THE STATUS AND JURISDICTION OF THE NEW ZEALAND EMPLOYMENT COURT

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EXECUTIVE SUMMARY

&IUML; The creation of specialist Courts enables governments to ensure that particular types of cases are heard by certain judges. They therefore constitute an interference with the independence of the judiciary.

ï Specialist Courts are not 'ordinary Courts' if this term has any distinct meaning.

&IUML; The Employment Contracts Act 1991 breaches fundamental constitutional principles:

- s 3 deprives private citizens with legal disputes with other private citizens of the right of access to the ordinary Courts; and

- ss 105 and 131 remove from the jurisdiction of the High Court supervision of certain statutory authorities, and purportedly assign power of judicial review over those bodies to other Courts.

ï The arguments for the Employment Court's exclusive jurisdiction fall into two main categories:

- practical arguments to the effect that the Employment Court is cheap and user-friendly (in which case there is no need for exclusivity of jurisdiction), or that its development of the law merely parallels developments in the law of contract generally (in which case there is no need for a separate Court); and

- philosophical arguments which stem from a position opposed not only to the free contracting on which the Employment Contracts Act 1991 is based but also to the independence of the judiciary and the equal application of the law.

ï The current jurisdictional divide between the Employment Court and the High Court is complex, illogical and uncertain. It leads to parallel litigation over one set of facts and serves no useful purpose. The role of the Court of Appeal in employment law undermines the arguments for the existence of a separate jurisdiction.

ï Proposals for reform by extending the jurisdiction of the Employment Court and/or extending the reach of employment law would create new boundary problems as people would reorder their affairs to avoid the requirements of employment law; would often disadvantage those whom the reforms would be intended to help; and would ride roughshod over individuals' express choices in the pursuit of social policy.

ï The only solution which avoids creating demarcation disputes and which preserves the principles of free contracting, the independence of the judiciary and the equal application of the law is the abolition of the specialist employment jurisdiction.

PART 1 SPECIALIST COURTS

1.1 INTRODUCTION

As President of the Court of Appeal, Sir Robin Cooke (as he then was) suggested that there may be common law rights that run so deep that parliament cannot abrogate them. One of these, he suggested, was a right of access to the 'ordinary Courts'.

This obviously raises the questions 'what is a Court?' and 'what is an ordinary Court?'. If the expression 'ordinary Court' means anything, it presumably delineates a sub-set of the set of 'Courts'. In other words there may be, at least theoretically, 'Courts' which are not 'ordinary Courts'.

This paper seeks to enquire into what is meant by the expression 'ordinary Court', to identify the values underlying claims of right of access to the ordinary Courts and to consider, in the light of those values, whether it is legitimate for the government to set up 'specialised Courts'. Throughout, the example for discussion will be the Employment Court created by the Employment Contracts Act 1991. That Court raises the question most starkly since its jurisdiction is expressed to be exclusive of the High Court, but there are other examples to be found in New Zealand such as the Planning Tribunal and the Maori Land Court.

It is true that Lord Cooke has also expressed the view that there appeared to be 'nothing constitutionally objectionable' in the provisions for the exclusive jurisdiction of the former Labour Court in view of the fact that its judges had security of tenure and were therefore not able to be dismissed by a government. There had, however, been very little writing and thinking about this issue, and indeed there still has been very little. The removal of private legal disputes (such as those heard in the Employment Court) from the jurisdiction of the High Court may raise questions of greater difficulty than has hitherto been realised.

1.2 THE EMPLOYMENT COURT

The Employment Court is created by Part VI of the Employment Contracts Act 1991 (ECA). It is the direct successor of the Labour Court created by the Labour Relations Act 1987 which in turn descended from the Court of Arbitration, one of the functions of which was to determine pay scales through the award system. The Court of Arbitration was presided over by a High Court judge, as a result of which that Court and its successors came to be regarded as equal in status to the High Court. The Employment Court is presided over by a chief judge and up to five other judges. Qualification for appointment is similar to that of High Court judges, as is the protection of their tenure and remuneration.

By virtue of s 3 of the ECA, the Employment Court has exclusive jurisdiction over any action "founded on" a contract of employment. In the language of labour law, the Court exists to deal with disputes of rights rather than of interests. In other words it does not settle or negotiate pay awards but only deals with disputes of a legal nature brought to it by the parties. Other detailed aspects of its jurisdiction will be discussed as they become pertinent.

The Employment Court is declared by s 103 of the ECA to be a 'Court of record'. This is a form of words used when parliament wishes to indicate that a body is to be regarded as a Court rather than as a 'statutory tribunal'. There is room for some doubt as to the effect of such a provision, however. The fact that parliament declares an institution to be a Court cannot of itself make it one, at least not in the sense in which the word 'Court' is used at common law. Were that to be so, then parliament could declare a minister or public servant to be a 'Court of record'. (This might be called the 'Caligula power'.) "To call [a body] a Court or a superior Court of record does not convert its non-judicial functions into judicial functions." Whether a body is a Court in the common-law sense must depend upon some basic principles and criteria beyond parliament's reach: "on substance and not on mere name".

1.3 WHAT IS A COURT?

The question 'what is a Court?' has received close attention in Australia and the United States as a consequence of their written constitutions which reserve the judicial power to 'Courts'.

In Australia judicial power is awarded to the Courts by s 71 of the constitution, and the power to create lower Courts is vested in parliament. This has led to parliament setting up bodies which it has described as a 'Court' or a 'Court of record'. A series of cases has established that whether a body is a Court is determined by whether it carries out a judicial function, not by how it is labelled by parliament. In the same cases the Courts have held that parliament cannot assign a judicial function to a body other than a Court, nor assign non-judicial functions

to a Court. This latter question does not arise in New Zealand in the absence of a written constitution, but the former question, "what is a Court?", does.

The central principle of our constitution is that the Courts will recognise Acts of parliament as valid. Parliament's power therefore depends upon the Courts which alone have the power to determine what is an Act of parliament and to enforce it. For this purpose at least, parliament cannot determine what is a Court simply by labelling it as such, otherwise it could confer that status on a Committee of the House of Representatives. What is a Court for this purpose must be determined by criteria such as those set out in the Australian cases, namely the power to make a binding declaration of right, the duty to do so by reference to the pre-existing law, relatively limited discretion, and powers of enforcement.

Likewise, Article III of the United States Constitution reserves the 'judicial power' to:

... one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during Good Behaviour and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

The Supreme Court has held that it is a requirement of a Court that it be able to make final determinations of legal rights. Thus the Article sets out objective criteria: ability to make final determinations of rights, tenure for judges and protection for their remuneration. Congress has occasionally set up bodies called Courts that did not comply with the criteria. The Supreme Court has held that Congress is entitled to set up such bodies in the exercise of its legislative power under Article I, but that they did not fulfil the judicial function under Article III. Hence commentators refer to Article I (or Legislative) Courts and Article III (or Constitutional) Courts.

Amongst the bodies found to be Article I Courts were the Courts in the Territories, and Courts to deal with taxation matters and claims against the government. The judges in the Territories did not have security of tenure, for the reason that the foreseeable change from Territorial status to Statehood would reduce the number of Federal judges required. The Court of Claims heard claims against the government which could not be sued in its own Courts. This body could not make final determinations. This expression (final determinations) is not used here in the sense in which it occasionally appears in legislation: 'the decision of which shall be final', which means that there shall be no appeal. Power to make 'final' decisions as a criterion for identifying Courts means the power to make a decision which disposes of the issue and is automatically effective unless one of the parties decides to appeal to a higher Court. This is to be contrasted with a body which merely produces a recommendation which may or may not be acted upon by some other authority, such as the Waitangi Tribunal in most of its activities. The Court of Claims only produced a recommendation in the form of a statement of where right lay but which it was up to the government to act upon. Even when Congress subsequently declared in the Act that the Court of Claims was an Article III Court, the Supreme Court held that this did not make it one. It was for the Supreme Court to decide whether it was an Article III Court according to the criteria in the Article. Congress's statement was merely evidence of what Congress intended, not of what it had achieved.

It will be noted that the Article I Courts mentioned above were not set up to determine private disputes between individual citizens of the States. Nor have the Article III Courts been sub-divided by subject matter. The textbooks assume that it would be within the power of Congress to set up specialised Courts, e.g. of Equity or Admiralty, but it has never done so. Article III Courts below the Supreme Court are organised into a hierarchy of Federal District Courts and Circuit Courts of Appeals which have general jurisdiction. One may speculate as to the reasons for this. Congress does not have the leading role in appointing judges. If the point of creating specialist Courts is to enable interference in the employment of judges, Congress has little incentive to pass such an Act. In Britain and New Zealand, however, where the executive is able to get 'its' legislation through parliament, specialised Courts and Divisions have been set up.

The United States Constitution was a codification of common-law principles, which have been developed since by the High Court of Australia. On these principles a Court is one in which the judges enjoy security of tenure and remuneration, the ability to make final determinations of legal rights based on pre-existing law, and the power to enforce their decisions. These principles arose in response to the problem with which England and the Colonies had been faced in the seventeenth century, namely judges subservient to and dismissable by the government.

Once such principles are recognised, governments, or other groups, who wish to interfere with the independence of the judiciary will have to resort to other devices. One which offers itself is to divide up the Courts by role. Where Courts have general jurisdiction it is extremely difficult to predict the decisions of individual appointees, as the history of the United States Supreme Court in this century shows. Even where there is detailed knowledge of appointees' views it is unlikely that they will agree with the government on a broad range of issues. The narrower the range of issues in a Court's jurisdiction the greater is the likelihood that there will be full knowledge of an appointee's views and the easier it should be to appoint judges who will make the decisions the government wants. This is especially so where an 'expertise' argument leads to the appointment of practitioners in the field, unless they are carefully chosen for having appeared on both sides of the question.

The Employment Court clearly satisfies the criteria laid down by both the United States Supreme Court and the High Court of Australia for identification of a 'Court':

ï its task, unlike its predecessors, is solely to make binding determinations of legal rights, but within a defined area;

ï it makes its decisions on the basis of pre-existing law, not on the grounds of what constitutes desirable policy. It can be seen that many complaints about the Employment Court are essentially allegations that it has failed to live up to this role;

ï its judges have security of tenure and protected remuneration; and

ï it has power to enforce its own orders.

The question therefore arises whether a specialist Court can be an 'ordinary Court'.

1.4 WHAT IS AN 'ORDINARY COURT'?

The nature of an 'ordinary Court' could just be treated as a question of semantics. It could be argued that a 'specialist Court' cannot possibly be an 'ordinary Court'; it would be a contradiction in terms. It is also possible to argue that the word 'ordinary' adds nothing, and that any body that satisfies the criteria in the previous section is an 'ordinary Court'. Such arguments would not have impressed the parliamentarians of the seventeenth century. A constitutional battle on these very issues went on for much of that century in England.

There were three ancient common law Courts: King's Bench, Common Pleas and Exchequer Chamber. This fact gave the monarch a measure of control without even having to exercise his undoubted power to dismiss judges. He could move judges from one Court to another and frequently did so. Chief Justice Coke, for example, was translated from the Chief Justiceship of Common Pleas to that of the King's Bench, before he was dismissed altogether.

In addition to these Courts, however, there were certain Prerogative Courts set up by the monarch. Chief amongst these were the Star Chamber, the Council of the North and the Court of High Commission. This last was supposedly restricted to ecclesiastical causes but the definition of 'ecclesiastical' could be elastic. The common law Courts asserted that these Courts were 'foreign jurisdictions' and constantly interfered in their work by issuing writs of prohibition, removing cases into the common-law Courts. The King replied that he had a right to appoint what Courts he pleased to dispense the King's justice. It was only later in the century and after a civil war that it was accepted that the King ruled subject to law.

In the Bill of Rights 1689, s 3, parliament declared:

That the commission for erecting the late Court of commissioners for ecclesiastical causes and all other commissions and Courts of like nature are illegal and pernicious.

The deep-rooted objection to such Courts was demonstrated by the fact that parliament expressed them not to be undesirable in future for policy reasons but to have been "illegal". The King, as part of the price of ascending to the throne, accepted that he had no power to create special Courts.

It therefore seems reasonable to assume that the word 'ordinary' in the expression 'ordinary Courts' is operative. That is to say it adds something to the word 'Courts': not all Courts are 'ordinary Courts'. If the expression 'ordinary Court' means anything, there must be some characteristic or characteristics possessed by ordinary Courts, the loss of which would not deprive them of the status of Courts but would deprive them of the status of 'ordinary Courts'. How is it to be decided, then, what the characteristics of an 'ordinary Court' are and whether a particular Court comes within the description?

