A CONTRACT LAW PERSPECTIVE ON THE INDIVIDUAL/COLLECTIVE EMPLOYMENT CONTRACT NEXUS: WHAT IS THE STATUS OF A SECTION 19(2) AGREEMENT?

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The concept of the collective employment contract under the Employment Contracts Act 1991, and its relationship to the individual employment contract, are relatively unexplored areas.[1] This is perhaps because on one level, the contractually focused regime of the Act appears to be functioning as a coherent mechanism for defining and regulating employment relationships. Nevertheless, it is arguable that employment contract law is not as coherent as it might appear to be in practice. One area in which this is particularly evident is where individual terms are negotiated while a collective employment contract is in force. Section 19(2) of the Employment Contracts Act makes provision for the separate negotiation of individual terms where a collective employment contract already binds the parties concerned. Thus, where a collective employment contract serves as the basis for the employment relationship between one or more employers and two or more employees, s19(2) enables an employer and employee to negotiate individual terms that are not inconsistent with the underlying collective document.

Analysis of s19(2), however, raises conceptual difficulties in relation to the contractually based regime of the Act. The aims of this paper are to query the precise legal status of individual arrangements entered into pursuant to s19(2); suggest why the conceptual difficulties raised in connection with s19(2) have not hitherto presented obvious problems in practice; and account for the cause of these conceptual difficulties. First, it will be suggested that individually negotiated terms under s19(2) are not actually enforceable on their own under the Employment Contracts Act. Secondly, it will be shown that the popularly understood legal position surrounding the relationship between collective and individual employment contracts has its basis, quite naturally, in assumptions carried over from prior industrial legislation, and that these historical assumptions play a significant role in making the regime under the Employment Contracts Act seem more coherent than it actually is. Thus, there is an apparent disjunction between current practice, which is based on these historical assumptions and which holds that individually negotiated terms become provisions of an employee's employment contract, and employment contract theory, as it can be put together from the Employment Contracts Act itself and the common law principles of the law of contract. Finally,

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1 For an early analysis, when the Employment Contracts Bill was before the Labour Select Committee, see A Szakats, "What is a Collective Employment Contract?" [1991] ILB 14.

it will be suggested that the root cause of the conceptual difficulties thrown up in this analysis of s19(2) is the statutory concept of the collective employment contract itself, which, as defined as a contract of service, is an entirely ideologically-driven concept.

Defining the Problem

Subsections 19(2) and (3) provide as follows:

> (2) Where there is an applicable collective employment contract, each employee and the employer may negotiate terms and conditions on an individual basis that are not inconsistent with any terms and conditions of the applicable collective employment contract.
> (3) Where an employee negotiates terms and conditions under subsection (2) of this section, that employee is still bound by the applicable collective employment contract.

The expression "applicable collective employment contract" is defined in s2 as "the collective employment contract that is binding on the relevant employee, employees, employer, or employers (as the case may require) at the relevant point in time".

It is commonly assumed from these provisions that it is possible to be a party concurrently to both a collective employment contract and an individual employment contract. That this assumption is widely held should hardly be surprising when it has been promoted by the Department of Labour and its Minister. For example, when introducing the Employment Contracts Bill into the House of Representatives for its first reading, the then Minister of Labour, the Hon. Bill Birch, explained that:

> Individual contracts may be negotiated at any time provided they are not inconsistent with the applicable collective contract. Thus no employee can be worse off under an individual contract while he or she is covered by an existing collective contract.[2]

Likewise, in its otherwise quite helpful *Guide to the Employment Contracts Act 1991,* the Industrial Relations Service includes in its description of bargaining options under the Act the following statement:

> Individual employment contracts may be negotiated at any time, but if the employee is party to a collective employment contract, the terms and conditions of *the new individual employment contract* must not be inconsistent with the applicable collective employment contract. *The combination of the collective and individual employment contracts form the employee's individual terms and conditions of employment.*[3]

In a later passage which purports to describe the relationship between individual and collective employment contracts, this view regarding the possibility of being bound by an individual and a collective employment contract concurrently is repeated:

2 (1990) 511 New Zealand Parliamentary Debates 480 (19 Dec 1990).
3 Para 2.5.2 (emphasis added).

> The term "not inconsistent" is a legal term, meaning that there can be no conflict or incompatibility between *an individual employment contract* and an applicable employment contract.[4]

However, in another part of that same passage the language shifts, introducing an element of ambiguity into the precise nature of the relationship:

> The Act allows individuals covered by an applicable collective employment contract *to add individual terms to that collective employment contract.* This combination of the individual and collective terms determines a single set of terms and conditions of employment for each individual employee covered by the collective employment contract.

