LAW AND INDUSTRIAL RELATIONS:

LEGAL AND SOCIAL PROBLEMS OF THE EMPLOYER/EMPLOYEE RELATIONSHIP

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> I do most earnestly exhort you all to Unanimity and Concord. But mistake me not: you may quarrel with each other as much as you please, only bear in mind that you have a common Enemy, which is your Master . . . , and you have a common Cause to defend.
>
> Jonathan Swift,
> *Directions to Servants* (1745).

I

The common law, true to its individualistic traditions, takes notice only of the concretised contract between master and servant; it does not recognise industrial relations in abstract. Its principles, which originate from pre-industrial domestic and small-scale handicraft service situations, despite the current use of the socially more acceptable "employer and employee" expression, have remained substantially unchanged. The much quoted dictum by Lord Atkin that it is "ingrained in the personal status of a citizen . . . to choose for himself whom he would serve and that this right of choice constitute[s] the main difference between a servant and serf"[1] seems to emphasise only the most obvious aspect of its laissez-faire philosophy. In its concept the employment contract is envisaged as a voluntary relationship, the terms of which are agreed by a free bargain between two citizens equal before the law.

By the end of the last century the illusory nature of the freedom of contract in view of the parties' gross economic inequality[2] had become sufficiently recognised to claim a collective approach for determining the incidents of employment, particularly wages. "Employment" by the closing of the Victorian era, both in England and New Zealand, meant to the great majority of wage earners a job in a factory or in other industrial work-places where conditions in general were bad, and no individual bargaining could improve them. The legislature's awakening social conscience—under the pressure of growing trade union power—enacted a series of statutes regulating minimum requirements in work places.[3] With legislative intervention, especially with the introduction

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1 *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014, 1026. (H.L.).
2 "Freedom of contract is but another name for freedom of coercion", J. S. Mills, *Principles of Political Economy*, V, XI; see M. Ginsberg, *On Justice in*
3 E.g. Factories Acts 1891, 1894, amendment of 1901; Truck Act 1891, Shops Act 1894.
Society, 148, and Ch. VIII in general.

of the conciliation and arbitration system,[4] the scope for individual bargaining and free agreement has been considerably narrowed down. The I.C. & A. Act placed the emphasis on the collective aspects of employer-labour relationship, and through the negotiation of industrial agreements or the award-making process the terms of the actual employment contracts were laid down in abstract. As a result gradually the common law principles on master and servant have become intermixed, superseded and absorbed by what is known now as the legal framework of industrial relations.

This must not be taken to mean that the common law principles on employment contracts have entirely lost their significance, or that the very crucial distinction between the individual employer-worker contract and the collective employer-union industrial agreements can be disregarded. Such a statement would be most incorrect. First, there are still a number of situations where the nature of the work, the qualification of the employee and other circumstances make all types of collective industrial relations arrangement[5] inapplicable, and the parties must settle their terms in accordance with common law. Secondly, even though collective arrangements predetermine most terms of the service contract,[6] the creation of the actual contract has remained for the parties' individual decision. The fact that the terms of the employment contracts for the majority of workers are largely pre-concluded by union-management negotiations means that the contentment of the workers in their job greatly depends on the effectiveness of the industrial relations system. The individual work contract reflects the success of the collective agreement.

Extra-legal criteria play a very important part in industrial relations, in the relationship between unions and employers, but considerably less in the concrete employment contracts. Any conflict between the employer and the individual worker may, however, be broadened into a collective confrontation, where social and economic sanctions are applied instead of the available legal sanctions: thus instead of the worker commencing damages action for wrongful dismissal or resorting to the grievance procedure,[7] a stoppage may be called as a means of protest.

Within the limits of this article no attempt can be made to expound all aspects of the law relating to employment contracts. Discussion of wages and methods of wage determination is out of question. The proper treatment of this immense problem necessitating an analysis of the whole conciliation and arbitration system together with the role of the new Remuneration Authority[8] and many other incidental matters cannot be brought within the confines of this essay. The same applies

4 Industrial Conciliation and Arbitration Act 1894, re-enacted in 1954 (hereinafter referred to as "I.C. & A. Act").
5 The term "industrial relations arrangements" is a loose but convenient expression to denote union-management negotiations, conciliation and arbitration proceedings as well as industrial agreements and awards; similarly "industrial instruments", "collective arrangements" or "collective agreements" refer in this context to industrial agreements and awards.
6 Service contract, employment contract, work contract and similar expressions all mean the contract of employment; instead of employer and employee, in appropriate places the words "master", "servant" and "worker" will be used.
7 See Part IV.
8 Established by the Stabilisation of Remuneration Act 1971.

to withdrawal of labour by way of stoppage.[9] Further, important topics, such as the distinction between servants and independent contractors,[10] will be referred to only when the exposition of the material demands.

Instead of an inadequate coverage of the multifarious ramifications of the law attention will be focussed on four main areas only: formation of the service contract and the capacity of the parties in the light of legislative restrictions on the employment of certain persons together with the additional limitations connected with closed shop and compulsory union membership; the contents of the contract with special reference to the impact of statutory requirements and industrial relations arrangements; the termination of the contract with emphasis on the possibility of mass displacement which may result from technological advancements in industry; the vertical and horizontal inter-connections of employees who serve the depersonalized master, the huge commercial enterprise.

The underlying theme is the interfusion and conflict of the common law principles with industrial relations instruments, and the lack of adeptness as the law now stands to find solutions for the emerging social and economic phenomena which within a few years will create new problems of immense dimensions.

II

A contract of employment can come into existence in a variety of ways: it may be embodied in a formal document, expressed by an exchange of letters, agreed by word of mouth or evidenced from the parties' conduct.[1] The mere fact that one party provides service to another would raise a presumption that such a contract exists.[2] Circumstances pointing to family relationship, cohabitation or charitable intent may, however, rebut the presumption.[3] Under a contract of employment the reason for the service is always monetary reward or other consideration of money's worth, as food, lodging or instruction.[4]

The great majority of service contracts is created by express agreement whereby one party accepts an offer made by the other party. So far the formation of the contract is in accordance with the classic offer and acceptance principle. The question which creates complications is: who makes the offer? Is it made when a job is (or jobs are) advertised in a newspaper or by a notice on the factory gate? Would it be correct to say that such notice constitutes an offer? If this is so, then mere reference to the notice coupled with expression of willingness to take the job would amount to acceptance, and would conclude a contract. It is trite law that a general offer will mature into a binding contract as soon as it has been accepted in the manner indicated.[5] What

9 Such questions as to whether or not a concerted withdrawal of labour would constitute a breach of the contract of service and termination of it cannot be examined without a thorough analysis of the entire law on strikes, boycotts, "go-slows", overtime bans, etc., which is outside the purview of this article.

10 An interesting analysis can be found in C. D. Drake, "Wage-slave or Entrepreneur?" (1968) 31 M.L.R. 408.

1 *Paynter* v. *Williams* (1833) I.C. & M. 810.

2 *R.* v. *Inhabitants of Catteral* (1844) 5 Q.B. 901.

3 *R.* v. *Inhabitants of Sow* (1817) 1 B. & Ald. 178; *Bradshaw* v. *Hayward* (1842) Car. & M. 591.

4 *R.* v. *Foulkes* (1875) L.R. 2 C.C.R. 150.

happens, however, if more than one worker "accept" the offer? The answer can be either that the first acceptance extinguishes the offer, or alternatively that the notice should be regarded as a mere invitation to treat: consequently the job-seeker makes the offer, and the employer is the one who may accept or repect it.

Placing the prospective employee in the position of the offeror would provide no satisfactory solution to the problem. Nothing can prevent a person from applying for several vacancies; a letter from the employer advising him of his appointment would create a binding contract as from the date of its posting.[6] Indeed in *British Guiana Credit Corporation* v. *Da Silva*[7] the Privy Council held that the letter sent by the Corporation's secretary to Mr Da Silva notifying him of the success of his application gave him a right to claim damages for breach of contract upon the subsequent change of mind by the appointment committee. A fortunate job-hunter could receive a number of favourable replies to his applications, and thus several employment contracts may have been concluded. Would he commit a breach of contract (or breaches of several contracts) by refusing to take all but one position? In order to avoid even the possibility of this problem ever arising, many employers when selecting one of the applicants for a position advertised, expressly state that the position is offered to the person addressed, and thereby leave the final acceptance to him. As a result neither the advertisement of the vacant position, nor the application for it can be regarded as an offer but only as invitations to treat. The offer is a specific one made by the employer in the form of a letter addressed to the selected person.[8]

In industrial employment the contract is normally concluded verbally. After a short interview the employer simply tells the worker that he is accepted for the job. Some big factories through the personnel department take great care in outlining the duties and rights to their different classes of employees, and in certain cases supply them with a little booklet which contains, besides general information, rules and conditions of work in addition to those laid down in statutes, awards and industrial agreements.[9] A new employee may be requested to sign a printed form acknowledging the contents of the booklet as forming part of the employment contract.

