The Labour Court and private sector industrial relations

Martin Vranken and Kevin Hince*

The central institution of the system of industrial relations established by the Labour Relations Act 1987 is the Labour Court. This Court, although the direct descendant of the earlier Arbitration Court, has many new features. Of particular significance is the exclusive jurisdiction given to it to deal with economic torts and injunction proceedings arising out of strikes and lockouts. In this article, Professor Kevin Hince and Dr Martin Vranken of the Industrial Relations Centre of Victoria University, analyse the Court's new powers against the background of the historical evolution of New Zealand labour law. The authors also compare the Court's powers and its general position in the labour relations system with a number of overseas jurisdictions.

I. INTRODUCTION

Labour law constitutes a special branch of law, with special needs and priorities. Hence, it requires specific concepts, specific rules, specific procedures including dispute settlement procedures. In essence, this requirement of specialisation can be documented, first by reference to the on-going relationship, as distinguished from the one-off link of the normal contractual relationship, between the individual as well as collective labour law parties. Second, the fundamental premises of general contract law, such as contractual freedom and equality of the contracting parties, do not necessarily apply with equal force in an employment setting. It is in this context that pleas for a specialist labour court system have to be seen. An academic summary of the above viewpoint is presented by Brooks and, perhaps with greater force, by Sykes. Brooks holds that:[1]

> Litigants in industrial relations are different from litigants at common law for the simple reason that they have to live together all the time. The practice of employers taking their employees to a common law court will not conduce to harmonious industrial relations and is clearly in opposition to the basic principle of conciliation and arbitration which is to encourage the parties to settle their differences amicably and between themselves. Moreover, the decision in a civil action rarely disposes of the real cause of the dispute, indeed it may exacerbate the

* Lecturer in Industrial Law and Professor of Industrial Relations, (respectively), Industrial Relations Centre, Victoria University, Wellington

1 B. Brooks *Contract of Employment* (2 ed. Sydney CCH, 1982) 221.

> whole issue, and the root cause of the problem remains to be resolved by means such as private agreement, conciliation, mediation or arbitration.

Sykes specifically addresses the issue of legal control over strikes. That author comments as follows:[2]

> ... it would also appear that the imposition of sanctions should be the business of special labour tribunals. The ordinary courts deal with concepts which are remote from the everyday round of industrial relations, and tort liability involves the playing with concepts far removed from the ken of the worker. Talk of conspiracy to break contracts of employment is surely sufficiently unreal, but what area of Disneyland do we reach when we solemnly discuss whether a particular situation reveals a conspiracy to threaten to break contracts of employment or one to threaten to induce others to break their contracts or, a conceivable possibility, one to induce others to threaten to break their contracts?

The judiciary as well, at times, clearly sees the differing needs of labour law and Common Law. One Australian judge expressed the view that the doctrines of Common Law are not well equipped to resolve what are essentially problems in industrial relations. He elaborated that a Common Law judge lacks the freedom to adopt a discretionary approach to such issues.[3]

Mr Justice Williams, retired Supreme Court judge in Fiji, speaking after eighteen months as Permanent Arbitrator in the industrial jurisdiction of that country, stated that:[4]

> It has been gradually instilled into me that Arbitration in Industrial Relations is very different from commercial arbitrations. The latter tend to follow legal procedures and are tied down more strictly to legal rules of evidence and the like than industrial arbitrations.

Explaining his experiences further he went on to assert that:[5]

> I find myself emphasising more and more frequently that the tribunal is not a court of law and bemoaning the fact that many judges, probably the majority, do not comprehend in depth that the further the law courts are displaced from industrial tribunals the better it is likely to be for industrial relations. We are unfortunately at a stage, especially in Fiji, where judicial action, some might call it judicial interference, has made that process difficult. When we do have the good fortune to be blessed with a legislation (sic) they may be encouraged to erect a legislative barrier between the courts and the industrial tribunal. I make those comments as an

2 E.Sykes and H.Glasbeek *Labour Law in Australia* (Butterworths, Sydney, 1972) 360.
3 *Woolley* v. *Dunford* [1971] S.A.S.R. 243, 298 per Wells, J.
4 J. Williams *What An Arbitrator Looks For*, Address to 3rd Industrial Relations Seminar, Fiji Employers' Consultative Association, Fiji, 25-26 September, 1987 (mimeo).
5 Idem.

> ex judge who eighteen months ago would have had great difficulty in appreciating that there could be any justification for making them.

A judge of the New Zealand Court of Appeal recently identified three major reasons why the courts of general jurisdiction are not well fitted for the role of industrial conflict resolution:[6]

> The first is the adversary method of conflict resolution which is the traditional way in which disputes are resolved in the courts of general jurisdiction. By definition it focuses on the dispute itself rather than on a continuing relationship: it pits one side against the other and there is no built-in encouragement to find common ground, let alone a central role for mediation and conciliation. The second is that the field of industrial relations calls for the development of broad expertise and experience. It requires specialised judges who become steeped in the field and who work with those from union and employer ranks who through their own background and experience have the confidence of their organisations. Such tribunals are likely to be more sensitive instruments for resolving these disputes. The third and associated reason is that the orderly resolution of industrial conflict in an ongoing relationship is not simply a matter of applying legal principles and attempting to discover on examination who is right and who is wrong. Such questions are often not susceptible to that kind of cold analysis in a forum far removed from the reality of industrial life and industrial strife. Bringing in the law and the regular court processes may simply exacerbate the human drama going on behind an industrial dispute.

Even a political acceptance of this viewpoint has been indicated by the Hon. S. Rodger, Minister for Labour. In speaking during the second reading of the Labour Relations Bill he commented, inter alia, that buying and selling labour did not amount to just another economic market in that the labour market had an additional element, namely the need for a continuing working relationship between the buyers and sellers.[7]

Several questions raised in the discussion document on industrial relations reform in New Zealand (the "Green" Paper)[8] directed attention to the inter-relationship of labour law and other areas of law in general, and to the appropriate role and place in that scheme of the Arbitration Court. Two of the questions raised were central to the debate. First, it was asked whether the wide jurisdiction of the Arbitration Court, as it had developed ever since 1894, was appropriate for one, single institution and, if not, which areas should be handled elsewhere.[9] Secondly, the question was raised whether Common Law action (in tort) should be available in the case of a strike or lockout and,

6 Sir Ivor Richardson, address (untitled) at Industrial Relations Centre, Victoria University, Wellington, 17 July, 1987, (mimeo), pp. 3,4, reprinted as "The Role of the Courts in Industrial Relations" 12 N.Z. J. of Industrial Relations 114.

7 *The Dominion* (Wellington, N.Z.) 13 May 1987, 2.

8 *Industrial Relations: A Framework for Review,* vol. 1, (Government Printer, Wellington, 1985) (the Green Paper) 31

9 Ibid. 32 question 29.

if so, where the jurisdiction should be.[10] In the legislation as adopted by Parliament and operative from 1 August, 1987, the Arbitration Court was abolished. The arbitral or legislative functions of the former Court were thrust upon a newly established Arbitration Commission. Its judicial powers, extended to include Common Law action in tort, became vested in an (equally new) Labour Court. The provisions of the Labour Relations Act 1987 undoubtedly constitute a major change in institutions, procedures and responsibilities as regards the operation and administration of New Zealand labour law. These changes can be analysed and evaluated from a variety of perspectives. It is hoped that this article may contribute to such evaluation by addressing the question as to what sort of Labour Court is appropriate in New Zealand given the social, economic, cultural and industrial relationships for the last decades of the twentieth century.

As a practical matter, this essay reviews in turn, the historical development of the Labour Court system in New Zealand, the current legislative framework of the New Zealand Labour Court, including the provisions of the "Green" and "White" Papers, the Labour Relations Bill, and the Labour Relations Act 1987, and the labour court in a comparative context. In the final section some evaluative and policy issues are addressed as they emerge from the earlier material.

II. HISTORICAL DEVELOPMENT OF THE LABOUR COURT IN NEW ZEALAND

A. Origins

The Arbitration Court was established under the Industrial Conciliation and Arbitration Act 1894 (IC and A Act). Why the legislation was introduced and what the role expected of the Court was are questions central to the background of this paper. Key reasons for the establishment of the Court, and bases for the anticipated role of the Court included to assist in the regulation (elimination) of sweating, to recognise and encourage trade unionism, to put the principle of State intervention in labour disputes into practice, and to eliminate strikes.

Woods[11] separates the elimination of sweating and the encouragement of trade unionism as objectives of industrial legislation. He identifies a range of statutes which sought to protect individual rights in the employment relationship.[12] He argues that

10 Ibid. question 35.

11 N.S. Woods *Industrial Conciliation and Arbitration in New Zealand* (Government Printer, Wellington, 1963).

12 For example

1865	Masters and Apprentices Act
1867	Offences Against the Person Act
1871	Contractors Debts Act
1873	Employment of Females Act - amendments 1875, 1881
1882	Employers Liability Act
1891	Truck Act
1891-1894	Coal Mines Act

the IC and A Act and the Court was not (initially) a response to these needs, but rather a product of, and a response to, the needs of trade unionism. However, Woods admits acceptance of a position that:[13]

> By 1894 both needs became fused in the minds of legislators with some important effects on the nature of the Industrial Conciliation and Arbitration Act of that year.

Holt[14] succinctly summarises his view about intent in respect to "sweating" by asserting that, "To describe the Arbitration Act as 'legislation against sweating' is to confuse intention and outcome."[15] He reaches this conclusion subsequent to an analysis of the impressions created by W P Reeves in his writing[16] compared with the speeches before Parliament and elsewhere in the early 1890's. Supporting the negative in the debate about whether the Arbitration Act, and hence the Court acting to establish wages, was to meet a social need, Holt refers to the frequent prediction (of Reeves) that most disputes would be settled by the parties in conciliation) and that appeals to arbitration would be rare.[17] Holt[18] also questions the centrality of the purpose of encouraging the formation of trade unions. Conventional and accepted wisdom has tended to accept with little questioning the stated purpose expressed in the title of the 1894 Act itself, viz. "An Act to encourage the formation of industrial unions and associations ...". Woods is unequivocal in asserting that the Act arose directly out of the growth of trade unionism itself,[19] and, in fact, he propounds the conventional wisdom of the legislation seeking to resurrect trade unionism from the defeats of the late 1880s and early 1890s. Holt argues that the tendency has also been to exaggerate this particular origin of the legislation. Again the point of reference is the input of Reeves during discussion (in parliamentary debate and in public). Holt asserts that much more significance must be given to the view put by Reeves that the measure favoured neither employers nor employees, and that the Arbitration Act would not drive non-union labour into trade unions.[20] All Holt will concede on this point is that Reeves and his supporters may have anticipated that the Act would strengthen unions but for tactical reasons chose not to say so.[21] Synthesis without discriminatory evaluation by Hare [22] refers to the role of the 1894 legislation in "creating" unionism, controlling strikes and the subsequent

1892-1984 Shop and Shop Assistants Act
1892 Contractors and Workmens Act.