This view of the relationship is reiterated at the end of the same paragraph by two passages which summarise the position as involving "individual terms and conditions" that are "additional" or "added to" the terms and conditions of the "applicable collective employment contract".[5] This conception of s19(2) as a provision enabling the *addition* of new terms to a collective employment contract was, in fact, clearly enunciated by the Department of Labour in its Report on the Employment Contracts Bill to the Labour Select Committee:

> The intention of the Bill in allowing individuals covered by an applicable collective employment contract to individually contract is to allow individual terms, such as bonuses, to be added to a collective employment contract.[6]

The position on this view of the relationship is that the individual terms and the collective employment contract combine to make up something other than a conventional collective employment contract: a contractual hybrid comprised of individual terms added to a collective employment contract to form a "customised" collective employment contract, as it were, for an individual employee.

To sum up, therefore, the Department of Labour material on the issue suggests two variants of the type of contractual relationship that is contemplated by subsection 19(2): one involves the concurrent existence of an individual employment contract and a collective employment contract, while the other involves individual contractual terms that are to be added to the collective employment contract.

Pronouncements from the Employment Court relevant to this issue to date are not particularly helpful, but they tend to lend weight to the first variant discussed above. In *Prendergast* v *Associated Stevedores,*[7] Travis J remarked that:

4 Para 2.6.1 (emphasis added).

5 (A) and (C) of the summary to paras 2.6.1; cf also the Industrial Relations Service booklet *Employment Contracts & Employment Rights: A Brief Guide to Your Rights* (May 1993) 6.

6 *Employment Contracts Bill: Report of the Department of Labour to the Labour Select Committee* (April 1991) 47.

7 [1992] 1 ERNZ 737, at 747.

> When the collective employment contract expires, the employer continues to be bound by an individual employment contract, whether individually negotiated or not, which is based on the expired collective employment contract. Any individual terms and conditions which may have been expressly negotiated [under s19(2)] would be included, as would any terms which might be implied.

In *United Food & Chemical Workers Union of New Zealand* v *Talley,*[8] Goddard CJ, delivering the judgment of the Full Court, simply remarked that there were a number of provisions in the Act "which indicate that the individual [employment] contract is subservient to the collective contract during the latter's currency." However, the issue has yet to be directly dealt with on its own as a contentious legal issue.

Before wading further into this conceptual morass, it is as well to ask at this point whether the type of contractual relationship contemplated by s19(2) indeed matters at all. What precisely is at stake aside from conceptual clarity? It is submitted that unless the individual terms referred to in s19(2) are capable of constituting an individual employment contract (assuming that it is possible to be bound by two concurrent contracts of service for the same position); or unless the individual terms are capable of being incorporated into an existing contract of service; or unless they are otherwise rendered enforceable by a specific statutory provision, such terms will be unenforceable on their own account under the Employment Contracts Act. This is because the specialist employment institutions have no jurisdiction over a "stand alone" agreement between an employer and an employee that is neither itself a contract of service nor part of a contract of service, even though it may deal with employment-related matters: *Hands* v *WEL Energy Ltd,* [1992] 1 ERNZ 815 (C.A.).[9] Section 3(1) of the Employment Contracts Act provides that the legislation applies only to employment contracts, and that the exclusive jurisdiction of the institutions established under it is for the hearing and determination of "any proceedings founded on an employment contract".

It is not known for certain how many employment relationships are governed by such combinations of collective and individual terms. According to a survey carried out in April 1992 by the Employers' Federation, the particular type of contractual arrangement applying to 13 percent of the respondents' predominant employee group consisted of a combination of collective and individual terms.[10] According to a survey commissioned by the Department of Labour and carried out by the Heylen

8 [1992] 1 ERNZ 756, at 779.

9 Gault J's decision in this case involved the suggestion that a "stand alone" redundancy agreement was not a contract of service, and it could not form part of a contract of service unless it was incorporated by reference into one. See also R Harrison, *The Employment Contracts Act 1991: Some Key Legal Issues* (1991, Auckland District Law Society) 7-9. For the jurisdiction of the specialist employment institutions, see ss3, 4, 79 (Employment Tribunal), and 104 (Employment Court).

10 (1992) The Employer (July, No. 130) 2-3. The Employers' Federation surveyed 10,000 employers of the four regional employers' associations. There were 1,172 responses, covering a total of 200,833 employees.

Research Centre and Teesdale Meuli & Co in August 1992,[11] the contract structure governing the employment relationship of 5 percent of the respondents' employees was a combination of individual and collective terms. All of these figures probably reflect to a large extent the survival of arrangements entered into under the Labour Relations Act 1987, where awards or agreements were extant.

Do Terms Negotiated under s19(2) Constitute an Individual Employment Contract?

