

COMMENT

HAS EMPLOYMENT-AT-WILL OUTLIVED ITS USEFULNESS? A COMPARISON OF U.S. AND NEW ZEALAND EMPLOYMENT LAW

INTRODUCTION

Mary Smith is a 38-year-old single mother. Her daughter is too young to stay home alone, so Mary works evenings as a cocktail waitress while her roommate watches her child. This arrangement enables Mary to spend time with her daughter all day, and work while her daughter is asleep. Mary has worked at a popular, trendy bar for over three years. She has an excellent work record. Recently, her place of employment has experienced a significant decrease in business due to the opening of a new bar across the street. To remain competitive with the newer establishment, her employer decides that he needs some "new blood" in the place. Mary is suddenly terminated and replaced by an attractive 22-year-old college student. Since Mary is employed "at-will," she is now faced with the burden of searching for a new job and perhaps even waiting in unemployment lines, because her employer's actions are legal in most jurisdictions of the United States.

The common law employment-at-will rule, which is still found in most jurisdictions of the United States, contrasts starkly with the long-standing job security legislation of New Zealand. "At-will" employment permits an American employer to terminate the employment contract at any time, with or without cause.¹ Prior to 1991, the relative powers of employers vis-a-vis the rights of workers generally favored New Zealand workers compared to their American counterparts. This partiality was especially true in the New Zealand courts' treatment of employment security. However, the Employment Contracts Act of 1991 (hereinafter ECA)² has drastically changed the face of New Zealand labor law by effectively discouraging collective bargaining. Because of the widespread influence of the ECA on employment legislation throughout the world, its impact on the labor arena has become the focus of a number of commentators.³

1. See, e.g., CAL. LAB. CODE § 2922 (Deerings 1991), which contains in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

2. Employment Contracts Act, 1991 (N.Z.) [ECA].

3. See Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L. 455, 456, n. 4-7 (1996) (citing to several countries

This Comment compares New Zealand job preservation statutes with United States at-will employment and its limited exceptions in an attempt to determine whether or not at-will employment in the U.S. has in fact outlived its usefulness. Part One explains the origins of at-will employment in the U.S. in a chronology of events beginning with its inception and ending with current exceptions to the rule. Part Two examines the current judicial and doctrinal exceptions to at-will employment in an effort to demonstrate that employers who implement at-will employment policies are nevertheless subject to legal implications which limit their ability to terminate employees arbitrarily. Part Three explores New Zealand's employment legislation both before and after the enactment of the ECA in an attempt to show that its "just cause" requirement is a concept that U.S. employers should include in all employment contracts. Such a condition would reduce the imbalance of bargaining power between employers and employees as well as the excessive number of lawsuits resulting from alleged wrongful termination.

The basic premise underlying proposals to abolish the at-will rule within the United States is the relative inequity suffered by the employee due to unequal bargaining positions of the parties, as well as the harsh consequences which can result from discharge. Accordingly, U.S. courts have been increasingly willing to limit the rule and to find exceptions to its application.⁴ By contrast, New Zealand courts, which have historically placed emphasis on employee rights, require employers to have "just cause" to dismiss employees. Even though legislators may have swung toward favoring the employer with freedom of association and freedom of contract theories, which in turn led to the creation of the ECA, the New Zealand labor courts have made it apparent that they are not willing to overturn earlier decisions relating to requirements of "justifiable dismissal." Accordingly, job security for the New Zealand worker can surpass that of his/her American counterpart, who is subject to at-will employment, albeit with limited exceptions.

I. AT-WILL EMPLOYMENT IN THE U.S.: ITS ORIGINS AND EVOLUTION

At-will employment in the United States did not begin in a legislative forum or a courtroom. Rather, it is attributable to a New York attorney. Horace Gay Wood, in his 1877 treatise on master-servant relations, wrote:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at-will, and if the servant seeks to make it a yearly hiring,

which have expressed interest in adopting similar legislation, including Canada, Germany, Japan, Sweden, Australia, the Netherlands, England, and the United States).

4. *See, e.g.*, *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980) (finding employer cannot discharge an employee for refusing to participate in illegal activities); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988) (court upholding plaintiff's cause of action for breach of implied contract which stated that he would be discharged only for good cause).

the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.⁵

Wood's principle was not only a marked departure from the law of England,⁶ but it was also rarely found in the American cases he cited.⁷ Despite this lack of foundation, at-will employment was almost immediately accepted by the courts and became the "American" common law rule.⁸ Indeed, Wood's principle so suited the demands of the times that the courts soon went beyond his pronouncement. Wood's formulation did not purport to establish employment-at-will as a rule of substantive law. It did not affect an agreement for a definite time, and, even as to "a general or indefinite hiring," it was phrased merely as "an aid to construction."⁹ Nevertheless, the courts quickly came to apply the at-will employment doctrine as a rule of substantive law¹⁰—and as an inflexible rule that almost no evidence could overcome. Eventually, at-will employment became established law in virtually all U.S. jurisdictions.¹¹

However, during the last two decades the courts have come about-face and recognized that employment-at-will, as it has evolved in the United States, is less a manifestation of freedom of contract than a denial of it. The presumption of an at-will relationship frequently operates to defy the intent of the parties to the arrangement rather than to implement it.¹² Accordingly, courts increasingly have recognized that statements or assurances by employers about job security to those who are being hired may give rise to reasonable expectations that the employment is not purely at-will.¹³

5. Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEG. HIST. 118, 126 (1976) (citing HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, 272 (1877)).

6. Feinman, *The Development of the Employment at Will Rule*, *supra* note 5, at 120 (citing 1 William Blackstone, Commentaries 425). The English presumption had been that, absent proof to the contrary, the parties to an employment contract with no stated term intended to enter into a one-year agreement. Under this rule, if either party sought to terminate the relationship prior to the expiration of one year, he must either produce evidence that the parties intended an indefinite period or in the alternative show good cause to terminate prematurely.