13 Woods, supra n. 11, 25.
14 J. Holt *Compulsory Arbitration in New Zealand: the First Forty Years* (Auckland University Press, Auckland 1986).
15 Ibid, 34.
16 Especially in W. P. Reeves *State Experiments in Australia and New Zealand* first published 1902, reissued with introduction by John Child in 1968 (Macmillan, Melbourne, 1986).
17 Holt, supra n. 14, 33
18 Ibid, 34.
19 See Woods, supra n. 11 esp. Ch. 2.
20 See generally Holt, supra n. 14.
21 Idem.
22 A. E. C. Hare *Report on Industrial Relations in New Zealand* (Whitcombe and Tombs, Wellington, 1946).

evolution to an instrument for the regulation of wages. Sinclair[23] accords emphasis to the stimulus to unionism, "... the Industrial Conciliation and Arbitration Act was intended to stimulate and protect unionism",[24] and the role of the collective, "... that unions were too weak to safeguard the interests of workers against employers".[25] In fact Sinclair re-emphasises his position by a reflection on:[26]

> The strange metamorphoses through which the arbitration system passed - how an Act intended, as its subtitle indicated, 'to encourage the formation of industrial unions', came to be used to dragoon obstreperous unions ...

The principle of State intervention and elimination of strikes and lockouts are inter-related, if not as separate objectives,then as a means (State intervention) and an end (elimination of the strike). And the centrality of these principles as the raison d'être for the IC and A Act, and hence for the role of Court has not been subjected to a debate in the negative. Rather the assertions have supported this linkage.

Holt[27] quotes Reeves again:

> ... but it would ... put a stop to those disruptions of industry by which factories are closed, enterprise checked, work stopped, and misery and desolation brought into hundreds and perhaps thousands of homes.

And he (Holt) clearly indicates the primacy of this rationale by adopting it as the point of reference for his analysis of the outcome of the legislation and the role pursued by the Court. Holt's central thesis is to show:[28]

> ... how a structure designed to ease the settlement of industrial disputes was gradually transformed by the judges into something which had not been envisaged by W P Reeves and his fellow legislators.

The descriptive flow of material in Woods[29] does not seek to make such a distinction. It is clear Woods sees the statute emerging from group conflict,[30] as a

23 K. Sinclair *A History of New Zealand* (Penguin, Harmondsworth, 1980) esp. 184 and ff.
24 Ibid. 184.
25 Idem.
26 Idem.
27 Holt, supra n. 14, 21.
28 Quoted from dust jacket of Holt, supra n. 14.
29 Woods, supra n. 11. Also in N. S. Woods, *Troubled Heritage: the Mainstream of Developments in Private Sector Industrial Relations in New Zealand 1894-1978.* Occasional Paper, No. 23, (Industrial Relations Centre, Victoria University of Wellington, 1979).
30 N. S. Woods *Industrial Conciliation and Arbitration in New Zealand* supra n. 11, 30.

product of the development of trade unionism,[31] but there is no questioning the consequential role of the Court in wage fixation, wage policy and (quasi) legislative fixation of other terms of employment. The development is described and accepted as a natural if not expected extension of role. From our point of view the differing treatment by these two commentators is interesting, but certainly not the most significant point to be made. We must stress the significance of a development of an agency (Court) role from one of social control (control of strikes) to one of formulating and implementing policy (in relation to wages and employment conditions). We have support from both commentators for this point of view. Holt seeks to analyse the dynamics of the shift, Woods was content to describe it. By the early 1900s the Court, Woods suggests, had developed a fair wage policy. Moreover he argues that:[32]

> The element of negotiation and of compromise between sides was reduced and the functioning of the Court took on a more authoritarian aspect. In addition to rates of wages, moreover, the Court's awards included almost from the outset clauses dealing with such matters as hours of work, holidays, overtime, under-rate permits, job definitions, preference clauses, etc. In many cases these came to be standardised or stereotyped clauses not regarded generally as matter for negotiation but rather as matter fixed by the Court in terms of a general policy. These lengthening codes of fairly standardised conditions served to emphasise the legislative rather than the negotiative aspects of the system.

Of further interest to the material of this article is the deduction that the IC and A Act, and the activity of the Court, regardless of the original prime intent, had resulted in a centrality of registered organisations, and that such organisations were prescribed a role in the arbitral process. We can therefore assert that the emphasis was on the needs of the collective, and that the protection of the individual by the conciliation and arbitration law and the Labour Court was to be through the protection of the collective. The plethora of labour law referred to earlier was administered and enforced by other agencies and the mainstream non-arbitral Court system.

B. To 1968

Argument and debate can be presented in respect to the primary basis of intent of the 1894 legislation and the role of the Court. Nevertheless some consensus is clear: the system was designed to benefit the whole community, individual rights were to be protected via the collective, and the Court was expected to play a residual rather than central role. It is in relation to this last point that expectations were most clearly unfulfilled. Even prior to 1908 award-making by the Court had emerged as a key role. Up to that time, as Woods observed:[33]

> The main trend in legislation and practice had been to enhance the predominance of the Arbitration Court. In addition to the determination of wages and hours, the

31 Idem.
32 Ibid. 62.
33 Idem.

> work of the Court included interpretation of awards,the handling of breaches of awards and the imposing of penalties, and the regulation of working conditions other than hours and wages.
>
> The Court was firmly established in the combined role of an industrial legislative tribunal and an industrial Supreme Court. It fixed minimum wages by decree rather than by negotiation.

Up to 1907 the Court had established a 'fair wage' on a case by case basis: after that time the Court moved progressively towards the (quasi) legislative decree of a general wage order adjusting all minimum rates. The progression followed through the establishing of a basic rate (8/- per day) for unskilled labourers(1908), developing a policy of uniformity for occupational groups, adjusting all rates for cost of living changes (1915 on), establishing rates for three classes of workers - skilled, semi-skilled, unskilled - (1919), and then between 1919 and 1922 adjusting each award sequentially but on the basis of a 'pronouncement' (which had the effect albeit with a time lag of a general adjustment). On 29 May 1931, an immediate reduction of 10% in all rates was made by general order. Many significant changes occurred in the legislative basis in the period to 1970. For example, voluntary arbitration was introduced in 1932, compulsion restored in 1935, and the 'blanket clause' concept making awards binding on all in, or connected with, the industry, present and future, was introduced in 1937. In the area of practice the trend to collective protection and the role of the Court as a policymaker continued. The 1936 amendments raised the possibility of the Court establishing a basic living wage, rather than merely establishing minimum wages. Provisions of the Act requiring consideration by the Court of the general economic and financial conditions, and the establishment of a wage sufficient for a man, wife and three children living in a fair and reasonable standard of comfort, reinforce the view that the shift in role from mediation (dispute settling) to policy formulation, was continuing. In the post-World War II years, certainly to 1968, general wage order hearings were the central role of the Court.[34] Woods saw the only diversions of the Court during the 1950's as, for example,'... the occasional election enquiry ...'[35] and some interest in union accounting methods. This pattern continued until the now (in)famous "nil" wage order of 1968.

C. *1968 to 1986*

Rapid industrialisation, major technological change and acute labour shortages in the 1950s and 1960s resulted in continued pressure for wages higher than the traditional wage fixing system was able to deliver. This marked the beginning of bargaining outside the formal system (the development of "second tier" bargaining), and an erosion of confidence in the Arbitration Court which peaked with the issuing of a nil General Wage Order by the Court in 1968. From that point unions increasingly ignored the Court, taking up direct bargaining with employers on a large scale. In 1970 a legislative amendment introduced the personal grievance procedure and a model

34 Idem.
35 Idem.

procedural clause for handling disputes of rights. Further major changes were introduced by the Industrial Relations Act 1973. The latter Act replaced the Industrial Conciliation and Arbitration Act. Industrial disputes were split into disputes of interest and disputes of right, with separate procedures for settlement. New bodies were established to assist in resolution of these disputes, with disputes of interest going before the Industrial Commission, and disputes of rights being the province of the Industrial Court. In effect, the Industrial Court was the former Court of Arbitration shorn of its jurisdiction over disputes of interest. The grievance processing role of the Court included personal grievance handling. In general, individual workers could not be parties to proceedings under the 1973 Act and a union could only represent those who were eligible to join it under its existing membership rule. As the enactment of the 1973 Act was followed by a period of direct government intervention in wage fixation, the Arbitration Commission never really became operational. In 1977 the Industrial Commission and the Industrial Court were rejoined into one Arbitration Court. Nonetheless. statutory wage controls of one kind or another remained in force until 1985[36]. The central role of the Arbitration Court in the areas of rights disputes, personal grievances, interpretation and enforcement of awards or collective agreements continued. Up to 1986 recourse to the ordinary courts of law for the resolution of industrial disputes was close to non-existent. However, whenever it did occur, the use of the regular courts received considerable attention from academic commentators, e.g. Brooks,[37] Mills,[38] Smith,[39] Anderson,[40]Chapman,[41] Szakats,[42] Reid,[43] Davis,[44] Hughes,[45]and, more recently, Hughes[46] and Vranken.[47]

36 See J. Boston *Incomes Policy and the 1985-86 Wage Round: from non-market failure to market failure?* (mimeo) and *Incomes Policy in New Zealand* (Victoria University Press, Wellington, 1984).
37 B. T. Brooks "Conspiracy and Intimidation" [1969] N.Z.L.J. 416-418.
38 S. Mills "The Tort of Inducement of Breach of Contract" (1971) 1 A.U.L.J.27-44.
39 I. T. Smith "The Disadvantages of Injunctions in Industrial Disputes" [1975] N.Z.L.J. 179-184.
40 G. Anderson "The Tort of Inducement of Breach of Contract" (1971) 1 A.U.L.R. 27-44.
41 D. J. Chapman "Tortious Consequences of the Strike" (1975) 7 V.U.W.L.R. 455-476.
42 A. Szakats *Law and Trade Unions: Use of Injunctions.* (Industrial Relations Centre, Victoria University of Wellington. Occasional Paper No. 12, 1975).
43 J. Reid "Injunctions and Industrial Relations: *Harder* v *New Zealand Tramways and Public Passenger Transport Authorities Employees Industrial Union of Workers"* (1977) 7 N.Z.U.L.R, 374-383.
44 W. Davis "Injunctions and Trade Unions" (1978) 3 A.U.L.R. 429-441.
45 J. Hughes "Justifying Inducement of Breach of Contract" [1981] N.Z.L.J. 405-407.
46 J. Hughes "Injunctions against strikes" (1986) 6 Otago L.R. 306-318.
47 M. Vranken "The Applicability of the Common Law in an Industrial Relations Context (with Special Reference to Industrial Action): A Comment" (1987) 12 N.Z. J. of Industrial Relations 107-112.

