Strike and the individual employment contract: the New Zealand case

M Vranken*

The relationship between collective labour law and individual employment contracts has long been a source of difficulty and uncertainty in New Zealand labour law. Although the Labour Relations Act 1987 creates a category of lawful strikes, the effect of this provision on individual contracts of employment is unclear. It may be that even if a strike is lawful in a collective sense, it remains "unlawful" at common law, giving the employer a right to terminate the contract. In this essay Dr Vranken explores these difficulties, and argues that some of the solutions devised in European labour law could usefully be adopted in New Zealand.

I. PRELIMINARY OBSERVATIONS

A. *Common Law and Statutory Law*

The relationship between the common law and statutory law has always been an uneasy one. This is particularly so as regards the relationship between common law and labour law.[1] The latter constitutes a special branch of the law comprising two major components: collective labour law, occasionally referred to as trade union law in that it covers the legal rules governing the relationship between management and organised labour, and individual labour law or, as it is commonly known in New Zealand, the law of employment. It is with respect to individual labour law, which component is mainly concerned with the individual employee - employer relationship, that the tension between common law and specialist statutory law is most pronounced.

Collective labour law has formed traditionally the object of close parliamentary scrutiny, witness the Industrial Conciliation and Arbitration Act 1894 and its successors. Currently, the Labour Relations Act 1987 can be viewed as a fairly comprehensive legislative code governing the relationship between the collective

* Lecturer, Industrial Relations Centre, Victoria University of Wellington. The author is grateful to Dr A Szakats for his constructive comments on an earlier draft.

1 While the scope of this article does not allow for it, an interesting parallel could be drawn with the civil law systems of Western Europe where a comparable (and likewise uneasy) relationship between the principles of the Civil Codes and specific labour legislation has persisted for many years and, to some extent, still continues. See M Vranken "The applicability of the common law in an industrial relations context (with special reference to industrial action): a comment" (1987) 12 New Zealand Journal of Industrial Relations 107, 110-111.

bargaining parties in the private sector.[2] However, no such comprehensive code presents itself as regards the legal regulation of the individual employment relationship.[3] The legal regulation of the individual employee-employer relationship thus far has been approached by the New Zealand legislator but in a piecemeal fashion.[4] Thus, the common law (of both contracts and torts) continues to perform a crucial, though increasingly auxiliary, role in governing the individual employment relationship.

The term "common law" is used above even though significant aspects of general contract law nowadays are affected by statute. The Contractual Remedies Act 1979 especially aims at replacing the rules of common law and equity that used to regulate "the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach".[5] Curiously enough, the courts thus far have not treated this Act as being applicable to the individual employee - employer relationship.[6] However, the (limited) importance of the Contractual Remedies Act 1979 in the context of individual employment contracts will be commented upon further at a later stage in this article.

B. *Collective and Individual Labour Law*

A second and equally uneasy relationship emerges as regards collective and individual labour law. While collective labour relations have become extremely important and are often of more societal significance than individual labour relations,[7] labour law is essentially about work or labour carried out in a subordinate position.[8] The ultimate issue in assessing any national system of labour law therefore involves an answer to the

2 Henceforth the Labour Relations Act 1987 also applies in relation to the Public Service: State Sector Act 1988 s67.

3 Admittedly, this observation is not new. With respect to the (former) Industrial Relations Act 1973, Szakats already suggested that "serious thought could be given to producing a labour code including the law of employment which would be complementary to, or merge with, the Industrial Relations Act": A Szakats, *Mazengarb's Industrial Relations and Industrial Law in New Zealand* (Wellington, Butterworths, 1987) update vol 1, 1-2. Mutatis mutandis, the same criticism can be made as regards the Labour Relations Act 1987.

4 The most important examples are the Factories and Commercial Premises Act 1981, the Holidays Act 1981, the Minimum Wage Act 1983, the Wages Protection Act 1983, and recently, the Parental Leave and Employment Protection Act 1987.

5 Contractual Remedies Act 1979 s 7(1). In the area of torts, the most important statue amending the legal rules at common law is the Accident Compensation Act 1972.

6 Reference is made to the abundance of case law as regards "wrongful" (at common law) and "unjustifiable" (under the labour legislation) dismissal. For an updated overview, see M Mulgan "Toward a uniform law of dismissal in New Zealand" (1987) 12 NZULR 384.

7 R Blanpain "Belgium" in R Blanpain (ed) *International Encyclopaedia for Labour Law and Industrial Relations* (Deventer, The Netherlands, Kluwer, 1985) 30. The observation by Blanpain arguably carries even more weight in the New Zealand context.

8 O Kahn-Freund *Labour and the Law* (London, Stevens & Sons, 1977) 3 ff.

question as to the protected status of the individual employee. In this respect collective labour law can only provide a framework or infrastructure.

For the majority of workers in the Western world most essential terms and conditions of the individual employment contract are predetermined by legislation and collective agreements. However, not even this consideration can alter the basically contractual nature of the employment relationship. Hence, there will always be scope for express as well as implied terms of the service contract. A too predominant or exclusive legislative focus on "trade union law" fails to cover adequately the whole domain of labour law. More importantly, it risks foregoing the ultimate question as to the protected status of the individual employee.