7. LEX K. LARSON, UNJUST DISMISSAL, § 2.04, at 2-10 (citing 11 A.L.R. at 475-76 (1921)). The editor of that annotation indicated that "Mr. Wood cites six cases, four American and two Scotch, no one of which bears out his statement." *Id.*

8. LEX K. LARSON, UNJUST DISMISSAL, § 2.04, at 2-6 (1995).

9. See Feinman, *supra* note 5 (citing HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, 272 (1877)).

10. See LARSON, *supra* note 8, § 2.04, at 2-6 (1995).

11. *Id.* at 2-10 to 2-11.

12. See Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980); and Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-06 (1967).

13. MARK A. ROTHSTEIN, EMPLOYMENT LAW, 526 (1994).

The at-will rule of law, which operates in practice much more harshly upon the employee than upon the employer, is contrary to the law in most of the world's industrialized countries.¹⁴ Notable is the 119-7 vote at an International Labor Convention in the early 1980s in favor of a draft that would have required employers in ratifying countries to discharge workers only if there was good cause. The U.S. was one of only seven nations which voted against the convention.¹⁵ This decision not to adopt such legislation further illustrates the government's reluctance to place any burden on the employer. The result is that American non-union employees who feel that they have been unfairly or wrongfully terminated have had to rely mainly on judicially created exceptions to the at-will rule.¹⁶

More recent exceptions to at-will employment have been the product of the legislatures, as well as courts, and some unionized worker collective bargaining agreements that require "just cause" for termination, progressive disciplinary procedures, and grievance-arbitration procedures. Most of the statutory exceptions at the federal level have taken the form of anti-discrimination laws, such as the 1964 Title VII legislation,¹⁷ which prohibits any form of job discrimination based on the worker's race, color, sex, religion, or national origin; the 1967 Age Discrimination in Employment Act;¹⁸ and the 1990 Americans with Disabilities Act.¹⁹

II. CURRENT EXCEPTIONS TO THE U.S. EMPLOYMENT-AT-WILL RULE

The judicial exceptions have found bases in both contract and tort law, with the application of traditional contract approaches to the employment relationship proceeding along four main lines. The first is the recognition that oral employment contracts may provide some rights against unjust discharge.²⁰ The second is the increasing recognition that employer statements of policy, frequently found in employee handbooks or personnel manuals, may help to discern the intent of the parties and therefore have a binding effect.²¹ The third doctrinal development is the recognition of limitations on

14. See LARSON, *supra* note 8, § 2.02, at 2-1 (citing Janice R. Bellace, *A Right of Fair Dismissal: Enforcing Statutory Guarantee*, 16 U. MICH. J. L. REF. 207, 210-17 (1983)).

15. LARSON, *supra* note 8, at § 2.01, n. 3.

16. By contrast, most contracts between unions and employers contain a "just cause to terminate" requirement. Upon termination, the union employee may file a personal grievance with the union, and the grievance will usually be investigated.

17. 42 U.S.C. § 2000(e) (1991).

18. 29 U.S.C. § 621 (1967).

19. 42 U.S.C. § 12101 (1990).

20. Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, *supra* note 12 at 1819-20. See also *Blom v. N.G.K. Spark Plugs (U.S.A.) Inc.*, 3 Cal. App. 4th 382, 4 Cal. Rptr. 2d 139 (1992); *Labus v. Navistar Int'l Trans. Corp.*, 740 F. Supp. 1053 (D.N.J. 1990); *Weiner v. McGraw-Hill, Inc.*, 457 N.Y.S.2d 193, 443 N.E.2d 441 (1982).

21. *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 776 (9th Cir. 1990) (employer impliedly promising employee that she would not be laid off except in accordance with em-

employer discretion by use of the "good faith and fair dealing" covenant implicit in all contracts.²² The final development is the increasing role of public policy violations by employers, which may allow an employee to bring a cause of action in tort, rather than contract law.²³

A. Oral Contracts

Since the mid-1970s, courts in many states have been more prepared to give legal effect to oral assurances of job security²⁴ and have in fact enforced implied promises of job security resulting from little more than a longstanding employment relationship.²⁵ The simplest case arises when an employer, frequently to induce someone to accept a position, promises an applicant employment for as long as the employee's performance is satisfactory. Such oral promises raise a number of questions. Aside from questions of proof and the factual issue of what, if anything, was promised, legal questions as to the authority of the promisor, the application of the statute of frauds,²⁶ and the parties' interpretation of the promise arise.²⁷

B. Employer Promises Based Upon Personnel Policies

Another recent development has been the trend among courts to recognize that formal employer policies may be enforceable under traditional

ployment manuals); *Greene v. Howard Univ.*, 412 F.2d 1128, 1133 (D.C. Cir. 1969) (faculty handbook on which employee relied created contractual obligation); *Clement v. Woodstock Resort Corp.*, 687 A.2d 886 (Vt. 1996) (court upholding decision that plaintiff and defendant employer had an implied agreement pursuant to company handbook and policy manual that he would be discharged only for cause).

22. Note, *Protecting At-Will Employees From Wrongful Discharge: The Duty to Terminate Only in Good Faith*, *supra* note 12; see generally, Anthony W. Livoti, *Court of Appeals Recognizes Action for Breach of the Implied Covenant of Good Faith and Fair Dealing in Employment Contract*, 48 S.C.L. REV. 123 (1996); Fortune v. National Cash Register, 373 Mass. 96, 364 N.E.2d 1251 (1977), discussed *infra*; *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), discussed *infra*.

23. *Petermann v. Local 396, International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 188-89, 344 P.2d 25 (1959), discussed *infra*; *Greene v. Hawaiian Dredging Co.*, 26 Cal. 2d 245, 157 P.2d 367 (1945) (employee fired for protesting newly imposed working conditions had cause of action for wrongful termination); see also Cynthia L. Estland, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996).

