

## THE EMPLOYMENT COURT, "JUDICIAL ACTIVISM," AND THE COALITION AGREEMENT

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### I. THE BACKGROUND TO THE COALITION AGREEMENT

#### *Introduction*

By the time of the 1996 general election in New Zealand, the Employment Contracts Act 1991 ("the ECA") had been in force for just over five years. The election result on October 12, 1996, made it clear that the next government would comprise a coalition between the New Zealand First Party and either the ruling National Party or the Labour Party (the main opposition party prior to the election).<sup>1</sup> On December 11, 1996, New Zealand's first government under the mixed member proportional representation system was established by the Coalition Agreement between the New Zealand National Party and New Zealand First.

To most political commentators, the partnership was unexpected. Founded and led by Winston Peters, a former minister in the National Government of 1990 who had left the National Party after a series of bitter internal disputes, New Zealand First had claimed the "center" as its political constituency and had reserved its strongest criticism during the election campaign for the National Government and its neo-liberal economic stance.

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1. Other parties represented in Parliament were the Alliance (13 seats), ACT New Zealand (8 seats), and the United Party (one seat). To ensure a majority in the House of Representatives for either of the two large parties, National (44 seats) and Labour (37 seats), a coalition with New Zealand First (17 seats) was required. On a spectrum from left to right, the Alliance was furthest to the left, Labour was on the center left, New Zealand First and the United Party were avowedly "center parties" per se, National was on the center right, and ACT New Zealand was furthest to the right. However, much of New Zealand First's rhetoric attracted support from former Alliance voters. For example, the Party's deputy leader, Tau Henare, announced shortly before the election campaign began that he would never serve in a Cabinet where the National Party's Prime Minister and Finance Minister continued to hold their portfolios (Tau Henare, A Defining Moment, speech to the New Zealand First Annual Convention, July 20, 1996). Mr. Henare is now Minister of Maori Affairs in a Cabinet where the Prime Minister and Minister of Finance continue in their previous roles.

Indeed, the party's central advertising theme was that the only way to get rid of National was to vote for New Zealand First. Naturally, then, the party was widely perceived as the most likely potential coalition partner for the Labour Party in a center-left Government. By common consensus among political analysts, New Zealand First had thereby gathered a significant share of votes that might otherwise have gone to Labour or—on the political left of Labour—to the Alliance Party.<sup>2</sup>

Nevertheless, on one significant issue New Zealand First had differed from Labour. The Labour Party was committed to repealing the Employment Contracts Act 1991 (the ECA) and to replacing it with legislation promoting collective bargaining and enhancing the rights of employees and unions.<sup>3</sup> Against this, New Zealand First undertook to retain the ECA but to amend it "to resolve outstanding issues relating to representation and fairness."<sup>4</sup> The most significant of these suggested amendments can be divided into three areas.<sup>5</sup> First, in terms of bargaining, it was proposed that the ECA should be amended to ensure "good faith bargaining" in all contractual negotiations; to introduce compulsory arbitration in the essential services; to ensure that employers recognize employees' bargaining agents; and to allow access for employees' representatives to address employees at their work site.<sup>6</sup> Second, in terms of personal grievances, it was proposed that amendments should seek to codify existing case law on procedural fairness in

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2. For an account of the election campaign, see Stephen Levine & Nigel Roberts, *The 1996 General Election*, in *NEW ZEALAND POLITICS IN TRANSITION* ch. 3(4) (Raymond Miller ed., 1997). Part 3 of this text contains a useful contemporary account of the four major political parties. The industrial relations policy of the three main parties (National, Labour, and Alliance) is set out in a symposium in the *EMPLOYMENT L. BULL.* 3-9 (1997).

3. *NEW ZEALAND LABOUR PARTY, WORKING TOGETHER: LABOUR'S STRATEGY FOR LABOUR RELATIONS IN THE 1990S* (1995).

4. *NEW ZEALAND FIRST POLICY RELEASE, INDUSTRIAL RELATIONS 2* (Sept. 26, 1996) [hereinafter *POLICY STATEMENT*]. The emphasis on amendment rather than repeal was seemingly designed to enhance New Zealand First's image as a "center party" and separated NZ First from the other main opposition parties. Clearly, legislation may be repealed yet substantially re-enacted. This would have been the case with the ECA had Labour been the dominant partner in a coalition government, given that the ECA's provisions relating to freedom of association (Part I), personal grievances (Part III), enforcement (Part IV), strikes and lockouts (Part V), and institutions (Part VI) were likely to have been re-enacted with few changes. Indeed, Parts III, IV, and V of the ECA themselves substantially re-enact the relevant provisions in the repealed Labour Relations Act 1987. At the same time, legislation may be retained yet amended so significantly that its entire nature changes. Arguably, this would have been the case with the ECA had New Zealand First's proposal for good faith bargaining survived the coalition negotiations in its apparently intended form.

5. The *POLICY STATEMENT*, *supra* note 4, also promised to raise the minimum wage under the Minimum Wage Act 1983 to \$7.50 per hour for adult employees (i.e., those over the age of 20) and to provide graduated increases for those between the age of 12 and 20. The Coalition Agreement undertook to raise the minimum adult wage to \$7.00 per hour and to review it further in the light of the target set by New Zealand First, together with a review of "below adult" rates. This was implemented by the Minimum Wage Order 1997 (SR 1997/11).

6. While the ECA provided at the time for recognition, Employment Contracts Act § 12 1991 (N.Z.) [hereinafter *ECA*], and access, *Id.* §§ 13-15, the emphasis on amendment suggested that enhanced rights were contemplated. This point is elaborated below.

grievance cases. Third, it was proposed that all employment-related legislation should be brought within the general framework of the ECA.

Equally significant, in terms of the eventual shape of the Coalition Agreement, was what New Zealand First undertook to retain. The party stated that it would retain the "voluntary unionism" of Part I of the ECA<sup>7</sup> and the unlawfulness of strikes relating to multi-employer collective employment contracts under Part V of the Act.<sup>8</sup> New Zealand First also pledged unequivocally that it would retain the specialist Employment Court<sup>9</sup> and boost resources for the Employment Tribunal.<sup>10</sup>

The brevity of the New Zealand First policy,<sup>11</sup> coupled with its publication barely three weeks before the day of the election (thereby precluding elucidation in debate),<sup>12</sup> made precise comparison with the policies of its eventual coalition partner, National, difficult. The National Party stated simply that the ECA was a fundamental of its economic policy and should not be changed. In this respect, the New Zealand First proposals for "good faith bargaining" were clearly the most significant point of difference between National and New Zealand First, since the ECA makes no provision requiring negotiation of any kind prior to entering into an employment contract, leave alone negotiation in good faith.<sup>13</sup> While no further content was given to the "good faith bargaining" which NZ First undertook to introduce, in media appearances by both the leader and deputy leader of the party prior to the election it was asserted that—at that stage—the intention was to redress a perceived imbalance in bargaining power under the ECA that favored employers unfairly.<sup>14</sup>

This is reinforced by documents emerging from the coalition negotiation process, indicating that some key features of "good faith" bargaining—such as a duty to meet, to negotiate, and to be timely—were contemplated.<sup>15</sup> The suggested amendment to provide for compulsory arbitration likewise marked a move away from National's emphasis on a "permissive" bargaining regime. Against this, the remaining aspects of New Zealand First's policy on bargaining—recognition of bargaining agents and reasonable access

7. POLICY STATEMENT, *supra* note 4, para 1. No other political party was committed to any other system.

8. *Id.* para. 5. The Labour Party, and the Alliance, would have allowed strikes over multi-employer collective contracts.

9. ECA § 103.

10. ECA § 77. For recent consideration of the Court and the Tribunal generally, see Symposium, *The Specialist Institutions*, 21 N.Z. J. INDUS. REL. 1 (1996).

11. The suggested substantive changes to the ECA were described in only 116 words.

12. The policy was made available on September 26, 1996. The election took place on October 12.

13. This point is developed below.

14. A repeated theme of speeches by Winston Peters, the leader of New Zealand First, was that the flexibility introduced by the ECA could not survive unless the ECA was seen to be made more even-handed in its operation. This point was emphasized in televised "Leaders' Debates" immediately before the general election.

15. See below under examples of perceived activism.

for employee representatives—simply restated existing obligations within the ECA.<sup>16</sup> Seemingly, New Zealand First's proposed investigation of codification in relation to the principles of procedural fairness and the absorption of all other employment-related legislation into the ECA were aimed at providing a convenient reference point rather than altering the law in these areas.<sup>17</sup> The retention of the "freedom of association" provisions in Part I of the ECA and the law barring strikes concerning multi-employer collective employment contracts were, again, simply a restatement of the existing position.

In terms of New Zealand First's pledge to retain the Employment Court, it might have been thought that the two parties were again in agreement. National, after all, had clearly stated that it did not favor amending the ECA and that the specialist institutions were an integral part of the legislation. However, it is likely that New Zealand First's undertaking was prompted by continuous and sharp criticism of the Employment Court, and particularly its Chief Judge, by government ministers in the National administration, and by employer organizations which were otherwise strongly supportive of the ECA and the National Government's economic direction. While the National Government had continued to deny that it planned to restrict further or to abolish the Employment Court if re-elected,<sup>18</sup> there was an increasing perception that if the ECA was to be changed at all by another National Government, it would be changed in this area.<sup>19</sup>

### *Reaching the Coalition Agreement*

The lengthy coalition negotiations between New Zealand First and National respectively yield little by way of hard evidence as to why particular aspects of either party's election policy were modified in the eventual Coalition Agreement. One aspect of the coalition-forming process was agreement on the part of all participants that they would not reveal details of the negotiations either during those negotiations or afterwards. Thus far, this undertaking has been observed. Yet there is no doubt that, if posed in terms of an isolated contest between competing ideas about employment under the

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16. See Employment Contracts Act §§ 12-15, 1991 (N.Z.).

17. The policy stated that the object was in relation to procedural fairness "to ensure that all employers and employees have a central legislative reference that outlines their rights and responsibilities." POLICY STATEMENT, *supra* note 4, para. 2.

18. Acting Minister of Labour, Oral Answer to Parliamentary question, *Hansard*, June 12, 1996.

19. This perception was heightened by comments made by the Prime Minister in a radio interview in the closing stages of the election campaign that the ECA might be modified so as to "tighten it" if the National party went into a coalition partnership with ACT New Zealand. Of those parties which eventually secured seats in the first MMP Parliament, ACT alone had appeared to advocate a radical rethinking of the institutional structure established by the ECA, the Employment Court, and the Employment Tribunal, and envisaged a return to principles of common law contract in employment disputes, administered in the ordinary courts.