A final preliminary observation, which is related to the one made above, involves the notion of collectivity at the labour side. As it is not just the sum of its individual members, the union constitutes a separate entity.[9] It is positioned in between the individual employee and the employer, thus strengthening the individual bargaining position of the former but also, simultaneously, providing a veil. This distinction between union and individual employee has been formally recognised in New Zealand, hence the incorporation of the union following its registration under the Labour Relations Act 1987.[10] Moreover, the main emphasis of the Labour Relations Act is on the union rather than on the individual worker, as can be expected from a piece of collective labour legislation. Even the personal grievance procedure is solely a benefit of union membership. The discretionary powers of the union in deciding whether or not to take up a particular personal grievance are well established.[11]

However, as the analysis below will show, the New Zealand cases reveal that the courts occasionally fail to distinguish clearly between the individual and the collectivity. Particularly in the context of strikes breach of the award tends to be held against the individual quite readily, without much scrutiny as to the actual nature of the provision in the collective instrument being breached.

This essay is about the relationships between common law and labour law on the one hand, and between collective and individual labour law on the other hand. It seeks to do so by analysing the legal effects of strikes on the individual employment contract. While the focus will be primarily on the New Zealand legal scene, more general as well as comparative comments will be made where appropriate.

9 See, for example, the distinction between unions as a movement and unions as an organisation in A Flanders *Management and Unions: The Theory and Reform of Industrial Relations* (London, Faber and Faber, 1975) 43 ff.

10 Labour Relations Act 1987 s8; compare Industrial Relations Act 1973 s166.

11 See, for example, *Russell* v *Foodtown Supermarkets Limited*, unreported, Labour Court, AC 14/87 [1987] Industrial Law Bulletin 341; and especially the numerous case references in *Perera* v *Manukau City Council*, unreported, Labour Court, AC 26/87 [1987] Industrial Law Bulletin 47.

II. STRIKES AND THE INDIVIDUAL EMPLOYMENT CONTRACT

In New Zealand as elsewhere individual employment contracts are typically[12] entered into for an indefinite period. It follows that either party can unilaterally terminate the contract at any stage during the employment relationship by serving notice upon the other party.[13] The open-endedness of the average employment contract inevitably increases the likelihood of events occurring during the lifetime of the employment relationship that temporarily prevent the employee from performing under the contract. In many instances (eg sickness or accident, annual holidays, pregnancy, etc) the legal effects of the "incapacity" of the employee to perform are governed by statute and/or collective agreement. This is less so as regards industrial action. The New Zealand case is not unique in this respect. As the legal regulation of strikes and lockouts is not always deemed politically feasible, the legislature "often wraps itself in silence and leaves its duty to the courts".[14]

Since 1987, and for the first time ever, the existence of a statutory right to strike (as well as a right to lock out) is explicitly recognised by the New Zealand legislature.[15] However, this statutory right features in a piece of collective labour legislation. Its legal effects, if any, on the individual employment contract are unclear, to say the least. This essay aims to analyse the legal effects of strikes on the individual employment contract by addressing two central questions.

First, it can be asked what happens to the contractual obligations of the other ("innocent") party when the employee refuses or deliberately fails to perform his contractual duty to work due to a strike. Most court cases tend to concentrate solely on this question, in particular as it relates to the contractual duty of the employer to pay wages. A second question that arises is as to what happens to the contractual relationship itself in case of a strike.

Both questions, while they are undoubtedly related to one another, are to be distinguished as each raises quite separate issues. Specifically, too narrow a focus on the pay issue may "discolour" the answer to the second question and thereby cause

12 This was not always the case. The civil and commercial codes of the nineteenth century favoured the contract for a fixed term. Similarly, countries following the British system arrived at the common position that employment contracts are normally of indefinite duration after living for years with the presumption of yearly hiring: H Barbagelata "Different categories of workers and labour contracts" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations* (Deventer, Kluwer, 1987) 442.

13 Fixed-term employment contracts in contrast automatically come to an end upon expiry of the agreed term. Self-evidently, both types of employment contracts can always be terminated for cause.

14 R Birk "Industrial conflict: the law of strikes and lockouts" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations*, above n 12, 402.

15 Labour Relations Act 1987 s230 (a).

unnecessary confusion.[16] There may indeed be a number of reasons why the employer does not have to pay the strikers, eg because the employment contract has been terminated or, alternatively, is being suspended for the duration of the strike. The termination or suspension of the contract in turn can be either the automatic result of the strike in and of itself or it can be the legal effect of some action by the employer in response to the strike. It is therefore suggested that, although it may affect the duty to pay under the contract, the question as to what happens to the employment relationship itself cannot be answered by looking only at the employer's position. Conceptually as well as logically, it is the second question that must be answered first.

III. LEGAL EFFECTS ON THE EMPLOYMENT CONTRACT ITSELF

A. *Position of Common Law*

1. *Termination of Contract*

The common law of contract makes no special provision for strikes.[17] The individual employment contract, as any other contract, may be terminated by breach. A breach occurs when one of the parties unjustifiably fails or deliberately refuses to carry out their obligations under the contract.[18] The individual who goes on strike thereby breaches his contract of employment.[19] Depending on its magnitude, the breach may entail the following consequences:[20]

(a) if the breach destroys the very substance of the contract, it will be automatically discharged;

(b) if the breach is less serious but still of vital importance so that it makes further performance impossible or essentially different from that originally contemplated, it gives the innocent party an option either to treat the contract as repudiated or disregard the breach and affirm the contract.

No recent cases are known where the courts have held that the employment contract automatically comes to an end because of a strike, although it has been suggested in the

16 In the *New Zealand (except Westland) Meat Processors, Packers and Preservers Freezing Workers* case (1971) BA 596, the workers had been "suspended without pay" by the employer. The Arbitration Court observed that "it could be said that whatever the words used, a declaration by the employers that there would be no work and no pay was tantamount to a dismissal notice" (at 598, obiter).

