

INTERPRETING THE EMPLOYMENT CONTRACTS ACT: ARE THE COURTS UNDERMINING THE ACT?

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I. INTRODUCTION

One of the central controversies at the time of the enactment of the Employment Contracts Act 1991 (ECA), and subsequently, has concerned the role of the specialist Employment Court.¹ The most fundamental question is whether any role remains for a specialist court within the “contract-based” labor law model introduced by the ECA. If employment contracts are no different from any other form of commercial contract, as new-right² proponents of the Act argue, there is no need for a specialist court and the courts of general jurisdiction are the most appropriate forum for employment disputes. A second debate centers on new-right allegations that many of the Court’s decisions have been contrary to Parliament’s intentions in enacting the ECA and that the Court has failed to adapt to the principles of “freedom of contract” embodied in the Act. The intensity of both debates can be explained by the new-right’s failure in 1991 to achieve the abolition of the Court and the repeal of the personal grievance provisions, and thus the introduction of “at-will” employment.³ This setback to its deregulation

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1. The Employment Court that was created by the Employment Contracts Act is the most recent in a line of specialist labor courts. The term “Labour Court” will be used in relation to pre-ECA decisions.

2. The term “new-right” is used as a convenient shorthand for those persons and groups holding the combination of neo-classical economic and libertarian beliefs that has driven much of the structural reform in New Zealand since 1984. The main voices of the new-right in labor market matters, the New Zealand Employers’ Federation (NZEF) and the New Zealand Business Roundtable (BRT), cooperate closely and in general advance a common ideological position. For a general discussion of the new-right in New Zealand, see JANE KELSEY, *ECONOMIC FUNDAMENTALISM: THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT?* (1995) [hereinafter *THE NEW ZEALAND EXPERIMENT*].

3. For a discussion of the political and policy debate relating to the Court in 1991, see Rose Ryan & Pat Walsh, *Common Law v. Labour Law: The New Zealand Debate*, 6 *AUSTL. J. LAB. L.* 230 (1993) [hereinafter *Common Law*].

agenda, and the determination to reverse it, helps explain much of the subsequent debate.

The new-right criticism of the Court focuses on two aspects of the ECA. The first is the extent to which the ECA supports collective bargaining and centers on the interpretation of Subsection 12(2). This subsection requires an employer to recognize the authority of an authorized union as bargaining agent during negotiations for a collective contract.⁴ Given the paucity of other provisions relating to collective bargaining, this subsection has become the crucial legal support for collective bargaining. Its interpretation is thus of central importance both to employees seeking to bargain collectively and to employers seeking to restrict their freedom to do so. The second aspect is the protection against unjustified dismissals in Part III of the ECA.⁵ Unlike collective bargaining, where the legal issues were based on novel legislation, the unjustified dismissal provisions have existed in legislation since 1973, with case law well developed by 1991. The new-right argument that the personal grievance provisions should be repealed, and that employment should be "at will," was not accepted by Parliament in 1991, which not only re-enacted the substantive provisions of the law but substantially extended the range of employees entitled to have access to the provisions.

A third factor affecting the interpretation of the ECA is the development of an apparent divergence in approach to labor law between the Employment Court and the Court of Appeal. Although in the past having been not only supportive of the Employment Court but itself innovative in employment matters, the Court of Appeal has more recently taken an increasingly orthodox⁶ approach to labor law. Since it is the superior court, its approach will clearly be the most influential.⁷

This Article will not attempt to describe developments in the law in detail, although these will be outlined.⁸ Instead, it will focus on the legal dy-

4. Although an employee may authorize any person to act as a representative, authority to represent has been an issue only where the representative is a union seeking to negotiate a collective employment contract. For this reason, this Article will in general use the term "union" rather than "representative." The term "collective employment contract" as defined in the ECA means merely a contract having more than one employee party. ECA § 2. The word "collective" can thus be highly misleading; as a result, in this Article the term "collective contract" will be used to denote a contract having the characteristics of a collective agreement.

5. An unjustified dismissal is one form of a personal grievance which also encompasses other forms of grievance, such as discrimination and sexual harassment. For the full definition, see ECA § 27(1).

6. "Orthodox" is used in the sense of an approach to labor law that sees employment in purely contractual terms, which tends to favor a pro-employer unitary view of the employment relationship and which has a tendency to be opposed to collective organization and collective action. The approach is historically favored by the common law.

7. The Court of Appeal is New Zealand's highest domestic court and in labor law matters the final court of appeal; ECA § 135(5).

8. A detailed discussion and description of the law can be found in GORDON ANDERSON ET AL., *MAZENGARB'S EMPLOYMENT LAW* (1997) [hereinafter *MAZENGARB*], especially vol-

namics involved in the interpretation of the ECA with the primary aim of evaluating the argument that the Employment Court has in some way undermined the ECA by not adhering to Parliament's intentions in passing the Act. While this Article attempts to analyze the decisions of the Court and its interpretation of the ECA in legal terms, it is, however, by no means clear that the surrounding debate can be characterized as a legal one. Nor is it clear that the legal appropriateness of the Court's decisions may be less important than the Court's failure, first, to reflect the political and economic perspective of the Act held by its proponents, and second, to advance the labor market outcomes sought by those proponents. If this argument is correct, developments in New Zealand may provide some lessons on the nature of legal debate in a highly charged political context.⁹

II. THE EMPLOYMENT COURT

A. *The Evolution of the Court*

New Zealand has had a specialist labor court since the country developed an indigenous system of labor law in 1894. The current Employment Court is the direct successor of that Court.¹⁰ Initially, the Court settled disputes of interest by arbitrating on wages and conditions of employment applying to particular industries and later determined national wage levels through a number of general wage adjustment mechanisms. The Court did have a limited enforcement function, but this was largely confined to the interpretation of awards and wage recovery actions. This phase in the Court's evolution ended with the Industrial Relations Act 1973, which divided the old Court of Arbitration into two: an Industrial Commission responsible for interest disputes and an Industrial Court having an extended jurisdiction for the enforcement of rights matters, including the new personal grievances jurisdiction.¹¹ Although the two bodies were remerged in 1977 to form the Arbitration Court, the Labour Relations Act 1987 reconstituted the court as the Labour Court and again created a separate Arbitration Commission to deal with interest disputes. The jurisdiction of the Court was extended to give it exclusive jurisdiction over common law actions relating to strikes and lockouts founded on one of the economic torts, which

ume 1. For a discussion of developments in the law of collective bargaining, see Gordon Anderson, *Collective Bargaining and the Law: New Zealand's Employment Contracts Act Five Years On*, 9 AUSTL. J. LAB. L. 103 (1996) [hereinafter *Collective Bargaining*].

9. For an alternative view of the interaction between the policy of the ECA and the courts, see Margaret Wilson, *Policy, Law and the Courts: An Analysis of Recent Employment Law Cases in New Zealand*, 8 AUSTL. J. LAB. L. 203 (1995) [hereinafter *Wilson, Policy*].

10. For a history of the arbitration system and of the changing role of the Court, see JAMES HOLT, *COMPULSORY ARBITRATION IN NEW ZEALAND: THE FIRST FORTY YEARS* (1986); NOEL WOODS, *INDUSTRIAL CONCILIATION AND ARBITRATION IN NEW ZEALAND* (1963).

11. The personal grievances workload expanded rapidly in the late 1970s and still accounts for the great bulk of the Court's case load.

was of significance as it was the first time the jurisdiction extended to traditional common law actions.

The significance of these changes was noted by Hughes: "Thus the Labour Court—unlike its predecessors—is not a court of conciliation and arbitration. It is purely a court of record, acting as a court of appeal and review with some important first instance jurisdictions."¹² The ECA not only retained the specialist court, renaming it the Employment Court, but significantly expanded its jurisdiction to include "exclusive jurisdiction to hear and determine any action founded on an employment contract."¹³ 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.¹⁴ The Court retained its previous jurisdiction over statutory-based actions, including some new rights of action introduced by the ECA such as the right to challenge "harsh and oppressive contracts,"¹⁵ and its common law jurisdiction over the economic torts relating to strikes and lockouts.