Every person who has capacity to enter into any kind of contract as a rule can employ or be employed. The capacity is to be decided on the principles of general law, subject to the natural exception that a corporation cannot be a servant.[10] Even as employer the corporation's capacity of engaging particular servants depends greatly on its powers,[11] and further questions may arise as to whether the agents acting on its behalf had authority to enter into certain contracts. An alien can employ servants without any restrictions but he may be under a disability to

5 *Williams* v. *Carwardine* (1833) 5 C. & P. 566; 12 Digest (Repr.) 77, 421.
6 *Adams* v. *Lindsell* (1818) 1 B. & Ald. 681. (P.C.).
7 [1965] 1 W.L.R. 248 (P.C.).
8 On the difficulties of pinpointing the offeror see D. Roebuck, "The Crisis of Contract" (1969) 3 Univ. of Tasmania L.R. 191.
9 Work books will be discussed in more detail when considering the contents of the contract.
10 It can be, however, employed as an independent contractor.
11 *Brown* v. *Dagenham U.D.C.* [1929] 1 K.B. 737; *McManus* v. *Bowes* [1938] 1 K.B. 98.

take employment.[12] On close examination it will be apparent that the reason is not contractual incapacity but imposition of public law prohibitions apposite to the status of non-citizens.[13]

The detailed common law position of various special categories of persons need not be discussed here. It is necessary, however, to examine certain statutory provisions affecting the employability of infants and women which may be regarded as limiting their contractual capacity. Thus, to mention only a few, the Factories Act 1946 prohibits the employment of boys and girls under 15 years of age;[14] if they are older but still under 16 years a certificate of fitness issued by the Inspector must be produced when seeking a job.[15] Another restriction is that "no woman, boy or youth shall be employed in any process involving the making of white lead" or in any work whereby they handle, use or come into contact with any material containing lead or oxide of lead.[16] No boy or girl under 16 years of age may be employed in a room in which dry grinding in the metal trade is carried out.[17] Similarly no girl under 18 shall be employed in any part of a factory where the nature of the work is melting or blowing glass, other than lamp blown glass, annealing glass, other than plate or sheet glass, or evaporating of brine in open pans or the stoving of salt.[18] Further, employment of women and boys is also prohibited "in or about a factory" between 6 p.m. and 8 a.m. (or with the consent of the Inspector 7 a.m.) next morning, or on Sundays and holidays or half-holidays.[19]

Analysing the effect of these statutory prohibitions it is obvious that the expression "employed" repeatedly appearing in all the sections of the Act mentioned signifies two entirely different meanings:

(1) The first sense denotes that the category of persons mentioned cannot enter into a contract of service at all: boys and girls under 15 years of age. The prohibition of employing girls under 18 in a glass factory may come under this meaning, if the only work available is connected with the glass manufacturing process, but not otherwise: nothing prevents the employment of such girls for other tasks.

(2) The second meaning does not convey any restriction of entering into a contract of employment. The word "employ" in this context merely acts as a synonym for "occupy", "be occupied", "serve", "perform a duty" or "do work". Thus the prohibition that a worker belonging to a particular group "shall not be employed" in any process involving white lead, or in a room where dry grinding of metal is carried out, does not deprive

12 Aliens in New Zealand can be employed without any restrictions; (except they cannot be masters of a British vessel and solicitors); in the United Kingdom aliens, including Commonwealth citizens, need a special permit for employment purposes.

13 See Kahn-Freund, "A Note on Status and Contract in British Labour Law", (1967) 30 M.L.R. 635, 636.

14 Section 37(1), as amended by s.7, 1956 Amendment Act; boy means a male person under the age of 16 years: s.2; there is no similar definition of girls.

15 Section 37(2); inspector means an Inspector of Factories appointed under the Act.

16 Section 38(2); youth is a male person over 16 but under 18 years.

17 Section 38(3).

18 Section 38(4).

19 Section 19(2): there are other similar provisions in the Act; see also the Shops and Offices Act 1955, ss. 13, 20.

him or her from obtaining employment in the sense of being in a contract of service: it simply means that the employee must be occupied with some other type of work.

The prohibition of employment in the first meaning appears to affect the capacity of the infant employee, and any contract purported to have been concluded would be null and void. In common law such contracts being manifestly against the benefit of the infant would also be void.[20] Statutory provisions regulating in general, the status and rights of minors[21] have to be read in conjunction with the special industrial Acts which widen, and at the same time restrict, the employability of certain categories of young persons. The true appraisal of the prohibitions imposed by the Factories Act,[22] however, points to the conclusion that they do not intend to affect the status or contractual capacity of the groups of workers referred to, though incidentally they may do so: they are primarily protective measures. The pure social purpose of the restrictions is even more manifest in the second category of provisions where the question of contractual capacity cannot arise.[23]

Restricting the work force to adult males who are under no legal curtailment of employability, can the common law principle of freedom in choosing the other party to the service contract be accepted as an entirely valid proposition?[24] It cannot be overlooked that the impact of labour relations negatives this liberty to a great extent. Closed shop agreements definitely limit the employers' choice of engaging any person for a particular job outside the members of the specific trade union, and correspondingly without such membership no worker can seek, obtain or retain work. As early as in 1901 the trade union demanded the dismissal of a non-union worker, and organised a boycott in support of its claim: *Quinn* v. *Leathem*.[25] More than sixty years later a draughtsman, Rookes, lost his job at B.O.A.C. when he resigned from the union, and his fellow workers threatened to withdraw their labour unless his employment were terminated within three days: *Rookes* v. *Barnard*.[26] Expulsion from a trade union as a disciplinary measure against an erring or defiant member also carries the secondary penal consequence of deprivation from livelihood notwithstanding that the employer otherwise has no reason or intention to terminate the service contract but for the closed shop agreement.[27] In the United States collective agreements usually contain a labour regulating and union security clause whereby the employer's free choice of selecting workers is controlled by the closed shop under which only union members can be hired. The

20 *De Francesco* v. *Barnum* (1890) 45 Ch. 7 430.
21 Infants Act 1908, Minors' Contracts Act 1969, Age of Majority Act 1970.
22 Also by the Shops and Offices Act 1955 and the Machinery Act 1957; some prohibitions are imposed by awards.
23 See on the question of status Kahn-Freund, (1967) 30 M. L. R. 635.
24 See the dictum of Lord Atkin in *Nokes* v. *Doncaster Amalgamated Collieries* [1940] A.C. 1014, 1026, although it referred to the servant's rights only.
25 [1901] A.C. 495 (H.L.).
26 [1964] A.C. 1129; the multifarious ramifications of this and other cases such as civil conspiracy, intimidation, trade disputes, strikes, etc., need not be discussed here.
27 Decisions relating to wrongful expulsion are outside the ambit of this article: the classic case is *Bonsor* v. *Musician's Union* [1954] Ch. 479, and the principles are well summarised in *Hiles* v. *Amalgamated Society of Woodworkers* [1967] 3 W.L.R. 896; for further details (and on note 26) see Grunfeld, *Modern Trade Union Law*.

Taft-Hartley Act prohibited such arrangements but not the union shop provisions under which all workers must join the relevant union.[28]

Similarly, in New Zealand the presence of unqualified preference clauses in awards and industrial agreements, which have the same effect as union shop arrangements in America, may be considered as a severe interference with the basic freedom of selecting an employer or an employee. Pursuant to the I.C. & A. Act[29] all awards and industrial agreements include either a qualified[30] or, in most cases, an unqualified preference clause.[31] The significance of an unqualified preference clause is that unless the newly employed worker joins the union within fourteen days after his engagement, if the employment continues, both he and the employer commit a breach of award.[32] To avoid prosecution and confrontation with the union the employer, as happened in Rookes' case,[33] would not hesitate to dismiss the union-resistant worker. He is not only entitled but is bound to terminate the contract. The view may also be taken that union membership is a condition precedent, and until the fulfilment of it no binding contract can come into existence.[34]

At this juncture the difference between servant and independent contractor, a topic not intended to be discussed, assumes great importance. If work is undertaken by an independent contractor, then, of course, union membership is irrelevant.

It would be erroneous to assert that union shop arrangements and unqualified preference clauses affect the contractual capacity of either the employer or the worker: the employee if he so wishes can easily remedy the situation by complying with the condition of membership.[35] In the case of closed shop and closed union,[36] where it does not depend on the worker's willingness to change his non-union status, the argument for lack of capacity would be stronger. The fallacy of this reasoning, however, is demonstrated by drawing attention to other sorts of impediments which debar a worker from entering into certain service contracts: where specified qualifications are required for employment in particular positions. Can it be maintained that an adult person does not have capacity to contract if, not being qualified as such, he is unable to take an engineer's position? Legal capacity and actual ability coupled

28 Section 8(B)2 of the Taft-Harley Act (the Labor-Management Relations Act 1947) made an unfair labour practice "to cause an employer to discriminate against an employee" who is not a union member; the practice, however, has not disappeared: Reynolds, *Labor Economics and Labor Relations,* 4th ed. pp. 190-194; in the U.K. the expressions "closed shop" and "union shop", unlike in the U.S., are used interchangeably.

29 Sections 174, 174A, 174B, 174C, and 174D.

30 Under such a clause the worker should be dismissed only if there is an equally qualified union member willing to take the job.

31 Where the parties, i.e. the employer or employers' organisation and the union so agree, or not less than 50 per cent of the adult workers bound by the award desire to be members, such a clause will be inserted.

32 Section 174 G, I.C. & A. Act.

33 *Supra.*

34 *Aberfoyle Plantations Ltd.* v. *Cheng* [1960] A.C. 115, (P.C.); this is not an employment case but the principle that until the fulfilment of the condition precedent the contract is not binding, was well explained.

35 Section 174 H, I.C. & A. Act provides that every person, unless of general bad character, is entitled to be admitted to membership of a union; the same applies in the case of American union shop arrangements.

36 Refusal of admission of new members over a certain number; the proviso to s.174 H permits refusal to admit applicants in cases where a maximum membership is fixed by statute, award or Court order.

with trade or professional qualification belong to two different categories of pre-requisites, and should be clearly kept apart.

Notwithstanding that the restrictions imposed by statutes and industrial instruments do not curtail legal capacity, their immense social and economic impact doubtless is very real, and for the persons affected carry a more measurable and vital import than the juristic concept of having and exercising rights.