24. See, e.g., *Esbensen v. Userware Int'l, Inc.*, 11 Cal. App. 4th 631, 639, 14 Cal. Rptr. 2d 93 (1992) (alleged oral promise to renew annual contract as long as employee performed competently); *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1980), *cert. denied*, 454 U.S. 835 (1981); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 408 Mich. 579, 292 N.W.2d 880 (1980) (employer's oral statements of job security may become part of the employment contract).

25. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (court finding in favor of plaintiff who was frequently told future with company was secure was suddenly terminated after 32 years of employment).

26. ARTHUR CORBIN, CONTRACTS, § 275 (1952).

27. *Id.* § 543 (1952).

contract analysis. A good example of this trend is the decision in *Woolley v. Hoffman-La Roche, Inc.*,²⁸ which treated a personnel policy manual as a general agreement covering all employees. In sharp contrast to earlier cases in New Jersey, the court stated, "There is no reason to treat such a document with hostility."²⁹ Further, the court concluded:

[W]hen an employer of a substantial number of employees circulates a manual that, when fairly read, provides that certain benefits are an incident of the employment (including, especially, job security provisions), the judiciary, instead of "grudgingly" conceding the enforceability of those provisions, should construe them in accordance with the reasonable expectations of the employees.³⁰

As the court concluded, "[w]hatever Hoffman-La Roche may have intended, that which was read by its employees was a promise not to fire them without cause."³¹ While several courts have rejected this analysis,³² some decisions in recent years have concluded that employer policies may constitute enforceable promises when they give rise to reasonable expectations by employees.³³

Employers have responded in various ways to the erosion of the at-will doctrine through developing contract law. One common employer reaction

28. 99 N.J. 284 (1985); *see also* *Scott v. Pacific Gas & Elec. Co.*, 11 Cal. 4th 454, Cal. Rptr. 2d 427 (1995) (implied contract not to demote except for good cause); *Preston v. Claridge Hotel and Casino, Ltd.*, 555 A.2d 12 (App. Div. 1989) (general promise of maximum job security, combined with specific reasons for termination, creating promise not to discharge without good cause); *see generally*, Roland T. Kelly, *An Employer's Course of Conduct and Representations May Create an Enforceable, Implied-In-Fact Contract Prohibiting the Employer from Demoting an Employee Without Cause: Scott v. Pacific Gas & Electric Co.*, 24 PEPP. L. REV. 766 (1997).

29. *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 296, 491 A.2d 1257 (1985).

30. *Id.* at 297-298.

31. *Id.* at 300.

32. *See, e.g.*, *Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 897 P.2d 1093 (Nev. 1995) (employee handbook not creating any contractual obligations); *Brown v. R.R. Donnelly & Sons Co.*, 650 N.E.2d 8 (Ill. App. 1995) (handbook language referring to a company policy of basing discharge decisions on verified facts did not indicate a promise to discharge for cause only); *Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095, 1096-97 (Del. 1982) (finding defendant's employee information booklet did not alter "at-will" status of employees); *Gates v. Life of Montana Ins. Co.*, 196 Mont. 178, 638 P.2d 1063 (1982) (holding that the handbook requirement of prior notice to terminate was not enforceable as a contract right).

33. *See, e.g.*, *Robinson v. Ada S. McKinley Community Servs.*, 19 F.3d 359 (7th Cir. 1994) (finding that mere implementation of a new policy manual with disclaimer did not modify terms of earlier manual which contained language that an employee could reasonably believe employment was not terminable at will); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984); *Southwest Gas Corp. v. Ahmad*, 99 Nev. 594, 668 P.2d 261 (1983) (employer bound by termination clause appearing in employee handbook); *Pine River State Bank v. Mettelle*, 333 N.W. 2d 622 (Minn. 1983) ("[P]rocedural restraints on termination of employees contained in employee handbook were contractually binding on former employer, and former employee was wrongfully terminated contrary to those provisions."); *see generally*, Richard Harrison Winters, *Employee Handbooks and Employment At-Will Contracts*, 1985 DUKE L.J. 196.

has been to add new provisions in manuals or even individually signed documents that state that employment is at-will.³⁴ A common formulation is, “[e]mployment is at the will of the employee and the employer. Either party may terminate the employment relationship with or without good cause.”³⁵ At least some cases suggest that such modifications may be effective to limit the rights of present employees. This limitation is especially likely when employers explicitly reserve the right to modify in their handbooks or manuals. At a minimum, however, it seems clear that policies will bind the employer unless and until modified.³⁶

C. Implied Covenant of Good Faith and Fair Dealing

A final contract theory for creating employee rights does not look to express promises for its basis but rather to an implied covenant of good faith and fair dealing that is read into all contracts by law.³⁷ As with all such principles, however, the duty of good faith is easier to approve than to define.

The classic invocation of the good faith principle occurs when one party to a contract performs an act that is not expressly barred by the contract in question but is contrary to the reasonable expectations of the other party. In the employment context, a seminal case is *Fortune v. National Cash Register*.³⁸ In *Fortune*, the plaintiff claimed that he was discharged the day after securing for his employer a five million dollar contract that would have yielded him substantial commissions under the company’s compensation system. The court found that the employment relationship, as with all contracts, contained an implied covenant of good faith and fair dealing that prevented the employer from firing an employee merely to deprive that employee of the fruits of his labors.³⁹

Although the principle that an employer cannot deprive an employee of an earned benefit—whether it be salary, commissions, or fringe benefits—is

34. Richard A. Epstein, *In Defense of the Contract At-Will*, 51 U. CHI. L. REV. 947 (1984); Hughes, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1935 (1983).

35. Epstein, *supra* note 34.

36. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 409 Mich. 579, 292 N.W.2d 880 (1980) (holding plaintiff had legitimate expectations based on employer’s written policy statements set forth in manual of personnel policies).

