New Zealand Journal of Industrial Relations, **24(1):** 21-45

The Employment Court after the Industrial Relations Package

John Hughes*

The future of the Employment Court was placed in doubt in the Coalition Agreement of December 1996. Following an extensive review of the Court's decisions under the Coalition Agreement, with a view to assessing whether it had been engaging in "judicial activism", the Industrial Relations Package of July 1998 did not - as expected - settle the Court's future. Instead the structure of the specialist Court was referred to a review being conducted by the Minister of Justice. This article examines the reasons publicly advanced by the current Government for changing the role of the Court and the political and constitutional environment in which this has occurred. A summary of currently available information on the process of change is included.

Introduction

Prior to the general election in 1996, neither of the parties which subsequently became the partners in New Zealand's first coalition government had indicated any intention of removing the Employment Court's jurisdiction. New Zealand First had pledged to retain the Court in its Industrial Relations Policy (Henare, 1996). The National Government had clearly stated that it did not favour amending the Employment Contracts Act 1991 ("the ECA") and the specialist institutions were an integral part of the legislation. More specifically, the National Government had continued also to deny that it planned to further restrict or to abolish the Employment Court if re-elected (Luxton, 1996).

Paragraphs 4 and 5 of the *Statement on Industrial Relations* in the Coalition Agreement of 12 December 1996 nevertheless promised:

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

* Senior Lecturer in Law, University of Canterbury. This article is based on the author's paper "The Employment Court: Endangered Species Under Siege", delivered to the CTU/ICFTU Conference "Workers' Rights Are Human Rights", Wellington, 13 October 1998.

The italicised phrase implied formally, for the first time since 1990, that the future of the specialist Court was now insecure:

> The Coalition Agreement is designed to ensure that the underlying principles of the Act continue to make an impact on the competitiveness of New Zealand businesses. It proposes a study of Employment Court and Court of Appeal decisions to find out whether Parliament's intentions have been clearly expressed in order to minimise judicial activism in employment, while retaining the separate Employment Court jurisdiction in the meantime. The review should reveal whether the landscape of the labour market has changed in a way that supports another look at the institutional arrangements in force at the moment" (Bradford, 1997a).

Attacking the Court

From 1991 to 1996, the then National Government had been broadly supportive of the role being played by the Employment Court (Birch, 1993; Bradford, 1993). Employers' organisations, however, had maintained a vigorous assault on the Court and its personal grievance jurisdiction, in a series of monographs (Baird 1996; Howard, 1995; NZ Business Roundtable/NZ Employers' Federation, 1992; Robertson, 1996). Whilst, by 1996, the views of influential members of the National Government had shifted to accommodate many of the objections being made by these organisations (Hughes, 1997), the earlier defence of the Court by Mr Bill Birch (as Minister of Labour) and Mr Max Bradford (as chair of the labour select committee) had two broad consequences when the Court's future came into question in 1996. First, in order to justify changing a Court which they had created in 1991 and - for the most part - strongly defended in its early years of operation, these ministers - and others in the National Government - had to argue that conditions had changed. Second, and related to this, it was necessary to argue that in some way the Court was either not working or redundant, or both. Whilst the reasons are interrelated, they may be loosely classified under three headings - political change, "changed labour market conditions" and judicial developments.

Political change

In purely political terms, by 1996 the supporters of further "deregulatory" change to the ECA had consolidated and strengthened their position, whilst opposition to those aspects of the ECA which were controversial in its inception had weakened. Employer pressure groups, whilst always influential (Dannin, 1997), had become markedly more so as well as increasingly strident in their demands that the role of the Employment Court be re-examined (Deeks, 1997; Kelsey, 1993; Roper, 1993). Conversely, unions and other representatives of workers had become significantly weakened in terms both of political influence and of resources. In 1991, the New Zealand Treasury alone amongst government departments had supported the broad thrust of the ECA. By 1996, in contrast, the material prepared by the Public Service for parties involved in the coalition negotiations - for the most part, by the Department of Labour - expressed unqualified

support for the principles underlying the ECA, coupled with criticisms of the Employment Court from employer groups. The papers did not generally reflect criticisms of the ECA, and support for the Court, from other perspectives (State Services Commission, 1997). Added to this, by the time of the coalition negotiations in 1996, those political parties which had criticised the ECA most vigorously were still outnumbered in Parliament by parties which had supported the legislation. During the negotiations, elements in the policy of New Zealand First which would have diluted the ECA by amendment in key areas were discarded. Instead, a firm commitment in New Zealand First's policy to retain the Employment Court, coupled with tentative suggestions that the law of procedural fairness in personal grievances might be codified, were translated in the coalition agreement into a promise to review the Court's decisions for judicial activism, preserving the Court's jurisdiction "in the meantime" (Hughes, 1997).

"Changed labour market conditions"

Both Mr Birch, now Treasurer, and Mr Bradford, now Minister for Enterprise and Commerce, have recently argued that new conditions dictate a fresh approach to the Court's future. First, it has been implied by Mr Bradford that the decision to retain a specialist Court in 1991 was in some undefined way a "trade off" reached under urgency, in order to carry out the radical reforms of the bargaining regime:

> "[In 1991] the then Minister of Labour asked the Labour Select Committee whether or not there should be a separate jurisdiction for employment law. In the event, given the sweeping changes proposed by the Employment Contracts Act at the time, the Select Committee reported the bill back with the Employment Court/Tribunal option" (Bradford, 1997a).

Against this one might argue that, whilst the ECA was undoubtedly passed through its stages quickly, in 1993 it was emphasised both by Mr Birch (Birch, 1993) and by Mr Bradford himself (Bradford, 1993) that the creation of the Employment Court was the result of extensive consultation and detailed consideration. The available evidence supports this (Walsh and Ryan, 1993a, 1993b).

Second, it has been argued that there has been an undefined "change in the landscape" of the labour market since 1991 (Birch, 1997; Bradford, 1997a). Since the supposed "change in the landscape" remains undefined, it is difficult to deal with this proposition. In terms of the overall structure of employment contracts, there has, of course, been a massive shift to individual contracts (Harbridge and others, 1998; Department of Labour, 1998c). In contrast to the argument that this change demands a fresh approach, faced with the argument in 1991 that this would occur and that diminishing collective negotiation would leave vulnerable workers at risk, Mr Bradford argued that the newly created specialist employment institutions (together with extended personal grievance rights) would counter-balance this effect (Bradford, 1991).

In addition to these factors, the potential changes to the ECA, including reconsideration of the Court's jurisdiction (and perhaps existence), were explained in terms of the need to retain the perceived competitive advantage which was claimed to result from the deregulation of the New Zealand labour market. This advantage was seen to have been eroded by similar developments in competing countries whilst being impeded by remaining "inflexibilities" within the industrial relations system to which the Court was allegedly contributing (Birch, 1997; Bradford, 1997b).