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 1991.¹⁶ Before 1991 that section of the workforce had its terms and conditions of employment determined by common law contracts of employment with any disputes coming within the purview of the courts of general jurisdiction.¹⁷ It was, therefore, the ECA that gave the Court jurisdiction over virtually all legal actions arising out of the employment relationship and which finally created a truly specialist labor court covering all employees. In many respects this represented a double defeat for the new-right. Not only was the specialist court retained, but its jurisdiction was enhanced to cover common law actions based on the contract of employment. The new-right argues that common law actions are best dealt with by the courts of general jurisdiction which are less prone to judicial "activism" and more likely to remain guided by strict contractual rules.

12. JOHN HUGHES, 1 LABOUR LAW IN NEW ZEALAND 9.30 (1990).

13. ECA § 3(1).

14. Prior to 1991, such actions came within the jurisdiction of the ordinary courts.

15. ECA § 57.

16. *Common Law*, *supra* note 3, at 231. "Employed workforce" for this purpose meaning employees employed under a contract of employment (or contract of service).

17. State employees were covered by a separate legal regime from private sector employees until the State Sector Act of 1988.

B. The Debate on the Court

Before discussing the way the Court has interpreted the ECA, some reference should be made to the content and nature of the current debate on the future of the Court to provide some feel for its direction and tone. The new-right, through a combination of skilled public relations, including the ability to influence the media, to finance and coordinate its campaign, and its lobbying ability, has dominated the post-ECA debate.¹⁸ The two major elements in this campaign are the commissioning and publication of research papers arguing the new-right position and an active media campaign to highlight this research, often combined with public attacks on the Court and its supporters.¹⁹

The Business Roundtable (BRT) and New Zealand Employers' Federation (NZEf) have jointly published a number of papers on the Court and its decisions and have organized seminars to promote those views.²⁰ The first of these papers analyzes a number of mainly pre-ECA decisions which are seen as unduly restrictive for employers.²¹ These include cases that require procedural fairness in dismissals, that place some limits on the use of fixed-term contracts, and that relate to implied terms in contracts. The paper leaves little doubt as to its overall conclusion:

It is questionable, however, whether there is any need to retain a specialist Employment Court. . . . The analysis contained in this report demonstrates the activist nature of the Court and the frequency with which it has extended the boundaries of its jurisdiction by purported reference to established principles. . . . the Court has demonstrated an intention to intervene in the management of the employment relationship in a manner which does not form part of the statutory framework of the Employment Contracts Act.²²

The argument that the Court should be abolished because of its alleged refusal to implement the ECA as Parliament intended is made most strongly in a paper by Howard which analyzes the decisions of the Court to late

18. For a discussion on how the new-right had been able to dominate policy debate, see THE NEW ZEALAND EXPERIMENT, *supra* note 2, especially chapters 1 to 4.

19. For example, the Chairman of the BRT has said of leading industrial relations academics who had been critical of the ECA that "incompetence is no barrier to lifelong employment in New Zealand Universities." *Why Not Full Employment by 2000?*, THE EMPLOYER, June 1996, at 10.

20. Professor Richard Epstein in particular is a frequent visitor to New Zealand and a participant in such seminars. See, for example, the report of his address at one such seminar, *The Judges Who Chip Away at the Freedom of Employment Contracts*, THE PRESS, May 23, 1996, at 11. For a comment on one BRT seminar, see Gordon Anderson, *Specialist Courts and the Interpretation of the Employment Contracts Act*, EMPLOYMENT L. BULL. 10 (Jan. 1996).

21. BRT & NZEF, A STUDY OF THE LABOUR-EMPLOYMENT COURT (1992) [hereinafter THE COURT].

22. *Id.* at 42-43.

1996.²³ Howard is critical not only of the Employment Court but also, in some decisions, of the Court of Appeal. His main conclusion is that the most “spectacular” reason the ECA is “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.”²⁴ Unlike the earlier paper, Howard has no room even for a specialist employment division in the High Court.²⁵ An equally strong plea for the abolition of the Court is made in another BRT—NZEJ publication by Robertson.²⁶ The arguments in these papers, and the tone of them, is taken up by other new-right commentators.²⁷ The second plank in the new-right attack is its media campaign. It is, perhaps, not necessary to describe this in detail, but the point should be made that it is notable for its intensity, its consistency, and in many cases for its highly personalized and emotional tenor. Some idea of this tenor may be obtained from the headlines such stories attract.²⁸ These attacks have had the political impact intended, as it is clear that the law, including the decisions of the Employment Court, is being subjected to an unusually intense degree of scrutiny at a political level and that further deregulation is highly likely.²⁹ The question addressed in this Article is whether these attacks have any legal substance.³⁰

23. COLIN HOWARD, INTERPRETATION OF THE EMPLOYMENT CONTRACTS ACT 1991 [hereinafter INTERPRETATION].

24. *Id.* at 24.

25. *Id.* at 24. This suggestion had been made in THE COURT, *supra* note 21, at 43.

26. BERNARD ROBERTSON, THE STATUS AND JURISDICTION OF THE EMPLOYMENT COURT (1996) [hereinafter JURISDICTION]. Robertson appears to argue that the creation of any specialist court is a threat to judicial independence. *Id.* at 60.

27. See, e.g., WOLFGANG KASPER, FREE TO WORK (1996), published by an Australian new-right body, The Centre for Independent Studies.

28. See, e.g., *Employer Wants Court Abolished*, THE DOMINION, Aug. 10, 1992, at 1; *Employment Contracts Act Undermined by Judicial Activism*, THE INDEPENDENT, May 14, 1993, at 6; *Employment Court Judges Need to Fall into Line with Free Market*, NAT'L BUS. REV., Jan. 19, 1996, at 18. One leading financial paper, THE INDEPENDENT, Dec. 16, 1994, at 14, has made the following, not untypical, comment in an editorial entitled *How the Employment Court Fosters Unemployment*:

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.

29. See recent speeches by the Minister of Labour at the Government to Business Summit, Apr. 3, 1997, or at the Labour-Management-Government Relations Seminar, Mar. 20, 1997, which can be found (or accessed) on his homepage: <[http://www. executive.govt.nz/minister/bradford/](http://www.executive.govt.nz/minister/bradford/)>.

30. For references to various newspaper articles and comments thereon, see Gordon Anderson, *The Judiciary, The Court and Appeals*, EMPLOYMENT L. BULL. 90 (1993); *Politics, the Judiciary and the Court-Again*, EMPLOYMENT L. BULL. 2 (1995).

III. INTERPRETING THE ECA

Statutory interpretation is, at best, more of an art than a science and, in the case of the provisions that are central to this Article, the difficulties facing an interpreting court are particularly acute. The supreme law-making body in New Zealand is Parliament; thus, in interpreting a statute, the proper function of any court is to interpret the statute to give effect to Parliament's intentions. The general trend in statutory interpretation in New Zealand³¹ is to take a purposive approach to the statute in question and, to quote the Acts Interpretation Act, to give the Act "such fair, large, and liberal construction and interpretation as will best ensure the object of the Act . . . according to its true intent, meaning and spirit."³² Apart from the words of the substantive provisions of an Act, the primary statement of Parliament's intentions is to be found in the objects statements in the long title of the Act and, increasingly, in a section that specifies the objects of each part of the Act. The ECA is notable for such statements.