37. Note, *Protecting At-Will Employees From Wrongful Discharge: The Duty to Terminate Only in Good Faith*, *supra* note 12; and Livoti, *Court of Appeals Recognizes Action for Breach of Implied Covenant of Good Faith and Fair Dealing in Employment Contract*, *supra* note 22; *Kern v. Levolor Lorentzen*, 899 F.2d 772 (9th Cir. 1990); *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

38. *Fortune v. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977); see also *Tonry v. Security Experts, Inc.*, 20 F.3d 967, 971 (9th Cir. 1994) (“[T]he existence of an implied contract of employment turns on the intent of the parties.”).

39. See also *Hall v. Farmers Insurance Exchange*, 713 P.2d 1027, 1031 (Okla. 1985) (plaintiff terminated before he could collect earned commissions).

scarcely an innovative doctrine, it is not clear whether *Fortune* goes beyond that normal rule.⁴⁰ The essential question is whether or not the good faith basis for this rule can be extended to provide some form of job security. Assuming that an employer makes some promise of job security to an employee, the precise nature of that promise must be considered. The first question is whether the employer has made a substantive promise of job security or has merely promised procedural protections.

A substantive promise may take many forms. It could be a promise for lifetime employment, or merely a promise not to terminate without good cause.⁴¹ Other promises can be to employ for as long as certain objective conditions are met. For example, an employer can promise to employ so long as the employee sells at least a certain number of units per week. Alternatively, it could be a promise of continued employment as long as the employee's performance is satisfactory. At a minimum, this means that the employer must exercise good faith in determining satisfactory performance. But more likely, such a promise would suggest an objective standard—employment unless there is good cause to discharge.⁴²

In general, what constitutes good cause can turn on two considerations.⁴³ The first is cause related to the individual in question,⁴⁴ and the second is systemic causes related to the business.⁴⁵ The first would focus on such factors as inadequate job performance, disloyalty, misconduct, or violence.⁴⁶ The second consideration focuses on termination of employees in the context of reorganizations, including, at the extreme, shutting down entire departments or even plants.⁴⁷

40. Courts have recently retreated from *Fortune*, so any expansion in the near future is unlikely. *See, e.g.*, *Morriss v. Coleman Co., Inc.*, 241 Kan. 501, 738 P.2d 841 (1987); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380; *Melnick v. State Farm Mut. Auto Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988) (plaintiff not entitled to showing of good cause before being terminated).

41. For example, in *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 301 n.8, 491 A.2d 1257 (1985), the court was careful to distinguish a promise of lifetime employment from one promising employment unless there was good cause for discharge. In noting the opinion in *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 89 A.2d 237 (1952), the court explained: "The essential difference is that the 'lifetime' contract purports to protect the employment against any termination; the contract arising from the manual [in question] protects the employment only from arbitrary termination."

42. *Toussaint v. Blue Cross & Blue Shield of Mich.*, 409 Mich. 579, 584, 292 N.W.2d 880 (1980).

43. The Supreme Court is expected to rule in early 1998 on *Cotran v. Rollins Hudig Hall Int'l.*, 49 Cal. App. 4th 903. A central issue in the case is what determines "good cause" when an employee has established the existence of an implied contract to terminate only for good cause. *See WILLIAM QUAKENBUSH & CLIFF PALEFSKY, WRONGFUL EMPLOYMENT TERMINATION PRACTICE*, § 1.6, at 6 (1997).

44. Roger Abrams & Dennis Nolan, *Toward a Theory of "Just Cause" in Employee Discharge Cases*, 1985 DUKE L.J. 594, 597.

45. *Malmstrom v. Kaiser Aluminum & Chem. Corp.*, 187 Cal. App. 3d 299, 321, 231 Cal. Rptr. 820 (1986).

46. Abrams & Nolan, *supra* note 44, at 597, 611 (1985).

47. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 803 (9th Cir. 1987).

D. Tort Law: Public Policy Exception

As contract law in the United States has undergone a transformation in the employment area, so too has tort law.⁴⁸ Perhaps even more significant, tort law has generated a broader cause of action, most frequently called the “public policy exception” to the at-will rule but sometimes also referred to as the tort of wrongful discharge.⁴⁹ As traditionally formulated, the public policy exception to the at-will doctrine limits an employer’s power to discharge when the employer’s action violates a substantial public policy.⁵⁰ The public policy exception is frequently attributed to the 1974 decision of the New Hampshire Supreme Court in *Monge v. Beebe Rubber Co.*,⁵¹ which held that the discharge of an employee for her refusal to accede to a supervisor’s sexual advances was actionable as a breach of contract. Its origins, however, can be traced back to a 1959 California case, *Petermann v. Local 396, International Brotherhood of Teamsters*,⁵² which involved a union business agent who was fired after he refused to give false testimony at a legislative hearing. The court held that the public’s interest in preventing perjury was sufficiently great to warrant judicial intervention, and that it was impermissible to discharge an employee for refusing to commit perjury.⁵³

In approaching the public policy exception, the basic problem is defining what constitutes a public policy basis sufficient to predicate a right to be free from retaliatory discharge. To limit the application, some courts, including those of California, have required that the policy be traced to some specific statute or constitutional provision.⁵⁴ Others, while not limiting the source of the policy, insist that the employer’s actions violate a “clear mandate.”⁵⁵

Another issue arises when the statutory scheme that is the basis of the public policy provides for its own enforcement mechanism. For example, it is against public policy to fire a worker because she has become pregnant.

48. See generally, Hughes, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983).

49. Note, *Protecting At-Will Employees Against Wrongful Termination: The Duty to Terminate Only in Good Faith*, *supra* note 12.

50. Hughes, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, *supra* note 48.

51. *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

52. 174 Cal. App. 2d 184, 189, 344 P.2d 25, 27 (1959).