None of New Zealand's competitors, however, have adopted a model of bargaining which remotely resembles that in the ECA. No empirical evidence was advanced in the review of the Employment Court's decisions to support the allegation that the Court's decisions were contributing to inflexibility. In the course of the review, officials made routine reference to research sponsored by the NZ Business Roundtable and NZ Employers' Federation (Department of Labour, 1998b) and particularly to a paper by Charles Baird on the purported economic effects of personal grievance awards (Baird, 1996). But Baird himself acknowledged that it could not be claimed that the empirical results of his research were directly applicable to New Zealand (whilst arguing that there was nothing to indicate that they were not). There will, of course, always be a trade off between overall economic performance and protection against unacceptable behaviour. Officials advised the Government that in the key area - personal grievances - the costs in terms of economic performance were uncertain but unlikely to be large (albeit likely to be significant enough to warrant further investigation) (Department of Labour, 1998b).

Judicial developments

Arguments that the Court has engaged in "judicial activism" were included in the *Coalition Agreement* and have fallen, broadly, into four categories.

First, there have been high profile cases where the Court of Appeal has reversed decisions by the Employment Court in areas such as direct communication between employers and workers during contract negotiations, fixed term contracts and redundancy compensation. As a consequence, the Employment Court has been portrayed as being - at best - unduly activist and - at worst - incompetent. The argument that the ordinary courts could act as a substitute for the Employment Court has been seen to be enhanced (Bradford, 1997a; Birch, 1997).

In these three areas, the history does not bear the accusation out. In the context of "direct communication", whilst the Employment Court was overruled in the leading decision, *NZ Fire Service Commission v Ivamy*, the Court of Appeal was split 3:2, with strong dissenting judgments (Anderson, G, 1997). Officials have advised the Minister that the open-textured drafting of the ECA could have been expected to lead to such uncertainty (Department of Labour, 1997). In the context of fixed term contracts Mr Bradford has argued that the Court's decision in *Hagg v Principal of the Auckland College of Education*, holding that failure to renew a revolving fixed term contract could amount to dismissal, was a prime

example of judicial activism. The Employment Court was applying principles, however, which the Minister had earlier impliedly endorsed during the passage of the ECA whilst chairing the Labour Select Committee, on officials' advice, and which the National Government had later endorsed when reporting to the ILO (Hughes, 1996: 51, no.26). In the case of redundancy compensation, the Employment Court's decisions were upheld by the Court of Appeal as then constituted in *Bilderbeck v Brighouse Ltd*, only to be overruled by the current Court of Appeal in *Aoraki Corporation Ltd v McGavin* (Johnston, 1998).

Second, as compared with 1993, by 1998 the Employment Court has sustained an increasing *number* of successful appeals (although the *proportion* of successful appeals between the two sets of figures remains close). By May 1998 there had been 212 Employment Court judgments appealed to the Court of Appeal, with 87 judgments on appeal issued and 53 cases waiting to be heard (the remainder not having proceeded) (Bradford, 1998d).

Applying a "scoreboard" approach to a Court's record, based on appeal statistics, is notoriously unreliable. Immediate difficulties arise in relation to how "wins" and "losses" are calculated. For example, an appeal against a Court's judgment may be dismissed in respect of substantial legal issues which the Court has determined at first instance, but allowed in part in respect of a peripheral technical point. Similarly, comparing the record of, say, the High Court with the Employment Court is invidious since the High Court has not had to grapple with any legislation at once so openly-drafted and internally inconsistent as the ECA (for the latter, see Wilson, 1995). Nevertheless, whilst in 1993 Mr Birch felt able to support the Employment Court by pointing to the upholding of just over 55 percent of appeals as an indication that there was no significant problem (Birch,1993), by 1997 Mr Bradford was citing the upholding of 49 percent of appeals in the previous three years as an indication that the Employment Court was not looking to the law as expressed by Parliament (Bradford, 1997b). As at 1 October 1998, by my calculation, 40 appeals have been completely upheld, 7 appeals have been upheld in part and 49 appeals dismissed (in other words, a better record for the Employment Court than that approved by Mr Birch in 1993). The irony remains that the NZ Business Roundtable, which had relied on the appeal statistics to damn the Employment Court, was simultaneously the most vocal proponent of retention of a right of appeal from the NZ Court of Appeal to the Privy Council, on the basis that the Court of Appeal was itself indulging in judicial activism (NZBR, 1995). One might also recall the comment of Justice Robert Jackson in the United States Supreme Court:

> "There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final" (quoted ADLS Public Issues Committee, 1995).

Third, it has been argued that increasing number of appeals has led to the Court of Appeal "making the rules", indicating less need for a specialist Court:

> "Recent experience does raise the issue of whether we need a specialist court for labour market disputes. Currently, much of the law seems to be made by the generalist Court of Appeal. This Court has no difficulty in recognising that employment contracts are different in some ways from other sorts of contract. The time may have come to consider whether the industrial relations environment has changed since 1991, so that the Employment Court need no longer be separate" (Birch, 1997).

Given that the Court of Appeal was always an established element in the hierarchy of institutions under the ECA, and that careful thought went into the creation of the Employment Court, this argument is difficult to follow. The same argument could be directed at appeals from any specialist Court to the Court of Appeal. In any event, only a small proportion of Employment Court decisions have been appealed *successfully*, reflecting that in most cases the law as established by the Employment Court has been accepted. On the last available Government statistics, as at 30 June 1997, the Employment Court had delivered 909 decisions (Bradford, 1998c), of which - by May 1997 - 30 had been successfully appealed in full and three successfully appealed in part (Bradford, 1998c). Expressed in Mr Birch's terms, the Court of Appeal has thus "made the law" in just 3.6 percent of employment cases when expressed as a percentage of the Employment Court's total workload. This is, in any event, a generous estimate from the perspective of Mr Birch's analysis. It ignores the fact that some of the successful appeals are "compound appeals" in the sense that two or more appeals involve the same legal issue. It does not take into consideration that several of the appeals concern the Holidays Act 1981, which the Government itself has declared to be unworkable. It excludes Court of Appeal decisions delivered since 30 June 1997, where the figures point to a lower rate of appeals upheld (three upheld in full, three partly upheld, nine dismissed). It also ignores the far greater number of Employment Tribunal decisions which are never appealed and which themselves adopt authority from the Employment Court.

Fourth, it has been argued that the Employment Court is simply a court of interpretation:

> "Employers' Federation chief executive Steve Marshall said the court's job was one of interpretation of contract law and appeals. It did not require specialist knowledge of either labour market or personnel management laws. That work was done at the Employment Tribunal level" (Anderson, F. 1998b).

> "There] are those who say the Employment Court should be abolished altogether. They argue that there is no need for a separate Employment Court, given that the Court's primary role is to review the legal interpretations of the Employment Tribunal rather than hear cases ab initio. There is undoubtedly more currency for this view than when the Employment Contracts Act was making its way through Parliament in 1991" (Bradford, 1997a).

This argument, again, would apply equally to any specialist Court. It is inconsistent with the rationale for the establishment of the Employment Court, and the detailed study which went into its creation, reiterated by Mr Bradford in a detailed speech on the subject (Bradford, 1993). It ignores the fact that the Court has an originating - and exclusive -

jurisdiction in a number of key areas under the ECA, that cases can be referred directly to the Court by the Employment Tribunal, and that the Full Court of the Employment Court has a significant role in development of principle (Goddard, 1993, 1996, 1997b). It is also a curious argument to be advanced by people who argue that the Court has deviated from a role of interpreting the law into "judicial activism".

