Dependent Contractors: In From the Cold

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I: INTRODUCTION

The liberalisation of the New Zealand labour market aims to generate a flexible and responsive workforce geared to adapt quickly to new economic conditions. It allows for management technique to be tailored to the conditions within which an industry operates. This customisation has encouraged industry use of dependent contractors.[1] Dependent contractors appear to have more in common with employees than independent contractors, inhabiting economic territory traditionally the reserve of employees. The law currently treats them as independent contractors, although the legal distinction remaining between the two is no longer easy to reconcile with workplace reality.

At the outset one should note the distinctions between independent contractors and dependent contractors. Independent contractors generally "rove" from contract to contract with different clients in each case. Although the independent contractor may serve one client on more than one occasion, his or her economic welfare does not hinge on one client only. The archetypical dependent contractor, with whom this article is principally concerned, typically relies on work from one source only. The dependent contractor differs from the employee only in that the dependent contractor brings to the exchange financial capital as well as his or her own labour effort.

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1 Arthurs, *The Dependent Contractor: A Study Of The Legal Problems Of Countervailing Power* (1965) 16 U Toronto LJ 89.

Using the social dividend model this article seeks to establish that dependent contractors should have access to employment law protection. The social dividend model proceeds on the premise that participants in the market bear social and economic obligations in exchange for rewards from interaction in the market process. In return for contribution to the economic and social infrastructure, participants should have access to dividends from the market. Where financial, logistical, or social vulnerabilities block avenues, a case exists for legal intervention. In the present context, where contractors operate subject to the same conditions as employees, there is a systemic failure if those workers have no ready access to the law for the resolution of disputes arising out of the working relationship.

The traditional indicators the New Zealand courts use to classify an individual as either an independent contractor or an employee are removed from present economic conditions. The author argues that a revamped economic reality test, which focuses on the individuals' capacity for managerial control, is more suited to define whether an individual worker is covered by the Employment Contracts Act 1991.

Inclusion under the Employment Contracts Act would give dependent contractors access to the Act's personal grievance machinery, better enabling them to enforce their rights to fair treatment in the workplace. Fairness translates into freedom from discrimination, sexual harassment, disadvantage and unjustified dismissal. In contrast, classification as independent contractors excludes dependent contractors from coverage by the Act. This shuts them out in the cold, subject to the burdens, but not the benefits, of their industrial relationship.

II: THE SOCIAL DIVIDEND MODEL

The social dividend model is based on the premise that participants contribute to the economy and society generally in return for material and social benefits derived from interaction in those spheres. In exchange for individual wealth obtained from interaction in the marketplace, each person pays some financial contribution by way of tax toward the infrastructure necessary for the market to operate. In return for social benefits derived from the market the participants make a correlative social input.

1. Financial Contributions

The market consists of innumerable people each of whom specialise. Each person participates in the market, interacting with other economic agents. Those best equipped to take advantage of the wealth generated derive more from the interaction than those less well placed in terms of either natural or non-natural endowments in demand. [2]

2 "Non-natural endowments" denotes proprietary wealth; "natural endowments" denote talents, skills, abilities.

The "market" may be seen at any one time as the result of the countless interactions between economic agents. Thus the market is the macroeconomic result of microeconomic interaction, but because of saved transaction costs, any microeconomic transaction generates a better outcome within the market than without.

The market, as a whole, is worth more than the sum of its parts. Interaction through the medium of the market yields better returns than without it. The better return through its brokerage is to that extent unearned. This excess is due not to innate ability for example, but to the market *process*. The excess gained is the "social dividend". It is derived by access to the marketplace through society.

Government is non-partisan in the sense that it will not protect entrenched interests, nor seek to benefit those less advantaged purely *because* they are less advantaged. However, in liberal society the government seeks to ensure free market transactions, and therefore supports infrastructure that enhances efficient transactions.[3] The government therefore must levy tax, a percentage of the social dividend received, for public amenities that support the market economy. Contributions may be viewed as maintenance payments — user pays.

2. Social Input

Participants in society also collect social returns. Social status coincides with financial success. Status consists of the quality of life contingent on the participants spending power. Beneficiaries in the scenario win once through the financial return and secondly through the social status it enables them to occupy.

Just as the financial return is due to the existence of economic machinery, so too the social return derives from the existence of social forums in which to interact. In the same way that a financial tax is levied, a social expectation exists that participants will follow a grundnorm of behaviour which society dictates. Social expectations develop and expand parallel with the economy. That society now recognises that each individual has a right to a certain threshold of personal social "rights" is evidenced in the Employment Contracts Act. The Act contains provisions that make unjustified dismissal and discriminatory conduct illegal. The legislative provisions suppliment common law jurisprudence which states that fundamental to the nature of the employment relationship are the tenets of mutual trust and confidence which must be observed by both employer and employee.

