

## Appeals to the Privy Council

Earlier this month *The Economist* reported that one of the most popular acronyms on the Internet is IANAL, "I am not a lawyer". As the only IANAL among your speakers I am something of a stranger and, doubtless, expected to deliver a dissenting judgment. I hope not to disappoint you. My position is that appeals to the Privy Council should not be abolished - at least not for the foreseeable future, and not until we have done a good deal to improve judicial decision making and the structure of our courts.

My background is in economics, but I expect this audience is well aware of the increasing interplay between the disciplines of law and economics. That interplay is personified by Richard Posner - Judge Posner, as he now is - who has long provided a useful bridge between the two disciplines in his writings.

In his 1987 Harvard Law Review centennial article, Posner cast doubt on the survival of law as "an autonomous discipline". On this platform, I very much bear in mind his opening remark:

The idea that law is an autonomous discipline, by which I mean a subject properly entrusted to persons trained in law and in nothing else, was originally a political idea. The Judges of England used it to fend off royal interference with their decisions, and lawyers from time immemorial have used it to protect their monopoly of representing people in legal matters.

Posner's article goes on to point out the changes during his adulthood, from the early 1960s. At the beginning, he says, "just as society had left the design of bridges to civil engineers, so it could leave the design of its legal institutions to lawyers". But from there things have become much less clear. He points out that:

- political consensus disappeared;
- many fields of law became deeply entangled with political questions (in part reflecting the expansion of government);
- the US Supreme Court "pioneered an aggressive style of judicial activism";

- there was a boom in complementary disciplines, particularly economics and philosophy, leading to the development of the theory of public choice; and
- the confidence in the ability of lawyers to put right the major problems of the legal system collapsed.

I would be astonished if any of you felt that none of those points were relevant to you, and to this debate. Clearly the subject of jurisprudence should be of interest to all users of the legal system and all who are interested in law and justice.

Staying with Posner, but moving to a more specific area, consider the topic of employment contracts. The result of judicial 'development' of the personal grievance provisions in the Employment Contracts Act and its predecessor legislation means that in this country employment contracts can only be terminated for cause (i.e. terminations must be justified). Not only that, terminations must be procedurally as well as substantively justified. My interest in the operation of the labour market in New Zealand leaves me in no doubt that all of this has produced a fine mess, primarily because we have lost sight of the 'contract' part of the employment relationship.

The alternative to a 'dismissal with cause' system is, of course, the 'employment at will' system under the common law. In a 1989 Cardozo Law Review article, Posner explained that:

Employment at will is a corollary of freedom of contract, and freedom of contract is a social policy with a host of economic and social justifications ... . Employment at will happens to be the logical terminus on the road that begins with slavery and makes intermediate stops at serfdom, indentured servitude, forced servitude and guild restrictions. That should be a point in its favour.

He goes on:

... a free market institution as persistent and widespread as employment at will is presumptively more efficient than an alternative imposed by government. The reason it might be more efficient is not hard to find. Litigation ... is costly. Apart from these direct costs of legally enforceable universal tenure rights there are the indirect costs, potentially enormous, from the weakening of discipline in the workplace

when workers can be fired only after a costly and uncertain proceeding. ... Consumers would be hurt, because these costs would be passed on (in part) in the form of higher product prices. Less obviously, workers would be hurt too. In figuring what he can afford to pay, an employer considers not only the direct costs of labor but indirect costs as well ... . Now in a sense just-cause protection is a fringe benefit, so the worker does not lose out completely, but it is by definition a benefit he did not want as much as he wanted a higher wage, or else the employer would have offered it to him... .

In a 1984 University of Chicago Law Review article, Richard Epstein has also dealt with this point in the context of emphasising the impact of rules designed for minority cases on the arrangements which apply to the majority:

No system of regulation can hope to match the benefits that the contract at will affords in employment relations. The flexibility afforded by the contract at will permits the ceaseless marginal adjustments that are necessary in any ongoing productive activity conducted, as all activities are, in conditions of technological and business change. The strength of the contract at will should not be judged by the occasional cases in which it is said to produce unfortunate results, but rather by the vast run of cases where it provides a sensible private response to the many and varied problems in labor contracting. All too often the case for a wrongful discharge doctrine rests upon the identification of possible employer abuses, as if they were all that mattered. But the proper goal is to find the set of comprehensive arrangements that will minimise the frequency and severity of abuses by employers and employees alike.

Against that background, consider the Court of Appeal's decision last year in the *Brighthouse* case. That decision illustrates defects not only in our employment law, but also in the approach taken by our Court of Appeal in a more general sense.

The *Brighthouse* case related to managers in a business which was losing money under its existing ownership. The business was sold and the managers were given one month's notice of termination of their employment contract, as provided for in their written contract. That contract did *not* provide for redundancy compensation but the managers asked for redundancy. The previous employer offered one week's wages for each year of service but that was not acceptable to the managers. The matter then proceeded over a period of some three years through the Employment Tribunal, the Employment Court, and the Court of Appeal.