The review of the Court

In October 1996, the Department of Labour had reported to its incoming Minister that:

> "The key issue in relation to the Tribunal and the Court is whether specialist institutions continue to be the best way to achieve these goals and support the objectives of the framework legislation. In this context it is important to identify whether issues arise:
>
> - from institutional arrangements
> - from lack of clarity in policy, or
> - from policy not being sufficiently specified in legislation.
>
> Concern about decisions by the Employment Court and the Court of Appeal on redundancy compensation and employers' obligations to follow fair procedures when dismissing employees, for example, may be more effectively addressed by legislative amendment than changing institutional structures" (Department of Labour, 1996: 38).

This analysis highlights, albeit unwittingly, the self-contradictory nature of the ensuing review. Government departments - and the Department of Labour in particular - were being asked to investigate alleged "judicial activism" whilst simultaneously investigating whether the legislation which the Court was being asked to interpret was clearly expressed. It is trite that the more open-textured - or vaguely expressed - legislation is, the greater is the likelihood that Courts will need to be creative (or judicially active) in interpreting its provisions (Burrows, 1992, ch.4). Correspondingly, the greater the exercise of discretion, the more likely it is that appeals will occur - particularly in a highly politicised area such as employment law. Further, many of the disputed decisions had been delivered under the Holidays Act 1981, which the Government was promoting as being unworkable in its current form. In the meantime, notwithstanding these paradoxes, political capital continued to be made of the allegations of unwarranted "activism" and a high rate of appeals (Birch, 1997; Bradford, 1997b; Campbell, 1997).

The result of the review must have come as a surprise, then, to the Government which had commissioned it. The two independent reviewers of the Employment Court's decisions on personal grievances - the area where "judicial activism" had been alleged most forcefully - concluded that the Court had generally interpreted the concept of "unjustifiable dismissal" as it might have been expected to, given that the jurisdiction remained unchanged with the passage of the ECA. The reviewers differed between themselves on aspects of the law relating to redundancy, fixed term contracts, contributory fault and procedural fairness (Hodder, Holden and Coleman, 1998; Bartlett, 1998). Whilst the reviews were released as part of the bundle of documents accompanying the *Package*, the general conclusions

of the reviewers were not mentioned in the accompanying media releases, despite the fact that they answered seven years of criticism on the issues they addressed and were directly relevant to the key issue raised in the Coalition Agreement.

The industrial relations package

Most of the then Coalition Government's *Industrial Relations Package*, released on 23 July 1998, was taken up with proposed changes to the Holidays Act 1981 and the personal grievance provisions of the ECA (Bradford, 1998d). Releasing the *Package*, the Minister of Labour (now the Minister for Enterprise and Commerce) commented simply that:

> "In regard to the Employment Court, the Government has made it very clear that it is committed to the continuation of a specialist court. The administration of the Court will be looked at in the context of a fuller review by the Minister of Justice of court structures. The review is expected to be completed later this year" (Bradford, 1998a, 1998b).

The reference to commitment to "a specialist court", however, does not imply retention of the Court as it is currently constituted, since the review apparently will include consideration of abolishing the current Employment Court and replacing it with an employment division of the District Court (an issue discussed below). Why the issue was dealt with in this manner, and at what stage the transfer took place, remain unclear. Requests for the background papers under the Official Information Act 1982 have been refused on the ground that the issue is still under consideration and decisions have yet to be made (Stockdill, 1998).

Some confusion remains. In August 1998, the Minister of Justice stated that the decision as to the Court's future would be made in two or three months' time (Graham, 1998b). In October 1998, however, in response to a request under the Official Information Act 1982, the Ministry of Justice replied that there was no "review of the courts" per se, but rather a "series of proposals that relate to the legislative framework and other conventions that govern the role of the judiciary in our society" with the possibility that some of this work may affect the future role of the Employment Court". There was said to be no background material. Nor was there any timetable (Stephens, 1998).

This leaves us to speculate within reasonable limits. Four possible reasons for transferring the Court's functions to the District Court suggest themselves, each of which is political. First, it is possible - although it seems unlikely - that the future of the Court had become a contentious point between the Coalition partners. Leaked information broadcast on Radio New Zealand's *Morning Report* in April 1998 (Soper, 1998) led to a sharp and inconclusive exchange between the Prime Minister and the then Deputy Prime Minister. That exchange can best be summarised in excerpts from the relevant news coverage:

> "Employment Minister Max Bradford said the court would remain but would become a division of the District Court along the lines of the environment, family and youth courts" (Rentoul, 1998a).

> "Treasurer and NZ First leader Winston Peters . . . ruled out plans to downgrade the status of the Employment Court . . . He dismissed the proposed changes as 'the mindless blitherings of some civil servant'" (Bell, 1998a).
>
> "Mrs Shipley [speaking in April 1998] confirmed that the structure of the Employment Court was under review. She said she wanted to make it 'categorically clear that we are not planning to downgrade the functions of the Employment Court so that workers' rights and interests are downgraded in any way. What we are looking to is where the Employment Court should sit within the courts structure for structure-of-government reasons" (Bell, 1998b).
>
> "Prime Minister Jenny Shipley said reports that the Employment Court's status would thereby be downgraded were 'malicious'. 'We are looking at reducing the size of government and that includes the size of the courts if we can. The Employment Court and its status will remain. How it is organised is what's being looked at. We do not intend to dilute the court's function" (Rentoul, 1998b).
>
> ". . . NZ First officials said Mr Peters had gone too far. He did not oppose merging the Employment Court with the District Court as long as it did not lose status, they said . . . The officials said NZ First's official position was that it was awaiting the results of a review of the Employment Court before making a decision. The party would not accept any downgrading of the Employment Court . . ." (Bell, 1998b).

The quotes reveal a fundamental confusion. Abolition of the Employment Court and the transfer of its jurisdiction to the District Court will inevitably reduce the status of the Court, for reasons set out below.

The second possible reason for transferring the issue to a review by the Ministry of Justice is that the issue might then become - superficially - less politically charged. Placing the review of the Employment Court in the context of structure and cost carries the potential to sidestep any controversy that would otherwise arise were the review to be openly directed at the Court's function and role. Further, and almost certainly not coincidentally, public understanding of the objections to a "transfer" of the Employment Court's functions to the District Court would require a more sophisticated knowledge of the Court's function and role than would be the case were simple abolition to be proposed. In short, the objections would be much harder to articulate successfully.

Third, transferring the Employment Court's jurisdiction to the District Court would avoid close examination of the various criticisms made of the Employment Court's record and the need to deal with rebuttals of those criticisms. The purported focus would be on cost and structure rather than role and function.

Fourth, removal of the Employment Court and a transfer of jurisdiction to the District Court would render it correspondingly easier to scale down, or ultimately abolish, any specialist division thus created. It would also be one step closer to bearing out the analysis that the Government is:

> ". . . determined to remove any recognition that the labour market is an unlevel playing field, and to subject contracts of employment to the narrowest tenets of ordinary contract law" (Kelsey, 1997).

Issues of constitutionality

Judicial independence is a fundamental aspect of constitutional law and practice. It has been observed by an Australian constitutional lawyer that "The main structural safeguards for judicial independence are the laws which give judges security of tenure and the convention . . . against reducing their remuneration during their term of office" but that:

> "[A] form of interference used by governments or legislatures as a means of circumventing an independent judiciary is the practice of reconstituting a court or group of courts . . . Legislative changes in the structure of the courts have been used . . . as a means of circumventing the procedures for the removal of judges . . . Again, legislation may establish a new court or tribunal to take over some politically sensitive part of the jurisdiction of the existing courts" (Palmer and Chen, 1993, quoting de Q Walker, 1988).

