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LEGAL FORUM

Avoiding the Rigour of the Personal Grievance Provisions of the Employment Contracts Act

Peter Churchman*

Introduction

The Wine Box Inquiry has shown that lawyers can be imaginative and ingenious in furtherance of their client's interests. The same willingness to test the boundaries of legislation has also been apparent in relation to the Employment Contracts Act (ECA).

Once legislation has been passed it presents a challenge to the legal mind and one of the first things that lawyers do is to see how legislation can be circumvented. Although the legal profession has not been as industrious in attempting to circumvent the provisions of the ECA as one might have anticipated, nonetheless there are a number of areas where the boundaries of the Act have been explored.

The part of the Act which most significantly operates against the interests of employers is Part III which relates to personal grievances. Effectively, an employer's right to terminate employment at will is heavily circumscribed by the statutory concept of "unjustified dismissal" and, in particular, by the case law development of the concept of procedural fairness.

This paper will therefore look at four areas where parties have entered into contractual relationships which have as their object or effect the avoidance of the personal grievance procedure set out in the Act.

There are two different possibilities for those who wish to avoid the Act. Either the parties to an employment relationship can seek to contract out of the ECA's provisions yet still remain within that employment relationship (as with fixed term contracts or alternative dispute resolution techniques) or they may opt to replace the employment relationship with another type of relationship altogether (as with independent contractors or the contracting out of part of an employer's business operation). The paper will look at developments in both of these areas.

* Peter Churchman is a Partner in the Dunedin law firm, Caudwells.

Fixed term contracts

The leading fixed term contract case is the 1989 Court of Appeal decision in the *Actors Variety Etc IUW v Auckland Theatre Trust* [1989] 1 NZILR 463 case. The Court of Appeal was split in this case with the majority holding that:

> The expiry of a fixed term was not, of itself, a dismissal giving rise to a personal grievance; and legitimate expectation of ongoing tenure, or reappointment by the employee, or any "wrong motive or unfairness" on the part of the employer, may give rise to a personal grievance claim. In dissent, Cooke P would have allowed an employee, dismissed at the end of a fixed term contract, access to the personal grievance procedures;

The majority judgments (particularly that of McMullin J) are ambiguous in scope. This ambiguity was seized upon by the Labour Court in the *NZ Food Processing IUOW v ICI (NZ) Limited* [1989] 3 NZILR 24. The Labour Court would clearly have preferred to adopt the dissenting view of Cooke P in the *Actors Equity* case. While the Labour Court nominally adopted the view of the majority in *Actors Equity* and held that unless there were wrong motives present there could be no personal grievance, the Court then went on to consider a number of issues that would seem to be wider than merely "wrong motives". The Court held that it was entitled to consider whether fixed term contracts genuinely related to the operational requirements of an employer. It stated that an employer had a burden to prove that there was a genuine reason for the fixed term contract and that its purpose was not to deprive the employee of the protection of the (collective employment contract); and further, that an employer had to satisfy the Court that, on the expiry of the contract, it had turned its attention to whether the genuine need which existed at the time of its creation still existed.

Both the *Actors Equity* and *ICI* cases pre-dated the ECA. While lawyers tended to accept that the law was as set out in the *Actors Equity* and *ICI* cases, there was considerable uncertainty as to how the passage of the ECA might have affected this area of the law.

A full bench of the Employment Court considered this issue in *Smith v Radio i Limited* [1995] 1 ERNZ 281. This case (which provides nearly as much interest for the insight it offers into the working conditions of Auckland radio announcers as it does for its commentary on the law of fixed term contracts) turns on a set of facts that are unlikely to be repeated. The industry was one in which fixed term contracts were common, the employer had initially offered a two year contract, however the employee had insisted on a one year term (no doubt anticipating that she would be in an even stronger position to renegotiate terms at the end of a year). When agreement on new terms couldn't be reached at the end of a year the employer allowed the contract to expire. The employee claimed she had been unjustifiably dismissed because she had an "expectation that her existing contract would be rolled over on request" at its expiry. The Employment Court reviewed the *Actors Equity* and *ICI* cases and concluded that there had not been any substantive change to the law of fixed term employment contracts as a result of the passing of the 1991 Act. The Court in the *ICI* case had been very conscious of the fact that deeming fixed term contracts legally permissible in all circumstances would provide a significant opportunity to subvert the personal grievance provisions of the Act. Notwithstanding the underlying ECA emphasis on contractual freedom, the Court in *Smith v*

Radio i was unwilling to adopt a position which, in the name of contractual freedom, might allow the personal grievance procedure to be circumvented.

On the facts in *Radio i* the Court found that there was no expectation that the contract would be renewed and no "wrong motives" on the part of the employer insisting on the contract's termination on its expiry date.

While, at first glance, the result in the *Radio i* case might look like a victory for employers, the reality is that the Court has restated the old propositions that there must be a justification for fixed term contracts and that the Courts will carefully scrutinise the circumstances surrounding the termination of such contracts. Few employers who have terminated such a contract against the wishes of their employees will be in a position to show that it was the employee who had insisted on the term of the contract. While fixed term contracts are clearly lawful, on this judgment they will only be effective where they represent the joint wishes of both the employee and the employer who have been fully informed of their rights and options when entering into the contract and the termination of the contract is not done for any improper motive.

