law's role in this respect, therefore, is to enforce a contractual promise by an employer to pay a worker certain

wages in consideration of work done by the latter. In enforcing this contractual promise, the law has found it appropriate on certain occasions to also fix, not only the minimum rates to be paid for different kinds of labour services, but also the mode and periodicity of their payment. Thus, it can be seen that the law's role in the area of wages protection is likely to transverse the narrow interest of the "servant" or "employee" properly so-called, to encompass also other persons engaged to work for hire or reward under a variety of contractual arrangements.

From "individual" to "collective" labour protection.

New Zealand's first collective labour legislation was the IC&A Act. We shall here rely substantially on the available research in order to provide some understanding of the policy considerations which informed the introduction of the first law. Writers are not unanimous on the question of whether or not the law has gone through any major changes since its introduction in 1894. However, one observation with which most writers will not disagree is this: whether or not the intent behind the first collective labour legislation was to eliminate "sweating",[3] to encourage trade unionism (or even to create unionism) or to regulate wages (Vranken and Hince, 1988, pp.108-113), these cannot be regarded as ends in themselves. Rather, whether viewed individually or collectively, the various and sometimes paradoxical justifications discovered by writers for the introduction of legislation of this kind are nothing but a means to certain significant ends - to reduce and also regulate, as far as possible, the incidence of industrial conflict. In 1894, conciliation and compulsory arbitration was intended to avert what one member of the then Legislative Council described variously as "actual", "civil" and "labour" war (NZ Parliamentary Debates, 1894, p.3). In 1973, the law was intended to "bring to an end the unnecessary and continuing frustrations that we have suffered through needless strikes" (NZ Parliamentary Debates, 1973, p.2768). This justification for reform of the law did not change in 1986 (NZ Parliamentary Debates, 1987(a), pp.6429-6430).

While the policy justification of collective labour legislation in New Zealand has remained the reduction and regulation of industrial conflict, some of the means of achieving this have varied from epoch to epoch. The changes which have so far characterised the role of the authoritative third-party court in particular have been studied by Vranken and Hince (1988, pp.108-113), and we shall not do the same here. Instead we will proceed to determine how the "worker" was intended by the law-makers to play a part in the overriding quest to reduce and regulate industrial conflict.

Vranken and Hince observe that the individual worker's role has not been recognised as capable of making a significant contribution to the achievement of the broad purposes of industrial conflict regulation. The emphasis in all of the laws has been on "collectivities" - trade unions - and how to make these effective and responsible entities capable of committing them ideologically to the system. The motto, therefore, must have been this: seek ye first effective and responsible trade unions and the interest of the individual worker shall be protected. Writing about the IC&A Act, Vranken and Hince note that:

> [T]he deduction [is] that the ... Act, and the activity of the Court, regardless of the original prime intent, had resulted in a centrality of registered organisations, and that such organisations were prescribed a role in the arbitral process. We can therefore assert that the emphasis was on the needs of the collective and that the protection of the individual by the conciliation and arbitration law and

3 "Sweating" is the euphemistic expression for atrocious exploitation of labour, particularly that of females and children.

> the Labour Court was to be brought through the protection of the collective (p.111).

A slight variation appears in this theme later when the co-authors observe that "the system was designed to benefit the whole community, individual rights were to be protected via the collective" (p.111). This, according to the co-authors, remained the philosophy up to 1968. Legislative amendment in 1970, (s 179 (1) IC&A Act) and a major revision in 1973 (IR Act) introduced what is now known as the personal grievance procedures, under which the Court was given an expanded jurisdiction to hear and determine workplace conflicts between employers and employees. One would have expected this innovation to have resulted in a de-emphasisation of the interests or role of the collective in the industrial relations system. This was, however, not the case. "In general", observe Vranken and Hince (p.117), "workers could not be parties to proceedings under the IR Act and a union could only represent those who were eligible to join it under its existing membership rule". As Judge Williamson once held:

> As a broad general rule, an individual worker has no party status before this court under the Industrial Relations Act. He may enforce various rights in the civil courts, but, generally speaking, his remedies in this court are available only at the suit of his union or an Inspector of Awards (*Allfrey*, [1983] ACJ 131, 134).