One way to approach this question is to consider what characteristics could be removed from the Employment Court without endangering its status as a Court? If the Employment Court were to lack any of the characteristics of security of tenure and remuneration or the power to make binding declarations of right it would clearly cease to be a Court. It is therefore hard to see what the characteristic that separates 'ordinary Courts' from 'extra-ordinary Courts' could be other than generality of jurisdiction.

Consideration of the value of a protected right of access to the 'ordinary Courts' leads to a similar conclusion. This right is valued because access to impartial judges who will enforce the law without fear or favour is an essential safeguard for liberty and the rule of law. There is a clear line of argument that specialist Courts endanger these traditional legal values.

It would obviously be a breach of the independence of the judiciary if the government were to assign cases to individual judges. In an independent judiciary that is the role of the Chief Justice, presiding judge or equivalent. In recent years much energy has been expended in both New Zealand and the United Kingdom on the potential threat to judicial independence posed by the increasing 'managerialism' of the government departments responsible for Courts. But all this debate is simply about the conduct of business in the High Court. The issue that has not been touched on is that whatever limits are put on the government's ability to interfere with the business of the High Court, they can easily be evaded if the government is allowed to remove matters from its jurisdiction and allocate them to separate Courts. The *reductio ad absurdum* is that the government could set up numerous Courts, each with very closely defined jurisdiction and each consisting of a single judge.

Furthermore, once parliament has set a precedent, there is no limit to the amount of shuffling of the judicial pack that might be carried out. The Labour Party has announced that it will "review the functions of the Employment Court". This illustrates one of the dangers of such specialist Courts: they are regarded as mere statutory bodies whose powers can be 'reviewed' whenever it suits the government. Even more egregiously, the Courts can be reshuffled to exclude particular judges from hearing particular cases. That this is no fanciful fear is shown by the creation by the Labour government in Australia of the Industrial Relations Commission in 1989 which excluded one particularly controversial judge of the former Conciliation and Arbitration Commission.

The creation of specialist Courts therefore enables the government to decide which judges will hear which kinds of cases. A specialist Court which has exclusive jurisdiction is clearly a device which can be used to prevent certain judges from hearing particular cases and to allocate them to other judges.

The case has therefore been made that the values which require a right of access to the 'ordinary Courts' require that the Court to which there is a right of access be a Court of general jurisdiction and not one in which the subject matter is limited by statute, whether substantively (such as the Employment Court and the Planning Tribunal) or procedurally (such as the Court of Appeal).

In *NZ Couriers Ltd v Curtin* Cooke P dealt with an argument based on a right of access to the Queen's Courts by saying that the Employment Court was clearly one of the Queen's Courts. The argument and the response, with respect, miss the point. The Star Chamber, the Council of the North and the Court of High Commission were clearly King's Courts. They were nonetheless "illegal and pernicious". In creating specialist Courts to determine disputes between private citizens, parliament is asserting today the absolute power claimed 400 years ago by the King.

1.5 DIVISIONS OF THE HIGH COURT

It may be objected that the High Court in England is divided into Divisions 'for the efficient despatch of business' and that there is no real difference between a Court divided into Divisions and separate Courts. It may be in a particular case that this is true. The creation of a separate Criminal Division with (as originally proposed)

its own chief judge, appointed by the government, in the Supreme Court of New South Wales provides an example.

This is not the case with the Divisions of the High Court of England and Wales, however. First, the Court is a single Court and all High Court judges are judges of the one Court. Any High Court judge can exercise the powers of any judge of any Division. Judges may be transferred from Division to Division by the Lord Chancellor (an office without equivalent in New Zealand) but only with the consent of the Head of the judge's current Division. The minimum numbers of judges in each Division is quite low, so that, for example, if a judge of the Chancery Division retires the newly appointed judge may go to the Queen's Bench Division if the current balance of work so requires. Thus a High Court judge is a High Court judge and if, for example, the Employment Court were to become a Division of the High Court under a similar arrangement, the appointees would have to be capable of undertaking the range of High Court work.

Secondly, proceedings can be transferred from Division to Division. It is recognised that there will always be proceedings that combine causes of action from different areas of the law. Where this is the case a purely practical decision may be made as to which Division should hear the case.

Thirdly, as originally envisaged, the distinction between the Divisions was based on conceptual divisions of the law. The Queen's Bench Division dealt with Common Law, the Chancery Division with Equity and the Probate, Divorce and Admiralty Division with matters stemming from Roman Law. The Divisions were thus based on abstract divisions of the law rather than on contextually based applications of law to specific circumstances in the real world. Legal subjects of the latter type tend to be associated with greater ideological rifts between practitioners, with the result that by the time they are appointed to the Bench practitioners have developed a track record on one side of the argument or the other.

The Divisions of the English High Court do not therefore provide a good analogy with the exclusivity of jurisdiction of the Employment Court. A better analogy would be with the exclusivity of the Order 53 procedure for applications for judicial review in the English High Court. This has caused considerable litigation and extensive comment, almost none of it favourable.

New Zealand has experimented with a specialist Division of the High Court (then the Supreme Court) in the form of the Administrative Division. This was set up in 1968 mainly to handle appeals from administrative tribunals. The Public and Administrative Law Reform Committee proposed that judges should be specially appointed by the government to hear such appeals but this recommendation was not adopted and the power to assign judges to the Division was given to the Chief Justice. It is interesting that, perhaps because it was introduced at such an early stage in the development of modern administrative law, this innovation was initially not to be involved in Judicial Review. It was the latter topic which dominated the later literature when the idea of a specialist administrative Court became a fashionable topic.

The Administrative Division quietly declined and was eventually put down in 1989. Many of the reasons offered for setting up a specialist Court were the same as have been put forward for the Employment Court: the specialised nature of the work, the necessity for flexibility and discretion, and consciousness of non-legal criteria for decisions generally described as 'policy'. It became clear that the work was not of a truly specialist nature, that the boundary lines between the Administrative Division and the rest of the High Court were haphazard and that the idea that the judges should treat these decisions differently from other cases was an ideological stance that the judges could not be relied upon to accept.

All the arguments against a specialist Employment Court, and all the jurisdictional problems arising from its existence, would apply equally to the creation of a separate Division of the High Court if it had separate statutory jurisdiction and specially appointed judges. The creation of a Division on the pattern of the former Administrative Division would be less open to objection, but the arguments in favour of such a move are weak in the extreme. As will be seen in Part 2, the reasons why some argue for a separate Employment Court would not be fulfilled by such an arrangement. Separate labour Courts are desired because their proponents do not like the application of the law in a traditional legal fashion by High Court judges. Shorn of this ideological aspect, their case is reduced to weak arguments about an undefined 'expertise'. There is no point to a specialist Division on these lines.

1.6 SPECIALIST TRIBUNALS

There is in New Zealand no authoritative definition of 'Court' or 'Tribunal'. Some tribunals conduct themselves in a Court-like manner while some Courts act today with the informality previously the hallmark of tribunals. Nor is the name determinative. The Planning Tribunal is a Court. Although the Employment Court is clearly different from most statutory tribunals, there is almost no writing on the subject of specialist Courts and it is instructive to analyse the debate that surrounds the creation of such tribunals.

Two main streams of argument are to be found. A traditional lawyers' rationalisation of the existence of tribunals is that they exist in order to provide "simpler, speedier, cheaper and more accessible justice than do the ordinary Courts ... . An accompanying advantage is expertise". Lawyers tend to regard tribunals as adjudicative bodies designed to protect individuals from abuse of newly created government powers: "when the state imposes controls there has to be a procedure which ensures that the citizen's freedom is not interfered with in an arbitrary manner".

Those who actually decide to create tribunals, however, appear to think quite differently. Thus Banting, working from the diaries of former British cabinet minister Richard Crossman, tells us that "the Labour Party had long regarded courts as insensitive and intimidating institutions, with an undue sensitivity to property rights".

Thus we find two entirely different views of the creation of tribunals. One is the lawyers' view that tribunals are 'quick, cheap and expert' substitutes for generalist Courts. The other view makes it clear that the motivation for the creation of tribunals is often political: that some interest group regards the Courts as unlikely to make the decisions it wants. New institutions have to be created which are likely to be more amenable to the decision makers' views.

These two views of tribunals turn out closely to parallel the arguments for a specialist employment jurisdiction discussed in Part 2.

1.7 JUDICIAL REVIEW

By s 105 of the ECA the Employment Court is given exclusive power of judicial review over certain authorities and activities. By s 131 the exclusive power to review decisions of the Employment Court is awarded to the Court of Appeal. The scope of these powers will be examined in detail in Part 3; what must be discussed here is the idea that parliament can assign the power of judicial review to a body other than the High Court.

The power of judicial review derives from the inherent jurisdiction of the Court of King's Bench. As Keylinge CJ put it:

The King himself sits here and that in person if he pleases, and his predecessors have so done; and the King ought to have an account of what is done below in inferior jurisdictions.

The jurisdiction for judicial review does not come from parliament. Attempts by parliament to restrict judicial review of particular bodies by means of ouster clauses have routinely been got round by the Courts of all Commonwealth countries. In the ECA, the High Court finds itself faced with the most ingenious of ouster clauses, a provision assigning exclusive power of judicial review to two other bodies, the Employment Court and the Court of Appeal.

The question then arises how parliament can effectively assign the power of judicial review to bodies other than the High Court. The obvious answer is that parliament is sovereign and can do whatever it likes and that an assignment of judicial review to another body effectively deprives the High Court of that power.

However, this argument proves too much. On this argument parliament could assign the power of 'judicial review' in respect of some activity to a minister or public servant. This would merely be an abolition of judicial review. It also adopts a mistaken view of parliamentary sovereignty. A correct statement of the rule of parliamentary sovereignty is that the Courts will recognise an Act of parliament as valid. But it is always within the power of the Courts to determine what is an Act of parliament and what a provision of the Act means. It is therefore impossible to withdraw completely from the High Court the power to determine the jurisdiction of a statutory body, especially when, as will be discussed in Part 3, the question arises collaterally in a proceeding started in the High Court.

Two possible conclusions may be drawn from this:

ï parliament can assign the jurisdiction of judicial review to another Court whose judges have security of tenure and remuneration and power to make final determinations of legal rights; or

ï parliament cannot assign the jurisdiction and a purported assignment leaves the High Court in the same position as if parliament purported to abolish judicial review.

The first conclusion seems dubious. It concedes that parliament is subject to some restriction in the disposal of judicial review, but then limits that restriction in a way that seems to have little justification. Once the concession is made that parliament's power to dispose of judicial review is subject to limit there is no ground on which to argue against the proposition that parliament cannot dispose of judicial review at all. No proposed detailed gloss can be defended against any other. The logical positions seem to be that parliament can either dispose of judicial review as it wishes or not at all.

Other factors indicate that the power of judicial review held by the Employment Court is not the power commonly meant by the expression 'judicial review'. First, the vital requirement that judicial review be an independent consideration of the legal powers of a subordinate body is lacking. When the Employment Court 'reviews' a decision of the Tribunal, or of an employer, it may well be deciding an issue which determines its own jurisdiction. There is, therefore, a clear conflict of interest.

Secondly, s 105(3) provides that where a right of appeal is provided "a person shall not make an application under subsection (1) of this section … unless any appeal brought by that person … has first been determined". The relationship between judicial review and appeal has long been the subject of discussion. Theoretically and logically, appeal and judicial review are entirely different concepts. Appeal is a second chance to have the merits of the case considered so far as the relevant statute allows. Judicial review is concerned with the legality of the decision or action. If a decision is unlawful because it is outside the powers of the decision maker, or is unreasonable or is taken after defective process, that illegality is not cured by the ability to pursue a right of appeal created and limited by statute. The Courts have made it clear that they prefer, for practical reasons, that avenues of appeal are explored before an application for judicial review is filed. A *legal* limitation on judicial review of this sort is, however, another matter and indicates that the power given to the Employment Court is not true judicial review.

The parliamentary effort to impose this limitation illustrates the problems with a supposed transfer or limitation of the power of review. In *The Conference of the Methodist Church of New Zealand v Gray* the appellant appealed to the Court of Appeal and raised the question of jurisdiction. This was equivalent to a challenge under s 131 that the Employment Court had had no jurisdiction to enter into the enquiry. This question was necessarily dealt with by the Court of Appeal and the same would occur in an appeal from the Employment Tribunal to the Employment Court. The attempt to shelter the institutions from review of the jurisdictional propriety of their decisions until after an appeal on the merits therefore fails.