III

The contract rarely contains the detailed particular terms. Indeed, they are usually not agreed by the parties at all. Top scientific, professional and managerial employees possessing special skills who have individual bargaining power, and can command their own terms normally insist on some formal document or at least a letter setting out their rights and duties. For the majority of industrial, clerical and technical workers the contract of service is a mere agreement, frequently oral, to employ and be employed for a particular service. In order to identify the terms extraneous, but related, material must be imported as integral elements of the contract partly from written, and to a limited extent, from unwritten, sources. The terms and the sources from which they are synthesized can be classified as follows:

1. Express terms: these are either
   (a) set out in the written agreement, or
   (b) stated orally.
2. Incorporated terms: these are written, and either by the command of law or by the agreement of the parties should be read as parts of the contract; they are to be found in, and imported from,
   (a) statutes,
   (b) industrial instruments,
   (c) work rules.
3. Implied terms: these are written or unwritten and can be
   (a) terms implied by common law,
   (b) work rules, if not incorporated,
   (c) customary terms.

The parties are free to set their express terms within the limits of legality. Certain objects and terms may make a contract

(a) illegal, void and unenforceable at common law,
(b) void and unenforceable under statute,
(c) illegal by statute.

Illegality of purpose, motive, public policy and restraint of trade are well analysed in leading English textbooks,[1] and there is no need to deal with them here.

Statutory provisions regulating conditions of work and incidents of employment cannot be classified as mere implied terms despite the view taken by Lord Wright in *Luxor* (*Eastbourne*) *Ltd.* v. *Cooper* that "implied term" may denote "some term which does not depend

1 Batt, *Law of Master and Servant*, 5th ed., pp. 118 ff; Mansfield Cooper, *Outlines of Industrial Law*, 5th ed., pp. 39 ff.

on the actual intention of the parties but on a rule of law".[2] Express terms, however, always oust implied terms,[3] while these statutory rules can never be superseded by other terms agreed between the parties;[4] to the contrary: any purported express terms which conflict with the statute shall be void, unenforceable, and sometimes even illegal.[5] Notwithstanding that the statutory rules are superimposed by force of mandatory legislation extraneous of the parties' will, they have become integral elements of the contract, and though their importation into the agreement is independent from volition and consensus, they operate as between the parties by the very reason of the existing contractual relationship.[6]

It may be argued that certain duties prescribed by Acts of Parliament, particularly those relating to health, safety and welfare[7] bind the employer not because they are infused in the contract but by way of general regulation making him upon non-compliance subject to penal sanctions,[8] regardless of whether or not any harm is caused. As for injuries suffered by a servant, the master will be liable in tort, either for breach of statutory duty, or in negligence for breach of the common law duties to provide and maintain a proper and safe system of work and safe premises.[9] In the majority of claims, anyway, the basis of the employer's liability is the existence of the contract of service, a "causal relationship between the employment and the injury or disability suffered by the worker",[10] thus the contractual aspect assumes paramount importance over a tortious claim, though at present the latter is still possible.[11] Statutory and tortious duties arise and exist apart from any contract but where a contract is created they transfuse and impregnate it. They can be enforced as a breach of contract by those in privity and by persons outside it through other actions.[12] Thus an employee can claim breach of a term in case of non-compliance with the relevant statutory provisions; but to avoid certain undesirable side effects of such an action the practicable approach would be to complain to the employer through the union representative with the possibility of

2 [1941] A.C. 108, 137; this is one sense; the other meaning "is based on an intention imputed to the parties from their actual circumstances . . . "; with respect, only the second kind can be implied term.

3 The conditions and warranties implied by ss. 14-17 of the Sale of Goods Act 1908 can be expressly excluded; in civil law terminology the quoted sections of the Sale of Goods Act have the character of *jus dispositivum.*

4 *Ius cogens* in civil law terminology.

5 See e.g. ss.85 *et seq.* Factories Act which impose penalties for breach of certain provisions.

6 See Kahn-Freund, (1967) 67 M.L.R. 635; see also H. Schulman, "Reason, Contract and Law in Labor Relations", (1955) 68 Harv. L.R. 999.

7 E.g. Factories Act 1946, ss. 47, 48, 53, 55, 56, 57 etc.; Shops and Offices Act 1955, s.23 and First Schedule.

8 The penalty is normally a fine; s.86, Factories Act 1946, s.38 Shops and Offices Act 1955.

9 *Wilson* v. *Tyneside Window Cleaning Co.* [1958] 2 Q.B. 110, 124; *Chipchase* v. *British Titan Products Ltd.* [1956] 1.Q.B. 545; *Quinn* v. *Horsfall-Bickham Ltd.* [1956] 1 All E.R. 777.

10 Workers' Compensation Act 1956, s.3(1); see Part V. infra.

11 If the Gair Committee's Report on the Woodhouse Report is implemented by Parliament the injured worker no longer will be able to commence a negligence action for damages instead of a non-fault claim for compensation.

12 *Lake* v. *Bushby* [1949]) 2 All E.R. 964, solicitor's liability arises from contract; where there is no contract in tort: *Griffiths* v. *Evans* [1953] 1 W.L.R. 1424; *Davie* v. *New Merton Board Mills Ltd.* [1959] A.C. 604.

referring the matter to the disputes committee,[13] or to notify the Inspector of Factories who may lay an information.[14]

Awards and industrial agreements regulate in detail many of the actual working conditions, such as hours of work, overtime, holidays, shift work, mealtimes and, the most important item, wages. These industrial instruments frequently repeat matters already regulated by statute, such as work hours[15] and holidays,[16] in a somewhat more elaborate manner; they also introduce special clauses related to the circumstances prevailing in that particular industry.[17]

As both awards and industrial agreements, unlike English collective agreements,[18] are enforceable,[19] there can be no doubt that they are incorporated into the contracts of service to which they relate, and not merely implied terms. To a certain extent they have the same force as statutes:[20] irrespective of the parties volition or even awareness of them they will constitute integral components of the contract.[21] There is, however, an important difference. The conditions prescribed represent only the minimum standard attainable, and the parties may deviate from them in favour of the worker. This characteristic is most recognisable with regard to rates of wages payable. Several key employers faced with the scarcity of skilled workers in certain trades to attract and retain them have offered wages above the award rates. In order to secure labour all employers are forced to pay similar wages, and the actual amount paid has become to be regarded as the ruling rate for the occupational group in question.[22]

The statement that an award may be deviated from in favour of the worker, does not equal with the proposition that it can be evaded. Section 168 of the I.C. & A. Act declares that proceedings by any employer, worker, union, association or a combination of them with the intention to defeat an award will be a breach of award, and thus is illegal. The purpose of this section is to prevent "an arrangement which purports to be one of partnership, or to constitute the relationship of employer and independent contractor [to] be only a cloak or device to

13 Sections 176-178, I.C. & A. Act as amended by I.C. & A. Amendment Act 1970.

14 The Inspector may require the defects to be remedied; the occupier of the factory can appeal to a Magistrate; the Inspector may lay an information or make a complaint; ss. 80, 83, and 92, Factories Act; *Charles Bailey and Sons Ltd.* v. *Inspector of Factories* (1950) 45 M.C.R. 138.

15 Factories Act, s.19 *et seq.*

16 Annual Holidays Act 1944 and amendments; s.26, Factories Act.

17 E.g. see the detailed clauses of the New Zealand (except Westland) Meat Processors, Packers and Preserves, Freezing Work Award—26.3.70—relating to slaughtering of sheep, lambs, pigs, cattle, calves, goats, etc.; to wool pullers, casing workers, freezing chambers, protective clothing, etc.

18 English collective agreements cannot be enforced by court action as they are not regarded as binding contracts; their normative effect is accepted and are treated as implied terms, as "crystallised custom": see Kahn-Freund, "Legal Framework" in *The System of Industrial Relations in Great Britain,* ed. Flanders and Clegg, p. 58; also *Hulland* v. *Saunders* [1945] K.B. 78; also N. Selwyn, "Collective Agreements and the Law" (1969) 32 M.L.R. 377.

19 I.C. & A. Act, s.199 *et seq.*

20 An award is regarded as an extension of the I.C. & A. Act: *Baillie & Co. Ltd.* v. *Reese* (1906) 26 N.Z.L.R. 451, 462.

21 *Amalgamated Collieries of W.A. Ltd.* v. *True* (1937) C.L.R. 417; *True* v. *Amalgamated Collieries of W.A. Ltd.* [1940] A.C. 537. (P.C.).

22 This "ruling rate" is not to be confused with the ruling rate surveys conducted periodically by the Labour Department.

conceal the real relationship of employer and worker".[23] An award naturally only applies to the relationship of master and servant. In *McMullin Holdings Limited* v. *Auckland Clerical Workers Union*[24] the employer claimed that a typist working at home was an independent contractor. The Court of Arbitration held that as the work formed an integral part of the employer's business, and as the typist was told exactly what she had to do she was a "casual worker" within the meaning of the award.[25] Both the integration and the control tests established a master-servant relationship, and the worker was entitled to the benefits of the award.[26]

Work rules can also become incorporated in the contract, if the employee signs a form of acknowledgement that they are to be considered part of the contract of service.[27] Otherwise they may be regarded merely as implied terms.

These neatly printed little booklets apearing sometimes under the title of "Staff Rules", "Employees' Handbook" or simply "Working With [name of employer]" usually refer to the relevant award, and draw attention to its salient points elaborating certain matters in accordance with the particular requirements of the workplace.[28] They also contain further norms of conduct referring not only to the actual process of work but extending to the entire time spent in the employer's premises, including meal and refreshment breaks. Some of the rules have a mandatory character ordering the regular performance of certain acts, such as the use of time-clocks when starting and finishing work, others are prohibitive, such as the ban on smoking or on alcoholic liquor in the premises. Besides statements of legal significance there are usually many others of advisory or exhortative purpose which have no direct bearing on contractual terms.[29]

Frequently the form attached to, and after signing by the employee detached from, the Work rules constitutes the only written document evidencing some terms of the service contract. These terms thus could be regarded as not only incorporated, but express ones: they may deviate from statutory and industrial relations rules unless the latter, having the force of *ius cogens*, are rules out of which the parties cannot contract.

