

CURIAL INSTITUTIONS UNDER THE EMPLOYMENT CONTRACTS ACT: 1991 TO 1997

AN OVERVIEW BY HIS HONOR CHIEF JUDGE T. G. GODDARD*

My contribution to this *Symposium* is a reluctant one. At first I resisted the invitation to make one. The editors were, however, quite pressing. They mentioned such things as completeness and balance. They showed themselves flexible in relation to deadline. In the end, I gave in. I will focus on aspects of the role of the Employment Tribunal and the Employment Court, the two new legal institutions created by the Employment Contracts Act 1991 (ECA). For reasons of space, and because its role underwent little change, I do not intend to say anything about the place of the Court of Appeal in the curial hierarchy of employment law.

Before I begin in earnest, I may mention, on the subjects of completeness and balance, that I have been sent a list of the titles of other contributions. There is obviously going to be a most comprehensive coverage of the subject matter of this journal. I look forward to reading all the articles. As to balance, I doubt whether anything that I may say can make any difference. There are some people and organizations who have made it their business to be detractors of the Court. They tend to blame it roundly for all that goes wrong in industrial relations and the economy generally. Blaming the Court is, has been, and no doubt will again be a popular pastime. It is easy to do and it costs little. When the Court's¹ structure was under review over a decade ago under a different administration, it was criticized by some (mainly but not solely plaintiffs) for being too slow. It is little wonder that it was, for it was under-resourced. When that state of affairs was suitably corrected, the Court responded at once. It cleared its backlog and started on the road to eliminating delays. It improved access to justice by adopting innovative and efficient methods of case management and decision-making. It is now re-

* M.A. (Hons), LL. B. (VUW); Chief Judge of the Employment Court of New Zealand since its inception; previously Chief Judge of the New Zealand Labour Court (1989 to 1991), before appointment to the Bench a barrister and solicitor for 27 years.

1. In this context and possibly elsewhere when I refer to "the Court," I include its recent predecessors, the Labour Court (1987-1991) and the Arbitration Court (1974-1987), but more usually I mean the Employment Court (1991-present).

garded by some (mainly but not solely defendants) as too efficient. It delivers justice far too fast for their liking.

Perhaps they do not need to worry. That state of affairs may not continue much longer. The vacancy created by the late Judge Castle's death two years ago has not been filled. There is no sign of any movement towards filling the more recent further vacancy caused by Judge Finnigan's premature retirement. When things finally do begin to move, it will not be easy to find a suitable candidate prepared to accept an uncomfortable seat on a Bench which is subject to an unremitting campaign from some quarters for its abolition.

The consequences of this inaction can only be appalling. A court of six judges will soon be one of four judges. Assuming that judicial leave already arranged for 1998 goes ahead, there will in the first half of next year be only one resident judge available in Auckland (New Zealand's main population center), rising to a maximum of two in the second half. There is already only one judge in Wellington (the capital and center of government and much business). The fourth judge resides in Christchurch. He has already been and will continue to be called on to an unreasonable degree to supplement the stretched resources in the North Island, as well as to cater to the needs of the South Island. This leaves four judges for the whole country (only three for most of the first half of the year) to deal with the entire first instance employment jurisdiction previously vested in the High and District Courts and the originating and appellate jurisdiction of the former Labour Court—potentially upwards of 450 cases annually, each capable of lasting from anywhere between half a day and several weeks. The problem stems not just from the number of cases, but also from the threat to the Court's established ability to react flexibly and in a timely manner where necessary to accommodate exigent emergencies in the workplace, yet provide the parties with a full opportunity to be heard. If it is prevented from providing this service by lack of resources, the best interests of employers and employees alike will suffer.

Despite the inevitable slowing of throughput as a result of the reduction in the Court's judicial resources, some would wish to see this process slide even further. They would rather see employment cases returned to the general courts of civil jurisdiction. I am afraid that such a change would not be good for the parties. New Zealand has not yet seen such sweeping reforms of the litigation process as have taken place in California. I understand that in New Zealand civil litigation, despite some recent reforms, still continues to be subject to great delays. They are not necessarily endemic to the system, but it seems that only clever litigators know how to overcome them even some of the time. It would not be a good idea to compound the problems of the ordinary civil courts by giving them another four or five thousand cases a year.²

2. I imagine that I have probably understated the magnitude of the problem.

It is against this background that I now look at the nature and volume of the work of the curial institutions under the ECA. At the beginning of this decade employment disputes were being dealt with, if based on individual rights, at common law by the courts of general jurisdiction of first instance—the High Court, the District Courts, and Disputes Tribunals (depending on the amount of the claim) and, if collective or statutory in origin, by the Labour Court and the Mediation Service of the Department of Labour (usually at the suit of unions rather than individuals).