The rationale for this "broad general rule" was stated by the learned judge as giving unions the right to determine whether a grievance had substance which warranted ventilation. The only circumstance in which an individual worker could proceed to the court was where the union had failed to act, or to act promptly to bring the grievance to resolution. It goes without saying that a non-union member had no right to invoke the personal grievance procedures under the IR Act.

Revision of the law in 1987 did nothing to reduce the influence of the collective in industrial disputes. Rather, the law-makers reiterated the desire to "promote the formation of more effective and accountable workers' unions and employers' organisations" (NZ Parliamentary Debates, 1987(a), p.6426). The emphasis was on "groups of workers" rather than the individual worker. Unions were given the right to determine their own objects and membership rules, subject only to controls to promote membership participation, democracy and accountable management. Again, access to the personal grievance procedures became the property of the union. The emphasis here was on union membership. A slight shift occurred: an individual worker not covered by an award could nevertheless require the union to invoke the personal grievance procedure on his or her behalf, provided the worker joined the union before the submission of the grievance. An individual worker, could however, by-pass the union, but only in a limited number of circumstances. Again, the law-makers' hope was that the individual's interest should be protected through that of effective and responsible unions. In so far as this was true, there is a considerable substance of truth in some parliamentary criticisms of the Labour Relations Bill that the Bill was too weighted in favour of trade unions and discriminated against the interests of individual workers in personal grievance claims. As such the Bill denied to individual workers certain fundamental human rights (NZ Parliamentary Debates, 1987(b), pp.8802, 8924).

It is against this background that the definition of "worker" in the LR Act must be examined. It would appear that because the rationale had remained the desire to establish effective and responsible unions as a panacea for the increasing incidence of largely unregulated industrial disputes, the law-makers did not bother themselves with the delicate question of qualification requirements for trade union membership. Unions were given the right to formulate their own membership rules so long as these promoted democratic participation and accountable organisation.

While this is hardly the place to go into a detailed discussion of union membership rules, it is, nevertheless, important to observe that the provisions of the LR Act raise a very strong presumption in favour of wider, rather than more restricted, trade union membership. Because this is so, the Act has refrained from specifying any eligibility qualifications for trade union members except perhaps the requirement that a potential trade union member must be a person engaged to work, or a person who intends to work. Two objects of the union membership provisions in the Act typify this presumption. Section 58(a) of the Act provides that:

> While unions may provide for a wider membership, *all persons working* who fall within the coverage of a union membership rule *have a* right to join that union [emphasis added].

Under Section 58(e), moreover, an exemption from union membership may only be sought on the grounds of conscience or other deeply held personal conviction. Section 60 of the Act complements these provisions by stating that:

> Subject to the provisions of this Act, *every person who, by virtue of that person's work or intended work*, is within the coverage of the membership rule of a union shall be entitled to be *admitted to membership* of the union and on application the union shall admit such a person to membership; and so far as the rules of any union are inconsistent with the provisions of this section they shall be null and void [emphasis added].

The italicised words in these provisions clearly indicate the intention of Parliament to extend the protections afforded under the Act to a variety of working people regardless of the contractual basis of their employment. The intent of the law-makers was to reduce and regulate industrial conflict through effective and responsible trade unions. The effectiveness of unions will derive from among other things, the numerical strength of their membership which, in turn, will generate sufficient resources, at both the personnel and financial levels, to enable unions to discharge their functions more efficiently and effectively. There must have been other justifications for expanding rather than restricting union membership: industrial conflict whether started by "employees" or "servants" properly so-called, or by independent contractors, are disruptive of any industrial or economic production process. The creation of effective trade unions with tentacles stretched into many areas of the industrial production sector, will canalise most, if not all, industrial conflict into the rationalised system. The consequence of this will be increased specialisation, hence, increased efficiency, in the handling of a greater proportion of industrial conflict within the system.