The question may arise as to whether after the express and incorporated written terms there is still any room left for implied terms, especially those implied by common law? Can common law implied terms co-exist with the detailed provisions of statutes and industrial relations instruments? It depends on the express terms of the individual service contract and on the clauses of the relevant award, but it is primarily a

23 *Wellington Amalgamated Watersiders Industrial Union of Workers* v. *N.Z. Port Employers' Association (Inc.)* [1961] N.Z.L.R. 365.
24 [1969] N.Z.L.R. 530.
25 New Zealand Clerical Workers' Award 1966, (1966) 66 Bk. Aw. 2576.
26 See also *Perry* v. *Satterthwaite* [1967] N.Z.L.R. 718; *Scott* v. *Trustees Executors and Agency Co. Ltd.* [1967] N.Z.L.R. 725; *Stevenson Jordan and Harrison Ltd.* v. *Macdonald* [1952] 1 T.L.R. 101.
27 See Part II above.
28 E.g. Hours of work, sick leave, payment of wages, overtime, etc.; *Employees' Handbook,* Felt and Textiles of Australia Ltd.; *Staff Rules,* Triplex Safety Glass Co. Ltd., Birmingham; *Work Rules,* Rowntree and Co. Ltd., York; *Office Handbook,* Felt and Textiles N.Z. Ltd.; *Working With,* The Carpet Manufacturing Co. (N.Z.) Ltd.
29 E.g. use of cafeteria, thrift club, accident prevention, tidiness and cleanliness, car and bicycle park, suggestion schemes, etc.

question of law.[30] Some common law duties of the servant may be accepted as so well established and basic that the implication is obvious.[31]

Considering the duties of the servant, and taking first the duty of personal service, it cannot be denied that this is essential in industrial employment unless the parties specially agree to the contrary.[32] The time clock system and the prohibition to clock another worker's card, apart from the prevention of cheating in payable work hours, purports to ensure personal service. Obedience to orders, faithful, honest and careful service as duties implied by common law[33] must be interpreted in the context of the type of work for which the employee is engaged. Apart from immoral and illegal orders[34] and statutory restrictions of assigning certain tasks to defined classes of workers,[35] demarcation of functions prohibits performance of work outside the job content of a particular occupational group: a cook is not allowed to undertake the steward's task, nor a carpenter the plumber's.[36] The degree of faithfulness also clearly differs on the type of employment: it will be implied more readily into the contract of, say, an accountant, confidential clerk or technician possessing special knowledge or trade secrets than in the case of unskilled workers. An employee is allowed to use his skill and experience but not confidential information gained during his employment.[37]

Custom, if it is certain, notorious, reasonable and not contrary to statute, may also imply terms.[38] Certain usages have gradually grown up at a workplace, and it is arguable whether they can be recognised as accepted customs. Work rules, without incorporation by signature on the form of acknowledgement, if adequately brought to the knowledge of workers through placing copies of them on conspicuous places may have achieved a sufficient degree of certainty and notoriety.[39] Practices,

30 *O'Brien* v. *Associated Fire Alarms Ltd.* [1969] All E.R. 93.

31 *Shirlaw* v. *Southern Foundries* (1926) *Ltd.* [1939] 2 K.B. 206, 227, the "of course" test by McKinnon L.J.; *Lister* v. *Romford Ice and Cold Storage Co. Ltd.* [1957] A.C. 555.

32 *Stubbs* v. *Holywell Ry. Co.* (1867) L.R. 2 Exch. 311; *Graves* v. *Cohen* (1929) 46 T.L.R. 121; *Orman* v. *Saville Sportswear Ltd.* [1960] 3 All E.R. 105.

33 Batt sets out the duties of servant in 8 points: personal service, obedience to orders, duties of disclosure, faithful and honest service, careful service, obligation to indemnify, liability to account and secrecy: *op. cit.* 204; some of these are obviously overlapping.

34 *Price* v. *Mouat* (1862) 11 C.B.N.S. 508; *Gregory* v. *Ford* [1951] 1 All E.R. 121.

35 Factories Act, ss. 37, 38, 42, etc.

36 The combined effect of the unqualified preference clause and the definition of the class of workers to which the award applies; also the attitude of the unions jealously guarding job opportunities: the recent container dispute between the waterside and storemen's unions. Cases where the doctrines of substantial employment and of indivisibility of employment can be invoked must be regarded as of special nature, see *Wilson v. Dalgety & Co. Ltd.* [1940] N.Z.L.R. 323, and *International Paints of N.Z. Ltd.* v. *Hopper* [1948] N.Z.L.R. 240; see also Reynolds, *op. cit.* 225 *et seq.*

37 *Hivac Ltd.* v. *Park Royal Scientific Instruments Ltd.* [1946] Ch. 169; *British Celanese Ltd.* v. *Moncrieff* [1948] Ch. 564; *Harvey* v. *R. G. O'Dell Ltd.* [1958] 1 All E.R. 657.

38 *Whitcombe & Tombs Ltd.* v. *Taylor* (1907) 27 N.Z.L.R. 237; *Swale* v. *Ipswich Tannery Ltd.* (1906) 11 Com. Cas. 88.

39 If provisions of the work rules which have legal significance regularly are being observed they have become a custom, may be called codified custom: see *Marshall* v. *English Electric Co. Ltd.* [1945] 1 All E.R. 653, where such rules were held to be part of the contract.

such as search of bags when leaving the factory, if the employees submit to it without protest, may establish a right to gate-checks after the lapse of certain time. Conversely if taking home scrap metal or other waste material has been tolerated by management for a considerable period, sudden prohibition of this usage may be complained of as breach of customary rights. Similarly, if a group of workers regularly finish work at 4.50 p.m. instead of 5 o'clock to allow time for wash and change this privilege will be regarded as a right by custom, and not necessarily inconsistent with the award.[40] The existence of any custom is a question of fact, and must be proved unless it has become judicially noticed.[41]

The foregoing brief outline, it is hoped, clearly points to the somewhat unique nature of the service contract. A word uttered by the employer or his representative when selecting a man from the line of job-seekers may create it in a second. The formation of it can be very simple: "you" and an answering nod all that is required.[42] The contract itself, however, could not be more complex. Its terms must be collected from various extraneous sources, and many questions may arise as to their applicability and inconsistency.[43] The paradoxical truth is that a lengthy agreement in writing which sets out terms relating to all conceivable contingencies produces a less complex contract than the one created by the word and the nod. To a certain extent the employment contract, then, has the character of a "contrat d'adhesion".[44] It certainly differs from other contracts in that it creates a mere ephemeral relationship.

IV

The ephemeral character of the employment contract is strikingly demonstrated by the right of either party to terminate the relationship at any time without committing a breach thereby.[1] This right, together with the initial liberty whether or not to accept or reject an offer, may be regarded as a vestige of the contractual freedom still venerated by common law. A service contract can be terminated either by giving notice or without notice summarily.[2] A summary dismissal without notice may be lawful or wrongful; a dismissal with notice usually is lawful but it still can be unjust or unfair. The words "wrongful",

40 *Inspector of Awards* v. *Lepperton Co-operative Dairy Co. Ltd.* (1946) 46 Bk. Aw. 565; *Inspector of Awards* v. *Ultimate Ekco (N.Z.) Ltd.* (1967) 67 Bk. Aw. 650.

41 *N.Z. Engineering I.U.W.* v. *Winstone Ltd.* (1953) 53 Bk. Aw. 1241.

42 Sir F. Tillyard, *The Worker and the State,* 3rd ed. 1948, 4.

43 *Strong* v. *L. Bava and Co. Ltd.* [1960] N.Z.L.R. 166.

44 This is a term invented by Saleilles, *Déclaration de Volonté,* (1901) 89; see Amos and Walton, *Introduction to French Law,* 2nd ed., 151; it denotes contracts in which the conditions are already fixed by one party, and unchangeable; in employment contracts they are fixed by collective arrangements and changeable only to a limited extent.

1 There may be some exceptions where the parties made the contract for a definite duration, e.g. five years, but even in this case the employee can be dismissed earlier either for misconduct or upon payment of an agreed compensation: *Bell* v. *Lever Brothers Ltd.* [1932] A.C. 161; Permanent contract for life is also possible: *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129 (H.L.).

2 The contract may also be terminated by frustration or impossibility: *Unger* v. *Preston Corporation* [1942] 1 All E.R. 200; *Morgan* v. *Manser* [1948] 1 K.B. 184.

"unjust" and "unfair" unfortunately are not used with precision: "wrongful" should denote an action in breach of law including breach of contract, the opposite of "lawful"; "unfair" should mean an action correct in strict legal interpretation, complying with the letter of law, but morally discreditable; "unjust" should carry the same meaning but it is more frequently used as a synonym for "wrongful", while in turn "unfair" is habitually applied instead of "unjust". Thus by confusion of word usage the categories of legal wrongfulness and moral-social disapproval are not kept separate.

The master has the right in common law to dismiss a servant summarily if certain facts justifying such action are present.[3] Corresponding with this is the worker's right to leave the employment if similar cause arises. The reason for the summary termination is simply a breach of contract by the other party,[4] such as misconduct,[5] disobedience,[6] or neglect of duties[7] on the part of the servant, though the master need not give any reason for the dismissal.[8] If there is no such breach of contract then the summary dismissal is wrongful, and the dismissal itself will constitute a breach of contract.