ECA,<sup>20</sup> the *Statement on Industrial Relations* in the Coalition Agreement indicates that the National Party negotiators conceded nothing of significance to New Zealand First.<sup>21</sup> At the same time, National's negotiators gained New Zealand First's commitment to changes which have the potential to amend the ECA more radically (and more in favor of employer interest groups) than National itself had suggested prior to the election and which, arguably, sits in stark opposition to New Zealand First's commitment to "put increased safeguards into the Act to ensure that workers cannot be exploited and that their best interests can be maintained."<sup>22</sup>

Taking the most radical of New Zealand First's policies, the introduction of the concept of "good faith bargaining," paragraph 8 of the *Statement on Industrial Relations* states that the Coalition Government will "[i]ntroduce the concept of 'fair' bargaining into the Employment Contracts Act, by describing areas where compliance is necessary to abide by principles underlying the Act (e.g., the obligation to respect the choice of bargaining agent and not to undermine the bargaining process by bypassing the agent)."<sup>23</sup> In short, contrary to the promise in New Zealand First's policy, apparently the ECA will not be substantively amended to introduce any form of good faith bargaining properly so called.<sup>24</sup> Instead, "fair bargaining" will be represented by statutory amendment to incorporate the existing interpretation given to the relevant provisions in the ECA. (This will result, of course, in no change to the legal principles applicable prior to the general election, which New Zealand First had criticized as being unfairly biased in the employer's favor.)

The intended result is to emphasize the absence of control on bargaining behavior that is the essence of the existing legislation. As the Minister of Finance recently stated:

The Coalition Agreement states that the Government will introduce the concept of "fair" bargaining to more clearly outline the responsibilities of parties under the ECA. This may include clarifying the obligations to recognise and not to bypass an authorised agent. The basic principles of the ECA will remain. . . . I want to emphasize that this is not "good faith bargaining," North American style. We remain committed to a permissive framework for industrial relations, the opposite of the North American system, which prescribes when people must meet to bargain and what they

20. Against this, it is clearly possible that policy in one area might have been traded off against policy in a different area altogether.

21. The Coalition Agreement of December 11, 1996, consisted of a First Part setting out the principles underlying the Coalition, and its management, and a Second Part consisting of two schedules. Schedule A contains detailed statements of agreement in policy areas, of which *Industrial Relations* is one. Schedule B outlines agreed fiscal parameters. The *Statement on Industrial Relations* in Schedule A is summarized in Gordon Anderson, *The Coalition Government's Policy on Industrial Relations*, 1997 EMPLOYMENT L. BULL. 28. [hereinafter *Statement on Industrial Relations*].

22. POLICY STATEMENT, *supra* note 4.

23. *Statement on Industrial Relations*, *supra* note 21.

24. This point is elaborated below.

have to bargain, and a host of other controls on bargaining behavior. The last six years have taught us that such control is not necessary.<sup>25</sup>

Similarly, the implied promise of increased powers of access for bargaining representatives is diluted into a pledge to incorporate the relevant case law principles under the existing provisions into the Act, again resulting in no effective change.<sup>26</sup> Against this, the relatively simple proposal by New Zealand First to investigate the feasibility of codifying the requirements of procedural fairness in personal grievance cases and its pledge to retain the Employment Court but convert it into a two-fold initiative in Paragraphs 4 and 5 of the *Statement*, which promise

... [an] immediate review [of] whether, and how, decisions of the Employment Court and the Court of Appeal with respect to personal grievance and procedural matters under the Act can be codified into legislation.<sup>27</sup> . . . . In [the] meantime, [to] retain the separate jurisdiction of the Employment Court but conduct a formal study of the Court's decisions to establish whether Parliament's intentions have been clearly expressed for the purposes of minimising judicial activism in the employment area.<sup>28</sup>

The italicized phrase implied, for the first time since 1990, that the future of the specialist Court was now insecure. A further promise, in paragraph 6 of the *Statement*, to boost the resources of the Employment Tribunal and the Employment Court if, following a review, it is found that justice is being denied because of delays, reflects New Zealand First policy. It cannot be reconciled with the apparently insecure status of the Employment Court (unless it is viewed as a temporary or transitional measure, should the Court be removed).

A variety of explanations have been offered for this apparent policy rout. The most frequently expressed explanation (from New Zealand First's political opponents) is that the party was simply duplicitous and never intended to fulfill its promises.<sup>29</sup> An alternative view is that New Zealand First's industrial relations policy was not central to its election campaign,<sup>30</sup> that it had been hastily formulated without expert assistance,<sup>31</sup> and that—in

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25. Minister of Finance W.F. ("Bill") Birch, Speech to the Wellington District Law Society (June 7, 1997).

26. See below under *The Duty to Recognize Bargaining Representatives*.

27. Paragraph 10 of the *Statement on Industrial Relations*, *supra* note 21, extends this investigation of codification to the principles surrounding fixed-term contracts.

28. *Statement on Industrial Relations*, *supra* note 21 (emphasis added).

29. Labour Party Spokesperson Steve Maharey, What's MMP Got to Do With It?, Speech Before the Labour-Management-Government Relations Seminar (March 20, 1997).

30. The party had campaigned primarily on issues arising from "overseas control" of New Zealand, the state-funded education and health systems, and Maori grievances. See Raymond Miller, *The New Zealand First Party*, in *NEW ZEALAND POLITICS IN TRANSITION*, *supra* note 2, ch. 4(3).

31. The origins of the policy are obscure, although the deputy leader of New Zealand First, Mr. Tau Henare (who released it and acted as spokesperson on industrial relations dur-

so far as it parted company with National's ideas while endorsing the retention of the ECA—it was therefore vulnerable to change when the New Zealand First negotiators met with the more experienced negotiators for the National Party. The National Party's negotiating team included Mr. Max Bradford, a former chief executive of the New Zealand Employers' Federation, who, as a National Party Member of Parliament, had chaired the select committee dealing with the Employment Contracts Bill and a later select committee inquiring into the effects of the ECA.<sup>32</sup>

A third, and possibly crucial, player then entered the scene. To cope with the perceived imbalance in experience and access to information between the teams involved in the coalition negotiation process, the Public Service was placed at their disposal during the negotiations. The implications of proposals put forward during those negotiations were to be dealt with by the supply of "answers" from the Public Service to questions from those teams. A series of such answers addressed the central tenets of New Zealand First's policy when framed as questions.<sup>33</sup> The authorship of the papers in terms of the relevant Government Department is not clear, but prime responsibility for labor market analysis lies with the Department of Labour, which must have played a major—if not exclusive—role in preparing much of the relevant information and analysis.<sup>34</sup> While the release of the documents under the name of the State Service Commission<sup>35</sup> was accompanied by the qualification that "the information and analysis provided was supplied in response to written questions on specific matters," and that "[the]

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ing the election campaign) was at one time a union official. The party's current industrial relations spokesperson, Peter Brown, is a former shipping consultant.

32. He is widely regarded as being among the strongest advocates of the neo-liberal economic stance of the then Government—in colloquial terms, he is "dry" rather than "wet." Mr. Bradford's place on the negotiating team was said to have been at the insistence of the National party caucus, which wanted a "dry" representative to counter any drift towards radical amendment of the key planks of Government policy, including the ECA, in the face of New Zealand First's apparent desire to shift to a more evenly weighted environment. For the coalition formation process, see Jonathon Boston, *Coalition Formation, in NEW ZEALAND POLITICS IN TRANSITION*, *supra* note 2, ch. 5(2).

33. The replies to requests for information are published without consecutive page numbering in STATE SERVICES COMMISSION, INFORMATION SUPPLIED BY THE PUBLIC SERVICE IN RESPONSE TO REQUESTS MADE BY POLITICAL PARTIES TAKING PART IN COALITION FORMATION TALKS (1997) [hereinafter RESPONSE TO REQUESTS]. Consistent with the secrecy surrounding the coalition building exercise, the papers do not indicate the source of the request for information (i.e., whether the National party, the Labour Party, or New Zealand First). The papers selected for this Article are primarily those answering questions which are clearly related to the themes in New Zealand First's election policy. Some of these issues overlap with proposals made by the Labour Party.

34. The other Government department which commonly offers analysis of labor market issues, the New Zealand Treasury, has disclaimed any involvement. See "No Agenda" says Labour Department, PUB. SERVICE ASS'N J., May 27, 1997, at 1, and related correspondence, *id.* at 5.

35. The State Services Commission is a department of State with overall responsibility for the administration of the Public Service. The powers and functions of the chief executive of the Commission are set out in Part I of the State Sector Act of 1988.

documents do not contain policy advice,"<sup>36</sup> it is obvious that the way in which information is selected and presented can in itself be persuasive without the addition of overt recommendations.<sup>37</sup>

It will be argued below that the defining characteristic of the Public Service advice offered to the coalition negotiating teams on labor market issues was its adherence to the National Government's line of thinking on the desirability of retaining the fundamental elements of the ECA, coupled—where reform was mooted—with an identifiable reliance on criticisms of the ECA made by the two major employer pressure groups, the New Zealand Employers' Federation and the New Zealand Business Roundtable.<sup>38</sup> The replies to requests for information were typified by an overall hostility to proposed changes to the ECA, particularly where the changes might lead to further development of legal principles by the courts.<sup>39</sup> A notable feature of the replies was the tendency in key areas to describe critical accounts of the ECA in terms of unfairness or exploitation as being "anecdotal" or "perceptions" only,<sup>40</sup> while presenting the controverted "successes" of the ECA—and the dangers presented by any amendment—as

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36. RESPONSE TO REQUESTS, *supra* note 33, at i. All answers to questions given in the context of coalition negotiations were provided by the State Services Commissioner on behalf of the Public Service. Under guidelines produced by the State Services Commissioner, departments were not permitted to offer advice, but were allowed to provide information and analysis. See STATE SERVICES COMMISSIONER, NEGOTIATIONS BETWEEN POLITICAL PARTIES TO FORM A GOVERNMENT; GUIDELINES ON SUPPORT FROM THE PUBLIC SERVICE (Oct. 21, 1996); STATE SERVICES COMMISSION, WORKING UNDER PROPORTIONAL REPRESENTATION 7 (1995).

37. The constitutional ramifications of this situation have yet to be fully explored. Since the enactment of the State Sector Act 1988, arguably New Zealand has moved away from the Westminster model of a politically neutral public service (with Ministers having a role in the selection of chief executives of Government departments) and Public Service "advice" to ministers has increasingly reflected back to the Government its own policy preferences. However, in the context of information supplied during coalition negotiations, it seems strongly arguable that a strictly balanced approach was called for and that the Public Service, which had a contemporaneous role in serving the "caretaker Government," should have been meticulous to avoid seemingly partisan advice. On the change in role of the Public Service, see RESHAPING THE STATE, NEW ZEALAND'S BUREAUCRATIC REVOLUTION (Johnathon Boston et al. eds., 1996); PUBLIC MANAGEMENT: THE NEW ZEALAND MODEL (Johnathon Boston et al. eds., 1996); JANE KELSEY, ROLLING BACK THE STATE: PRIVATISATION OF POWER IN AOTEAROA/NEW ZEALAND ch. 4 (1993); JANE KELSEY, THE NEW ZEALAND EXPERIMENT: A WORLD FOR STRUCTURAL ADJUSTMENT? ch. 3 (1995); BRIAN EASTON, THE COMMERCIALISATION OF NEW ZEALAND (1997). On the role of the Public Service during the coalition process, see John Martin, *Advisers and Bureaucrats*, in NEW ZEALAND POLITICS IN TRANSITION, *supra* note 2, ch. 6(2). Martin makes the cogent suggestion that an inter-party protocol is required on the modalities of the provision of technical information and support by the Public Service, *id.* at 114.