Where the words of the Act are clear and an appropriate interpretation can be derived, the courts are generally reluctant to go further but will use extrinsic materials where the Act is unclear. Two extrinsic sources are particularly relevant in the context of this Article. The first, the New Zealand Bill of Rights Act 1990 which, while it does not allow the courts to override other legislation, does require that, when an enactment can be given a meaning consistent with the rights and freedoms in the Act, such a meaning shall be preferred to any other meaning.³³ Second, New Zealand's international obligations,³⁴ even if not incorporated into domestic law, may be taken into account in interpreting a statute. In the case of labor law, ILO conventions have been used for guidance even if not ratified by New Zealand. The parliamentary history of the legislation may also be used for guidance, although Burrows suggests that the courts use such material, and especially material from Hansard, only when it confirms an interpretation derived from more traditional sources.³⁵

The ECA presents particular difficulties for an interpreting court for a number of reasons. Foremost amongst these is that Parliament has used the sparsest possible language in relation to the two issues central to this Article. The total Parliamentary guidance on unjustified dismissal is the wording of Section 27 (1)(a), which states that employees have personal grievances if they have a claim that they have "been unjustifiably dismissed."³⁶ Although Part III of the Act gives considerable guidance on the procedures

31. For a fuller exposition, see JOHN BURROWS, *STATUTE LAW IN NEW ZEALAND* (1992), from which the following paragraph is drawn.

32. Acts Interpretation Act § 5(j), 1924.

33. New Zealand Bill of Rights Act § 6, 1990.

34. BURROWS, *supra* note 31, at 238.

35. *Id.* at 140.

36. Employment Contracts Act § 27(1)(a), 1991 (N.Z.).

and on remedies, there is no further elaboration of what is meant by either “unjustifiable” or “dismissal.” The provisions relating to the negotiation of collective employment contracts are somewhat less minimal, although not much. While there are detailed provisions relating to obtaining and proving authority to represent and for the ratification of any resulting contract, the only provision that relates to the actual negotiation process is section 12(2) which states that the employer shall “recognise the authority of that [representative] to represent the employee . . . in those negotiations.”³⁷

A second problem lies in the nature of the Act itself, which is a combination of a radical reforming Act and a re-enactment of previous law.³⁸ The provisions in Parts I and II of the Act relating to freedom of association and the negotiation of employment contracts were clearly intended to reform radically the previous law. The same cannot necessarily be said for the personal grievance provisions in Part III, and indeed other aspects of the Act, such as the disputes and enforcement procedures. There are, therefore, strong arguments for adopting different approaches to different parts of the Act and in particular for regarding Part III as essentially consolidating the previous legislation.

It might also be commented that the parliamentary history is of limited use in interpreting the Act. The fact that the final Act was the compromise product of very different, and competing, policy and ideological agendas, all of which are reflected in the parliamentary history, lessens the usefulness of that record as an interpretative guide. In one case the Chief Judge of the Employment Court said the following:

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.³⁹

The Chief Judge’s comments could equally have referred to the definition of an unjustified dismissal when it was first enacted. It might also be commented that his comment erred on the side of charity towards the legislators who failed to consider fully the nature of the legislation they were enacting or the obvious and foreseeable difficulties it was likely to pose in practice. Either the legislature chose to avoid making those decisions, leaving the issues to be decided by the courts, or it was so committed to its ideological position that it refused to recognize that the world might behave in a manner different than that envisaged by new-right “theory.”

37. ECA § 12(2).

38. See *Common Law*, *supra* note 3, at 243-51.

39. N.Z. *Airline Pilots Association v. Airways Corp. of N.Z.* (No 1) [1995] 2 E.R.N.Z. 545, 583.

IV. COLLECTIVE BARGAINING AND THE RECOGNITION OF A REPRESENTATIVE'S AUTHORITY⁴⁰

A. The Statutory Framework

The most striking characteristic of the language of the ECA as it relates to the negotiation of contracts of employment is that of choice and of the rights of the parties to determine the nature of their own relationship. The Act allows the parties to an employment relationship to choose the type of contract that will govern their relationship, with the type of contract being agreed through negotiation, and employees being able to choose whether they negotiate personally or through a representative.⁴¹ The critical issue, given the bargaining advantage that accrues to employers by virtue of their superior economic power, is whether the Act provides sufficient support to ensure that employees are able to exercise fully the choices provided to them and in particular the choice to bargain collectively through a union and enter into collective contracts. The substantive provisions that allow employee choices to be implemented are, to put it mildly, minimal and provide little guidance for the courts. Section 10 provides: "(1) Each person may, in negotiating for an employment contract— (a) Determine whether that person wishes to be represented by a person, group or organisation."⁴² The only provision⁴³ which places some obligation on an employer to respect that choice is Section 12(2), which provides that the employer shall "recognise the authority of that [representative] to represent the employee . . . in those negotiations."⁴⁴

By default Section 12(2) became the critical legal support for collective bargaining as, for example, an employer is under no statutory obligation to negotiate with an authorized union, let alone to do so in good faith.⁴⁵ Even if employees choose to negotiate collectively, they have no right to a collective contract—itsself a matter for negotiation. In practice, of course, once employees are able to organize in a union, the likelihood increases that they will succeed in obtaining a collective contract. In response employers may

40. For a more extended discussion, see *Collective Bargaining*, *supra* note 8, at 114-24.

41. While employers are also free to choose to negotiate through a representative (and indeed would have to do so if a corporation), this right is of little practical relevance in the context of this discussion.

42. Employment Contracts Act § 10, 1991 (N.Z.).

43. Two other provisions of the Act should be mentioned. First, Part I of the Act, which deals with freedom of association, prohibits undue influence in relation to membership or non-membership of employee organizations, ECA § 8. Second, once bargaining authorization has been obtained, employers are required to grant the representative access to the authorizing employees to discuss matters relating to negotiations for an employment contract, ECA §14. See also *Foodstuffs (Auckland) Ltd. v. National Distribution Union Inc.* [1995] 1 E.R.N.Z. 110 (C.A.); MAZENGARB, *supra* note 8, para. 14.2-14.10.

44. ECA § 12(2).

45. On whether such an obligation arises out of the implied terms of the employment relationship, see *Collective Bargaining*, *supra* note 8, at 124-28.

attempt to exclude or weaken the union or to weaken its employees' coherence so that the union becomes irrelevant. Alternatively, an employer may attempt to bypass the union and negotiate directly with employees or communicate directly with employees to persuade them to accept an offer.

In interpreting Section 12(2), what guidance can be claimed from the objects provisions in the Act? The objects clause in the long title of the ECA states that the Act's object is:

- . . . to promote an efficient labor market and in particular—
- a. to provide for freedom of association;
- b. to allow employees to determine who should represent their interests in relation to employment issues; and
- c. to enable each employee⁴⁶ to choose either
 - i. to negotiate an individual employment contract with his or her employer; or
 - ii. To be bound by a collective employment contract to which his or her employer is a party
- . . .
- e. To establish that the question of whether employment contracts are individual or collective or both is a matter for negotiation by the parties themselves.⁴⁷

The objects section for Part II reinforces these primary objects.⁴⁸ It states that the objects of Part II are to establish that employees and employers may conduct negotiations on their own behalf or may choose to be represented by another group or person and that arrangements to govern the employment relationship are a matter for negotiation. Thus, employees, as well as employers, are entitled to choices in relation to their employment, including the right to choose to bargain collectively. An employer is, however, entitled to resist its employees' choice.

B. Interpreting Section 12(2)

The predictable effect of the legislature's failure to provide a coherent framework for collective bargaining was that the courts were left to determine what constraints, if any, the ECA placed on an employer when negotiating with its employees' union. Such decisions were clearly likely to be extremely controversial, since they required the courts to formulate legal principles in an area that was politically contentious and which went to the heart of the philosophy of the ECA. The Court's task was further complicated by the nature of the cases presented. Although the early cases concerned employer attempts to defeat union representation where a union presence was relatively weak or vulnerable, later cases centered on attempts by employers to bypass established unions to communicate directly with

46. Employers have a similar choice—see object (d).

47. ECA title.

48. ECA § 9.

employees with the intention of persuading them to accept the employer's negotiating offer. This shift in the focus of the cases moved the debate away from the issues of freedom of association and the right to bargain collectively, where it was more difficult for employers to gain sympathy, to the right of employers to communicate with their employees. Employers strongly and vocally opposed limitations on their ability to communicate directly with employees concerning ongoing negotiations and claimed that such restrictions were contrary to the spirit of the ECA, which, they argued, was intended to strengthen the individual employer-employee relationship.⁴⁹ They were also able to characterize such restrictions as contrary to their right of freedom of expression guaranteed by the New Zealand Bill of Rights Act.

