EMPLOYMENT LAW: THE RICHARDSON YEARS

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Kit Toogood in one of the two papers on employment law makes the point that when Sir Ivor Richardson was appointed to the Court of Appeal, industrial law (as it was then called) was largely dealt with outside the courts. At the time of his appointment, the Industrial Relations Act 1973, which marked the beginning of the end of the arbitration system, was only five years old. The personal grievance procedures introduced in that Act became the dominant class of case to come before the specialist institutions. In 1978, industrial law was largely the province of the long established Court of Arbitration although the true legal jurisdiction of that Court only really commenced with the introduction of the statutory distinction between disputes of interest and disputes of rights in the Industrial Relations Act. The courts of ordinary jurisdiction had from time to time, although rarely, intervened in industrial law. In *Ohinemuri Mines and Batteries Employees' IUW v Registrar of Unions*,[1] they had applied a restrictive interpretation of the *ultra vires* doctrine severely limiting the permitted objects of registered unions and in *Auckland Freezing Works IUW v New Zealand Freezing Works IAW*,[2] they held that registered unions had no legitimate interests beyond their own industry, thus rendering affiliated groups of trade unions unlawful. A few years before Sir Ivor's appointment the courts had for the first time utilised the economic torts in New Zealand as a technique for controlling industrial action.[3] Later, Sir Ivor was to question the wisdom of the courts of ordinary jurisdiction hearing industrial relations cases of this type taking the view that they were properly to be heard in the specialist court.[4]

As industrial law transmogrified into labour law and as the 1970s became the 1980s the law remained in a state of considerable flux, adaptation, and development. These

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1 *Ohinemuri Mines and Batteries Employees' IUW v Registrar of Unions* [1917] NZLR 829 (CA).

2 *Auckland Freezing Works IUW v New Zealand Freezing Works IAW* [1951] NZLR 341 (CA).

3 *Northern Drivers IUW v Kawau Island Ferries Ltd* [1974] NZLR 617 (CA).

4 *New Zealand Baking Trades Employees IUW v General Foods Corpn (NZ) Ltd* [1985] 2 NZLR 110 (CA).

developments, however, largely remained outside the province of the courts. The centre of attention remained Parliament where governments passed what seemed a constant stream of legislation to deal with not only the major legal issues of labour but even the smallest. It was not until after this stream of legislative activity subsided in 1984, and later the passage of the Labour Relations Act in 1987, that the Court of Appeal came to play an important and then central role in the development of the law.

There are probably three major reasons for the increasing juridification of the law. The first has already been alluded to – the distinction made between interest disputes and rights disputes in the Industrial Relations Act 1973. This distinction meant that for the first time one class of labour disputes was seen as justiciable by the normal techniques of the judicial system. The same division also acknowledged that this was no longer true of fundamental economic disputes over pay and conditions – the first legal acknowledgement of the end of the arbitration system. This distinction, however, did not become fully effective until the reform of strike law in the Labour Relations Act 1973. Although strikes had been unlawful both under statute and common law this state of affairs was more theoretical than practical. Indeed during the 1970s and 1980s statutory restrictions were gradually removed and strike action decriminalised. It was not until 1987, however, that the statutory distinction between lawful and unlawful strikes was put in place, a reform that rightly took the policy issue of the boundaries of legitimate industrial action out of the hands of the courts and placed it into those of Parliament. A primary effect of reform was that strike law, for the first time, became a practically effective sanction and set genuine boundaries on strike action. Given that strikes relating to disputes of rights and personal grievances were unlawful such disputes were required to be resolved within the judicial system and not by industrial action.

The final reason of course was the enactment of the Employment Contracts Act 1991, which fundamentally restructured employment law (as it then came to be called) largely displacing the final remnants of the old arbitration system. The Employment Contracts Act did away with the collectivist underpinnings of the previous system and instead was founded on a contract based – anti-collectivist philosophy that gave priority to the individual employment contract.

The EC Act significantly expanded the jurisdiction of the Employment Court to include "exclusive jurisdiction to hear and determine any action founded on an employment contract". This change had the effect of bringing all employees within the Court's jurisdiction while at the same time extending its jurisdiction to encompass a wide range of common law actions arising out of breaches of a contract of employment, including breaches of the implied terms of fidelity, confidentiality and the like, as well as actions concerning restraint of trade clauses. Thus, in the relatively short space of time between 1987 and 1991, the jurisdiction of the Court expanded from actions deriving purely from a

statutory origin, effectively confined to private sector workers covered by a collective instrument, to a broad-based common law and statutory jurisdiction covering all workers having the legal status of an "employee". This expanded the Court's coverage from about 60 percent of the employed workforce in 1987 to the entire workforce after 1991. These changes created a system more familiar to the common law and it was under this system that the Court of Appeal came to increasingly dominate the development and structure of employment law both in its collective and its individual spheres.