38. For the role of these groups in setting the political agenda and influencing Government policy, see Brian Roper, *A Level Playing Field? Business Political Activism and State Policy Formation*, in STATE AND ECONOMY IN NEW ZEALAND ch. 8 (Brian Roper & Chris Rudd eds., 1993); John Deeks, *Business and Politics*, in NEW ZEALAND POLITICS IN TRANSITION, *supra* note 2, ch. 4(8); JANE KELSEY, ROLLING BACK THE STATE, *supra* note 37, ch. 8.

39. This point is developed below under *Examples of Perceived Activism*.

40. Noting also that the extent of such perceptions could not be measured because of a lack of "reliable data." Request No. 508/1, in RESPONSE TO REQUEST, *supra* note 33.



being facts.<sup>41</sup> The underlying assumptions informing this analysis were outlined in a key passage from the "Executive Overview" of the Public Service, which stated the following:

Under current labour market regulation, the emphasis is placed on the encouragement of competitive behaviour and choice, flexibility, and responsiveness in bargaining processes and outcomes in order that the particular needs of the parties are met in the most efficient way. This enhances firm-level productivity, income generation and employment.

New Zealand firms and employees are still adjusting to the opportunities and threats from increasing international competition. The current regulatory policy settings in the economy and labour market have acted to facilitate and reduce the cost of this adjustment, contributing to a substantial growth in jobs and fall in unemployment.

The Employment Contracts Act liberalized bargaining processes and options and has contributed to adjustment processes over a period of sustained economic and employment growth. Amending the Employment Contracts Act to reintroduce procedures incurring significant transaction costs or constraining outcomes should only be considered if the identifiable benefits from doing so are sufficient to offset these costs.<sup>42</sup>

We can now turn to a more detailed examination of those aspects of the Coalition Agreement already outlined. In terms of the implementation of the Agreement, Mr. Bradford is now the Minister of Labour in the Coalition Government. Significantly, New Zealand First has no Associate Minister of Labour.<sup>43</sup> As of July 1997, the review of Employment Court decisions outlined in the Coalition Agreement is under way and legislation based on that review, amending the ECA, is planned for the first or second quarter of 1998.<sup>44</sup>

## 2. Questioning the Employment Court: The Impetus for Change

When the Employment Contracts Bill was proceeding through Parliament in 1991, a paper setting out four possible options was sent to the 800-odd people and organizations who had made submissions on the bill. The options presented were, first, the retention of the existing Mediation Service and Labour Court; second, the creation of a specialist tribunal with appeal rights to the High Court; third, a specialist tribunal with appeal rights to a

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41. In particular, this occurred in the *Executive Overview* presented in answer to Requests No. 519 and No. 508/5, in RESPONSE TO REQUEST, *supra* note 33, which responded to the question, "Are there any changes to the ECA that would help to increase sustainable rates of economic growth and/or improve labour market performance?"

42. Request No. 519, *supra* note 41.

43. When approached to comment on Mr. Bradford's industrial relations proposals, Mr. Peter Brown, New Zealand First's spokesperson on industrial relations, stated that he was "not up to speed with what Mr. Bradford was working on." Ruth Largeson, *Bid to Toughen Employment Contracts Act*, SUNDAY STAR TIMES, March 23, 1997, at A2.

44. Gordon Campbell, *The Max Factor*, N.Z. LISTENER, May 3-9, 1997, at 24 (interview with Max Factor).

specialist court; and, fourth, for employment matters to be dealt with by the ordinary courts.<sup>45</sup> Prior to this, two opposing schools of thought on the then-specialist Labour Court had been presented to the Government by departments of the Public Service. The New Zealand Treasury strongly favored the abolition of the specialist court and advocated a return to the ordinary principles of contract in employment cases. In this, the Treasury had the support of the two most influential employer groups, the New Zealand Employers' Federation and the New Zealand Business Roundtable. Against this, the Department of Labour and the State Services Commission, the two departments with the most immediate responsibility for industrial relations, had favored the retention of a specialist jurisdiction. This approach was supported by the overwhelming majority of submissions to the select committee considering the Employment Contracts Bill, including those from unions and—for the most part—from the legal profession. At this stage, the policy debate was won by those favoring the retention of the specialist institutions.<sup>46</sup>

While the Employers' Federation and the Business Roundtable had welcomed the permissive bargaining framework imposed by the Employment Contracts Act 1991, their combined assault on what had by then become the Employment Court<sup>47</sup> continued unabated in a steady stream of published papers, media releases, and conferences dedicated to the subject.<sup>48</sup> At first, the Government's response was supportive of the Court. In 1993, following the joint publication of a purportedly topical report by the employer groups criticizing the Labour Court and the Employment Court,<sup>49</sup> Bill Birch, then Minister of Employment stated the following:<sup>50</sup>

The exchange of labour is not simply subject to the same contractual arrangements as financial and product market exchanges. Employment law is now concerned with the legal requirements of the balance between the legislation's intentions of catering for society's requirements of fairness, and enabling the building of positive longer term employment relation-

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45. See Pat Walsh & Rose Ryan, *The Making of the Employment Contracts Act*, in *EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES* ch. 4 (Raymond Harbridge ed., 1993); Rose Ryan & Pat Walsh, *Common Law vs. Labour Law; the New Zealand Debate*, 6(3) *AUSTL. J. LAB. L.* 230 (1993).

46. *Id.*

47. This was previously the Labour Court.

48. The main publications were: NEW ZEALAND BUSINESS ROUNDTABLE & NEW ZEALAND EMPLOYERS' FEDERATION, *A STUDY OF THE LABOUR/EMPLOYMENT COURT* (1992) [hereinafter *LABOUR/EMPLOYMENT COURT*]; COLIN HOWARD, *INTERPRETATION OF THE EMPLOYMENT CONTRACTS ACT 1991* (1995); BERNARD ROBERTSON, *THE STATUS AND JURISDICTION OF THE NEW ZEALAND EMPLOYMENT COURT* (1996); CHARLES W. BAIRD, *THE EMPLOYMENT CONTRACTS ACT AND UNJUSTIFIABLE DISMISSAL* (1996).

49. But in reality mainly dealing with the Labour Court and its predecessors. See *LABOUR/EMPLOYMENT COURT*, *supra* note 48.

50. Rt. Hon. Bill Birch, Address at the New Zealand Institute of Industrial Relations Research Conference on Employment Law: Present Developments and Future Issues (October 8, 1993).

ships. . . . Subsequently [sic], the institutions play an important role in the scheme of . . . employment relations in New Zealand. Their duty and responsibilities are clearly written in [the] statute. . . . The major objectives of the Government in determining the best formula for the institutions were carefully thought through. The Employment Tribunal and Employment Court are better placed to recognize practical solutions which assist compromise and adjustment. In turn this contributed to certainty of outcomes and longer stability. In contrast, common law as it stands, does not adequately reflect the need for compromise and labour market adjustment. Neither does it fully reflect the human dimension in labour contracting. The Government still believes that the Employment Tribunal and Court have a valuable role to play in maintaining this balance.<sup>51</sup>

At the same time Mr. Bradford, the current Minister of Labour and then chairperson of the Labour Select Committee, commented that the reasons for establishing the specialist institutions were still valid, that "the Employment Tribunal would be difficult to replace as a low level disputes resolution body," that "the Employment Court has also played a useful role in interpreting the new legislation," and that moving from specialist institutions to the ordinary courts would not eliminate criticism of some bands of judicial decision-making.<sup>52</sup>

Thus, in 1993, both Mr. Birch and Mr. Bradford emphasized the well-established justifications for specialist institutions in terms of the special characteristics of employment contracts, and the need for expertise, ease of access, and speedy and informal processes and outcomes.<sup>53</sup> Both had also expressed qualified satisfaction that the Employment Court was performing as the Government had intended it would in terms of the aims of the ECA.<sup>54</sup> As we have just seen, four years later, both were equivocal on the need to retain the Court. What, then, had changed in those four years? A number of factors might be seen to have combined to breathe new life into the issue:

1. The 1993 statements were made immediately before a general elec-

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51. *Id.*

52. Max Bradford MP, *The Future of the Employment Court and Tribunal: The Government View*, Address at the New Zealand Institute of Industrial Relations Research Seminar on *The Future of the Employment Court and the Employment Tribunal* (Apr. 23, 1993).

53. See, e.g., JUSTICE, *INDUSTRIAL TRIBUNALS: A REPORT BY JUSTICE* (1987). In the New Zealand context, see, for example, Gordon Anderson, *A Specialist Labour Law Jurisdiction? An Assessment of the Business Roundtable's Attack on the Employment Court*, GAMMA OCCASIONAL PAPER 5 (1993); Gordon Anderson, *Specialist Employment Law and Specialist Institutions*, Paper presented to the New Zealand Institute of Industrial Relations Research Seminar on *The Future of the Employment Court and the Employment Tribunal* (Apr. 23, 1993); Nick Wailes, *The Case Against Specialist Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations*, 19 N.Z. J. INDUS. REL. 1 (1994). At the same time, the Attorney-General, The Rt. Hon. Paul East, had suggested that the Employment Court should become a division of the District Court. See Steve Marshall, *The Future Structure and Operation of the Employment Court and Tribunal*, Speech at the New Zealand Institute of Industrial Relations Research Seminar on "[t]he Future of the Employment Court and the Employment Tribunal" (Apr. 23, 1993).

54. Mr. Bradford's view was tempered by his concerns that the continuing requirements of procedural fairness in dismissal cases might be interpreted in a "dogmatic way."

tion, at a time when the ECA was still attracting controversy and was widely unpopular.<sup>55</sup> Among those who opposed the ECA's emphasis on untrammelled "freedom of choice" in bargaining, the Employment Court's limited but exclusive jurisdiction was regarded as the last hope for redressing some adverse consequences of power imbalances between employers and employees. By 1997, the next election was more than two years away and the ECA was perceived to be less controversial, both in terms of the parliamentary representation of those parties which had criticized it most vigorously<sup>56</sup> and of opinion surveys.<sup>57</sup> In short, questioning the continuing usefulness of the Court was not so electorally perilous.

2. The Public Service, and the restructured Department of Labour<sup>58</sup> in particular, was now reflecting back to the Coalition Government unqualified support for the principles underlying the ECA, coupled with criticisms of the Employment Court from employer groups, while not reflecting criticisms of the ECA, and support for the Court, from other perspectives.<sup>59</sup>

3. The employer pressure groups had become far more influential in policy terms<sup>60</sup> as well as increasingly strident in their demands that the role of the Employment Court be re-examined. Conversely, unions and other representatives of workers had become significantly weakened in terms both of political influence and of their resources to challenge what had become in effect an elite consensus between employer groups, influential policy-advisers in the Public Service (in particular the Department of Labour and the New Zealand Treasury), the Government, and significant parts of the news media.<sup>61</sup>

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55. For analyses of early surveys of opinion under the ECA, see Richard Whatman et al., *Labour Market Adjustment Under the Employment Contracts Act*, 19 N.Z. J. INDUS. REL. 53, 69 (1994); Kevin Hince & Raymond Harbridge, *The Employment Contracts Act: An Interim Assessment*, 19 N.Z. J. INDUS. REL. 235, 251 (1994).