The Employment Court has been roundly criticised (Howard, 1995) for failing in this case to appreciate the significance of the ECA and apply its philosophies to fixed term contracts. This view begs the question: Is there anything in the ECA which compels the Courts to take a different view of fixed term contracts?

The Court in the *Radio i* case had adopted the view that unless there was something in the Employment Contracts Act which required it to depart from the law as it had previously been stated in the *Actors Equity* and *ICI* cases it would continue that approach. This approach has been criticised as a tendency to treat the changes in the Employment Contracts Act as if they were minimal. While a valid point is made in suggesting that many of the Courts have failed to appreciate the full significance of the changes made by the ECA that does not necessarily mean that such criticism is applicable in relation to the law on fixed term contracts.

Howard (1995) criticises the Employment Court's approach in Smith v *Radio i* by saying:

> The Court nevertheless went out of its way to apply to the case before it not only the majority judgments in the earlier decision (the Actors Equity case) but also, necessarily, the underlying doctrines upon which the earlier case proceeded. One would have expected such doctrines to be reconsidered in the light of the new regime rather than routinely applied merely because the ECA makes no express reference to them.

The error in approach in this criticism is its assumption that the ECA is a seamless web, the provisions of which are all consistently based on the libertarian economic views which underlie so much of the Act. The reality is that the ECA is a "cut and paste" mishmash of the old and new and certain parts of the Act are philosophically incompatible with others. The personal grievance section (Part III) of the ECA sits uneasily with the philosophy behind the Act itself. While the balance of the Act is largely permissive, this part is prescriptive. Despite the formal rhetoric of s.18 which gives a wide freedom to negotiate, the reality is that the Act circumscribes that freedom in relation to personal grievance provisions.

The law relating to personal grievances is not based on any libertarian or new right economic philosophy. It is drawn essentially from the pre-existing law developed under the Labour Relations Act and its predecessors.[1] Likewise the tort jurisdiction conferred on the Employment Court by s.73 of the ECA is uplifted from s.242 of the 1987 Act and is at odds with the philosophy underlying the rest of the Act. At a more basic level, the fact that there is a specialist Employment Court at all, separate from the civil Courts, is a legacy from the structure that pre-dated the ECA. The ECA is therefore a compromise. Although the main thrust of the Act is certainly very different from the Labour Relations Act, aspects of the old Act have been grafted onto the new legislation. At least to that extent, it is therefore valid to refer to pre-existing principles of law.

If the Employment Court is not entitled to consider matters such as the motive of an employer in stipulating for a fixed term employment contract and the circumstances surrounding its termination, then employers will have a mechanism whereby they can effectively escape the operation of the personal grievance procedure (including its application in redundancy situations). The question must be asked whether this is what Parliament intended in passing the ECA.

One argument in favour of the Actors Equity/ICI approach (and one referred to expressly in the *ICI* case) is that such an interpretation would be in conflict with ILO convention No.158, in particular article 3, which safeguards against fixed term contracts undermining the general protection against unfair dismissal. In order to interpret New Zealand's industrial legislation the Courts have increasingly turned toward what have been described as New Zealand's "international obligations" even though these "obligations" are found in treaties that New Zealand may often not have ratified.[2]

Given that s.26 of the ECA records that the object of Part III of the legislation is that all employment contracts contain an effective procedure for the settlement of personal grievances it seems unlikely that Parliament would have intended there to be a class of contracts (fixed term contracts) that effectively deprived employees of the protection of the personal grievance provisions.

The Court of Appeal's views

The Court of Appeal has had two recent opportunities to consider the issue of fixed term contracts: *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 1390 and *Auckland College of Education v Hagg* [1996] 1 ERNZ 150.

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1 The basic framework of the personal grievance provisions in the ECA dates from the Industrial Relations Act 1973. See further Anderson (1990).

2 See *Eketone v Alliance Textiles* [1993] 2 ERNZ 783 CCA per Gault J at 794, *NZ Medical Laboratory Workers Union Inc v Capital Coast Health Ltd* [1994] 2 ERNZ 43 per Goddard CJ at 118, and the approach of the Employment Court referred to in *Cashman v Central Regional Health Authority* (unreported) CA 34/96 26.8.96 per Blanchard J at p.4 and Employment Court in *Cammish v Parliamentary Service* 4 June 1996 WEC 29/96 Goddard CJ

In *Victoria University of Wellington v Haddon* the Court was faced with a claim under s.27(1)(b) (unjustifiable disadvantage) from a lecturer who had been employed on a fixed term contract to fill a vacancy due to the temporary absence of the permanent incumbent. At the end of the fixed term the University created a new position which the lecturer applied for but was unsuccessful in obtaining. The lecturer brought a personal grievance which (in the form in which it reached the Court of Appeal) was based on a claim of unjustifiable disadvantage.