17 Lord Wedderburn *The Worker and the Law* (England, Penguin Books, 1986) 190.

18 A Szakats *Introduction to the Law of Employment* (Wellington, Butterworths, 1981) 363.

19 B W Napier "Strikes and the individual worker: reforming the law" [1987] 46 CLJ 288.

20 A Szakats, *Introduction to the Law of Employment*, above n 3, 363, with reference to *Mersey Steel & Iron Co* v *Naylor Benzon & Co* (1884) 9 AC 434.

past that this might be a possibility under certain circumstances.[21] Instead the strike is readily accepted as constituting just cause for summary dismissal, especially where the strike is held to be in breach of the terms of the relevant award or collective agreement. In the *Shortland* case the Arbitration Court summarised the position as follows:[22]

> It is clear law that in contracts of service as in other contracts a breach of an essential term of the contract by either party enables the other party to terminate the contract summarily. What is an essential term is a question of fact and law in the particular case.

In *Shortland* Blair J referred to a decision of the English Court of Appeal where Lord Evershed, in delivering the judgment, had mentioned that "a deliberate flouting of the essential contractual conditions" was sufficient to justify summary dismissal.[23] Surprisingly, the Arbitration Court continued to observe that the action by the workers in the present case was not only in breach of their fundamental obligations under the contract of employment but also "a flouting of the terms of the award giving the employers the right of summary dismissal".[24]

While the *Shortland* case did not involve any actual dismissals, the strikers in the more recent *Ford Motor Company* case[25] had formally been issued with summary dismissal notices in writing. Even though most of the workforce was re-employed under new contracts of employment following the end of the strike, the company refused to take on again five of the former strikers. When each of the five men sought to bring personal grievance proceedings, the Court dismissed the claim by upholding a preliminary submission made on behalf of the respondent company. The employer, through its counsel, had submitted that:[26]

> (1) Each of the men in question at the time of his dismissal had not only been suspended from his employment, but was actively participating in an illegal strike. In doing so each had broken a fundamental term of his contract of employment, the composite agreement specifically precluding that type of action in the circumstances then existing.

21 In the *Shortland* case the Arbitration Court held that in the strike situation at issue "no formal notice of termination by employers is required. Summary termination means termination without giving normal notice. In the present case it was the engineers themselves who in effect gave summary notice that they were not prepared to carry on their contracts...": *Re New Zealand Engineering, etc, IUW* v *Shortland Freezing Company Limited* [1973] 1 NZLR 326, 332.

22 Above n 21.

23 *Laws* v *London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, 701; [1959] 2 All ER 285, 288.

24 Above n 21, 332.

25 *Larsen etc* v *Ford Motor Company of New Zealand Limited*, unreported, Labour Court, AC 86/87 [1987] *I*ndustrial Law Bulletin 69.

26 Above n 25.

(2) That, therefore, each of the men in question cannot have a personal grievance in the sense that he was unjustifiably dismissed having already repudiated his contract of employment.

In *Shortland* as well as *Ford Motor Company* the Arbitration Court could not resist going beyond the mere common law principles of essential (contract) breach. In both cases a reference was indeed made to the striking workers also having breached the collective instrument. From a perspective of general contract law it is clear that such an additional qualification can have no bearing whatsoever on the individual employment contract. Undoubtedly, allowance must be made for those provisions of the award or collective agreement that form incorporated terms of the individual contract. It is submitted, however, that not all clauses of a collective instrument automatically go over into the service contract. Therefore, a proper analysis as to the exact nature of the collective provision allegedly breached is called for in any particular case.

Whereas attempts to distinguish between the so-called normative and obligatory or contractual provisions of collective agreements have not always been easy, the Continental systems of labour law are highly advanced in this respect.[27] In the course of over half a century the European courts have acquired considerable experience and expertise in determining which clauses lay down rules or norms that affect the individual employee-employer relationship, hence the notion of "normative" provisions, and which clauses of the collective agreement do not. As the "obligatory" or "contractual" provisions merely govern the relationship between the contracting parties at the collective level, this latter category of clauses in the collective agreement leaves the individual employment contract untouched.[28]

The normative-contractual classification made above has crucially important practical consequences. For instance, as the so-called "no-strike" clause or obligation of social peace, a clause not uncommonly found in New Zealand collective instruments also, is generally perceived to form part-and-parcel of the collective agreement in its contractual or obligatory dimension, the individual worker cannot be held liable for its breach.[29]

27 The normative-contractual classification, for which there is no explicit statutory basis, was first made by German scholars in the 1920s: A Nikisch *Friedenspflicht, Durchfuhrungspflicht und Realisierungspflicht* (Weimar, 1932); *Arbeitsrecht* (Berlin, 1951) 211. This basic classification has since then been perfected by a further distinction of the normative provisions in individual-normative and collective-normative clauses: A Hueck and H C Nipperdey *Lehrbuch des Arbeitsrechts* (Berlin and Frankfurt, 1963). While not even this modified classification can necessarily pretend to cover all the different modalitites now contained in the practice of collective bargaining, it is generally accepted on the Continent as being relevant and useful: E Cordova "Collective bargaining" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations*, above n 12, 327.

28 Because of its double content Blanpain has compared the collective agreement to a "double-yolked egg": R Blanpain "Belgium" in R Blanpain (ed) *International Encyclopaedia*, above n 7, 227.