The Employment Contracts Act makes provision for two types of employment contracts, the "collective employment contract" and the "individual employment contract". The expression "employment contract" is defined in s2 as "a contract of service". When, therefore, one speaks in terms of being bound at once by both an individual and a collective employment contract, one is really saying that an employee is capable of being bound by more than one contract of service at the same time, despite the fact that the employee in question holds but one position.[12] However, it seems conceptually difficult to accept that an employee could be bound by *both* a collective and an individual employment contract concurrently if *each* is a contract of service.[13] If, on the other hand, one concedes that an employee with one position can be subject to two contracts that relate to his or her employment, it may be that in reality only one of these will be the actual basic contract of service, and it will be the one that contains the essential characteristic of such a contract, which must surely be the wage-work bargain.

A strict construction of the relevant provisions of the Employment Contracts Act lends support to the view, offered above, that an individual cannot be bound by more than one contract of service in respect of a single position. Similarly, while employers may enter into both individual and collective contracts with their workforce, they are only given the power to bind themselves to an individual employee by *either* an individual *or* a collective employment contract. The difference is that the employer may also be able to choose to be bound to some employees by a series of individual employment contracts, and to a group of others by one collective employment contract.

11 Department of Labour, *Contract* (Special Edition, November 1992) 2. This survey was based on responses from a random sample of enterprises, 1,000 randomly selected employees, and 500 directors randomly selected from the Business Who's Who.

12 Cf J R P Horn et al, *Employment Contracts* (Wellington, 1993) vol 1, EC 9.06: "Employees who are covered by a collective employment contract are also likely to be subject to an individual employment contract"; cf *Mazengarb's Industrial Relations and Industrial Law in New Zealand* (Wellington, 1993) vol I, div A, p22, and G Anderson, "The Employment Contracts Act 1991: an Employer's Charter?" (1991) 16 NZJIR 127, 138.

13 It is of course theoretically possible that employment could be divisible into separate jobs. Such an example might be posited, *mutatis mutandis,* on the basis of the working relationships held to exist in *Gisborne Sharefisherman's Association (Inc)* v *J Wattie Canneries* [1982] ACJ 629, where a contract was "split" into a contract of service and a contract for services, covering fishermen's dock work and boat work respectively.

First, paragraph (c) of the the Long Title states that one of the objects of the Act is:

> To enable each employee to choose *either* –
> (i) To negotiate an individual employment contract with his or her employer; *or*
> (ii) To be bound by a collective employment contract to which his or her employer is a party.[14]

This paragraph does not explicitly make provision for any further arrangement whereby an employee can be a party to a combination of each type of employment contract. By way of comparison, paragraph (d), which outlines the basic options of the employer, does not contain the "either . . . or" construction which limited the apparent range of choices of individual employees in paragraph (c); paragraph (d) states the following object:

> To enable each employer to choose –
> (i) To negotiate an individual employment contract with any employee;
> (ii) To negotiate or to elect to be bound by a collective employment contract that binds 2 or more employees.

Moreover, the specification of options in terms of a mutually exclusive choice to be made by the employee through negotiation is repeated in s9(b), the object section of Part II of the Act, which deals with bargaining. Section 9(b) states that:

> Appropriate arrangements to govern the employment relationship may be provided by an individual employment contract *or* a collective employment contract, with the type of contract and the contents of the contract being, in each case, a matter for negotiation. [emphasis added]

Accordingly, if the above interpretation is correct, paragraph (e) of the Long Title, which provides that an aim of the Act is "[t]o establish that the question of whether employment contracts are individual or collective *or both* is itself a matter for negotiation by the parties themselves" (emphasis added), will need to be qualified in the way suggested by subsection 18(1)(b). Subsection 18(1)(b) includes among the matters that may be the subject of negotiations for an employment contract "[t]he number and mix of employment contracts to be entered into by any *employer*" (emphasis added). The phrase "or both" in paragraph (e) of the Long Title therefore should only be applicable to those employers who are contractually bound to part of their workforce by individual employment contracts, and to part by a collective employment contract. Thus, by impli-

14 Emphasis added. The difference in expression, whereby an employee "negotiates" an individual employment contract, but "is bound by" a collective employment contract, seems to be due to the fact that in the latter instance, an individual employee throws his or her lot in with others, and is normally bound by a ratification procedure; cf s16.

cation the number and mix of employment contracts to be entered into by any *employee* cannot be a matter that is negotiable since an employee can be subject to only one of the two possible types of employment contract at a time.