It should now be clear that the Labour Court and its predecessors have paid little or no attention to the policy justifications behind collective labour legislation of this country in their efforts to determine the key question of who is a "worker" for the purposes of the Act. The law-makers were not interested in the question of whether a person works or intends to work as a "servant" or an independent contractor. Rather the interest was in the person as a potential participant in industrial conflict. Insofar as the person's work or intended work, makes him or her a potential industrial disputant, he or she will become subjected to the control of a trade union; the latter will then define and protect his or her interests. The absolute discretion conferred on unions to formulate and implement membership rules was intended to be exercised in a way which will bring as many working people as possible, regardless of the contractual basis of their employment, under the umbrella of the national industrial conflict process (Clark and Wedderburn, 1983, p.145). The lesson which emerges from the understanding provided in this section is that it is union membership rules which make a person a "worker" for the purposes of the Act. These rules are what industrial tribunals in New Zealand should be scrutinising.

The paradox in industrial tribunals' decisions

In one class of cases decided under the IR Act, the Labour Court and its predecessors were willing to recognise the right of unions to determine who to admit to membership; yet in another class decided under the same Act they were unprepared to declare a person a "worker" for the purposes of the Act, although a union had treated the person as its member. In *Greenwood* v *Keith Galloway Ltd* ([1982] ACJ 41, 43) a personal grievance dispute, the Arbitration Court held *obiter* that

> We acknowledge too, that there is an argument that since the right to take personal grievance proceedings is vested in the union, the union should have the right to say who should be regarded as its member for the purpose of taking those proceedings.

This dictum was adopted and applied to the facts of *Canterbury Clerical Workers IUW* v *Brady* ([1986] ACJ 98, 102) where the same court held that:

> if a union is prepared to accept ... a person under the age of eighteen years, who is not obliged to become a member of the union, but nonetheless has been 'under its wing' as a worker covered by the award which is serviced and applied by that union, then it should be entitled to do so.

An examination of 2 other cases will disclose the unwillingness of industrial tribunals to accept union membership rules as determinative of the question who is a "worker" for the purposes of the Act. In *Agricultural Pilots' Assoc of NZ IUW* v *The Southland Aerial Co-operative Society Ltd*, ([1985] ACJ 330), the grievant, whose initial contract of service with the society was terminated, nevertheless held himself available to fly the society's planes under a different arrangement. He had remained a member of the union and attended all its annual general meetings. His employment was later terminated. The court held that although the factor of his continued membership of the union pointed to the existence of an employer-employee relationship, it could not attract any weight apart from the one that it provided him with occasions for meeting other pilots in a social interaction context. Accordingly, the Court denied him a "worker" status under the Act. The effect of this decision and many others is to deny to a union the right to say who should be regarded as its member.

Similarly, in *NZ Workers IUW* v *Wilkins* ([1986] ACJ 227) where the relevant award covered the work of the grievant, the Court nevertheless held that the grievant was not a "worker" since he worked under a contract *for* services and not one *of* service. Chief Judge Horn went further to observe in his judgment that:

> We comment there are and have been for many years items in successive awards which purport to extend the terms of awards to persons not bound in a master and servant relationship. There are deficiencies in this award which should be looked into (p.279).

It is submitted, in the light of what has been said so far, that the Court was not correct in this observation because the provisions of the Act did not restrict coverage of the terms of awards to the work of "servants". The IR Act, like the LR Act, was intended to be construed broadly so as to include as many working people as possible within its provisions. Such an interpretation would have been consistent with at least judicial authority in the United Kingdom that to qualify as a "worker" the test is whether a person has undertaken to perform "personally" any work in a contractual context (*Broadbent* v *Crisp* [1974] ICR 248; *WGGB* v *BBC* [1974] ICR 234). It is further submitted that for the purposes of the LR Act, it is a union, and not the Court, which is competent to make

a person engaged or employed to do any work for hire or reward, or a person intending to work, a "worker". The Court's role is strictly limited to determining:

(i) whether a union's membership rules are inconsistent with the provisions of the Act;
(ii) whether the union or the person so admitted as a member has met the criteria and procedure prescribed by the union's rules relating to admission to membership;
(iii) whether the person so admitted as a member of the union was employed, or has intended to do any work for hire or reward; and
(iv) whether the persons work or intended work is covered by the union's coverage rules.