The social dividend model presented implies an ultimate co-dependence at the micro level of all economic agents. It warrants financial taxation so infrastructure found conducive to efficient operation of the economy may be maintained and improved. Socially, the model supports a minimum threshold of rights being available to each participant in the marketplace.

3 "Efficient" is here defined as the optimal return given a set of inputs.

III: NATURE OF THE WORKING EXCHANGE

1. Historical Development of Interaction in the Workplace

The industrial revolution brought about fundamental changes both in the way labour was organised and capital holders sought returns. The revolution changed the status of workers from bonded labourers in the feudal and guild systems to sources of labour who exchanged this resource for wages. The social hierarchy, which produced security of land tenure, and the guild and apprenticeship systems were lost as bases upon which the law could organise the working exchange.[4] To fill this vacuum the courts applied the law of contract. Previously developed for mercantile transactions, the law of contract was readily applicable given the element of bargaining that emerged between worker and capital holder.[5] Characterising the employment contract as a bargain fitted well with Benthamite views on individualism in the mid nineteenth century and allowed the courts to adopt a neutral approach to industrial relations.[6] However contract law was not left unbridled. The British Parliament recognised the need to protect workers. Legislation like the Truck Acts was implemented to protect workers' rights to wages for their labour.[7]

The fact that the law saw the employment relationship in a contractual setting had repercussions beyond the direct regulation of the transaction between the parties. Structuring the labour/capital interaction as a contract of employment allowed contract to become the medium for the application of laws relating to employment.[8] The existence of a contract of employment became the acid test by which tax was collected either from the capital owner or the worker.

The development of the factory system saw a tendency to define and isolate work tasks in a way that made workers fungible. Bureaucratic control coupled with the setting of strict boundaries for each task in the production line led to a loss of the worker's autonomy in the performance of her task.[9] This loss of control today survives as one of the factors used to distinguish between independent contractors and employees.[10]

Just as technology earlier justified centralisation and integration at a single workplace for manufacturers new economic exigencies created their own demands on business organisation. In the last two decades, instead of centralisation and integration of the workplace, manufacturers often sought to increase flexibility in fast changing economic conditions by using "outworkers" for tasks that might earlier have been assigned to employees.

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4 Macken, McCarry, Sappideen, *The Law of Employment* (2nd ed 1984) 5.

5 Ibid, 7.

6 Napier, *The Contract of Employment*, in Roy Lewis (ed), *Labour Law in Britain* (1986) 328.

7 Ibid, 330.

8 Ibid, 332.

9 Perritt, *Should Some Independent Contractors Be Redefined As "Employees" Under Labour Law?* (1988) 33 Vo L R 989, 1002-1003.

10 Ibid.

Contracting out the work allows for shorter term contracts whereby the employer saves redundancy costs if the work dries up. It also allows for development of a network of small firms that can offer flexibility, sophistication and ability to respond quickly to the changing demands in the marketplace.[11]

A switch to the use of outworkers allows businesses to replace contracts of employment with commercial contracts and thereby alleviate the company's responsibility for employment protection, tax and, to an extent, health and safety laws. Where contracting out is to a network of small firms the price agreed between the two parties includes some premium for the smaller party to perform these added obligations. Other savings to the original employer include reduced training costs and the ability to take advantage of lower wage costs outside the firm either because of non-union rates or regional differences.[12] There is also the opportunity to bargain for more favourable contractual terms.[13] Contracting out is an efficient way to achieve the necessary labour return for money by reallocating the risk to the party who wins the contract.[14] Such reorganisation lends itself well to industries where individual workers operate out of range of direct supervision and the work does not involve 'conveyor belt' discipline.

Employers thus have the choice of either bureaucratic control or allocation of contractual risk or an amalgam of both to ensure an efficient return of labour for money.[15] However, the choice of either or both devices is a product of economic reasoning rather than an indicator of a fundamental distinction in the nature of the labour/capital interaction per se; it tells more about economic conditions than whether an individual worker is an employee or independent contractor.

The ability for such reorganisation to occur is positive proof of the continuing rationale of employers to exercise their management prerogative to organise and adjust their operations to adapt to new economic circumstances. The question that remains is: what difference is there between an employee and independent contractor? This is the focus of the next section.