1. *The Alliance Textiles Cases*

The starting point for a consideration of Section 12(2) is a case that had its origins in the first month after the ECA was enacted. Alliance Textiles, wishing to negotiate a new contract significantly diminishing existing conditions, attempted to exclude the union from negotiations and exerted very strong pressure on individual employees to persuade them to revoke the bargaining authority given to the union and to bargain directly with the employer. The "bargaining" consisted of first signing a revocation of authority and, immediately afterwards, the employer-drafting a standard form contract. These tactics eventually proved successful, with a majority of employees signing the new contract.

The resulting case, *Adams v. Alliance Textiles (N.Z.) Ltd.*,⁵⁰ highlighted the fact that the ECA provided little protection from such conduct. The Court held that an employer could engage in such tactics as long as the conduct did not amount to duress or undue influence. If this standard was breached, the employer's conduct could be challenged under Section 8 (which prohibits duress or undue influence in relation to union membership) and Section 57 (which allows contracts obtained by "harsh and oppressive behaviour or by undue influence or duress" to be set aside). It was held that no such conduct had been established on the facts of this case.⁵¹ The Court also held that, while an employer could not negotiate directly with an employee while an authority remained in force, it remained free to approach an employee directly to attempt to persuade them to withdraw their authority. If such persuasion was successful, and the pressure used was not undue, direct negotiations with the employee did not breach Section 12(2).⁵²

Adams had the potential to provide employers with a virtual *carte*

49. See INTERPRETATION, *supra* note 23, at 21-23.

50. [1992] 1 E.R.N.Z. 982.

51. *Id.* at 1039-40.

52. *Id.* at 1024.

blanche to undermine collective bargaining by isolating individual employees, persuading them to revoke the authority given to their union, and then accept the employer's offer—tactics likely to seriously weaken all employees collectively represented. Even if undue influence or duress could be established and as the case makes clear this may be very difficult in practice, it is unlikely to provide an effective remedy for attacks on collective bargaining. Unless conduct that might constitute undue influence can be prevented by injunction, a later legal action is unlikely to remedy the damage done, as undue influence can only be established after the event and for each individual employee.⁵³

Adams was appealed (as *Eketone v. Alliance Textiles (N.Z.) Ltd.*⁵⁴) and the approach taken by the Employment Court partially overruled.⁵⁵ While the Court accepted that Part I of the Act permitted an employer to attempt to persuade its employees in relation to union membership, it drew a distinction between this and an employer's options under Part II, holding that, once a union was authorized to represent an employee, the employee's choice must be respected and given effect by the employer as required by Section 12(2).⁵⁶ The President of the Court of Appeal, Justice Cooke, held that, though the Act is union-neutral, "employers are not bound to be union-neutral . . . they are free to express views against unionism."⁵⁷ Section 12, however, imposes an obligation that during negotiations the employer must recognize the authority given to the union and not negotiate directly with those employees:

To go behind the union's back does not seem consistent with recognising its authority. The contrary argument advanced for the employer here is that authority can be recognised by trying to persuade the giver of the authority to revoke it. That seems to me a rather cynical argument not in accord with the true intent, meaning and spirit of the enactment. . . . Certainly an employer is free not to negotiate with anyone; but if he wishes to negotiate I doubt if he can bypass an authorised representative.⁵⁸

The judgment of Justice Gault was important for two reasons. First, he held that it is appropriate for the Court to have reference to international instruments relating to freedom of association, including ILO Conventions 87

53. Section 57 also requires individual (as opposed to class) actions, MAZENGARB, *supra* note 8, para. 57.4, and even if an action was legally feasible, a union would need to find an employee party to any contract prepared to be named as plaintiff in an action, an option unlikely to appeal to employees who had already succumbed to the employer's pressure and who would fear retaliation for any such initiative.

54. *Eketone v. Alliance Textiles (N.Z.) Ltd.* [1993] 2 E.R.N.Z. 783.

55. Strictly speaking, the Court of Appeal's decision was *obiter* (i.e., not formally binding), as no live issues remained between the parties by the time of the hearing.

56. [1993] 2 E.R.N.Z. 783, 787, per Justice Cooke. Three other judges concurred in the judgment.

57. *Id.* at 786.

58. *Id.* at 787.

and 98,⁵⁹ in interpreting the ECA. Second, he stated 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.”⁶⁰ Justice Gault did, however, express some reservations as to whether all attempts at persuasion by employers could be prohibited because of the need to assure an employer’s freedom of expression. This issue came to prominence in later cases.

2. *The Approach of the Employment Court Following Eketone*

Clearly, *Eketone* required a modified approach to Section 12(2), and over several cases the Employment Court reassessed an employer’s obligations under the Section. In *New Zealand Medical Laboratory Workers Union v. Capital Coast Health Ltd.*,⁶¹ the facts involved an employer who had, over several years, made a number of attempts to bypass the relatively small plaintiff union and negotiate directly with employees. The Court found the employer’s actions to be in breach of Section 12(2) and granted an injunction prohibiting further breaches. The Court first held that “negotiations” were not confined to the formal aspects of the process, describing them as “an amorphous process” encompassing all stages from the initial offer and including the use of tactics to force the pace of the negotiations or to affect their shape.⁶² It then held that, where an employer’s actions were intended to disadvantage employees in their ability to bargain, there would be a breach of Section 12(2). The Court was not prepared to rule out all employer attempts at persuasion, such as imparting information, opinion, and other material, but stressed that actions that “undermine the authority of the representative” were likely to be unlawful regardless of the motives of the employer.⁶³

The most articulated expression of the Employment Court’s position is found in *Ivamy v. New Zealand Fire Services Commission*.⁶⁴ The employer, allegedly in breach of a previous undertaking to the Court, and with the help of a public relations company, developed a strategy to present new, and significantly changed, contract proposals directly to individual firefighters. The material included detailed terms of an offer which the employer was yet to make to the union and an offer of a \$4,000 payment if the employment contract was signed by a set date. The Employment Court held that the material went well beyond factual explanatory material and that it was an attempt to

59. These two conventions have not been ratified by New Zealand.

60. [1993] 2 E.R.N.Z. 783, 794.

61. [1994] 2 E.R.N.Z. 93.

62. *Id.* at 117. It will be recalled that the employer’s obligation is to recognize the authority “in negotiations.”

63. *Id.* at 127-28.

64. [1995] 2 E.R.N.Z. 724.

bypass the union and to negotiate directly with employees.⁶⁵

The decision is notable first for its concern with providing effective remedies for unlawful employer conduct during negotiations, the Court making it clear that injunctions may be granted to restrain conduct in breach of Section 12(2). The second central element in the Court's reasoning was that the right of freedom of association and the right to choose to be collectively represented by a union are not token rights but are to be enforced in light of the reality of industrial relations practice. The approach of the Court was perhaps best seen in the following passage:

Where collective bargains are to be made, those who bargain collectively alone can decide what their collective will is. It is legitimate for their representative to take part in their decision making, but not for the other party to the negotiations to do so. Attempts to interfere in this process can involve taking liberties with the rights of the employees collectively to play their full role in an efficient labor market. It is to be expected that different representatives will have different styles of representing and will differ in competence and other respects. Some will be sympathetic to the employer's problems, others will seem more difficult to deal with. That cannot be helped and must be accepted, however inconvenient, as a fact of industrial life.⁶⁶

The most contentious point to emerge from *Ivamy*, however, was the Court's view that, if employees choose to negotiate through a union, then all negotiations and all relevant communications must be channeled through that union. While the Court made it clear that not all communications relating to negotiations were prohibited, it did indicate that those designed to promote an employer's offer, or to persuade employees to accept it, were likely to be contrary to Section 12(2).⁶⁷ The Court did not see this requirement as curtailing the employer's freedom of speech, since the communication was still to the employees "even if psychologically it may not seem so."⁶⁸

3. Subsequent Developments in the Court of Appeal

Since the Employment Court decision in *Ivamy*, the Court of Appeal has delivered three decisions concerning Section 12(2). The overall effect of these decisions has been to restrict significantly the liberal construction of Section 12(2) initiated in *Eketone*. In the first of these decisions, *Capital Coast Health Ltd.*,⁶⁹ the Court, except on one point, dismissed the appeal

65. *Id.* at 770-71.