The author of that analysis is himself no friend to specialist tribunals, to which the above argument was directed. The broad point has been made - albeit reversing the author's emphasis - in relation to the current proposals (*The Press*, 1997). When suggestions were made in a Parliamentary question that the Government was intending to remove Employment Court judges by reconstituting the Court, Mr Bradford described the allegation as being "outrageous". The opposition question was itself a supplementary, prompted by a question from Government MP Roger Maxwell directed at Chief Judge Goddard's record in terms of reversals in the Court of Appeal (Bradford, 1997d).

Not all restructuring of the Court system, of course, is impermissible. "A Court created by statute may of course be abolished by statute" (Hardie Boys, 1995: 5). The immediate past President of the Court of Appeal has pointed to the restructuring which created the Labour Court as an example of restructuring which was not constitutionally objectionable (Cooke, 1988, who nevertheless argued that it might be otherwise were a Court's functions to be entrusted to a lay tribunal, as to which see Harrison, 1991: 44). Similarly, to take the closest overseas example, the replacement of the National Industrial Relations Court in the UK with the Employment Appeals Tribunal in 1975 was not perceived as raising issues of constitutionality, even though the legislation under which the NIRC acted - and some of its decisions - were controversial (Deakin and Morris, 1995). The current review of the Employment Court, however, can be distinguished from the creation of the Labour Court (and the UK Employment Appeals Tribunal) not only because a reduction in status is

apparently contemplated but also because of the tone set by ministerial criticism of the Court, linked with questioning of the Court's future; aspects of the background to the review; and the review process itself.

First, let us deal with ministerial criticism of the Court. Constitutional law in New Zealand includes a number of pure conventions, many of which go to the essence of the constitution. Whilst the administration of justice is a proper topic for political discussion, and back bench MPs are not subject to the same restraints as ministers, certain conventions placing restrictions on what ministers may say about the courts are seen to be crucial in guaranteeing the independence of the judiciary. Their significance lies both in the sense that there should be no interference by the executive with the exercise of the judicial function and the threat to public confidence in the courts if judicial independence is perceived to be undermined (Palmer and Chen, 1993, quoting de Q Walker, 1988). These are reciprocal conventions to the convention which precludes judges from engaging in partisan political activity. One such convention is that ministers of the Crown do not criticise the judiciary or judicial decisions. Ministers are also restrained by convention from casting aspersions on judges. Ironically, the "text book example" of breach of these conventions tends to be a speech delivered by Michael Foot, then a senior British cabinet minister, questioning the historical role of common law judges in delivering (or rather, not delivering) justice for workers (Bradley and Ewing, 1996; Brazier, 1988).

In New Zealand, these conventions are reflected in instructions in the *Cabinet Office Manual*, paras 5.141 - 5.143. Although these instructions are drafted mainly with criminal law cases in mind, the conventions are clearly not restricted to the criminal courts and nor, in general tenor, are the instructions:

> "The separation of the executive and the judiciary under New Zealand's system of government means that Ministers must exercise prudent judgment before commenting on judicial decisions . . . [They] should not express comment on the results of particular cases . . . [Ministers] should avoid at all times any comment which could be construed as being intended to influence the courts in subsequent cases . . . Ministers should not express any views which are likely to be publicised where they could be regarded as reflecting adversely on the impartiality, personal views or ability of any judge . . . It is, however, proper for Ministers to comment on the effectiveness of the law . . . i.e. on those matters where the executive has a proper involvement but not where the performance of the courts is brought into question"

In summary, the convention means that:

> "The government may say that a judicial decision differs from the legal advice upon which it had acted or that it proposes to bring in amending legislation, but ministers are not expected to state that a court's decision is wrong" (Bradley and Ewing, 1996: 381).

In my view, it is strongly arguable that these conventions have often not been observed in relation to the Employment Court. In this context, the following examples are a random selection of comments from the current Minister for Enterprise and Commerce:

> "Mr Bradford says an excessively strict view by the Employment Court on the correct procedure for firing employees has meant too many dismissals are overturned on procedural grounds" (Laugeson, 1997).
>
> "Some Employment Court decisions are clearly inconsistent with the principles of the Act and have caused considerable debate over the role of the Court" (Bradford, 1997a).
>
> "If there was ever an example of what the Coalition refers to as judicial activism in the employment area, the Auckland College of Education v Hagg case is it" (Bradford, 1997b).
>
> "[Speaking about procedural fairness] Bradford replies 'But, if an employee is caught stealing the petty cash, and the employer has failed to give notice that stealing the petty cash is not acceptable behaviour, what is more important?' Yes, he believes such perverse court rulings do exist . . . 'You'd need to talk to the employers. They would argue that they are trying to get it right. Because there is some uncertainty now built into the process by a string of court decisions, and they don't know what the court will do next'" (Campbell, 1997).
>
> "There is plenty of anecdotal evidence that small and medium-sized employers are shying away from employing new staff because of the uncertainties in the personal grievance procedures created in part by some Employment Court decisions . . . [Procedure] is an issue in dismissals, but in my view should not be the dominant factor . . . The Employment Court in the past has applied a pernickety approach in this area . . . The Court of Appeal generally looks to the law as expressed by Parliament more so than the Employment Court seems to . . . The role of the courts is to administer the law, not rewrite it" (Macfie, 1997; Bradford, 1997c).

The link drawn by the Minister between dissatisfaction with some decisions of the Employment Court and the debate on the future of the Court under the review process (Bradford 1997a) underscores the fact that such statements have implications for the perceived constitutional integrity of the current review process.

Next, there are those aspects of the review of the Employment Court which we know of through the leaked Justice Department papers in 1997. One such aspect was a study by Stewart Schwab based on a "game-theoretic model of adjudication", aimed at an analysis of alternative institutional structures on court performance and commissioned by the New Zealand Treasury. The study originated in proposals preceding the Coalition Agreement, but its continuation stemmed from the reference in the Coalition Agreement to a study of the Court's decisions in relation to judicial activism (Palmer, undated). One part of the study was designed to see whether judges varied systematically in outcomes. The model generated a number of hypotheses, one of which was described in the following terms:

> "If judge effects exist, can they be explained systematically by judge characteristics, or do they appear random? Hypothesis: because judges are chosen in part for their political views on employment cases, variations in judges are predictably based on observed characteristics that predict political views. This question can be tested by regressing judge coefficients . . ." (Schwab, 1997).

Treasury formed an advisory group to assist in "managing the risks associated with obtaining conclusive results from these projects". The Ministry of Justice reported to its Minister that, "There is also a need for agencies of the Executive to recognise the independence of the judiciary while at the same time fulfilling the requirement to provide informed advice on decision making in the Employment Court" (Palmer, undated). Whilst the Chief Judge of the Employment Court and the Chief Justice had responded positively to the proposal, officials from Justice reported to their Minister that:

> ". . . Treasury note two possible policy approaches are available to Government for responding to concerns about the quality of judicial decision making namely:
>
> - providing greater clarity or specificity in employment legislation, so as to make clear the intent of Parliament; and
>
> - altering judicial institutional (or court governance) structures, which might include altering the EC's separate jurisdiction.
>
> *It is entirely possible, therefore, that aspects of this project will conflict with the principle of judicial independence, and may prove a controversial issue for you to deal with.*
>
> It is for this reason that the Ministry believes it should be on the advisory group to keep you informed and to ensure constitutional principles are adhered to" (*Palmer, undated; emphasis added*).