2. The Nature of Contractors - Premium and Risk

A participant may bring to the labour exchange human and/or financial capital. The form of capital exchanged indicates whether the transaction is primarily an employee type relationship, where the worker seeks a return on her labour effort, or an investment opportunity where the entrepreneur seeks a return on money invested. In between these poles hybrid transactions take place where a worker brings both labour power and financial capital to the exchange. A rational participant in the market seeks an adequate return on both sorts of capital.

In an efficient labour market, where the supply of labour exactly equals demand, wages tend to settle where the rents from the activity in the market are shared by the employer and employee so that each receives an economic return on

11 Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws* (1990) 10 Oxford J Legal Stud 353, 356.

12 Ibid, 360.

13 Ibid.

14 Ibid, 365.

15 Ibid, 362.

their investment. Assume that the activity in the market is the production and sale of widgets, and that the market for widgets remains constant so that the same quantity is demanded for the same price. If one worker withdraws his or her labour from the supply available to the employer, the balance will favour the remaining workers because demand for their services surpasses supply. Thus the workers can each charge a premium for providing their labour power. Conversely, if one extra worker joins the workforce, there will be an excess of labour that tilts the balance in favour of the employer, presenting him or her with the opportunity to extract extra rents from the transaction. This can be achieved in at least two ways. The employer can require an extra component of the rents by causing workers to bid down their wages. Each worker will accept marginally less for the same effort and one person will be unemployed. The same number of widgets are produced at the same price and the sum of the forgone wages accrue to the employer increasing the profit from the venture.

Alternatively, instead of requiring workers to accept less wages, an employer can opt to extract extra rent from the exchange by causing workers to accept some responsibility hitherto borne by the employer. Allocating this responsibility to the workers creates a barrier to entry to that labour market which consequently reduces the number bidding for jobs to the number of workers required by the market to produce widgets. The workers opting to remain will receive the same wage as they received before the extra worker created the imbalance. However their real return on input will reduce as if they have accepted a drop in wages. The extra responsibility is undertaken because of relative job scarcity, not because the worker will gain a corresponding economic return. In practice the workers' extra responsibilities may include the acceptance of administrative tasks, for example filing their own tax returns. It may also include the worker bringing to the exchange plant for which they are responsible, for example a vehicle for use in job performance. Although in orthodoxy, a worker is conspicuous by the lack of financial capital she brings to the exchange, it is submitted that economic development is gradually undermining rationale for continued adherence to this characteristic as means to distinguish an employee from independent contractor.

To illustrate, it is noted that in an environment of scarcity of employment competitive markets have a tendency to push wages toward a subsistence level. However, this subsistence level is today sufficient to purchase a basket of goods made available to workers by the progress of capitalism generally. This progress uses efficiency to produce more sophisticated goods that earlier were available only to the relatively rich. Producing better goods at a cheaper price, then, is the result of market economies. This, for example, makes cars and computers available which the worker may choose to include in the exchange.

Such behaviour in the market place is indicative of economic circumstance. The law, by its choice of the contractual model, has opted to give participants freedom to contract. If parties agree to terms involving the divestment of responsibilities by one party to the other, reorganisation should be recognised by the courts as a technique to "clear" the market. As a technique, this is equivalent in effect and purpose to the parties agreeing to contract at a lesser wage level. Provision of financial capital thus indicates the economic context in which an exchange takes place rather than a distinction in the nature of task performance.

Reliance in law on whether the worker provides his or her own "tools" for the job is therefore robbed of much of its probative force as an indicator for distinguishing an employee from an independent contractor.

The bargain struck between independent contractors and those who require their services has a return on the labour component as does a bargain with an employee. Moreover the bargain has a return on the financial capital the independent contractor includes as part of the exchange. If, in certain economic conditions an employee and employer choose to redistribute responsibility between themselves in a way which gives a better economic return on components they bring to the exchange, there will be no distinction between their exchange and one involving an independent contractor. However, it is suggested that an exchange involving an independent contract also involves uncertainty, the risk of which is assumed by the independent contractor. This uncertainty translates into the chance of profit and the risk of loss. The uncertainty exists partly because the independent contractor is in business for himself or herself, having no security of income beyond the most recently won contract.

An obvious example of an independent contractor is one where the contractor tenders for work and supplies his or her own workers to fulfil the commission. In accepting the commission the independent contractor accepts the risk of cost variations and unforeseen exigencies. Scope for profit and loss will vary according to the scale of the contract because there will be more room for movement in the conditions that the tenderer forecast to make up the price. As the "condition set" increases the scope for variation likewise becomes greater, and the independent contractor may include a higher premium in return for accepting the risk. As the scale of the venture decreases there is correspondingly less scope for variation in the profit or loss and therefore less premium is installed into the job price.[16]

Where the condition set has little or no scope for variation the independent contractor will charge little or no premium. However, the independent contractor's condition set will always differ from that encountered by the employee because of the relative lack of security of job tenure. Where the "small" independent contractor, a sole operator, passes on only the actual cost of materials used, it thus follows that the a sole operator will charge more per hour for his or her labour than an employee would demand from an employer. On this analysis the party who is truly in business on their own account is the one who can charge a premium for the risk encountered.