66. *Id.* at 761-62.

67. The Court was careful to indicate that normal day-to-day employer-employee communications were not affected. *See, e.g.,* Couling v. Carter Holt Harvey Ltd. [1995] 2 E.R.N.Z. 137, where the Court accepted that the employer's motive was not to undermine the union.

68. [1995] 2 E.R.N.Z. 724, 766.

69. *Capital Coast Health Ltd. v. NZ Med. Lab. Workers Union Inc.* [1995] 2 E.R.N.Z.

and reaffirmed the principles it had set out in *Eketone*.⁷⁰ The Court stated that the ECA was essentially practical legislation and should not be subjected to esoteric analysis. Its application was a matter of balancing the competing rights of the parties—those of the employer to freedom of expression under Section 14 of the Bill of Rights Act and those of the employee under Section 12 of the Employment Contracts Act—not a case of one prevailing over the other. It then stated:

Once [negotiation] is under way with an authorised representative participating, the process may not be conducted directly with the party so represented. The provision of factual information does not impinge on that process. But anything that is intended or is calculated to persuade or to threaten the consequences of not yielding does. Attempts to undermine the authority of the agent may be in breach of [Section] 8(1), but will also be in breach of [Section] 12(2), because it is for the particular parties to choose their representative. It is their right to have that person act on their behalf without interference.⁷¹

This case must now be read in the light of the two more recent Court of Appeal decisions, *New Zealand Fire Serv. Comm'n v. Ivamy*⁷² and *Airways Corporation of New Zealand v. Bean*.⁷³ In the majority decision in *Ivamy*,⁷⁴ Justice Gault provided what he described as a “brief elaboration” of the law,⁷⁵ which is a clear repudiation of the approach of the Employment Court in *Ivamy*, and also, although the Court appears to deny this, of its own decision in *Eketone*. Two aspects of the majority judgment are of particular significance. The first is the restrictive approach taken to freedom of association. The Court held that, although bargaining rights may arise out of freedom of association, they are not, as such, an element of freedom of association.⁷⁶ In particular, an employer’s obligations under Section 12(2) are a purely statutory obligation. This approach allowed the Court to then give primacy to an employer’s freedom of expression guaranteed in the New Zealand Bill of Rights Act, which requires that statutes, where possible, “must be given a meaning consistent with the rights and freedoms” in the

305 (C.A.). Although his case was heard before the Employment Court decided *Ivamy*, the decision was not delivered until after the *Ivamy* decision was delivered by the Employment Court.

70. In *New Zealand Fire Serv. Comm'n v. Ivamy* [1996] 1 E.R.N.Z. 85, 100, the Court of Appeal later said, “Notwithstanding all of the argument addressed to us, we consider that it is a sufficient statement of the law to be applied in the circumstances of particular cases.”

71. [1995] 2 E.R.N.Z. 305, 320.

72. [1996] 1 E.R.N.Z. 85.

73. [1996] 1 E.R.N.Z. 126.

74. The two decisions were delivered contemporaneously, and *Ivamy* contains the most developed argument of the Court of Appeal’s position.

75. This accounted for four pages of the decision.

76. [1996] 1 E.R.N.Z. 85, 100. This view is not unusual in common law jurisdictions. See *Colleymore v. A-G* [1970] App. Cas. 538 (P.C.), and *Reference re Pub. Serv. Employee Relations Act* [1987] D.L.R. 4th 161.

Act.⁷⁷ These rights include both freedom of expression⁷⁸ and freedom of association. By confining the latter to the right to join a union, the right to bargain collectively was able to be interpreted restrictively and read subject to an employer's freedom of expression when a conflict arose between the two rights. The Court did, however, take a more restrictive approach in its cursory dismissal of the argument that employees' freedom of expression included a right to decline to receive employer-generated information, or to receive it only through their union.⁷⁹

The second aspect of the majority opinion is its lack of any reference to the ILO principles of freedom of association. This omission is particularly striking for two reasons. First, in his earlier judgment in *Eketone* Justice Gault explicitly stated that "the right [to elect and pursue collective bargaining] is conferred by Part II of the Employment Contracts Act and that right should be fully accorded, bearing in mind ILO Convention No. 98 concerning the right to organise and bargain collectively."⁸⁰ The second reason is that this decision was made shortly after the highly publicized report of the ILO Committee on Freedom of Association on the ECA.⁸¹ This Report explicitly made the point that the principles of freedom of association, enshrined in the ILO Constitution, have application in New Zealand as a consequence of its ILO membership, and regardless of the fact that it has not ratified Conventions 87 and 98.⁸² It appears that the Court of Appeal now views object (a) in the Long Title, "to provide for freedom of association," as confined to the right to join a union and regards international obligations and ILO conventions as irrelevant to the interpretation of the Act.

The Court did reiterate that, while "persuasion as to the reasonableness of an employer's stance on an issue, which all parties understand is the subject of negotiations between representatives," need not be in breach of Section 12(2), persuasion of employees to exclude the representative and to enter into direct contacts with the employer would breach the section.⁸³ While the Court set out a range of general factors that might be relevant in answering its question, it concluded that an answer was really "a matter of practical common sense."⁸⁴

The difficulty with such broad statements is, of course, that they provide only limited guidance for future cases and leave considerable room for judicial latitude. In this case three judges (if one includes the Employment

77. New Zealand Bill of Rights Act § 6, 1990.

78. This includes . . . "the freedom to seek, receive and impart information and opinions of any kind in any form." *Id.* at § 14.

79. [1996] 1 E.R.N.Z. 85, 100.

80. [1993] 2 E.R.N.Z. 783, 794.

81. ILO Committee on Freedom of Association, *Case No 1698: Complaint Against the Government of New Zealand*, 77 OFFICIAL BULL. 39 (1994).

82. *Id.* para. 240.

83. [1996] 1 E.R.N.Z. 85, 101-02.

84. *Id.* at 101.

Court) were able to reach one view of the employer's conduct and three another. Notwithstanding that appeals are permitted only on a point of law,⁸⁵ the crucial factor in the Court's decision was not the law (which they purported not to develop) but a differing interpretation of the factual issue of whether the employer's conduct went beyond persuasion to become a direct negotiation. The majority took what can only be described as an extremely charitable view of the employer's motives and actions. The two dissenting opinions both held that the initial findings of fact were clearly open to the Employment Court.⁸⁶

Justice Thomas, in a strongly worded—and extremely cogent—dissent notable for its careful analysis of both the law and the facts as found by the Employment Court, concluded that the Chief Judge's decision "was . . . the only decision properly open to him."⁸⁷ After concluding that the ECA permits collective bargaining, he stated:

Section 12(2) must, therefore, be interpreted and applied having full regard to that consideration. Recognition of the agent's authority at a level lower than that which is necessary to preserve the process of collective bargaining defeats the very object of these statutory provisions. . . . It is my concern that a decision in favour of the Commission in this case will be perceived by employers and employees alike as significantly eroding the import of Section 12(2) and thereby undermining the practice of collective bargaining.⁸⁸

Finally, given the history of the case law described above, it is somewhat ironic that in the *Airways Corporation* case the Court of Appeal stated that its views in *Ivamy* "do not differ from what was said by the Employment Court in *Adams v. Alliance Textiles* to the extent apparently apprehended by the Chief Judge so far as he sees them as a rejection of the robustness of approach favored in his Court."⁸⁹

C. Comment

The main question addressed in this Article is whether the decisions of the Employment Court are contrary to the intentions of Parliament and have limited the reforms of 1991. Clearly, if the Court was minded to limit the application of the Act, either because of old habits or in an attempt to restore "balance," Part II would be the logical Part of the Act to use for this purpose as it was central to the government's successful strategy to radically restructure collective bargaining in New Zealand. It is, however, clear that,

85. Employment Contracts Act § 135, 1991 (N.Z.).

86. [1996] 1 E.R.N.Z. 85, 93 (per Justice Cooke), 112 (per Justice Thomas).