Industrial instruments have not substantially altered the common law position relating to dismissal for misconduct or for good cause, and most of them expressly incorporate a clause recognising the management's powers of hiring and dismissal. Remedies both in common law and through the I.C. & A. Act are available to the worker complaining of dismissal without good cause but their effectiveness is questionable. If a worker sues for damages all that he can recover will be his actual pecuniary loss: the amount of wages he could have claimed for the period of notice had he received one, usually a week.[9] No amount will be granted in respect of injured feelings or for difficulty in obtaining new employment.[10] The paltry sum of damages would hardly satisfy a worker whose main concern is the loss of his livelihood. Nor does the victimisation section of the I.C. & A. Act[11] give any real protection: it aims to prohibit employers from dismissing employees involved in trade union activities but the maximum fine[12] is so ridiculously small that it has no deterrent effect. In any case the employer always can

3 *Ridge* v. *Baldwin* [1964] A.C. 40 (H.L.).

4 "Act or conduct . . . evinc[ing] an intention no longer to be bound by the contract"—per Coleridge C.J. in *Freeth* v. *Burr* [1874] 4 C.P. 213; quoted in *General Billposting Co.* v. *Atkinson* [1909] A.C. 118 by Lord Collins.

5 *Clouston* v. *Corry* [1906] A.C. 122, P.C. on appeal from the N.Z. Court of Appeal in (1904) 7 G.L.R. 213; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch. D. 339; *Burnett* v. *Distributing Agency Ltd.* [1923] N.Z.L.R. 169.

6 *Laws* v. *London Chronicle* (*Indicator Newspapers*) *Ltd.* [1959] 1 W.L.R. 698; *Pepper* v. *Webb* [1969] 2 All E.R. 216.

7 *Baster* v. *London County Printing Works* [1899] 1 Q.B. 901; incompetence may be further ground: *Nunn* v. *Hodge* (1909) 12 G.L.R. 178.

8 *Boston etc.* v. *Ansell, supra; Ridge* v. *Baldwin, supra.*

9 *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488; *Lindsay* v. *Queen's Hotel Co.* [1919] 1 K.B. 212.

10 *Cowles* v. *Prudential Assurance Co. Ltd.* [1957] N.Z.L.R. 124; actual pecuniary loss includes loss of gratuities: *Manubens* v. *Leon* [1919] 1 K.B. 208, or in publicity or reputation: *Withers* v. *General Theatre Corporation Ltd.* [1933] 2 K.B. 536.

11 Section 167.

12 $50.00.

allege another cause, a proper cause for the dismissal,[13] and even if the prosecution succeeds[14] the penalty is a cheap price for getting rid of an alleged troublemaker.

The recently introduced grievance procedure to be inserted in awards and industrial agreements provides for the setting up of a body or tribunal which would consider all individual complaints of workers.[15] This grievance adjustment body is given the power to inquire into the matter, hear all representations, and make a final decision binding on the parties.[16] If the tribunal finds the dismissal wrongful it may order

(a) reimbursement of the wages lost, or part of them,
(b) reinstatement in the former or a similar position, and
(c) payment of compensation.[17]

Two or all three of these remedies may be applied concurrently.[18] Reimbursement appears to be similar to common law damages in awarding payment of the amount of wages due for the period of notice, while compensation must signify a more substantial sum, including such items of claim as loss of dignity, inconvenience suffered, or expenses incurred in connection with trying to find other employment and similar other grounds.[19] The notion of reinstatement cuts through the common law principle that specific performance cannot be granted to redress breaches of contract involving personal service.[20]

As yet the effectiveness of the new standard grievance procedure and especially that of the availability of reinstatement cannot be evaluated, though the idea has been known, and even practised, in New Zealand for a number of years prior to its statutory recognition. The Freezing Workers' Award[21] contains an elaborate dispute clause which provides, among others, a grievance settling process in the course of which the Freezing Industry Dispute Committee after inquiring into a complaint for summary dismissal and upon finding it wrongful may declare that "the worker's employment is not terminated and he is paid the accrued earnings he would have obtained had he not been dismissed".[22] To some extent the concept was accepted also on the waterfront: a Port Conciliation Committee is given power to order the reinstatement of a worker's name to the bureau register, and thereby make him eligible

13 *Inspector of Awards* v. *Tractor Supplies Ltd.* [1966] N.Z.L.R. 792; cf. *Inspector of Awards* v. *Williamson Construction Co. Ltd.* [1958] 58 Bk. Aw. 1020; *Inspector of Awards* v. *Armoured Transport-Mayne Nickless Ltd.* (1967) 67 Bk. Aw. 763.

14 *Marlborough Clerical I.U.W.* v. *Barraud* N *Abraham Ltd.* [1970] 13 M.C.D. 93; *Inspector of Awards* v. *Tractor Supplies Ltd., supra,* where the fine was $10.00.

15 I.C. & A. Act, s.179, as inserted by the 1970 Amendment Act.

16 Section 179(2)(f).

17 Section 179(5).

18 *Ibid.*

19 There is no authority for this statement but the logical interpretation of the words used in paragraphs (a) and (c) respectively would substantiate this explanation.

20 Strictly speaking the equitable principle: *Southern Foundries* v. *Shirlaw* [1940] A.C. 701; but negative covenants can be enforced by injunction; *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; *Page One Records* v. *Britton* (*Trading as "The Troggs"*) [1967] 3 All E.R. 822.

21 New Zealand (Except Westland) Meat Processors, Packers and Preservers, Freezing Works Award, dated 26 March, 1970, cl. 29.

22 *Ibid.*, cl. 29, 12(f).

for employment.[23] These two industries are commonly regarded as trouble spots and therefore do not seem to be the best illustrations for the effectiveness of a grievance procedure; but without a rights dispute adjustment machinery, however creaking sometimes it may be, no doubt, even more stoppages would occur.

Personal grievance settlement cannot be restricted to summary dismissal only, as is at present the case in New Zealand, but it should be extended to termination of employment for any other reason. If the requisite notice is given neither industrial instruments nor common law can provide any help to the worker who loses his job.[24] Automation, containerisation, other technological changes or economic depression may result in such a redundancy that a wide-scale dismissal follows.

Overseas industrial relations systems recognise the significance of preventing wrongful dismissal but at the same time place more emphasis on evolving methods to ensure a just and equitable solution in those cases where economic and technological factors necessitate the discharge of a great number of workers. The difference between summary dismissal and termination with notice still exists, and the worker's own conduct has remained an important criterion when deciding the remedy to be granted but the procedure is very much the same. In Germany[25] no employee over twenty years of age and with more than six months' service can be dismissed by notice without first consulting the Works Council; ultimately the Labour Court will decide after examining the employee's conduct, age, family status, number of children and the employer's circumstances whether the termination is socially justifiable.[26] In France authority must be obtained from the manpower office, otherwise the dismissal will be "abusive".[27] In Sweden the Labour Market Board acts as a joint tribunal of employers and unions in cases of dismissal disputes taking into consideration matters similar to those by the German Labour Court.[28] In Italy, again, the employer must prove sufficient grounds for dismissal which, as in Germany, may be either obvious failures of the worker in performing his duties, or economic reasons on the part of the employer.[29] In the United States problems of job security and tenure occupy a prominent part in collective agreements providing detailed rules as to seniority, promotion, transfer and dismissal. Under the well developed grievance procedure a worker may

23 Waterfront Industry Act 1953, ss. 31, 32; see D. Levinson, "The New Zealand Waterfront Industry Tribunal", reprint from the *Arbitration Journal* (no date, probably 1970).

24 Reasonable notice should be given under common law: *Re African Association Ltd., and Allen* [1910] 1 K.B. 396; it can be in case of a newspaper editor as much as 12 months: *Grundy v. The Sun Printing and Publishing Association* (1916) 33 T.L.R. 77, but in weekly employment usually not more than a week; industrial instruments normally stipulate one week's notice, but it can be less, even as little as two hours.

25 The Federal Republic.

26 Protection Against Notice of Dismissal Act (Kündigungsschutzgesetz), Law of 10 August 1951; Works Constitution Act (Betriebsverfassungsgesetz), Law of 11 October, 1952; see Bathe, *Das Arbeitsverhältniss*.

27 Code du Travail, Bk. I, tit. II, art. 23; Ordinance 24.5. 1945; see (1959) *International Labour Review*, 625-642.

28 F. Schmidt, *The Law of Labour Relations in Sweden;* the Board is a voluntary agency formed on the Basic Agreement between the Employers' Confederation and the Confederation of Trade Unions; an English text of this Agreement is to be found in the book quoted, pp. 266-277.

29 Law of 15 July, 1966, No. 604; "sufficient motive" appears to correspond with the German social justification.

demand reasons in writing for his dismissal, and can carry through his complaints from the grievance committee to an abitrator.[30]

The English position has also been far removed from the economically and socially obsolete laisser-faire principle still pursued by the common law which may be summarised by saying that the master may dismiss the servant at any time without any reason. The Contracts of Employment Act 1963 and the Redundancy Payments Act 1965 purported to create rules more in line with modern industrial conditions but these statutes do not appear to have solved any of the problems. On the recommendations of the Donovan Commission[31] the Labour Government in 1969 endeavoured to introduce new machinery regulating dismissal,[32] and at present the controversial Heath-Carr Bill intends to achieve, among others, the same purpose.[33]

Not quite a decade ago the International Labour Organisation formulated the now famous Recommendation on termination of employment which crystallises the criteria to be observed when dismissing workers for any reason whatsover.[34] Details of this document, like those of the different overseas systems of dismissal control, cannot be given here. It is sufficient to point out that reinstatement has been recognised by the ILO Recommendation, as well as the German, Italian, Swedish and U.S. systems, though it is applied on different bases: in Germany and in Italy on statutes, while in Sweden and in the United States on voluntary agreements between employers and unions. In France this remedy cannot be ordered; in Britain the tribunals, as the Bill stands at present, will have power only to recommend it. The two-fold classification of the justifiable reasons for dismissal, i.e.