53. *Id.*

54. See, e.g., *Turner v. Anheuser-Busch Inc.*, 7 Cal. 4th 1238, 1256, 32 Cal. Rptr. 2d 223 (1994) (finding “wrongful discharge must violate a policy that is (1) fundamental, (2) beneficial for the public, and (3) embodied in a statute or constitutional provision”); *Brockmeyer v. Dunn & Bradstreet*, 113 Wis. 2d 553, 335 N.W.2d 834 (1983) (holding public policy must be evidenced by statute or Constitution).

55. *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (“[An] employee at-will has a cause of action for wrongful discharge when the discharge is contrary to a clear mandate of public policy.”).

But the statutes that establish that policy—Title VII and state analogs—frequently establish an enforcement scheme such as California’s Fair Employment and Housing Act (FEHA)⁵⁶ that has its own procedural and remedial provisions. It is unclear whether an employee can escape the limitations of those laws by simply bringing a public policy tort action.

Similarly, in the wake of the public policy cases, some jurisdictions have enacted “whistle blower” protection statutes.⁵⁷ While such laws are not necessarily coextensive with the public policy exception, are common law suits permitted where the public policy exception overlaps? In approaching the question of exclusivity, the few cases decided thus far are split, although the larger number refuse to allow a common law tort where the relevant statute also provides a civil remedy.⁵⁸ However, in many jurisdictions, including California, plaintiffs will not be barred from bringing suit in common law tort when plaintiffs have failed to meet the requirements of a specific statute which also governs their claims.⁵⁹

An American worker who feels that an unfair termination has occurred has little chance of either reinstatement or money damages unless the worker can prove that he/she fits into one of the established exceptions to at-will employment. A New Zealand employee, however, does not have this difficult burden, since employers are required to show that the dismissal was justified. Part Three examines both traditional and current employment legislation in New Zealand in an effort to illustrate the benefits of a “just cause” requirement.

III. NEW ZEALAND’S DISMISSAL PROTECTION LAWS

In 1894, the New Zealand legislature enacted the Industrial Conciliation and Arbitration Act (IC&A Act), which protected the worker by legalizing and encouraging collective bargaining.⁶⁰ The IC&A Act began what

56. CAL. GOV. CODE § 12900.

57. See, e.g., MICH. COMP. LAWS ANN. § 15.361- 15.364 (West 1997); CAL. LAB. CODE § 1102.5; N.J. STATS. ANN., tit. 34, § 19-1 (West 1987); TENN. CODE ANN. § 50-1-304 (1991).

58. See, e.g., *Teale v. Sears, Roebuck & Co.*, 66 Ill. 2d 1, 359 N.E.2d 473 (1976); *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982); *Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir. 1982). See generally, Marc C. Greenebaum, *Toward a Common Law of Employment Discrimination*, 58 TEMPLE L.Q. 65 (1985).

59. See *Rojo v. Kliger* 52 Cal. 3d 65, 82 (1990), which held that FEPA neither expressly nor impliedly preempted other rights of action on account of employment discrimination arising under state law, including common law. In *Carmichael v. Alfano Temporary Personnel*, 233 Cal. App. 3d 1126, 1130-32 (1991), the court specifically recognized that a common law claim for retaliatory discharge in contravention of public policy exists independent of FEHA. This holding was later confirmed by *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.*, 3 Cal. App. 4th 382, 387-389 (1992).

60. RAYMOND HARBRIDGE & KEVIN HINCE, A SOURCEBOOK OF NEW ZEALAND TRADE UNIONS AND EMPLOYEE ORGANISATIONS, 2 (1994) (citing Industrial Conciliation and Arbitration Act, 1894 (N.Z.) [IC&A Act]).

was to be known as a pro-worker regime in New Zealand, protecting the employee and attempting to moderate industrial conflict.⁶¹ Although the IC&A Act was revised with several other acts of legislation, its basic framework remained the same.⁶² In fact, from 1894 to 1991, New Zealand labor law under the IC&A Act was one of the most protective of unions and unionization in the world.⁶³

In 1991, however, after many years of lobbying by the New Zealand Business Roundtable and New Zealand Employers' Federation, the Employment Contracts Act (ECA)⁶⁴ was enacted as the fundamental labor legislation of New Zealand,⁶⁵ and, according to one commentator, this "protectionist" course was abruptly changed.⁶⁶ The ECA was designed to eliminate much of the protection and regulation of labor unions in favor of emphasizing freedom of association and contract. Employers argued that this "freedom of contract" would increase employee bargaining power, and that the free market system in the ECA would have a beneficial impact on unions by increasing competition for members, which in turn would lead to improved member services.⁶⁷ Instead, the ECA dramatically slashed union membership from 63 percent in 1989 to 43 percent after its first year.⁶⁸ Union membership is now below 20 percent.

This Part will explore the history of legislative protections for the New Zealand worker, and the ways in which the enactment of the ECA has changed these protections to more closely resemble traditional at-will employment. This Part will also attempt to prove that, although recent employment legislation in New Zealand is more favorable to employers than it was prior to the ECA, its "justifiable dismissal" requirement still offers the New Zealand worker greater protection than is afforded to the typical American employee.⁶⁹

61. Penelope Brook Cowen, *Labour Relations Reform in New Zealand: The Employment Contracts Act and Contractual Freedom*, 14.1 J. LAB. RESEARCH 69 (1993).

62. *Id.*

63. Ellen Dannin, *We Can't Overcome? A Case Study of Freedom of Contract and Labor Reform*, 16 BERKELEY EMPL. & LAB. L., 1, 6 (1995).

64. Employment Contracts Act, 1991 (N.Z.).

65. Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L. 455, 459-60 (1996).

66. Dannin, *supra* note 63, at 7.

67. *Id.* at 87.