It is proposed that there is a distinction between premium derived because of economic bargaining power and that extracted in return for exposure to risk. The former is explained by prevailing economic conditions, the latter because of the nature of the obligations undertaken. If obligations are assumed by a party, without the benefit of a discernible premium, it is likely to have resulted from the application of economic bargaining strength by the other party rather than being an indicator of the nature of the relationship itself.

16 Where the risk in the transaction is borne entirely by the employer, in an employment relationship with an employee, the employer exacts a premium from the transaction to compensate for his or her greater vulnerability to economic variations.

The most difficult cases to distinguish might occur where economic conditions allow for the party with an advantage to require the other to assume risk as well as bring capital, for example by bringing plant to the exchange, yet still not give a premium in return either for the capital or for the risk. In this situation the party who occupies the weaker economic position might appear to be in business on his or her own account when in fact the obligations are merely the best terms that could be bargained. The court is put in the invidious position of having to either accept the appearance of the relationship as indicative of its nature or undertake a valuation exercise. If the exchange in question occurs in an industry where are employees also, a comparison readily occurs. It is in industries run entirely using independent contractors that difficulties for the courts emerge as they have no base to work from.

In such a scenario it may become meaningless to use classification by way of 'independent contractor' or 'employee' as the criteria for the application of employment protection law. In situations where superior bargaining power causes a worker to bear risk and provide capital without premium in return, existing employment protections should properly apply.[17]

Examination of the terms of the contract will indicate where risk in the arrangement resides. Risk may prove to be the initial 'litmus test' the courts use to rule in cases where each party to the exchange asserts a different kind of relationship, whether employer/employee or independent contractor.

3. Property Excluded from the Exchange

In any contract there are some promises that cannot be made. Attention to these is warranted before the examination of the working exchange is complete.

Parties' freedom to contract presupposes choice of what they choose to exchange. In an orthodox labour for wages contract a manual worker trades rights to his or her physical effort for a number of hours. However the worker cannot drop off the physical effort each morning and take the rest of him or her to the beach. When contracting out his or her effort, the whole package, so to speak, comes along too. But not all of it has been given up; the worker retains rights to his or her thoughts and to uses of his or her body not necessary for completion of the agreed task. Moreover the worker has not contracted to be subject to sexual or other discrimination or exploitative behaviour outside the relationship.

The Employment Contracts Act legislates that some rights may not be abused. Its personal grievance sections list unjustifiable dismissal, disadvantage, discrimination, sexual harassment and duress as grounds for legal redress.[18] Behaviour that breaches these provisions amounts to action that attempts to appropriate more to the relationship than was originally bargained. Under s 147 of the Employment Contracts Act parties may not contract out of its provisions.[19]

17 Employment protection law does not interfere with terms agreed by the parties involved, it merely provides a threshold of rights that society has deemed fit to provide.

18 Sections 27-42 Employment Contracts Act (ECA).

19 Section 147 ECA states that the Act shall have effect notwithstanding any provision to the contrary in any contract or agreement.

This indicates that despite the right to contract freely some agreements are contrary to public policy.[20]

In the case of dismissal the courts recognise the right of the employee to be provided with a substantive reason for the dismissal.[21] This necessitates proper investigation into the matter.[22] Investigation includes an opportunity for the worker to put a case in his or her defence. It has been said that the distinction between substantively and procedurally unjustified dismissal blurs in the final analysis because without a proper investigation, the employer can not know if the circumstances are such to warrant dismissal.[23]

In contracts of employment where one party attempts to act beyond the terms agreed the court will intervene, investigating and determining the matter. This indicates both a prohibition on either party attempting to appropriate "property" outside the bargain, and endorsement of expectations in a maturing society that safeguard each individual's integrity. Currently the remedies under the Employment Contracts Act are available only to those workers classified as employees.

IV: IDENTIFICATION OF A LABOUR CONTRACT

1. Historical Development

Presently the choice of judicial forum depends on the classification in law of the working relationship as either a independent contract or employer/employee contract.