As you may know, prior to this case it was well understood, as Chief Judge Goddard had put it in a 1992 case, that "in New Zealand redundancy compensation is payable only pursuant to an individual or collective contract or redundancy agreement to that effect". But two years is a long time in our modern employment jurisprudence.

The Employment Tribunal concluded that the employer had dealt unfairly with the managers by both:

- failing to offer adequate compensation; and
- failing to communicate or negotiate about alternatives to redundancy, or about the quantum of compensation.

This view was essentially upheld by Chief Judge Goddard in the Employment Court, and by the 3:2 majority of the Court of Appeal.

The problem with the decision cannot be put any better than it was by Justice Gault, dissenting in the Court of Appeal:

... the Tribunal's approach would put employers in an impossible position. It seems to require employers, although under no legal obligation to do so, to pay by way of compensation upon dismissal for genuine redundancy such amount as the Tribunal subsequently determines is fair. If this is not done, the substantially justified dismissal is held to be unjustified as involving 'unfair' treatment ... .

Of the majority judges, only Justice Casey was prepared to acknowledge that the decision could be seen as "a radical departure from the earlier decisions of the specialist courts in this area". He acknowledged also that this was the result of conscious judicial activism in those specialist courts. He said:

I can understand the manifest desire of the Tribunal and the Employment Court to secure fair treatment of such employees, particularly in the present climate engendered by restructuring and extensive dismissals, where redundancy payments have become commonplace in the major undertakings affected.

... in the absence of any legislative provision it is not surprising to see the Tribunal and the Employment Court reassessing the [earlier] approach to redundancy compensation, by seizing on the ability to take it into

account as a fact in determining whether there has been an unjustifiable dismissal.

Is this any way to run our employment law? Is it not a totally unsatisfactory example of judicial decision making? It raises several serious questions:

- Has it any basis in the reality of the bargain between employers and employees?
- Why should the Court of Appeal condone the 'manifest' judicial activism of the Employment Tribunal and the Employment Court?
- Why on earth should we create an 'impossible' situation for employers?
- Given that it was a decision by the slenderest of majorities, where was Justice McKay? And why was Justice Bisson roped in from retirement?

Now one of the features of the employment jurisdiction is that the Court of Appeal has the final say. It is *not* possible to have the matter reconsidered by the Law Lords in the Privy Council. Nevertheless, would anyone here bet against the proposition that, had the matter gone before the Privy Council, the majority *Brighouse* decision would have been reversed (and by 5:0)?

The *Brighouse* decision brings out two other points that are deeply disturbing in the current context.

First, the decision was a direct and conscious snub to parliament's intentions in passing the Employment Contracts Act. The government was quite clear that it did not want courts interfering in the area of redundancy compensation when no provision was made in contracts. The fact that the government now feels powerless to do anything about the problem merely reinforces the objectionable nature of the Court's action in usurping a policy making role which should be the preserve of democratically elected and accountable institutions.

Second, the *Brighouse* case brings out the tenuous grasp our courts, including the Court of Appeal, appear to have of even quite elementary economic concepts. There is no parallel to the sophistication in law and economics which is now commonplace in the US court system. The majority of the Court in

*Brighouse* considered that the personal grievance procedure afforded a way of redressing the balance of bargaining power of the parties to an employment contract. However, the idea that there is any systematic inequality in bargaining power between employers and employees is a basic fallacy in labour law which was rightly set aside in the Employment Contracts Act. To quote Professor Epstein again:

If such inequality did govern the employment relationship, we should expect to see conditions that exist in no labour market. Wages should be driven to zero, for no matter what their previous level, the employer could use his (inexhaustible) bargaining power to reduce them further, until the zero level was reached. Similarly, inequality of bargaining power implies that the employee will be bound for a term while the employer ... retains the power to terminate at will. Yet in practice we observe both positive wages and employees with the right to quit at will.

As another example of economic illiteracy, consider the following statement by Justice Cooke in *Telecom v Commerce Commission* (this is the judgment in which the court concluded you look to the dictionary to work out what the concept 'dominant influence' is all about):

It may be theoretically conceivable, for instance, that one person could be in a position to exercise a dominant influence over supply, while another was in a position to exercise a dominant influence over price.

A legal academic asked me to critique this statement, preferably with the aid of a standard economic text. Being completely unable to make any sense of it, I referred him as a precaution to a leading Australian academic in the field. His reply was:

I am afraid I cannot find a textbook statement to counter Justice Cooke: the proposition is so silly it does not arise once we understand what a demand curve is.

In the Business Roundtable submission on the Privy Council issue, we make reference to the equally disturbing decisions by the Court of Appeal on the *Goldcorp* and *Mouat* cases, and on a number of public law cases. All of this leaves me asking the umbrella question: What *is* going on here?

As a spectator, I see our senior resident judges giving strange decisions like *Brighouse*. In their only other visible role, we have seen some of them operating

as amateur social architects producing or reinforcing some of the more disastrous pillars of public policy, such as the accident compensation report of Sir Owen Woodhouse, the social security report of Sir Thaddeus McCarthy and the social policy report of Sir Ivor Richardson. Although the last was properly dead on arrival, it perhaps served to underline how far some in the New Zealand judiciary have fallen behind contemporary standards of economic and social policy analysis.