A further indication that s19(2) does not contemplate the concurrent existence of an individual employment contract and a collective employment contract is the drafting history of the provision. In the Employment Contracts Bill as originally introduced into the House of Representatives for its first reading, cl. 13(2) and (3) provided as follows:

> (2) Where there is an applicable collective employment contract, each employee and the employer may enter into or perpetuate an *individual employment contract* that is not inconsistent with that collective employment contract.
> (3) Where there is an applicable collective employment contract and an employee and an employer enter into or perpetuate an *individual employment contract,* the collective employment contract shall prevail to the extent that there is any inconsistency between the *individual employment contract* and the collective employment contract. [emphasis added]

In the Bill as reported back from the Labour Committee, however, the phrase "terms and conditions [negotiated] on an individual basis" was substituted for the expression "individual employment contract", and this was the version which was eventually enacted into law.

Finally, if anecdotal evidence may be accepted from this author's (admittedly limited) experience in perusing individual employment contracts that have been negotiated on top of collective employment contracts, the former tend in legal terms to be *elucidations* of the collective employment contract. That is, they merely fill in details which had already been agreed upon in the collective employment contract.[15] They have been standard form contracts that are only "individualised" to the extent that they contain the employee's salary in a schedule, but always in terms of a scale already agreed upon in the collective employment contract.[16] Moreover,

15 Cf *New Zealand Needle Manufacturers Ltd* v *Taylor and Another* [1975] 33, at 39-40, and *Chitty on Contracts* (26th ed, London 1989) vol I, para 1603.

16 Cf R Harbridge, "Collective Employment Contracts: A Content Analysis," in R Harbridge, ed, *Employment Contracts: New Zealand Experiences* (Wellington, 1993) 70, at 76. To complicate matters further, however, the Department of Labour has recently noted a trend towards "individualised pay" in its analysis of collective employment contracts lodged with it pursuant to s24, which requires employers to submit collective employment contracts that bind 20 or more employees to the Secretary of Labour. "Individualised pay" means that

> while the collective sets almost all the terms and conditions of employment, and perhaps even a minimum adult pay rate, the contract provides for the rates of pay for each employee to be negotiated individually between the employer and that employee without setting pay scales within which they can agree (*Contract* (July 1993) 3).

It is to be questioned whether such documents are, strictly speaking, collective employment contracts at all, since the essence of a contract of service is the wage-work bargain.

they also have often contained express provisions which set out existing duties at common law and equity. For example, there may be terms dealing with various duties of care, confidential information, and conflicts of interest, which in any case would be implied into all collective employment contracts as contracts of service.

Are Terms Negotiated under s19(2) Incorporated into the Applicable Collective Employment Contract?

If s19(2) does not envision the concurrent existence of individual and collective employment contracts, does it then make provision for the addition or incorporation of individual terms and conditions into the collective employment contract? The addition of terms to a contract would normally constitute a purported *variation* of the contract. Accordingly, since a collective employment contract is a multilateral contract, it would normally require the consent of the other parties to it. Indeed, one of the very objects of collective bargaining is to strengthen employees' bargaining position through mutual support, whereas individual bargaining for better terms tends to undermine the power of the collective by enabling employer parties to pay the lowest possible market price for their labour; the bargaining power of the weakest is thus not increased to the level it might be by the greater bargaining power of the strongest members of the collective if the strongest can bargain individually outside the collective.

Variation of a collective employment contract is provided for by s23, which empowers all of the parties to such a contract to agree in writing to a variation "of any or all of its provisions". The fact that all of the parties to the contract must agree to the variation is in accordance with the normal rules of contract.[17] The type of variation contemplated by s19(2), however, functions as a statutory override of the usual contract rules regarding variation of a multilateral contract, and it is entirely consistent with the underlying philosophy of the Act, which is to promote individual rights over those of a collective nature. The power to vary under s19(2) differs from that conferred under s23 in that (1) it is not a requirement of s19(2) that all of the parties to the contract agree to the variation; (2) there is no requirement that terms negotiated under s19(2) be put in writing, unlike variation of collective terms under s23; and most importantly (3) the addition of individual terms would not, strictly construed, constitute a variation "of any or all of [the] provisions" of the collective employment contract, since such an addition would be limited in its effect only to the relationship as between the individual employee and the employer and would be required to be consistent with the applicable collective employment contract.

17 Cf R Harrison, supra n9 at p10, and n20. This provision has been viewed as an inconvenience by the New Zealand Employers' Federation for being "unduly restrictive"; it suggests that the Employment Contracts Act should enable variation only by those parties who are "affected directly by the variation", without having to obtain *all* of the original parties' agreement: *A Review of the Employment Contracts Act* (20 December 1991) 16-17, and *Submission to the Labour Parliamentary Select Committee on the Review of the Employment Contracts Act 1991* (26 May 1993) 22-23.