Speaking to the Wellington District Law Society last year, Mr Bill Birch observed - some would say belatedly - that the Government would need to be cautious in the context of the debate over the future of the Employment Court, since "the key principle is that Judges must be independent of political control" (Birch, 1997). With this background, it might be thought that caution at this stage is too late.

Related to this issue is the convention that relevant ministers defend the Courts from personal attacks on judges. For the most part, in my view, ministers in the current Government and its predecessors have failed to respond adequately to personalised attacks on Employment Court judges during an unremitting campaign by employer groups and sections of the business press. It is important in this context to stress the difference between legitimate criticism of court decisions and the type of personal attack which undermines public confidence in the judicial system. It is attacks of the latter kind alone which should prompt the relevant office holders or ministers to act. In 1995 the Attorney-General, for example, took issue with a reported claim by the executive director of the New Zealand Business Roundtable that judges were becoming increasingly politicised and responding to "victimhood, perceived fairness issues, media hype and pressure groups" (ADLS, 1995).

Nevertheless, I would argue that the more general failure to respond appropriately to highly personal attacks on the Employment Court's judges has encouraged a virtual "free for all" in terms of treatment of the Court by its detractors. The most recent illustration arose on 15 May 1998, when the *National Business Review* published an article headed

"Friends at Court for the Unions - Uncle Tom Goddard et al". The article implied - amongst other things - that some Employment Court judges were biased in favour of workers and unions by inclination and background. It went on to imply that a supposed animosity between Lord Cooke and Chief Judge Goddard was reflected in the treatment which Employment Court decisions received in the Court of Appeal (Hampton, 1998). At the same time the article consistently misspelled the name of one of the five Employment Court judges and mistook the identity of the one Judge who had retired (for these and other errors, see Muir, 1998). In a rare defence of the Employment Court by a Government Minister in recent times, the Attorney-General informed the newspaper by letter that the allegations attacking the integrity of the judges were "highly offensive" (Graham, 1998a). The reporter, her employers and her publisher might have counted themselves fortunate in terms of the limited nature of this response. An earlier example of a complaint that one industrial party could not get fair play from a Court - this time by a union activist - led to a significant fine for criminal contempt (Burrows, 1990: 250-252).

There is then the contested status of the Employment Court. Would abolishing the Employment Court in its present form and creating an employment division of the District Court effectively "downgrade" the Employment Court and its judges and, if so, what are the constitutional implications of such a step? This is a highly technical issue but requires some brief analysis since the Minister of Justice has apparently been advised by the Solicitor General that - as a statutory court - the Employment Court is an inferior court. He has argued that the executive has given every consideration to the constitutional issues and can change the court structures. The 25 page report on the status of the Employment Court has been withheld on grounds of legal privilege (Graham, 1998b).

It is clear that analyses of predecessors to the Employment Court as being "inferior courts" in the technical senses of that term must be read carefully in the light of the changed structure and jurisdiction of the Employment Court. The Court of Appeal had characterised the Arbitration Court as an inferior court in *Quality Pizzas Ltd v Canterbury Hotel Employees IUW* (although this analysis was disputed by Judge Williamson in *Wellington etc Clerical Workers IUW v Greenwich*). In punishing a union for contempt in *NZ Railways Corporation v NZ Seamen's Union (no.2)*, however, Chief Judge Goddard dealt with the concept of the specialist Court as being an "inferior court" by pointing out that that expression does not always have a uniform meaning in New Zealand. In the *Seamen's Union* case, Chief Judge Goddard noted that, in one sense of the term, an inferior Court is "a Court which is subject to the supervision of the High Court so that its decisions may be reviewed by the High Court by way either of appeal or other extraordinary remedy". The Chief Judge noted that:

> "The Labour Relations Act 1987 created the Labour Court with a status different to that of the Arbitration Court. The decisions of the Arbitration Court could be appealed only to the Court of Appeal but its proceedings could still be reviewed in the High Court under its general supervisory power. The Labour Court, however, is in a different position. Applications to review its decisions may not be brought in the High Court but only in the Court of Appeal. There is yet another definition of inferior court which is referred to by the Court of Appeal in the *Quality Pizzas* case. That definition characterises as an inferior court

> 'any Court of judicature within New Zealand of inferior jurisdiction to the High Court' (Judicature Act 1908, s.2). The jurisdiction of the Labour Court is inferior to that of the High Court in the sense that it is narrower, the High Court being a Court of general jurisdiction and of unlimited general jurisdiction. This Court has unlimited jurisdiction but it is not general, it is restricted to a particular field. The jurisdiction vested in the Labour Court by the Labour Relations Act 1987 to deal with certain actions in tort, certain applications for review and to issue injunctions in certain circumstances with rights of general appeal to the Court of Appeal makes considerable inroads into the concept of the Labour Court as an inferior Court."

In *United Food and Chemical Workers Union of NZ v Talley*, the Full Court of the Employment Court indicated that its main concern was that its jurisdiction was not frustrated and that it was unconcerned with the issue "whether some other court may or may not possess a co-extensive, supportive or co-ordinate jurisdiction". Nevertheless, it is clear that the extended jurisdiction enjoyed by the Employment Court under the ECA strengthens the argument in the *Seamen's* case. The High Court no longer possesses the unlimited general jurisdiction which it possessed under the Labour Relations Act 1987, because it is now excluded from actions founded on employment contracts (ECA, ss.3 and 4: *Mazengarb*, paras [3.2] and [4.2]). Appeals from the Employment Court lie to the Court of Appeal, but even these appeals are limited by the prohibition on appeals concerning the construction of an employment contract. The Court of Appeal also has the sole power to review the Court (ECA, ss.131-137: *Mazengarb*, paras [131.2]-[137.2]). The High Court thus possesses no supervisory or appellate jurisdiction in relation to the Employment Court. Restrictions such as this have led to an argument that the Employment Court is, itself, an unconstitutional creation (Robertson, 1996). Since that argument forms no part of the current Government's analysis, it is outside the scope of this paper.

This leaves the argument that specialist courts that are "creatures of statute", such as the Employment Court, are always inferior to those courts which possess inherent jurisdiction. However, at this point the two strands of reasoning become both circular and interlinked, since the concept of inherent jurisdiction is usually tied to the High Court's jurisdiction "to enable it and inferior Courts to act effectively in the administration of the law". In particular, emphasis tends to be given to the High Court's general inherent jurisdiction to protect inferior courts from contempt committed out of court and the High Court's general supervisory jurisdiction over the proceedings of inferior courts (Hardie Boys, 1995: 152). But, as we have seen, the Labour Court punished the Seamen's Union for contempt committed out of court under corresponding powers to those possessed by the Employment Court, and the High Court has no supervisory jurisdiction over the Employment Court.