Lord Cooke of Thorndon was inclined to accept the view that it had attracted itself to the Employment Court and to hold that the employee had a right of personal grievance. He stated:

> . . . it is obvious that, as a matter of fact and everyday commonsense, employment without the prospects of promotion or re-employment is less advantageous than employment with such prospects. The value of the job is less if the existing employment ceases to carry with it those prospects. I should have thought it very arguable that the existing employment has been effected to the employee's disadvantage . . . (p.143)

The majority judgment delivered by Gault J took a very narrow view of the concept of employment as that term is used in s.27(1)(b). It relied on an earlier Court of Appeal decision in *Wellington AHB v Wellington Hotel etc IUOW* [1992] 3 NZLR 658which held that the concept of "employment" related only to the "on the job situation".

The Court essentially held that denial of procedural fairness in relation to the application for the new position could not amount to unjustifiable disadvantage. Gault J said:

> It is the prospect of securing new employment that is affected and that is not within the wording of s.27(1)(b). (p.148)

Accordingly, the Court dismissed the personal grievance without considering in any detail the law relating to fixed term contracts.

The second opportunity to consider this issue was presented to the Court in *Principal of Auckland College of Education v Hagg*. This case related to a College of Education lecturer who had been appointed to a series of fixed term contracts. The unusual aspect of this case was that some 40 percent of similar teaching staff were also on fixed term contracts. The Employment Court seemed to accept that it was college policy to be able to shed staff without the further expense of service-related lump sum payments. In considering a claim of unjustifiable disadvantage the Employment Court had upheld the personal grievance, found that there was an expectation of ongoing employment and ordered the respondent be made a permanent member of staff.

Without addressing the wider issue of the justification for a fixed term contract the Court of Appeal simply applied *Haddon* and held that any claim the employee may have had to appointment to a permanent position was not a personal grievance arising out of the respondent's employment. Accordingly, there could be no personal grievance under s.27(1)(b). The Court referred the issue of whether or not the non-renewal of the fixed term contract could amount to a dismissal back to the Employment Court for consideration. The

Employment Court considered this issue and concluded that the concept of unjustified dismissal should be interpreted in the context of the equity and good conscience jurisdiction granted the Court under s.104(3) of the Act. On this basis the central issue became whether the dismissal was, when taken as a whole, unfair to the employee. Using this test the Employment Court ruled that Mr Hagg had been unjustifiably dismissed.

The Auckland College of Education appealed the decision. This gave the Court of Appeal the opportunity to clearly state the relationship between fixed term contracts and unjustified dismissal. The key issue for decision was whether the Employment Court had erred when it applied principles of equity and good conscience to a contract that was certain as to duration. The Court of Appeal stated that these principles were only applicable where the contract was either uncertain or silent on an issue in dispute. The equity and good conscience jurisdiction under s.104(3) of the ECA could not be brought to bear where it was inconsistent with the ECA or the employment contract at issue. Here the duration of the employment contract was certain, therefore the equity and good conscience jurisdiction was inapplicable. The result of this analysis is that the meaning of "unjustified dismissal" under s.27(1)(a) will normally involve a straight forward two step analysis: firstly, one must consider whether there has been a dismissal and secondly whether that dismissal was unjustified. As to the first step the Court concluded that the expiration of a fixed term contract could not, in the ordinary sense, be described as a dismissal as an employee whose fixed term had come to an end could not be said to have been "sen[t] away or remove[d] from office". (p.124) Since there was no dismissal Mr Hagg could not be said to have been unjustifiably dismissed and the appeal was allowed.

This decision should be read in light of the fact that Mr Hagg's employment was subject to the provisions of the State Sector Act 1988. Section 77H provided that all permanent positions had to be suitably advertised, while s.77G required the employer impartially select the most qualified person for any position. Therefore the Auckland College of Education had a statutory obligation to advertise positions on expiry of the employment contract and give all comers an equal opportunity for employment. As Mr Hagg was aware of these conditions any legitimate expectation of a permanent position couldn't be justified.

As a result of the Court of Appeal's decision in *Hagg* it can be stated with confidence that an employee can no longer bring a personal grievance alleging that he or she has been unjustifiably dismissed or disadvantaged in relation to their existing employment as a result of their non-appointment to some other position following the expiry of a fixed term contract. Accordingly, fixed term contracts provide a tantalising, but as yet unrealised prospect of avoiding the personal grievance provisions of the Act. The Court of Appeal has upheld the right to freedom of contract against the right to protection offered by the personal grievance provisions of the Act. In doing so an interpretation of the so-called international obligations found in the ILO conventions has, in the context of fixed term contracts, become unnecessary.

To summarise the law on fixed term employment contracts the current position is that:

- Fixed term contracts of employment are valid unless prohibited expressly or impliedly by an applicable collective employment contract;

- These contracts expire on the date specified and the employee should not expect to be re-employed to an advertised position based on past employment;

- Such a contract may not expire however if there has been an express or implied promise of renewal or if the form of the contract was a sham utilised by the employer to conceal the true nature of the employment.

In the *Hagg* case we see the Court of Appeal clearly rejecting the prior guidelines formulated by the Employment Court on the formation and termination of fixed term contracts. The Court has recognised that although the use of fixed term contracts may be unfair, in the absence of statutory provisions limiting the use or termination of these contracts there is no room for judicial extension to the meaning of the term "dismissal" in the ECA.