56. See *supra* note 1, for the respective representation of the Labour Party and the Alliance Party. Against this, when New Zealand First's original proposals for significant change to the ECA are taken into account, almost 56 percent of the votes in the 1996 general election went to parties committed to changing the ECA to redress the perceived unfair imbalance in favor of employers (Labour 31.1%, NZ First 13.5%, and Alliance 11.3%). *Id.*

57. See Barbara Burton, *A Report on Recent MRL and NZIER Research*, 1996 EMPLOYMENT L. BULL. 24; cf. Raymond Harbridge, *The Employment Contracts Act a "Hit"—Really?*, 1996 EMPLOYMENT L. BULL. 26 (questioning the reliability of these surveys).

58. The Labour Market Policy Group of the Department of Labor provides the Government with strategic policy advice on all aspects of the labor market. The Industrial Relations Service, also within the Department of Labour, provides advice on the industrial relations regulatory framework and system. The current organization of the Department of Labour was established following a review of the Department in 1988.

59. This point is elaborated below under 3. *The Possible Outcomes.*

60. See *supra* note 38. The New Zealand Employers' Federation was reported as having spent M\$1.3 on an advertising campaign supporting the ECA in the run-up to the 1996 general election, urging electors not to vote to change the Act (as was then advocated by the three opposition parties, including New Zealand First). To put this sum in perspective, it considerably exceeded the officially declared election expenditure of the main opposition party, the Labour Party.

61. See Jane Scott, *Neo-liberalism at Work: Media-Politics and the Employment Con-*

4. In terms of the permissive bargaining structure which represents the core of the ECA, as of 1993 the Employment Court had issued a number of decisions which had enhanced the power of employers and hastened the Government's intended breakdown of working conditions achieved under the award system by, for example, enabling employers to by-pass bargaining representatives and negotiate directly with employees,<sup>62</sup> and to impose partial lockouts to achieve their ends.<sup>63</sup> In contrast, by 1997, as well as reversing these lines of authority<sup>64</sup> to some extent, the Employment Court had begun to interpret the ECA to restrict the power of employers to communicate directly with represented employees during negotiations, an issue of concern to the Government and to employers.<sup>65</sup> The Court had also retained an approach to personal grievance determination (especially in relation to fixed-term contracts) which the Government and employers argued not to be appropriate under the ECA's bargaining structure.<sup>66</sup>

5. As compared with 1993, the Employment Court in 1997 had sustained an increasing number of successful appeals (although the proportion of successful appeals between the two sets of figures remained almost identical). While in 1993 Mr. Birch felt able to support the Employment Court by pointing to only nine ECA-related appeals to the Court of Appeal in the previous two years, of which five had been allowed as an indication that there was no significant problem,<sup>67</sup> by 1997 Mr. Bradford was citing fifty-three appeals in the previous three years, of which twenty-six had been allowed, as an indication that the Employment Court was not looking to the law as expressed by Parliament.<sup>68</sup>

6. As a consequence, the Employment Court was portrayed as being—at best—unduly activist and—at worst—incompetent. The argument that the ordinary courts could act as a substitute for the Employment Court was seen also to be enhanced, since the generalist Court of Appeal was increasingly seen to be "making the rules."<sup>69</sup>

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tracts Act (1995) (unpublished M.A. thesis, University of Auckland) (on file with the University of Auckland Library).

62. *Adams v. Alliance Textiles Ltd* [1992] 1 E.R.N.Z. 982.

63. *Paul v. IHC Inc.* [1992] 1 E.R.N.Z. 65.

64. For discussion of the case law developments, see MAZENGARB'S EMPLOYMENT LAW ¶¶ 12.10, 62.8 (Gordon Anderson et al. eds., 5th ed. 1992).

65. *Id.*, ¶¶ 12.10-14.

66. See the materials listed at *supra* note 48.

67. Minister of Labour W.F. ("Bill") Birch, Address to the New Zealand Institute of Industrial Relations Research Conference on Employment Law, Present Developments and Future Issues (Oct. 8, 1993).

68. Campbell, *supra* note 44. It should be noted also that a number of the decisions in this period relate to legislation other than the ECA, in particular the Holidays Act 1981, which is widely regarded to be poorly drafted, and that many relate to relatively minor procedural points under the ECA. The major decisions are dealt with below. See John Hughes, *Hunting the Snark: Open Legislative Drafting and "Judicial Activism."* EMPLOYMENT L. BULL. 118 (1997).

69. Birch, *supra* note 25.

7. The original justification of the Employment Tribunal and Employment Court as providing one aspect of an easy, speedy, and informal resolution to disputes was seen to be clouded by increased legalism and formality, and lengthy waiting lists for fixtures, particularly in the area of personal grievances.<sup>70</sup>

8. In addition to these factors, the potential changes to the ECA, including reconsideration of the Court's jurisdiction (and perhaps existence), were explained in terms of the need to retain the perceived competitive advantage, which was claimed to result from the deregulation of the New Zealand labor market. This advantage was seen to have been eroded by similar developments in competing countries while being impeded by remaining "inflexibilities" within the industrial relations system to which the Court was allegedly contributing.<sup>71</sup>

### *The Perceived "Activism" of the Court Under the ECA*

The criticisms of the Employment Court spring essentially from two related sources. First, in terms of the conventional neo-liberal economic analysis, employment contracts are said to be no different from any other contract and, as a consequence, to require no different treatment from that afforded to other contracts.<sup>72</sup> Where legislation—including the ECA—recognizes such a distinction (as, for example, in providing discrete remedies for unjustifiable termination), it is condemned under this analysis.<sup>73</sup> Where, on the other hand, the ECA appears to incorporate ordinary contractual concepts, particular criticism has been directed at judgments of the Employment Court which modify the impact of those concepts by incorporating a particular approach based on distinctions between contracts of employment and other types of contract. Such judgments of the Court have been said to be at odds with the new "contractualism" of the ECA, particularly in relation to bargaining and personal grievances, and this alleged

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70. *Id.* See also Max Bradford, Address to the Labour-Management-Government Relations Seminar (Mar. 20, 1997); and Max Bradford, Address to the 1997 Government to Business Summit (Apr. 3, 1997). There is a paradox here, in that the Government had earlier hailed the extension of the personal grievance jurisdiction to all employees as a positive feature of the ECA in comparison to its predecessor, and these clouding features were undoubtedly in large measure the result of that extension. See, e.g., Max Bradford, The Employment Contracts in Operation: A Government View, Speech to the Victoria University of Wellington Industrial Relations Seminar (May 15, 1992); Minister of Labour Doug Kidd, Maharey Misunderstands Operation of Employment Contracts Act, Press Release (July 3, 1996).

71. Birch, *supra* note 25; Bradford, Labor Management-Government Relations Seminar, *supra* note 70.

72. In the New Zealand context, see PENELOPE BROOK, FREEDOM AT WORK: THE CASE FOR REFORMING LABOUR IN NEW ZEALAND (1990), a book heavily dependent on the analysis of Richard Epstein.

73. Penelope Brook-Cowen, *Labour Relations Reform in New Zealand: The Employment Contracts Act and Contractual Freedom* XIV J. LAB. RES. 69 (1993).

"judicial activism" is argued to be subverting the intention of Parliament.<sup>74</sup>

Both "judicial activism" and the "intention of Parliament" are notoriously slippery concepts, particularly in the hands of pressure groups and politicians.<sup>75</sup> While judicial activism is not susceptible to formal standards of measurement, in the hands of critics of the Employment Court it has loosely embraced extensions of the employer's duties through development of implied terms at common law beyond the "black letter" contract,<sup>76</sup> and expansive—rather than restrictive—interpretation of certain provisions of the ECA (particularly those relating to bargaining and personal grievances).<sup>77</sup>

In contrast, there are formal means of ascertaining the intention of Parliament, which will be examined shortly in the context of the main examples of alleged activism by the Court. These do not include resort to opinions expressed by members of the Government, except in rare cases.<sup>78</sup> This is perhaps as well. The published views of key members of the Government after the inception of the ECA display some startling inconsistencies in terms of alleged intention in key areas of labor relations policy, often overlapping with areas of supposed judicial "activism" on the part of the Employment Court. For example, section 12(2) of the ECA requires employers to "recognise" an employee's representative.<sup>79</sup> In one of its earliest decisions, the Employment Court held that such recognition did not preclude attempts by the employer to negotiate directly with the employee involved, thereby by-passing the representative.<sup>80</sup> When this decision, among others, precipitated a complaint to the International Labour Organisation under ILO Conventions 87 and 98, the Government supported the Employment Court's approach as indicating an intended "robust" aspect of the bargaining process under the ECA.<sup>81</sup> When—in an election year—the ILO had reported back unfavorably, without taking account of a then recently delivered Court of

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74. Birch, *supra* note 25. See *supra* note 48, for publications which also adopt this approach.

75. There is an excellent analysis in the New Zealand context in Wendy Davis, *Judges and the Politics of Employment Law* (1994) (unpublished L.L.M. Research Paper) (on file with the Victoria University of Wellington Law Library).

76. See *supra* note 48, in particular Howard and Robertson.

77. *Id.* See also Birch, *supra* note 25.

78. Use of extrinsic materials in interpreting legislation is still comparatively rare, although there is increasing resort to Parliamentary history. JOHN BURROWS, *STATUTE LAW IN NEW ZEALAND* ch. 9 (1992).

79. Employment Contracts Act § 12(2), 1991 (N.Z.).

80. *Adams v. Alliance Textiles Ltd.* [1992] 1 E.R.N.Z. 982.

81. NEW ZEALAND GOVERNMENT, *RESPONSE TO THE NZCTU COMPLAINT TO THE ILO 46* (1994). For studies of the ILO Complaint, see Nigel Howarth & Stephen Hughes, *Under Scrutiny: The ECA, the ILO and the NZCTU Complaint 1993-1995*, 20 N.Z. J. INDUS. REL. 143 (1995); and Tonia Novitz, *New Zealand Industrial Relations and the International Labour Organisation: Resolving Contradictions Implicit in Freedom of Association*, 21 N.Z. J. INDUS. REL. 119 (1996).

Appeal decision overriding the Employment Court's approach,<sup>82</sup> the Government then criticized the ILO as being ignorant of the intention of the legislation in this respect, now citing the Court of Appeal's conflicting view as representing that intention.<sup>83</sup> Similarly, when the Employment Court held that the ECA enabled employers lawfully to impose a "partial" lockout (whereby employers were able unilaterally to vary employment contracts to fit a proposed form of contract under offer, while requiring employees to work),<sup>84</sup> the then Minister of Labour, Mr. Birch, stated that this was an intended counterpart of the employee's right to strike lawfully by partial withdrawal of labor.<sup>85</sup> When the Court subsequently reversed its approach,<sup>86</sup> the chairperson of the Labour Select Committee (and current Minister of Labour) Mr. Bradford denied that it had ever been the Government's intention to allow partial lockouts.<sup>87</sup> Given that Mr. Birch and Mr. Bradford were key figures in the drafting of the ECA and its subsequent passage through Parliament, perhaps the courts might be allowed some room for uncertainty.