In the event, however, s19(2) does not explicitly provide that the individually negotiated terms are to be considered as actually added to or incorporated into the collective employment contract. In fact, subsection 19(3) impliedly preserves a conceptual distinction between the two, since it provides that where individual terms have been negotiated, the employee "is still bound by the applicable collective employment contract."

If the purported function of s19(2) is to enable changes to be made in the contractual relationship as between an individual employee and the employer, the provision does not actually provide that individual terms shall be incorporated into the applicable collective employment contract. It might easily have done this through a statutory provision to that effect, which would have overridden the common law applicable to the variation of multilateral contracts. Section 19(2), however, like many of the provisions of Part II of the Act that deal with the various freedoms of choice in respect of bargaining, is a permissive as opposed to a prescriptive provision. It merely sets out what the parties are free to do, provided that they do not interfere with the sanctity of the applicable collective employment contract; this sanctity of contract is reinforced by subsection 19(3).[18]

Indeed, the incorporation of individually negotiated terms into the (collective) contract of service that binds the individual employee and the employer would be technically impossible without a statutory provision expressly deeming the contract to be modified to the requisite extent. This is because the legal rules governing incorporation will not permit the incorporation of terms into a contract unless that contract (here, the collective employment contract) expressly incorporates those terms by setting them out in the document itself ("incorporation by signature"); or by explicitly referring to them in the contract ("incorporation by reference"); or, where no document is signed,[19] notice is given to the other party

18 This reinforcement of the sanctity of the terms of the applicable collective employment contract is necessary in view of s25, which would otherwise have permitted an individual term that was inconsistent with the applicable collective employment contract to stand. Section 25 provides as follows:

> **Application of law relating to illegal contracts** – The fact that a contract has been entered into in contravention of any of the provisions of this Part of this Act or that an act which contravenes any of the provisions of this Part of this Act has been committed in the course of the performance of any contract shall not –
>
> (a) Make that contract illegal; or
>
> (b) Except as expressly provided in this Act, make that contract or any provision of that contract unenforceable or of no effect.

Subsection 19(3), however, satisfies the "express provision" requirement of s25(b), which has the effect of rendering the inconsistent term "unenforceable or of no effect".

19 Note that although a collective employment contract is required to be "in writing" (s20 (3)(b)), there is no requirement that it actually must be signed by the parties.

that terms are to be incorporated into the contract from another source ("incorporation by notice").[20] Whatever the method of incorporation relied upon, however, *the process of incorporation must take place at the time of the formation of the contract.*[21]

Thus, once there is in existence a written document (and this is the requisite form for a collective employment contract), one cannot then incorporate different or additional terms into the contract by the above methods of incorporation unless either all of the parties to the multilateral contract agree, or there is some statutory mechanism that enables the effect of the common law to be overriden. That was precisely the function of s174 of the Labour Relations Act 1987. Moreover, in the case of inconsistency between the document that incorporates and the term that is incorporated, the former in any case would prevail over the latter without the need of any statutory provision such as s19(2) to that effect.[22]

The Root of the Problem

The source of the conceptual problem discussed here can be isolated as stemming from the fact that a collective employment contract is itself a contract of service rather than an instrument that is incorporated into a contract of service. As a consequence, there is a need of some legal mechanism by which individually negotiated terms can become part of an individual employee's contract of service. The position under the Employment Contracts Act, therefore, is precisely the reverse of the traditional quandary surrounding the means by which collective agreements are able in law to become part of individual contracts of service,[23] so that breach of the collective provisions may give rise to an action for breach of an individual's contract of service.

When the employment relationship is entered into, a contract of service is created. This is a common law concept. In terms of the Employment Contracts Act, one would say that this relationship gives rise, at least initially, to an individual employment contract. However, a collective em-

20 See *L'Estrange* v *F Graucob Ltd* [1934] 2 KB 394, *Curtis* v *Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; cf G J Tolhurst, "Contractual Confusion and Industrial Illusion: A Contract Law Perspective on Awards, Collective Agreements and the Contract of Employment," (1992) 66 ALJ 705.

21 Cf *Chitty on Contracts* (26th ed, London, 1989) vol II, para 3890; 16 *Halsbury's Laws of England* (4th ed Reissue, 1992) para 55. Where a collective instrument is specifically incorporated into an individual's contract of service, any subsequent instruments that succeed the original one in force when the contract of service was entered into will continue to be incorporated unless there is a contrary intention expressed in the incorporating document; cf *National Coal Board* v *Galley* [1958] 1 All ER 91 (CA).

22 Cf *Modern Buildings Wales Ltd* v *Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, at 556 per Buckley LJ (CA): "if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported."