All of which has led to the conclusion that:

> "Within the New Zealand Court structure, the Employment Court is in a unique position (quite different from the position of its predecessors, such as the Labour Court). It is a superior Court of record with inherent powers, yet with limited jurisdiction. It has both original and appellate roles. Its jurisdiction is principally determined by reference to the EC Act and related legislation, but at the same time, it has jurisdiction in conventional legal and equitable areas such as review proceedings (s.105); tort (s.73), and the granting of injunctive relief (s.74) . . ." (Mazengarb, para [103.2]).

Finally, in terms of perceived "downgrading", the qualifications for appointment, tenure arrangements and remuneration of judges of the Employment Court are parallel to the conditions applying to High Court judges. To paraphrase Judge Williamson in *Greenwich*, this seems to suggest a recognition that judges of the Employment Court are not classified by Parliament as belonging to a Court inferior to the High Court. When the then Attorney-General, Mr Paul East, suggested in 1993 that the Employment Court could be made into a division of the District Court, Chief Judge Goddard commented that:

> "[Two] of our judges came to us - I am sure they would want me to say on promotion - from the bench of the District Court. I can be wrong, but it would amaze me if they would jump, as Mr East suggests they should want to, at the opportunity of once again, as he puts it, getting their teeth into the general jurisdiction of the District Court . . . [To] achieve the more high-minded objectives stated in the Employment Contracts Act it is necessary to move structurally in precisely the opposite direction to that suggested in Mr East's iconoclastic proposition" (Goddard, 1993).

Whilst the constitutional convention that judges do not have their remuneration reduced while in office could be observed by maintaining the current judges on their existing conditions whilst creating new positions for them in the District Court (Graham, 1998b), the reduction in status - for judges and for the Court itself - is not so easily dealt with. The Minister of Justice stated in August 1998 that whilst he was "aware of the sensitivities" in relation to the position of the judges, he could not "freeze the issue in time" (Graham, 1998b).

Although there are therefore some difficult strands to disentangle before deciding that the Employment Court is an "inferior" court in the various technical senses of that phrase, and the issue should not be lightly side-lined, I would argue equally that one should not be diverted into placing undue emphasis on this ground when considering the current proposals. Arguing about the relative hierarchical position of the Employment Court and the ordinary courts entails the risk of impliedly assimilating them by association and thereby blurring the fundamental differences between them.

In *Greenwich*, Judge Williamson went on to draw the conclusion, with respect to the relationship between the Arbitration Court and the High Court, that, "The jurisdictions of each of them are quite separate and . . . each of the two courts is a superior court within its own jurisdiction". In a different context, but to the same broad effect, the current Chief Judge has remarked of the Court's equity and good conscience jurisdiction under s.104(3) that:

> "[The] Employment Court has a special jurisdiction which calls for special decision-making techniques differing markedly from those used in other courts. That is not to say that they are better or worse but it is to say that they are different. The difference may not seem as great as in the past because in the last two decades some of the methodology developed by

> the Court and its predecessors - which at one time may have been almost unique - has now been conferred on or assumed by other courts. The difference is still substantial" (Goddard, 1996).

Judicial vacancies

One further issue relevant to the *Industrial Relations Package* remains to be highlighted. Notably, the Government has failed to provide the resources which the Court needs in order to carry out its functions adequately. The vacancy created by Judge Castle's death in 1995 was not filled despite repeated statements by judges of the Court that the vacancy significantly impaired the Court's ability to function (and even though Judge Castle's intention to retire had been known for some time prior to his death) (Goddard, 1996). A month after the Chief Judge had described the situation as being one of unsustainable crisis (Goddard, 1996), the then Minister of Labour announced simply that he had given "no consideration to the appointment of any person to the Employment Court to replace Judge Castle" (Kidd, 1996). As a predictable consequence, whilst the number of cases dealt with by the Court in 1996 and 1997 decreased from the number heard in the preceding year (*1995*: 185, *1996*: 125, *1997*: 139), with one less Judge the number awaiting hearing in the Court increased (*1995*: 234, *1996*: 284, *1997*: 283, *1998 (as at 30 April)*, 272) (Bradford, 1998c). The impact of delay on perceptions of the Court - particularly when it is constituted under legislation notionally designed to provide accessibility and speedy resolution of disputes - does not need to be emphasised.

When Judge Finnigan was not replaced on his subsequent retirement, so that the original complement of six judges was now reduced by one third, the Chief Judge commented that:

> "This leaves four judges for the whole country . . . to deal with the entire first instance employment jurisdiction previously vested in the High and District Courts and the originating and appellate jurisdiction of the former Labour Court - potentially upwards of 450 cases annually, each capable of lasting from anywhere between half a day and several weeks. The problem stems not just from the number of cases but from the threat to the Court's established ability to react flexibly and in a timely manner where necessary . . . " (Goddard, 1997a).

Whilst the failure to replace Judge Finnigan has been explained in terms of the continuing review of the Court (Bradford, 1998c), this clearly cannot be used to justify the failure to fill the vacancy which existed for the full year preceding the commencement of the review. Again, the implications of a failure to fill two vacant positions, amounting to one third of the Court's complement of Judges, whilst conducting a review of the Court's performance, do not need to be elaborated. Nor do the obvious implications to be drawn from what can

only be described as recent gloating in the business press that the political damage done to the Employment Court would now complicate further appointments even were the Government to change:

> "No decent lawyer wants to subject himself (sic) to the kind of media attention that would inevitably result. But, just as importantly, no one would want to be appointed to a court whose future is to be a political football" (Hampton, 1998).

This is a conclusion seemingly accepted by the Court itself:

> "When things finally do begin to move, it will not be easy to find a suitable candidate prepared to accept an uncomfortable seat on a Bench which is subject to an unremitting campaign from some quarters for its abolition" (Goddard, 1997a).

The current review

By any analysis, then, the future of the present Employment Court under the current Government looks bleak. To quote Mr Max Bradford, in creating the Employment Court in 1991, the Government of the day created institutional arrangements which were "the result of extensive consultation and very careful consideration of the issues involved" (Bradford, 1993). Since then, the Court has not been given adequate resources to perform its judicial functions properly for the past three years; it has been subjected to a campaign of denigration by employer pressure groups during which it has often lacked the support which might have been expected from the executive; and (arguably in breach of constitutional convention) it has been criticised by members of the current Government. The Government has then failed to give appropriate prominence to independent reports it commissioned, which refuted many of those same criticisms.

Whilst the creation of the Employment Court was marked by public submissions and detailed study, in undertaking the current review (whatever its precise status) Mr Bradford recently told Parliament that, "No public submissions have been sought or received" even though "the outcomes of this process are expected in the near future" (Bradford, 1998c).

Access to the relevant papers having been refused (Stockdill, 1998, Graham 1998b), speculation on the outcome of the review is difficult, except to the extent that governmental statements indicate that the favoured option seems to be abolition of the current Employment Court coupled with the creation of a division of the District Court to take its place (Bell, 1998a, 1998b; Rentoul, 1998b). This is strengthened, perhaps, by the proposal in the background papers issued with the *Industrial Relations Package* to amend the ECA so as to give the Employment Tribunal the same jurisdiction as the Employment Court to exercise the various powers available under statutes relating to contract (Department of Labour, 1998a), agreed to by Cabinet in July 1998 (Cabinet, 1998).