(a) relating to the worker's conduct and
(b) referring to the economic conditions of the employer

are similar in the ILO, German, Italian, Swedish, French and to some extent in the American systems. The principle of seniority, "first hired last fired", also appears to be an all pervading idea present with certain variations in all systems including the British one.[35]

Will these forward looking and enlightened principles adequately meet the challenge of the automation age already commenced? Will employment become smaller in occupations where automatic devices have

30 Reynolds, *Labor Economics and Labor Relations*, 4th ed. 176 *et seq.*, 198 *et seq.;* Maher, *Labour and the Economy*, 127 *et seq.;* Sloane and Witney, *Labor Relations*, 196 *et seq.;* Chamberlain and Kuhn, *Collective Bargaining*, 2nd ed., Ch. 6 and *passim*.

31 Cmnd. 3623, Ch. IX.

32 *In Place of Strife*, Cmnd. 3888, para-s 103-4.

33 The new Bill reiterates many of the Labour Government's proposals but it is still strongly opposed not only by the trade unions but by the Labour Party in Parliament; on English and American procedures see H. M. Levy, "The Role of the Law in the United States and England in Protecting the Worker from Discharge and Discrimination", (1969) 18 I.C.L.Q. 558.

34 No. 119, *Recommendation Concerning Termination of Employment at the Initiative of the Employer*, 26 June, 1963.

35 See for a detailed discussion on Recommendation 119, also on overseas systems and the new grievance procedure introduced by the I.C. & A. Amendment Act 1970. Szakats, *Recent Changes in Industrial Law*, Occasional Paper No. 5, Industrial Relations Centre, V.U.W. 1971; on seniority rights see B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights" (1962) 75 Harv. L.R. 1532.

advantage over human labour?[36] Workers and their unions, not without grounds, have serious misgivings that further automation will result in loss of job opportunities, in shutdown of plants and dislocation of employment in whole regions.[37] Experts while realising that the property rights in jobs may disappear at the same time are at pains to point out that high unemployment is not an inevitable consequence of the pace of technological change provided that positive fiscal, monetary and manpower policies will be taken to reduce it.[38] The problem of unemployment must be dealt with at government level as part of an integrated national policy.[39] If the challenge is met, the experts say, shorter hours, more leisure, new opportunities for social enrichment, the extension of man, and, no doubt, a real millenium will follow.[40]

May the experts be right! They foresee, however, mass displacement and great problems of re-absorbing the displaced. To achieve absorbment the following measures are urged:

1. Training and retraining of those workers who have no skills or whose skills have become obsolete.
2. Provisions for income during temporary or final lay-off, and during retraining.
3. Early retirement schemes for those over 60 years (or even 55) provided they have a minimum of 20 years' service.[41]

Mr F. J. L. Young, a New Zealand expert, recommends a manpower planning programme, similar to that in Sweden, to be introduced, and emphasises the importance of positive action to maintain and improve the skills of the work force.[42] A leading trade unionist also points out the necessity of training, retraining and education, and warns of unemployment "unless social and economic adjustments are made simultaneously with the advance of automation."[43]

Legal adjustments are also needed. Many legal problems will arise in connection with the right of the employer to transfer a worker from one job to another or even to another town; this is certainly against the common law principle but may be agreed contractually. Would the worker commit a breach of contract if he refuses to shift? Would a worker remain in employment during retraining and receive wages, or should he be discharged and be given a maintenance allowance, or

36 H. A. Simon, *The Shape of Automation for Men and Management* (Harper, New York, 1965) 32.

37 M. S. Wortman, *Critical Issues in Labor,* (MacMillan, New York 1969) 159 *et seq.*

38 H. R. Bowen and G. L. Mangum, *Automation and Economic Progress,* (Prentice-Hall, Englewood Cliffs, 1966) 15 *et seq.*

39 L. Bagrit, *The Age of Automation,* (Penguin 1965) 72.

40 Bagrit, *op. cit.* passim; Wortman, *op. cit.* 161 and passim; Bowen and Mangum, *op. cit.* 128 and passim; W. Buckingham, *Automation* (Mentor Executive Library Book, New York, London, 1961) 150 *et seq.*

41 E. B. Shils, *Automation and Industrial Relations,* (Holt, Rinehart and Winston, New York, London 1963) pp. 144, 156, 162; Buckingham, *op. cit.* pp. 88, 109 and passim.

42 F. J. L. Young, "The Economic Implications of Automation and Technological Change; in *Automation in New Zealand,* ed. Young & Blizard (Royal Society of N.Z., 1966) p. 27; see also same author, *The Supply of Labour in New Zealand,* Occasional Paper No. 3, Industrial Relation Centre, V.U.W., 1970.

43 I. E. Reddish, General Secretary, Post Office Association, "The Perspective and Attitudes of Organised Labour Towards Technological Change and Automation" in *Automation in New Zealand,* pp. 45, 54.

perhaps a loan to be repaid later? Would retraining entitle him, as a right, to re-employment? Further questions will arise in case of workers who are considered too old for retraining but too young for retirement; or those who for certain reasons have not accumulated sufficient service and are not eligible to participate in any pension scheme.[44]

These are only random examples, and, no doubt, many more contentious legal problems must be solved when mass displacement of workers, dislocation and re-organisation of industries will occur. The recent container dispute is only one small forewarning of the difficulties, and of their dimension, which are likely to confront society unless the law will keep in step with social and economic adjustment.

V

Technological transformation is merely one of the more manifest aspects of the generic metamorphosis that goes to the root of the capitalist industrial enterprise. The emergence of management as a profession and even science, and its divorce from ownership[1] is another relevant factor which should necessarily lead to a complete reassessment of the legal and social aspects of the master-servant relationship. The economic character has already changed. The private industrialist of the "master" type, the solitary owner-boss figure is rapidly disappearing and his place is taken by the corporate employer, the concentrated production unit organised as a company. The master in most cases is not a flesh and blood human being but an invisible spirit, and an economic entity identifiable only for the purposes of its business as a corporation, a juristic personality.[2] It is a curious phenomenon that parallel with this legal personification of the big commercial enterprise the management-worker relations have become increasingly depersonalised, and an impersonal personnel administration has developed.[3]

The corporate employer when entering into employment contracts with applicants for jobs can act through its agents only,[4] who are frequently also its servants. The principal agents to whom the authority to exercise the company's powers is primarily delegated are the board of directors, who derive their authority direct from the company itself in general meeting.[5] The board may subdelegate agency powers to individual directors and other officers.[6] The managing director is the principal officer as the first among directors, and he also holds the position

44 These questions have already been raised by this author in *Recent Changes in Industrial Law,* referred to above.

1 See J. Burnham, *The Managerial Revolution;* managers are not capitalists—though they may own shares—but those persons who have functions of guiding, administering, and organising production; in short who administer complex political, economic and social organisations. Although Burnham's opinions are not always acceptable, this observation is valid.

2 Shareholders are not, in the eye of the law, part owners of the undertaking; per Evershed L.J. in *Short* v. *Treasury Commissioners* [1948] 1 K.B. 116, at 122.

3 See in general Berle and Means, *The Modern Corporation and Private Property;* P. Sargent Florence, *Economics and Sociology of Industry,* and *Ownership, Control and Success of Large Companies.*

4 *Ferguson* v. *Wilson* (1866) L.R. 2 Ch. App. 77, 89.

5 Companies Act 1955, Table A, arts. 75, 79 and 80.

6 *Id.* arts. 81 and 102.

of the number one servant.[7] The other directors can act as agents but they are not servants unless they are employed under a contract of service, like the managing director, in a managerial position[8] with a regular salary. Other persons, not being directors, can be employed as managers, and for the purpose of carrying out their functions also have authority to act as agents. Their agency powers are normally restricted to matters connected with their particular duties. Even office-holders in non-managerial positions, such as the secretary, are given authority to enter into certain contracts on behalf of the company: to engage clerical staff. Submanagers, floor managers and foremen may also employ workers under delegated authority.

A hierarchy of servants being in an interrelated position of superiority and inferiority has been established as an internal structure in all big business organisations similar in complexity to those in the state's civil and armed services. All employees, save the managing director, have over them a superior servant to whom they are responsible, whom they regard as the "boss", and who in the day to day work-process represents the master. Conversely, many of them, except those in the lowest jobs, are in charge of a certain sector of the enterprise with supervisory duties and powers over a group of employees. These superior servants may be regarded by their fellow workers as personifying the master but they are not in any way identifiable with the employer: they have a limited internal representative power for the purposes of giving orders, or simply communicating the orders of their superiors to their subordinates; they may possess external agency powers to enter into a certain category of contracts;[9] but in any case they are mere agents acting under subdelegated authority.[10]

Not all servants represent the employer in their daily contact with other servants, whether they are of equal or of different grade. What is the relationship between them in their capacity as fellow employees? Contractual relationship exists only between the employer and each individual employee; there is no contractual relationship between the employees themselves.

With certain imagination it may be asserted that through the central focussing point of a common employment workers employed by the same enterprise enter into a secondary contractual relationship with one another, analogous to that of the shareholders of a company,[11] or members of a trade union,[12] or competitors of a race.[13] The memorandum and articles of association, the rules of the union or the rules of the

7 *Id.* arts. 107 and 109; see Gower, *Modern Company Law,* 3rd ed. pp. 127 and 142.