29 The obligation of social peace aims at ensuring the sanctity of the collective agreement. It stands for a commitment on behalf of the contracting parties to honour

The same reasoning applies to the provisions in the collective agreement which lay down the procedures to be followed for the peaceful resolution of disputes arising during the currency of the collective agreement.[30] Occasional attempts in the collective agreement itself to expand the scope of certain contractual clauses to include individual workers have met with serious criticism by legal commentators.[31] Surprisingly, the New Zealand courts thus far have neglected even to try to categorise the contents of awards and collective agreements. In terms of the normative-contractual classification, the overall contents of collective instruments are readily viewed as being normative in nature.[32] It is suggested that, ever since the introduction of an explicit, statutory right to strike in the 1987 legislation and the subsequent need to reconsider the legal effects of (especially lawful) strikes on the individual employment contract, the normative-contractual distinction can perform a useful function in New Zealand as well.

The preceding discussion has been based on the assumption that the termination of the employment contract remains within the domain of the common law, notwithstanding the enactment of the Contractual Remedies Act 1979. Indeed this is the way it has been treated in the cases. However, the Contractual Remedies Act 1979 can be viewed as an attempt by the New Zealand legislature to update the common law of contract and it does not explicitly exclude employment contracts. Nevertheless, Mulgan has argued in a different context that this Act would be of little assistance in effecting the remedies sought by the employee.[33] With respect to strikes the argument is of particular significance in that cancellation of the contract (albeit with damages) is unlikely to be what either party wants,[34] except maybe in certain limited circumstances. This goes to show that the problem here is not one of general statutory law versus common law but rather that there is a need for specialist labour law to deal with labour issues.

the agreement, and includes a commitment to see to it that their membership does not upset the contents of what has been agreed upon either.

30 Compare the disputes of rights procedure in New Zealand.

31 This criticism was strongest in Belgium. Since Belgian unions lack corporate capacity and since the obligatory provisions are in principle not legally enforceable against the collective parties anyway, the temptation to safeguard the legal sanctity of the collective agreement via the individual membership of the contracting organisations has always been greatest in that country. See R Blanpain "Belgium" in R Blanpain (ed) *International Encyclopaedia*, above n 7, 245. For an in-depth analysis of this technique of "normativisation" of the obligatory provisions, see M Vranken *De Collectieve Arbeidsovereenkomst in Belgie* (Leuven, Acco, 1984) 357 ff.

32 See the above-cited cases of *Shortland* and *Ford Motor Company*. While the normative-contractual classification does not feature in the Labour Relations Act 1987, the Act does distinguish between the contracting parties and, more generally, the parties bound by the award or collective agreement: Labour Relations Act 1987 ss 160 and 165.

33 Above n 6, 397.

34 Lord Wedderburn *The Worker and the Law*, above n 17, 191-192.

2. *The Doctrine of Suspension*

The discussion as to the legal effects at common law of a strike on the individual employment contract cannot end here. The issue at stake arguably goes beyond the mere matter of automatic termination or not. In particular the feasibility of implied terms of the contract remains to be explored. While their overall significance admittedly ought not to be overestimated,[35] Mulgan recently noted an increase in the creative use made of the concept of implied terms within the employment contract framework.[36] Specifically, it may be asked whether there could be room for an implied term of the employment contract to the effect that the normal operation of the contract be automatically suspended for the duration of the strike.

The case to come closest to accepting the principle of automatic suspension in England was *Morgan* v *Fry*.[37] Denning M R observed that: "If a strike takes place, the contract of employment is not terminated. It is suspended during the strike and revives again when the strike is over."[38] The effect of strikes on the contract of employment was also considered at length by the Donovan Commission.[39] In the end the Commission, however, reached the conclusion that it was not practicable to introduce the concept of suspension into the law.[40] A formal rejection of the doctrine of automatic suspension by the English courts followed in *Simmons* v *Hoover*.[41] In the latter case the Employment Appeal Tribunal refused to accept that *Morgan* v *Fry* had been intended to "revolutionise" the law. It noted that Lord Denning, although he used the word "suspension", had not dealt with any of the problems which arise when a contract is suspended. To illustrate these problems, the report of the Donovan Commission was quoted from extensively.[42] The Tribunal summed up its position as follows:[43]

> There is no doubt that if *Morgan* v *Fry* has introduced into the law the concept of the suspension of a contract it is in only an embryonic form, for none of the consequences has been worked out; and it is difficult to see how this could be done except by legislation.

35 See A Szakats *Introduction to the Law of Employment*, above n 18, 100.

36 Above n 6, 389. The most important recent example undoubtedly constitutes the holding by Cooke J to the effect that there may be a duty of the employer "to be good and considerate": *Auckland Shop Employees IUW* v *Woolworths (New Zealand) Limited*, [1985] 2 NZLR 372, 376.

37 [1968] 3 All ER 452; [1968] 2 QB 710.

38 Above n 37, 458 and 728 respectively.

39 *Royal Commission on Trade Unions and Employers' Associations* 1965-1968 (1967-68) Cmnd 3623.

40 Above n 39, para 943.

41 [1977] 1 All ER 775.

42 Above n 41, 784-785.

43 Above n 41, 785 (sub b-c).

None of the modern English cases doubt that the answer in *Simmons* v *Hoover* was correct.[44]

The doctrine of automatic suspension has never been canvassed in New Zealand. Arguably, the stand taken by Lord Denning in *Morgan* v *Fry* was indirectly rejected in the *Ford Motor Company* case, where the *Simmons* case was cited in argument by counsel for the employer with the approval of the Arbitration Court.[45] In sharp contrast to the English and New Zealand state of affairs, the principle of automatic suspension is today accepted in most countries of the European community.[46] Even though the majority of legal systems in the EEC lack a formal statutory right to strike, industrial action tends to be construed by the various national courts as the exercise of a collective freedom which in and of itself suspends the operation of the individual employment contract.