Alternative dispute resolution

Section 32 of the Employment Contracts Act mandates that every employment contract must contain an effective procedure for settling any personal grievance.[3]

Section 32(2)(a) gives the appearance of offering parties to employment contracts an alternative to the personal grievance resolution procedures found in the First Schedule to the Act. However, a close examination of s.32 reveals that the aspect of choice is largely an illusion. Section 32(2)(a) permits parties to adopt:

> "An agreed procedure that is not inconsistent with the requirements of this Part of this Act (which requirements do not include the requirements of the First Schedule to this Act)."

However the illusion of choice is heavily qualified by the requirement in s.32(5) that parties to an employment contract cannot agree upon an appeal system which confers jurisdiction on any Tribunal or Court other than the Employment Tribunal or Employment Court. The statutory requirement that any alternative system for the resolution of personal grievance be an "*effective*" system has also been interpreted by the Employment Tribunal in a way which further restricts the availability of any true alternative to the procedures in the First Schedule.

Initially, after the passage of the Act, commentators were predicting a surge in demand for private mediation/arbitration of employment disputes.[4] That optimism has proved to be misplaced and the reality is that relatively few employers and employees have opted to replace the statutory procedures with a private mechanism of dispute resolution (see Goddard, 1993).

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[3] See also s.21 (the relevant objects section).

[4] See the optimistic comments of the Hon W.P. Jeffries in Alternative Dispute Resolution, the advantages and disadvantages from a legal viewpoint (1991) *New Zealand Law Journal* 156-159.

The question must be asked why this is so. There are undoubted disadvantages with the system contained in the First Schedule to the ECA.[5] These include delays[6], the possibility of publicity of adjudication proceedings, and the high legal cost attendant on lawyers being involved throughout the mediation and adjudication process. It is clear that there is an interest in the mediation process itself (see Hurley, 1993) but it is simply private mediation and/or arbitration which has proved unattractive. This is puzzling when viewed in the light of the practice that prevails in North America. In the United States the private arbitration of personal grievances is the overwhelmingly preferred method of personal grievance resolution and it is estimated that tens of thousands of personal grievances annually are satisfactorily resolved by this method (Edwards, 1996).

There have been a number of theories advanced as to why virtually all employment contracts adopt the procedures set out in the First Schedule to the Act. Goddard CJ (1993) suggests that the established expertise of the professional Employment Tribunal mediators and the widespread perception of their impartiality are likely to be causes. It may also be that the structure of the ECA is such to deny the real advantages that private arbitration of personal grievances confers in countries such as the United States.

Banks (1992) has suggested that the advantage of a private procedure is the opportunity to tailor a procedure that is "in harmony with the nature of the particular employment relationship". Because of the constraints set out in s.32 it is questionable whether there is indeed an opportunity to "tailor" anything.

Edwards (1996: 681) lists the advantages of private arbitration as being:

> The presence of a skilled neutral with substantive expertise, the avoidance of issue-obscuring procedural rules, the arbitrator's freedom to exercise common sense, the selection of arbitrators by the parties, and the tradition of limited judicial review or arbitral decisions . . .

Because of the relative rarity of private labour arbitration in New Zealand there is a dearth of people who could be described as "skilled" or with the "substantive expertise" in resolving personal grievances. It is debateable whether "issue obscuring procedural rules" are indeed absent from any private grievance settlement procedure that could be said to be "effective" in terms of the Act and the ability of an arbitrator to exercise common sense might also be said to be constrained by the Act. It is probably fair to assume that New Zealand Courts are likely to exercise the same restraint on review of arbitral decisions as their American counterparts,[7] but this, and the advantage of the parties being able to select an arbitrator of

[5] For criticism of the efficiency of the procedures see L. Skiffington, *Compensation for Unjustified Dismissal under the Employment Contracts Act 1991*, Employment Law Bulletin, pp.74-77.

[6] For a recent analysis of delays see N. Taylor, The Employment Tribunal - Is there a better way? *Employment Law Bulletin*, 1996: 101-103.

[7] Although by s.32(5) such review would be by the Employment Tribunal or Court rather than the Civil Courts.

their choice would appear to be the only advantages of the American system that could be said to be currently applicable in New Zealand.

Some commentators have suggested that the Act "contains few major constraints on an alternative [personal grievance] procedure . . .".[8] The constraints listed are those of being "effective" and "not inconsistent with" the requirements of Part III of the Act. The case law that has been decided indicate that those two constraints are indeed major impediments to the development of any useful alternative personal grievance procedure.

In *Slack v Campbell* [1993] 1 ERNZ 347 the Employment Tribunal upheld as "effective" a private arbitration agreement between parties to a sharemilking operation. The arbitration clause in the agreement entered into between the parties was alleged to be not "effective" on the basis that it did not specify that compensation for the emotional consequences of the unjustified dismissal was available. Its effectiveness was also challenged on the basis that the dismissed employee could not gain access to the procedure as legal aid was not available to him.