8 Not necessarily top managerial; it can be a subordinate position such as branch manager, sales manager, accountant, etc.; see Gower, *op. cit.* 140.

9 *Stone* v. *Cartwright* (1795) 6 T.R. 411; *Hill* v. *Beckett* (1914) 112 L.T. 505; if a superior servant without authority engages a servant the latter will be his servant and not that of the master; see Batt, *op. cit.* 25.

10 The managing director is somewhat more than a mere agent and servant, he may be regarded as one of the primary organs of the company; see Gower, *op. cit.* 141 *et seq.*

11 Section 34, Companies Act 1955; *Hickman* v. *Kent and Romney Marsh Sheep-breeders' Association* [1915] 1 Ch. 881; *Rayfield* v. *Hands* [1960] 1 Ch. 1.

12 *Prior* v. *Wellington Waterside Workers I.U.W.* [1958] N.Z.L.R. 1; *Gould* v. *Wellington Waterside Workers I.U.W.* [1924] N.Z.L.R. 1025; see also Grunfeld, *Modern Trade Union Law* 15, 55; and Lloyd, "The Law of Association" in *Law and Opinion in England in the Twentieth Century,* ed. Ginsberg, 99, 115.

13 *Clarke* v. *Dunraven* [1897] A.C. 59.

race, however, constitute in these cases an all embracing contract between the company and its shareholders, between the union and its members, and between the club organising the race and the competitors respectively, and at the same time between the shareholders, members and competitors themselves. But where is the super-contract in industrial, or for that matter in any, employment relationship?

Can awards or industrial agreements be regarded as super-contracts? The significance of industrial relations instruments has already been referred to. They are super-contracts in a sense but not in the meaning used with reference to company articles or rules of a society. The individual service contracts are parallel to awards or industrial agreements but made independently by several separate acts of offer and acceptance, while company articles, union rules and rules of a race create the network of interlacing contractual relationships by the very same document itself.

Even though the existence of a secondary contract, or more correctly a number of secondary contracts, were recognised, how are its terms to be ascertained? Can it be asserted that a worker when entering into a contract with the employer simultaneously also promises to all the other employees that he will work with them as a member of a group or team as directed by the employer, that he will be peaceful, careful and will endeavour not to injure fellow workers either intentionally or negligently? He is certainly obliged to do so: these duties, however, either arise from the service contract and are owed primarily to the employer, or are duties of a general nature towards everybody.[14] Refusal to work with a fellow employee for any reason, such as that that worker is not a union member, constitutes a breach of contract as against the employer only. Likewise, to use due care in the course of the work process is a contractual obligation towards the employer. If a worker causes injury to a fellow employee liability will arise in tort and not in contract. The simple truth is that there is no contract, only the service contract with the employer. The tortious act, however, may well be also a breach of the service contract, and the employer can claim contribution from his employee in respect of the damages awarded on vicarious liability. Thus the liability for the negligence of an employee resulting in harm to another employee must be borne by the employer under the principle that he is responsible for any tort committed by his servant while acting in the course of his employment.[16] Besides claiming from the employer on the grounds of his employee's fault, an action open to all persons injured, a worker can demand compensation by the mere fact of having suffered "personal injury by accident arising out of and in the course of his employment".[17]

The vicarious tort liability as well as the statutory duty under the Workers Compensation Act 1956 binds the employer only, and a

14 In tort the duty is towards persons generally, in contract towards a specific person or persons: Winfield, *Province of the Law of Tort,* pp. 40, 229-231; the word "duty" relates to the primary duty not to commit the tort, and not to the remedial duty to make reparation which is always owed to a specific person: Winfield, *On Tort* (7th ed.), 7, n. 17.

15 *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555.

16 *Swainson* v. *North Eastern Railway Company* (1878) 3 Ex. D. 341; *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343; *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852 (C.A.).

17 Workers' Compensation Act 1956, s.3(1).

superior servant acting as agent will not assume any personal responsibility for torts of inferior servants under his control.[18] Similarly, directors of a company, as primary agents will not be vicariously liable,[19] but if they have contributed to the wrong they can be joint tortfeasors with the company itself which must accept liability for its servants' actions.[20]

Under the obnoxious, and now fortunately abolished, rule of common employment the master's liability could not be invoked for any injury negligently caused by one employee to another who was engaged in common employment with him. For more than a hundred years[21] this rule was a blot on "Our Lady the Common Law",[22] and disgraced the Anglo-American legal system. The doctrine "resulting from considerations as well of justice as of policy" as stated by Shaw C.J. in *Farwell* v. *Boston and Worcester Railroad Corporation* was "that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural risks and perils incident to the performance of such services" including "perils" arising from the carelessness and negligence of those who are in the same employment".[23] In the view of Shaw C.J., there was an implied contract—presumably collateral to the service contract —that the master would not indemnify the servant against the negligence of anyone except his own (the master's); in tort the master could not be liable because, being in contractual relationship with the servant, the servant was not a stranger.[24] The employees had to be regarded as strangers "because they were not privy to each other's contract with the employer".[25] The service contract according to this reasoning implied

(a) non-liability by the master except for his own personal negligence,
(b) consequently the acceptance of all ordinary risk by the servant, incidental to the employment, but
(c) did not imply any contract between fellow workers.

Precisely because the employees were complete strangers could their tortious liability be invoked.

There is no need to discuss any longer the obsolete rule of common employment which became very complex but now is relegated to historical interest only. It suffices to comment that having cast aside the doctrine and the reasoning behind it, the point that there is no implied contract between fellow employees ancillary to the main contract, and that it creates no privity as between them, can be accepted as valid.

18 *Bird* v. *O'Neal* [1960] A.C. 907.
19 *Performing Rights Society* v. *Cyril Theatrical Syndicate* [1924] 1 K.B. 1.
20 *Yuille* v. *B. & B. Fisheries (Leigh) Ltd. and Bates* [1958] 2 Lloyd's Rep. 596.
21 In New Zealand much less; the origins of the rule can be found in *Croft* v. *Alison* (1821) 4 B. & Ald. 590, and *Priestley* v. *Fowler* (1837) 3 M. & W. 1; in England it was abolished by the Law Reform (Personal Injuries) Act 1948, but in New Zealand forty years earlier by the Workers Compensation Act 1908, s.62.
22 Sir Frederick Pollock, *Jurisprudence and Legal Essays*, ed. A. L. Goodhart, Introduction by editor, p. XIX referring to Pollock's Carpentier Lecture at Columbia University in 1911 under the title *The Genius of Common Law*.
23 (1842) 3 Metc. 49, Supr. Court of Massachusetts; quoted from Auerbach and others, *Legal Process*, (Chandler, San Francisco 1961) 26 *et seq.*, esp. 28.
24 Leonard Levy, *The Law of the Commonwealth and Chief Justice Shaw*, 166 *et seq.*
25 Levy, *op. cit.* 172 *quoting Allan* v. *Jaquith*, 4 Gray 99 (1855).

The contention for a network of secondary contracts between all the fellow servants themselves is in no way tenable.

Nor can the argument be maintained that the work rules[26]—whether incorporated or merely implied in the service contract—would create such secondary contract. They form part of the primary contract regulating incidents of the employer-employee co-operation notwithstanding that they purport also to arrange the employees' in-work and out-work relations inter se, such as work teams, use of cafeteria and recreational facilities.

Workers, of course, are in contractual relationship with one another if they are members of the same union, through the union rules. This relationship however, is of a different character, and need not necessarily coincide with the service contract. Workers in the same plant may belong to several unions,[27] and members of one union can be scattered through the whole industry.

Being employed in the same workplace, belonging to a specific plant community certainly forges a strong bond of fellowship between employees, quite distinct from union ties. The inter-connection is of a diffuse, sociological nature, and lawyers have not paid much attention to it except in Germany. Modern German legal theory conceives the workers' community as one of the constitutent elements of the enterprise. Company (Gesellschaft) as a legal entity is distinguished from the enterprise (Unternehmen) as an economic and social reality. The essence of the theory, summarised in a simplified form, is that the enterprise as the paramount phenomenon results from the co-ordination and co-operation of three human components: association of shareholders contributing the capital (Gesellschaft), the community of the employees (Gemeinschaft) supplying the labour, and the team of managers providing entrepreneurial leadership for the fruitful use of capital and labour. The owners of capital and the owners of labour, realising that without organisational skills their assets cannot be properly utilised, agree to pool their resources for a mutually beneficial purpose, and to carry out this objective engage the managers.[28] This agreement between capital and labour, of course, is not a contract in a legal sense, it is a mere fictional understanding in the nature of Rousseau's *contrat sociale.*

The enterprise theory, in Fogarty's opinion, "is basically sound", because "it distinguishes correctly between the common and separate spheres of interest of shareholders, employees and entrepreneurs".[29] It emphasises the equal importance of the workforce with the two other groups. The managers, as professional entrepreneurs must be selected solely on the grounds of their ability, initiative and drive. While managers remain stewards for the shareholders in handling the capital,

26 See Parts II and III above.

27 E.g. in a dairy factory workers in general belong to the Dairy Workers Union but a maintenance worker may be the member of the Engineers Union: *N.Z. Dairy Factories and Related Trades Employees' I.U.W.* v. *Cooper* (1955) 55 Bk. Aw. 1212; clerks belong to the Clerical Union.

28 The main propounders of the theory are Nikisch, Fahrtmann, Ballerstedt, Schilling, Duvernell; in many points their views differ, and the theory is not yet completely crystallised; see M. Fogarty "Co-determination and Company Structure in Germany" (1964) *Br. J. of Industrial Relations,* vol. 2, 79, esp. 91-96.