The Employment Contracts Act gives circular definitions of "employee", "employer" and "employment contract".[24] An employee is a person of any age employed by an employer and includes a homeworker and person intending to work, and an employer is the person employing employees, including homeworkers. An employment contract is a contract of service, but includes a contract for services with a homeworker. The definitions do not attempt to identify the hallmarks of employee or employer. This is consistent with the perception that definitions may change with economic conditions. Rather than seeking a statutory definition which would require amendment whenever the economy moved on, Parliament appears to have left to the court the ongoing function of ensuring the Act is applied in line with its purpose. Accordingly, the policy of allowing access to a specialist court for workers who find themselves in a position of relative economic vulnerability remains the same.[25]

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20 For example, one may not contract to accept discrimination as prohibited by section 28 ECA.

21 *Auckland Local Authority Officers IUOW v Waitemata CC* [1980] ACJ 35.

22 *Hennessey v Auckland City Council* [1981] ACJ 213.

23 *Madden v New Zealand Railways Corporation* [1991] 2 ERNZ 690, 705 per Chief Judge Goddard.

24 Section 2 ECA.

25 Max Bradford, the Employment Contract Bill select committee chairman said that it would retain low cost, easy access by employers and employees to both the employment tribunal and employment court. He continued by stating that the bill's extension of personal grievance and disputes procedures to all employees whether covered by individual or collective agreements "is a very significant advance", and "will give substantial added protection in every work-place throughout New Zealand", (Hansard) 514 NZPD 1426 (23 April, 1991).

The courts are aware of the shifting nature of a contract of service.[26] The fact that legal tests come in and out of vogue is evidence of judicial appreciation of new realities. The courts have shown a readiness to look beyond superficial labels if they amount to attempts to circumvent responsibilities or obligations.[27]

The test used today to differentiate an independent contractor from an employee is one of mixed law and fact, determined by examining the terms of the contract between the parties and drawing the proper inferences from the specific facts.[28] This test has evolved over the last few decades. It incorporates various factors and tests considered by the courts to be useful aids in making their determination.[29] These factors are outlined below.

(a) The control test

The control test is the original test used to differentiate an independent contractor from an employee. It was applied in the 1924 case *Performing Right Society Ltd v Mitchell and Booker* [30] where the court held that control, although only one of several circumstances to be considered, was of vital importance. Twenty-two years later in *Short v J and W Henderson Ltd* the right to exercise control was held to be an important indicator that a worker was an independent contractor, whether or not the worker had actual control.[31] Less than a decade later emphasis moved to the possibility of control compared with the element of independence.[32]

In 1963 Megaw J, in *Amalgamated Engineering Union v Min of Pensions,*[33] said "[t]he nature of the control which is required in order to bring the employment within the scope of the contract of service varies almost infinitely with the general nature of the duties involved." It has also been said that the assumption that the master is superior to the servant in knowledge, skill and experience derives from a state of affairs where ownership of the means of production coincided with the possession of technical knowledge and skill.[34] The original control test was

26 Lord Denning in *Stevenson Jordan and Harrison v MacDonald and Evans* (1952) TLR 101, 111 said "it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies." The learned authors of Szakats, *Law of Employment* (3rd ed 1988) say at page 20 that the main problem arises from the difficulty of determining the criteria for the distinction and formulating them into a precise, watertight definition. In *Willy Scheidegger Swiss Typewriting School Ltd v Minister of Social Security* (1968) KIR 65, 70, Megaw J said "there is almost infinite variety in the types of contract in respect of which the question "employee or independent contractor" can arise."

27 *Inspector of Awards v Newlandia Industries Ltd* (1975) BA 5705 ICJ, and *Inspector of Awards v Colson* (1977) ICJ 209.

28 *Law of Employment*, supra at note 4, at 21.

29 Ibid, 22-34.

30 *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1KB 762, 767 per McCardie J.

31 (1946) 62 TLR 427, 429.

32 *Westall Richardson Ltd v Roulson* [1954] 1 WLR 905.

33 *Amalgamated Engineering Union v Min. of Pensions and National Insurance* [1963] 1 All ER 864, 871.

34 Sir Otto Kahn-Freund, *Servant and Independent Contractors* (1951) 14 MLR 504, 505.

appropriate when economic and social development caused relationships to exist on a certain level. But when progress made such relational forms as the Victorian master-servant type redundant, the test devised in that context was vitiated. The control test has consequently waned in importance.