68. *Id.*

69. Although the ECA replaced the Labour Relations Act of 1987, it retained a section relating to a procedure for resolving employee grievances. Section 27 of the ECA states in pertinent part:

For the purposes of this Act, "personal grievance" means any grievance that an employee may have against the employee's employer or former employer because of a claim—

(a) That the employee has been unjustifiably dismissed; or

(b) That the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by

A. Common Law

Prior to industrial legislation in 1894, employment disputes were decided on the basis of common law principles which were grounded in general contract law.⁷⁰ For example, the concept of wrongful discharge involved merely a consideration of whether reasonable notice of termination was given to the employee in any particular case.⁷¹ Considerations such as whether or not the employer was "fair and reasonable" in its decision to discharge were not considered until the mid-1980s.⁷²

It was evident that statutory provisions were needed to protect workers because a New Zealand employee with a personal grievance had, for the most part, no remedy under the common law. For example, a worker who was being sexually harassed could turn to the courts for relief only through the torts of nuisance or assault and battery.⁷³ However, these torts did not provide a broad enough definition to encompass the majority of harassment cases, and many workers were faced with the difficult decision of either putting up with the behavior or resigning their positions. Moreover, reinstatement of employment was not available as a remedy at common law, and damages were severely limited.⁷⁴

Activism by the New Zealand judiciary, however, clearly established under the Industrial Relations Act of 1973,⁷⁵ and later confirmed under the Labour Relations Act of 1987,⁷⁶ that an employee may not be "unjustifiably dismissed."⁷⁷ This concept, which involves both actual and constructive dismissal, was developed as a response to the needs of employees and was seen by many employers as "protectionist."⁷⁸

the employer (not being an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application or operation, of any provision of any employment contract); or

- (c) That the employee has been discriminated against in the employee's employment; or
- (d) That the employee has been sexually harassed in the employee's employment; or
- (e) That the employee has been subject to duress in the employee's employment in relation to membership or non-membership of an employee's organisation.

70. JOHN DEEKS, *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND*, 102 (1996).

71. NEW ZEALAND BUSINESS ROUNDTABLE (NZBR) & NEW ZEALAND EMPLOYERS' FEDERATION (NZEAF), *THE LABOUR/EMPLOYMENT COURT: AN ANALYSIS OF THE LABOUR/EMPLOYMENT COURT'S APPROACH TO THE INTERPRETATION AND APPLICATION OF EMPLOYMENT LEGISLATION 4* (Dec. 1992).

72. *Id.*

73. John Hughes, *The Critical Weakness in Kerr's Case Against High Court Judges*, *OPINION*, Aug. 2, 1995.

74. NZBR, *supra* note 71, at 4.

75. Industrial Relations Act, 1973 (N.Z.) [IRA].

76. Labour Relations Act, 1987 (N.Z.) [LRA].

77. DEEKS, *supra* note 70, at 116.

78. Hughes, *supra* note 73.

B. Implied Contractual Terms

In New Zealand, the courts may imply certain terms in an employment contract with the rationalization that some terms "are so fundamental that the parties have in some way tacitly agreed to them."⁷⁹ The concept of implying terms into employment contracts is the result of judicial development which can be traced to the 1985 judgments of the New Zealand Court of Appeal in the cases of *Woolworths*⁸⁰ and *Goulden*.⁸¹ In *Woolworths*, the Court stated that "fair and reasonable treatment is so generally expected today of any employer that the law may come to recognize it as an obligation in a contract of service."⁸² Following the decisions in *Woolworths* and *Goulden*, the courts firmly established that an employer owes its employees a duty of fair and reasonable treatment and that this obligation impliedly exists in all employment contracts.⁸³

Over the next few years, the courts extended this principle to find the existence of other, more precise duties owed by employers. These duties were said to arise out of the implied duty of fair and reasonable treatment.⁸⁴ For example, in *United Food etc. Union v. Talley's Fisheries Ltd.*,⁸⁵ the court held that it was an implied term that neither party to an employment contract would act to defeat the right of the other party to have grievances settled in accordance with statutory procedures provided by the ECA. The court effectively applied a duty of good faith and fair dealing, similar to U.S. contract law.

Under the judicial development of New Zealand labor law, these explicit duties (such as the duty of fair and reasonable treatment) cannot be waived by the creation of a written employment agreement.⁸⁶ For example, in *Moffat Appliances Ltd. v. N.Z. Clerical Workers Union*, an employee was dismissed without cause only three weeks after signing an employment contract.⁸⁷ The contract specifically stated that, during the first month of employment, either the employee or the employer could give one hour's notice of termination and that neither the company nor the employee was required to give reasons for the termination. The New Zealand Employment Court, however, held that, notwithstanding the written contractual provision, the company's failure to give any warning or reason for the termination was

79. DEEKS, *supra* note 70, at 109.

80. EMPLOYMENT REPORTS OF NEW ZEALAND, pre-1991 (Peggy Christianson ed., 1995) (citing *Auckland Shop Employees Union v. Woolworths Ltd.*, [1985] 2 N.Z.L.R. 372).

81. EMPLOYMENT REPORTS OF NEW ZEALAND, pre-1991 (Peggy Christianson ed., 1995) (citing *Marlborough Harbour Bd. v. Goulden*, [1985] 2 N.Z.L.R. 378) (court finding dismissal of a public officer unjustified due to procedural unfairness).

82. [1985] 2 N.Z.L.R. 372.

83. NZBR, NZEF, *supra* note 71, at 31.

84. *Id.*

85. [1992] 1 E.R.N.Z. 756, 757.

86. *Id.*

87. [1991] 2 E.R.N.Z. 437.

an unfair labor practice under the ECA.⁸⁸ A U.S. court almost certainly would have held differently, and found the employment to be purely at-will.