The Labour Court was created by the Labour Relations Act 1987 (LRA), and it was plain that, in the event of a change of government at the 1990 elections, there would also be changes to the arrangements for deciding disputes and for the negotiation of terms and conditions of employment. The change of government eventuated and, within a very short space of time, the ECA was enacted, coming into force on May 15, 1991.

It will have been presented by other contributors variously as an enlightened regime and an intolerable yoke. For reasons that I hope are obvious, I do not propose to express any views that I may have. I may perhaps offer this general and, I hope, entirely neutral comment. Of the policy options available to it for regulating the labor market, the New Zealand legislature chose, when enacting the ECA, to emphasize the importance of contract as opposed, perhaps, to status. This choice was not unique to New Zealand and is not particularly surprising in the environment of progressively greater deregulation of economic life at the time and still currently fashionable in the developed world and elsewhere.³

There was considerable pressure even in 1991 from certain lobby groups to abolish the Labour Court entirely. One of the options suggested was a return of all employment disputes to courts of general jurisdiction. The argument was that no strong need exists for a specialist employment court and that it was not good economics for the State to provide machinery at the taxpayer's expense for the purpose of solving problems that employers might have with their employees and vice versa. To some extent the economic arguments prevailed and State support was removed almost entirely from the negotiation and conciliation of collective instruments known as awards and agreements. In relation to curial institutions, however, economic arguments were thought to be met by the introduction for the first time in this area of filing and hearing fees. "User pays" was preferred to abolition.

Indeed, far from accepting the arguments for the abolition of the Labour Court, Parliament chose instead to create new and stronger specialist institutions intended to have between them the totality of exclusive jurisdiction in employment matters. It is important to stress from the outset that the Labour Court did not have any powers to fix for the future the terms and

3. See, e.g., UNITED NATIONS ORGANIZATION, CHANGE: THREAT OR OPPORTUNITY FOR HUMAN PROGRESS? (1992).

conditions of employment in any industry or enterprise if the parties were unable to agree.⁴ The Court's powers were limited to determining and enforcing existing rights.

Sometimes, under the LRA, an employee might have a claim which needed to be heard partly in the specialist court and partly in one of the general courts; such a duality of jurisdiction had been the subject of criticism because of the uncertainty and concomitant expense for the parties. Several cases were, because of doubt, commenced both in the Labour Court and in the High Court and, in one such instance, the Court of Appeal heard together and decided in a single judgment appeals from decisions of the High Court and of the Labour Court on striking out applications based on the ground of want of jurisdiction in each court.⁵

This duality of jurisdiction was seen by many as bringing the administration of justice into disrepute. The validity of this criticism was accepted by Parliament and the solution resorted to was to transfer the whole of the employment jurisdiction to new specialist institutions to be exercised by them to the exclusion of the courts of general jurisdiction. In pursuance of this policy, the Employment Contracts Act 1991 created the Employment Tribunal as a low-level informal tribunal designed to deal with cases at the coalface by using mediation as an important tool of dispute resolution, and the Employment Court as a specialist court to oversee the role of the Tribunal, "it being recognised that the nature of employment contracts is such that the parties to employment contracts from time to time require the assistance and certainty that can be provided by a specialist court."⁶

The actual mechanics of this transfer of jurisdiction was achieved by statutory provisions that seem clear enough on their face. However, as no consequential changes were made either to the Judicature Act 1908, to the District Courts Act 1947, or to the Disputes Tribunals Act 1988, the courts governed by those statutes sometimes took the view that their jurisdiction had not been diminished with the result that they were not precluded from hearing and determining employment cases. The extent to which they did so was entirely unpredictable from year to year and did little to assist case management in the specialist institutions.

The Employment Contracts Act 1991, in sections 3 and 4, seemed to make the jurisdictional position plain enough:

4. It was never part of the debate that the Employment Court should be given any such function.

5. *N.Z. Air Line Pilots' Ass'n v. Air N.Z. Ltd.* [1992] 1 E.R.N.Z. 353 (C.A.).