87. *Id.* at 112.

88. *Id.* at 124.

89. For an employer's perspective on the Court of Appeal decision, see Barbara Burton, *Ivamy or Balance Restored*, EMPLOYMENT L. BULL. 88 (1996).

whatever some employers might like to believe, the Act expressly permits an employee to choose to negotiate through a union, and that a group of employees may authorize that union to negotiate a collective contract and, if necessary, to resort to a strike to achieve such a contract.⁹⁰ The question that arises is whether Section 12(2) prevents an employer resisting collective negotiations by undermining or bypassing the agency relationship between employees and their unions. The decisions of both the Court of Appeal and the Employment Court are unanimous that this cannot be done. Thus, the central issue has become where to draw the line between conduct that undermines the union or bypasses a union and conduct that constitutes direct bargaining and legitimate communication. This line is difficult to draw and will depend very much on the facts of a particular case. Employers, who are clearly likely to be more interested in persuading than informing, are likely to push that line as far as possible.

A reading of the cases indicates that there is a difference in approach between the Employment Court and the majority of the Court of Appeal. What is a little more difficult to discern is the width of that gap, as the statements of the law are sufficiently vague to encompass a range of views on any particular set of facts. The difference appears to arise because the Employment Court, and the minority in the Court of Appeal, focuses to a greater extent on the employee's choice to negotiate through a union with the decision implied in that choice not to be directly involved in the negotiation process. This viewpoint makes considerable sense from an employee's perspective, since it is likely to be less damaging to an ongoing employment relationship and limits the employer's ability to put direct pressure on the employee. The Court of Appeal, on the other hand, appears more sympathetic to an employer's perspective. Employers argue that unions fail to appreciate an employer's needs and generate unnecessary conflict between employer and employee and that direct communication is often required if the employer's offer is to be properly understood.

A difference of approach does not, however, mean that the Employment Court is in some way undermining the ECA. Indeed, given the case history described above, the Employment Court's initial reaction was favorable to the new-right perspective of the ECA.⁹¹ Its subsequent approach has been dictated by the Court of Appeal's decision in *Eketone*, where the Court clearly held that Section 12(2) was to be interpreted to give real protection to an employee's right to authorize a union as its representative. Subsequent decisions cannot seriously be regarded as deviating from the law as laid down in that case. Since *Eketone*, the main force driving legal developments has been the changing position of the Court of Appeal, where the majority is taking an increasingly restrictive approach to the ECA. While the new-right may object to the Employment Court's decisions, it is clear that those ob-

90. ECA § 64.

91. See the endorsement of the *Alliance* decision in *THE COURT*, *supra* note 21, at 36-37.

jections have no basis in law and in no way justify the extreme claims that the Court is undermining the intentions of Parliament.

V. UNJUSTIFIED DISMISSAL

A. *The Personal Grievance Provisions*

Unlike Part II of the ECA, which was entirely novel legislation in 1991, the personal grievance provisions in Part III were substantially the same provisions as in the Labour Relations Act and, indeed, as they had existed since 1973.⁹² The only substantive provision relating to unjustified dismissal is (the now) Section 27(1)(a), which states simply that employees have a personal grievance if they claim they have been “unjustifiably dismissed.” As a result, the law is almost entirely judge made, Parliament leaving the courts the task of determining such matters as what is a dismissal, what constitutes justification, whether the term encompasses a constructive dismissal, and whether a dismissal must be carried out in a manner that is procedurally fair. These issues had been resolved by the courts, and by 1991 the law was largely settled. It should be stressed that the Court of Appeal has both supported the broad legal principles developed in the Labour Court and has itself taken a relatively liberal approach to labor law matters.⁹³ It can be safely assumed that those responsible for the ECA were well aware of the nature of that law before the Act was passed.⁹⁴

While significant changes were made to the personal grievance provisions in the ECA, those changes did not affect the substantive law of dismissal. The most significant change was, in fact, to extend the right to contest a dismissal to that proportion of the work force that had not been union members prior to 1991. Other changes affected only procedural matters.⁹⁵ Finally, the point should be made that the Court has no first instance jurisdiction in relation to personal grievances; cases are heard on appeal from the Employment Tribunal. The great majority of cases are in fact settled by mediation without a formal hearing.⁹⁶ Criticism is therefore directed at those

92. Gordon Anderson, *The Origins and Development of the Personal Grievance Procedure in New Zealand*, 13 N.Z. J. Indus. Rel. 257 (1988).

93. See, e.g., the Court of Appeal’s decisions in *Auckland City Council v. Hennessy* [1982] A.C.J. 699 (accepting the need for procedural fairness in dismissals); *Auckland Shop Employees Union v. Woolworths N.Z. Ltd.* [1985] 2 N.Z.L.R. 372 (upholding the concept of a constructive dismissal); *Marlborough Harbour Bd. v. Goulden* [1985] 2 N.Z.L.R. 378 (the first of several cases holding that there was a mutual obligation of fair treatment in an employment relationship). The major difference between the two courts before 1991 concerned an employer’s obligation to establish the justification for a redundancy. In *GN Hale & Sons Ltd. v. Wellington Caretakers Union* [1991] 1 N.Z.L.R. 151, the Court of Appeal opted for a much more conservative approach than the Labour Court. For a detailed account of the law on unjustified dismissal, see MAZENGARB, *supra* note 8.

94. This is indicated by new-right efforts to have the law changed.

95. An example of such a procedural matter is the time for submitting a grievance.

96. The figure for mediated settlements is in the range of 80 percent but varies from

cases where an appeal is regarded as warranted, although the decisions in those cases are clearly influential for the law in general.

B. The Areas of Discontent

This Article will confine itself to a few comments on those aspects of the law most criticized by the new-right: procedural fairness, fixed-term contracts, and redundancy compensation as an aspect of procedural fairness. It should be noted that new-right groups have also been critical of other decisions, including decisions relating to the content of implied terms in contracts of employment.⁹⁷

1. Procedural Fairness

The criticism by employers that a dismissal which is justifiable on substantive grounds may be held to be unjustifiable if carried out in a manner that is procedurally unfair is not new.⁹⁸ This criticism is understandable in some cases and reflects both a feeling of unfairness and a frustration that unsuitable employees cannot be dismissed without some risk.⁹⁹ The rule is not, however, unique to New Zealand and had been developed in other jurisdictions before the personal grievance procedure was enacted in New Zealand.¹⁰⁰ A clause in the EC Bill, as introduced to Parliament, would have minimized the role of procedural fairness where the dismissal "would otherwise have been substantively justifiable,"¹⁰¹ but this was not carried into the final Act. Instead, Parliament restricted changes to a provision that contributory conduct by an employee may disentitle the employee to some or all of the compensation that would otherwise be payable,¹⁰² which was already the practice of the Court. While employers remain discontented with dismissal cases, the law has not changed since 1991, and the Court has continued to apply the law as previously understood.

center to center. Alistair Dumbleton, *The Employment Tribunal-Four Years On*, 21 N.Z. J. INDUS. REL. 21, at 22-23 (1996).

97. The most detailed employer criticisms were in *THE COURT*, *supra* note 21. See also *INTERPRETATION*, *supra* note 23. For other analyses, see *Policy*, *supra* note 9; Ellen Dannin, *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration*, 14 B.U. INT'L L.J. 267 (1996). Employer beliefs about the state of the law often overestimate the degree of employee protection, an effect exacerbated by the high degree of publicity given to dismissal law.

98. Most of the cases criticized in *THE COURT*, *supra* note 21, were decided before 1991.

99. Whether these feelings are justified is another matter. A sense of unfairness, often very acute, is typical of either party in a dismissal case.