The conclusion is that the power of judicial review in the common law/prerogative sense is not in the gift of parliament. Section 105, on this view, constitutes an ouster clause so far as the High Court is concerned and creates a new statutory procedure so far as the Employment Court is concerned.

It must therefore be doubted whether ss 105 and 131 have any more effect on the jurisdiction of the High Court than any other privative clause, certainly so far as an application for one of the prerogative remedies is concerned. That this is so is demonstrated by the power of the High Court to determine the jurisdictional limits of the Employment Court when the question arises collaterally to an action in the High Court. This is discussed in Part 3.

1.8 CONCLUSION

The fundamental question raised by the creation of specialist Courts is 'why can the High Court not be trusted with these decisions?'. Various arguments relating to expertise and so on are routinely put forward and these will be examined in the employment law context in Part 2. The arguments discussed in Part 2 demonstrate that the motivation is at least partly ideological. Specialist Courts are created when some interest group does not believe

that equal application of the laws by judges applying the traditional canons of statutory interpretation and the traditional values of the common law will result in decisions that favour its own ideology and interests.

The only conclusion that can result from consideration of the value of access to the 'ordinary Courts' is that a specialist Court is not an ordinary Court. An Act of parliament which diverts disputes away from the ordinary Courts into a specialist Court is therefore an Act which deprives the subject of access to the ordinary Courts. It is no answer to point to the right of appeal to the Court of Appeal since, as will be seen, that itself creates an unstable situation which is just as likely to lead to abolition of that right of appeal as it is to lead to abolition of the specialist jurisdiction.

It will be seen from Part 2 that the effect is to divert private disputes between private citizens away from Courts supposed only to decide issues by reference to pre-existing law to Courts created on the premise that they will pursue a political agenda. This renders private disputes mere opportunities for the advancement of policy and constitutes a major erosion of liberty and individual autonomy.

PART 2 THE ARGUMENTS FOR A SPECIALIST EMPLOYMENT COURT IN NEW ZEALAND

2.1 INTRODUCTION

There is agreement between commentators as diverse as Maryan Street, former president of the New Zealand Labour Party, and Ruth Richardson, former National Party finance minister, that the Employment Contracts Act 1991 is philosophically incoherent. Both agree in labelling the early Parts of the Act, based on a philosophy of free contracting, as inconsistent with Part VI which creates the specialist institutions. Other writers on employment law in New Zealand agree.

A notable exception is the present government which appears content to leave the current arrangements until it can be seen "how well they are working". Since no specified outputs are required of the Employment Court, there is no way of telling "how well it is working"; indeed one wonders what possible criteria the government could properly lay down in advance as requirements to be met for a Court to continue in existence.

There also seems to be general agreement that the current jurisdictional divide between the Employment Court and the High Court is impractical and undesirable. Chief Judge Goddard has pointed out that the current rules potentially "expose the same defendant to litigation at the suit of the same plaintiff in respect of the same subject matter in two different Courts" - and that "nothing could be more undesirable or more disgraceful". Hammond J has referred to the current position as being redolent of the old forms of action.

The role of the Court of Appeal is seen as anomalous. Appeals from the Employment Court go to the Court of Appeal which is hence likely to retain a "controlling influence on the development of employment law". In order to prevent judicial review of the Employment Court being used as an alternative to appeals, the Court of Appeal also has the power of judicial review of the Employment Court. This casts doubt on the rationale for a separate Employment Court. A "controlling influence" in the development of employment law is exercised by a Court none of whose members have been Employment Court judges. Conversely, if the Court of Appeal is capable of dealing with employment cases on appeal it is difficult to see why the High Court is not capable of dealing with them at first instance.

If it is agreed that the present position is illogical and incoherent, the real question is which way should New Zealand move? Should a more specialised and autonomous employment law system be created with its own appeals or should the Employment Court be abolished? The answer, based on the strictures against specialist Courts in Part 1, would appear to be the latter. It would be possible to argue that no desirable consequence in a particular instance should be allowed to outweigh an important principle. It may be argued, however, that in the case of employment law there are particular arguments which discharge the burden of explaining why the principle should be breached. This Part will examine the arguments put forward to see if they do so and will

show why the existence of a specialist Court is inconsistent with an employment régime largely based on free contracting.

2.2 OFFICIALS' COMMITTEE ARGUMENTS

After assuming power in 1990, the National government intended to legislate immediately to reform the substantive law of employment but to leave the institutional questions to a later date. It became clear, however, that the two matters could not be disentangled and so the government decided to deal with both issues in the one Bill.

On the institutional issues, however, the government had no clear policy and, indeed, no apparent grasp of the issues. Consultation was called for and an Officials' Committee, including officials of the Department of Labour, produced a report calling for the retention of specialist institutions on the grounds of expertise, flexibility, avoidance of legalism and preservation of parliament's intentions. These reasons are all atheoretical and other defences of a separate labour Court system are available. At the most theoretical these include a claim of autonomy on behalf of labour law, but other justifications advanced include the ability to make specially considered appointments, and that the Employment Court is much cheaper and more 'user-friendly' than the High Court. It is also argued in defence of the Employment Court that it is not as 'bad' as it is painted, and that its critics have misrepresented its behaviour in various ways. These arguments will now be considered.

2.2.1 Expertise

The main point made by the Officials' Committee under this heading was the ongoing nature of the employment relationship. The Committee said that the:

... average occupants of the judicial bench are more used to dealing with one-off settlements, derived from the application of abstract principles embodied in precedents, and have little knowledge of the realities of the workplace and the on-going nature of the employment relationship.

It seems, however, that in much of what they say the officials were thinking about the problems of daily life rather than the settlement of disputes in Court. Their views may seem appropriate to a body such as the Employment Tribunal which genuinely deals with industrial relations matters rather than to a Court the task of which is either to supervise the Employment Tribunal on matters of law or to deal with original actions involving well-defined legal questions. Specifically, employment may be in general terms an ongoing relationship but that does not mean that disputes before the Employment Court concern relationships that are actually subsisting at the time of the hearing. Many of the cases between individuals (as opposed to unions) and employers concern relationships which have already ended. The purpose of the dispute is to reallocate the losses caused by the relationship ending in a way other than that originally intended. No evidence is offered by any of the protagonists to support the contention that Employment Court judges deal predominantly with on-going relationships.

Even if it were true that employment cases involve long-running and subsisting contracts, this situation is by no means unique to employment contracts. It is recognised that such contracts do pose different questions from those raised by more short-lived contracts. Wholesale energy contracts are a case in point, as are construction contracts. These are all matters identified by writers as suitable for mediation and other non-legal procedures and access to such procedures is available as an alternative to, but not as a compulsory substitute for, ordinary Court action. But cases arise where the parties wish to go to Court for a determination of the legal issues. These are cases in which alternative methods have failed. The role of the Court in such cases is to determine the legal rights in the small number of cases that come before it. The fact that the bulk of such cases are better resolved by mediation does not mean that the few that come to Court should be treated any differently from any other dispute.

The 'expertise' argument assumes either that there is something to be expert in or that some special skill is required. The first raises the question of the autonomy of labour law, which is discussed below. Employment cases can raise questions in contract, tort, equity, restitution, public law and even criminal law. It seems then that Employment Court judges, far from being experts in a narrow area, have to have a thorough understanding of the whole seamless web of the law, as do High Court judges.

The second idea is reflected in comments such as Vranken's:

The major factor which triggers the need for labour Courts rather than the Courts of general jurisdiction is that judges of a specialist Court, because of their expertise and background in the subject, are most likely to demonstrate the sensitivity required when dealing with labour disputes.

Since Employment Court judges are not today concerned with negotiating agreements but with deciding disputes, it is unclear why 'sensitivity' beyond that required of a High Court judge is a prerequisite. Whatever the reason, this prediction does not seem to have been borne out, at least in the eyes of the Courts of general jurisdiction which in one case have gone so far as to remark that "the manner in which the Employment Court's judgment was expressed could only have exacerbated the situation".

Expertise is sometimes linked to the tripartite nature of labour Courts (see below), a characteristic which the Employment Court lacks. So far as legal members of labour Courts (including some Employment Court judges) are concerned, this expertise is apparently gained 'on the job' since the practitioners appointed in common law countries are frequently not 'labour lawyers' and on the Continent they may well be young career judges who have recently completed their legal education and have 'drawn the short straw'.

Expertise is often said to include knowledge of 'custom and practice'. This is an interesting argument. Other areas of law draw on 'custom and practice'. Classical contract law grew up in this way; indeed Hayek's evolutionary theory claims that the entire common law did so. In these other areas of law judges are informed as to 'custom and practice' by counsel and witnesses. This imposes costs where the same matter has to be explained to a succession of judges, but eventually a custom or practice may become the subject of judicial notice or part of the law. Where this is not so it may well be that parties would wish to argue a point rather than let it be taken into account by a judge *sub silentio*. The 'custom and practice' argument is also inconsistent with the views, discussed below, that the role of employment law is to change practice, to impose a structure against the wishes of the parties.

It is difficult to discern from the backgrounds of the Employment Court judges what kind of expertise is sought. There is no formal requirement in the ECA for any particular experience other than seven years practice of law. There seems to be no practical requirement for any particular experience. Of the original judges, two were formerly District Court judges with Family Court warrants, so presumably had experience of dealing with the breakdown of long-term relationships. Two were predominantly employment lawyers (crudely speaking, one employers' lawyer and one trade union lawyer) and two were in general practice. The Chief Judge was mainly known as a defamation expert. Nor is it appropriate to talk about a 'mix of relevant experience' as most Employment Court cases are heard by a single judge.

All these points tend to undermine the expertise argument, but the major point against it is the complex, haphazard and arbitrary nature of the jurisdictional divide between the Employment Court and the High Court. Over the last 100 years matters have been moved into and out of the competence of the specialist employment institutions. The effect of the ECA was to sweep away much of the jurisdiction of the Labour Court and to replace it with matters previously the preserve of the High Court. In fact it could be said that in 1990 the Employment Court judges had no experience of settling disputes relating to individual employment contracts, whereas High Court judges did.

Not only has there been no rational allocation of functions over time but the present boundary lines are incoherent. The division of work between the Employment and High Courts will be separately examined, but it is clear that many issues can arise in the High Court which closely resemble employment law matters. Even if it were true therefore that employment law were an autonomous branch of the law, the boundary lines draw by parliament have always left and still leave to the High Court many issues in which the Employment Court is supposedly expert. Conversely, many matters now within the Employment Court's jurisdiction were, until 1987 or 1990, matters dealt with by the ordinary Courts without any apparent cause for complaint.

The greatest of these boundary problems is caused by the distinction between contractors and employees. This is examined in detail in Part 3. Two people operating under very nearly the same contractual conditions can find their affairs regulated by entirely different procedural and substantive law. The anomalies that this obviously causes has led to calls for contractors, or at least 'dependent contractors', to be brought under the Employment Contracts Act 1991. The difficulty is that wherever the boundary line is drawn, new anomalies will arise. People

will arrange their affairs so as to fall just outside the definition of a 'dependent contractor' and there will be further calls for the Act to be extended to cover new ranges of circumstances. The situation is therefore unstable and cannot be made less so by altering the definitions.

2.2.2 Flexibility

The Officials' Committee believed it important that employment law operate in a flexible fashion and that parties were encouraged to settle disputes without going to Court and to use non-legal mediators. This view is mirrored by Maryan Street who observes that employment disputes should be resolved, not won or lost.

This is not an argument about employment law, but about law and the legal system generally. There are thousands of differences between people every day which do not even go near lawyers. If they go to lawyers the vast bulk are settled informally or formally without going to Court. All this is achieved without any intervention by organs of the state, save that the ordinary Courts encourage these activities by a variety of devices. In the case of the ECA, settlement of disputes by alternative means is specifically provided for by s 3(2).

There seem to be two possible explanations for this argument. One is an underlying belief that all disputes of a legal nature go to Court where they are dealt with in the formalistic manner of a Court case. The other is a belief that organs of state must be involved at an early stage in employment disputes, although not in other disputes. Institutions must therefore be fashioned which can achieve sensitive resolution of differences.