The Tribunal rejected the challenges because of the "effectiveness" of the private arbitration agreement, however it did so on a curious basis. It held the agreed procedure didn't purport to exclude any of the remedies available under the ECA therefore all remedies were impliedly available. It also referred to s.147 of the Act[9] and held that s.147 had the effect of modifying the contract to include reference to all the remedies available under the Act. It may have been that a better interpretation of s.147 was that the absence of the breadth of remedies specified in the Act would result in the procedure not being "effective" and therefore the personal grievance provisions of the First Schedule would apply. This seems preferable to trying to imply into an alternative arbitration procedure something the parties may never have intended or may have expressly wished to avoid by adopting the alternative procedure.

In this case it had been argued that the unavailability of legal aid in relation to any private arbitration procedure meant that the procedure was thereby "ineffective". The Tribunal rejected this and held that legal representation was not a necessity. The Tribunal's overall conclusion was that the procedure adopted was a "comprehensive" one and therefore could be said to be "effective" provided all of the remedies set out in Part III of the ECA were implied.

The same Employment Tribunal member considered another private personal grievance resolution provision in *Meredith v Radio New Zealand Limited* [1993] 2 ERNZ 929. Here the parties to an employment contract had drafted a procedure which contained an alternative to the provisions of the Act, however it said nothing about the availability of any remedies. Instead of holding that the effect of s.147 was to imply all the remedies available in Part III of the ECA (as it had done in *Slack v Campbell*) the Tribunal held that this alternative

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8 See *Mazengarb's Employment Law* Chapter 111.15.

9 This section states: "The provisions of this Act shall have effect notwithstanding any provision to the contrary in any contract or agreement".

procedure was "ineffective". Here, the alternative procedure adopted involved little more than specifying a method of appointment of an arbitrator and recording that the arbitrator's decision would be final and binding.

It was argued for the employer that it was up to the arbitrator to determine what his or her powers should be including what powers might be available in relation to remedies. The Tribunal held: "I do not think that, even by clear and express words, an employee could agree to be precluded from seeking any one or more of the calendar of remedies available for a personal grievance". If this interpretation of the ECA is correct then, other than speed and the ability to eliminate publicity there are no obvious advantages in adopting an alternative dispute resolution procedure. There is the real disadvantage that such a procedure is likely to be significantly more expensive for the parties than using the procedure set out in the Act[10]. Therefore, despite the appearance created by the wording in s.32(2)(a), parties to an employment contract have little real freedom of choice in relation to the resolution of personal grievances and most importantly, they cannot agree on a mechanism of resolution that provides for anything less[11] than the range of remedies set out in Part III of the Act.

Those who, notwithstanding the apparent lack of advantages in pursuing an alternative dispute resolution procedure, wish to pursue such a course will want to know how they have to draft the relevant provision to ensure that it is "effective". Unfortunately, there is a divergence of opinion amongst Employment Tribunal members as to what those requirements are.[12] In *Bashford v Target Furniture Mart Limited* (unreported AT 430/94 AET 296/94 T E Skinner) the Tribunal followed the principles established in *Meredith v Radio N Z Limited* and asked the following questions:

- Does the clause provide for the decision to be made on the merits?
- Is it a capricious method of decision-making?
- Is there certainty as to the steps to be followed?
- Is there a reasonable quality of adjudication?
- Is there freedom from undue cost or technicality?

A significant factor in providing positive answers to each of those questions was the reference to the Arbitration Act 1908. However, in the case of *Mason & Johnson v Robertson First National* (unreported CT 88/94 CET 289/93, 290/93 I McAndrew) the Tribunal held that the reference in the arbitration clause to arbitration "in accordance with the Arbitration Act 1908" meant that the arbitration provision was inconsistent with the ECA.

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10 In *Slack v Campbell* the Employment Tribunal rejected an argument that an arbitration procedure would be "effective" only if the employer agreed to fund it.

11 Given the interpretation of the words "not inconsistent with" arrived at by the Court of Appeal in *New Zealand Meat Workers Union v Alliance Freezing Co (Southland) Limited* [1991] 1 NZLR 143 it may even be arguable that if an alternative dispute resolution procedure is to be "not inconsistent with" Part III of the Act it cannot provide greater remedies than those specified in the Act.

12 Compare *Meredith v Radio New Zealand Limited* and *Bashford v Target Furniture Mart Limited* with *Mason & Johnson v Robertson First National.*

The particular reasoning of the Tribunal seems to be that the High Court has a power of review of arbitral decisions pursuant to the Arbitration Act 1908 and that this was inconsistent with s.32(5) which mandates that no alternative dispute resolutions procedure can include an "appeal system" which confers jurisdiction on any Tribunal or Court other than the Employment Tribunal or Employment Court.

The real issue raised by this case is whether the right of review that the High Court has in relation to arbitral decisions made under the Arbitration Act 1908 is in fact a right of "appeal". It has been argued (Churchman and Grills) that there is a distinction between the right of appeal to the High Court and the limited right of review under the Arbitration Act. While the Arbitration Act 1908 remains in its present form[13] it is arguable that reference to that Act does not create any inconsistency with s.32 and that the decision in *Mason*'s case has been wrongly decided.