As at October 1998, confusion remains even as to what form the review of the Employment Court is taking. Whilst Mr Bradford had referred in the *Industrial Relations*

Package of 23 July to a "review of court structures" being undertaken by the Ministry of Justice, on 9 October the Ministry of Justice stated that there is no "review of the courts" as such (Stephens, 1998). Those scraps that can be salvaged from the information currently available can be summarised as follows:

- The Government is considering abolishing the Employment Court as it is currently constituted and transferring its functions to the District Court (Rentoul, 1998a, 1998b; Bell, 1998b; Graham, 1998b);
- If the change were to occur, the Government does not intend to change the specialist nature of the court thus created (Graham, 1998b);
- The Government has been advised by the Solicitor-General that a transfer of the Employment Court's jurisdiction to the District Court would not, in itself, result in a breach of constitutional principle (Graham, 1998b);
- All material on the issue, including the Solicitor-General's opinion, has been withheld (Stockdill, 1998; Graham, 1998b);
- As at 9 October 1998 there was no "review of the courts" per se, but rather a "series of proposals that relate to the legislative framework and other conventions that govern the role of the judiciary in our society" with the possibility that some of this work may affect the future role of the Employment Court"; there is no background material; nor is there any timetable (Stephens, 1998);
- The officials involved are primarily those of the Ministry of Justice (Stephens, 1998);
- The decision is expected to be made in October or November of this year (Graham, 1998b).
- Whilst the Coalition was alive, the proposal apparently had the qualified support of the NZ First political party and currently has the support of the ACT political party (Shirley, 1998); if these voting patterns were to remain undisturbed after the unravelling of the Coalition, there would be a majority in support of the move in Parliament;

There is, of course, a recent historical precedent. In 1992, the Government replaced appeals to a specialist Accident Compensation Appeal Authority with appeals to the District Court. Mr Bill Birch explained this on the basis, amongst other things, that more "robust" and less activist decisions would be delivered in this area under the Accident Rehabilitation and Compensation Insurance Act 1992. The experiment was widely regarded as a failure and in some respects led to lengthy delays (Todd, 1997). Similarly, replacing the present Court structure with an employment division of the District Court has obvious potential drawbacks for workers, unions and employers in terms of ease of speed, access, lay representation and cost, unless any new division attracted its own rules in these and other respects. Arguably, any such drawbacks would be more pronounced in the case of employees, even if it were to be assumed that other elements of the Court's general jurisdiction - such as the "equity and good conscience" clause - would be preserved. It is

relevant, in this context, to recall that Mr Max Bradford emphasised the significance of the current institutional framework in terms of protecting vulnerable workers, when answering allegations that the ECA discriminated against them (Bradford, 1991).

Nor would such a move win unqualified accolades from employer groups. The New Zealand Business Roundtable sees no room for employment law, leave alone specialist employment law institutions whether "stand alone" courts or divisions of the ordinary courts (Brook, 1990). The New Zealand Employers' Federation favours, at most, a specialist division of the High Court, thereby removing one tier of the appeal structure were the District Court to inherit jurisdiction from the Employment Court (Anderson, F. 1998).

Nevertheless, the unrelenting campaign by these organisations to extinguish the current Employment Court would have succeeded. Were the current judges not to take up positions in any newly created employment division of the District Court, their victory - if that is the right word - would be complete. At the same time, arguably, an extremely dangerous constitutional precedent would have been set.

References

Auckland District Law Society (ADLS) Public Issues Committee (1995), *Of Judges' Words and Apron Strings*, Auckland, ADLS.

Anderson, F. (1998), "Employment Court Next on Coalition's Reform Agenda", *National Business Review*, Wellington, 31 July 1998.

Anderson, G. (1997), "Interpreting the Employment Contracts Act: Are the Courts Undermining the Act?" (1997), *California Western International Law Journal* **(29):** 117.

Baird, C.W. (1996), *The Employment Contracts Act and Unjustifiable Dismissal*, Wellington, NZBR/NZEF.

Bartlett, P. (1998), *Review of the Literature: Review of the Institutions/ECA*, unpublished paper held by Department of Labour.

Bell, Cathie, (1998a) "Peters Now Likely to Torpedo Court Move", *The Dominion*, Wellington, 28 April 1998.

Bell, Cathie, (1998b), "Peters Backs off Employment Court Stand", *The Dominion*, Wellington, 29 April 1998.

Birch, W.F. (1993), Address to the New Zealand Institute of Industrial Relations Research Conference on *Employment Law: Present Developments and Future Issues*, unpublished paper, available from Butterworths of NZ Ltd, Wellington, 8 October 1993.

Birch, W.F. (1997), Speech to the Wellington District Law Society, unpublished, 7 June 1997.

Bradford, M. (1991), Speech, (1991), 514 *NZ Parl Deb* 1452.

Bradford, M. (1993), "The Future of the Employment Court and Tribunal: The Government View", speech notes to the New Zealand Institute of Industrial Relations Research Seminar, *The Future of the Employment Court and the Employment Tribunal*, unpublished, 23 April 1993.

Bradford, M. (1997a), "What Happens Now?", Ministerial Address, Labour-Management-Government Relations Seminar, unpublished, 20 March 1997.

Bradford, M. (1997b), Address to the Government in Business Summit, unpublished, 3 April 1993.

Bradford, M. (1997c), Speech to the Employers and Manufacturers' Association Employment Relations Conference, unpublished, 8 July 1997.

Bradford, M. (1997d), Answer to oral question, *Hansard*, 19 March 1997.

Bradford, M. (1997e), Answer to written question, *Hansard*, Questions Supplement, 1997, 3597.

Bradford, M. (1998a), Media Release: "Industrial Relations Package - Good for New Zealand", 23 July 1998.

Bradford, M. (1998b), Speech to the Employment Law Institute, unpublished, 31 July 1998.

Bradford, M. (1998c), Answers to written questions, *Hansard*, Questions Supplement, 1998, 1075-1079.

Bradford, M. (1998d), *Industrial Relations Package*, media release, Department of Labour, 23 July 1998.

Bradley, A.W. and Ewing, K.D. (1996), *Wade and Bradley's Constitutional and Administrative Law*, Oxford, Oxford University Press.

Brazier, R. (1988), *Constitutional Practice*, Oxford, Clarendon Press.

Brook, P. (1990), *Freedom at Work*, Auckland, Oxford University Press.

Burrows, J.F. (1990), *News Media Law in New Zealand*, 3rd ed, Auckland, Oxford University Press.

Burrows, J.F. (1992), *Statute Law in New Zealand*, Wellington, Butterworths of NZ Ltd.

Cabinet (1998), Cabinet document CAB (98) M 25/15.

Cabinet Office Manual, Office of the Prime Minister and Cabinet, Wellington, 1996.

Campbell, G. (1997), "The Max Factor", interview with Max Bradford, *New Zealand Listener*, 3-9 May 1997, 24.

Cooke, R.B. (1988), "Fundamentals" [1988] *New Zealand Law Journal*, 158.

Dannin, E. (1997), *Working Free*, Auckland, University Press.

De Q Walker, G. (1988), *The Rule of Law - Foundation of Constitutional Democracy*, Sydney, Law Book Co Ltd.

Deakin, S. and Morris, G.S. (1995), *Labour Law*, London, Butterworths.