The first of these ideas is clearly mistaken. The second would seem to be a conclusion requiring argument rather than an assumption on which to base an argument. Even if it were true however, this is largely irrelevant to the nature of the Employment Court. If it were true that there were some market failure in employment disputes that justified government intervention, the state might have to create an organ such as the Employment Tribunal. Cases that reach the Employment Court, however, are the equivalent of the cases in other areas which reach the ordinary Courts, other methods of resolution having been tried or rejected. The desirability of informal settlements says nothing about how disputes not suitable for such resolution are to be dealt with and is not a reason for having a specialist Court. In fact, this argument conflicts with the supposed advantages of the cheapness and accessibility of the Employment Court since these features might be expected to encourage more people to take their cases to the Court rather than to allow them to be settled out of Court.

The Officials' Committee also hoped to avoid rigid following of precedent. This raises interesting jurisprudential questions about the nature of law and how people are to order their affairs if they cannot tell in advance what the attitude of the Court is to be. It demonstrates a failure on the part of the officials to understand the distinction between officials who implement policy and judges who decide disputed questions of law. Suffice to say, however, that the doctrine of precedent in the Employment Court is in theory exactly the same as in the High Court. That is to say that a previous decision of the Court is not formally binding on it but judges will usually require some good reason or argument for departing from it. On the other hand, decisions of the Court of Appeal are binding on the Employment Court, as on the High Court. There is obviously substantial variation between judges of all Courts as to the extent of willingness to depart from the judgments of their fellows. Even if the Employment Court adopted some radical approach to its own precedents it would still be bound by decisions of the Court of Appeal, which could include decisions on the role of precedent in the Employment Court. It is difficult to see how the Officials' Committee, if it had had any understanding of the legal system, could have expected the position to be any different.

Much of this discourse ignores (perhaps deliberately) fundamental insights from economics. Coase's theorem tells us that if trade is free, regardless of the legal position rights will end up in the hands of those who value them most given opportunities for free exchange. A Court case is thus a prelude to bargaining, rather than an alternative to it. It is also the case, however, that for exchange to be free, rights must be clearly defined. Where rights are not clearly defined, recourse to a Court is necessary in order to obtain a clear definition. Resolution of the practical problem in the real world can then proceed, informed by knowledge of where the legal rights lie.

An Employment Court case, then, is not or should not be aimed at resolving a dispute in the real world. It should be aimed merely at allocating legal rights so that the parties may then resolve their dispute in an atmosphere of some certainty as to the value of the rights they are trading. The role of judges in a free society is merely to identify and clarify legal rights and not to command and control how private parties dispose of their own property. This is reinforced by the common law procedural system which provides judges with no method of

enforcing a judgment, indeed with no way of even knowing whether it has been complied with, unless one of the parties chooses to return to Court and complain that the order has not been complied with. This point was almost certainly not understood by the Officials' Committee which would, as part of executive government, be used to the idea that policy decisions should actually be implemented - that is, to the idea of command and control. That viewpoint would also appear to be shared at least by the Chief Judge of the Employment Court who recently remarked: "I find it quite unacceptable that Court orders and obedience to them should end up being used as bargaining counters in the course of the negotiations".

2.2.3 Avoidance of legalism

The Employment Court has been criticised for excessive legalism, even by the Court of Appeal, a fact which renders ironical the Officials' Committee view that a separate Employment Court would avoid this vice.

It is not entirely clear what is expected from a Court, if not legalism. But whatever answer is given will be an argument not about labour law but about the nature and role of the legal system. If there is something accurately described as 'excessive legalism', there does not seem any good reason why it should be acceptable in any part of the legal system.

This is therefore not an argument in favour of having a separate Employment Court. It is either an argument for reforming the entire legal system, or it is an argument for exempting employment matters from all legal control, which was certainly not the intent of the ECA.

This line of reasoning also places the Employment Court in a difficult position. What the Officials' Committee describes as 'excessive legalism' might be regarded by others as predictability and adherence to settled rules. If the Employment Court avoids what public servants might regard as 'excessive legalism', it may be criticised for unpredictability, bias and excessive activism. If it does not, it calls into question its *raison d'être*.

2.2.4 Parliament's intentions

The Officials' Committee suggested that the common law would fail to take account of equity issues and imbalance of power between contracting parties. There are a number of responses to this. The first is to say that this is a matter to be addressed by the substantive law, in other words by parliament. Once it has been settled in this way, there would be no reason why a special Court should be required to implement the law. The only reason for having a special Court on this argument is that one wants the judges to implement a policy and to pursue a social goal rather than to apply the words of an Act of parliament. In that case accepted concepts of the rule of law and the role of judges are clearly being departed from. In particular, it will be necessary to select the judges carefully to ensure that they will in fact pursue the desired social programme.

The argument about the balance of bargaining power reveals a particular economic judgment, no less fallacious for its pervasiveness. The obvious retort is to point to the 'inequality of bargaining power' between, say, Heinz-Wattie and the average purchaser of a can of baked beans. Employers are in a competitive market for labour and, provided the market is essentially contestable, the supposed inequality of bargaining power is no more relevant than it is in the supermarket. In fact, employees are not competing with employers but with each other. One of the main effects of 'employment protection' is to protect those currently employed from competition from the unemployed, a fact made obvious by cases such as *Victoria University of Wellington v Haddon*. When employees or potential employees have skills which are in short supply they benefit from rising wages; those who do not have such skills face the possibility of falling wages. Any attempt to defy this tendency risks freezing the structure of the labour market and dissuading people from reskilling themselves. The 'inequality' argument disregards the mutually beneficial nature of voluntary contracting and is in direct contradiction to the general philosophy of the Employment Contracts Act 1991.

Like most arguments about state intervention in employment bargaining, this argument also fails to explain why contracts of employment are regulated when contracts for services are not. If the inequality of bargaining power argument were correct it would obviously apply to contractors as much as to employees.

Finally, there is a certain irony in this argument since it is precisely the contention of certain observers that the one thing the Employment Court has not been doing in its decisions on substantive employment law is giving effect to the will of parliament.

The Officials' Committee also argued that contract law is not homogeneous and that special arrangements exist in other areas. It cited the examples of the Family Court, the Fair Trading Act 1986 and Tenancy Tribunals. Walsh and Ryan believe this a powerful argument because it undermines the claim that a specialist jurisdiction for labour law would be anomalous. In fact, it does nothing of the sort.

Most contracts today are regulated by Acts of parliament which either amend or replace the common law. This does not stop the High Court from enforcing them, including the Fair Trading Act 1986 which is enforced through ordinary civil or criminal proceedings. The Family Court is a part of the District Court and its judges are District Court judges who are specially selected for that work but continue to deal with ordinary District Court business. Tenancy Tribunals are indeed state organs created to deal with private disputes, but their status is that of administrative tribunals, heavily regulated by the High Court and entirely lacking the status of the Employment Court.

More than anything else, these arguments demonstrate that at best the Officials' Committee's arguments were directed to the old Court of Arbitration and not to the new role envisaged for the Employment Court. At worst, the arguments may show that the Officials' Committee (and Walsh and Ryan) lacked any real understanding of (or perhaps sympathy for) the nature and working of the ordinary legal system.

2.3 OTHER ARGUMENTS

2.3.1 Employment Court 'not so bad'

There is a line of argument that the Employment Court is not so bad as it is made out to be and is not in fact out on a jurisprudential limb. This proposition is supported by two arguments: that contract law outside the employment field is developing away from the freedom of contract model and that the Employment Court does indeed make decisions in favour of employers.

Thus we find Anderson saying that the 'new right' arguments assume that the 'ordinary Courts' apply classical contract theory and ignore the extent to which contract law is moving away from classical positions. It has also been argued that the Court of Appeal in decisions such as *Brighouse Ltd v Bilderbeck* did no more than apply to employment law the same principles that it has been applying to contract law generally. Two points can be made in reply. One is that these developments in contract law have also been criticised. Such criticisms of Employment Court decisions are entirely consistent with criticisms of judicial activism in the private law field generally. The second obvious rejoinder to this argument is that it is even harder to see the necessity for a separate Employment Court if the ordinary Courts are not in fact going to implement the classical contractual doctrines that Anderson and others are anxious not to see imported into employment law.

The second defence of the Employment Court is that it demonstrates its impartiality and professionalism by making decisions in favour of employers. Examples cited in support of this argument by Wilson include *Adams v Alliance Textiles*; *Hawtin v Skellerup International*; and *Emergicare (Henderson) Ltd v NZ Nurses Union*. Here again the Employment Court seems to be in a bind. If it appears to act in favour of employees it will be accused of partiality, favouritism and excessive activism. If it acts without fear or favour to interpret pre-existing law then it is failing to serve the purposes we have seen that its proponents wish it to serve. It is also failing to establish a case for its continued existence, since its product is not differentiated from that of the High Court.

2.3.2 The Labour Party's view

It is difficult to resist the conclusion that the real agenda behind the arguments of many proponents of a separate Employment Court is the line of argument revealed by Maryan Street as 'The Labour Party's view'. This is that the world is made up of different classes of people with opposing interests and that the role of the state is to stabilise the relationships between these classes. Employment law is just one of the devices by which this is done. In Street's view, the role of employment law is to be the "kindly solution to the natural warfare between the classes".

Street contrasts the Labour Party's world view with that of, for example, Professor Richard Epstein, and expresses dissatisfaction with what she represents as unsatisfactory common law attitudes such as the antipathy to combinations (on both sides of the employment divide). The argument is that a specialist Employment Court

is necessary in order to ensure that employment law plays its allotted role in mediating class warfare. It is implicit in these arguments that it is not enough to have a separate Employment Court; it must consist of judges who share Street's views rather than the accepted precepts of the legal system. There is no point in appointing judges who do not conceive of the world in terms of class warfare. The role of the judges is to pursue an agenda which for some reason is not set out in the legislation. This is, of course, entirely opposed to accepted legal values and also to the philosophy of the government and the general thrust of the ECA.

Attempts to predict the decisions of judges once appointed to the Bench are notoriously difficult, especially when they are protected by security of tenure. Such attempts are, however, very much more likely to be successful when there are only six judges in a Court which deals only with disputes drawn from one area of life. Such pre-selection is also aided by the extent to which Street's rationale for the Court is dependent not on technical legal opinion but on a world view. It should be relatively easy to detect lawyers who share that world view.

Street also advances as reasons for having a separate Court certain aims such as "equitable outcomes for all parties" and "social considerations" and ensuring that the "particular needs of the industrial relations partners, namely employers and their associations, workers and their unions and the state, can be monitored and addressed". The state also "has a responsibility to intervene in order to achieve social objectives such as equity and the avoidance of exploitation". The usual way the state intervenes, of course, is to pass legislation laying down the general law and to leave it to the Courts to decide individual disputes in the light of that legislation. Street does not explain why the ordinary Courts cannot be trusted to pursue such aims if they are written into legislation. One reason for this may be that it is impossible to define by pre-existing rules what are "equitable outcomes for all parties". Courts wedded to the usual rules of statutory construction and belief in the rule of law will fail to pursue social goals of this nature. Another may be indicated by the inclusion of 'the state' as an "industrial relations partner". Apparently in a dispute between two contracting parties the 'state' may have an interest in the outcome which is not indicated in the usual way through legislation. How is this 'state interest' to be communicated to and maintained by the judges? The argument takes as given that labour disputes are not to be treated as disputes between private parties but as opportunities for the advancement of social policy. Clearly there is no point to having a specialist Employment Court unless its judges are in sympathy with the relevant policy and this view of their own role.

The Labour Party will, according to Street, "review the functions of the Employment Court". As noted earlier, this statement itself reveals one of the problems of creating specialist Courts by legislation. The result is to create bodies which Street regards as "responsible ultimately to Parliament" and whose functions can be "reviewed". The Labour Party thus explicitly states that the future jurisdiction and status of the Employment Court is dependent on how well it fits into Labour's scheme of things. The precedent of a specialist Court having been set, the government could obviously sideline any judge who did not make the 'right' decisions by reshuffling the specialist Courts and reassigning the judges, following the precedent of the Staples affair in New South Wales.

Street's argument is essentially a muted call for a socialist conception of politics to take precedence over law. The arguments made are not limited to the employment field. They constitute an attack on the whole concept of the independence of the judiciary and the rule of law. If those views are indicative of the thinking of the Labour Party, it apparently views these concepts as obstacles to the achievement of its policy goals. We thus have what is commonly regarded as a 'mainstream' political party which seemingly does not believe in the rule of law or the independence of the judiciary. The government and other political parties appear to have failed to grasp these arguments of fundamental principle. It is submitted that the threat to fundamental legal values represented by Street's paper alone provides compelling reasons for abolishing the Employment Court before it becomes further politicised.