This period was not, of course, a particularly peaceful or stable one. The Employment Contracts Act was by any standards an extreme reform strongly biased to one side of the employment relationship and one which generated considerable emotion. Understandably and justifiably the labour movement saw the Act as designed to deunionise New Zealand workplaces and undermine or remove hard won employee rights. At the opposite end of the spectrum new-right acolytes, exemplified by the Business Roundtable, decried the failure of the government to fully reform the labour market in accordance with the new-right vision – at a minimum by abolishing the specialist Employment Court and introducing employment-at-will – but preferably by abolishing the total statutory scheme of labour law and allowing employment relationships to be governed by the law of contract and tort. This ideological drive partly manifested itself in an unparalleled attack on the Employment Court and its members with the Court of Appeal being portrayed as the defender of the true intent of the Employment Contracts Act. The argument that the Employment Court should be abolished is typified in a paper by Howard.[5] Although Howard was also critical of some decisions of the Court of Appeal his main conclusion was that the most "spectacular" reason the ECA was "not working as well as it could and should" is the "quite extraordinary resistance to implementation of the Act manifested by a section of the judiciary". The second plank in the new-right campaign was a media campaign that was probably unique in New Zealand for its vitriolic and sustained and highly personalized attack on the Employment Court and its Judges. It is not necessary to describe this in detail but some of the headlines of the time might recall the nature of this campaign.[6]

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5 Colin Howard *Interpretation of the Employment Contracts Act 1991* (New Zealand Business Roundtable and New Zealand Employers Federation, Wellington, 1996).

6 See for example: *Employer Wants Court Abolished* (10 August 1992) *The Dominion*, Wellington, 1; *Employment Contracts Act Undermined by Judicial Activism* (14 May 1993) *The Independent*, Auckland, 6; *Employment Court Judges Need to Fall into Line with Free Market* (19 January 1996) *National Business Review*, Wellington, 18. One leading financial paper, (16 December 1994) *The Independent*, Auckland, 14, made the following, not untypical, comment in an editorial entitled *How the Employment Court Fosters Unemployment*:

These developments coincided with the last decade of Sir Ivor's tenure on the Court of Appeal and he was therefore fated to play a central role in the legal developments that took place during this period of legal and industrial change first as a member of the Court and after 1997, as its President. Inevitably, in a period of ideological conflict over the nature of a field of law the courts are placed in a role that is bound to be controversial and the Court of Appeal as the final court in matters of employment law was thus at the centre of the controversies that surrounded employment law during the 1990s. It might be commented that the Employment Contracts Act presented some difficulties for an interpreting court particularly given that Parliament chose to use the sparsest possible language in relation to two central issues. The total Parliamentary guidance on most personal grievances was section 27(1)(a) which stated that an employee has a personal grievance if they have a claim that they have "been unjustifiably dismissed", a formulation dating from 1973. The provisions relating to the negotiation of collective employment contracts were somewhat less minimal, although not much. The provision central to the actual negotiation process was section 12(2) which stated that the employer shall "recognise the authority of that [representative] to represent the employee … in those negotiations". In one case, the Chief Judge of the Employment Court said the following:[7]

> I feel bound to say that the framers of the Employment Contracts Act 1991 could not have intended to leave so much room for judicial doubt and difference of opinion as has been left by section 12. The problems that have arisen in practice could not have been foreseen. Perhaps Parliament will revisit the topic one day. I hope that day will be soon. It is asking too much to expect the Courts to read the legislators minds to the extent that has been necessary in these cases.

The two papers published in this collection deal with only two elements of employment law. The first, by Kit Toogood, *Roles and Perspectives in the Law: Facilitating and Regulating Employment* deals with developments in the law applicable to redundancy. In that paper, he draws attention to the growth in litigation after 1991 as a result of the protection of the personal grievance provisions being extended to all employees with the practical effect that for the first time higher level white collar employees had access to a remedy for unjustifiable dismissal. The particular aspect of the law dealt with by Toogood, redundancy, is of course an area of the law where Sir Ivor played a central role.

> Thus the Employment Court can be seen as a major contributor to unemployment. This body, topped off by chief judge Tom Goddard, seems to be out to usurp the power of Parliament. By making its own law rather than interpreting and enforcing that enacted by our elected representatives, the employment court seems hell-bent on becoming a law unto itself.