D. 1986-1987: the "Green Paper"/"White Paper" Debate

In December 1985 the Labour Government issued a discussion document (the "Green Paper") as the first formal step in the public debate about change in the labour relations legislation. The "Green Paper" (Vol. 1) posed forty-four questions as directional guides for the public debate about the future principles, structure and processes of industrial relations in New Zealand. The two questions central to the role of a labour court have already been mentioned.[48] It is worth noting that neither the distinction as such between interest and rights disputes, nor the role of the court in rights disputes, was raised as an issue in the "Green Paper". This indicated a prima facie acceptance of the status quo. Also, while the scope of the matters subject to personal grievance hearings (including the personal scope of the grievance procedure) was addressed,[49] the role of the Court in these procedures was not raised as an issue for debate. Further, it was asked whether, given the overlap in functions of conciliators and mediators, there was a case for amalgamation of both services.[50] Some commentators, rather than the "Green Paper" itself, took this matter further, and argued for an integration of these services with the personnel and control of a labour court.

The formal submission by the Federation of Labour (FOL)[51] was brief and assertive in arguing for the broadest possible role for a single institution; arguing, inter alia, that the Arbitration Court should have exclusive jurisdiction over all employment-related matters, including Common Law actions.

In sharp contrast to the centralisation of the FOL case, the New Zealand Employers' Federation (NZEF) argued for a two-tier structure, and fragmentation. The submission[52] argued for a labour court which would be recognised as the senior industrial relations institution for the determination of major claims and legal interpretations. Such a court should retain the existing membership structure for this role. Further, it was argued that:[53]

> There is also, however, a need for a lower level structure for the speedy resolution of such matters as minor claims and grievances not resolved at committee level as well as for handling routine interest administration and operational issues. This could be achieved in a variety of ways including the establishment of a lower level tribunal system possibly with a unit in Auckland, Wellington and Christchurch.

48 *Industrial Relations: A Framework for Review*, supra n. 8, Questions 29 and 35.
49 Ibid. Questions 22 and 23.
50 Ibid. Question 31.
51 *Looking Ahead: A More Just Industrial Relations System: NZFOL Viewpoint on Industrial Relations Reform.* (New Zealand Federation of Labour, Wellington, 1986) 6,7.
52 *The Industrial Relations Green Paper: an Employer Perspective: Submission by the NZ Employers' Federation* (NZ Employers' Federation, Wellington, 30 April 1986) 70,71.
53 Idem.

> Alternatively the role could be performed by a network of one-man tribunals specifically appointed for and allocated to particular industries.

Finally it was commented that:[54]

> A possible extension to the jurisdiction of the Arbitration Court might lie in establishing a separate administrative division to deal with jurisdictional questions, including procedures for representation and recognition rights of bargaining agents.

The above points must be measured against the mainstream of the NZEF submission which argued for a system of enterprise bargaining, and Common Law enforcement of contractual relationships. It was consistent with this general thrust that the NZEF considered (responding to Question 35) that Common Law action should continue to be available in the case of a breach of the law, or of an agreement, including injunctions and actions for economic loss.

The idea of a change of jurisdiction for such matters was not contemplated, but an argument was put that there was clearly room for the power of the Arbitration Court to be strengthened in the area of return-to-work orders, and that there was no reason why either unions or employers should not remain accountable for unlawful actions under Common Law procedures.[55] Many other submissions were received making comments on these aspects of the debate; a wide variety of opinion was expressed; some supported the broad thrust of the FOL submission, some that of the NZEF, some expressed variations of detail from these points of view. The single most common opinion expressed was that the Court was too legalistic and too technical in its approach.

In September 1986 the Government issued a policy statement (the"White Paper" [56]) on labour relations, acknowledging inter alia, the need for a radical reform of the Arbitration Court, and justifying a need for re-thinking the desirability for greater specialisation of the various institutions that underpin the industrial relations system.[57] A Labour Relations Bill was introduced into the House in December 1986, further public debate occurred at Select Committee hearings, the bill was debated. passed and became operational as the Labour Relations Act 1987 on August 1. The provisions of the legislation in respect to the Labour Court and related matters are dealt with in detail in the following section of the paper.

54 Idem.
55 Ibid. 77
56 *Government Policy Statement on Labour Relations* (the "White Paper") (Government Printer, Wellington, 1986).
57 Ibid. 18.

III. THE LABOUR COURT IN NEW ZEALAND: CURRENT SITUATION

A. Structure and Composition

In the past the Arbitration Court was based in Wellington and travelled around the country. In order to enable the Court to respond more quickly and flexibly to problems that arise, the Government decided to decentralise the Labour Court. The new Labour Court will therefore be based in Auckland, Wellington and Christchurch; the Chief Judge of the Court will continue to be based in Wellington.

Prima facie the basic characteristics of this decentralised Court, especially its tripartite composition as well as the presence of a lay element and, thus, the emphasis on industrial relations expertise at the bench, remain unchanged. However, upon consideration of the actual changes brought about by the Labour Relations Act 1987, the picture tends to become somewhat more blurred.

Under the Industrial Relations Act 1973, the presence of the Judge and at least one other member was necessary to constitute a sitting of the Arbitration Court, "except as otherwise expressly provided".[58] Such an explicit exception was provided for in section 202(2) which stipulated that the jurisdiction of the Court relating to inquiries into disputed union elections was to be exercised by the judge alone.

What used to be the exception has become the general rule under the Labour Relations Act 1987. While the basic tripartite constitution of the Labour Court remains the same as that of the former Arbitration Court,[59] section 295(1) holds that the jurisdiction of the Labour Court shall, in principle, be exercised by the professional judge sitting alone. Two exceptions which are specifically provided for in the Labour Relations Act itself are demarcation disputes[60] and personal grievances.[61]

The reason for the change outlined above is arguably that the new Labour Court is perceived to have a more exclusively legal function than the former Arbitration Court. As it is pointed out in the "White Paper", the role of the lay members has been limited to advise when industrial relations expertise is deemed to be required; they are therefore not to take up a judicial role in the legal sense of the word.[62]

Due to the decentralisation of the Labour Court, the number of judges has increased to five. Whereas the statutory conditions for the appointment of the professional judges to the Labour Court are identical to those which existed under the Industrial Relations

58 Industrial Relations Act 1973, s. 53 (1).
59 Compare Labour Relations Act 1987, s. 285 (1) and Industrial Relations Act 1973 s. 33 (1).
60 Labour Relations Act 1987 (LRA 1987), s. 108 (6).
61 LRA 1987 s. 217 (2).
62 White Paper, supra n. 56, 18.

Act 1973 and, hence, any special knowledge or expertise of industrial law is still not a formal prerequisite,[63] several alterations took place with respect to the nomination and appointment of the lay members. First, the range of nominated organisations has been extended by including any organisation of workers or employers, other than the central organisations, approved by the Minister for that purpose.[64] The appointment is to a panel from which both the Chief Commissioner of the Arbitration Commission[65] and the judges of the Labour Court[66] can choose for the purpose of each matter. Remuneration and travel allowances of the panel members is on a per diem basis only.[67]Relatively minor changes involve furthermore a reduction of the age limit from 72 to 68 years and the appointment by the Minister directly, rather than by the Governor-General on the advice of the Minister.[68]

Under the Industrial Relations Act 1973, the granting of exclusive jurisdiction to the Arbitration Court in industrial matters was interpreted to mean that the Arbitration Court was the final Court. Hence, no general right of appeal to other courts existed, whether direct or indirect.[69] The only two exceptions were, first, lack of jurisdiction in which case an application for review could be made to the High Court,[70] and, second, appeals to the Court of Appeal by way of case stated on a question of law only.[71] The limited nature of such appeals becomes clear when it is borne in mind that the "case stated" must be in the form of specific questions seeking advice on the solution of a particular problem that actually has arisen in the proceedings, and not merely general questions; also, a statement of the facts already settled must accompany the questions.[72] Furthermore, as no specialisation existed at the appellate level, the Court of Appeal was under a statutory obligation to have regard to the special jurisdiction and powers of the Arbitration Court.[73] Reference can be made here to the decision of the Court of Appeal

63 No person other than a barrister or solicitor of no less than 7 years' standing of the High Court can be appointed a judge of the Labour Court; retirement from office is at the age of 68 years. Compare LRA 1987 s. 288 and ss. (2) and (6), Industrial Relations Act 1973 s. 37 ss (2) and (6). The other terms of appointment remain unchanged as well. The appointment of temporary judges is still possible: LRA 1987 s. 291.

64 LRA 1987 s. 268 (2) (e). Special allowance is made for the purpose of proceedings relating to the State Services or State Owned Enterprises or both.

65 LRA 1987 s. 261 (1) (b).

66 LRA 1987 s. 285 (2).

67 LRA 1987 s. 269. Compare Industrial Relations Act 1973 s. 45, s. 45A.

68 Compare LRA 1987 s. 268 (1), s. 268 (4) (e) to Industrial Relations Act 1973 s. 41 ss. (1) and (2).

69 *Mazengarb's Industrial Law* (October 1982) 53.

70 Industrial Relations Act 1973 s. 48 (6).

71 Ibid. s. 62A.

72 A. Szakats "Industrial Jurisdiction: A complex hierarchy of courts (Part III)" [1980], N.Z.L.J. 490.

73 Industrial Relations Act 1973 s. 62 A (4).

in *Winstone Clay Products Limited* v. *Cartledge (Inspector of Awards)* is where it was said that:[74]

> It is not to be assumed that propositions of law, however prestigious and well established in the High Court or Court of Appeal, will apply with the same clear force in the Arbitration Court. That is a specialist Court, designed for a specific field. In the matters directed by statute to come before it, it must take into account other considerations besides legal issues. It is concerned primarily with fairness ... In particular it may determine all matters before it and make such decisions ... as in equity and good conscience it thinks fit.