6. Employment Contracts Act § 76(d), 1991 (N.Z.).

3. Exclusive jurisdiction in relation to matters arising out of employment contracts—

(1) This Act shall apply to all employment contracts and the Tribunal and the Court shall, subject to the provisions of this Act, have exclusive jurisdiction to hear and determine any proceedings founded on an employment contract. (2) Nothing in this section prevents the parties to an employment contract from agreeing, whether by a term of the contract or otherwise, to have any of their differences under that contract resolved otherwise than by reference to any court or tribunal.

4. **Right to sue**—Nothing in section 3 of this Act affects the right of any party to an employment contract to bring proceedings founded on that contract, but any such proceedings shall, subject to the provisions of this Act, be heard and determined before the Tribunal or the Court or both.⁷

The language used was in some respects a close parallel to that used in other statutes in the past to transfer jurisdiction from general to special courts, and it had been effective in those cases.⁸ For some reason that has never been explained, a similar verbal formula did not seem to be equally efficacious to transfer employment cases. Quite apart from this resistance to change, in some cases genuine room for doubt about the exact extent of the jurisdiction transferred still existed.

In certain respects the LRA had been more emphatic, if not more clear, on jurisdictional issues. In transferring to the specialist court the jurisdiction to grant injunctions to stop or prevent unlawful strikes or lockouts, the LRA provided in express language that no court other than the Labour Court should have jurisdiction to restrain a strike or lockout by injunction.⁹ This formulation was continued in the Employment Contracts Act 1991.¹⁰ Moreover, the same formula was used in relation to actions in tort arising out of a strike or lockout and brought against one party to it.¹¹ And in these areas, the LRA contained provisions, comparable to sections 3 and 4 of the ECA, conferring exclusive jurisdiction on the Court.¹²

The jurisdiction which the ECA confers on the Employment Tribunal, omitting machinery provisions, is as follows:

7. ECA §§ 3, 4.

8. For example, the Family Proceedings Act 1980, which transferred jurisdiction in relation to divorce and allied topics from the High Court to the Family Court.

9. Labor Relations Act § 243(2), 1987 (N.Z.) [LRA].

10. LRA § 242(2).

11. The specialist court was given limited tort jurisdiction to deal with the torts of conspiracy, intimidation, inducement of breach of contract, or interference by unlawful means with trade, business, or employment but in relation solely to a strike or lockout or a threatened strike or lockout.

12. LRA §§ 242(1), 243(1).

- (a) To provide mediation assistance in all matters properly brought before it:
- (b) To adjudicate on personal grievances, under personal grievance procedures contained or implied in employment contracts, which are properly brought before it:
- (c) To adjudicate on disputes, under disputes procedures contained or implied in employment contracts, which are properly brought before it:
- (d) To adjudicate on all actions . . . for the recovery of wages or other money:
- (e) To adjudicate on all actions for the recovery of penalties under this Act for a breach of an employment contract or for a breach of any provision of Part II or Part III or Part IV of this Act:
- (f) To make a compliance order under section 55 . . . :
- (g) To adjudicate on all actions for breach of an employment contract:¹³

The members of the Tribunal are not required to be qualified as lawyers.¹⁴ They are to be appointed for terms not exceeding four years but may be reappointed, subject to retirement at age 65. The general function of the Tribunal "shall be to assist employers and their representatives and employees and their representatives to achieve and maintain effective employment relations, in particular, by facilitating mutual resolution of differences between the parties to employment contracts."¹⁵

The Tribunal was to do this by providing mediation assistance to facilitate agreed settlements of differences between the parties to employment contracts or by adjudicating a settlement of those differences. However, "Nothing in this Act shall require the Tribunal to provide mediation assistance in any matter as a prerequisite to adjudication."¹⁶ In reality, mediation is the main activity of the Employment Tribunal. It can be said that four out of every five cases are resolved either at mediation or subsequent to mediation, and only one in five go to an adjudicated hearing. The number of Tribunal members has varied, but it currently fluctuates around 25 who, between them, dispose of an ever-growing number of cases per year—exceeding 5,000 for the first time in 1996.