7 *NZ Airline Pilots Association v Airways Corporation of NZ (No 1)* [1995] 2 ERNZ 545, 583 (EC).

His views of the law, first expressed as a dissent in *Brighouse Ltd v Bilderbeck,*[8] and later adopted as the correct view of the law in *Aoraki Corporation Ltd v McGavin,*[9] are crucial to understanding recent developments in the law. Toogood traces developments in the law relating to redundancy from that period through to the first significant Court of Appeal decision under the Employment Relations Act: *Coutts Cars Ltd v Baguley.*[10] In that case, a Court of Appeal consisting of four of the five judges who decided *Aoraki* effectively held that *Aoraki* remained good law under the new Act. Toogood's analysis of the Court's decisions is clearly pro-employer. His concern is to support an approach to the law such that "there is no reason well advised employers should feel that they are at risk of having their decisions in a redundancy setting second guessed". The Court of Appeal's approach is clearly seen by Toogood as reaching an appropriate balance between an employer's commercial imperatives and the rights of employees whose jobs are at risk. His analysis is relatively uncritical and could be criticised for unduly focussing on the employer's needs at the expense of those of employees. This is, of course, a matter of taste but it does tend to play down points such that, other than in cases of insolvency, consultation should be more than a formula to be gone through before implementing a decision that has already been made. In many cases, careful and fully informed consultations can make a significant difference to the nature of a decision and suggest reasonable alternatives. Toogood's view that failure to consult can be corrected through the personal grievance remedies is a little too pat and in particular ignores the collective benefits of consultation, something unlikely to be compensated for by individual remedies. Moreover the Court of Appeal has consistently limited those remedies by stressing that compensation is for the lack of consultation and not the loss of the job – an approach that tends to ensure low levels of compensation award. Notions of employees as stakeholders seem to play little part in the view advanced by Toogood, which essentially is based on the notion that workers should work and managers be left to manage. Toogood is also relatively uncritical of the extent to which the Court of Appeal in *Baguley* appeared to read down the extent of the change of philosophy in the Employment Relations Act and in particular the enhanced role of good faith and the implications that this might have had for redundancies.

The second paper by Jack Hodder, *Employment Contracts, Implied Terms and Judicial Law Making* is essentially a sustained criticism of the implied term of mutual trust and confidence. Given that this term is now widely ingrained in the law of most common law jurisdictions and accepted by the appellate courts, Hodder's criticism of the validity of implying such a term is optimistic. He accepts that given the high level of judicial

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

9 *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601 (CA).

10 *Coutts Cars Ltd v Baguley* [2001] 1 ERNZ 660 (CA).

recognition given to the term it is probably here to stay. Hodder traces the origins of the term both in the United Kingdom and in New Zealand in some detail before concluding that such a term does not meet the tests required for the implication of terms into a contract. Interestingly, Hodder pays relatively little attention to the implication of terms that favour employer interests. In one short paragraph he justifies the implication of the duty of fidelity because the employee "must often have access to the employer's property" and suggests it would be absurd to suggest that theft of the employer's property is not a breach of contract. He goes on: "What fact, what absurdity, and what kind of bystander, demands the implication of a duty that an employer act so as to maintain the employee's trust and confidence?" Probably most employees might be so persuaded when the implications of such a term are explained! Moreover if the same employees were fully aware of the reach of the duty of fidelity they may well wonder why it is particularly obvious that such a term should be implied or that it is so different from that of maintaining trust and confidence. Hodder's assertion that the former is needed to protect an employer's property from theft seriously understates the reach and nature of the term which can and has been used to justify dismissing employees for a range or matters that have nothing to do with theft and little to do with property.

These two papers are clearly written from a perspective that essentially sees the employment contract as a contract for the benefit of the employer and which should largely reflect the commercial needs of the employer. In his paper, Hodder appears to implicitly support the views of Richard Epstein one of the more extreme proponents of the new-right approach to employment law. The major criticism that can be made of both papers is that they fail to consider the employment relationship from the perspective of an employee. Employees as much as employers have expectations from employment relationships and these include an expectation of security of employment in the absence of good cause for termination, an expectation of fair treatment and a range of psychological and behavioural expectations. The fight for recognition of these expectations has been long, hard won and generally unsupported by the common law. The perspective of the law presented in these papers helps explain why.