The Labour Relations Act 1987 changes the situation described above in various aspects. First, as the jurisdictional scope of the Labour Court, to be discussed below, has been widened to include jurisdiction in relation to torts, injunctions, and applications for review, the scope for appeal has logically been increased accordingly.[75] It is noteworthy, however, that appeals with respect to these areas of extended jurisdiction of the Labour Court are not limited to appeals by way of case stated on a question of law only.[76] Moreover, the Court of Appeal is now specifically instructed to disregard the special jurisdiction and powers of the Labour Court as to both torts, injunctions and applications for review.[77] Ironically, this is the direct result of the Act prohibiting the Labour Court from applying relaxed rules of evidence and in equity and good conscience in these matters.[78] Finally, applications for review in relation to any proceedings before the Labour Court now go to the Court of Appeal.[79]

B. Jurisdictional Scope

The Labour Court, not unlike the former Arbitration Court, is a creature of legislation. Hence, its authority and functions are encompassed by statute and it has no inherent jurisdiction comparable to that of the High Court. The jurisdiction of the Labour Court is spelled out in sections 279 of the Labour Relations Act 1987 and bears a remarkable resemblance to what was provided in sections 48 of the Industrial Relations Act 1973. As pointed out already, the major limitation introduced by the 1987 Act is

74 [1984] A.C.J. 1035 (CA).

75 LRA 1987 s. 309 and ff.

76 See LRA 1987 ss. 309 (appeals in respect of proceedings founded on tort) and s. 311 (appeals in respect of order on application for review) and compare s. 312 (appeals on question of law).

77 Section 314, Labour Relations Act 1987 specifically refers to, among other things, the provisions of ss. 279 (4) and 303 (1).

78 LRA 1987 s. 279 (4) generally confirms the power of the Labour Court to make decisions or orders "as in equity and good conscience it thinks fit". However, it makes except for matters under ss. 242 (torts) s. 243 (injunction) and s. 280 (application for review). An identical exception is provided for in s. 303 (1) Labour Relations Act 1987 as regards evidence.

79 LRA 1987 s. 279 (6), s. 308.

the removal of jurisdiction in interest disputes. On the other hand, a transfer of jurisdiction from the High Court to the Labour Court took place with respect to certain civil actions as related to strikes or lockouts, as well as with respect to applications for review as related to persons or bodies with statutory powers of decision. In respect to the latter, a full list of persons or bodies envisaged is contained in sections 280 (1) and (2) of the Labour Relations Act 1987; in respect to the former, the jurisdiction of the Labour Court has been limited to four specifically enumerated economic torts.[80] These tort actions can be remedied by the granting of an injunction.[81]

The Industrial Relations Act 1973 stipulated that "in all matters before it the (Arbitration) Court shall have full and exclusive jurisdiction to determine them ...".[82] However, this was never interpreted to mean that the Arbitration Court was the only court having industrial jurisdiction to the exclusion of other, ordinary courts of law. On the contrary, the High Court especially had, pursuant to its inherent jurisdiction, competence in a variety of Common Law actions connected with employer-employee conflict.[83] The Labour Relations Act 1987 did not fundamentally alter this situation, since no transfer of the industrial jurisdiction in general from the High Court to the Labour Court has taken place.

C. Access to the Labour Court: Representation of the Parties

The distinction between individual and collective disputes never really played a major role in New Zealand. Traditionally, all labour disputes, including personal grievances, were perceived of as being essentially collective in nature. Hence, the standard grievance procedure of section 117(4) Industrial Relations Act 1973 contained no legislative command independently from a collective instrument and, therefore, it had no direct enforceability in the individual employer-employee relationship. Conceptually, without the intermediary of the employer-union collective instrument, the model clause of section 117(4) was not deemed to have been imported in the individual employment contract.[84]

As a practical matter, under the Industrial Relations Act 1973, industrial workers could only avail themselves of the benefit of the personal grievance procedure if they could show both union membership and award coverage. Some workers, while clearly being within the coverage of the award or collective agreement, were barred from its benefits - including the grievance procedure - because of the salary bar. Even where all preconditions for the applicability of the grievance procedure were fulfilled, it was only

80 LRA 1987 s. 242.
81 LRA 1987 s. 243.
82 Industrial Relations Act 1973 s. 48 (4). Note the identical wording in LRA s. 279 (4).
83 For an overview, see A. Szakats "Industrial Jurisdiction (Part III)", supra n. 72, 484 ff.
84 A. Szakats and M. A. Mulgan *Dismissal and Redundancy Procedures* (Wellington, Butterworths, 1985) 27.

the collectivity (the union) that could pursue the matter once direct (individual) negotiations had failed. As a result, it could fairly be said that the employee benefits contained in the collective instrument were not seen as independent legal entitlements which could be protected against infringement by the individual himself. Rather, not only were the contents of the collective instrument the product of a collective bargaining process, once established they also remained under the control of the collective parties throughout the currency of the award or collective agreement. It follows that the individual grievant had no direct access to the Arbitration Court, except where it could be shown that the union (or the employer or any other person) had failed to act or had failed to act promptly.[85]

Under the Labour Relations Act 1987, several changes have taken place. First, the definition of personal grievance has been widened so as to expressly include unjustifiable detrimental employer actions other than unjustifiable dismissal (specifically: sexual harassment, duress, and discrimination).[86] Also, the personal grievance procedure is henceforth viewed as solely a benefit of union membership and its availability is thus no longer dependent on coverage by the award or collective agreement. Even this precondition of union membership is being waived in the limited circumstances of discrimination, duress, and union exemption.[87] Furthermore, personal grievances are now legally distinguishable from rights disputes by their subject matter rather than by the number of workers affected.[88] This means that the alleged unjustifiable employer action at the basis of the grievance may not derive solely from the interpretation, application or operation of a collective instrument.[89] As before, to invoke the disputes of rights procedure remains the exclusive competence of the collective parties.

In principle. the issue of party representation remains unaltered. In actual practice, the change brought about by the Labour Relations Act 1987 is substantial. Both under section 54(1) of the Industrial Relations Act 1973 and section 299(1) of the Labour Relations Act 1987, any party to any proceedings before the Court may appear personally, or be represented by an agent, a barrister, or a solicitor. Formerly, an important restriction to the right to legal representation was contained in section 54(4) which held that, with respect to arbitration proceedings, no barrister or solicitor with a current practising certificate was allowed to appear or be heard before the Arbitration Court, except with the consent of all parties. As the arbitration proceedings go now before the Arbitration Commission, this obstacle to the legal representation of parties before the Labour Court has been removed.

85 Industrial Relations Act 1973, s. 117 (3A).
86 LRA 1987 s. 209 (a).
87 LRA 1987 s. 218.
88 LRA s. 209 (6) (1) (b)-(d).
89 LRA 1987 s. 210 (1) (b).

D. Labour Court Proceedings

The emphasis continues to be on informality[90] as well as, now more explicitly than under the 1973 Act, on speediness of the Labour Court proceedings. Under section 296 Labour Relations Act, any party may, under certain circumstances, apply to the Court to accord urgency to the hearing of the proceedings. A judge of the Labour Court considers the application and may, "if satisfied that it is necessary and just to do so", order that the proceedings be heard by the Court "as soon as practicable". The proceedings to which urgency may apply include applications for award exemption, new matters, applications for a Court order of compliance, torts, and injunctions.

The traditional emphasis on the importance of more than just legal rules and principles seems to have lost momentum under the Labour Relations Act 1987. A first indication thereof may be that, henceforth and as a general rule, the jurisdiction of the Labour Court is to be exercised by a judge sitting alone.[91] Secondly, even though the rules of evidence continue to be more relaxed than in ordinary courts of law[92] and even though the power of the Court to decide in equity and good conscience remains as a general rule,[93] both these unusual[94] powers of the Labour Court do not apply to some of the most important areas of its extended jurisdiction, namely the jurisdiction of the Labour Court in relation to torts, injunctions, and applications or review.[95]

IV. LABOUR COURTS; A COMPARATIVE ANALYSIS

A. Introductory Observations

One common feature to be found in labour law systems throughout the world is that the settlement of labour disputes is not simply or at least not exclusively left to the ordinary courts of law. Even though various mechanisms exist internationally for the final disposition of labour disputes,[96] labour courts undoubtedly constitute the most

90 Compare LRA 1987 s. 315 (1) with Industrial Relations Act 1973 s. 226 (1) (validation of informal proceedings); and LRA 1987 s. 279 (5) with Industrial Relations Act 1973 s. 48 (5) (no decision shall be held bad for want of error or form).

91 LRA 1987 s. 295 (1).

92 Compare LRA 1987 s. 303 (1) and Industrial Relations Act 1973 s. 57 (1).

93 Compare LRA 1987 s. 279 (A) and Industrial Relations Act 1973 s. 48 (4).

94 "Unusual" was the term used by Cooke J. in *NZ Forest Products Ltd* v. *Northern, etc. IUW* [1981] ACJ 613 to describe the powers of the Arbitration Court.

95 LRA 1987, s. 303 (1) and s. 279 (4).

96 The great variety of national systems and of techniques used to settle labour disputes is to be noted in particular as regards disputes other than conflicts of rights. A link can be made here between the growing diversification of dispute settlement mechanism and the emergence of many new nations during the twentieth century, as these have been searching for new approaches to industrial relations problems in order to minimise the adverse effects of industrial unrest on their economic

common mechanism used for the settlement of disputes over rights.[97] This is particularly true in Western Europe where the task of deciding rights disputes is left to the regular courts in only a few countries.[98]

The emphasis on disputes of rights as regards the jurisdiction of labour courts need not surprise. Even though labour courts are usually set up outside the regular courts or, at the very least, as autonomous divisions within them, they generally constitute public bodies for the determination of disputes with a jurisdictional basis similar to that of the regular courts. Because of their economic nature, disputes of interest conceptually lack a legal basis; therefore they quite commonly do not come within the jurisdictional scope of the labour courts.

This comparative overview will focus upon the experience in the principal examples of labour court systems in Europe. Aaron, in his major study on "Labour Courts and Organs of Arbitration", identified France, West Germany, the United Kingdom and Sweden as the major specimens.[99] These countries will be analysed in respect of their degree of specialisation by applying identical criteria to the ones used for the analysis of the New Zealand labour court system. The comparative material is summarised in Table 1, and discussed briefly below.