A question that has been put to the New Zealand courts in the past is whether or not a wages claim for a period of no work would stand or, conversely, whether the employer's duty to pay wages continues during a strike. While this question might have induced some clarification as regards the issue of automatic suspension or, at the very least, the issue of a common law (implied) right of the employer to suspend the strikers, the courts invariably saw in their narrow briefing as to the pay issue a justification for not having to examine fully the legal effects of strikes on the individual employment contract itself. In the case of *New Zealand Steel*[47] for instance, the company invoked common law principles[48] and previous decisions of the Arbitration Court[49] to claim that, in certain circumstances, a breach by an employee of his employment contract entitles an employer not only to terminate the contract but also to suspend its operation while the breach is maintained.[50] The Court was asked whether the employer's action was lawful and if wages were lawfully payable to the workers during the period of their suspension. Unfortunately, as the Arbitration Court ultimately decided the issue on the basis of its statutory powers to rule in accordance with equity and good conscience, the *New Zealand Steel* case does not provide much guidance either way. Be this as it may, *New Zealand Steel* did make a reference to the *Meat Processors* case.[51] In the latter case as well the employer had notified the strikers that they were "suspended without pay". The Arbitration Court observed that the word "suspended" connoted a continuation of the contractual link.[52] Nevertheless, not even in that case was the analysis of the concept of suspension carried any further in that the

44 Lord Wedderburn *The Worker and the Law*, above n 17, 191-192.

45 See the reference in n 25.

46 L Betten *The Right To Strike in Community Law* (Amsterdam/New York/Oxford, Elsevier Science Publishers, 1985) 134.

47 *New Zealand Engineering, etc IUW* v *New Zealand Steel Limited* [1978] ACJ 131.

48 These were not specified in the judgment.

49 *Australian National Airlines Commission* v *Robinson* [1977] VR 82; *New Zealand Engineering, etc IUW* v *Shortland Freezing Company Limited* [1973] 1 NZLR 326; *New Zealand (except Westland) Meat Processors, etc IUW* [1971] BA 596.

50 [1978] ACJ 131, 134.

51 [1971] BA 596.

52 Above n 51, 598.

Court took a clearly result-oriented approach, focussing on the pay issue rather than the right to suspend as such. As a practical matter, the Court suggested that, on the one hand, the employer may not have a right at common law to suspend without pay.[53] On the other hand, it held that the claimant workers are not necessarily guaranteed a legal remedy either.[54] The conclusion must therefore be that the legal position regarding the right to suspend at common law is once again unsatisfactory.

B. *The Labour Relations Act 1987*

1. *Overview*

It has not been necessary to distinguish thus far in this article between lawful and unlawful strikes. The reason for this is quite simply that the employer is readily entitled to issue the striking workers with summary dismissal notifications, which are lawful at common law.[55] Judged by the usual standards, strike conduct amounts to a repudiatory breach of the employment contract. As the exceptions to this traditional stance are extremely limited,[56] it can fairly be said that the rule at common law is that strikes are unlawful per se.

The legal position of strikes under statutory law is radically different in that a distinction is made between lawful and unlawful strikes. This classification of strikes arguably pre-dated the Labour Relations Act 1987, because the Industrial Relations Act 1973 itself made reference to "unjustified industrial action" (the inference therefore being that there were instances of justified or lawful strikes). The Labour Relations Act 1987, however, goes further. It contains explicit provisions as to the right to strike and sets out the instances of lawful and unlawful industrial action.[57]

The question arises as to how, if at all, the legislative enactments of both 1973 and 1987 affect the legal effects strikes have on individual employment contracts. Cooke J,

53 Specifically, the Court stated that "if the employment contracts were merely suspended then there would be a prima facie right to the minimum weekly payment": above n 51. It is to be noted that the cases discussed immediately above both date from before the 1981 Amendment to the (now repealed) Industrial Relations Act 1973. The 1981 Amendment provides a statutory basis for the employer to suspend (without pay) workers who are party to a strike. See below under B: *The Labour Relations Act 1987*.

54 A further discussion will follow below under 3: *Legal Effects on the Contractual Duty to Pay*.

55 D L Mathieson "The lawyer, industrial conflict and the right to fire" [1981] NZLJ 216, 223.

56 Purely defensive strikes are not necessarily repudiatory. For example, it could hardly be said that a strike in opposition to demands by an employer in breach of contract by him would be repudiatory: *Simmons v Hoover* [1977] 1 All ER 775, 786.

57 See Part X of the Labour Relations Act 1987.

as recently as 1985, suggested that the traditional position at common law may subsist without more:[58]

> In one sense strikes can be unlawful quite apart from the (Industrial Relations) Act. This is because the individual workers may be in breach of their contracts of service. That was admittedly so in the present case .... The right to strike can therefore be a rather vague and even misleading expression.

Statutory law, ever since 1981, also makes explicit provision for the right of the employer to suspend striking workers without pay.[59] The fact that a specific reference is made in the statute to the individual worker's situation makes its effect on the common law position regarding the contract of service somewhat problematic. The common law denial of the right to suspend now appears to be superceded. However, this is not necessarily the case, it is submitted, as regards the common law doctrine of termination.[60]

2. *Questions to be Addressed*

The above observations by the President of the New Zealand Court of Appeal serve as a timely reminder that legislative enactments in the sphere of collective labour law are not always of direct benefit to the individual employee. With respect, however, the matter does not end here. At issue are a number of problems which centre around the relationship between specialist statutory law (in casu, collective labour law) and common law.