Given the public expression of such views, the position of the Employment Court would appear to be very difficult. Should a Labour government or a coalition including Labour be in office, then on every occasion in which the Employment Court appears to exhibit 'activism' on behalf of employees, it will be accused of taking advantage of political backing to implement its own programme or, more sinisterly, of implementing the government's programme ahead of legislation. If, on the other hand, a centre-right government were to be in office then at every sign of 'even-handedness' the Court might be accused by unions of being timid in an attempt to stave off abolition.

The problem can also be seen in terms of the current vacancy in the Court. If and when this is filled, it is certain that the media and the legal professon will be examining the appointee to discover whether he or she is a 'union person' or an 'employers' person'. The Employment Court is now hopelessly and irretrievably politicised, as its British cousin the Industrial Relations Court became. The longer this situation is allowed to last, the greater the risk that these attitudes would be carried over into criticism of the ordinary Courts.

2.3.3 Cheapness/informality of Employment Court

The Employment Court is said to be much cheaper and more 'user-friendly' than the High Court. In particular, a party may be represented by a lay employment advocate, rather than by counsel. The Court's fees are low compared with those of the High Court. If the Court were to be abolished, however, many employment disputes would come within the jurisdiction of the District Courts and the Disputes Tribunals, so comparison with the High Court only may be inappropriate. Furthermore, this argument should not be accepted unquestioningly. The efficiency of Courts is difficult to measure; anecdotal evidence suggests that hearings in the Employment Court may be lengthier than equivalent cases in the District Courts. Where cases are dealt with more speedily overall this may be because the Court is more generously resourced for its case-load than are the ordinary Courts.

Whatever conclusion may be drawn from such arguments, however, it is not that a Court with exclusive jurisdiction is required. Indeed, given exclusive jurisdiction one would expect the Court to come to exploit its monopoly position, if only to the extent of resting on its laurels, so that any competitive advantage disappeared.

The usual rule is that the plaintiff is entitled to file in any Court that has jurisdiction over the matter. It is for the defendant to argue that the jurisdiction chosen is not the appropriate or convenient one. If it is the case, therefore, that the Employment Court is attractive to plaintiffs on the grounds of cheapness and informality, there is no need for an exclusive jurisdiction. In fact it would be better not to have an exclusive jurisdiction, so that the Employment Court was encouraged to maintain these desirable characteristics.

As will be seen from the survey of jurisdictional details in Part 3, there has been concurrent jurisdiction and effective competition between the Employment Court and the High Court over many issues for the last five years. The issue of overtly competitive provision of Court services has recently been raised and regarded as highly controversial. Throughout the seventeenth and eighteenth centuries, however, this was the effective position. The Courts of King's Bench, Common Pleas and Exchequer Chamber were in competition with one another for the marginal business. As one of these Courts became expensive and procedurally cumbersome the others would expand their own jurisdiction to take some of the business. Professor Geoffrey de Q Walker has pointed out that it was during this period that the English Courts created the reputation on which the legislatively created monopoly has since attempted to trade. Concurrent jurisdiction is arguably in the users' interests, provided that once an action is under way in one jurisdiction related actions can be prevented from being run in other jurisdictions.

The other possible conclusion from the observation that the Employment Court is cheaper and more 'user-friendly' than the High Court is that the latter Court should change its procedures. State monopolies seldom adjust to become more useful to the customer without the stimulus of competition. Such a stimulus is being presented by commercial arbitration and the High Court has responded by setting up the Commercial List. In general, however, as is customary with state monopolies, the reaction to backlogs of work is to agitate for an increase in inputs rather than to examine the efficiency with which the system works.

For present purposes the key point is that if it is true that it is advantageous to parties to use the Employment Court, there is no need for a rule giving exclusive jurisdiction - in fact such a rule may be counter-productive.

2.3.4 Tripartism

In many countries specialist employment institutions are of a tripartite nature, that is to say they include 'representatives' of the unions, employers' organisations and a lawyer or judge. This has not applied in New Zealand since the abolition of the Arbitration Court in 1987 and the composition of the Employment Court does not even theoretically create an appearance of tripartism. In view of the Labour Party's commitment to review the functions of the Employment Court, however, it is worth canvassing an argument that might well reappear.

The rationale for a tripartite arrangement is seldom clear. At a formal level a Court which includes union and employer members is not supposed to constitute a tripartite wage conference (government, business and unions) since the judge usually has security of tenure and is expected to act in a neutral and impartial manner. Informally the employer and trade union appointees on such a Court seem to develop an impartial and judicial attitude. This is so even where the body is not a labour Court but more in the nature of the New Zealand Employment Tribunal. A survey in Britain found that 96 percent of Employment Tribunal decisions were unanimous despite the tripartite appointment.

Given that attitude of impartiality, it is hard to discern a reason for tripartite appointment beyond giving some appearance or feeling that the panel includes someone of roughly one's own point of view. Even this 'benefit' is reduced by the fact that the appointers are trade unions and employers' organisations. 'Unorganised' employees, employees who are in dispute with their unions, and small employers who tend not be represented by employers' bodies may well not feel that their point of view is represented.

2.3.5 Autonomy of labour law

The intellectual core of the argument for a separate employment jurisdiction is the claim for autonomy made on behalf of employment law. In conventional terms 'employment law' is not a conceptual subdivision of 'law' as are public law, the law of property, the law of obligations and criminal law. Each of these consists of a series of abstract principles. Like Family Law, Maritime Law, Military Law and many other subjects, employment law is a contextually defined subject. Its defining characteristic is the subject matter to which principles and rules drawn from various of the conceptual subdivisions of law are applied, namely the employment relationship.

Claims by academics and practitioners that their area of speciality should be recognised as an 'autonomous area of law' are neither rare nor surprising. One is, of course, entirely free to interest oneself in whatever one wishes and even to design courses in such contextually defined subjects. These should be studied after the main conceptual divisions of the law have been absorbed. The concept of 'autonomy' is not self-defining, however. Nor is it clear what consequences follow from a claim for autonomy. Rather than concentrate on the idea of 'autonomy', therefore, it seems more profitable to identify what is actually being said about employment law and to examine each point in turn.

- Employment law not just part of contract

The first claim frequently met is that employment law is not just a subdivision of the law of contract. This is obviously true. The relations between an employer and employee may involve questions of contract, tort, equity, public, property and even criminal law. Judges dealing with employment law questions therefore need to be versed in all these areas of law, as do judges of the ordinary Courts. The issue, therefore, is whether applicable rules and principles are to be 'developed' in the context of employment cases consistently with, or in isolation from, their parent areas of law.

The argument that employment law is not merely a subdivision of contract law seems to involve the rejection of the view that employment contracts are ruled only by classical contract theory. This is undeniable. But it does not lead to the conclusion that there must be a separate Court to deal with these issues. Almost no contracts in New Zealand today are governed entirely by the common law of contract, let alone by classical contract theory. Legislation such as the Contractual Mistakes Act 1977 has created new causes of action and new remedies. The ordinary Courts administer these Acts and, as discussed above, have clearly departed from classical contract theory even at common law.

- Employment contracts are governed by specific legislation

Numerous different kinds of contract are governed by specific legislation. Motor vehicle securities, sales of land, international carriage of goods and others too numerous to mention are governed by their own Acts. These are all administered by the ordinary Courts.

- Employment contracts are different

This is a diffuse argument because, needless to say, any phenomenon can be described as different from, or similar to, any other phenomenon, depending upon the characteristics chosen for comparison. The complexity

and enduring nature of employment contracts has already been discussed. The key argument that employment contracts are different seems to be a statement that:

... a contract to buy and sell labour is fundamentally and essentially different from any other commercial contract. Human labour … cannot be separated from its source.

Sir Ivor Richardson has said:

... people are not commodities and the performance of services is not akin to the supply of goods.

To see that this is not so one only has to consider contracts for the manufacture and sale of some item like hand-made chairs. If a customer in a craft shop sees a beautifully made chair and buys it, that is certainly a contract for sale. If the customer asks for a second one to be made, is that a contract for sale or for service? And if the former, why is a contract to produce a research paper or a legal manual a contract for service? It is unclear why any arguments about diffuse concepts such as 'the dignity of human labour' apply only, for example, to the relationship between a restaurant owner and a waiter and not between the customer and the restaurant.

Secondly, it is, of course, the case that contracts of all sorts can affect livelihoods. The reason a company may make staff redundant may be that it has lost, or failed to renew, a contract. If one is concerned to protect workers from the capricious effects of contractual freedom, state intervention at a microeconomic level clearly needs to be on a far broader scale than employment contracts. This is, therefore, an argument for re-ordering society, the need for which should be addressed in general terms before one device for pursuing it, a specialist employment Court, is slipped in.

But statements about human labour such as those quoted elsewhere are in any case unhelpful in present circumstances. This is because employment law applies only to employees and not to contractors. The distinction is examined in detail in Part 3 of this paper. It is submitted that the distinction between employees and contractors is entirely inconsistent with the idea that employment law exists to protect some fundamental human value. This argument is, therefore, a programmatic one; it is an argument for the extension of employment law to contracts for services and that is indeed how we find it being used by many. It is, therefore, disappointing to find some who would cavil at the major inroad into individual autonomy this would entail, falling for the 'employment contracts are different' argument.

Furthermore, this argument about the 'specialness' of human labour entirely misconstrues ordinary contracts of sale. We do not trade commodities, we trade rights. A contract of service or of services is essentially a trading of the rights to the fruits of an individual's labour. This trade will be made for the same reason that any other trade is made, namely that in the hands of the buyer the labour is worth more than in the hands of the seller. This may be because certain tasks require the organisation of a number of people, or because the buyer of labour has ideas, knowledge or access to capital that the seller of labour does not have.

- The employment relationship

The autonomy argument leads to the proposition that employment should be regulated not by contract (and the other aspects of private law) but by a legally formalised 'employment relationship' which would be regulated public-law style. This is based on the idea that employment is not a mutually beneficial relationship based on a free transaction but upon 'subordination', 'subservience' or 'economic dependence and social subordination'. It therefore needs to be regulated, not to ensure that the wishes of the parties are properly enforced but to ensure that social policies determined by the legislature are imposed on possibly unwilling parties.

In so far as the expertise argument depends upon 'custom and practice', these arguments actually conflict. The supporters of an autonomous labour law do not want the Courts merely to enforce the custom and practice of the parties; they want to change practice by enforcing legislatively mandated social policies. Whereas the expertise argument is that a job which currently exists can be done better given specialist expertise, the autonomy argument is avowedly programmatic. That is to say that the autonomy of labour law is espoused for the purpose of achieving a change of view on the part of the Courts, usually to that of the speaker. The aim is to correct a perceived imbalance of power which the ordinary law will not correct. The rhetoric of autonomy refers to the need to "cut adrift from the rules and methods of civil law which prejudice workers". There is a clear assumption in much labour law writing that the measure of success of any employment law institution is how

sympathetic it is to the interests of 'workers'. This is bound to leave one wondering whether the 'expertise' desired is actually expert knowledge of social policy rather than of 'the realities of the workplace'.

In short this argument is a manifestation of the belief that equal application of rules of law will perpetuate the subjection of the 'workers' and protect the interests of the monied classes. It is surprising, therefore, to find defenders of the Employment Court responding to criticism of it on the grounds that such criticism endangers the independence of the judiciary: the arguments for a separate employment Court clearly stem from a philosophy hostile to that concept. Anderson commented on recent criticism of the Employment Court by saying:

The suggestion by influential political groups that a Court should be abolished because its decisions do not fully reflect the ideology and interests of that group, goes beyond the bounds of justifiable criticism.

But it is clear that the main reason for having a separate employment Court is that certain influential political groups do not have confidence in the willingness of High Court judges to make decisions fully reflecting their ideology and interests. They therefore wish to act to "remove that discretion and put certain decisions elsewhere".

It is thus clearly demonstrated not only that there is no compelling reason for having a specialist Court that would justify a breach of the principles that militate against such jurisdictions, but also that the existence of a specialist employment Court is inconsistent with the guiding philosophy of the ECA. The ECA is motivated by the belief that individuals will best flourish and advance their own interests when they are free to define those interests for themselves and pursue them as they see fit. The autonomy argument is an argument for unequal treatment and for the use of the law as an instrument for the implementation of social policy. Either the Employment Court operates as such an instrument, in which case its survival is entirely inconsistent with the philosophy of the substantive law of the ECA, or it behaves like an ordinary Court in which case its survival is pointless.