100. See, for example, the United Kingdom case of *John v. Rees* [1970] Ch 345 per Megarry J at 402. This passage has been quoted by the New Zealand courts.

101. Employment Contracts Bill, cl. 17(3), 1990 (N.Z.).

102. Employment Contracts Act §§ 40(2), 41(3), 1991 (N.Z.).

2. Fixed-term Contracts

The employer argument relating to fixed-term contracts has a different basis, as it springs not from a sense of unfairness but from the belief that employers should be free to use fixed-term contracts when they see them as necessary and that restrictions on this right restrict their freedom of contract. Such an argument clearly gained strength with the passage of the ECA with its emphasis on the rights of the parties to choose the form of their own relationships. Again, however, the law on fixed-term contracts was clear before 1991. In *New Zealand Food Processing Union v. ICI (N.Z.) Ltd.*, the Labour Court held that fixed-term contracts were legitimate where there was a commercial justification but that in some circumstances the failure to renew such a contract might amount to a dismissal.¹⁰³ The main situations were where the need for a fixed-term no longer existed, where the employer had created a legitimate expectation of renewal, or where the termination of the contract was brought about by a wrong motive.¹⁰⁴ The rationale for the Court's approach was to ensure that fixed-term contracts could not be used to defeat the right to challenge an unjustified dismissal. *ICI* was confirmed by the Employment Court in *Smith v. Radio i Ltd.*¹⁰⁵

Recently, however, the Court of Appeal in *Principal of Auckland College of Education v. Hagg*¹⁰⁶ has overruled these cases and held that the expiration of a fixed term is not a "dismissal," and thus cannot found a personal grievance, unless there has, during the term of the contract, been an express or implied agreement to renew the contract.¹⁰⁷ The effect of the decision is that an employer need have no justification for the use of a fixed-term contract and may use such contracts purely to avoid the unjustified dismissal provisions in the Act, a result clearly pointed out by the Court. The Court did not discuss whether Parliament intended to allow the personal grievance provisions to be avoided by such a technical device.¹⁰⁸

3. The Need for Procedural Fairness in Redundancy Dismissals

The decision of the Court of Appeal in *Brighouse Ltd. v. Bilderbeck*¹⁰⁹ has been the subject of considerable criticism by the new-right.¹¹⁰ Prior to

103. [1989] 3 N.Z.L.R. 24.

104. *Id.*

105. [1995] 1 E.R.N.Z. 281.

106. [1997] 1 E.R.N.Z. 116.

107. This exception is of course consistent with standard contract rules that allow the parties to modify a contract during its term.

108. Justice Thomas (dissenting) concluded that "[i]t cannot be thought that Parliament intended that the Act would be able to be so easily circumvented" by allowing employers to adopt a format deliberately designed to avoid the statutory obligations. [1997] 1 E.R.N.Z. 116, 134.

109. [1994] 2 E.R.N.Z. 243 (C.A.).

110. The Executive Director of the BRT, Roger Kerr, said of this decision that "it was a

Brighouse Ltd., a line of Employment Court cases had held that in a redundancy, as with any other dismissal, an employer must act fairly and that this obligation may, in some cases, require an employer to pay compensation for redundancy even if the contract of employment is silent on the matter. Although given the opportunity to reconsider the law in *Brighouse Ltd.*, the Court confirmed the decisions. While a minority disagreed that an award of compensation could include an amount for the employer's failure to pay redundancy pay, it should be stressed that even the dissenting judges accepted that procedural fairness was required in any dismissal.¹¹¹ The major ground for the new-right criticism of this decision is that it implies into a contract an obligation that the parties did not contemplate in their contract. This may be so, although it should be stressed that procedural fairness is not concerned with contractual rights, but rather is part of a statute-based obligation that requires fairness in dismissals.

C. Discussion

As was the case with the interpretation of Section 12(2), the question to be answered is whether the interpretation of the unjustified dismissal provisions of the ECA has remained within the permissible limits of judicial discretion. Clearly, the Court has chosen to make the assumption that no significant change was intended to the law with the passage of the ECA. This assumption is clearly supportable in that an Act which radically altered the law relating to the negotiation of contracts of employment made no changes to the substance of the law on unjustified dismissal. Moreover, given the debate on this aspect of the Act, it seems clear that Parliament deliberately chose not to amend the law. Is there then a case that the law should have been reinterpreted? Again, there seems little legal justification for such an argument, which would seem to rely on some implied intention of Parliament that the law be reinterpreted. It should also be pointed out that as the main legal principles had been endorsed by the Court of Appeal, the Employment Court remained bound by those decisions. If a reinterpretation of the law was to be justified, the proper forum for this change was the Court of Appeal. With the exception of fixed-term contracts, where the Court of Appeal had not previously given a definitive view, that Court has confirmed the general principles of unjustified dismissal that pre-dated the Act.

Two points become clear if one examines the rhetoric of much of the criticism of the Court's interpretation of the law. The first is that it is often not the interpretation of the law as such which is objected to but rather its application in some cases where employers find the results unfair. The second is that the criticism is also used to advance the position advocated by

direct and conscious snub to Parliament's intentions in passing the Employment Contracts Act." *Appeals to the Privy Council*, New Zealand Bar Association Conference (1995). See also INTERPRETATION, *supra* note 23, at 7-12.

111. [1994] 2 E.R.N.Z. 243, 258-59 (per Justice Richardson), 270 (per Justice Gault).

both the NZEF and BRT that employment should be “at will.”¹¹² This argument was not accepted by Parliament in 1991.

V. THE EMPLOYMENT COURT AND THE COURT OF APPEAL

From about the time of the ECA, there appears to have been some divergence between the Court of Appeal and the Employment Court in their approaches to employment law. With the change to a common law based system of labor law that places less emphasis on collective labor law and favors the individual contract of employment, one emerging factor is that the Court of Appeal is more comfortable with the law than when labor law was a specialist statutory system. As a consequence, the guidance to be derived from the Employment Court, with its specialist expertise and experience of employment and industrial relations matters, may be perceived as less important and less relevant than previously. One indication of this change is that the Court of Appeal has adopted a more orthodox contractual approach to employment than the Employment Court, which is seemingly more sympathetic to the argument that contracts of employment are a specialized form of contract with its own rules. In *Cunningham v. TNT Worldwide Express (N.Z.) Ltd.*¹¹³, the Court of Appeal held that, in deciding who was an employee, the fundamental test was the intention of the parties as stated in the contract and that the Employment Court had been mistaken in disregarding the stated intention of the parties in favor of the traditional common law tests.¹¹⁴ This decision is important, since it effectively allows an employer to use a form of contract that deprives a person who is, in any economic sense, an “employee” of the minimum statutory protections available to employees.¹¹⁵

A second factor is that there has been a change of personnel in the Court of Appeal in the last few years and, in particular, the former President Justice Cooke (generally regarded as a liberal) has retired and been succeeded by Justice Richardson (a conservative).¹¹⁶ This and other changes appear to have led to a more orthodox, black letter Court. The more orthodox

112. See THE COURT, *supra* note 21, at 46.

113. [1993] 1 E.R.N.Z. 694.

114. See also *Attorney-General v. NZPPTA* [1992] 2 N.Z.L.R. 1, where the Court of Appeal held that no different approach was to be applied to the implication of terms in a contract of employment than in any other contract.

115. The ECA itself, together with minimum wage laws and laws on minimum holidays, apply only to “employees,” a term that is not defined in statute but depends on the common law definition of a contract of employment. It is not clear how far the Court would take this approach if there were an attempt to exclude minimum entitlements. In *Cashman v. Central Reg'l Health Auth.* [1996] 2 E.R.N.Z. 156 (C.A.), the Court took a very liberal approach to the statutory definition of a “homeworker” so as to provide statutory protection. The ECA deems “homeworkers” to be “employees.” Employment Contracts Act § 2, 1991 (N.Z.).