29 Fogarty, *op. cit.* 95.

at the same time they are also in the position of trust for the employees, and have equal responsibility towards them.[30]

In English and New Zealand company law the concept that managers are solely responsible to shareholders is still strongly held.[31] Directors as primary agents must act in the interest of the company which means the general body of shareholders. Employees, including those in managerial positions, are not members of the company—unless they happen to hold some shares. "Directors are not entitled to have regard to the interests of anyone other than members, for example, the employees, the consumers of the companies products, or even the nation generally".[32] Managers, if directors, are stewards, for the shareholders only, and if employee-managers, are merely superior servants. They certainly cannot be regarded as having been appointed by the agreement of capital and labour. The work-force is a social and economic reality, but it forms part of the undertaking only in the sense as the buildings, machinery and other tangible assets do. For the purpose of peaceful industrial relations the importance of the plant community, however, is admitted by recognising shop stewards, union delegates and joint committees.[33]

Employees' interconnections with one another exist in a number of different situations, some with little or no legal content. These relations can be classified in categories as follows:

1. Superior and inferior servant: contractual, but the superior servant represents the employer.

2. Members of a work team: contractual towards the employer, social inter se; also economic if production and remuneration are interdependent.

3. Employees of the same employer working at the same plant: economic, as earnings are dependent on the functioning of the plant as a production unit.

4. Members of the same union: contractual through the union rules with economic and social elements.

5. Members of the same craft: contractual if craft union, otherwise economic and social.

6. Members of joint committee or similar body: contractual through the union.

7. Members of social, welfare and sport clubs connected with the work-place: contractual if the societies are incorporated; correlated to the employment contract, if membership is restricted to employees, but independent from it, mainly social.

30 The real employer then in this theory is not the company (the shareholders) but the enterprise as a compound entity; in law, however, including German law, the incorporated association, the company, as a legal person remains the employer.

31 *The Savoy Hotel* v. *Berkeley Hotel Co. Ltd.* (1954, H.M.S.O.), Report of Mr Milner Holland Q.C.; *Parke* v. *Daily News* [1962] Ch. 927.

32 Gower, *Modern Company Law*, 2nd ed., 475.

33 E.g. disputes committees formed in pursuance of ss. 176-178, I.C. & A. Act; works committees under the Industrial Relations Act 1949; some union rules provide for shop stewards and joint committees; in U.K. joint consultation by way of works, factory and colliery committees: see Clegg and Chester, "Joint Consultation", in *The System of Industrial Relations in Great Britain*, ed. Flanders and Clegg, 323.

8. Comradeship, friendship: purely social.

9. Lastly, the duty of care, not to cause harm; owed to the whole world not only to fellow employees: contractual as against the employer, tortious as to the other workers.

VI

With the progress of technological transformation an ever increasing number of workers will achieve the status of the white-coated technician, and as a consequence the traditional dichotomy of white collar—blue collar labour will become obsolete. This process can be regarded as a further indication of the gradual embourgeoisement[1] of the working class, manifested not only by the equalisation of earnings and the resultant even level of affluence, but by the adoption of certain social and economic values which frequently were referred to with derision as of a typical middle-class character. Secure tenure in the job, a long-time privilege of administrative office workers in the public sector, is just as important to industrial workers as to civil servants. The principle of job security has even been enshrined as one of the basic rights in the Universal Declaration of Human Rights.[2]

In the United States trade unions have endeavoured to obtain guarantees for job security through introducing a "civil service system" to industrial employment.[3] The collective agreement contains detailed provisions relating to incidental rights connected with the job based on the security principle guarding the workers not only against arbitrary dismissal, but securing special benefits for them, commensurate with their length of service, such as paid holidays, sick-leave, insurance and health services, unemployment payments and other perquisites. The "right to work", frequently interpreted as a mere anti-closed-shop slogan, has developed into "the right in the work" similar to right in property as "workers tend to regard their jobs as if they had property rights in it."[4]

Social legislation, coupled with restrictions placed on union activities by the I.C. & A. Act,[5] put the demand for fringe benefits, highly valued

1 " . . . the proletarian workers are becoming homogenous with the white collar workers and are joining the middle class." K. Mayer, "Recent Changes in the Class Structure of the United States," *Transactions of the Third World Congress of Sociology,* vol. 3, 78; see also Mayer, "The Changing Shape of the American Class Structure", *Social Research,* vol. 30; Zweig, *The Worker in an Affluent Society,* (London 1961); Marxist writers recognised this process as a problem, Lenin himself discussed it in "The Collapse of the Second International", *Lenin: Selected Works,* ed. J. Fineberg, vol. 5; some non-Marxist sociologists are sceptical about the validity of Mayer's statement, see Goldthorpe, Lockwood, Bechhofer and Platt, *The Affluent Worker in the Class Structure,* Cambridge Univ. Press, 1969.

2 Art. 23; see also arts. 22 (right to social security), and 25 (right to a standard of living).

3 Reynolds, *op. cit.* 198 *et seq.*

4 F. Meyers, *Ownership of Jobs,* Univ. of California 1964, 112; as to the "right to work" see Wedderburn, *The Worker and the Law,* 95 and 328; Grunfeld, *Trade Unions and the Individual in English Law* (1963, Inst. of Personnel Management); Lloyd, "The Right to Work" (1957) 10 *Current Legal Problems,* 36.

5 I.C. & A. Act, s.66; although para (n) permits the inclusion in the main rules of "any other matter not contrary to law" besides the compulsory requirements, matters of welfare were outside the permitted activities until the 1964 Amendment, inserting s.66A.

by American labour organisations, beyond the objectives of their New Zealand counterparts. The so-called overfull employment, scarcity of skilled workers and the resulting mobility of labour, made the idea of job security unimportant. There can be no doubt, however, that the predicted mass displacement which may accompany the reorganisation of production methods in accordance with more advanced technology will raise the question of secure employment to an issue of priority and urgency among union goals.

The employers' right "to hire and fire", the assertion of the prerogative in regulating the number of workers required according to the demands of an efficient production system, has to be reconciled with the objective of job security.[6] Economic expediency might insist upon mass reduction of the labour force but social ethics cannot allow it without some assurance as to the workers' future welfare.

Labour economists have not lost sight of the long term labour shortage in many skilled occupations existing parallel with the peril of the potential higher level of unemployment. The suggested remedies for both ills are manpower planning and active labour market policy, joint action by government, employers and trade unions. These measures should improve the workers' choice in employment matters, and at the same time ensure that employers have an adequately trained labour force. The aim is not direction of labour, but "to create conditions of full, productive and freely chosen employment rather than mere full employment".[7]

While any tendency to regimentation, as contrary to democratic freedom, would certainly be strenuously resisted, it is not inconceivable that, in return for the job security of workers, some employers may claim a corresponding duty on the employees' part to stay in the job, at least for a certain minimum period. Such suggestions, however, certainly would be shortlived and unacceptable as trying to revive a form of industrial serfdom.

Instead of perpetuating the class struggle and regarding the other party as the "common enemy"[8] employers and workers in search of solutions to the emerging issues of the automation age must reach rapport. This may lead to the recognition of the labour force as an integral part of the enterprise, equal in importance to that of the shareholders, culminating in workers' participation based on the German co-determination system as adapted in New Zealand conditions.[9]

Government co-operation and parliamentary action will always retain a paramount importance in the implementation of the envisaged manpower policy, codetermination and other necessary measures. The desired aims cannot be translated into practice otherwise than on the

6 L. E. Blades, "Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power," (1967) 67 Col. L.R. 1404.

7 F. J. L. Young, *The Supply of Labour in New Zealand,* Occasional Paper No. 3, Industrial Relations Centre, Victoria University of Wellington, 1971, 33, passim.

8 Even Dean Swift, well before the industrial revolution and Marx, so denoted the master in his advice to servants; *Directions to Servants,* in Swift, *Gulliver's Travels and Selected Writings in Prose and Verse,* ed. J. Hayward, London 1946, 601.

9 Mitbestimmungsgezetz, 21 May 1951, together with statutes of 7 August 1956 and 7 April 1967; Fogarty, *op. cit.;* W. H. Blumenthal, *Codetermination in the German Steel Industry,* Ind. Rel. Sec., Princeton Univ. 1956; A. Frame, "Workers' Participation in Company Management" (1970) 5 V.U.W.L.R. 417.

basis of well considered and properly co-ordinated legislative enactments. Co-ordination is the key word. Individual employer-employee contracts are profoundly intertwined with, and inevitably affected by, the great issues of collective labour relations, and no isolation is possible. When endeavouring to reconstruct industrial relations legislation,[10] special attention should be given to problems of job tenure, redundancy, retraining and pension rights; in general, the whole law of employment should be codified in a Labour Code incorporating all those features of the present common and statutory law which can be adapted to the demands of a society in perpetual transmogrification, and establishing a special Labour Court to deal with all differences arising from employment. Other equally good, or even better, solutions may, perhaps, be found. Whatever reform statutes will be introduced, the law of employment must always stand out clearly in the great variety of economic and industrial legislation superimposed. Lawmakers should never lose sight of the fact that the ultimate purpose of an efficient industrial relations system is the welfare of the individual human being.

10 N. S. Woods, *Needed Reforms in Industrial Conciliation and Arbitration,* and *Industrial Relations Legislation Reconstructed,* Occasional Papers in Industrial Relations Nos. 2 and 4, Industrial Relations Centre, V.U.W.; also *Submission to Government Concerning Industrial Legislation and Procedures,* N.Z. Employers' Fed. Inc. May 1970; the F.O.L.'s views on reform were published in *Evening Post,* 31 July 1970, 8.