PART 3 THE JURISDICTION OF THE NEW ZEALAND EMPLOYMENT COURT

3.1 INTRODUCTION

The ECA removed the right of private individuals in dispute with other private individuals to have that dispute determined in the High Court. Prior to the ECA employees on individually negotiated contracts of employment were not included in the Labour Relations Act system, which applied only to the 40 percent or so of the workforce on collective contracts and represented by registered unions. The ECA brought all contracts of employment under the wing of the Employment Court and awarded the Court "exclusive jurisdiction" over all actions "founded on" a contract of employment (s 3 ECA). This has been assumed to include actions for wrongful dismissal, a common law action previously dealt with by the High Court.

However comprehensive the drafters intended the Act to be, numerous jurisdictional problems have arisen. "In fact [they] failed to achieve a prime criterion for legislation of this character - the eradication of jurisdictional demarcation disputes." In their defence, it might be said that, for reasons which will become apparent, the task was an impossible one.

There are theoretically three different classes of case:

ï those within the Employment Court's exclusive jurisdiction;

ï those within the jurisdiction of the Employment Court but not excluded from the jurisdiction of the High Court; and

ï those outside the jurisdiction of the Employment Court.

Unfortunately there may, in practice, be more than three classes of case since the High Court and the Employment Court may have different ideas about where the boundary lines fall. Thus there may be cases which all agree are within the exclusive jurisdiction of the Employment Court but others which the Employment Court believes fall within its exclusive jurisdiction but over which the High Court regards itself as having concurrent jurisdiction. There may also be cases on which the two Courts disagree as to whether the Employment Court has jurisdiction at all. The Employment Court has expressed itself uninterested in the question of exclusivity, and stated that its sole concern is to determine whether it has jurisdiction over a particular case. Nonetheless, if the Employment Court finds that its jurisdiction in a particular case stems from s 3, that naturally implies exclusivity, while the High Court might decide that the Employment Court's power to deal with a case stemmed from a different provision. Furthermore, Chief Judge Goddard has extra-judicially made clear his dissatisfaction that the High Court continues to claim jurisdiction in employment-related matters.

The first question in any jurisdictional dispute is 'who has jurisdiction to decide the jurisdictional question?'. In France, where there is an entirely separate court system for dealing with administrative law, such questions are settled by a *Tribunal des Conflits* specially created for the task. Here the Court of Appeal has said that the first port of call should be the Employment Court:

This Court values the opinion and experience of the Labour or Employment Court in matters within the industrial sphere. We would hope not to have to determine a question in that sphere without the benefit of the Labour Court's expertise.

However generous and respectful this may sound, this is essentially the attitude taken by the ordinary Courts to administrative tribunals. All decision makers have, in principle, first to decide whether they have jurisdiction over a matter and the Courts prefer, as a pragmatic matter, to have the benefit of the views of specialist tribunals before deciding a case themselves. Conversely, it would normally be accepted without question that a body of limited jurisdiction should not have the last word on the extent of its own jurisdiction - something which the Employment Court would be on the way to achieving if the Chief Judge's suggestions relating to appeals and judicial review were taken up (see discussion below).

Under the ECA three main areas of jurisdictional dispute have emerged:

ï where actions are based on legal concepts other than contract (and the torts specifically assigned to the Employment Court's jurisdiction) or include parties other than employees or former employees of the employer;

ï the distinction between a contract of employment and a contract for services; and

ï incidental and remedial questions.

These will be examined in turn. But it should first be noticed in passing that the situation is complicated by a number of cases which the High Court has heard without considering, presumably because neither side raised the issue, whether they came within the exclusive jurisdiction of the Employment Court.

It must also be borne in mind that matters affecting the jurisdiction of the Employment Court do not only arise in disputes between employer and employee. Cases on the employee/contractor divide can arise as disputes with the Department of Inland Revenue over the tax status of the performer of services, or with the accident compensation scheme. In these cases a decision will be made on someone's employment status in the High Court, appealable to the Court of Appeal and to the Privy Council. It has been suggested that a contract can only have one status, either as a contract of employment or for services, for all purposes. The logic of this together with the idea that the Employment Court should have the first opportunity to rule on jurisdictional issues would dictate that the Employment Court should decide cases of this nature. It is arguable, on the other hand, that revenue law is a public matter and employment law a private matter and that in the latter the wishes of the parties should have primacy. The Employment Court seems to have decided that the tax status and employment law status of a contract may be different, but this must be based on some argument other than the public/private

distinction which runs counter to the philosophy of labour law explained in Part 2 on which the case for a separate Court largely depends. This is yet another demonstration that creating a separate jurisdiction is a far more complex proposition than its proponents allow.

3.2 ACTIONS INVOLVING CONCEPTS OTHER THAN CONTRACT AND PARTIES OTHER THAN EMPLOYEES

There are many examples of such disputes and others can be imagined. Some involve cases where the employer and employee also had some other relationship such as mortgagor and mortgagee; others involve causes of action such as conversion and conspiracy. The most common example of such actions are those involving the use of confidential information.

Confidential information may be passed between parties in a variety of relationships. Even in the employment area, loosely defined, confidential information may be passed not just to employees but to independent contractors and to persons negotiating contracts, whether of service or for services, who do not eventually come into a contractual relationship. Confidential information can also obviously be passed to customers, investors and suppliers.

In all these cases equity offers remedies to restrain misuse of such information. In order to qualify for protection certain requirements must be met, such as that the information was known to the person receiving it to be confidential. Otherwise, the nature of the relationship between the parties at the time the information was passed is irrelevant to the enforcement in equity of a duty to maintain a confidence.

The question obviously arises whether an action for breach of a duty of confidentiality that happens to stem from an employment relationship is an action "founded on a contract of employment". This question becomes: 'what does "founded on" mean?'. The Employment Court has said that "founded on" means that the employment contract is the foundation on which the case stands; the plaintiff cannot succeed without relying on the employment contract; if there had been no employment contract, there would and could be no case. With respect, this merely restates the question. This stricture is capable of two different interpretations, a narrow interpretation that the cause of action is one that, as a matter of law, can only exist when there is or has been a contract of employment, or a broader interpretation that all that is required is that the cause of action arose in this case because, as a matter of fact, there was an employment contract. The latter is the view that the Employment Court has taken, while the High Court has continued to hear actions that have, as a matter of fact, arisen out of an employment relationship, regarding breach of confidence, amongst others, as a cause of action conceptually separate from the employment contract.

The Court of Appeal now appears to have resolved this question by deciding that an action for inducement of breach of contract is founded on the tort of inducement and not on the contract of employment. The Employment Court therefore has no jurisdiction to deal with such torts under s 3 of the ECA. Nor does it have jurisdiction under s 104(1)(l) (discussed further below) since that only gives jurisdiction to make orders when a cause of action is properly before the Employment Court. This may appear to have settled the matter but four observations need to be made:

ï the Court of Appeal's decision in *Gray* was made nearly five years after the ECA came into force, during which period the Employment Court and the High Court have been at odds;

ï the decision in *Gray*, that the Employment Court had no jurisdiction over the particular events in question, could not be made on the pleadings but only after hearing evidence as to the facts. It is not acceptable that the question of which of two courts has jurisdiction over a case should depend upon a contested factual enquiry;

ï while the Court of Appeal's reasoning would appear to apply equally to an action for breach of confidence, especially where a third party is concerned, the Court of Appeal did not clearly overrule the decision in *Medic Corp*. At the time of writing, therefore, it is by no means clear in which Court such an action should be filed; and

ï the question remains of the effect of a confidentiality clause in a contract of employment. Does such a clause by implication replace any equitable duties, meaning that an action would be within the exclusive jurisdiction of the Employment Court, or is it simply a way of drawing attention to particularly important matters with the

result that the general equitable duty survives and an action can be mounted in the High Court? The question of the relationship of equitable duties and contractual provisions that overlap is a matter of debate in academic journals, but should not be a problem with which practitioners have to grapple when deciding where to file an action.

Even where an employment contract is involved, breach of confidence cases may also involve parties who are not, and have never been, employees of the employer. Often these will be third parties who have induced the breach of confidence. These may be companies which may or may not have been set up by the former employee. In *Medic Corp v Barrett* some play was made of the fact that the alleged third party was simply a front for the former employee, but the third party could equally well have been a long-established company with numerous employees. This is another example where jurisdiction over a case might depend upon a protracted factual enquiry, 'lifting the corporate veil', and a marginal judgment. It is clear from *Medic Corp* that the High Court regards the presence of non-employee parties as rendering the case unsuitable for decision in the Employment Court whereas the Employment Court does not. The Court of Appeal appeared to agree with the High Court in *Gray* but again, although Lord Cooke and McKay J specifically suggested that the Court in *Medic Corp* was wrong to hear a claim against someone not a party to the contract of employment, the Court of Appeal did not formally decide the question.

Thus until *Gray* there was a broad area of conflict between the High Court and the Employment Court over the interpretation of s 3 of the ECA. Where a case arose because, as a matter of fact, one party was the employee of the other the Employment Court regarded the matter as falling within s 3. Where the cause of action did not conceptually depend upon the existence of a contract of employment for its validity, the High Court did not regard the case as falling within s 3, and could presumably have granted a declaration to that effect. It seems that a series of cases in the Court of Appeal on different causes of action will be required finally to settle the question.

The question at the heart of this debate returns us to the question of the 'autonomy of labour law'. Should areas of law such as confidentiality be allowed to develop differently when a contract of employment is involved? If they are not to do so, it is difficult to see why they should be adjudicated upon by a separate Court where the potential for separate development will always be present. If they are to be treated separately, then the rules that are developed in the Employment Court will be different from the rules in 'mainstream' confidentiality. Given truly competitive Courts, it is possible that the Employment Court would hit on new rules that were more efficient than the current rules of equity, benefiting both parties and the general welfare. Given the current situation and the rhetoric of labour law, which is essentially that the established rules of law disadvantage 'workers', it is likely that the new rules would benefit only the 'worker-litigants' in the cases before the Court. The result would be a further cost on employment and increased incentives for employers to make arrangements beyond the reach of employment law.

3.3 THE DISTINCTION BETWEEN A CONTRACT OF EMPLOYMENT AND A CONTRACT FOR SERVICES

The variety of contractual transactions is infinite but for reasons entirely created by state intervention (mainly labour taxation and labour law) they have to be categorised into a small number of boxes of which the most important for our purposes are contracts of employment, contracts for services, partnerships and contracts for sales. Many of the contracts which come up for consideration are made without legal advice by private parties choosing the mechanisms which best suit their particular purposes. Subsequently a Court has to decide into which box to put the arrangement.

The process then becomes interactive since informed parties will be aware of the legal decisions and will alter their affairs so that they clearly fit into one of these categories or another. To the extent that this leads to people making arrangements different from those that would have been made but for the intervention of taxation and employment law, inefficiencies and general welfare losses result.

As a rule of thumb, while a contract is running a contractor for services will receive higher remuneration than an employee, but when a contract terminates an employee will receive greater benefits than a contractor, including access to the statutory employment 'rights'. It is not surprising, therefore, to find people happy to be labelled contractors during the currency of a contract but attempting to obtain the benefits of being an employee once the contract is terminated.

A number of tests have been devised to help Courts determine whether a particular arrangement is a contract of employment or for services. These are summed up in the oft-quoted words of an English judge, Cooke J, who said:

... the fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on his own account?

Cooke J went on to itemise matters relevant to the issue, none of which was determinative on its own, but all of which had to be considered together. These included the degree of control over the conduct of the contractor, whether and to what extent the contractor provided equipment and capital investment, the distribution of risk, whether the contractor employed others, the degree of responsibility the contractor had for sound management and the extent to which the contractor could profit from improvements in management.