23 For recent discussions of the conundrum in the context of Australian labour law, see R J Mitchell and R B Naughton, "Collective Agreements, Industrial Awards and the Contract of Employment", (1989) 2 AJLL 252, and Tolhurst, supra note 20.

ployment contract is also defined as a contract of service by s2 of the Act. Under the Act, therefore, it is theoretically possible to enter into the employment relationship *ab initio* by means of a collective employment contract. Section 21, however, does not seem to recognise this possibility. Section 21 provides as follows:

> **New Employees** – If a collective employment contract contains a term allowing the extension of its coverage to other employees *employed* by any employer bound by it, any such other employee may, in addition to the employees who are parties to it, become a party to, and be covered by, that collective employment contract if that employer and any such other employee so agree. (emphasis added)

Section 21 appears to assume that in so far as that provision covers new employees, as the marginal note suggests is its primary function, there is *already* an employment relationship existing between the new employee and the employer. This is because s21 refers to employees such as new employees simply as "other employees *employed* by any employer". Moreover, the existence of a prior employment relationship arising out of a concluded contract of service in the case of the new employee who is proposed to be bound by a collective employment contract is supported by the definition of "employee" in s2 as including "a person intending to work", which in turn is defined as "a person who has been offered, and accepted work." Therefore, even in the case of new employees who are to be bound by a collective employment contract, there seems to be contemplated a prior contractual relationship. This relationship in turn must be the classical common law contract of service, which in the language of the Act is known as an individual employment contract, since it binds one employer and one employee.

As a consequence, whether employment is entered into, as it normally is, on the basis of an individual employment contract, or whether it is entered into with the immediate contemplation of being bound by a collective employment contract, it would appear that, initially at least, all employees are bound by an individual employment contract. What happens to this individual contract of service after the employee becomes a party to a collective employment contract? Do its rights and obligations remain "live" in so far as they are not inconsistent with the applicable collective employment contract? Or are the terms of the individual contract of service entirely extinguished?

The answer, it is submitted, is provided by s19(2) itself. That provision deals only with "new" terms negotiated after the applicable collective employment contract has been entered into. Accordingly, because a collective employment contract is itself defined as a contract of service, there occurs what is known as a "novation" of the contract of service when the collective employment contract is entered into:[24] the former individual em-

24 Cf 9 *Halsbury's Laws of England* (4th ed, 1974) paras 570, 578.

ployment contract is rescinded and replaced in its entirety by the applicable collective employment contract. Lord Dunedin summed up the difference between variation and rescission of a contract in *Morris* v *Baron and Co* [1918] AC 1 as follows:

> The difference between variation and rescission is a real one, and is tested, to my thinking, by this: In the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be both performed.[25]

Thus, an individual employment contract that has been superseded by a subsequently negotiated collective employment contract cannot be sued upon, for the later contract of service novates the earlier contract of service. Such a collective employment contract may provide for the continued validity of certain terms of the earlier individual employment contract by means of a "grandfather" clause. But if there is no such clause, the legal effect of being bound by a collective employment contract appears to be that the terms of the pre-existing individual employment contract are rescinded in their entirety and replaced by the terms of the applicable collective employment contract.

As to the position in respect of those terms which are implied by the common law into every contract of service, the Department of Labour clearly envisioned in its comment to the Labour Committee considering the Employment Contracts Bill that these would be subsequently implied into the collective employment contract:

> The various terms such as faithful service, which are at present implied into contracts of service by common law will apply to collective and individual employment contracts. The Department considers it appropriate that these implied common law rights and obligations should continue to apply to employment contracts as they do at present.[26]

However, elsewhere in the same document, the Department of Labour appears to have assumed that the original individual employment contract or some aspects of it somehow remain unaffected by or have an existence independent of the collective employment contract, for when dealing with a submission on the Employment Contracts Bill concerning (interestingly enough) the lack of clarity in the legal nature of the relationship between a collective employment contract and an individual employment contract, it commented:

25 At 25-26; the passage was cited with approval in *New Zealand Needle Manufacturers Ltd* v *Taylor and Another* [1975] 33, at 39 per McMullin J.

26 Supra, n6 at p4; cf p6.

> There are technical issues of legal definition arising out of the definitions of employment contracts. The relationship between a negotiated collective employment contract and the contract of service every employee has by common law, does not have a practical effect on the operation of the Bill.[27]

It is submitted, however, that the effect of the Employment Contracts Act is such that the common law concept of the contract of service has been statutorily modified in that the concept has been extended by definition to a collective employment contract. The original individual common law contract of service is rescinded by the collective employment contract, which the statute elevates to the status of a contract of service. The common law contract of service entered into by every employee has no magical life or after-life of its own in the face of a statutorily defined relationship which, *mutatis mutandis,* applies to contracts that simply bind more than one employee to their employer.