First, it may be asked how the 1981 amendment to the Industrial Relations Act 1973 relates to the traditional common law right of the employer to terminate the contract. Specifically, can the employer henceforth choose between suspension and termination or has the common law entitlement of dismissal been implicitly abolished by the 1981 legislation? While it is to be noted that the statutory right to suspend is available in instances of both lawful and unlawful strikes, the answer undoubtedly remains unclear. Nonetheless, it can be argued that strong policy considerations support the latter view. To maintain that dismissal continues to be possible in all cases has indeed become highly questionable, especially since 1987 and in instances of lawful strikes. Briefly, if termination at common law were still to be allowed in the case of a lawful (in terms of the Labour Relations Act 1987) strike, the practical result would inevitably be a direct negation of the statutory right to strike itself.[61] Moreover, termination would almost

58 *New Zealand Baking Trades Employees IUW* v *General Foods Corporation (NZ) Limited* [1985] 2 NZLR 110, 114.

59 Industrial Relations Amendment Act 1981, s12. Compare Labour Relations Act 1987 s239.

60 See above under A: *Position at Common Law.*

61 Even though the dismissal of a worker participating in a lawful strike can arguably be made the subject of personal grievance proceedings, a Court finding as to the dismissal being unjustifiable does not necessarily follow. Since the term "unjustifiable" is not statutorily defined, it has become the standard practice of the

certainly be in breach of the ILO standards on anti-union discrimination. ILO Convention No 98 in particular protects individual workers against acts prejudicial to them in relation to participation in trade union activities including, in particular, dismissal.[62] It is to be noted, though, that New Zealand has still not ratified this Convention which dates back as far as 1949.[63]

Secondly, it is submitted that not even with respect to unlawful (under the Labour Relations Act 1987) strikes should termination at common law be allowed any longer. In all New Zealand cases cited thus far, the courts' findings as to breach of contract were made in light of the observation that the strike also took place in breach of an award or collective agreement.[64] The statutory determination as to the lawfulness or unlawfulness of a strike as well is, by and large, made in function of whether or not the industrial action at issue amounts to breach of pre-existing (if any) collective instrument.[65] However, it should be borne in mind that the crucial rationale behind such a classification of strikes is to ensure orderly behaviour by and among the collective parties themselves. It would certainly explain why the right to strike features in a piece of collective labour legislation. The very way in which the classification is made also goes to show that whether or not a particular strike is lawful generally is not up to the individual worker. As they are made independently of the individual employment contract, lawful and unlawful strikes are classifications that ought to leave the individual employment contract untouched.

A further question arises as to the difference, if any, between the statutory right to suspend and the doctrine of automatic suspension. It may indeed happen that the

Court to look at all circumstances surrounding the dismissal. See A Szakats and M A Mulgan *Dismissal and Redundancy Procedures* (Wellington, Butterworths, 1985) 61.

62 Article 1(1) of the said Convention provides that "workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment": J Hodges-Aeberhard and A Odero de Dios "Principles of the Committee on Freedom of Association concerning strikes" (1987) 126 International Labour Review 543, 555.

63 For a review of the major ILO Conventions that have a direct bearing on industrial relations' structures and of the New Zealand approach to their ratification, see G Anderson "International labour standards and the review of industrial law" (1986) 11 New Zealand Journal of Industrial Relations 27.

64 In the *Meat Processors* case [1971] BA 596 it was held that: "The actions of the workers were clearly contrary to clause 29 of the award and their cumulative effect constituted a fundamental breach" (at 598). In the *Shortland* case [1973] 1 NZLR 326, the Arbitration Court again ruled that: "In the present case it hardly needs to be stated that the action of the engineers in ceasing work as they did on Thursday was in breach of their fundamental obligations under the contract of employment, *and a flouting of the terms of the award* ..." (332; the emphasis is mine). Both cases were cited with Court approval by counsel for the employer in the *New Zealand Steel* case [1978] ACJ 131, 134-135. See also the *Ford Motor Company* case, unreported, AC 86/87, 2-3.

65 Labour Relations Act 1987 ss230(b) and (c), 233, 234. Hence, the Labour Relations Act 1987 prohibits strikes over matters of award interpretation or application, including, among other things, personal grievances and demarcation disputes. Hence also, it is lawful to strike over disputes of interest towards the expiry of the agreed upon duration of the award or collective agreement.

employer chooses not to terminate the contracts of the striking workers while yet not issuing suspension notices either. Can the employer under these circumstances be held liable to pay wages under the contract? The issue at stake here concerns the legal effects of a strike on the contractual obligations of the other party. It will therefore be dealt with under the next heading.

3. *Legal Effects on the Contractual Duty to Pay*

Whenever the employer formally invokes the statutory right to suspend a striking worker, that worker is subsequently not entitled to "any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the worker's suspension".[66] Unless sooner revoked by the employer, the suspension (without pay) continues until the strike is ended.[67]

It is clear that the statutory position as described above represents an improvement over the traditional position at common law. It will indeed be recalled that the principle of automatic suspension has never really been accepted in the New Zealand courts.[68] On the other hand, the employer does not possess a common law right to suspend (without pay) either.[69] It follows that, if the employer were simply to refuse to pay the strikers without, however, wanting to bring the employment contract to an end, he or she would be acting unlawfully.[70]

In the past the courts have attempted to alleviate the harsh result a strict application of the common law could bring about by invoking what may be called the "clean hands" doctrine. The doctrine holds in essence that no claim for payment for a period of no work can succeed whenever this state of affairs is caused by the plaintiff's own actions.[71] As a practical matter, this means that the striking worker's legal entitlement to wages is bound to be without a remedy whenever a claim for wages is made against the backdrop of a strike in breach of the relevant collective instrument. However, even though the faith of the doctrine in instances of lawful strike action remains to be stated explicitly,[72]

66 Labour Relations Act 1987 s239(4); compare Industrial Relations Act 1973 s127A(4).

67 Labour Relations Act 1987 s239(2); compare Industrial Relations Act 1973 s127A(2).

68 If the strike were to have the automatic effect of suspending the employment contract, the employer undoubtedly would be in a position where the non-performance by the worker provides a legal justification for withholding payment of wages. The applicable adage in Belgium to this effect is "exceptio non adimpleti contractus"; it is an implied term of mutual contracts in general.