The leading New Zealand case is *TNT Express Worldwide (NZ) Ltd v Cunningham*. This concerned an owner/driver who operated for TNT Couriers. As is customary in the courier business, Mr Cunningham was required to provide his own van, licence and insurance and to employ his own temporary drivers. The standard form contract also made provision for the contractor to be a company rather than an individual. The method of payment (per job) effectively placed the risk of the proper running of the business on Mr Cunningham. All these factors pointed in the direction of a contracting arrangement, rather than employment. But it was also the case that strict control was maintained by TNT over a number of matters relating to the way the business was carried on in order to maintain its image. Hence a uniform had to be worn, the vehicle had to be painted in TNT's colours and no passengers were allowed to be carried. These and other matters pointed in the direction of employment. Perhaps the most important was that Mr Cunningham was not allowed to contract with anyone else to carry courier packages, so that he was not an 'independent courier' available to the public with TNT as a major customer, but an operative for TNT.

In the Employment Tribunal and the Employment Court great attention was paid to an article on the employee/contractor problem: Collins', 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws'. This article will be discussed below. Suffice for the present to say that it advocates a test which would push out the boundaries of employment considerably and which expressly disavows any attention to the wishes of the parties. The majority of the Court of Appeal restricted themselves to saying that the effect of the Employment Court and Employment Tribunal's decision was to enact Collins' reform proposals. Hardie Boys J alone countered Collins' argument by saying:

There are many reasons why both employer and contractor prefer the independent contractor arrangement. They should be free to exercise their choice without paternalistic intervention by the Courts.

The Court of Appeal was agreed that the central question was one of interpretation of the contract. In that context the Court agreed that parties could not make a contract of one sort into the other by merely labelling it as such. The question whether Mr Cunningham was estopped by the 'labelling' clause from arguing that it was a contract of employment does not seem to have been considered. The learned authors of *Brooker's Employment Contracts* consider that it should have been. As a basic principle, once the law has created certain categories of contract, parties should not be able to determine that a particular contract falls into one or other category simply by announcing that it does so, or 'to contract out of the Act'. On the other hand once a party has accepted and operated under a contract, accepting the remuneration negotiated on the basis that it was a contract for services, there is an argument that the contractor should be estopped from saying that it is in fact a contract of employment, even if the Department of Inland Revenue, for example, were not affected by the estoppel and remained free to argue that the label in the contract was not correct.

The Court of Appeal went on to find that the contract was one for services because that was its essential structure and there was no evidence that it was in any sense a sham, or merely a tax device. Some other pertinent observations were made. Robertson J said that the Employment Court had exhibited a predisposition to find that the contract was one of employment and had said that all anyone who wanted to create a contract for services had to do was to obtain competent legal advice. The obvious response is to ask why private individuals should have to obtain legal advice merely to ensure that the Courts will give effect to their clear intentions.

McKay J discussed the reasons why parties elected to contract for services rather than for employment:

There are advantages, however, in having as couriers independent contractors who are responsible for their own income tax and GST returns and accident compensation levies and are in a relationship which lies outside the ambit of the labour laws (p 716).

There are, in fact, a variety of reasons for such a decision - to do with ability to supervise, distribution of risk and so on - which are canvassed by Collins, but it is noticeable that McKay J concentrated on those which are the product of state intervention. One of these was a desire to have a relationship which lies outside the ambit of the labour laws. The consequences of this point have escaped those calling for 'dependent contractors' to be brought under the ECA.

'Dependent contractors' in the language of politics are people described in the language of business as 'independent contractors', i.e. those not employees of the business. The first question is the definition of 'dependent contractor'. According to Chief Judge Goddard, "There may be problems of definition, but that is not unusual. They have been overcome before." He himself described as dependent contractors those who "have only one contract and are often prohibited by or under their contract from having any others". Collins went further by defining an exclusive class of relationships which were to escape labour laws:

... a contract of employment exists for the purposes of employment law if the worker performs services for another, referable to a contractual agreement unless that contract satisfies two conditions: that it is a task performance contract, and that no badges of membership of the firm's organisation apply.

'Badges of membership' include literal badges such as uniform or a dress code but also the tax treatment of payment and participation in the firm's promotion structure and internal labour market (this latter seems to beg the question since the boundaries of the firm's 'internal labour market' will have to be drawn).

It can readily be seen that these proposals ignore the dynamic nature of the labour market and the fact, identified by McKay J, that the labour laws themselves are a factor taken into account when making contractual arrangements. First, one can expect some straight evasive behaviour, such as setting up dummy companies so that a contractor appears to have more than one customer or such as contractors turning themselves into sole shareholder companies. But over time one can expect a shift to new arrangements altogether.

One could predict, for example, that a courier firm which consisted of a partnership of owner-drivers employing the control-room staff would, *ceteris paribus*, do better than firms organised under the current structure once they were brought under the ECA. (Taxi firms of both types are currently to be found.) They would operate more efficiently and offer the partners higher remuneration than the contractors under the old arrangements. Once the bulk of courier firms were organised in this way we would doubtless hear calls for partnerships to be brought within the ECA.

Any new arrangement will reduce economic welfare if it means that people undertake tasks differently from the way which they would have adopted had they been allowed to contract freely. Many of the new arrangements would even render the extension of employment law counter-productive since contractors would be deprived of the certainty and benefits of their contracts. Contracts for services negotiated before the contractor had started work for an agreed fee could be turned into mere invitations to treat preparatory to a contract of sale when the work is finished. Further uncertainties loom. If a contractor who made parts for two or three firms lost one or two of its contracts the remaining customer might take its custom elsewhere rather than allow itself to become an 'employer'.

Two main conclusions can be drawn about calls for extension of labour laws to 'dependent contractors'. The first is that those calling for such reforms do not understand that voluntary parties to contracts make the arrangements that will produce greatest mutual benefit (in fact many specifically deny that this is so). When freely contracting parties consider their arrangements they take into account state interventions such as taxation and labour laws. The system is therefore dynamic, not static, and changes in behaviour will occur, many of which will actually make worse the situation of the very people the reform was intended to benefit. This is why, as Collins observes but does not properly consider: "every test of employment becomes disfunctional [sic] in the long run". Secondly, it is clear that the purpose of extending the ambit of the labour laws is to impose arrangements favoured by policy makers on to unwilling parties to contracts. Collins, for example, says:

... that the first step towards an adequate solution to the problem of setting limits to employment protection rights involves an abandonment of deference to the contractual arrangements agreed between the parties.

It is difficult to find clearer evidence that those who call for the extension of labour law to 'dependent contractors' are philosophically opposed to the motivating principle of the ECA which is that people are best advantaged when they can negotiate their own working arrangements.

Such paternalism and imposition are not limited to labour lawyers, however. The Court of Appeal has recently allowed damages to a contractor on grounds traditionally only available to employees. The Court justified this on the basis that the common law was entitled to develop its principles and its approach to contemporary problems bearing in mind and by analogy with the way the legislature has dealt with allied subjects. This raises fundamental questions about the nature of the common law and about legislation that cannot be addressed here. Suffice to say that legislation is a conscious activity, while the development of the common law has traditionally been by the cumulative effect of decisions each made on their own facts and merits. *Andrews v Parceline Express* therefore entirely deserves the label 'judicial legislation' since it constitutes a conscious development of the law parallel to particular legislation. The Court went on to say that since the ECA awarded damages for distress and humiliation to employees, the Court should be able to award them to non-employees (p 397). The response, of course, is elementary. Had parliament intended to alter the terms of contracts for services it would have done so, for example by acceding to calls to bring 'dependent contractors' under the Act. In fact parliament did not do so and, presumably, did not intend developments of this nature to occur.

The decision in *Andrews v Parceline Express* is yet another demonstration that a system based on the division of the workforce into two classes with different rules applicable to each is not tenable. The question is which way to move, and it has been demonstrated above that the movement cannot intelligently be in the direction of extending employment 'protection' to contractors. The Court of Appeal appears willing to move in that direction, however, in which case it again has to be asked why a separate Court is necessary for employees if the ordinary Courts are going to award 'protections' to contractors.

3.4 INCIDENTAL AND REMEDIAL QUESTIONS

Sections 104(1)(f) and (h) of the ECA have caused dispute between the High Court and the Employment Court. These provide that:

The Court shall have jurisdiction:

(f) ... to hear and determine any question connected with employment contracts which arises in the course of any proceedings properly brought before the Court;

(h) … to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts.

The Employment Court regarded these provisions as giving it jurisdiction to hear actions 'relating to employment contracts' even between parties who had never been in an employment relationship. The Court reached this decision by giving 'founded on' the definition given above but then also by conflating the expressions 'founded on' and 'relating to' into a single definition:

An action is founded on or relates to an employment contract if it could not succeed without relying on either the existence of such a contract … or upon a term of the contract or if it is closely referable to an employment contract.

It is respectfully submitted that this is clearly illegitimate as the two expressions are used in different contexts in the Act and therefore presumably have separate meanings.

The Court backed up this decision by pointing out that it would be absurd if the same proceedings had to be pursued in two separate Courts because one of the defendants was and one was not within the exclusive jurisdiction of the Employment Court. One can only respond that indeed it would be absurd, but that attempts to divide the Court system and to define jurisdictions in this way will clearly lead to absurdity. The possibility of parallel actions clearly exists if a case is properly commenced in the High Court and not struck out but the

defendant embarks upon a counter-suit in the Employment Court. Such inevitable absurdities are good reasons for not having a separate and exclusive jurisdiction, not bases on which the Employment Court should extend its jurisdiction beyond that granted in the Act.

The High Court interpreted s 104(1)(h) differently. In the view of Temm J and Master Kennedy-Grant, this subsection only provided the Court with jurisdiction to hear the questions and make the orders mentioned when a cause of action 'related to an employment contract' was properly before the Court under some other jurisdictional provision. The object, they both said, was to avoid parallel actions on the same issue in two different Courts. It does not appear in terms from the text, and is not fully explained in any of the headnotes in the three series of Law Reports in which the case is reported, but Master Kennedy-Grant must have meant that para (f) only empowered the Employment Court to decide issues incidental to a *cause of action* which was properly before the Court. That this is so is shown by the fact that the High Court in *Diamond Advertising* retained jurisdiction over the case despite another cause of action, founded on the same employment contract, being admittedly within the jurisdiction of the Employment Court. In that case the supposed rationale for paras (f) and (h) fails, since a breach of confidence action would have to be pursued in the High Court even though an action for breach of the contract was before the Employment Court. The effect of these provisions is, therefore, limited to ensuring that once a cause of action is properly before the Employment Court there does not have to be an excursion to the High Court to deal with any incidental matter or obtain a particular remedy.

The Court of Appeal agreed with this restricted view of s 104(1)(h) and subsequently with such a view of para (f) in *Gray*. The subsections themselves could not give the Employment Court jurisdiction over any cause of action. It is respectfully submitted that by the traditional rules of statutory interpretation this is the correct reading; it might be observed, however, that the High Court and Court of Appeal have themselves so frequently engaged in 'purposive construction' and pursuit of the 'spirit and policy' of an Act that a less rigorous view would not have been remarkable. In particular, the absurdity of which the Employment Court complained is now a reality, namely that an action for breach of a contract and for inducement of that breach will have to be filed in two separate Courts.

Other incidental questions have arisen, such as whether the Employment Court has power to make interim injunctions. The Employment Court resolved this question in favour of its own jurisdiction by pointing out that it would be absurd if a party had to obtain an interim injunction in the High Court before proceeding to argue for a permanent injunction in the Employment Court. The Court of Appeal subsequently agreed that the Employment Court had this power by reference to s 104(1)(h) but the answer to the absurdity argument remains the same. Where absurdities exist, they are symptoms of fundamental flaws in the institutional arrangements, not reasons for the Employment Court to extend its own jurisdiction.

3.5 JUDICIAL REVIEW

As discussed in Part 1, s 105 of the ECA creates a procedure whereby the Employment Court has 'full and exclusive jurisdiction' to hear and determine applications for judicial review of the exercise of statutory powers or statutory powers of decision under the ECA and the State Sector Act 1988 by:

ï the Employment Tribunal;

ï an officer of the Tribunal or the Employment Court;

ï an employer; or

ï an employee.

Power to review decisions of the Employment Court itself is assigned to the Court of Appeal by s 131. This power is apparently limited by ss 104 (5) and (6). These provide that a decision of the Employment Court may only be removed into the Court of Appeal by an application for judicial review if the Court has exceeded its jurisdiction. For this purpose jurisdiction is narrowly construed as meaning 'entitlement to enter upon the enquiry in question', or the making of an order of a kind the Court is not authorised to make, or acting in bad faith. These restrictions were given full effect as a matter of statutory construction by the Court of Appeal in *New Zealand Rail Ltd v The Employment Court* but arguably reflect the common law in relation to subordinate courts.