(b) The integration test

In *Bank voor Handel En Scheepvaart NV v Slatford*,[35] Lord Denning said the test no longer relied on whether the worker submitted to orders, but depended on whether the person was part and parcel of the organisation. In *Stevenson Jordan*[36] his lordship used the "integration" test to distinguish the nature of contracts according to whether the worker was an accessory to, or integral part of, the business. This approach is criticised for the lack of definition given to "organisation" or "integration". The lack of definition allegedly allows certain applications of the test to cloak judicial discretion.[37]

(c) The multiple approach

In 1946 Lord Thankerton indicated that the employer's power to choose servants, his or her right to dismiss, and the method of payment were relevant considerations when differentiating independent contractors from employees.[38] A year later Lord Wright in the Privy Council indicated four factors were relevant; control, ownership of tools, opportunity for profit and risk of loss.[39] His Lordship noted however, that a decision with respect to one contract is of no real guidance in determining the classification of another except to the extent that it throws light on legal principles.[40] Lord Wright found the four-step test more appropriate to complex conditions prevailing in modern industry than one based on control. Further, his Lordship said some cases may be determined by raising the "crucial" question; whose business is it?[41]

A persuasive case is *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [42] in which MacKenna J said a contract of service exists where the servant agrees to provide personal service for a wage and be subject to a degree of control sufficient to make the other party the master.[43] A further consideration is whether the other provisions of the contract are consistent with a contract of service. The judge also said the provision by the worker of tools of a minor character may carry little weight. This can be compared with the

35 *Bank voor Handel En Scheepvaart NV v Slatford* [1952] 2 All ER 956, 971.
36 Supra at note 26, at 111.
37 Rideout, *Principles of Labour Law*, (3rd ed 1979), 8.
38 *Short v J & W Henderson Ltd* (1946) 62 TLR 427, 429 (HL).
39 *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161, 169.
40 Ibid, 168.
41 Ibid, 169.
42 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433.
43 Ibid, 39-40.

provision by the worker of plant and equipment on a large scale. In the latter case the real object of the contract is hireage of the plant, the worker's services to operate it being purely incidental.[44]

(d) The 'business on own account' approach

In 1968 Cooke J adopted the "business on own account" approach.[45] His Honour said control was an element, but should be considered in the whole context of the contract.[46] Factors to be considered should include whether the worker provides his or her own equipment, hires helpers, how much financial risk is undertaken, and how much responsibility the worker has for investment and management. The chance of profit is also relevant.

(e) The policy approach

In *US v Silk* Rutledge J considered that the balance in borderline cases should be cast in favour of coverage by the relevant legislation where coverage would fulfil the policy and purpose of the legislation. He stated: [47]

> [I]t can not be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation.

His Honour further stated in a following case "[t]he Act's ... applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications".[48] Where all the conditions of the relationship required protection, protection ought to be given.[49]

In *Young and Woods Ltd v West* [50] the United Kingdom Court of Appeal dismissed an employer's appeal against a finding that a worker who took a job as an independent contractor was in fact an employee for the purposes of the Employment Protection (Consolidation) Act 1978. Although the sheet-metal worker opted for independent contract status for financial reasons, his conditions were the same as employees of the company. Stephenson LJ said the parties' expressions must accord with the true nature of the facts. Where the parties have in fact chosen a certain kind of relationship which is covered by the Act they cannot resile from it. To hold otherwise is to allow them to contract out of the Act's coverage.

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44 Ibid, 445.

45 *Market Investigations Ltd v Min. of Social Security* [1968] 3 All ER 732.

46 Ibid, 738.

47 (1947) 331 US 707.

48 *NRLB v Hearst Publications, Inc* (1944) 322 US 111, 129.

49 *Lehigh Valley Coal Co v Yensavage*, 218 F 547, 552 (CCA 2d).

50 [1980] IRLR 201 (CA).

(f) Summary

The above survey indicates that courts have grappled with changing social and economic conditions and the changing organisational form of working relationships, attempting to ensure worker related statutes are applied to those situations intended to be covered by the legislature. Indicia used to define a relationship are those which in one or more cases have been found to coincide with a certain relationship. The indicia themselves do not constitute the nature of the relationship, they point to it. As such they constitute a checklist; a "shorthand" test that more accurately identifies the nature of the relationship entered is one based on economic reality.

2. A Proposed Future Approach - Economic Reality Test

An economic reality test would make work relations subject to employment law if workers occupy a certain economic position. The focus is on the economic position of the worker, rather than the set up of the working relationship, which has been adopted for commercial expediency. This approach would not derogate from the employer's ability to reorganise his or her business, but would retain employment law application where it was intended. The approach suggested marries the logic of the 'business on one's own account' test with an updated control element.