69 To borrow the terminology of Mathieson: "The Courts have set their face against implying a right to suspend (other than on full pay) into contracts of service". See above n 55, 223, where it is made clear that this ruling dates back to *Hanley* v *Pease and Partners Ltd* [1915] 1 KB 698.

70 Above n 69.

71 See the reference to the *Meat Processors* case, above n 64.

72 Another situation where the doctrine of clean hands does not necessarily stop pay claims by strikers are claims based on statutory entitlements which are not directly related to actual work performance. An example can be statutory holiday pay. In *Hellaby Shortland Ltd* v *Weir* [1976] 2 NZLR 355, the Court of Appeal held that workers were entitled to payment of holiday pay for statutory holidays falling within

it appears that the doctrine as applied by the courts thus maintains the distinction between lawful and unlawful strikes.

The statutory provisions as regards the right to suspend strikers in the Labour Relations Act 1987 set out to do away with the (questionable) distinction between lawful and unlawful strikes in an individual employment context. However, it is submitted that the legislature failed to achieve fully this result in that the statutory entitlement applies only to instances where the employer has given individual notice and has cited the statutory basis of the suspension. The situation envisaged here includes cases where the employer fails to comply with these formal requirements for statutory suspension.[73] Moreover, it may happen that the suspension notice does not coincide with the beginning of the strike due to delays beyond the control of the employer. These are all situations where the answer to the duty to pay cannot be found in the statute. Therefore, a need to invoke the doctrine of clean hands conceivably remains. The net result is then that both the common law and the Labour Relations Act 1987 are limited in adequately resolving the issue at stake.

IV. CONCLUDING OBSERVATIONS

This essay focussed on two central questions as regards strikes and the individual employment contract. Specifically, a number of issues have been raised with respect to the legal effects of strikes on both the contract of service itself and the contractual obligations of the other party. By putting these issues in context, this article hopefully produced some useful insights into a "forgotten" area of the law.[74]

a period when they were refusing to work but had not been dismissed. Significantly, the decision in *Hellaby* did not distinguish between lawful and unlawful strikes, thus indirectly refusing to single out instances of lawful strike action only.

73 "The employer shall indicate to the worker at the time of the worker's suspension the section under which the suspension is being effected": Labour Relations Act 1987 s 241.

74 It follows from the above that this essay addressed some aspects of strikes and the individual employment contract only. For instance, this article envisaged instances of so-called regular strikes only. The legal analysis of industrial action taken by a group of workers spontaneously, namely without prior union authorisation, may very well yield different results. Furthermore, this article did not examine the possible tort liability of strikers and their organisation. There is an abundance of literature in this latter area of the law. See the various contributors to the Symposium on the Common Law and Industrial Relations in (1987) 12 New Zealand Journal of Industrial Relations 89-121. See also J Hughes "Injunctions against strikers" (1986) 6 Otago Law Review 306; J Hughes "Justifying inducement of breach of contract" [1981] NZLJ 405; W Davis "Injunctions and trade unions" [1978] 3 Auckland University Law Review 429; J Reid "Injunctions and industrial relations" (1977) 7 NZULR 374; G Anderson "Disadvantages of injunctions in industrial disputes" [1975] NZLJ 179; D J Chapman "Tortious consequences of strikes" (1975) 7 VUWLR 455; A Szakats *Law and trade unions: use of injunctions* (Wellington, Industrial Relations Centre, 1975) Occasional Paper No12; I T Smith "Use of injunctions in industrial law" [1974] NZLJ 432; S J Mills "Tort of inducement of breach of contract" (1971) 1 Auckland University Law Review 27; B Brook, "Conspiracy and intimidation" [1969] NZLJ 416. The statutory

The underlying tone of this article has been that the strike qualifies as an essentially collective right. As such the right to strike constitutes an necessary correlation to collective bargaining. Without at least the potential of a collective refusal to work, the workers would effectively not be able to bargain collectively.[75] A system of labour law that does not provide for at least a freedom (as opposed to right) to strike not only lacks teeth, it also fails to recognise the fundamental nature of labour relations as power relations[76] and, hence, the need to correct the imbalance in individual negotiation power between employee and employer. In some continental jurisdictions, a willingness to resort to strike action is a prerequisite of union recognition.[77]

In one sense collective and individual labour law are inseparably linked. However, both aspects of labour law are not to be confused either. In this article it has been argued that strikes ought to "disrupt" legally the individual employment contract but to a limited extent. The adoption of the doctrine of automatic suspension, and the awareness that not all provisions of a collective instrument constitute incorporated terms of the service contract as a matter of course, are two means that have successfully been used in legal systems elsewhere to achieve this effect in a pragmatic while yet intellectually acceptable fashion.