B. Structure and Composition

Labour courts owe their origin to the "conseil de prud'ommes" (literally: court of wise men), set up at Lyons by virtue of a Napoleonic law passed in 1806. The idea behind this court was simply to have certain labour disputes settled promptly and without expense by a council composed of representatives of employers and workers.[100]

Speediness, cheapness as well as informality are among the traditional characteristics of the labour court proceedings. As to composition, however, most labour courts nowadays are tripartite. The conspicuous exception is France where the

development programmes. See J. de Givry "Prevention and Settlement of Labour Disputes, other than Conflicts of Rights" in B. A. Hepple (ed.) *International Encyclopaedia of Comparative Law*, Vol. XV (Labour Law) (J.C.B. Mohr, Tübingen, 1978) 72.

97 B. Aaron "Labour Courts and Organs of Arbitration", ch. 16, in B. A. Hepple (ed.), supra n. 96, 1985, ch 16, 5.

98 The most outstanding examples of labour law systems that do not have a system of labour courts are those of Italy and the Netherlands. Outside of Europe, the conspicuous exception is Japan.

99 B. Aaron, supra n. 97, 4.

100 I.L.O. *Labour Courts, an International Survey of Judicial Systems for the Settlement of Disputes* (Geneva, 1938) as cited in E. M. Kassalow *Trade Unions and Industrial Relations: An International Comparison* (Random House, New York, 1969) 169.

Labour Courts ("conseils de prud'hommes") are still bipartite, a professional judge being added only when necessary to break a deadlock.[101]

Originally, the presence of a lay element served as a guarantee that cases were decided by persons specially acquainted with the subject matter upon which they were asked to give an opinion.[102] Expertise and specialised knowledge of the matters on which the lay representatives are to judge are still among the statutory requirements of eligibility to serve as assessors.[103] However. contemporary regulations also stress that the lay representatives are not to represent the interests of the parties to the dispute. Rather, they are to decide objectively and in a non-partisan fashion. This is achieved in Great Britain in that about 96% of the decisions by industrial tribunals are unanimous.[104] In the Federal Republic of Germany, lay judges are not bound by instructions and cannot be recalled or transferred. They are not answerable to the organisations which nominate them and, at least formally, these organisations have no possibility of exerting influence on the court performance of (their) assessors.[105] In Sweden, a lay member may not sit in cases in which the union or employer association to which he belongs is a party to the court proceedings.[106] Finally, in France, where the risk of partisan decisions is greatest, in case of a tie another meeting is held in which a (professional) judge from the local regular court ("tribunal d'instance") participates. If the lay members of the labour court deadlock again, he will cast the deciding vote.[107]

The statutory requirements for appointment of the professional judges differ widely among countries. Nonetheless, all surveyed countries do have in common that any special knowledge of labour law or labour matters is not a formal prerequisite. In Great Britain it suffices for chairmen of industrial tribunals to have seven years' standing as a barrister or solicitor; hence, they usually come from the ranks of private practitioners in the ordinary courts.[108] In Sweden, the chairman and deputy chairman must have

101 The same is true for the socialist countries of Eastern Europe, except Hungary - see B. Aaron "The Administration of Justice in Labour Law: Arbitration and the Role of the Courts" (1979) 3 Comparative Labour Law 7.

102 This idea was not entirely new at the time. It is said that a category of persons known as "prud'hommes" had existed already since the fifteenth century in France, although their powers and duties had not been defined by a national law yet. See E. M. Kassalow, supra n. 100,169, n. 6.

103 B. Aaron, supra n. 96, pp. 6 ff, No. 8.

104 B. A. Hepple and S. Fredman, "Great Britain", in R. Blanpain *International Encyclopaedia for Labour Law and Industrial Relations* (Kluwer, Deventer, Netherlands, 1986) 60.

105 M. Weiss, S. Simitis, and W. Rydzy "The Settlement of Labour Disputes in the Federal Republic of Germany in T. Hanami and R. Blanpain (eds.) *Industrial Conflict Resolution in Market Economics* (Kluwer, Deventer, Netherlands, 1984) 102.

106 B. Aaron, supra n. 96, 39-40.

107 Ibid, 15.

108 B. Hepple and S. Fredman "Great Britain" in R. Blanpain (ed.), supra n. 104, 6.

TABLE 1: LABOUR COURTS - A COMPARATIVE ANALYSIS

LABOUR COURT	FEDERAL R. OF GERMANY
Composition and Structure	tripartite composition at 3 levels; professional judges (chairpersons) must have same qualifications as judges of ordinary courts; appointment of chairpersons by Ministers of Labour and Justice jointly, following active consultation of unions, employers' associations, and labour judiciary appeals, generally permitted on both law and facts, to Appellate Labour Court ("Landesarbeitsgerichte") with leave, further appeals are possible to the Federal Labour Court ("Bundesarbeitsgericht") and the Federal Constitutional Court (Bundesverfassungsgericht") on questions of law and constitutional issues, respectively
Jurisdiction	
- individual v collective disputes	Labour courts are the dominant mechanism for resolving both individual and collective labour disputes
- comprehensiveness	no total or all-inclusive jurisdiction in labour matters (limited list of exceptions)
- exclusivity	genuinely exclusive jurisdiction in both individual and collective labour disputes; instances of shared jurisdiction with ordinary civil courts virtually non-existent
Access and Representation	general access by both individuals and their collective representatives legal representation mandatory at appellate level
Proceedings	Labour Courts (both at lower and at appellate level) under statutory duty to attempt conciliation first; formal preliminary conciliation hearing before professional judge only; continued duty to look for compromise during actual litigation proceedings

GREAT BRITAIN	NEW ZEALAND
tripartite composition, both at first and appellate level; chairperson is a barrister or solicitor of at least 7 years' standing, drawn from a panel of chairpersons appointed by the Lord Chancellor; no special expertise in labour law required for first appointment as chairperson	tripartite composition; general rule is for the professional judge (a barrister or solicitor of no less than 7 years' standing at the High Court) to sit alone
Employment Appeal Tribunal generally hears appeals on questions of law only with leave, further appeals are possible to the Court of Apeal and, ultimately, the House of Lords (rare)	in principle, the Labour Court is a court of first and last instance; applications for review as well as appeals on questions of law by way of case stated go before the Court of Appeal; appellate court is statutorily instructed to take account of the special jurisdiction of the Labour Court (major exceptions: torts and injunctions)
jurisdiction covers a wide range of statutory individual employment rights, some of which allegedly have collective ramifications	no formal distinction between individual and collective disputes
no total or all-inclusive jurisdiction in labour matters; continued importance of ordinary courts of law in individual and collective disputes alike	no total or all-inclusive jurisdiction in labour matters.
both the industrial tribunals and ordinary courts can claim exclusive jurisdiction for those labour disputes within their jurisdiction	exclusive jurisdiction for those disputes within the jurisdiction of the Labour Court
proper plaintiff is the individual	immediate access by individual workers severely restricted
legal representation increasing, particularly on the part of the employer	legal representation permissable
functions of conciliation and adjudication formally split between ACAS and industrial tribunals, respectively; industrial tribunals lack power to promote or order a compromise	emphasis on adjudication; no statutory requirement of conciliation attempt once the dispute is before the Labour Court

FRANCE	SWEDEN
Composition and Structure	
Bipartite (lay) composition: professional judge ("tribunal d'instance") added only when necessary to break deadlock	tripartite composition; chairpersons and deputy chairpersons must have legal training and experience as judges
no appellate labour courts; appeals ("de novo") go before the ordinary courts of appeal ("chambre sociale")	the Swedish Labour Court ("Arbetsdomtol") is the first and final court in respect of most labour disputes within its jurisdiction
with leave, final appeal on questions of law only to the "Cour de Cassation"	exceptionally, the Supreme Court may be petitioned to reverse the decisions of the Labour Court and order a new trial
Jurisdiction	
- individual v collective disputes	
jurisdiction statutorily limited to individual disputes only, but interpreted broadly	distinction between union-initiated and other disputes of greater importance than between individual and collective labour disputes
- comprehensiveness	
no total or all-inclusive jurisdiction in labour matters; continued importance of ordinary courts of law in collective labour disputes	no total or all-inclusive jurisdiction in labour matters; general emphasis on those labour disputes having a collective nature or ramification
- exclusivity	
both the labour courts and ordinary courts have exclusive jurisdiction for those labour disputes within their jurisdiction	collective party may choose to bring its claim before the district court instead of labour court (rare)
Access and Representation	
general rule is for the proper plaintiff to be the individual employer or employee	generally, no immediate access by individual workers
personal appearance of individual parties not required during judgment session; legal representation is common	legal representation is both permissible and common
Proceedings	
Labour courts divided into two sections: Board of Conciliation and Judgment Board	negotiations (at local and, if necessary, at national level) required before dispute is referred to Labour Court; possibility of last minute settlement legally accommodated for

additional experience as judges.[109] West Germany goes one step further still. While the professional judges of its labour courts must meet the same formal criteria as judges of the ordinary courts, an appointment advisory committee equally representing the unions, employers' associations and the labour judiciary exists. In practice, the influence of the serving labour judiciary on the appointment of new judges is very strong. Thus, even though the judges are not officially required to demonstrate any special expertise in labour issues, the candidates are scrutinised with this very much in mind.[110]

More diversity exists at the appellate level. At this level specialisation features only in Great Britain and the Federal Republic of Germany, whereas appellate labour courts have not been established in France or Sweden. The obvious reason for the lack of a specialist appellate court in Sweden lies herein that the single Arbetsdomtol (labour court)[111] operates as a court of both first and last instance. Very exceptionally, a losing party may petition the (regular) Supreme Court to reverse the decision of the labour court so as to obtain a new trial.[112] This contrasts sharply with the situation in France, where regular appeals from decisions of the labour courts can be brought in the ordinary courts of appeal. Each French court of appeal admittedly has a so-called social chamber ("chambre sociale") which only hears cases on social matters (i.e. labour disputes and social security claims). However, those social chambers are composed of exclusively professional judges who are not bound by the findings of the lower (labour) court; a complete rehearing takes place.[113]

In Great Britain the lay element is also present at the appellate level[114] and the Employment Appeal Tribunal generally hears appeals on questions of law only. In recent years, the Employment Appeal Tribunal has become increasingly reluctant to take jurisdiction by classifying issues as questions of fact on which no appeal lies. While such a stance may discourage legalism and technicality, thus retaining the industrial tribunals' character as quick, cheap and accessible means of resolving disputes, it also risks resulting in a lack of uniformity in the application of legislative provisions by different tribunals.[115] Quite the opposite tendency appears to have become established in the Federal Republic of Germany. Due to its federal political structure, appellate labour courts exist at both state and federal level. This may give German litigants two possibilities of appeal. At the top of the court hierarchy is the Federal Constitutional Court ("Bundesverfassungsgericht"). The jurisdiction of the latter court can only be

109 S. H. Ryman and H. Toren "Arbitration and the Role of Courts in Sweden" (1979) 3 Comparative Labour Law 53.

110 EIRR, 1977, No. 37, 20.

111 There is only one Labour Court for the whole country. It is located in Stockholm. Because of the increasing workload of the Labour Court, its staff has been tripled so as to enable the Court to sit in three divisions simultaneously. See A. Adlercreutz "Sweden" in R. Blanpain (ed.), supra n. 104, 1985, 129.