The Solicitor-General correctly noted in his report that the Privy Council had reversed decisions of the Court of Appeal in half of the decided cases, an extraordinarily high figure. In my view he brushed this finding aside much too lightly by dismissing it as "differences in judicial philosophy". At the heart of the issue are surely the standard of judicial performance and judicial accountability.

*The Independent* broached this issue in a controversial article last year. I suspect we are going to see more such challenges. My enquiries of constitutional lawyers overseas suggested there was nothing untoward about that step in today's environment of greater judicial accountability. By comparison with some overseas jurisdictions, judicial accountability in New Zealand is weak. For example, judges rarely participate in professional settings such as law and economics conferences and we do not have world class law schools where cases are subject to rigorous academic scrutiny; and there is no provision for citizens-initiated recall of incompetent judges. The Privy Council is the only effective accountability mechanism we possess.

Obviously enough, the Business Roundtable is particularly interested in the fate of commercial law in what is undoubtedly not an era of judicial restraint. The commercial community is one of the major users of the system. Most of the cases which now go to the Privy Council are commercial cases. Restraint and predictability are cardinal virtues for the business community. The inconsistency of the Court of Appeal has a real economic cost. It makes enterprises risk averse, and it raises the prospect that every transaction and every decision is in a sense conditional upon judicial approval. In other words there seem to be no claims which are being properly laughed out of Court - an advocate can dress up a duty of care, or a fiduciary duty, out of any circumstances if the law is declared by appellate judges in sufficiently sloppy terms.

The business community is well aware that, on numerous occasions over the past decade or so, the Privy Council has had to provide reminders of the importance of adhering to the primary rules in commercial cases - not least rules of contract and the upholding of what the parties to a particular arrangement have agreed before any dispute arose. It seems to us that the Privy Council has properly reversed Court of Appeal decisions which have failed to send away optimistic plaintiffs empty-handed, and have made up or remade equitable or tortious duties to provide a remedy.

Given these trends, it is critical that we review carefully the Privy Council issue. Increasingly our judiciary appears to be becoming politicised and to some extent parochial. It is also reacting to 'victimhood', perceived 'fairness' issues, media hype and pressure groups. At its most fundamental, these difficulties appear to reflect the dominance of an 'activist' judicial philosophy within the Court of Appeal. Developing in New Zealand only in the last decade or so, this is a judicial perception of the Court of Appeal's role as consciously shaping the law. The purpose of this shaping is not well articulated, although it appears to involve a touchstone of 'fairness', some assumptions about the legal and social culture of New Zealand, and the conscience of individual judges. In general, this approach is problematic. In the commercial law field, it is simply not acceptable. A commercial lawyer today is almost reduced to advising that, if a matter goes to court, the outcome will depend on who the judge is and on what he or she perceives to be fair on the day. In my view, law making should be the preserve of parliament and the courts should apply the law from a non-political perspective.

As well as this change in environment, we are beginning to be regulated by an increasing number of commissions, tribunals, specialist courts and other bodies (e.g. the Privacy Commissioner, Human Rights Commission, Employment Court, various Ombudsmen, Securities Commission, Commerce Commission, Race Relations Commissioner etc.) To provide the appropriate checks and balances there is a real need for a well-structured court and appellate system, developing legal policy and applying legal principles rather than dispensing social justice.

All this suggests it may be dangerous to deny citizens access to a non-politicised and impartial expert appellate system. The debate should focus on

the real issue, which is the quality of judicial services. The issue is not one of sovereignty. If New Zealand chooses to have the Privy Council as its ultimate Court of Appeal, then that is a decision it is making as an independent sovereign state. Arguably it is an act of robust independence to resist superficial appeals to nationalism and retain an institution which may appear constitutionally anachronistic but which is providing an excellent service.

Currently we are in volatile times. We have an activist Court of Appeal which has attracted a lot of criticism, much of which is discreet because of ethical considerations or because of fear of retribution. We have difficult Treaty and sovereignty issues to resolve and we are moving into an MMP environment. These and other factors should warn us to tread cautiously. We should not change the present system on some political whim without proper consideration. There is no strong public or political constituency for abolition. We should learn from the MMP debacle where a major constitutional change was decided by a minority of registered voters, and it is now apparent that most of the minority that supported it did not understand what they voted for. Surely this experience demonstrates the need to think carefully and move slowly.

The weakest link in the present judicial chain is clearly not the Privy Council. Logic suggests that we should apply our minds first to remedying the most obvious weaknesses. In the last ten years the judiciary has remained one of the few unexamined New Zealand institutions. It is not a matter of calling into question its independence but, like the Reserve Bank, matching its independence with transparent standards of accountability and performance. This is a complex agenda which will take time to work through. We have made some suggestions in our submission on possible ways of improving the structure and performance of the courts. No doubt there are others worthy of consideration. The priority task should be to decide and implement the desirable reforms, and then allow time for the community to be satisfied that our judicial services are of the highest possible standard. Only at that point should we look at cutting the link with London.