Unlike U.S. courts, where the burden of proving wrongful termination generally lies with the plaintiff,⁸⁹ the New Zealand courts have also found that, in a personal grievance claim, the burden is on the employer to prove that a dismissal was justified.⁹⁰ Moreover, the courts have found that an allegation of unjustifiable dismissal could be upheld due to lack of procedural fairness even in the instance where the termination itself was justified.⁹¹

Some commentators have attacked the New Zealand Employment Court due to what was seen as its pro-employee reasoning.⁹² Not surprisingly, these commentators were comprised mostly of employers or tended to speak from an employer's perspective. When the Employment Contracts Bill was first introduced, employer organizations supported the removal of any requirement for procedural fairness in dismissals.⁹³ Organizations such as the New Zealand Employers' Federation argued that procedural fairness should have less importance as a consideration where substantive justification for dismissal could be established.⁹⁴

Such arguments persuaded the New Zealand Parliament to add a section, now known as Clause 17 (3), to the Employment Contracts Bill. This clause in essence stated that "[t]he failure by an employer to observe, follow or adhere to any procedural requirements in making a decision to dismiss an employee would not of itself render the dismissal unjustifiable if, but for that failure, the dismissal would otherwise have been substantially justifiable."⁹⁵ In other words, procedural requirements would be given little, if any, enforcement. Opponents were able to defeat these arguments, however, resulting in the eventual omission of the Clause from the final Bill.⁹⁶ Nevertheless, the fact that the Parliament even considered including the clause demonstrates the drastic change in employee rights in all facets of the employment context.⁹⁷

88. *Id.*

89. *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 456 (1980).

90. EMPLOYMENT REPORTS OF NEW ZEALAND, pre-1991 (Peggy Christianson ed., 1995) (citing Wellington Road Transport etc. IUW v. Fletcher Construction Co. Ltd., A.C.J. 663 (1982)) (burden on employer to prove dismissal of plaintiff was justified).

91. EMPLOYMENT REPORTS OF NEW ZEALAND, pre-1991 (Peggy Christianson ed., 1995) (citing Auckland City Council v. Hennesey, A.C.J. 699 (1982)) (court finding an unjustified dismissal where employee not given an opportunity to be heard prior to termination).

92. NZBR, *supra* note 71, at 4.

93. *Id.* at 7-8.

94. *Id.* at 8.

95. *Id.* at 14.

96. *Id.*

97. *See, e.g., Rusk & Finch Ltd. v. Vanderwall*, WEC 48/96 (court applying a much stricter approach than before the enactment of the ECA when it found that "exceptional circumstances" did not exist when an employee submitted a personal grievance too late because he was not advised of all the facts by a solicitor and was unable to pay an advocate to submit a personal grievance on his behalf).

C. *The Effects of the ECA*

The ECA was not enacted to provide greater protections to workers, although its proponents, consisting primarily of employers and employer organizations, argue that the ECA allows greater freedom of the individual.⁹⁸ Unlike the previous statute, the ECA confers no legal advantages upon union members, thereby discouraging collective bargaining and successfully removing one of the strongest incentives for an employee to join.⁹⁹ In addition, under the ECA, reinstatement is no longer the preferred remedy, and therefore is not used as frequently by the Court as a remedy to claims of personal grievances as it had been in the past.¹⁰⁰

Although substantive rights of employees remain largely the same as they were prior to the Act, under the ECA it is likely that the expense and difficulty involved in tribunal and attorneys' costs will lead to many employees failing to pursue their claims. Previously, if an employee's dispute was unresolved, the union would bear the cost on behalf of its members. However, in light of the drastic decline in union membership since the enactment of the ECA, more than 80 percent of New Zealand workers are not members of unions. For the common worker, this legal expense is too great, especially in light of the possibility that the matter will be appealed to the Employment Court and/or the Court of Appeal.

D. *Fixed-Term Contracts*

Unlike U.S. employers who engage in at-will employment, New Zealand employers are required to show good cause when terminating an employee. However, if a position is temporary, an employer may create a fixed-term contract which automatically expires on a specified date. The employer is therefore relieved from supplying justification for the termination of the employee. The law relating to fixed-term contracts prior to the passing of the ECA was as stated in *Actors Variety v. Auckland Theatre Trust*,¹⁰¹ where the contract of a stage manager was set to terminate on a certain date. Most other workers had their contracts renewed, but the stage manager's was not. The Arbitration Court held that the failure to renew a fixed-term contract did not give rise to a personal grievance, and that the employment was terminated in accordance with her contract.¹⁰² On appeal, the decision was affirmed, but the holding left room to argue that in certain cases, the failure to renew a fixed-term contract might form the basis of a

98. Dannin, *supra* note 65, at 455.

99. *Id.*

100. DEEKS, *supra* note 70, at 96.

101. 1 N.Z.I.L.R. 463; EMPLOYMENT REPORTS OF NEW ZEALAND, pre-1991 (Peggy Christianson ed., 1995) (citing [1989] 2 N.Z.L.R. 154 (C.A.)).

102. [1986] A.C.J. 562.

personal grievance.¹⁰³ No substantive changes have occurred in the established law of fixed-term contracts as a result of the passing of the ECA.¹⁰⁴

In *Principal of Auckland College of Education v. Hagg*, the court addressed the issue of whether a fixed-term contract can be used by the employer to avoid permanent employment.¹⁰⁵ The Court of Appeal first heard the case in 1996, where it held that no unjustified disadvantage grievance arose on the facts.¹⁰⁶ The Court further referred back to the Employment Court the issue of whether there had been an unjustifiable dismissal. In making its determination, the Employment Court analyzed the underlying reasons that encouraged the employer's decision and found that the College was using fixed-term contracts not because the position was for a fixed term but instead because it allowed the employer the power to terminate the employment of some staff (without justification) if the need arose sometime in the future.¹⁰⁷ The Court held that the fact that an employer may need, at some point in the future, to reduce the number of employees due to unforeseen events, was not a sufficient justification to override the unfairness of terminating a contract after four years when the position still in fact existed.¹⁰⁸ It also held that the plaintiff in *Hagg* did have a valid claim of unjustified dismissal, and that (even under the ECA) it was unfair of the defendant employer to terminate his employment on the basis that the short-term need for his services no longer existed.¹⁰⁹