The papers published here deal with only two aspects of employment law, and given that Hodder's paper is relatively escoteric, touch on only one of the controversial facets of employment law that were central to the Richardson years. As noted above, the last decade of Sir Ivor's tenure on the Court of Appeal was particularly controversial in employment law. The decisions of the Court of Appeal were central to that controversy in a whole range of areas. These two papers deal with individual employment law and then only one major, although possibly the most contentious, development. The period saw the Court overrule the accepted position that the failure to renew a fixed term contract could,

in some situations constitute a dismissal,[11] a case that was one in a number of cases during the period where the Court was concerned to ensure that personal grievance protection remained confined to traditional dismissals and did not extend beyond the particular contract under which an employee was employed.[12] Over the same period the Court increasingly limited the scope of the Authority and Employment Court to review a dismissal decision by requiring a focus on the reasonableness of an employer's decision from the perspective of a reasonable employer as opposed to a reasonable person generally. More recently it seems that the standard of review has moved more to that of the particular employer whose decision is being reviewed[13] and the scope for limiting awards for contributory conduct by an employee has been increased.[14] Sir Ivor personally sat on only one of these cases (*Hagg*) but the combined effect of these cases in confining and limiting the personal grievance remedy is identifiable with Sir Ivor's tenure as President.

A particularly important area of legal development and controversy that is not discussed in this symposium are the decisions of the Court of Appeal impacting on collective employment law and in particular collective bargaining. In *Eketone v Alliance Textiles (NZ) Ltd*,[15] the Court of Appeal initially took a reasonably cautious approach to collective bargaining under the Employment Contracts Act holding that once a union had established its authority to represent the employer would be in breach of section 12(2) if it attempted to negotiate directly with its employees or to otherwise bypass the union. Interestingly one member of the Court, Gault J,[16] held that it is appropriate to have reference to international instruments relating to freedom of association, including ILO Conventions 87 and 98, in interpreting relevant legislation and noted that, while the right to elect to bargain collectively is not a necessary element of freedom of association, it is a right conferred by Part II of the Act and "should be fully accorded, bearing in mind ILO Convention 98".[17] Over time, however, it became clear that a substantial reversal in policy occurred in the Court. In *New Zealand Fire Services Commission v Ivamy*,[18] the majority

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11 *Principal of Auckland College of Education v Hagg* [1997] 1 ERNZ 116 (CA) overruling *Smith v Radio i Ltd* [1995] 1 ERNZ 281 (CA).

12 *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139 (CA).

13 *W&H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 (CA).

14 *Ark Aviation Ltd v Newton* [2001] 1 ERNZ 133 (CA).

15 *Eketone v Alliance Textiles (NZ) Ltd* [1993] 2 ERNZ 783.

16 Now of course Sir Ivor's successor as President of the Court.

17 *Eketone*, above, 794, Gault J (as he then was).

18 *New Zealand Fire Services Commission v Ivamy* [1996] 1 ERNZ 8 (CA).

decision of the Court (including Sir Ivor), although claiming not to change the law, provided a "brief elaboration" which heralded a more conservative and restrictive approach by the Court. In particular the Court adopted a restrictive view of freedom of association, which enabled it to take a more restrictive approach to employee bargaining rights. It held that bargaining rights arise out of but are not regarded as an element of freedom of association and instead approached the employer's obligations under section 12(2) as a purely statutory obligation thus allowing it to give primacy to the employer's freedom of expression. It held that section 12(2) "must be given a meaning consistent with the rights and freedoms in the Bill of Rights Act (section 6) which include the freedom of expression which extends to '... the freedom to seek, receive and impart information and opinions of any kind in any form'". Freedom of association was thus impliedly limited to the Part I right to join a union and disassociated from the freedom to bargain collectively through a representative. What was particularly noteworthy was that the decision contains no reference to the ILO principles of freedom of association. This is a somewhat surprising omission given the release of the ILO Committee on Freedom of Association's Decision[19] shortly beforehand and also because of the marked contrast with Gault J's earlier judgment in *Eketone*, where he regarded ILO conventions as an important factor in interpreting the Act. The decision was also notable for a very strong split in the Court with Cooke P and Thomas J both delivering extremely strongly worded dissents.

It is probably too soon to fully assess the impact of Sir Ivor's tenure, both as a judge and President of the Court, on employment law. What is undeniable is that his tenure coincided with one of the most controversial and divisive periods of industrial relations in New Zealand history and that as a consequence, the Court of Appeal was bound to take a leading role in determining many of the legal conflicts that arose as a result. Given the clear ideological divides inherent in the reforms and the law there are clearly differing views on the direction taken by the Court in this period. If nothing it will be agreed that Sir Ivor presided over the Court in interesting times.

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19 ILO Committee on Freedom of Association, Case No 1698: Complaint Against the Government of New Zealand (*Official Bulletin,* Vol 77, Series B, No 3) 39.