Whatever rationale there may be to assigning these powers of review, it is in practice defeated. Since an exhaustive list of two Acts is mentioned in s 105, cases of a very similar nature but concerning other legislation such as the Local Government Acts, the health service Acts and the Fire Service Act 1975 have to be heard by the High Court. If reform is suggested, this would take the form either of listing further statutes, in which case some other anomaly would be bound to arise, or would refer in general terms to 'public services' in which case a major inroad would have been made into the High Court's jurisdiction.

The assignment of power to review decisions of the Employment Court to the Court of Appeal was presumably to assuage the sensitivities of Employment Court judges who are said to be equal in status to High Court judges. If the object is to prevent High Court judges ruling on the jurisdiction of the Employment Court, the attempt plainly fails. If an action is begun in the High Court and a defendant protests the jurisdiction on the ground that the case should be before the Employment Court, the High Court has to decide the issue. Thus we have seen a single judge and even a Master rule against the opinion of the Full Court of the Employment Court on the extent of its jurisdiction. Their decisions were appealable to the Court of Appeal and thence (unlike applications under s 131 of the ECA) to the Privy Council. If the system were to be made coherent, therefore, there would have to be provision in the High Court Rules for mandatory removal of such questions to the Court of Appeal and a statutory bar on appeal to the Privy Council. This would constitute a mighty inroad into the rights of High Court litigants in order to prop up the Employment Court system.

Greater changes yet to traditional attitudes were floated by Chief Judge Goddard when he suggested, prefaced by a caveat that he was hazarding matters not fully thought out, that judicial review of the Employment Court should be carried out by the Full Court of the Employment Court. This is, with respect, fundamentally to misunderstand the role of judicial review. Judicial review is no mere technical business. It has the vital constitutional role of ensuring that statutory bodies do the job, and only the job, that parliament has given them. To give a statutory body power to determine the limits of its own jurisdiction would be completely contrary to the whole philosophy of judicial review as discussed in section 1.7 of Part 1. Furthermore, for the reasons also discussed in Part 1, such a statutory attempt to assign the power of review to the Employment Court itself could not operate as a complete abolition of the power of review by the High Court over the Employment Court and would probably be counter-productive in leading the High Court to take a more aggressive line in determining the Employment Court's jurisdiction.

As with other causes of action, it is unclear whether judicial review is expected to develop differently in the employment field or not. Judicial review is doubtless allocated to the Employment Court to defend the autonomy of the employment law system, in which case we cannot expect the same of judicial review in this sphere as we expect of judicial review in the traditional sense. If judicial review is not to develop differently in employment matters then allocation to a different Court is undesirable as that is the almost inevitable consequence.

There has also been some potentially far-reaching discussion of the scope of an employer's statutory powers under the ECA. This has been litigated in the context of applications to strike out applications for review and applications for interim injunctions. When an application to strike out is heard the applicant must prove that there is no arguable case. A final decision on the issue is not therefore obtained. In several cases applications for review have survived on the basis that there was an arguable case that the employer's actions were under a statutory power granted by the ECA, but in each case there were special supporting circumstances. The idea is floated that the 'power' to employ or dismiss someone is a power granted by or under the ECA and hence reviewable under s 105. The only response can be that the very suggestion that private individuals carry on their ordinary private activities by permission of the state (as opposed to being forbidden from carrying on certain activities) is utterly at variance with the traditions of a free society and of the common law. Very clear words should be required in a statute before that conclusion could be drawn.

3.6 APPEALS

Appeal from a decision of the Employment Tribunal lies to the Employment Court. Appeal from the Court is to the Court of Appeal, but no appeal is permitted to the Privy Council. Appeal to the Court of Appeal is also limited in that there is no appeal on a question of the interpretation of a term in a contract of employment.

3.6.1 Lack of appeal to the Privy Council

Two main arguments are put up to support the bar on appeals to the Privy Council. The first is that 'historically' there was no such appeal. This is, of course, not a reason. It also fails to take into account that the former Court of Arbitration carried out tasks not normally allocated to a Court. Its main work was the settling of awards. It was obviously inappropriate for such matters to be appealed to the Privy Council; in fact it was inappropriate for functions "so remote from the proper exercise of the judicial function" to be dealt with by a Court-like body at all. Furthermore, the jurisdiction of the Employment Court now includes new matters such as actions for breach of an individual contract of employment and judicial review, in respect of which litigants have been deprived of the opportunity they formerly had for appeal to the Privy Council.

The second argument is that the usual rule is that a party may only have two appeals, one general appeal as of right and one appeal by leave on points of law. This argument was used, for example, in the Solicitor-General's report on severing appeals to the Privy Council, and also by Chief Judge Goddard in arguing for appeal from the Employment Court to the Full Court. Apart from not dealing with cases which originate in the Employment Court, this principle, if it exists, treats appeals as purely private goods and treats the question of availability of appeals as a question of rationing a service provided at less than its market price. But appeals are, like the legal system itself, to some extent a public good. If a unified system of law is to be maintained, an ultimate appeal court is required which may deal with questions from any part of the legal system. Appeal to the highest court is in many countries limited to questions of law of general public importance - in other words, to questions the resolution of which is a public good. In that case there is no argument for not allowing appeals which meet this criterion to the Privy Council. Even though the general legal and employment law systems converge on the Court of Appeal, the Court of Appeal may be expected to behave differently when its decisions are not appealable.

No good reason seems to have been advanced for preventing appeals to the Privy Council on employment law issues.

3.6.2 Appeals to the Court of Appeal

There were no appeals at common law. A right of appeal therefore only exists where it is created by statute. It can be provided by creating a general right of appeal from the decisions of one Court to another. Alternatively a detailed series of rights of appeal can be created, in which case in an instance which cannot be fitted into one of the categories there is no appeal.

Appeal lies from decisions of the Employment Court to the Court of Appeal against any order of the Court in an action founded on one of the torts over which the Court has jurisdiction, from any decision in the exercise of the judicial review power granted by s 105, and from any order or sentence made in respect of contempt of court. There is also a general right of appeal on a question of law, but questions of the construction of a particular contract of employment are excluded.

The justification for the exclusion is historical. There was no appeal from the Arbitration Court on the construction of awards and agreements. But employment contracts are different in nature from the previous agreements and awards, which may have been constructed by the Arbitration Court itself. The philosophy of the substantive law of the ECA is that employment is governed by contract. The Court of Appeal is well used to constructing terms of contracts made in a wide variety of circumstances, including contracts which involve long-term relationships and supposed 'disparities in bargaining power'.

Prior to the passage of the ECA an individual employee who was not a union member could have an employment contract considered by the High Court and had a right of appeal to the Court of Appeal and thence to the Privy Council. Such employees were deprived of those rights by the ECA.

The bar on appeals on the construction of an employment contract is not as simple as might appear at first sight. Yet again jurisdictional problems arise. The Court of Appeal has heard what look like appeals on the interpretation of employment contracts on a number of occasions. This is achieved by ruling that there is an appealable error of law where the Employment Court misinterprets an Employment Tribunal decision, where a question of general principle is involved that goes beyond the particular employment contract, or where the Employment Court's decision in respect of an employment contract is unsupported by the evidence. Bearing in mind the traditional reluctance of appeal courts to interfere with the decisions of lower courts involving factual

disputes where witnesses have been heard, the cumulative effect of these rulings is to create a situation not far different from that which would result if there were a statutory right of appeal.

Chief Judge Goddard has argued that appeal should lie from the Employment Court to the Full Court of the Employment Court. His Honour pointed out that applications for rehearing may well be heard by a Full Court, and that this might provide an attractive alternative to appeal to the Court of Appeal. The situation therefore seems to be that there are two possible routes of 'appeal' (loosely speaking) from an Employment Court decision, so that at the appeal level we have the competitive position discussed in Part 2. This still leaves the Court of Appeal in a strong position to determine the development of the law, as the appellant can choose to go to it if it believes that it will obtain a preferable decision by doing so. It is clearly inconsistent with the logic of the arguments for a separate Employment Court that there should be a general right of appeal to the generalist Court of Appeal. The arguments for a separate Employment Court are essentially arguments for the autonomy of labour law (and are also necessarily opposed to competitive Courts with plaintiff's choice of forum). If employment law is an autonomous system it requires its own autonomous forum for hearing appeals. The current system is incoherent and the question is how coherence should be restored. As has been demonstrated in this paper, the concept of the autonomy of labour law is contrary to the philosophy and purpose of the ECA. Greater institutional autonomy would indicate a reversal of thrust on the principles of the ECA. If the reforms introduced by the ECA are to be continued coherently and consistently, the abolition of the exclusive employment jurisdiction (if not the separate jurisdiction altogether) is a logical next step.

3.7 ABOLITION OF THE EMPLOYMENT COURT OR THE EXCLUSIVE JURISDICTION

A proposal to abolish a Court is usually seen as a threat to the independence of the judiciary. As has been argued above, however, it is the *creation* of specialist Courts that is a threat to the independence of the judiciary. The creation of such a Court therefore requires some compelling argument and such an argument is not forthcoming. The strongest arguments in favour of a specialist labour Court are expressions of hostility towards common law judges and Courts which themselves prove the point made in this paper that the existence of the Employment Court threatens the fundamental principles of the legal system.

Furthermore, this paper has demonstrated that the current position of the employment law institutions is thoroughly unsatisfactory. Since the Court of Appeal decision in *The Methodist Church v Gray*, the argument that the ECA requires reform has become unanswerable. It has also been shown that if it is desired to eliminate demarcation problems, reform cannot be in the direction of extending the jurisdiction of the Employment Court either procedurally by giving the Court jurisdiction over new causes of action or substantively by extending the reach of employment law to cover new classes of contracts. Substantive reform of that kind would also fail to remove the breach of equal treatment that the existence of the specialist jurisdiction entails and would constitute a major inroad into individual freedom.

Meanwhile, the entire Court structure appears to be under examination by the Ministry of Justice. Issues such as the competitive provision of Court services may arise for discussion but are beyond the scope of this paper. The Employment Court could be used to provide an element of competition, but not under a statutory regime giving it exclusive jurisdiction over certain subject matters. Abolition of the the exclusivity of jurisdiction would mean that in employment matters there would be two separate Courts available, with choice of forum to be for the plaintiff (subject to the Employment Court having jurisdiction at all). The bar on appeal to the Privy Council would have to be removed in order that that was not a consideration in the choice of forum. This course will not eliminate all the problems identified in this paper as the question of whether the Employment Court had jurisidiction at all would still remain.

Assuming that for the time being the Court structure will continue to be in the form of a state-provided monopoly, abolition of the Employment Court appears, therefore, to be the only practical solution to the problems currently posed.

Once specialist Courts have been created a difficult situation exists, which is difficult to unwind. However the matter is dealt with, it is difficult to avoid the impression that a Court is being abolished because a government does not like the decisions it makes. Obviously the abolition and reshuffling of Courts can be used as a device for getting rid of inconvenient judges. Recent precedents, in addition to the Staples affair, include the abolition of the Magistrates Courts in New South Wales and their replacement by new Courts. Five magistrates were not appointed to the new Court and the whole operation had in fact been a transparent exercise in weeding out magistrates who were not wanted. Worse still, the former Chief Magistrate was not confirmed in the

corresponding post in the new Court until after he had given evidence in a politically sensitive inquiry. It is important, therefore, that the argument be directed to the principle of specialist Courts in general and labour Courts in particular. It is also important that, once the specialist Courts have been removed, politicians abandon the idea that Courts are bodies whose functions can be 'reviewed' and reshuffled to meet policy objectives.

If the Employment Court is to be abolished, convention requires that the judges continue to receive their current remuneration and preferably are employed in some judicial role. The options for dealing with current specialist Court judges would be to:

(i) translate them to the High Court - the question here is whether they would pass muster as High Court judges from the points of view of ability to deal with a range of issues at High Court level and experience of major litigation;

(ii) translate them to the High Court for employment cases only. This would not be a mere formality as the cases would be before the High Court, could be heard by a High Court judge and would be appealable to the Privy Council. There would be no new appointments of specialist employment judges;

(iii) remove the exclusivity of jurisdiction and make no new appointments to the Employment Court, thereby allowing the Employment Court to die out, while allowing a choice of venue to plaintiffs in the meantime;

(iv) translate them to the District Court but retaining their current remuneration;

(v) find other jobs for the judges but at their current salaries; or

(vi) retire the judges at their current salaries.