Contracting out

Section 147 of the ECA stipulates that there is to be "no contracting out of" the provisions of the Act and that the provisions of the Act shall have effect notwithstanding any provision to the contrary in any contract or agreement. However, this section catches only contracts of employment.

If an employer came to the conclusion that, because of the impact of the personal grievance provisions of the ECA (or for any other reason) they were no longer prepared to continue to employ staff (or a section of their staff) they do have an option open to them. The case law has made it clear that it is permissible for an employer to close down a part of their operation and to contract out that work to an independent contractor. Often, such independent contractors have had no prior connection with the employer and may enjoy significantly less by way of conditions of employment than were previously enjoyed by the relevant employees, but sometimes the independent contractors may in fact be a group of former employees who have combined to tender to undertake work that they were previously employed to carry out.

The Court of Appeal in the case of *G N Hale & Son Limited v Wellington Etc Caretakers Etc IUW* [1991] 1 NZLR 151 established that an employee has no "property" in a job in the sense of an ongoing expectation that irrespective of the financial or other forces operating on the employer, the employer will continue to provide employment. Cooke P at 155 in *Hale* said:

> . . . this Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, reorganisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

A similar approach was more recently endorsed by the majority in the Court of Appeal in *Brighouse Limited v Bilderbeck* [1995] 1 NZLR 158.

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13 For a discussion of the implications of proposed changes see *Churchman and Grills*.

Although the statements of Cooke P in *Hale* seem reasonably clear, their application in relation to an employer shutting down a large part of its operation and contracting out those services gave rise to some initial interpretation difficulties. In *Hyndman v Air New Zealand Limited* [1992] 1 ERNZ 820 the employer was engaged in negotiations for a collective employment contract with its Auckland Catering Division staff. It wished to obtain a reduction in wage rates and conditions. When no agreement could be reached with its employees it decided to close the Auckland Catering Division and have the catering carried out by outside contractors. The implementation of this decision was met with an application for an interim injunction and an allegation that the employees' dismissals constituted an unlawful lockout.

The relevant definition of lockout (s.62(1)(a)) defined within the meaning of the term lockout the act of " . . . closing the employer's place of business, or suspending or discontinuing the employer's business or any branch thereof".

Although the Court rejected the claim that the employees had a legitimate expectation that their employer would continue to negotiate for their collective employment contract, it did find that it was at least arguable that the action of the employer had amounted to a lockout. The definition of lockout is such that if an employer does one of the prohibited acts (including closing its business or discontinuing any branch or part thereof) with the intent of " . . . compelling any employees, or to aid another employer in compelling any employees, to accept terms of employment or comply with any demands . . . " then that may amount to a lockout. Obviously, the contracting out of the catering operation could potentially have amounted to a lockout. The Court found that in respect of those employees who lost their employment the employer did not have the necessary intention; but the Court found that in respect of those employees employed in other catering departments around the country, it was arguable that the employer had taken the action with a view to compelling those employees to accept terms of employment. The Court seemed to accept that such a lockout would be lawful although this is debatable given that s.64(1)(b) declares that lockouts are only lawful if they relate " . . . to the negotiation of a collective employment contract for the employees concerned". Arguably the employees concerned with this action were not having a collective employment contract negotiated for them at all, rather they were being dismissed. However, this point does not seem to have been argued and the Court refused the interim injunction reinstating the workers on the balance of convenience, although it did issue interim injunctions to restrain the employer from dismissing any other employees in circumstances which might amount to a lockout.

The lesson to be learned from this case is that any employer contemplating closing part of its business or undertaking would be well advised not to attempt to do this at the same time that it is negotiating a collective employment contract. An employer should also endeavour to make it clear that the closing of a business unit and the contracting out of work is not being done for the purpose of compelling other employees with whom it may be negotiating for a collective employment contract to accept particular terms and conditions of employment.

The consequence of an employer choosing to contract out part of a business operation is that the employees concerned will be redundant. Even if they obtain work with a new contractor and end up doing their previous job under similar terms and conditions they are nonetheless

redundant and entitled to redundancy compensation (see *Brighouse Limited v Bilderbeck* [1994] 2 ERNZ 243). If the employees do not have an applicable redundancy agreement they may be able to bring personal grievance proceedings to enforce payment of redundancy compensation. The liability for redundancy as a consequence of contracting out part of an operation was overlooked by an employer in *Watties Frozen Foods Limited v United Food and Chemical Union of New Zealand* [1992] 2 ERNZ 1038. Here the employer had decided to contract out a cafeteria operation and had insisted that an employee transfer to a job with a new contractor despite the fact that the employee wished to be made redundant. The Court of Appeal confirmed that the employer couldn't escape its redundancy obligations in this manner and remitted the matter to the Employment Court for assessment of appropriate redundancy compensation.[14]

A more difficult question arises if an employer chooses to close part of its operation and contract out the work in response to action by employees that is lawful under the ECA. If a particular group of employees exercised their right of freedom of association by joining a Union and seeking to bargain collectively through that Union, an employer with a strong anti Union animus may well wish to teach those employees (and other employees) a lesson by closing down that part of its business operation. This was the fact situation in the well known United States Supreme Court case of *Textile Workers Union v Darlington Manufacturing Co* 380 U.S. 263. Here, a textile manufacturing company had closed down a South Carolina mill where the members had voted to unionise. The closure was clearly in reprisal for the exercise of the decision to unionise and to intimidate employees at other plants owned by the same employer from following a similar course of conduct. The conduct was held to be an unfair labour practice and ultimately, after 26 years and numerous appellate judgments, the employees concerned finally received a proportion of the compensation originally awarded to them.