The courts have accepted the validity of business as a prime factor. In *Ready Mixed Concrete*[51] McKenna J said that a man does not cease to be in business on his own account because he agrees to run it efficiently or accept another's superintendence. While this approach is theoretically satisfying, it causes problems in practice. This is evident in cases where the contractor has no input into management and obeys work instructions, thereby losing the ability to profit or lose by his or her *own* judgement. The only uncertainty that the contractor undertakes in this position is that of an investor in a company, who profits according to his or her shareholding at the end of the financial year. A worker with a material investment in the enterprise is in a position no different from that of a traditional employee participating in a profit-sharing scheme. It is unlikely that a worker would invest in the company without some security of tenure.

If the contractor is able, as a matter of course, to transfer human and financial capital to other business opportunities, it is likely he or she is able to exploit those opportunities that he or she can identify. Mobility of investment therefore indicates the facility to operate in a dynamic marketplace subject to the uncertainty this entails. Conversely, capital locked into a single business enterprise, although not conclusive, is not indicative of economic independence. This is especially so if accompanied by lack of control in its use.

A contract endowing the employer with flexibility in the contractual arrangement, but not extending the same scope to the worker, points to an asymmetry in the economic spheres occupied by each. This asymmetrical position is further clarified by considering that, according to diminishing marginal utility

51 Supra at note 42, at 447.

theories, dollars accumulated earlier are valued more than later ones. If true, it follows that a worker just able to invest $10,000 in plant necessary for task performance values that investment more than another person, able to purchase ten such plant units, values any one of the ten. The first worker will therefore be more "attached" to his or her plant and more reliant on its earning stream. If this dependence is compounded by specificity of application of the plant, the worker is truly more dependent on that enterprise than an orthodox worker who at least can walk away from the job with no capital loss. To describe the dependent contractor in this situation as being in business on his or her own account either strains the natural understanding of "business on own account", or extends the phrase to encompass employees too.

The true business owner enjoys property rights over his or her investment, and as such can deal with it. It may be sold as a going concern and will fetch a sum for its material assets and a premium for the goodwill it has built up. Where the worker employs flair and innovation to participate in the marketplace, uses his or her human or financial capital, and accepts the uncertainty of prospects of profit and loss, the archetypical business person is found.

However, without control over his or her affairs, the worker cannot be said to be putting themself in a business position because without control there is no management. If there is no management there is no direction and without direction the worker who also invests is at best a passive investor more akin to a shareholder than business person.[52]

The discussion thus far indicates the blurring of the demarcation between orthodox independent contractors and employees. This development represents the emergence, in commerce, of the dependent contractor. The recognition in New Zealand law of this economic agent operating in the labour marketplace is overdue. The nature of the dependent contractor warrants his or her access to the machinery of the Employment Contracts Act. This may be facilitated by using the economic reality test to define an employee under the Act.

V: DEPENDENT CONTRACTORS IN NEW ZEALAND

In New Zealand, the position of the dependent contractor is suspended between orthodox employees, who have cheap and ready access to the Employment Contracts Act provisions, and relatively powerful commercial operators who have sufficient financial and information resources to enable access to the commercial court system.[53] If it is accepted that dependent contractors have essentially the same position in the labour marketplace as employees, they should have similar access to grievance remedies. There is therefore a systemic failure in the justice system as dependent contractors have no access to the specialist employment

52 Control in this sense fits well with jurisprudence developed to apportion vicarious liability to employers. Imposing vicarious liability allows for the full costs of the business to be borne by that business. It causes externalities of the business' operation to be internalised.

53 One may say that the "roving" independent contractor is also trapped in the same hiatus, however his or her position is not the central focus of this paper.

courts and recourse to the commercial courts is prohibitive. The effect is that where a substantively justifiable grievance is left unremedied, the costs involved are borne elsewhere in society.

Dependent contractors are currently categorised in the same grouping as conventional independent contractors, thanks, in large part, to the Court of Appeal's decision in *Cunningham v TNT Express Worldwide (NZ) Ltd.*[54]

1. *Cunningham v TNT* revisited

In *Cunningham and TNT* the full bench of the Court of Appeal held that a courier driver is an independent contractor and not covered by the Employment Contracts Act. The complainant therefore could not bring an action of unjustifiable dismissal in the employment courts. In reaching this decision the Court of Appeal overruled the decisions of both the Employment Tribunal and the Employment Court.