112 This happened only once to date: ibid, 130.

113 B. Aaron, supra n. 96, 18.

114 Ibid 32.

115 B. Hepple and S. Fredman, supra n. 108, 62.

invoked by the filing of a constitutional complaint and after all other instances of appeal have been exhausted. However, the number of constitutional cases is increasing, especially in areas where new statutory regulations fundamentally influence industrial relations.[116]

C. Scope of Jurisdiction

Labour courts, being exceptional or extraordinary courts, can only hear cases for which their jurisdiction is expressly recognised by law. In an attempt to determine further the degree of specialisation of labour courts in the countries under review, the survey below will focus on such questions as the (both in principle and in fact) contents of their jurisdiction and, related to this, on the question as to how total or all-inclusive a jurisdiction the labour courts possess in labour matters. To be distinguished from the latter issue is the question as to the exclusive nature of the jurisdiction of the labour courts in that this involves the issue of possible concurrent jurisdiction between labour courts and other, ordinary courts of law for those matters that do come within the jurisdiction of the labour courts.

1. *Individual -v- collective disputes*

The statutorily delineated jurisdictions of the French labour courts and the British industrial tribunals reflect some striking similarities in approach. In both countries the emphasis is clearly on individual labour disputes. The resulting need to distinguish between individual and collective disputes, the latter category of disputes thus remaining within the province of the ordinary courts of law, often proves difficult to apply in practice. Over time, a tendency has become apparent for the specialist court, particularly in France, to assume jurisdiction in at least some labour disputes which are collective in nature.The distinction between individual and collective disputes, though made in German law, is of no relevance for dispute settlement through labour courts in the Federal Republic, with both types of disputes within the jurisdiction of the labour court. The difference in focus is most noticeable in Sweden. Ever since the Labour Court Act 1928, the purpose of Swedish legislation has indeed been to establish an expert court for the use of the collective parties in settling disputes. It follows that the crucial distinction in Sweden is between union-initiated and other disputes, rather than between the more traditionally proclaimed division of labour disputes in individual and collective ones, with the labour court dealing with union-initiated disputations.

The emphasis on individual disputes in France arguably is a result of the pre-union origin of the "conseil de prud'hommes".[117] A more contemporary justification may be that the French approach represents a conscious choice to provide maximum freedom of action for the individual, thus stressing the importance of individual rights.[118] The rationale for a similar division of labour between industrial tribunals and ordinary courts

116 M. Weiss et. al., supra n. 105, 101.
117 M. Weiss et. al., supra n. 105, 101.
118 B. Aaron, supra n. 96, 22.

in Britain has been phrased in more negative terms. The Donovan Commission was indeed mainly preoccupied with the preservation and the enhancement of voluntary collective bargaining in the broadest sense. It therefore emphasised that industrial tribunals should not be given the job of handling collective disputes. More specifically, the Commission recommended against granting the industrial tribunals jurisdiction over "any issues connected with the negotiation of collective agreements, or even with their interpretation insofar as this arises between trade unions and employers and employers' associations."[119]

An explanation for the active role played by the German labour courts in the area of collective dispute resolution[120] may be the collective labour law in that country.[121] Similarly in Sweden, the jurisdictional requirement for labour disputes to be initiated by the union must be viewed in light of the historical consideration that the Labour Court Act 1928 was enacted simultaneously with the Collective Agreements Act which incorporated collective agreements into the legal system. As the Collective Agreements Act, now replaced by the Co-determination Act 1976, banned industrial action over disputes about the interpretation and application of collective agreements, the peaceful settlement of such collective disputes was the primary aim in establishing the "Arbetsdomtol".[122]

A labour dispute is individual if it involves one employer and one employee. It typically arises out of an individual employment contract and addresses rights issues only. The British interpretation of individual disputes clearly is more restrictive than that used by the labour courts in France. While the jurisdiction of the industrial tribunals has been expanded considerably over the last two decades, it appears to cover individual employment rights as consolidated by statute only.[123] Breach of contract, including the contract of service, remains the province "par excellence" of the ordinary civil courts.[124] In contrast, the jurisdiction of the French labour courts includes both

119 *Report of the Royal Commission on Trade Unions and Employees Associations 1965-1968* (Cmnd 3623) (The "Donovan Report"), para. 577.

120 Admittedly, in view of the total workload of the Labour Courts, cases dealing with matters of collective labour law represent a small proportion only. However, the Labour Courts' activities in this field are of much more importance than the cases on individual labour law. Especially the structure of collective bargaining, the power relationship between the parties in industrial conflict, as well as the structure for institutionalised forms of worker participation are shaped by the Labour Court to a significant extent. See M. Weiss "Federal Republic of Germany" in R. Blanpain (ed.), supra n. 104, 1987, 184.

121 Special reference is made here to the legislation governing institutionalised forms of worker participation (works councils and board level representation). In 1984 over 8000 cases of so-called "order procedure" were pending in the Labour Courts of first instance. They mainly referred to works councils: M. Weiss, idem.

122 A. Adlercreutz, supra n. 111, 128.

123 B. Hepple and S. Fredman, supra n. 108, 62.

124 The ordinary courts have exclusive jurisdiction in respect of actions for damages and other remedies arising out of breach of contract, and for arrears of pay, including

disputes arising during and after the existence of the individual employment contract.[125] Even disputes arising from a legally void contract are entertained.[126] Most importantly, as the terms of collective agreements frequently become incorporated into the individual employment contract,[127] disputes over the interpretation or application of collective agreements are commonly heard by French labour courts as well. Even a strike can be treated as a series of individual disputes which interpretation allows a French employer to sue each striker individually in the labour court.[128] The expanded jurisdiction of the British industrial tribunals with respect to collective disputes has thus far been much more modest. Nonetheless, since 1980, industrial tribunals in Britain have been given additional powers which are alleged to have clear collective ramifications, particularly in closed shop cases.[129] In short, in Britain as well as in France, the actual situation is less clear-cut than the general principles outlined earlier may suggest.

In Sweden, the general rule is for the labour court to be the first and final court in respect of all labour disputes involving the relationship between the parties to a collective agreement. Even though individual employees may be bound by the collective agreement, they are not themselves parties to it. Disputes between individual employees and their employer must therefore be brought before the regular (district) courts, irrespective of the nature of claim. However, the potentially harsh impact thereof is mitigated in two ways. First, if the employee is organised, and most Swedish workers are,[130] the union may decide to start an action in the labour court on behalf of its member. Secondly, while the majority of cases for which the district court is the

holiday pay, due under the contract. Thus, for example, if an employee complains of unfair dismissal, he or she cannot also ask the tribunal to deal with a claim for arrears of holiday pay, because this raises a question of breach of contract which must be taken before the ordinary courts. The exclusive jurisdiction of the ordinary courts includes furthermore actions in tort, the most important of which are for injunctions and damages in connection with industrial action. While the latter category of actions in tort admittedly refers to collective disputes, the exclusive jurisdiction of the ordinary courts includes also actions for damages for personal injury in respect of a person's death. See B. Hepple and S. Fredman , ibid, 59-60.

125 M. Despax and J. Rojot, "France", in R. Blanpain, supra n. 108, 1977, 214.

126 The French situation in this respect is quite similar to the one existing in Belsian statutory law, the nullity of certain individual employment contracts may not be invoked by the employer to the detriment of the employee. Such situation may illustrate then an interesting trend away from the contractual element in the employment relationship.

127 These are the so-called normative provisions of the collective agreement, to be distinguished from the obligatory provisions or the contractual part of the collective agreement.

128 M. Despax and J. Rojot, supra n. 125, 214.

129 For example, the right not to be unreasonably excluded or expelled from one's trade union, and the right to join a trade union as a defendant in unfair dismissal proceedings in closed shop cases: B. Hepple and S. Fredman, supra n. 108, 62.

130 More than 90 per cent of manual workers are affiliated with I.L.O. unions. Among salaried employees, the degree of unionisation is about 70 per cent, which is still rather high from an international perspective: A. Adlercreutz, supra n.111, 146.

appropriate court of first instance involve either disputes between unorganised workers and their employers, or disputes involving organised workers whose union is unwilling to bring an action on their behalf, appeals from the district court may be taken to the labour court, subject always to a review permit being obtained from the labour court itself.[131]

It can be inferred from the above that the Swedish labour courts are looked upon as constituting the last step in the collective bargaining process, which process in turn is viewed as encompassing not only the formal contract negotiations but also the administration of the agreement.

2. *All-inclusive versus partial jurisdiction in labour matters*

In none of the surveyed countries can the jurisdiction of the labour court in labour matters be said to be truly total or all-inclusive. Instead, the ordinary courts of law continue to play a role in the adjudication of labour disputes. the relative importance of which varies in each national system of labour courts.

As it has been outlined already,[132] the jurisdiction of the industrial tribunals in Britain is essentially limited to statutory individual employment rights. Clearly, the scheme envisaged by the Donovan Commission is not yet complete.[133] The result is that the jurisdiction of industrial tribunals is by no means all-inclusive, not even with respect to the handling of individual labour disputes. This led Hepple to hold that an "awkward separation of jurisdictions" between industrial tribunals and ordinary civil courts remains up to the present day.[134] The most important areas of continued jurisdiction of the ordinary courts include claims arising out of breach of contract, as well as actions for damages in tort.