However, the Court of Appeal recently ruled on the same "unjustified

103. 2 N.Z.L.R. 154, 158. Although the law as contained in *Actors Variety* held that fixed-term contracts are valid unless expressly or impliedly prohibited by an applicable collective employment agreement, a fixed-term contract will not automatically expire on the date specified against the will of the employee if:

- (1) It does not genuinely relate to the operational requirements of the undertaking or establishment of the employer; or
- (2) The employer fails to discharge the burden of proving that there was a genuine reason for the fixed term contract and that the purpose of the contract was not to deprive the employee of the protection of an applicable collective employment contract or of the benefit of the personal grievance procedure; or
- (3) The employer failed to consider whether the genuine need at the time of creation of the fixed term contract still existed at the time of its expiry; or
- (4) An express or implied promise of renewal had not been kept; or
- (5) The termination of the contract was brought about by any wrong motive on the part of the employer (at 309).

Id.

104. *Id.*

105. [1996] 1 E.R.N.Z. 150. In this case, the plaintiff, an instructor at the Auckland College of Education, was terminated at the expiration of his second two-year fixed-term contract. He brought a personal grievance on the basis that the termination amounted to an unjustifiable dismissal, since the position still in fact existed; the employer argued that an educational setting required the flexibility to hire staff from year to year.

106. *Id.*

107. 2 E.R.N.Z. 486 at 511 [1996].

108. *Id.* at 511.

109. *Id.*

dismissal" issue. It held that the judge in the Employment Court misinterpreted the concept of "unjustified dismissal" and incorrectly applied a test of "fairness," rather than one consistent with the ECA. It further held, "[m]erely to allow a contract to expire is not a dismissal."¹¹⁰ Clearly, the issue of whether an employer may use fixed-term contracts to avoid the consequences of permanent employment is an unsettled point of law. Despite the pro-employer sentiments of the ECA, the courts have continued to abide by the "justifiable dismissal" requirement. Had a U.S. court ruled on *Hagg*, it would likely have found the contract to be a valid fixed-term contract, regardless of the employer's alleged motive.

IV. CONCLUSION

To attempt to discern the reasons underlying the diverse legislative patterns among different countries, one must first recognize that one stands on uncertain ground. As one commentator has concluded, any attempt to compare labor laws confronts the student or scholar with "nearly insurmountable problems because it ultimately reaches into a comparison of social structures and attitudes."¹¹¹ Despite these problems, the obvious differences in the overall legislative schemes can nonetheless be addressed.

Laws in the U.S. generally restrict the means an employer may use through negative measures; i.e., the laws state what cannot be done by the employer rather than endowing workers with positive rights.¹¹² In contrast, New Zealand labor laws grant affirmative rights to the employees. The New Zealand affirmative rights approach is achieved by imposing upon the employer the burden of proving that it had good cause to dismiss. In other words, the dismissal is assumed unlawful unless the employer justifies it. The negative rights approach of the U.S., however, places the burden upon the employee plaintiff to prove he or she comes within an established exception to employment-at-will. To draw a parallel to the situation for a discharged New Zealand employee, dismissal in the U.S. is effectively assumed lawful unless the worker proves otherwise. This evidentiary distinction is a critical one and grants the initial advantage to the U.S. employer.

Yet, in some respects, the employee in the U.S. who has been successful in a wrongful termination action against his former employer benefits more than his New Zealand counterpart. The American employee who convinces a court that his or her situation is an exception to employment-at-will generally can obtain an order of reinstatement. The New Zealand worker has never been entitled to this remedy in common law and has been finding

110. [1997] 1 E.R.N.Z. 116 at 117.

111. Clyde Summers, *Comparison in Labor Law*, 7 INDUS. REL. L. J. 2 (1985).

112. An example of an exception to this broad generalization is § 7 of the National Labor Relations Act (29 U.S.C. § 157), which grants to workers the right to organize, choose a bargaining representative, and bargain collectively with their employers.

it more and more difficult to obtain reinstatement since the enactment of the ECA. Notable is Chief Judge Goddard's¹¹³ opinion in *Ashton v. The Shoreline Hotel*,¹¹⁴ where he stated that the incidence of reinstatement appeared to be diminishing to the extent of "becoming an endangered species."¹¹⁵ In his well-reasoned opinion, he further concluded:

That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.¹¹⁶

Moreover, the successful American employee plaintiff who was able to sue on tort, rather than contract, grounds is entitled to receive a much larger amount of compensation than a wrongfully discharged New Zealand employee, whose damages are statutorily greatly limited. In addition to the actual compensatory amount, the American employee may be awarded punitive damages as well as damages for injuries such as emotional distress.

This benefit aside, proponents of abolishing the U.S. employment-at-will rule denounce the employer's right to discharge without cause and without notice as creating an unfair and inequitable imbalance of power between the parties to an employment contract. Decision-makers in the U.S. should compare the efficiency and effectiveness of the overall workforce in the U.S. with that of New Zealand in considering whether or not employment-at-will has outlived its usefulness. Special deliberation should be given to adopting legislation similar to that of New Zealand which requires employers to have "just cause" to terminate employees, and shifting the burden of proof to the employer, the party who is more likely to have access to the reasons for any given dismissal. A "just cause" requirement would prevent employers from terminating employees arbitrarily, like Mary, the cocktail waitress, and thus reduce the number of lawsuits resulting from arduous attempts at fitting into an exception to employment at-will.

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113. Judge Goddard is currently Chief Judge of the Employment Court.

114. [1994] 1 E.R.N.Z. 421.

115. *Id.* at 436.

116. *Id.*

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