No legal order can be totally indifferent to industrial conflict: it is thus a legal problem.[78] The common law, built on the pillars of property and contract, cannot accommodate a right to strike.[79] The Labour Relations Act 1987 can be commended for establishing a relatively comprehensive legislative code as regards the relationship between the collective parties. Similarly, a statutory consolidation of the various legal rules governing the individual employment relationship is called for. This consolidation exercise should not be limited to merely incorporating such pre-existing statutes as the Minimum Wages Act, the Wages Protection Act, the Holidays act, the Parental Leave and Employment Protection Act, etc. Inevitably, it must also include those provisions of the Labour Relations Act 1987 that deal with aspects of the individual employment

regulation of civil action in relation to industrial action is now emobdied in the Labour Relations Act 1987 ss242-243.

75 O Kahn-Freund *Labour and the Law*, above n 8, 225. In support of this argument Kahn-Freund cites from Lord Wright in the leading case of *Crofter Harris Tweed* v *Veitch* [1942] AC 435, 463: "The right of workmen to strike is an essential element in the principle of collective bargaining."

76 R Blanpain "Belgium" in R Blanpain (ed) *International Encyclopaedia*, above n 7, 140.

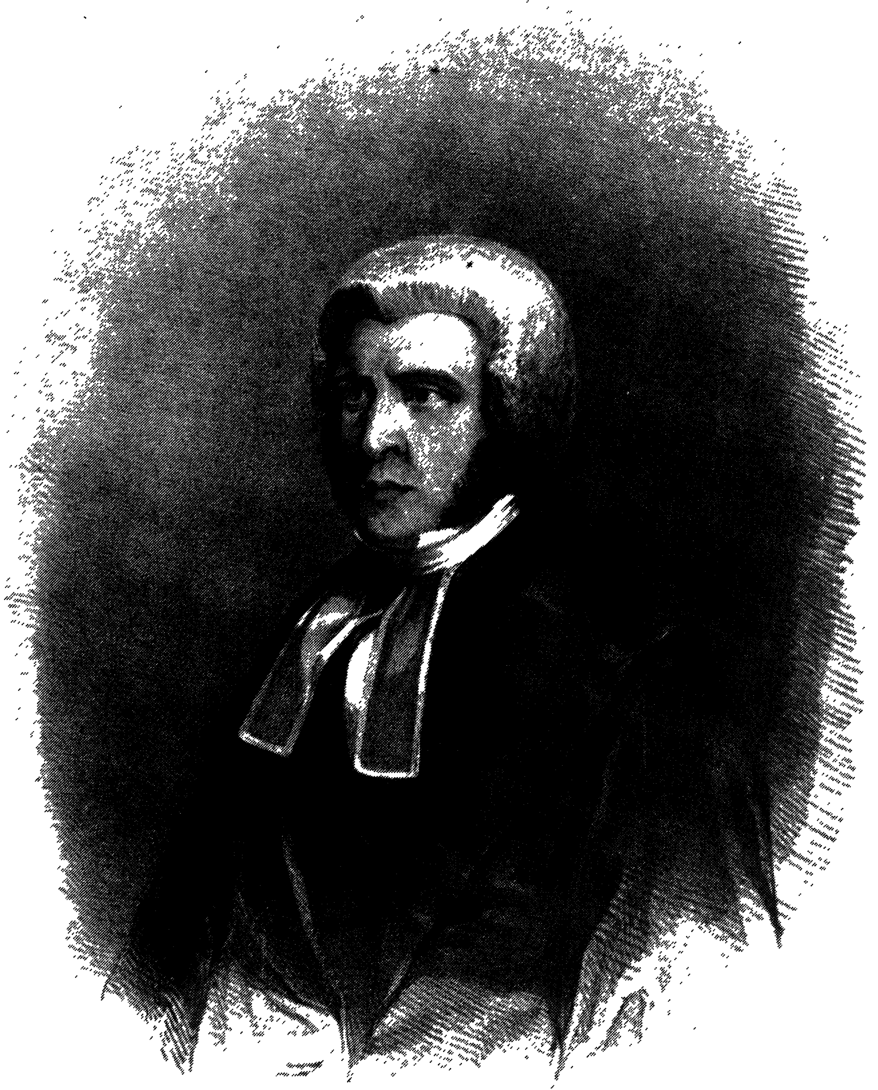
77 For example, the Federal Republic of Germany. The Federal Labour Court has established a range of criteria to be observed by associations being parties of collective agreements. These criteria arguably include a willingness to use industrial action and the power to put pressure on the other side: M Weiss "Federal Republic of Germany" in R Blanpain (ed) *International Encyclopaedia*, above n 7, 77.

78 R Birk "Industrial conflict: the law of strikes and lockouts" in R Blanpain (ed) *Comparative Labour Law and Industrial Relations*, above, n 12, 405.

79 Lord Wedderburn *The Worker and the Law*, above n 17, 193.

relationship. Examples here are the employer's duty to justify dismissals,[80] individual access to the Labour Court,[81] and the provisions as to suspension in strike instances.[82] The relationship between common law and labour law and between individual and collective labour law can be clarified there and then. A single Act on the Individual Employment Contract would thus promote coherence in the legal regulation of the employee-employer relationship. It would also achieve a further recognition of labour law as a mature and separate branch of the law.

80 Labour Relations Act 1987 s225 (Statement of reasons for dismissal).
81 Above n 80, s218 (direct access to Labour Court).
82 Above n 80, ss238-241 (particular right of employers).



THE HON H S CHAPMAN
Judge of the Supreme Court, New Zealand
(from a picture in the possession of his family, by Mr T Lawrence)