Whatever jurisdiction the French labour courts possess in dealing with collective disputes derives solely from a broad interpretation given to the notion of individual dispute. Hence, their jurisdiction in collective disputes clearly constitutes the exception rather than the general rule. Even in the area of individual dispute handling, important gaps in the jurisdictional scope of the labour courts have been filled only recently. For a long time a number of individual litigants indeed did not have access to the labour courts, simply because the dispute did not come within the territorial or occupational scope of a particular "conseil de prud'hommes". In 1979, for the first time in 70 years, the French labour court system was thoroughly overhauled so as to extend it to all areas of France. Previously individual disputes involving seamen and fishermen had to be brought before the local "juge d'instance". In the provinces of Provence and Languedoc, individual disputes between shipmasters and fishermen were the jurisdiction of the "Conseil des prud'hommes pêcheurs de la Méditerranée". Further, special agencies used

131 Ibid.132.
132 Cf., supra: "Individual v Collectives Disputes."
133 B. Aaron, supra n.96, 30.
134 B. Hepple and S. Fredman, supra n.108, 62.

to exist for the settlement of certain types of individual disputes involving journalists (e.g. severance pay).[135] In Sweden individual employment contracts can only be interpreted and applied by the Arbetsdomtol in respect of their compatibility with the relevant collective agreement. In all other respects, the interpretation of service contracts is a matter for the ordinary courts. The same applies to compensation actions against individual employees for damages to property resulting from industrial action.[136]

In spite of the wide ranging powers of the German labour courts in both individual and collective disputes, their jurisdiction in labour matters is not all-comprehensive either. However, the list of exceptions is comparatively limited. The ordinary courts retain jurisdiction in disputes between trade unions and their members, or between different unions. They are also competent in torts committed by unions against nonorganised workers, disputes arising from employee inventions, and all penal matters including violations of safety regulations.[137] Of greater relevance is that most questions relating to workers' representation on supervisory boards are dealt with by the civil courts.[138] This follows from the fact that the ordinary courts have jurisdiction in company law cases. As workers' representation in Germany is embedded into the traditional structure of company law,[139] it is indeed understood to be an aspect of company law.

3. *Exclusive versus concurrent jurisdiction*

As the distinction between individual and collective disputes has become blurred over time,[140] the possibility of concurrent jurisdiction between the labour courts and the ordinary courts of law is no longer purely academic in France. Parties to a collective labour dispute may always bring it for adjudication before the regular civil court ("tribunal de grande instance"). Since the labour courts have jurisdiction (in principle at least), over individual disputes only, this would be the normal procedure in collective disputes concerning the interpretation or application of collective agreements.[141] The

135 Previously, an estimated 14 million employees eligible to take complaints before Labour Courts could not do so, because there were no courts covering the geographic or occupational areas in which they worked. See (1981) 84 E.I.R.R. 16.

136 B. Aaron, supra n. 96, 10.

137 T. Ramm "Federal Republic of Germany" in R. Blanpain (ed.), supra n. 111, 1979, 210-211.

138 M. Weiss "Federal Republic of Germany" in R. Blanpain (ed.), supra n. 111 , 1979, 185-186.

139 The Acts providing worker's representation on the supervisory board did not create any new bodies. They simply fitted workers' representation into the traditional corporate framework, modifying only the composition of its governing bodies. See M. Weiss, ibid, 173 ff.

140 Some authors go are far as stating that the real distinction is no longer between individual and collective disputes but rather between conflicts of rights and interests. See G. H. Camerlynck and G. Lyon Caen *Droit du Travail* (Dalloz, Paris, 1975) 704, as cited in M. Despax and J. Rojot, supra n. 125, 214.

141 B. Aaron, supra n. 96, 19.

problem is a delicate one, especially since the jurisdiction of the French labour courts is viewed as a matter of public order and public policy. Consequently, any provision which would give jurisdiction to another court, or even any agreement to arbitrate or any provision of a collective instrument substituting the competence of a conciliation organ for that of the labour court would be automatically void for reasons of public order.[142] On the other hand, the jurisdiction of the ordinary civil courts is compulsory as well; it cannot be pre-empted by special clauses in collective agreements.[143] Both the labour court and the regular civil court can therefore claim exclusive jurisdiction in certain labour matters.

A similar situation exists in Britain where it has been openly acknowledged that the establishment of industrial tribunals was recommended, not so much to overcome the former multiplicity of jurisdiction in labour matters, but rather to make available to individual employers and employees, for all disputes arising from their employment contracts, an easily accessible, informal, speedy and inexpensive procedure.[144]

The jurisdiction of the German labour courts in both individual and collective labour disputes is genuinely exclusive, in that the instances of shared jurisdiction with the ordinary civil courts are almost nonexistent. In the area of individual employment law, the labour courts have exclusive jurisdiction over virtually all legal conflicts between employer and employee in the private sector and arising from the employment relationship. They also have exclusive competence to decide civil disputes concerning collective agreements, including such questions as the existence or non-existence of such agreements. In addition, they have exclusive jurisdiction to adjudicate actions in tort. It is irrelevant whether the dispute is simply between the parties to the collective agreement, or whether third parties are involved as well. Further and to the exception of reservations made earlier, German labour courts also rule exclusively on disputes in connection with the institutionalised forms of workers' participation.

The legal situation in Sweden is somewhat special. Formally, a collective party may indeed choose to raise its claim in the ordinary district court instead of the labour court.[145] The jurisdiction of the regular courts of law can thus be invoked at the option of the collective parties. However, this does not prevent the jurisdiction of the labour court from being closely guarded. To this effect, the district court can take jurisdiction only if the parties have concluded an agreement of prorogation. Further, if a member or former member of an organisation has instituted proceedings in the district court, the organisation has the right to take over the action and have it transferred to the labour court, provided always that the dispute falls within the jurisdiction of the specialist

142 M. Despax and J. Rojot, supra n. 125, where it is pointed out that, nevertheless, managerial employees are given a choice by the Labour Code to bring their case to the Labour Courts, or to a Court of First Instance, or to a Court of Commerce.
143 B. Aaron, supra n. 96, 19.
144 Donovan Report, supra n. 119, para 572.
145 A. Adlercreutz, supra n. 111, 132.

court. The district court has a legal obligation to inform the organisation concerned so as to provide an opportunity for the latter to pursue the action in its own right.[146]

D. Access to the Labour Court - Representation of the Parties

As the primary distinction in Swedish labour law is between disputes with or without union involvement, rather than between individual and collective disputes, the Arbetsdomtol is the only labour court in this comparative survey to which the individual worker has no immediate, general access. In France and Great Britain, on the other hand, the proper plaintiff is the individual (employee or employer). In practice, legal representation has become common in both the countries, particularly on the part of the employers.[147] The emphasis on appearance in person is stressed most in the labour court system of France, though can be explained by the traditional dual mission of the "conseil de prud'hommes" which is to first attempt conciliation before resort is had to adjudication. To this effect, the French labour court system operates a so-called Board of Conciliation as well as a Judgment Board.[148] In any event, the parties may always be assisted by legal counsel (not compulsory) or by a union representative. Also, it follows that parties need not appear in person during the judgment session.[149] Furthermore, it is noteworthy that the French labour code grants unions the option to intervene directly in cases involving the interpretation of a collective agreement, provided that individual consent is obtained. In addition, the Labour Code empowers a union to constitute itself a "partie civile" whenever there is to be found anything of direct or indirect prejudice to the collective interest of the group it represents.[150] This means that unions can associate themselves with an (individual) claim that has already been brought. The mere intervention of the union does not in itself convert the individual dispute into a collective one.[151]

In the Federal Republic of Germany, parties in labour court proceedings are not only individual workers and employers but also their collective organisations. The latter can bring actions in their own right . In disputes involving the Works Constitution Act, even works councils can be participants.[152] Individual litigants may choose to represent themselves in the labour courts of first instance. However, legal counsel is required at the appellate levels.[153]

146 Idem.
147 B. Hepple and S. Fredman, supra n. 108, 61-62, provide figures for Britain which reveal that in 1983 about 37 % of applicants and 40% of respondents appeared in person. 49% of all respondents had legal representation at the hearing, as against 37% of all applicants. Applicants were represented by trade union officials in a further 16% of cases.
148 Cf. infra: "Court proceedings".
149 M. Despax and J. Robot, supra 125, 214. B. Aaron, supra n. 96, pp 17 ff.
150 B. Aaron, ibid. 16.
151 B. Aaron, supra n. 101, 12.
152 M. Weiss et. al., supra n. 105, 102.
153 Idem.

E. *Court Proceedings*

All four countries under review reveal the same preference for amicable settlement by compromise over formal adjudication of labour disputes. To this effect conciliation talks are scheduled at the pre-hearing stage with, in the Federal Republic of Germany and Sweden, active involvement by the chairman of the labour court. In France, each section of the labour court has a so-called Board of Conciliation as distinguished from the Judgment Board. While judges serving as conciliators on the Conciliation Board may not participate in any subsequent judgment session, the separation of both functions of conciliation and adjudication is carried even further in Great Britain. Unlike labour courts elsewhere, the British industrial tribunals have themselves no power to promote a compromise. Instead, the function of conciliation in Britain has been given to a separate institution, the Advisory Conciliation and Arbitration Service (ACAS).