By contrast, the jurisdiction of the Court is far more extensive. It is contained in a number of provisions of the Act conveniently gathered together in section 104. Again, omitting machinery provisions, these are:

- (a) To hear and determine appeals from adjudications of the Tribunal,
- (b) To hear and determine all actions for the recovery of penalties under this Act for a breach of any provision of this Act (other than any provision of Parts II to IV):
- (c) To hear and determine questions of law referred to it by the Tribunal:
- (f) To hear and determine any question connected with any employ-

13. Employment Contracts Act § 79(1), 1991 (N.Z.).

14. Some members of the Tribunal are lawyers.

15. ECA § 78.

16. ECA § 78(6).

ment contract which arises in the course of any proceedings properly brought before the Court:

- (g) To hear and determine any action founded on an employment contract:
- (h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:
- (i) To hear and determine any question connected with the construction of this Act or of any other Act, being a question that arises in the course of any proceedings properly brought before the Court, notwithstanding that the question concerns the meaning of the Act under which the Court is constituted or under which it operates in a particular case:
- (j) To order compliance under section 56 . . .
- (k) To hear and determine any application for an order or declaration under section 57 . . . :
- (l) To hear and determine any proceedings founded on tort and of a kind specified in section 73 . . . :
- (m) To hear and determine any application for an injunction of a type specified in section 74 . . . :
- (n) To hear and determine any application for review of the type referred to in section 105 . . . :¹⁷

The ability to deal with harsh and oppressive contracts and similar conduct was new.¹⁸ It is worth setting out:

57. Harsh and oppressive contracts—

- (1) 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 under this section.
- (2) An allegation of the type referred to in subsection (1) of this section may be made in proceedings before the Court commenced for that purpose or in the course of other proceedings properly brought before the Court.
- (3) The Court may exercise the powers contained in subsections (4) and (5) of this section only on the application of a party to the contract and not of its own motion.
- (4) Where the Court is satisfied, on the application of a party to an employment contract, that an allegation of the type referred to in subsection (1) of this section is true, the Court may make one or more of the following orders:
 - (a) An order setting aside the contract (either wholly or in part);
 - (b) An order directing any party to the employment contract to pay to any other party such sum by way of compensation as the Court thinks fit.
- (5) In making any order under this section the Court shall take into account all the circumstances surrounding the creation of the contract or the relevant part thereof.
- (6) Any order under this section may be made on such terms and conditions as the Court thinks fit.

17. ECA § 104.

18. It was somewhat cryptically alluded to in paragraph (k) of section 104(1) above.

(7) Except as provided in this section, 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.¹⁹

The key provisions of section 104(1) are those contained in paragraphs (f), (g), and (h), which transfer to the Court jurisdiction over all issues connected with or relating to any employment contract. The jurisdiction is not limited in monetary amount or any other way and is not expressed to be limited to a jurisdiction in contract rather than in tort, or at law rather than in equity. A question that arose very early was whether language such as “founded on” or “related to” an employment contract carries with it jurisdiction in equity to protect confidences, and in tort to protect against third parties inducing breaches of contract. It is important to employers and employees, but especially to employers, that there should be clarity about jurisdiction in such cases. They may arise in a number of ways. Scenarios that have actually arisen include the following:

1. An employer alleges that two employees in contemplation of leaving their employment have formed a company and caused it to then use the employer’s confidential information provided by the employees for the purpose of engaging in competition with the employer to its detriment. Clearly, the employer, on proof of this allegation, will be entitled to damages against the employees and to an injunction against the company to restrain it from using the information. Does the employer have to go to two courts to obtain these remedies or only to one, and which one?

2. An employer wishes to allege that an employee has left the employment and induced fellow employees also to leave in breach of their contracts of employment. Plainly again, the employer, on proof of its allegation, is entitled to damages from the first employee. Are those to be sought in the Employment Court, or the High Court, or in both?

3. A former employee claims that a stranger to the employment contract with knowledge of it has persuaded the employer to breach it. It wanted, for reasons of its own, to bring about the employee’s dismissal, or so it is said. In certain circumstances an action for damages may lie. Does it lie in the Employment Court or in the High Court?

4. An employee signs a covenant in restraint of trade. In alleged breach of that covenant, the employee enters into competition with the former employer and, in addition, without breaching the covenant, is said to be making use of confidential information. Is one action in one court enough or are two needed?

5. An employee leaves, omitting to return non-confidential property such as a motor vehicle. The employer is advised to bring an action for damages for breach of the employment contract and an action in tort for conversion and detinue, relying solely on a term of the employment contract

19. ECA § 57.

to show when its entitlement to possession of the car began. How many courts? If one, which one?