In New Zealand an employer adopting a similar cause of conduct with the same sort of motivation risks being found to be in breach of the ECA. Although it is noteworthy that the penalties in s.53 for breach of the Part I provisions of the Act are relatively modest (with a maximum penalty of $2,000 for an individual and $5,000 for a company). If there are any commercial reasons justifying such a decision (in addition to an unlawful motive) an employer would probably avoid the prospect of reinstatement in personal grievance action and there will be few employers unable to find any commercial justification for closure of part of their business.

In conclusion therefore, the contracting out of part of a business remains available to employers who wish to reduce their cost structure either by avoiding the personal grievance provisions of the ECA or for other reasons. Employers must be careful to avoid conduct which could be construed as a lockout, must be aware of their obligation to pay appropriate redundancy entitlements, and must have some commercial justification for their conduct.

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[14] In *Camnish v Parliamentary Service* 4 June 1996 WEC 29/96 Goddard CJ the Court confirmed that an employee cannot be transferred to the service of another without their consent.

Independent contractors

A variation on the concept of contracting out an area of employment is the transformation of employees into independent contractors. If the relationship is genuinely one for services rather than of service then the obligations and rights conveyed by the ECA will be ousted. The difficulty arises in working out exactly what sort of independent contractor arrangement is a genuine, as opposed to a sham, arrangement.

With an exception relating to homeworkers (which has recently become topical), the definition of "employee" in the ECA excludes those involved in contracts for services. In ascertaining whether a particular individual is an employee or not the Courts will generally attempt to give effect to the intention of both parties. Where that intention is unclear there are a number of indicia that the Court will apply. Traditionally the "control" test has been of great relevance. This asks whether the employer is entitled to control the work and those who perform it. An alternative is the "fundamental" test which asks whether a person is performing the services in question as part of a business on their own account. In the leading case of *TNT v Cunningham* [1993] 2 NZLR 681the Employment Tribunal and Employment Court had both applied the control test and concluded that Cunningham was an employee. However, the Court of Appeal reversed that decision finding that too much weight had been given to the "control" factor. The Court instead placed greater reliance on the "fundamental" test as that test had been applied in the Privy Council decision in *Lee Ting Sang v Chung Chi Keung* [1990] 2 AC at 374.[15]

The "control" test has clearly been eclipsed as the dominant test by the judgment in *TNT v Cunningham*. In that case the comprehensive provisions of the contract prevailed despite the considerable amount of control exercised by TNT. Four of the five Judges in that case referred to and appeared to rely on the wording of the contract only. One Judge referred to extra contractual features which can often be highly significant in indicating whether an arrangement is one of independent contractor or employee. These are arrangements such as the payment of GST, ACC levies or the claim of depreciation on plant.

Despite placing great reliance on the terms of the written contract, the Court of Appeal in *Cunningham* made it clear that the mere presence of a clause in a contract declaring that it was an independent contractor relationship rather than an employment relationship is not of itself conclusive. McKay J at 669 stated: "The proper classification of a contractual relationship must be determined by the rights and obligations which the contract creates and not by the label the parties put on it".

Notwithstanding these comments it appears that the presence of such a clause is likely to be a powerful indicator of the intention of the parties (or at least of the dominant party). Given the apparent trend in more recent Court of Appeal judgments toward a literal interpretation of employment contracts, the Courts may well be less willing to go behind such a clause and than they have been previously.

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[15] There are or course more than two tests and as many as five different tests have been identified - see French and Tremewan *Employment Law Update* NZ Law Society Seminar booklet 1994.

Although employers have an obvious incentive for wishing to convert employees into independent contractors (they thereby can avoid the personal grievance and other provisions of the ECA and also the provisions of the Holidays Act 1981, the Minimum Wage Act 1983, Wages Protection Act 1983 and Parental Leave and Employment Protection Act 1987) the decision to adopt an independent contractor arrangement often comes from employees. There can be significant advantages for employees, including the ability to claim deductions for expenses incurred in performing their employment duties and an ability to control the timing and incidence of taxation. Many employees are prepared to trade the statutory protection available to employees for the perceived financial advantage of independent contractor status.