*Examples of Perceived "Activism" Viewed in the Context of Statutory Interpretation of "Intention"*

To understand the criticisms of the Employment Court which lie behind some aspects of the Coalition Agreement, three areas of contention under the ECA will be examined by way of example—the decisions on recognition of representatives, procedural fairness in personal grievances, and the principles relating to fixed-term contracts. These areas have been selected since they predominate in criticism of the Court by employer groups and influential members of the Government.<sup>88</sup> In each case, the method adopted will be to outline the statutory provision, to examine what formal indicators exist to the ascertainment of Parliament's intention, to summarize briefly the approach taken by the Employment Court and the Court of Appeal, and then to consider the coalition-building process and, in particular, the answers provided by the Public Service to questions posed by the negotiating teams.

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

83. Minister of Labour Doug Kidd, Press Release (Mar. 1994).

84. See *Paul v. I.H.C. Inc.* [1992] 1 E.R.N.Z. 65, by virtue of section 62(1)(c) of the ECA, which enables employers to break some or all of their contracts in order to compel employees to comply with their demands.

85. W.F. ("Bill") Birch, *The Employment Contracts Act*, THE PRESS, June 22, 1992, at 9 & July 1, 1992, at 9.

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

87. Radio interview by Radio New Zealand with Max Bradford, Morning Report (June 21, 1994).

88. See Birch and Bradford, *supra* note 67. Other examples include the Employment Court's interpretation of its jurisdiction over actions "founded on" an employment contract under section 3 of the Employment Contracts Act 1991 and—outside the ECA—interpretation of the Holidays Act 1981.



### *The Duty to Recognize Bargaining Representatives*

Section 9 of the ECA states that the object of the bargaining provisions in Part II of the Act is to establish that:

- (a) Any employee or employer, in negotiating for an employment contract, may conduct the negotiations on his or her own behalf or may choose to be represented by another person, group, or organisation.
- (b) Appropriate arrangements to govern the employment relationship may be provided by an individual employment contract or a collective employment contract, with the type of contract and the contents of the contract being, in each case, a matter for negotiation.<sup>89</sup>

Nothing in the ECA requires the parties to negotiate,<sup>90</sup> nor does Part II give rise to any enforceable legitimate expectation of negotiation.<sup>91</sup> However, any party to negotiations for an employment contract may determine whether to be represented and, if so, who his or her representative will be.<sup>92</sup> Under section 12(1) all such representatives must establish their authority to represent in any negotiations, whereupon section 12(2) states that:

[w]here any employee or employer has authorised a person, group, or organisation to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall . . . recognize the authority of that person, group or organisation to represent the employee or employer in those negotiations.<sup>93</sup>

There is no statutory definition of the concept of recognition and nothing in the background material to the ECA to suggest what—if any—substantial obligation was in the mind of the draftsman at this point.<sup>94</sup> Indeed, in the original drafting instructions for the Employment Contracts Act, the suggestion was made that the employee's choice of bargaining agent should be subject to a right of veto on the employer's part, a suggestion apparently amended on the basis of departmental advice that such a measure would conflict with the "freedom of choice" purportedly conferred elsewhere in Part II, with section 12(2) being the result.<sup>95</sup>

Not surprisingly, both the Employment Court and the Court of Appeal have had some difficulty in interpreting the intention of Parliament in terms

89. Employment Contracts Act § 9, 1991 (N.Z.).

90. This is a key aspect to the "permissive" bargaining regime under Part II of the ECA. See, for example, observations in *Hyndman v. Air New Zealand Ltd.* [1992] 1 E.R.N.Z. 820.

91. *Id.*

92. ECA § 10. This is subject to a rarely invoked exception allowing the other party to object to representatives with serious criminal convictions. ECA § 11.

93. ECA § 12(2).

94. Although the concept of recognition is obviously a key aspect of good faith bargaining regimes, which represent the antithesis of Part II of the ECA.

95. MAZANGARB'S EMPLOYMENT LAW, *supra* note 64, ¶ 12.9.

of the obligation to recognize representatives. In *Adams v. Alliance Textiles (N.Z.) Ltd.*,<sup>96</sup> the Employment Court held that no implied rule of neutrality results from the obligation to recognize representatives. The result was that, where an employee had authorized a representative to act, the employer was said to be entitled to attempt to negotiate directly with the employee.<sup>97</sup> On appeal, in *Eketone v. Alliance Textiles (N.Z.) Ltd.*,<sup>98</sup> President Cooke suggested that—once a union had established its authority to represent certain employees—“then the employer fails to recognize the authority of the union if the employer attempts to negotiate directly with those employees” and that “[to] go behind the union’s back does not seem consistent with recognizing its authority.”<sup>99</sup> Following *Eketone*, the Employment Court was held to have erred in law when it extended the *Eketone* analysis to cover an employer’s communication with employees concerning negotiations with their union while those negotiations were in progress. In *N.Z. Medical Laboratory Workers Union Inc. v. Capital Coast Health Ltd.*,<sup>100</sup> the Court of Appeal agreed that once the negotiating process was underway between an employer and the authorized representative of employees, that actual process may not be conducted with a person so represented. Nevertheless, the Court then distinguished between negotiating (described as being “a process of mutual discussion and bargaining”) and the provision of factual information:

The provision of factual information does not impinge on that process. But anything that is intended or calculated to persuade or to threaten the consequences of not yielding does. Whether any words or actions are of that kind is a question of fact to be determined on an overall view of what was said or done and the context in which it was said or done.<sup>101</sup>

The extent of the employer’s ability to provide information during negotiations without breaching section 12(2) is illustrated by the contemporaneous decisions of the majority of the Full Court of Appeal in *N.Z. Fire Service Commission v. Ivamy*<sup>102</sup> and *Airways Corporation of N.Z. Ltd. v. NZALPA IUW (Inc.)*.<sup>103</sup> In these cases, the Court held that there was no

96. [1992] 1 E.R.N.Z. 982.

97. Subject to constraints on harsh and oppressive behavior, undue influence, or duress, each forbidden by section 57 of the ECA.

98. [1993] 2 E.R.N.Z. 783.

99. *Id.* at 787.

100. [1994] 2 E.R.N.Z. 93.

101. *Id.*

102. [1996] 1 E.R.N.Z. 85.

103. [1996] 1 E.R.N.Z. 126. For analysis of the two decisions from opposing perspectives, see Maxine Gay, *Back to Year Minus One*, 1996 EMPLOYMENT L. BULL. 60; Gordon Anderson, *Collective Bargaining after Ivamy*, 1996 EMPLOYMENT L. BULL. 80; Gordon Anderson, *Collective Bargaining and the Law: New Zealand’s Employment Contracts Act Five Years On* [1996] AUSTL. J. LAB. L. 106; Sandra Moran, *Ivamy and Airways—The Implications for Employees*, NEW ZEALAND LAW SOCIETY EMPLOYMENT LAW CONFERENCE PAPERS 163 (1996) (all critical of the Court of Appeal’s majority decision); Barbara Burton, *Ivamy*,

breach of the duty to recognize where, respectively, the employer provided material to employees setting out the employer's case and—in some cases—draft contracts, prior to release of this information to their union, and provided “updates” on negotiations directly to employees coupled with the solicitation of feedback through accompanying “feedback forms.” In both cases, the Employment Court's decision that the conduct breached section 12 was overruled and in both cases there were strong dissenting judgments in the Court of Appeal.<sup>104</sup>

*Ivamy* encapsulates the difficulties in ascertaining Parliament's intention from the tersely worded and largely permissive provisions of Part II of the ECA. While the majority saw its decision as conforming to that intention, the vigor of the dissenting judgments was unusual, Justice Thomas going so far as to state that the majority decision was one which would “effectively bring to an end the practice of collective bargaining for a collective employment contract as recognised and defined by Parliament in the Employment Contracts Act.”<sup>105</sup> The dissenting judges in *Ivamy* also questioned the legitimacy of the new-found readiness of the majority to disturb the findings of the Employment Court on an appeal limited to points of law, a point we shall return to presently.

What, then, of the argument raised by employer groups that the Employment Court has been unduly “activist” in its decisions under section 12? First, it is clear that the decision to avoid detailed prescription in relation to bargaining arrangements was—and remains—a calculated risk, with inevitable reliance on the courts to make sense of uncertain concepts:

Legislation that is unclear or fails to address issues arising in practice can lead on a reliance on litigation to resolve issues. The effect may be costs in terms of time and money to the parties and of Government. However, detailed and/or prescriptive regulation does not necessarily produce either clarity or certainty. Nor does regulation guarantee appropriate or better outcomes. It can limit the ability of the parties to manage their own arrangements successfully and to adapt and respond to a changing environment.<sup>106</sup>

As the Minister of Finance recently pointed out, Section 12 is a section

... where a lot depends on one word – “recognize.” And it has taken a number of judgments of the Employment Court and the Full Court of Appeal to bring some clarity to this area of law. A simple survey of the

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*or Balance Restored*, 1996 EMPLOYMENT L. BULL. 83; Derek Broadmore, *Airways—The Facts: Ivamy and Airways—The Implications for Employers*, NEW ZEALAND LAW SOCIETY EMPLOYMENT LAW CONFERENCE PAPERS 169 (1996); Jack Hodder, *A Background to Fire Service v. Ivamy and Airways Corporation v. NZALPA*, NEW ZEALAND LAW SOCIETY EMPLOYMENT LAW CONFERENCE PAPERS 149 (1996) (all favoring the Court of Appeal's majority decision).

104. Lord Cooke dissented in both decisions. Justice Thomas dissented in *Ivamy* only.

105. [1996] 1 E.R.N.Z. 85, at 125.

106. Department of Labour, *Post-Election Brief* 34, Oct. 1996.

leading cases shows that what counts as by-passing a bargaining agent is still not entirely clear.<sup>107</sup>

Second, substantive content was first given to the duty to recognize by the Court of Appeal in *Eketone*. Third, to the extent that the Employment Court was subsequently overruled on appeal, the 3:2 majority in *Ivamy*, and the strength of the dissenting judgments, indicates that the issue is by no means clear cut.<sup>108</sup> Fourth, the overruling of the Employment Court in *Ivamy* and in *Airways* was, in the view of the dissenting judges and most commentators,<sup>109</sup> an unorthodox extension of the Court of Appeal's jurisdiction, derogating from the fundamental principle that findings of fact at first instance are to be accepted on appeal unless they cannot reasonably be supported by the evidence.

As we have seen, the Coalition Agreement subsumes the issue of recognition under the heading of "fair bargaining." Indeed, to date, it is the only aspect of that commitment to fairness, which is expressed to be limited to describing areas "where compliance is necessary to abide by principles underlying the Act." The remainder of the negotiating proposal from which this paragraph was extracted contemplated the introduction of "fair" bargaining in its more conventional form, with duties to meet, to consider matters raised within a reasonable time frame, and to facilitate the conduct of the bargaining process. The introduction of fair bargaining was condemned in the answer by the Public Service as moving the ECA "away from one of its major underlying principles namely that the content of contracts should be determined by the parties themselves" (even though the proposal related to process rather than outcome) and as carrying significant risks for employment and economic growth.<sup>110</sup>

Finally, and paradoxically, one of the principles underlying the ECA—to be maintained in terms of the Coalition commitment to "fair bargaining"—is the deliberate exclusion of principles of fairness when the courts consider the parties' bargaining behavior. Section 57 sets the appropriate standard as that of "harsh and oppressive" behavior, an intentionally high threshold well above the normal standard of unfairness or unconscionability which applies in all other contractual situations.<sup>111</sup> In answer to a question from the negotiators during the coalition talks, the Public Service answered that to change the relevant criterion under section 57 to that of unfairness (i.e., to apply the standard contractual test) would have a number of adverse consequences:

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107. Birch, *supra* note 25.