CONCLUSIONS

Putting these complications to one side, however, by and large the specialist institutions have found the Employment Contracts Act 1991 and their role under it to be workable. Between them they have disposed of many thousands of cases and done so in general promptly. The Court and the Tribunal have been able to develop their own separate methods both of case management and of decision-making. The field is by no means narrow and frequently involves considerations of many areas of the law. The Court has varied jurisdictions—it sits as an intermediate appellate court, and it hears first instance witness actions, applications for judicial review, and many urgent interlocutory applications for interim relief. The branches of the law that are raised are, of course, contract but, in addition, tort, public law, equity, and international law, public and private. Overlaid are the special considerations that apply to employment cases. This is the true specialization of the specialist institutions which in other respects, especially at the level of the Court, have to be all-rounders to a far greater degree than their predecessors. A number of features are worth special mention. Space and time do not permit a full discussion. In preparation for writing this Article, I put together an ABC schematic of the ECA. There were several topics worthy of development under almost every letter of the alphabet. I will mention only a few by way of sample.

APPEALS

At the request of the judges, the ECA and the Employment Court Regulations 1991 brought about many changes to the way in which appeals are run. So far as concerns appeals from this Court to the Court of Appeal, the preparation of the case on appeal²⁰ is now the responsibility of the parties and not of the Court except in those rare cases in which the Court may wish, of its own motion, to state a case for the opinion of the Court of Appeal.²¹ More extensive changes have taken place in the way in which appeals are conducted that have to be heard by this Court. Parties (and especially appellants) are not, in general, permitted to take points on the appeal that were not taken before the Tribunal. To ensure that this rule is not infringed, and to enable appeals to be dealt with efficiently, the Employment Tribunal is required to produce a transcript of the proceedings before it when an appeal is filed (unless, for good reason, the Court dispenses with a transcript), and the parties are required to submit their arguments to the Court in ad-

20. The bound volume that constitutes the Court of Appeal's file.

21. These cases are rare indeed, for there has been only one.

vance of the hearing. This requirement greatly reduces the length of time required for the hearing of appeals, even in cases that have been the subject of extensive evidence before the Tribunal.²² The only other thing that I wish to mention on this subject is that, while there is a general right of appeal²³ from the Employment Tribunal to the Employment Court, the right of appeal to the Court of Appeal from decisions of the Employment Court is, in most cases, limited to appeals on questions of law only. The Court of Appeal is further directed by the ECA, as it was by its predecessor statute, to have regard when deciding any appeal to the special jurisdiction and powers of the Employment Court.²⁴ It has now been confirmed that there is no further right of appeal beyond the Court of Appeal.²⁵

I must mention the important role of full courts²⁶ in ensuring certainty and consistency in employment law and practice. That role could continue and be expanded and developed further if the complement of judges is raised to its previous level.

THE PERSONAL GRIEVANCE JURISDICTION

The personal grievance jurisdiction is a statutory jurisdiction that is peculiar to the employment institutions.²⁷ Only some 25 years old, it does not exist in the courts of general jurisdiction. It consists of the following claims:

- unjustifiable dismissal,
- unjustifiable action,
- discrimination,
- sexual harassment, and
- duress in relation to the freedom of association.

If the grievance is established, there is power to order reinstatement, to award reimbursement of wages lost as a result of the grievance, to compensate for distress and losses of benefits, and (in the case of sexual harassment) to make recommendations to the employer concerning the action the

22. I am given to saying that, under these arrangements, the argument of a well-conducted appeal should be over by morning tea. This does not frequently happen in practice, but as often as not half a day is sufficient for the hearing of an appeal. It should be appreciated that this system requires more, rather than less, work by the judges, but it reduces the time spent by counsel and advocates in Court and streamlines their preparation for it, thus rendering appeals more economical for the parties. To achieve that at a time when legal costs are generally escalating has been a satisfying feature of the work of the Court.

23. By general is meant that it is on fact and law.

24. Employment Contracts Act § 137, 1991 (N.Z.).

25. *Sears v. Attorney-General*, unreported, Oct. 7, 1997, Judicial Committee of the Privy Council.

26. In which three judges sit instead of one.

27. In some respects overlapping with parallel jurisdiction under the Human Rights Act 1993 in which case persons wishing to complain are called upon to choose their remedy.

employer should take with respect to the person guilty of the objectionable behavior, including the rehabilitation of that person. The personal grievance is the main diet of the Employment Tribunal's work and provides also the bulk of the Court's appellate work.²⁸

DISPUTES JURISDICTION

The expression "dispute" is a term of art in this context, meaning a dispute about the interpretation, application, or operation of an employment contract. These do not feature as largely as in the past but still remain an important part of the unique jurisdiction of the institutions. It has been responsible, for example, for the development of a jurisprudence about the interpretation of employment contracts and the requirements of consultation, where it is mandatory under an employment contract.