In West Germany the labour courts (both at the lower and appellate levels) have a statutory obligation to attempt settlement of the dispute by way of compromise. Hence, the first oral pleas ("Guteverhandlung") are entered before the chairman sitting alone. His role is to discuss with the parties all details of the dispute "under free consideration of all circumstances".[154] Often the chairman will indicate to the parties his legal opinion during this conciliation session. This can substantially influence the parties' willingness to compromise. While recent indications are that amicable settlements may be decreasing because both parties attach greater importance to the formal outcome of their disputes as a result of depressed economic conditions,[155] roughly one-third of all court actions are settled during the conciliation session. [156] This is three times the figure for Sweden as cited by Aaron.[157]It must be kept in mind, though, that preliminary dispute negotiations are a prerequisite before the jurisdiction of the Swedish labour court can be invoked at all. As these negotiations are to take place both at the local level and, if no settlement is reached, at the national branch level, a double filter mechanism is operational, the practical result of which is to reduce the number of cases that actually end up in court. Also, the negotiating parties tend to seek guidance from previous labour court decisions, especially at central level.[158]

In France conciliation sessions are conducted by a panel of two Judges (one employer and one employee) with alternating chairmanship. All judges of the labour court, with the exception of the president and the vice-president, serve on the Board of Conciliation

154 B. Aaron, supra n. 96, 24.
155 M. Weiss supra n. 138, 98.
156 Ibid. 103.
157 B. Aaron, supra n. 96, 42.
158 It is only when the dispute has not been settled by central negotiations that a suit may be brought in the Labour Court. Adlercreutz comments that, if there are thousands of disputes a year at local level in a particular industry, there may be only a few hundred for central negotiations, and of these very few are brought before the Labour Court: A. Adlercreutz, supra n. 111, 127.

on a rotation basis. The linkage between the stage of conciliation and any subsequent judgment session is maintained by the court clerk. His role is a crucial one, not only because of his neutral position, but also because the clerk of the court participates in both the conciliation and the adjudication sessions.[159] No such linkage exists in Britain, as the task of promoting a settlement of complaints submitted to industrial tribunals is thrust upon special conciliation officers designated by ACAS. The figures provided by Hepple and Fredman indicate a high success rate.[160] Even if official litigation proceedings are under way before the full labour court, the legal obligation to seek a compromise continues in the Federal Republic of Germany. This approach is encouraged by the mechanism that in those cases where a compromise is reached in the (local) labour courts, or an out-of-court settlement is arrived at, fees and court costs are waived.[161]

V. CONCLUSION

In the initial sections of this paper we presented an analysis of both the historical development and the contemporary situation in respect to the Labour Court in New Zealand. A subsequent section extended to the analysis of labour courts into a comparative perspective. Several concluding remarks emerge directly from this process, and are highlighted in this final section.

Social policy, control of strike action and the encouragement of unionism were aspects of the origins of the Court. Debate, reflected in the introductory section of the paper, has sought to clarify the appropriate emphasis of the original intent, and of subsequent evolutionary and legislative change. It is useful to review these aspects of intent and development in the light of recent changes.

The Labour Court established under the Labour Relations Act 1987 is the lineal legislative descendent of the Arbitration Court established by the IC and A Act 1894. However it is clear that any social policy function which may have been devolved upon or developed by the original Court is no longer a part of the Labour Court.

Analysis of policy relating to 'low wages' has passed to the discussions of the Tripartite Forum, and adjustments to minimum wage levels occur by legislative fiat within powers encompassed in the Minimum Wage Act 1983. Further aspects of the social function of income determination are now debated within broader social welfare and tax policy of government and are currently implemented through the family support/negative income tax provisions introduced in October 1986. A residual, but

159 The conciliation procedure is regarded as more than a mere perfunctory process or meaningless step on the way to a judicial decision. The figures cited by Aaron in this respect are now rather dated. However, they may serve as an indication that the procedure is taken quite seriously. See B. Aaron, supra n. 96, 17.

160 An average of two-thirds of cases received are cleared without reference to a tribunal: see B. Hepple and S. Fredman, supra n. 108, 54.

161 EIRR, 1977, No. 37, 20.

limited social wage role, exists for the Arbitration Commission in fixing maximum rates in awards when requested under the voluntary arbitration provisions. In summary the effect of change over time is that the current Labour Court has no more of a social role than an ordinary court.

A function in respect to control of strike action has historical continuity from 1894 through to 1987. The evolutionary trend to establish a clear distinction between illegal and legal strikes has continued. Similarly the definition, proscription, together with penalties, of the illegal strike is clearer and more expansive than previously. One aspect of this is the further reinforcement of the distinction, first introduced legislatively to New Zealand by the Industrial Relations Act 1973, between disputes of interest and disputes of rights. In the case of rights disputes there is a continuation of the position of clear illegality with associated enforcement and remedies. However, there has been a significant change in respect to strike action and interest disputes. There is, for the first time, a formal official legislative expression of the 'right to strike'. Subject to specified conditions (for example, within 60 days of the expiry of the agreement or award) the right to strike in pursuit of a new contract is both tolerated and legal.

The Labour Court does retain a general protective role related to trade unions, being charged, in particular, with regulating good housekeeping as defined by the legislation, for example, that operations are 'democratic', no unreasonable rules, financial probity etc. However, the central focus of protecting unionism has moved to the political level, and is exemplified clearest in the compulsory/voluntary unionism debate and the legislative provisions reflecting, from time to time, the current political resolution of that debate. Current provisions provide for balloting of union members when no agreement is reached between unions and employers. But the Labour Court, unlike earlier days in the Arbitration Court, has no prescriptive role one way or the other.

Clearly change, not unexpectedly, has occurred in the role of the Labour Court compared to historic predecessors. Nevertheless, and despite the extent of change referred to above, it can be asserted that the most significant change, gradually over time, but reinforced most clearly in the 1987 legislation, has been the movement towards the centrality of the Labour Court as the primary, if not the sole, repository of law in respect to labour matters, at both the individual and collective level.

A central proposition of comparative studies is that there is no such thing as an ideal model, and this position is central to our analysis and conclusions. Each system reserves functions for the role of the ordinary courts and the ordinary principles of law in labour matters. There are trade-offs, in all instances, between ordinary law and labour law. An arguable reason for the existence of these trade-offs is that the interests of one group cannot be placed entirely separate from those of the general community. The historical development of the role of the Labour Court in New Zealand clearly illustrates this process in action.

In a comparison with European labour courts the New Zealand court closely approximates the Swedish model in two critical aspects. First, the provision of one Court for the whole country, although in the New Zealand case there is a supervisory role for another court, the Court of Appeal. Even so the Court of Appeal is

"conservative" in its approach to labour matters, and takes into account, to some extent, the special nature of the jurisdiction of the Labour Court. Second, an emphasis on the union (generally) initiating action. Such a position is in contrast to that existing in France and the United Kingdom.

When addressing the issue of specialisation in the Labour Court area, the single most important specialised aspect to be provided is that of specialist judges steeped in specialist knowledge applying this to specialised substantive rules. All labour courts reviewed fall short of this ideal, with the closest being the systems where the formal criteria for appointment to the bench involves consultation with the existing labour judiciary.

The new New Zealand system maintains the movement away from the conflictual approach to industrial relations and collective bargaining, because it continues to emphasise the separation of interest and rights matters. The British refuse to make this distinction and the conflictual approach is utilised in the administration of the contract. In France a distinction is recognised, but the position is confused by a stance which has the collective agreement as settling conflicts of the past, and thus refusing to view the collective agreement as a regulatory device. That is, the French refuse to accept the 'social peace' obligation of the agreement due to a desire to maintain the fundamental, indeed constitutional, presence of the 'right to strike'.

Given the potential of an increased work load for the new Labour Court, given the need to handle some matters on an urgency basis and given the delays in the past which have been a basis for concern (especially in personal grievance issues) there seems little alternative than both an increase in the number of judges and a decentralisation of the Court.

Appointment of five judges based in three different centres has the potential to, but hopefully will not, lead to a disparity in handling cases. The judges will, hopefully, maintain contact with other decisions to identify benchmarks, even if they are not bound to do so. One possible step may be the provision for consultative meetings as a formal provision, and a defined authority role for the Chief Judge. Such interchange of ideas will almost certainly occur at the informal level. The query is, does it need to be formalised? Decentralisation at the Labour Court level may also lead to more emphasis on the Court of Appeal as a unifying factor.

There is only a partial transfer of economic torts which may have industrial relations implications to the new jurisdiction. Further, in respect to those that have been shifted, the legislative instructions are such that the emphasis will be on the legal rather than the industrial relations approach. Neither the provisions for considering equity and good conscience nor the relaxed rules of evidence apply. Further, the Court of Appeal is to operate only on the rule of law, and is instructed to ignore the special jurisdiction of the Labour Court when handling such issues. All this adds up to the need to ask what really has changed?

An interesting point for speculation in this context is raised by consideration of the union objection to the use of the 'equity and good conscience' provisions. The union

argument is that these provisions, intended to facilitate flexibility, are in fact used by a conservative judiciary to inhibit change and innovation. It is difficult to identify a better form of words to give expression to this type of provision: it is clear that application need be based on the spirit or the intent of the provision. Consequently there is a further argument for emphasis to be placed on who is appointed, and how they are appointed to office in the jurisdiction.

From an industrial relations perspective, it is quite clear that the mere issue of an injunction produces a rapid and extensive shift in the bargaining power positions of the parties. What is meant to be interlocutory, a temporary step, determines or becomes the final solution. Consequently the provision for the Labour Court to act as a matter of urgency, especially in the injunctive areas, is a positive advance. A specialised Labour Court should recognise the different impact of injunctive procedures in labour relations processes as compared with those of more conventional civil cases. Not only can industrial relations considerations extend the range of arguments put before the specialised court, but movement from the interim to final legal determination can be expedited if such changes in the substantive relationship as between the parties are of industrial relations significance. It is also clear that granting ex parte applications by the Labour Court goes against the rationale of providing urgency in proceedings.

If there is to be a specialist labour court dealing with specialist labour matters, it is illogical to distinguish between labour matters on the basis that some require more industrial relations input than others. The official argument runs that certain cases should be heard by a single judge in order to emphasise the legal role of the Court. However, the position of the legal nature of the Court has already been highlighted by the removal of interest disputes from the jurisdiction. If this is so, then why eliminate lay members in a substantial part of the work? Although the outcome of Labour Court proceedings is a legal decision there is still the need for the blend of the industrial relations implications. And this is best achieved by the participation of the lay panel members in all cases in a specialist Labour Court. The European experience is that the role for the panel is accepted in all cases where the hearing is one of a court of first instance. Only from the appellate level onwards do the European systems consider having only professional judiciary involved. An argument could therefore be made in the New Zealand context to extend the mandatory requirement to utilise panel member input in all cases but certainly no argument should be made to exclude cases involving new matters, injunctions and economic torts.

Three possible models of construction of the labour tribunals can be identified. First, that which existed immediately prior to the Labour Relations Act 1987 - one body combining functions and membership, second, that provided for in the Labour Relations Act 1987 - two bodies, the Commission and the Court, separate in membership and function; and third, two bodies say a commission and a court, with separate functions, but a common core element of members

Our preference is for the third model, as an extension or adaptation of that currently provided. This modified structure retains the central distinction between disputes of interest and disputes of rights and hence does not permit disputation to melt into one continuum of disputes. Further, the expertise and specialised role of the judges is more

likely to be enhanced, as well as the interplay and interaction of judicial and non-judicial members. And perhaps of even greater significance is that emphasis is more likely to be placed on industrial relations outcomes rather than pure legal adjudication, and interpretation and enforcement would not be made in a vacuum but in the light of experience in establishing the terms and conditions of employment.