How, then, can fresh individual terms that are subsequently negotiated between an individual employee and his or her employer become part of the collective contract of service as it pertains to the individual employee? It is submitted that there is no apparent legal avenue under the Employment Contracts Act by which this may be accomplished. The Act merely suggests that nothing in the Act prevents individual terms from being negotiated on top of the multilateral contract. However, the Act does not make any explicit provision for the enforcement of such terms.

The Power of Historical Assumptions

If the nexus between individual and collective employment contracts seems incoherent, this has not turned out to be a problem in actual practice. For one thing, disputes concerning individual terms negotiated on top of collective employment contracts appear rarely to arise; this is perhaps because by their nature such terms involve the specific agreement of the parties directly concerned at the time they are entered into. However, it is also arguable that the complexities of the issue are masked by the fact that industrial practitioners appear to be operating on the basis of two principal assumptions that rest on their understanding of industrial law in the past: first, that because the nature of the employment relationship is unmistakably an individual and personal relationship, an individual contract of service *must* form an essential component of, if not the entire basis for, the *legal* relationship;[28] and second, that collective agreements are simply incorporated into the individual contract of service.

Reliance on the above assumptions, however, raises difficulties. This is because the first assumption arguably no longer holds true if the collec-

27 Ibid at p4.

28 Cf *Mazengarb's Industrial Relations and Industrial Law in New Zealand* (Wellington, 1993) vol I, div A, p22: "Whilst the preamble does not specifically contemplate this, it is likely that many contracts of employment will be governed by both an individual employment contract and a collective employment contract (just as, under the previous regime, many contracts of employment were governed by an individual contract between employer and employee and the terms of a collective instrument of one sort of another)."

tive employment contract, now defined as a "contract of service", is actually the only contract of service that binds individual employees to their employer. The second assumption, that registered collective instruments became incorporated into individual contracts of service may not have accurately described the strict legal position in the past. However, there was never any pressing need for clarifying the otherwise ill-defined nature of the relationship between registered collective instruments and the individual contract of service because there was in place a statutory process for the enforcement of the terms of such instruments, thus obviating the need to resort to the more expensive and time-consuming avenue of individual enforcement of employment contracts in the courts of general jurisdiction.

Section 19(2) is based on s174 of the Labour Relations Act 1987,[29] which provided that:

> Every award or agreement shall prevail over any contract of service . . . so far as there is any inconsistency between the award or agreement and the contract; and the contract shall thereafter be construed and have effect as if it had been modified, so far as necessary, in order to conform to the award or agreement.

There are a number of material differences that should be noted between s19(2) of the Employment Contracts Act and s174 of the Labour Relations Act. First, whereas the function of s19(2) is to make provision for the negotiation of new individual terms on top of and not inconsistent with an applicable collective employment contract, the focus of the earlier provision was on the primacy of the collective instrument and the concept and consequences of "inconsistency" between an individual's contract of service and the applicable collective instrument. Accordingly, the application of the provision was necessarily limited to a contract of service existing *prior to* the relevant award or agreement; the use of the expression "thereafter" suggests that the interpretation and effect of a contract of service was to be modified *after* the coming into force of an award or agreement. As Tolhurst remarks in regard to the analogous position currently obtaining in Australia:

> For an award to operate there must already be in existence a contract of employment, or perhaps on a more modern approach, an award *presupposes* the existence of a relationship of employer/employee.[30]

The situation provided for by s19(2) of the Employment Contracts Act, however, the negotiation of new individual terms after a collective employment contract has been entered into, would not have come within the purview of s174, since any inconsistent terms negotiated during the currency of the collective instrument would have automatically been void on the basis that they were contrary to a document that enjoyed a unique statutory status and that contained protected entitlements which the legis-

29 As amended by s17 of the Labour Relations Amendment Act 1990.
30 Supra, n20 at 705-706.

lature did not intend to be able to be overridden by private arrangements; registered awards and agreements were intended to have "the same force and effect as a statute".[31] In an often quoted passage describing the status of industrial awards, Salmond J observed that:

> An industrial award is . . . in substance . . . an act of legislative authority. It is the establishment of a set of authoritative rules regulating an industry, and determining . . . the future relations and mutual rights and obligations of all persons who thereafter during the currency of the award choose to enter into contractual relations with each other as employers and employed in that industry. The making of an industrial award is as much an act of delegated and subordinate legislative authority as the making of by-laws by a municipal authority . . .[32]

Thus, while s19(2) enables new, non-inconsistent terms to be negotiated, s174 of the Labour Relations Act prescribes that collective instruments should overrride inconsistent terms of any contract of service.