The determination of the third issue will not necessarily involve the determination of the issue of whether the person engaged was engaged as an "employee", or a "servant" or an independent contractor; or whether the person intends to work in any of the forgoing capacities. It will only become a live issue where a union's membership rule requires so. The Court's role is misconceived when it purports to decide any question outside those 4. It is in the light of this approach that Judge Palmer's Judgment in 2 recent cases (*Denford*, 1989, CLC 70/89; and *Tan*, 1989, CLC 67/89) must be commended as seminal.

4. Conclusion

The understanding provided in this article has revealed one significant development in the law and practice of industrial relations in New Zealand, namely, an incorrect interpretation of the term "worker" in the LR Act and other enactments under which industrial tribunals have exercised their specialist jurisdictions. This development has occurred because of 2 main reasons. First, industrial tribunals have read into the clear statutory definitions of the term, "a contract of service," words which the definitions do not contain. Furthermore, they have limited the construction of the term to a person who works or worked under a contract of service. This is contrary to the elementary and fundamental rule of statutory construction that words in a statute should be given their ordinary meaning unless the result would lead to absurdity, irrationality, hardship, injustice, inconsistency, etc. New Zealand industrial tribunals have not shown that any of these results are likely to arise if the words of the statutory definitions of the term are given their ordinary or plain meanings. Second, industrial tribunals have failed to allow the policy considerations behind the enactments to influence the meaning which they have given the term. This approach directly contradicts section 5(j) of the Acts Interpretation Act 1924.

Dissatisfaction with this development is justifiable on a number of grounds. First, given that the current Labour Court, in particular, can only assume its specialist jurisdiction upon a finding that a party before it is a "worker" or a representative of a "worker" or a group of "workers", any meaning which the Court decides to give the term will necessarily have consequences for the size of the working population which can benefit from the exercise of the Court's jurisdiction. It is submitted that the development identified in this article has shrunk, rather than enlarged, the size of the working class that has so far benefited from the specialist jurisdiction and protection of our industrial tribunals. Social policy does not support this development.

Second, the institutional specialisation which is rapidly taking place in the industrial relations system means that other institutions or courts are being increasingly deprived of the competence to determine the question "who is a worker?" for the purposes of industrial disputation under the LR Act and other enactments. One inevitable

consequence of institutional specialization is the increased bureaucratisation and differentiation of industrial disputes. Another is that decisions of the specialist institution will become less and less subject to review by, or appeal to, other courts or tribunals in society. A limited system of reviews and appeals exist under the LR Act. It would appear, however, that so far, these have not affected decisions of our industrial tribunals in this crucial area. On the issue of appeals in particular, Section 312 of the LR Act will regulate the matter. The section provides that:

> (1) Where any party to any proceedings under this Act is dissatisfied with any decision of the Labour Court ... as being erroneous in point of law, that party may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law only.

Although this right of appeal exists, its exercise has been restricted to decisions of the Labour Court on points of law. It is submitted that even if this provision can be invoked in relation to the decisions of the Labour Court on the question "who is a worker?", it can only be invoked in a marginal number of cases. This is so because the Court and its predecessors have largely treated the application of their current crop, the "mixed" (or "multiple") and "totality" tests of a contract of service as a matter of fact rather than as a matter of law (Szakats, 1988, pp.26-31).

While there are direct statements in some of the judgments to this effect, the industrial tribunals have also held that these tests represent the "common sense approach of the reasonable person" (see e.g. *NZ Carpenters, etc, IUW* v *Construction Development Ltd* 1989, CLC 16/89). This being the case, it is further submitted that decisions on the question are unlikely to be successful unless an appellant can show that a test was incorrectly interpreted[4], or that a particular conclusion of the Labour Court is perverse, or is one that cannot be justified on the basis of the evidence presented in the case[5]. There can be no doubt, therefore, that successful appeals on the question will be not only as scarce as dog's tears, but completely non-existent. This itself compounds the crisis of confidence in the Labour Court's approach to this question.