ACTIONS FOR DAMAGES FOR WRONGFUL DISMISSAL

Actions for damages for wrongful dismissal are to be contrasted with personal grievances seeking reinstatement, reimbursement, and compensation. The latter are under statute, while the former are under the common law. The latter must be initiated in the Employment Tribunal; the former can only be initiated in the Employment Court. Contributory conduct is no defense to an action for damages, but it is a defense in a personal grievance and may result in a reduction of remedies that might otherwise have been awarded. It is often said that another important difference exists: In an action in common law in seeking damages for wrongful dismissal, the remedy of reinstatement is not available. However, it is commonplace for interim injunctions (and declarations against the Crown) to be made pending the hearing of a substantive case. These have the effect of restoring dismissed employees to their employment in the meantime.

USE OF THE COURT BY EMPLOYERS

Employers are generally thought of as defendants or respondents in the Court but largely as a result of habit rather than as a reflection of reality. In the Labour Court, employers appeared as plaintiffs only when seeking to stop or prevent an unlawful strike. That is still a feature of the Employment Court's work, but increasingly employers have come to the Court to enforce employment contracts against employees, including covenants in restraint of trade and duties of confidentiality.

28. The Court deals with some personal grievances at first instance if they are removed to the Court by order of the Tribunal or of the Court for initial hearing because of the presence of an important question of law or of urgency.

FINAL REMARKS

In the only six full calendar years of their existence, the Court will have disposed of 2,500 cases and the Tribunal of 25,000.²⁹ Recent trends suggest that the Tribunal's work is on the increase. There is no reason why the demand for its services should not reach 35,000 cases in the next six years. This number must have an impact for the Court as well, and it is the scale of the workload that will need to be catered for if other arrangements are to be contemplated.

The ECA was and is a novel statute that introduced many new concepts.³⁰ It must take the Courts time to work their way through the Act, case by case, to establish its true meaning in different fact situations. That is necessarily a gradual process which needs an atmosphere of calm reflection. It can be informed by reasoned discussion of burning issues by professionals and academics. The "partial lockout" debate, culminating in the full Court judgment in *Witehira*³¹ and the Court of Appeal judgment in *Marsh*³² may be an example of such influences. Mere public clamor is less helpful, especially when it is of the emotive kind. It can strike at judicial independence.³³ Those who have an ideological objection to a specialist Employment Court may wish to reflect upon movements in the common law in recent years and ask themselves whether employment cases if heard now in the ordinary courts would produce a significantly different result. I am afraid the horses have all bolted out of the open stable door! Those who strongly favor retention of specialist institutions may console themselves with the same thought while reflecting on how many employers and employees would have the

29. From January 1, 1992, to December 31, 1997; for the last year I have actual figures only through November but can readily make a projection for the last month based on past years. The brief period of the institutions' infancy, August 19 to December 31, 1991, is not worth including, but it would make little difference if the period counted were to be computed from August 19, 1991, instead of January 1, 1992.

30. One American academic thinks that it was meant to go further than almost anyone in New Zealand has realized. Professor Ellen Dannin suggests that, on a proper construction, the ECA entitles employers to dismiss and replace employees who refuse to accept new terms of employment. See, e.g., *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration*, 14 BOSTON U. INT'L L. J. 267 (1996).

31. *Witehira v. Presbyterian Support Services (Northern)* [1994] 1 E.R.N.Z. 578.

32. *Transportation Auckland Corp. Ltd. v. Marsh*, unreported, Aug. 14, 1997, C.A. 211/96.

33. It seems that some people had unrealistic expectations of the ECA. Among these was a view urged with dramatic emphasis that the ECA permitted employers to vary employment contracts unilaterally. The Employment Court and the Court of Appeal, in a series of cases, excluded that interpretation, making it plain that under the law of contract there was a requirement to obtain the other party's consent as well as a requirement that there should be consideration for the variation. For its part in doing so, the Employment Court came in for some quite intemperate criticism, to a degree that even to lukewarm supporters of the rule of law must have seemed disconcerting and disquieting.

stamina to endure the harder row they would have to hoe if employment cases were homologated with commercial litigation in the ordinary civil and criminal courts.