A second significant difference between s19(2) and s174 of the Labour Relations Act is that in the latter provision, the individual worker's contract of service functions as a base document in the sense that it forms the basis of the actual employment relationship and thus remains in existence notwithstanding the coming into force or expiry of a collective instrument. By way of contrast, under s19(2) the base document is the collective employment contract, which, as has been contended earlier, is the only contract of service by which an employee is bound once it comes into force.

Furthermore, the terms of an award or agreement were enforceable independently of any action for breach of contract, since they were ultimately statutory entitlements rather than primarily rights under a contract; the collective instrument created substantive rights on their own, as distinguished from rights arising from the terms of a contract.[33] In contrast, the scope for the enforcement of an individual employment contract negotiated under s19(1) and a collective employment contract negotiated under s20 are exactly identical, for all employment contracts may be enforced by way of a compliance order or an action for breach of contract. However, the anomaly that arguably arises in relation to the Employment Contracts Act is that individual terms negotiated pursuant to s19(2) would not appear to be actually enforceable under the Act or by its specialist institutions, unless the matter could be considered under subsections 104(1)(f), (g), or (h), where, in the face of recent High Court

31 *Auckland etc Shop Employees etc IUW* v *Imperial Supplies Ltd* [1983] ACJ 729 at 737 per Williamson J.

32 *New Zealand Waterside Workers Federation IUW* v *Frazer* [1924] 43 NZLR 689, at 709; cf *Baillie & Co* v *Reese* (1907) 26 NZLR 451 (CA); *Chapman* v *Rendezvous Ltd* (1923) 42 NZLR 174; *Hill* v *United Repairing Co Ltd* [1946] NZLR 585; *Wellington etc Local Bodies Officers IUW* v *Wellington Regional Council* [1981] ACJ 465; *Auckland etc Freezing Works etc IUW* v *Weddel Crown Tomoana Ltd* [1988] NZILR 374; and *New Zealand Meat Processors IUW* v *Alliance Freezing Co (Southland) Ltd* [1991] 1 NZLR 143.

33 Cf E Niven, "Industrial Awards and Common Law Recovery of Wages," (1939) 13 ALJ 8, at 9.

resistance,[34] the Employment Court's jurisdiction currently awaits clarification by the Court of Appeal.

CONCLUSION

The conceptual problems discussed in this paper appear to be the result of the Government's desire to implement a particular ideology without thinking through the implications in legal terms. This ideology involved the indirect weaning away of parties from collective agreements and the encouragement of individual contracts by framing the legislation in such a way that no particular arrangement would be overtly "pushed", so that individuals would be given the maximum "freedom of choice". This is illustrated, for example, by the Department of Labour's response to a submission on the Employment Contracts Bill which suggested that the Bill be confined in its application to collective contracts; the Department commented that it was Government policy that the Bill should cover both individual and collective employment contracts, and that it be "neutral towards the different forms of bargaining, giving both equal weight".[35] Likewise, in response to a submission which suggested that the Bill should contain a clear definition of the term "contract", the Department of Labour commented:

> A considerable body of contract law already exists. The Bill provides a clear definition of the term "employment contract" as used in the Bill. The Bill is not intended to be prescriptive as to the form or content of contracts.[36]

However, it was this very "neutrality" and overarching desire to treat individual and collective employment contracts as instruments that are essentially on a par in form and effect as "employment contracts" that appears to have led to the problems of conceptual coherence discussed in this paper. As Professor Szakats astutely remarked while the Employment Contracts Bill was still being considered by the Labour Select Committee, "A document which does not create an employment relationship by an actual service contract should not be called an employment contract."[37] It therefore seems somewhat ironic that in a piece of legislation entitled the "Employment Contracts Act" the coherence of a key concept upon which a significant aspect of the statute is structured is fundamentally flawed. The reason for this, it is submitted, is that conceptual coherence has been sacrificed on the altar of ideology. If, despite this, the Act seems to provide a viable legal framework for the structuring of employment relationships, this is arguably because of the continued belief in and application of the assumptions of the past.

34 See *Diamond Advertising* v *Brunton* [1993] 1 NZLR 168 and [1992] 2 ERNZ 777 (HC); *Medic Corporation* v *Barrett* [1992] ERNZ 1048 (HC); *Canterbury Produce Market Ltd* v *Richardson* (unreported, HC, Christchurch, 3 March 1993, CP18/89, Williamson J; cf the Employment Court case *Medic Corporation* v *Barrett* [1992] 3 ERNZ 523 (Goddard CJ).

35 Supra n6 at p7.

36 Ibid at p9.

37 Supra n1 at p14.