108. See, in particular, Gordon Anderson articles, *supra* note 103.

109. See *supra* note 103.

110. RESPONSE TO REQUESTS, *supra* note 33, Request No. 519/2.

111. Adams v. Alliance Textiles (N.Z.) Ltd. [1992] 1 E.R.N.Z. 982; United Food etc. IUW v. Talley [1992] 3 E.R.N.Z. 423. See Ellen Dannin, *Bargaining under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455 (1996).

It is not possible to predict the precise nature and extent of intervention by the courts but there is a risk that it will be difficult for the courts to develop a consistent approach to the interpretation and application of the proposed amendment given the wide variety of individual contractual situations. In any event, it is likely that the proposed amendment would have a highly detrimental impact on the efficient functioning of the labour market, with flow on effects on employment. The proposal effectively transfers the decision-making function from the parties to the Employment Court, which runs counter to the basic philosophy underpinning the Employment Contracts Act.<sup>112</sup>

Apart from the confusion once again between process and outcome illustrated by the reference to "transfer of the decision-making function," tellingly, no reference was made in the answer to detailed published research on the outcomes when courts apply the standard test for unfair contractual behavior and, in particular, to research carried out by the New Zealand Law Commission only six years earlier.<sup>113</sup>

### *Personal Grievances and Procedural Fairness*

The personal grievance provisions of Part III of the ECA, with a few exceptions,<sup>114</sup> re-enact the corresponding provisions of the repealed Labour Relations Act 1987. Like the retention of the specialist Court, the transfer of the grievance provisions was the outcome of a closely fought policy debate.<sup>115</sup> Here at least the formal guidelines for establishing intention are clear. Where new legislation re-enacts provisions drawn from earlier legislation which it replaces, it is assumed that Parliament was aware of the way in which the courts had interpreted those provisions and, by re-enacting them unchanged, was endorsing that interpretation.<sup>116</sup> The principles underlying the personal grievance jurisdiction were firmly established by the time the ECA was enacted, having been in force in respect of the most significant grievance—unjustifiable dismissal—since 1973.<sup>117</sup> Yet paradoxically, it is those principles which have supplied the main focus of claimed judicial activism on the part of the Employment Court under the ECA, particularly as

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112. RESPONSE TO REQUESTS, *supra* note 33, Request No. 519/5.

113. NEW ZEALAND LAW COMMISSION, UNFAIR CONTRACTS (1991). Another recent New Zealand treatment was supplied in MINDY CHEN-WISHART, UNCONSCIONABLE BARGAINS (1989). For the background to ECA § 57, see MAZENGARB'S EMPLOYMENT LAW, *supra* note 64, ¶ 57.2.

114. These exceptions are not relevant for present purposes.

115. See Walsh & Ryan, *The Making of the Employment Contracts Act*, *supra* note 45.

116. See JOHN BURROWS, STATUTE LAW IN NEW ZEALAND 170 (1992). For the problems in the use of statutory interpretation techniques in this context, see Ellen Dannin, *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration* 14 B.U. INT'L L.J., 267 (1996).

117. The concept of unjustifiable dismissal was introduced in the Industrial Relations Act 1973. For the background, see JOHN HUGHES, PAUL ROTH, & GORDON ANDERSON, PERSONAL GRIEVANCES ch. 1 (1996).

they relate to procedural fairness in dismissals and the expiry of fixed-term contracts.

It has been argued, nevertheless, that the dramatic change in the bargaining arrangements under the ECA should have been reflected in a changed judicial approach to personal grievances. The Labour Relations Act 1987, according to this argument, was based on collective documents with prescribed conditions, while the key feature of Part II of the ECA is the purported "freedom to choose" in relation to the form and content of employment contracts. As a consequence, it is argued, when considering grievances under the ECA, a correspondingly greater weight should be placed on what the parties have contracted for. This approach has been urged particularly strongly in relation to grievances based on failure to observe procedural fairness in redundancy cases and grievances based on the expiry of a fixed-term contract.<sup>118</sup> However, it is suggested that this line of reasoning—as well as giving insufficient effect to the established principles of statutory interpretation relating to re-enacted provisions—overlooks a fundamental feature of personal grievances under the Labour Relations Act 1987. Under that Act, personal grievances were able to be brought by any employee who was a union member,<sup>119</sup> whether he or she was covered by a collective or by an individual contract. Many grievances brought under the Labour Relations Act were brought by employees on individual contracts which had been negotiated under conditions emerging for the most part only from sketchy common law principles,<sup>120</sup> reflecting the "freedom of choice" environment now established for all employees under Part II of the ECA.<sup>121</sup> While the proportion of employees on individual contracts has grown dramatically under the breakdown of collective bargaining precipitated by the ECA,<sup>122</sup> this does not alter the point that the personal grievance procedure was designed to include such employees under the Labour Relations Act 1987 and—arguably—should not alter the approach of the courts to this area of the law from that adopted under the 1987 Act.

The requirements of procedural fairness were well established by the

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118. See *supra* note 46, and Campbell, *supra* note 44. The argument finds particular favor with the current President of the Court of Appeal, Sir Ivor Richardson, in the two key decisions *Brighouse Ltd. v. Bilderbeck* [1994] 2 E.R.N.Z. 243 (in which he dissented) and *Principal of the Auckland College of Education v. Hagg*, unreported, March 26, 1997, C.A. 230/96, in which he delivered the principal judgment. It is fair to add that proponents of this line of argument would also probably have endorsed the same approach as being appropriate under the Labour Relations Act 1987, with the changed nature of bargaining under the ECA simply adding a further emphasis.

119. Labour Relations Act § 216(2), 1987 (N.Z.).

120. For contemporary accounts, see JOHN HUGHES, *LABOUR LAW IN NEW ZEALAND*, ch. 1 (1989), and ALEXANDER SZAKATS, *AN INTRODUCTION TO THE LAW OF EMPLOYMENT* Parts II & III (1988).

121. See generally, MAZENGARB'S *EMPLOYMENT LAW*, *supra* note 64, for commentary on Part II of the Employment Contracts Act 1991, especially at paragraphs 18.2-18.4.

122. For summaries of the statistical surveys, see *supra* note 64, para 18.4.

time the ECA was enacted.<sup>123</sup> In cases of dismissal for cause, they include such basic elements as a requirement that notice be given of the allegation against the employee and of the likely consequences if the allegation is established, a genuine opportunity for the employee to refute the allegation or to explain or mitigate his or her behavior, and an unbiased consideration of the employee's explanation.<sup>124</sup> A clause in the Employment Contracts Bill, which was aimed at limiting (if not entirely excluding) the role of procedural fairness,<sup>125</sup> was dropped, as—in the words of the Department of Labour at the time—"[t]he explicit overruling of these requirements . . . removes what in effect are regarded, in New Zealand and internationally, as basic employment rights."<sup>126</sup> Or, as Mr. Bradford (the current Minister of Labour) stated in 1993, "The requirements of natural justice have become firmly established as a benchmark for judicial decision making in all jurisdictions."<sup>127</sup> In its place, new provisions were inserted that make it mandatory for the Tribunal or the Court to reduce remedies where the situation giving rise to the dismissal was contributed to by fault on the employee's part.<sup>128</sup>

It is not surprising, then, that the Employment Court has continued to apply the principles of procedural fairness, most of which derive from judgments of the Court of Appeal (by which the Employment Court and its predecessors are bound). Complaints of judicial activism in this respect are puzzling when viewed objectively. Indeed, in some significant cases, the Court of Appeal has remitted cases back to the specialist lower court on the basis that the principles of natural justice may not have been sufficiently applied by the court below.<sup>129</sup>

The most controversial aspect of procedural fairness, the duty to consider payment of compensation for redundancy to employees whose contracts are silent on the issue,<sup>130</sup> can be seen in this context. That duty was

123. See HUGHES, *supra* note 117, para. 4.170.

124. *N.Z. Food Processing Union v. Unilever N.Z. Ltd.* [1990] 1 N.Z.I.L.R. 35.

125. Employment Contracts Bill, Clause 17(3). For an analysis, see JOHN HUGHES, *THE ROLE OF LABOUR LAW: THE FUTURE OF INSTITUTIONS AND PERSONAL GRIEVANCES* (Victoria University of Wellington Industrial Relations Centre Working Paper 1/91, 1991).

126. DEPARTMENT OF LABOUR, *REPORT OF THE DEPARTMENT OF LABOUR TO THE LABOUR SELECT COMMITTEE* 62 (1991).

127. Speaker, *The Employment Contracts Act in Operation: A Government View*, Speech Notes to the Victoria University of Wellington Industrial Relations Centre Seminar (May 15, 1992).

128. Employment Contracts Act §§ 40(2) & 41(3), 1991 (N.Z.). For a summary of the relevant principles, see JOHN HUGHES ET AL., *PERSONAL GRIEVANCES* paras. [11.45] - [11.51] (1996), and Sean Woodward, *The Effect of Employee Conduct on Personal Grievance Remedies*, 20 N.Z. J. INDUS. REL. 385 (1995).

129. The most significant example is *Auckland Shop Employees Union v. Woolworths (N.Z.) Ltd.* [1985] 2 N.Z.L.R. 372.

130. See Raymond Harbridge & Peter Kiely, *Redundancy: Trends in Compensation*, 20 N.Z. J. INDUS. REL. 302 (1995); Raymond Harbridge, *When the Gun Goes Off—Compensation for Redundancy*, 1997 EMPLOYMENT L. BULL. 103; Virginia Dunlop, *A Response to "When the Gun Goes Off,"* 1997 EMPLOYMENT L. BULL. 143; and Lori Grantham,

upheld by a majority of the Full Court of Appeal in *Brighouse Ltd. v. Bilderbeck*,<sup>131</sup> where Justice Casey recognized that the Court of Appeal's approach could be seen as "a radical departure from the earlier decisions of the specialist Courts."<sup>132</sup> While criticized as being unduly activist both by employer groups<sup>133</sup> and the current Minister of Labour,<sup>134</sup> the requirement only operates so long as the employment contract neither provides for, nor negates, redundancy compensation. A simple—and increasingly common<sup>135</sup>—clause in the contract stating that no such compensation is payable will operate to defeat it.<sup>136</sup>

Two of the replies from the Public Service to questions from the coalition negotiating teams addressed the issue of procedural fairness directly.<sup>137</sup> In the same way as the Department of Labour's *Ministerial Brief*,<sup>138</sup> both assumed that there are valid concerns about the role of procedural fairness, said to result from a high degree of uncertainty about the outcomes of personal grievance cases, and both assumed that change is desirable.<sup>139</sup> In response to the question, "Are there any changes to the ECA that would help to increase sustainable rates of economic growth and/or improve labour market performance?" the Public Service raised changes to the role of procedural fairness:

First, addressing the uncertainty that has arisen around personal grievances . . . will reduce the focus on procedural issues, about which there is the greatest uncertainty. It should be noted that the difficulty of codifying a simple process which reduced the need for future legal debate should not be underestimated. Second, the emphasis that the courts attach to procedural issues could be altered through a legislative amendment which sought to give some guidance on the weight they should give to procedural issues relative to substantive issues. An indication from Parliament could help to redress, although not eliminate, current concerns. Such an amendment would, however, raise some legal issues, as under current law there is no clear distinction between substantive and procedural issues. Third, changes to the structure of remedies for personal grievances could increase the emphasis that is placed on substantive matters. Remedies could be made to relate more closely to the behavior of employees. At present remedies for an unjustified dismissal may not be reduced where the employee does not contribute to any procedural failing . . . leading to

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*Towards a Right to Redundancy Compensation*, 21 N.Z. J. INDUS. REL. 157 (1996).