116. The President can influence not only the tenor of the Court but, more importantly, the composition of the judges making up the Court for any particular hearing.

influence, in both political and legal terms, is quite clear in a number of the cases discussed above, especially *Ivamy* and *Hagg*. It might also be noted that Justice Richardson delivered a strong dissent in *Bilderbeck Ltd.*, where he held that there is no room for the payment of redundancy compensation as an aspect of procedural fairness and only limited room for procedural fairness generally in a redundancy decision. His judgment emphasizes commercial certainty and the need for an employer to be able to plan with certainty and is clearly tied to a unilateral view of the employment relationship.¹¹⁷ He has also stated, in a revealing comment, that "it is not open to the Courts to construct an extra-statutory concept of social justice applicable in redundancy situations."¹¹⁸

The full impact of what seems to be a changing dynamic in the Court of Appeal is still difficult to predict. What does seem clear is that the Court of Appeal is likely to take an orthodox contractual approach to employment and to view employment in purely contractual terms. It also seems clear from *Ivamy* that the Court shows considerably more sympathy with employers attempting to negotiate with "difficult" unions and for unitarist, non-conflictual theories of employment relationships than it does with employees wishing to negotiate collectively. This was a significant step back from the position taken earlier in *Eketone*. While the Court of Appeal still appears far from supportive of the full new-right agenda, as for example in its continuing support for procedural fairness in dismissals, it is nevertheless sympathetic to employer arguments on the "right to manage," on the need for "flexibility," and the need to be "competitive." Employee protections are likely to be increasingly eroded at the margins as employers take advantage of the changed approach of the Court and employees seeking to advance their legal position before the Court face a less than receptive bench.

VI. CONCLUSIONS

The major theme of this Article was to assess whether there is any substance in the new-right's allegations that the Employment Court has undermined, consciously or unconsciously, Parliament's intentions in passing the ECA. The answer to this question must depend on whether the decisions of the Employment Court were within the range of permissible options available to it according to the standard legal rules of statutory interpretation and judicial precedent. The fact that the Court of Appeal has upheld appeals from the Employment Court, either in whole or in part, does not of course mean that the Employment Court's decisions were "wrong"¹¹⁹ in the sense of

117. [1994] 2 E.R.N.Z. 243, 255.

118. *G.N. Hale & Son Ltd. v. Wellington etc. Caretakers etc.* IUOW [1990] E.R.N.Z. Sel. Cas. 843, 852.

119. New-right critics (who are predominantly non-lawyers) tend to speak as if an overruled decision was "wrong" in some absolute sense and on this basis argue that the Employment Court is making major legal mistakes.

being outside the range of permissible decisions, let alone that the Court was undermining the intentions of Parliament. Lower courts are often reversed on appeal and there is no indication that the Employment Court has a record that differs substantially from other courts.¹²⁰

The above analysis indicates that, when assessed in traditional legal terms, the new-right's criticism of the Employment Court has little, if any, credibility. The Employment Court's decisions may have been politically controversial and may limit some employer bargaining strategies, but they are clearly within the legally acceptable parameters of judicial decision-making. The most difficult area for the Court was the interpretation of Section 12(2). While the proponents of the ECA may have hoped that collective bargaining would disappear or become totally marginalized, the reality was that this was unlikely. The Court was, therefore, charged with the task of interpreting the ECA as it applied to collective bargaining and to balance the competing legal rights set out in the statute with minimal legislative guidance. The Court's decision in *Ivamy*, the high point of a liberal approach to Section 12(2), remained within the boundaries set out by the Court of Appeal in *Eketone*. Given that the ECA allows employees the right to negotiate through a union, and that the Court of Appeal stated that the ILO conventions should be taken into account when interpreting the Act, the approach adopted by the Employment Court was both justifiable and legitimate. In the end, the decision as to whether the employer's conduct strayed over a very inexact and shifting line was a factual one. That the Court of Appeal in *Ivamy* has impliedly resiled from its earlier decision in *Eketone* and has decided to shift the frontline is hardly the fault of the Employment Court.

The position in relation to unjustified dismissal seems even clearer in the light of Parliament's refusal to amend the law in 1991. The Employment Court continued to apply developed legal rules, which in most cases the doctrine of precedent required it to adhere to. Indeed, if it had done otherwise, accusations of judicial activism or of acting contrary to Parliament's intention may have been more justified.¹²¹

What then of the new-right attack? What appears inescapable is that the criticism of the Court's decisions and the attack on it is largely a political attack by the new-right that has the dual function of attempting to persuade the government that unjustified dismissal law should either be repealed or significantly downgraded and of undermining the Court itself, the abolition

120. This information was supplied by John Hughes of the University of Canterbury and is to form part of an article to be published as *The Employment Court and the Court of Appeal*, EMPLOYMENT L. BULL. (forthcoming 1997). The results of appeals are difficult to assess in simple terms, as an appellant may well obtain a reduction in the amount of damages, a partial victory based on a different approach to the facts, or win a limited victory on a point of law. Whether the original decision is "wrong" will depend on how the person calculating chooses to classify each such case.

121. Howard appears to argue that the court should have been activist in this respect. See INTERPRETATION, *supra* note 23, at 1. In new-right parlance, "judicial activism" appears to mean making a decision with which the new-right disagrees.

of which is also central to the new-right deregulation agenda. Members of the new-right are of course entitled to argue for the implementation of their agenda and for further deregulation, but the nature of that argument and the tactics used to further it are unfortunate.¹²² In particular, the characterization of the Court as undermining the intention of Parliament is seriously misleading and, to the extent that this is advanced as a serious legal argument, is based on a flawed understanding of the judicial process and the rules that govern it. It may also be based on a particular approach to the law generally. The new-right concept of law, particularly as advocated in New Zealand,¹²³ is one that centers on a simplistic "classical" version of the common law rules of contract, tort, and property. The freedom of the parties to enter into any contract they regard as advantageous is regarded as a paramount virtue. Thus, the task of the courts appears to be to enforce the resulting obligations unless duress or the like has been established. There is clearly no room for considerations such as inequality of bargaining power or fairness.¹²⁴ Government intervention in the labor market that limits freedom of contract is also strongly opposed in this view of the law. Given this vision of the law, the new-right would clearly regard many of the decisions of both the Court of Appeal and Employment Court as wrong. The difficulty with this argument is that it is concerned with a view of what the law should be in a new-right world, not with what it is in the real world of the late twentieth century.

Will the new-right succeed in abolishing the Employment Court and the protection of the personal grievance procedure? It is difficult to predict the political future, but at the time this Article is being written, it seems likely that further deregulation can be expected. The current Minister of Labor appears to be sympathetic to BRT-NZEF arguments.¹²⁵ The Coalition Government Agreement states that a formal study "will be conducted of the Employment Court's decisions to establish whether Parliament's intentions have been clearly expressed for the purposes of minimising judicial activism in the employment area."¹²⁶ Any resulting legislation is likely to include

122. For other comments on the new-right attack, see the comments by Gordon Anderson, *supra* note 36.

123. See Wilson, *Policy*, *supra* note 9, at 205. As noted above, the writings of Professor Epstein have been particularly influential.

124. "The idea that there is any systematic inequality in bargaining power between employers and employees is a basic fallacy, which was rightly set aside in the Employment Contracts Act." Roger Kerr, Executive Director BRT, Appeals to the Privy Council, New Zealand Bar Association Conference (1995).

125. The Minister is an ex-Treasury and ex-NZEF official. The Minister's background and the text of his speeches referred to below can be found (or accessed) on his homepage. See *supra* note 32.

126. New Zealand currently has a conservative coalition government of two political parties. The Agreement as it affects labor law is set out and discussed in Gordon Anderson, *The Coalition Government's Policy on Industrial Relations*, EMPLOYMENT L. BULL. 28 (1997).

a reduction in employee personal grievance rights, possibly some codification of the substantive law, and some reform of the Employment Court. The extent of further deregulation will depend, no doubt, on how the government gauges political opinion at the time.¹²⁷

127. At the time of finalizing this Article, the Government was preparing to release a series of option papers on reforms to various aspects of the ECA. These should be accessible through the Department of Labour's URL www.nzir.dol.govt.nz/index.html as they are released.