This raises the policy question of whether, if it was Parliament's intention in stipulating that all employment contracts contain an effective personal grievance resolution, it is appropriate that a device be available to exclude a segment of the workforce not just from the personal grievance provisions but from the other forms of statutory protection of employees. Where parties to a contract both genuinely wish to structure it as an independent contactor arrangement, rather than one of employment, there seems to be no policy reason why they should not be entitled to do so. However, a more difficult question arises where the imbalance in bargaining strength between two parties to an employment contract results in one party effectively being able to dictate to the other whether the arrangement be one of contractor or employee. If the Courts are prepared to go beyond the written wording of the contract and look at issues such as relative bargaining strength then they may well be prepared to classify a contract brought about by an equality of bargaining power as a "sham". There is some support in a judgment of Casey J in *TNT v Cunningham* for the view that, if there is no trade-off of genuine benefits between the parties entering into an independent contractor relationship, then that may possibly amount to a sham. Cooke P seems much less inclined to this view and would not regard such a transaction as a sham if it recorded the actual arrangement entered into between the parties.

Apart from the obvious loss to employees of the protection provided by the ECA and other employment statutes there are further disadvantages that may result from the opting for such an arrangement. The employment relationship has clear implied terms of fidelity and confidence and trust. The operation of such terms may benefit both parties.[16] However, parties to an independent contractor arrangement should not necessarily assume that the same terms would be implied. The case of *Smith v Courier Systems Limited* CP 157/86 High Court Wellington 4 June 1986 Heron J seemed to assume that the implied term of fairness was found in contracts for service. This notion was rejected by Fisher J in *Paul v Mobil Oil (NZ) Limited* [1992] 3 NZLR 194. Another potential disadvantage is that third parties such as the Inland Revenue Department are not necessarily bound by the label which the parties may choose to apply to their contractual relationship. In the case of *Challenge Realty Limited v Commissioner of Inland Revenue* [1990] 3 NZLR 42the Commissioner of Inland Revenue had applied a "control" test which was upheld ultimately by the Court of Appeal. It seems undesirable that in the context of taxation issues the Courts should have applied one test (that of control) but in the context of an employment dispute the same Court (in *TNT v*

[16] See *McKay Electrical (Whangarei) Ltd v Hinton* CA 123/96 Gault, McKay and Blanchard JJ, 25 June 1996, for an example of where the implied duty of fidelity was of significant advantage to an employer.

Cunningham) has applied a different test (the "fundamental" test). The consequence of this is that parties to an employment relationship, relying on the comments of the Court of Appeal in *TNT v Cunningham,* may enter into an independent contractor arrangement only to subsequently find that, as against the Inland Revenue Department, their relationship is still regarded as one of employer/employee and the presumed benefits of the independent contractor status are lost while the disadvantages remain.

The use of independent contractor relationships raises a number of policy questions. Guidance from Parliament would be helpful on the issue of whether such arrangements should be permitted where they have the effect of removing a sector of the workforce from the benefit of the statutory protections covering all other employees, particularly in circumstances where the insistence on such a contractual relationship comes solely from one of the parties. The Courts have made it clear that they are not prepared to attempt to solve this policy issue. Casey J in *TNT v Cunningham* referred in particular to the definition of "employee" in the ECA and indicated that he believed it was:

> . . . a deliberate choice by the legislature militating against the adoption of policy considerations favouring worker protection when interpreting the nature of employment contracts.

Those employers who wish to pursue independent contracting arrangements as an alternative to employment should also be careful to ensure that they do not attempt to unilaterally convert an employment relationship to one of independent contractor against the will of the employee concerned. This was the mistake made by the employer in the case of *James and Company Limited v Hughes* [1995] 2 ERNZ 432. The employer's action in attempting to convert the employee status from employee to independent contractor was challenged on the basis that it, in effect, amounted to a redundancy and the employee had been unjustifiably dismissed on the grounds of redundancy. Finnigan J accepted this argument and held that because the position occupied by the employee had not disappeared the employer was not entitled to dismiss an employee merely because the employer could achieve better financial returns if the employee became an independent contractor. The employee received significant compensation.

The most recent case of the issue of independent contractors has been the Court of Appeal's judgment in *Cashman v Central Regional Health Authority* CA 26/8/96 Henry, Thomas, Keith, Blanchard and Neazor JJ, CA 34/96. This case focused on the only category of non-employee to be covered by the ECA. The definition of "employee" in the ECA includes employees and also "homeworkers". Homeworker is further defined as someone who is engaged to do work for another person in a dwelling house. This case involved homecare workers employed by a company which contracted with a Regional Health Authority to provide homecare services to the elderly and infirm. The contract described the relationship between the parties ". . . as an independent contractor and not as one of our employees". Reversing the Employment Court, the Court of Appeal held that the individuals were homeworkers within the definition in the Act in that they "did work for" the employer rather than just for the people in whose homes they worked.

While this case is useful in clarifying the definition of homeworker it does not add anything of substance to the principles laid out in *TNT v Cunningham.*

As the law stands at present the option of stipulating that the relationship be one of independent contractor rather than employee provides employers with an opportunity to evade the protection provided to employees by the ECA and other relevant acts. Unless the Courts are prepared to look at the issue of imbalance of bargaining power and whether the arrangement reflects a genuine meeting of the minds or a unilaterally imposed solution there is real potential for members of the workforce to be significantly disadvantaged. This is of course an issue of policy and it is asking too much of the Courts to provide a solution to this problem when Parliament chooses to remain silent on it.

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