The third and final objection to the Labour Court's determination of the crucial question addressed in this article is that the Court has assumed a jurisdiction which the LR Act has not conferred on it. It is not the province of the Court to make or unmake a "worker" for the purposes of the Act. It must be re-emphasised that this competence is the property of unions. We have already drawn attention to the Court's role in this matter. There may be an argument that it was not the legislative intent that all manner of working people benefit from the provisions of the LR Act. If indeed this argument is sustainable, then it is equally important to indicate here that it is not the province of the Court to fill in this lacuna in the Act. Parliament had for reasons best known to itself, defined "worker" and "employee" differently in different enactments. The jurisdiction conferred on the Court in the LR Act is limited to issues concerning the "worker", not the "employee". If Parliament intended to make the "worker's" common law cousin the "employee", it would have done so expressly. If Parliament considers that it has created a Frankeinstein monster out of the current "worker", it is Parliament alone which is competent to shear the concept of its undesirable qualities. The Labour Court should not arrogate to itself the competence to perform this task. There must remain a strict separation of powers between the legislature and the judiciary.

4 See, e.g., *Davis* v *New England College of Arundel* [1977] ICR 6; and *Parsons* v *A J Parsons & Sons Ltd* [1978] ICR 456.

5 *Neale* v *Hereford and Worcester County Council* [1986] ICR 471, 483; and *Campion* v *Hamworthy Engineering Ltd* [1987] ICR 966, 972-973.

References

Blackstone W. (1978) Berkowitz D.S. and Thorne S.E. (eds) *Commentaries on the laws of England, Vol 1.* 4 Vols, New York, Garland Publishing Inc.

Brooks B. (1978) *The practice of industrial relations in New Zealand.* Auckland, Commerce Clearing House.

Cane P. (1987) *Atiyah's accidents, compensation and the law.* 4th ed, London, Weidenfeld and Nicholson.

Clark J. and Wedderburn, Lord (1983) Modern labour law: problems, functions and policies. In Wedderburn *et. al.* (eds) *Labour law and industrial relations: building on Kahn-Freund.* Oxford, Clarendon Press.

Geare A. J. (1976) *Handbook on New Zealand industrial relations.* Dunedin, Campbell and Jones.

Geare A. J. (1988) *The system of industrial relations in New Zealand.* 2nd ed Wellington, Butterworths.

Hare A.E.C. (1946) *Report on industrial relations in New Zealand.* Wellington, Whitcomb and Tombs.

Hepple B. and O'Higgins P. (1989) *Encyclopaedia of labour relations law.* London, Sweet and Maxwell.

Kahn-Freund O. (1977) Blackstone's neglected child: the contract of employment. 93 *Law quarterly review* 508.

Mathieson D. (1970) *Industrial law in New Zealand Vol 1.* Wellington, Sweet and Maxwell.

Merrit A. (1982) The historical role of law in the regulation of employment: abstentionist or interventionist? *Australian journal of law and society.* 1:56.

Morris R.B. (1946) *Government and labour in early American New York.* Columbia Univ. Press.

Napier P. *et.al* (1980) *Labour law: cases and materials.* London, Butterworths.

NZ Parliamentary Debates (1882) Vol 41.

NZ Parliamentary Debates (1984) Vol 84.

NZ Parliamentary Debates (1973) Vol 384.

NZ Parliamentary Debates (1987a) Vol 477.

NZ Parliamentary Debates (1987b) Vol 480.

Reeves W.P. (1986) *State experiments in Australia and New Zealand.* First published, 1902, Melbourne Macmillan.

Rideout R. (1983) *Principles of labour law.* 4th ed London, Sweet and Maxwell.

Schouler J. (1870) *A treatise on the law of domestic relations.* Boston, Little Brown and Co.

Seidman J. (1974) New Zealand's Industrial Relations Act 1973. *International labour review.* **110**:515.

Selznick P. (1983) *Law, society and industrial justice.* New Brunswick, Transaction Books.

Szakats A. (1980) Industrial jurisdiction: a complex hierarchy of courts. *New Zealand law journal.* 436.

Szakats A. (1988) *Introduction to the law of employment.* Wellington, Butterworths.

Szakats A. (1989) The Waterfront Industry Reform Act 1989. *International law bulletin.* **22**.

Vranken M. and Hince K. (1988) The Labour Court and private sector industrial relations. *Victoria University of Wellington law review.* **18**:105.

Woods N.S. (1963) *Industrial conciliation and arbitration in New Zealand.* Wellington, Govt Printer.

Woods N.S. (1974) *The Industrial Relations Act 1973.* Occasional Paper No. 11, Industrial Relations Centre, VUW.