131. [1994] 2 E.R.N.Z. 243.

132. *Id.* at 257.

133. See, in particular, Colin Howard, *supra* note 48.

134. Campbell, *supra* note 44.

135. This was made clear in the judgment of President Cooke in *Brighouse Ltd. v. Bilderbeck* [1994] 2 E.R.N.Z. 243. For the use of such clauses, see Harbridge & Kiely, *supra* note 130.

136. Campbell, *supra* note 44 (quoting Peter Kiely) (meeting the criticism of the *Brighouse* decision from the standpoint of a lawyer who usually acts for employers).

137. RESPONSE TO REQUEST, *supra* note 33, Request Nos. 508/3, 508/5.

138. "No Agenda" says the Labour Department, *supra* note 34, at 38.

139. RESPONSE TO REQUEST, *supra* note 33, Request No. 508/5.



the determination of unjustifiability, even if they have contributed to the reason for the dismissal. The law could be clarified so that the remedies would be reduced where the employee contributes to any of the circumstances of the dismissal.<sup>140</sup>

This analysis is infected by a crucial internal inconsistency, whereby the authors accept the (legally correct) view that procedural fairness and substantive fairness cannot be separated,<sup>141</sup> while simultaneously suggesting that amendments might "redress" the uncertainties caused by procedural fairness as a discrete issue.

When the Public Service was asked, "What are the implications of codifying the existing case law relating to personal grievances and procedural issues within the Employment Contracts Act to ensure that all employees and employers have a central legislative reference that outlines their rights and responsibilities?"<sup>142</sup> the answer was not confined to the question.<sup>143</sup> The advantages and disadvantages of codification were discussed in the abstract (although, surprisingly perhaps, no mention was made of corresponding provisions that might have been thought to be directly relevant, such as the well-established use of codification of procedural fairness in other jurisdictions (notably the UK),<sup>144</sup> and of analogous codification in other areas of employment law in New Zealand).<sup>145</sup> The question was used as a springboard, however, to reiterate employers' criticisms of the personal grievance procedure and of the Court, and to raise alternative approaches such as enabling employers to contract out of the grievance procedure or abolishing the grievance procedure and leaving employees with the common law and "general legislation" such as the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 as an option.<sup>146</sup>

In key areas, the ensuing analysis of alternative approaches was lacking in rigor and—to a legally untrained eye—might have made these approaches seem to provide more protection than is in fact the case. For example, the Public Service Reply nowhere mentioned the fact that the New Zealand Bill of Rights Act does not apply to private contractual arrange-

140. *Id.*

141. A fundamental point, reiterated by the Court of Appeal in *Nelson Air Ltd v. New Zealand Airline Pilots Assn. Inc.* [1994] 2 E.R.N.Z. 665 and *Brighouse Ltd. v. Bilderbeck* [1994] 2 E.R.N.Z. 243.

142. RESPONSE TO REQUEST, *supra* note 33, Request No. 508/3.

143. For a summary of the document, see generally Rebecca Macfie, *Labour Department Officials Push Limits of EC Act*, 1997 EMPLOYMENT L. BULL. 31, 32.

144. ADVISORY CONCILIATION AND ARBITRATION SERVICE, DISCIPLINARY PRACTICE AND PROCEDURES IN EMPLOYMENT (1977).

145. For example, there are a number of analogous codes of practice for employers issued under the Health and Safety in Employment Act 1992.

146. It is at this point, in particular, that the arguable need for strict impartiality in the provision of information (*see supra* note 37) might be seen to have been departed from. Suggested alternatives, such as the introduction of a right to "contract out" of the grievance procedure, or abolition of the procedure, were both gratuitous in terms of the question asked and ideologically loaded.

ments,<sup>147</sup> and, while reciting employers' criticisms of excessive legalism and delay under the personal grievance jurisdiction, made no reference to corresponding concerns about the common law from the employee's point of view when setting out an analysis of wrongful dismissal at common law as an alternative to the grievance procedure.<sup>148</sup> Nor did the analysis make any structured reference to the link between liberalization of the common law rules in New Zealand as a consequence of the availability of the grievance procedure (in other words, the courts' tendency to see the statutory framework of the grievance procedure as an indication that the common law rules should—at least to some degree—become less restrictive so as to reflect contemporary standards in areas such as procedural fairness). The Court of Appeal has repeatedly made this connection.<sup>149</sup> Should the grievance procedure be removed, the obvious resulting question is whether the common law courts would take this as an indication that a correspondingly greater degree of conservatism is required in the common law jurisdiction.

### *Personal Grievances and Fixed-Term Contracts*

The third example of purported judicial activism under the ECA has been the Employment Court's approach to fixed-term contracts. In New Zealand such contracts are commonly fixed in relation to a date of termination, but sometimes have a term which is referable to the length of a season (e.g., fruit picking, fishing, etc.) or to the completion of a particular project.

The personal grievance procedure relating to unjustifiable dismissal under the ECA makes no separate provision for fixed-term contracts. Under the corresponding provisions in the Industrial Relations Act 1973, the Court of Appeal in *Actors Equity v. Auckland Theatre Trust* had rejected—by a majority—an approach favored by President Cooke under which dismissal was to be given a wide meaning, corresponding to its literal one of sending away.<sup>150</sup> Instead, the majority (Justices McMullin and Barker) held that failure to renew a fixed-term contract might form the basis for a claim of unjustifiable dismissal if there had been an express or implied promise or renewal, or a legitimate expectation to this effect had been created. Given the potential for the use of fixed-term contracts to circumvent the protection provided by the grievance procedure, under the subsequent Labour Relations Act 1987, the Labour Court—while retaining the *Actors Equity* test—then developed a series of additional guidelines to be applied to the termination of fixed-term contracts to determine whether an employer which allowed the term to expire was thereby effectively dismissing the employee, relying in part on Article 3 of ILO Convention 158 (which requires safe-

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147. See, e.g., *McGuinn v. The Board of Trustees of Palmerston North Boys' High School*, CP 36/95, High Court, Palmerston North (Dec. 24, 1996).

148. RESPONSE TO REQUESTS, *supra* note 33, Appendix I to Request 508/3.

149. Most clearly in *Ogilvy & Mather (N.Z.) Ltd. v. Turner* [1993] 2 E.R.N.Z. 799.

150. [1989] 2 N.Z.L.R. 154.

guards to be observed so that the use of fixed terms does not undermine the general protection against unfair dismissal).<sup>151</sup> A key element in these guidelines was an emphasis on whether the fixed term was genuine in nature, with reference to the employer's operational needs.<sup>152</sup>

In decisions of the Employment Court under the ECA, the guidelines developed under the Labour Relations Act 1987 were held to be still applicable, for reasons which will be elaborated below.<sup>153</sup> However, in its recent decision in *The Principal of the Auckland College of Education v. Hagg*,<sup>154</sup> on appeal from a decision in which the Employment Court had referred to (but not directly applied) those guidelines, the Court of Appeal suggested obiter, but in a firm and unqualified way, that the guidelines had no legal basis.<sup>155</sup> Rather, the Court suggested, the expiry of a fixed-term contract will constitute a dismissal only if the contract has been varied in the way contemplated by the *Actors Equity* judgment or, alternatively, was a "sham" under which the parties had a common intention to create rights and obligations which did not reflect the form of the contract (that is, not a fixed-term contract at all). In a joint judgment, delivered by President Richardson, four judges of the Full Court of the Court of Appeal accepted that fixed terms might be used unfairly to defeat the protections given by the personal grievance procedure (using the example of a series of "nominally" fixed-term monthly contracts for the whole workforce). However, the judges stated that it was not for the courts to alter the meaning of the word "dismissal." That was for Parliament. Such devices, it seems, will now probably succeed. Justice Thomas, in a separate judgment, suggested that it could not have been Parliament's intention to allow the personal grievance procedure to be so easily circumvented and suggested that a "shift in the nature" of a short-term contract might arise if it is "rolled over" to such an extent that it can no longer be said that the true relationship between the parties is anything other than ongoing employment.<sup>156</sup> This difference between the judges in the Court of Appeal essentially concerned the "genuineness" of any given fixed term, the consideration at the heart of the Employment Court's guidelines.

Immediately following the *Hagg* decision, Max Bradford, the Minister

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151. *N.Z. Food Processing Union v. I.C.I. N.Z. Ltd.* [1989] 3 N.Z.I.L.R. 24.

152. The guidelines also asked whether the contract had been allowed to expire out of some wrong motive or unfairness, which seemed to be relevant more to the issue of justification than that of dismissal (although derived from the judgment of Justice McMullin in *Actors Equity*, *supra* note 150, at 142).

153. *Smith v. Radio Ltd.* [1995] 1 E.R.N.Z. 281; *Haddon v. Victoria Univ. of Wellington* [1995] 1 E.R.N.Z. 375.

154. [1997] 1 E.R.N.Z. 116.

155. The case was decided on a more narrow ground, with reference to the specific legislative context in the state sector. See Bernard Banks, *Hagg—The Public Sector Implications*, 1997 EMPLOYMENT L. BULL. 43; and John Hughes, *Fixed-Term Contracts in the Private Sector After Hagg—1997 EMPLOYMENT L. BULL.* 46.