Deeks, J. (1997), "Business and Politics", in Miller (ed.), *New Zealand Politics in Transition*, Auckland, Oxford University Press.

Department of Labour, (1996), *Post-Election Brief*, October 1996.

Department of Labour, (1997), *Bargaining Issues Paper*, 25 June 1997.

Department of Labour, (1998a), *Outstanding industrial relations initiatives; and other technical issues*, undated paper, 1998.

Department of Labour, (1998b), *Issues Paper on Personal Grievances*.

Department of Labour, (1998c), *Contract*, Industrial Relations Division, Department of Labour, September 1998.

Goddard, Chief Judge, T.G. (1993), "The Role of the Employment Court", Paper delivered to NZIIRR Seminar, unpublished but available through Butterworths of NZ Ltd, Wellington, 23 April 1993.

Goddard, Chief Judge, T.G. (1996), "Decision-Making Techniques in the Employment Court", Speech to the Employment Law Institute, unpublished, 28 August 1996.

Goddard, Chief Judge, T.G. (1997a), "Curial Institutions Under the Employment Contracts Act: 1991 to 1997" *California Western International Law Journal*, **(28):** 103.

Goddard, Chief Judge, T.G. (1997b), "The Employment Court and the Role of Full Courts" *Employment Law Bulletin*, 134.

Graham, D. (1998a), Letter to *National Business Review*, Wellington, 3 July 1998.

Graham, D. (1998b), *Minutes of a meeting held between Wellington Women Union Advocates and Minister of Justice*, 6 August 1998 (unpublished memorandum, prepared by WWUA).

Hampton, P. (1998), "Friends at Court for the Unions - Uncle Tom Goddard, et al.," *National Business Review*, Wellington, 15 May 1998.

Harbridge, R., Crawford, A. and Kiely, P. (1998), *Bargaining Trends and Employment Law Update 1997/98*, Wellington, Victoria University Press.

Hardie Boys, the Rt Hon Justice (1995), "Courts" in *The Laws of New Zealand*, Wellington, Butterworths of NZ Ltd.

Harrison, R. (1991), *The Employment Contracts Act 1991: Some Key Legal Issues*, Continuing Legal Education Papers, Auckland, NZ Law Society.

Henare, T. (1996), New Zealand First Policy Release, *Industrial Relations*, unpublished, 26 September 1996.

Hodder, J., Holden, S. and Coleman, M. (1998), *Review of The Institutions and the Employment Contracts Act 1991 - The Meaning of Unjustifiable Dismissal*, unpublished paper held by the Department of Labour.

Howard, C. (1995), *Interpretation of the Employment Contracts Act 1991*, Wellington, NZBR/NZEF.

Hughes, J. (1996), "Fixed Term Contracts in the Private Sector after *Hagg*" [1996] Employment Law Bulletin 46.

Hughes, J. (1997), "The Employment Court, 'Judicial Activism', and the Coalition Agreement" *California Western Journal of International Law*, **(28):** 167.

Johnston, K. (1998), "Redundancy: Swings and Roundabouts" *Employment Law Bulletin*, 86.

Kelsey, J. (1993), *Rolling Back the State*, Wellington, Bridget Williams Books.

Kelsey, J. (1997), "Mad Max and the Future of the ECA", *Labour Notes*, Wellington, March 1997, 6.

Kidd, D. (1996), Answer to written question, (1996) 24 *NZ Parl Deb* Questions Supplement 6216.

Laugeson, R. (1997), "Bid to Toughen Employment Contracts Act", *Sunday Star Times*, 23 March 1997.

Luxton, J. (1996), Answer to oral question as acting Minister of Labour, [1996] 555 *NZ Parl Deb* 3597.

Macfie, R. (1997), "Spring Clean or Major Renovation for ECA?" MG Business, *Mercantile Gazette*, 4.

Mazengarb (1995), *Mazengarb's Employment Law*, 5th ed., Wellington, Butterworths of NZ Ltd.

Muir, P. (1998), "Judge Judges on their Record, Not Perception", *National Business Review*, 12 June 1998.

NZ Business Roundtable (1995), *Appeals to the Privy Council*, Wellington, NZBR.

NZ Business Roundtable/NZ Employers' Federation, (1992), *A Study of the Labour/Employment Court*, Wellington, NZBR/NZEF.

Palmer, Sir G. and Chen, M. (1993), *Public Law in New Zealand*, Auckland, Oxford Univeristy Press.

Palmer, M. (undated), "Employment Court", memorandum to Minister of Justice.

The Press (1997), Unattributed article, 2 April 1997, "Chief judge 'real target' in effort to abolish court", summarising material in a Labour Party publication, *Work*.

Rentoul, M. (1998a), "Alarm over integration of courts", *The Press*, 28 April 1998.

Rentoul, M. (1998b), "Coalition partners may fall out over moratorium plan", *The Press*, 29 April 1998.

Robertson, B (1996), *The Status and Jurisdiction of the New Zealand Employment Court*, Wellington, NZBR/NZEF.

Roper, B. (1993), "A Level Playing Field? Business Political Activism and State Policy Formation", in B. Roper and C. Rudd (eds), *State and Economy in New Zealand*, Auckland, Oxford University Press.

Shirley, K. (1998), "Employment Court Proposals", press release, 28 April 1998.

Schwab, S. (1997), "Study of New Zealand Courts Game-Theoretic Model of Adjudication", unpublished paper held by the Ministry of Justice, 15 May 1997.

Soper, B. (1998), Broadcast, Radio New Zealand, *Morning Report*, 27 April 1998.

State Services Commission (1997), *Information supplied by the Public Service in response to requests made by political parties taking part in coalition formation talks*, Wellington, State Services Commission.

Stephens, Alison, on behalf of Secretary for Justice (1998), letter to author, 9 October 1998.

Stockdill, R.A., General Manager, Department of Labour (1998), Letter to the author, 8 September 1998.

Todd, S.M.D. (ed.), (1997), *The Law of Torts in New Zealand*, (2nd ed.), Wellington, Brookers of NZ Ltd.

Walsh, P. and Ryan, R. (1993a), "The Making of the Employment Contracts Act", in R. Harbridge (ed.), *Employment Contracts: New Zealand Experiences*, Wellington, Victoria University Press.

Walsh, P. (1993b), "Common Law vs Labour Law; the New Zealand Debate" *Australian Journal of Labour Law*, **(6):** 230.

Wilson, M. (1995), "Policy, Law and the Courts: An Analysis of Recent Employment Law Cases in New Zealand", *Australian Journal of Labour Law*, **(8):** 203.

Decisions cited

Aoraki Corporation Ltd v McGavin [1998] 1 ERNZ 601.

Brighouse Ltd v Bilderbeck [1994] 2 ERNZ 243.

Hagg v Principal of the Auckland College of Education [1995] 2 ERNZ 239.

NZ Fire Service Commission v Ivamy [1996] 1 ERNZ 85.

NZ Railways Corporation v NZ Seamen's Union (No.2) (1989) 2 NZELC 97,281.

Quality Pizzas Ltd v Canterbury Hotel Employees IUW [1983] 2 NZLR 612.
United Food and Chemical Workers Union of NZ v Talley [1992] 1 ERNZ 756.

Wellington etc. Clerical Workers etc IUW v Greenwich [1983] ACJ 965.