156. It will be recalled that Justice Thomas also delivered a powerful dissent in the key decision in *Ivamy*, *supra* note 102.

of Labour, stated that “[i]f there was ever an example of what the Coalition Agreement refers to as judicial activism in the employment area, [the Employment Court’s decision in] *Hagg* is it.”<sup>157</sup> This statement is difficult to reconcile with the treatment of the issue during both the passage of the Employment Contracts Bill and in subsequent developments. During the passage of the Bill, the New Zealand Employers’ Federation and the New Zealand Business Roundtable made vigorous submissions demanding a statutory reversal of the effect of the Labour Court’s guidelines on fixed-term contracts (which were identical to those in issue in *Hagg*). In response, Mr. Bradford (who was then the chairperson of the Labour Select Committee) asked for—and received—briefing notes on the issue from the Department of Labour.<sup>158</sup> These notes set out the then-existing law in terms of the guidelines.<sup>159</sup> The Department of Labour’s *Report to the Labour Select Committee on the Employment Contracts Bill* again advised against changing the guidelines applicable to fixed-term contracts, drawing attention to its earlier briefing notes.<sup>160</sup> The personal grievance provisions were subsequently re-enacted without any change in this respect. Both the political response to the issue and the established principles of statutory interpretation, under which re-enactment of provisions without change is generally seen to endorse the approach taken by the courts to the corresponding provisions in superseded legislation,<sup>161</sup> might well be thought to indicate that Parliament both understood, and intended, that the developed guidelines in relation to fixed-term contracts would continue to apply. The approach of the Government after the enactment of the ECA also supports this construction. When the Government reported to the International Labour Organisation under ILO Convention No. 158, it set out New Zealand’s approach to fixed-term contracts in terms of the guidelines and attached no reservations to the analysis.<sup>162</sup> No reference to this background was made by the Court of Appeal in *Hagg*, although, as we have seen, Justice Thomas alone questioned whether Parliament could have intended that the intention of Parliament could be defeated by contracts which were fixed by time in form only. Ironically, in the light of the Minister’s statement, the answers from the Public Service during the coalition negotiations also reflect an unqualified

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157. Minister of Labour Max Bradford, Address to the 1997 Government to Business Summit (Apr. 3, 1997).

158. Department of Labour, Briefing Notes to the Labour Select Committee, *Fixed Term Contracts* (Mar. 1991).

159. This undated Report followed the conventional format whereby the Department with primary responsibility for the bill summarizes submissions on the draft legislation, suggests amendments, and explains why other amendments sought are not reflected in the draft before the committee (unpublished report, on file with author).

160. *Id.* at 61.

161. See JOHN BURROWS, *STATUTE LAW IN NEW ZEALAND* 170 (1992).

162. Report of the New Zealand Government Report, Termination of Employment Convention, 1982 (No. 158) for the period ending June 30, 1994, Commentary to Article 3.

use of the guidelines.<sup>163</sup>

### 3. The Possible Outcomes

As of July 1997, it is not possible to predict the outcome so far as the future of the Employment Court, or of the areas of law touched upon earlier, are concerned. Arguably, the policy choices in relation to the specialist institutions remain broadly the same as those in 1991,<sup>164</sup> namely, retention of the specialist institutions in their present form, abolition of the Employment Court but retention of the Employment Tribunal with appellate rights to the High Court, or removal of provision for any specialist institutions so that all employment matters would be dealt with by the ordinary courts or the Disputes Tribunal.<sup>165</sup> As the Department of Labour reported to its incoming Minister in 1996, it was considered in 1991 “after considerable debate” that the specialist institutions would best support the objectives of the ECA. The Department at that stage went on to state that

[t]he key issue in relation to the Tribunal and the Court is whether specialist institutions continue to be the best way to achieve these goals and

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163. One question asked:

What are the implications of amending the Employment Contracts Act to include within the term ‘unjustifiably dismissed’ the situation where an individual fixed-term contract is terminated in circumstances where the same position continues in existence after the expiry date contained in any contract of employment, unless the employer has provided the employee with reasonable notice that the contract was not going to be extended and has commercial or operational reasons for so deciding?

RESPONSE TO REQUESTS, *supra* note 33, Request No. 519/4. After setting forth the guidelines, the Public Service comment was that the intention was to reinforce the case law:

It should be noted that it would codify only part of existing case law, as well as introducing a new element through its requirement for reasonable notice of the termination of the contract. There is a serious risk that legislative amendment might be interpreted by the courts as signalling substantive changes to the law, beyond current case law. It is questionable whether the benefits of an amendment of this type would outweigh the potential costs in terms of unpredictable development by the courts.

The current legal position relating to fixed term contracts has been developed in a series of cases originating before the introduction of the Employment Contracts Act, and may well be developed by future decisions. It was noted that, at the time, the *Hagg* appeal was pending. Any legislative amendment of this nature is likely to change the basis for the development of the law regarding fixed term contracts in an unpredictable way and may lead to unintended consequences.

*Id.* The answer concluded that it was necessary to consider carefully whether an amendment to the Employment Contracts Act relating to fixed-term contracts was necessary.

164. See Walsh & Ryan, *The Making of the Employment Contracts Act*, *supra* note 45.

165. *Id.*

support the objectives of the framework legislation. In this context it is important to identify whether issues arise:

- from institutional arrangements,
- from lack of clarity in policy, or
- from policy not being sufficiently specified in legislation.<sup>166</sup>

Concern about decisions by the Employment Court and the Court of Appeal on redundancy compensation and employers' obligations to follow fair procedures when dismissing employees, for example, may be more effectively addressed by legislative amendment than changing institutional structures.<sup>167</sup>

Nevertheless, the climate of opinion in policy-making circles—particularly within some circles in the Department of Labour itself—has changed markedly in the past six years. One request for information during the coalition negotiations was whether there were any changes to the ECA that would help to increase sustainable rates of economic growth and/or improve labor market performance.<sup>168</sup> In this context, the Public Service noted as areas where change could improve performance in both respects “personal grievances, legal institutions, and the treatment of minimum conditions in general.”<sup>169</sup> Concerns about the Employment Tribunal were raised in a limited way, in the context of ease and cost of access, perhaps reflecting a commonly held perception that the Tribunal is less activist than the Court (itself to some extent a concomitant of the exclusion of the Tribunal from direct enforcement of the more heavily politicized aspects of the ECA, those provisions relating to freedom of association and strikes and lockouts).<sup>170</sup> In contrast, the Public Service answer went on to state the following:

The greatest concerns about the operation of the employment law institutions relate to the Employment Court. Concerns expressed about the Court have tended to focus on apparent inconsistencies between judicial decisions and the intent of the statute, giving rise to uncertainty and confusion. There are a number of ways that may, in principle, address this issue. These range from ways of selecting judges, to changing the rights for appeal within the current framework, to various degrees of integration of the Employment Court into courts of general jurisdiction:

- Widening the pool of judicial talent from which judges hearing employment contract litigation are chosen;
- Rotating judges between the divisions of a general court could recognize the build-up of specialist knowledge, but also broaden the knowledge and experience in related areas of law;
  - ... internal forms of quality control on judicial decision-making;
- Widening the scope for appeal from the Employment Court, such as

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166. DEPARTMENT OF LABOUR, POST-ELECTION BRIEF 38 (Oct. 1996).

167. *Id.*

168. RESPONSE TO REQUESTS, *supra* note 33, Request No. 508/5.

169. *Id.*

170. See section 56 of the ECA, under which the Court alone has jurisdiction to issue compliance orders in relation to those Parts of the ECA.

aligning it to appeal rights from the High Court, should place increased disciplines on decision-making in the Employment Court; parties could be given the option of choosing dispute resolution in the general courts, with the legislation specifying the Employment Court as the default option. This would work only if the Employment Court and the High Court were given the same jurisdiction on employment matters;

- The functions of the Employment Court could be transferred to courts of general jurisdiction.<sup>171</sup>

The analysis is noteworthy for its implicit acceptance of the idea that the Employment Court's role is indeed a cause for concern, for its failure to identify that the "concerns" which it listed all originate from employer pressure groups, for the omission of countervailing views from unions and other worker organizations, and for the radical nature of its chosen options—changing the selection process for the judges (impliedly allowing for appointments based at least in part on political considerations, hitherto regarded as anathema to the system of judicial appointment in New Zealand),<sup>172</sup> subjecting Employment Court judges to forms of quality control not imposed on other judges, allowing parties to avoid the Court by "contracting out," or simply abolishing the Court altogether.

As we have seen, the Coalition Agreement promises a review of decisions of the Employment Court, which is to retain its jurisdiction "in [the] meantime." The Government's likely final position on the matter cannot be predicted with confidence. The Minister of Labour, Mr. Bradford, has denied—albeit obliquely—that it is his intention to abolish the Court,<sup>173</sup> while emphasizing that the proposed review "should reveal whether the landscape of the labour market has changed in a way that supports another look at the institutional arrangements in force at the moment."<sup>174</sup> Meanwhile, the Minister of Finance, Bill Birch, has recently stated that "[t]he time may have come to consider whether the industrial relations environment has changed since 1991, so that the Employment Court need no longer be separate."<sup>175</sup> As we have seen, it is equally uncertain whether the insecure status of the Employment Court extends as well to the Employment Tribunal, or whether one policy option which might be adopted is retention of the Tribunal (albeit under a more limited jurisdiction, particularly in relation to personal griev-

171. RESPONSE TO REQUESTS, *supra* note 33, Request No. 508/5, 6.

172. Wendy Davis, *Judges and the Politics of Employment Law* (1994) (unpublished L.L.M. Research Paper 19, Victoria University of Wellington) (on file with Victoria University of Wellington Law Library) (quoting Sir Thomas Eichelbaum, *Political Influences in the Legal Profession: Judicial Independence—Fact or Fiction?*, 2 N.Z. LAW CONFERENCE PAPERS 120 (N.Z. Law Society, Mar. 1993)).

173. Campbell, *supra* note 44.

174. Max Bradford, *What Happens Now?*, Ministerial Address to the Seminar on Labour-Management-Government Relations in an Era of MMP, Industrial Relations Centre, Victoria University of Wellington (Mar. 20, 1997).

175. W.F. ("Bill") Birch, Speech to the Wellington District Law Society (June 7, 1997). Mr. Birch was Minister of Labour during the passage of the Employment Contracts Bill.

ances), with the replacement of appeals to the Employment Court with appeals to the ordinary courts (or, perhaps, to an "Employment Division" of the District Court or of the High Court).<sup>176</sup> Nor is it clear whether the National Party's coalition partner, New Zealand First, has any independently developed policy thinking on these issues. Nevertheless, the mechanisms and consultation procedures for coalition management which are in place and designed to ensure that important policy announcements are the subject of prior consultation would seem to suggest that the coalition partners must have been consulted on Mr. Birch's statements as well as those of Mr. Bradford.<sup>177</sup>

Under a new proportional representation system which was designed to introduce greater accountability into the parliamentary system, the current debate raises a number of ironies. Not the least of these is that the concept of a specialist court, which had survived attacks on its exclusive jurisdiction during a period when the National Government had an unassailable majority and when the force of neo-classical economic thinking was thought to be at its political zenith in New Zealand, is now apparently to be challenged by a Government with a much smaller majority. That Government, moreover, is composed of two parties, both of which had disclaimed any such intention prior to the election, and one of which had made a political virtue of its intention to make the ECA "fairer" and its institutions more accessible to employees.<sup>178</sup>

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176. While Minister with responsibility for New Zealand's "no fault" accident compensation scheme, Mr. Birch replaced appeals to a specialist Accident Compensation Appeal Authority with appeals to the District Court on the basis, among other things, that more "robust" and less activist decisions would be delivered in this area under the Accident Rehabilitation and Compensation Insurance Act 1992. The experiment is widely regarded as a failure and in some respects has led to lengthy delays. See *THE LAW OF TORTS IN NEW ZEALAND* ch. 1 (Stephen Todd ed., 2d ed. 1997).

177. The communications would have been through a Parliamentary Coalition Management Committee and Government Communications Committee. Iain Templeton, *Focus*, SUNDAY STAR TIMES, June 8, 1997, at C2.

178. POLICY STATEMENT, *supra* note 4.