The contract at issue in the case was a carefully drawn standard form contract. Cooke P, as he then was, said in the leading judgment that when a contract is wholly in writing the case must turn on the true interpretation and effect of the contract's written terms. In dealing with this question of law the court should not regard control as the sole determining factor, but investigate whether the person was in business on his or her own account. Traversing the main features of the contract. His Honour noted that it gave the company very extensive control over the contractor, including an exclusive service agreement. In exchange, the contractor provided the vehicle, transport licence, insurance and was paid per trip, although the company guaranteed a minimum $2750 per month for ten months of the year, stating the guarantee did not apply in December and January. The contract allowed for termination of the agreement by either party on four weeks written notice. A company witness said that this clause was inserted in case of an industry downturn, and may therefore be known as the contract's redundancy provision.[55]

Cooke P placed weight on the fact that in his licence application to the Ministry of Transport, Mr Cunningham declared that he was the owner of the proposed courier service.[56] However, this assertion by Cunningham directly contradicted clause 6 of the contract which stated "[t]he contractor acknowledges that the Company is the owner of all the Courier services managed by it and that such services are now and shall remain the sole property of the Company".[57]

His Honour also put particular weight on the contractor's obligation to employ relief drivers.[58] However, the exercise of this duty was subject to the company's approval and had to involve the appointment of a relief driver familiar with the company's operational procedure. The burden for training a relief driver fell on the contractor.[59]

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54 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1993] 1 ERNZ 695.

55 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1992] 1 ERNZ 956, 963 (ET).

56 Supra at note 54, at 700, 703.

57 Ibid, 707.

58 Ibid, 703.

59 Ibid, 706, Clause 2(q) of the contract.

President Cooke said the risk of profit or loss in the company's business fell on the company, and in the contractor's business fell on the contractor.[60] However, it is submitted that the extensive control by the company over the operation of its courier service meant the only risk of loss to the contractor, assuming the guaranteed minimum monthly payment was sufficient to make ends meet, was in December and January when the guarantee did not apply. A company witness said that December was sufficiently busy for the guarantee to be redundant.[61]

Apart from the opportunity to minimise both wear and tear on the vehicle and tax liability, the courier drivers' scope for "profit" amounted to the opportunity to earn more by working faster. This differs in no way from piece rates paid to employees or commission payments. Indeed, the arrangement overall might easily be characterised as a retainer plus commission type agreement.

Clause 1 declared that the courier would conduct for the company a "courier service."[62] Notably, it did not describe them as courier services which, arguably, would have been more apt to describe a series of contracts. Courier *service* implies an ongoing, continuous relationship akin to that of an employee which, it is submitted, the rest of the contractual provisions reinforced. For example Clause 2(o),[63] prohibited the contractor from accumulating or selling any goodwill in the courier service. Contracts of carriage were between the company and its customers.[64]

Clause 7 said the relationship "is and shall be for all purposes that of independent contractor and neither this Agreement nor anything herein contained or implied shall constitute the relationship of employer and employee between the parties."[65] It is suggested that this clause amounts to an agreement to build and live in a castle but agree not to call the castle a castle. President Cooke acknowledges that a "mere label is in itself of little or no importance".[66] One must wonder however, if the outcome of the case would have been different if references to "contractor" were instead termed "provider of service(s)".[67]

Cooke P approved the reasoning of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions*.[68] where he held the owner-driver of a concrete mixing unit to be an independent contractor. MacKenna J identified three conditions to be fulfilled in order to find a contract of employment. First, the performance of personal service for remuneration. Second, this performance must be subject to control sufficient to make the other party a master and, finally, the other provisions in the contract should not be inconsistent with a contract of service.[69] Stressing the importance of the final condition, MacKenna J explained that some contracts involving the provision of both labour and plant might be

60 Ibid, 699.

61 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1992] 3 ERNZ 1030, 1047 (EC).

62 Supra at note 54, at 704.

63 Ibid, 706.

64 Ibid, 699.

65 Ibid, 707.

66 Ibid, 698.

67 Ibid, 715, the comment by Hardie Boys J is noted.

68 Supra at note 42.

69 Ibid, 440.

contracts for services, while others could be contracts of service. Each case depended on whether the essential part of performance was fulfilled by the worker or machine.[70] It seems therefore, a contract of service will exist where the worker's personal service is essential to the contract, and transport necessary for task performance is incidental. Conversely a contract for service will exist where the worker provides all the tools necessary for task performance.

The driver's personal service was essential to the contract in *Cunningham v TNT*. Applying MacKenna J's reasoning in *Ready Mixed Concrete* the contract could therefore be classified as a contract of service. Applying the same reasoning it is also arguable that because the car was essential for performance of the task the contract was one for service, the driver being incidental.[71] Both arguments are equally plausible. This analysis demonstrates that the application of MacKenna J's reasoning produces an inconclusive outcome in *Cunningham's* case.

Hardie Boys J stated in his judgment:

> Where persons wish to enter into a contract for services the Courts should not frustrate that wish by unswerving adherence to a test which looks to the effect of what they have agreed rather than to the purpose for which they agreed to it.

With respect, this is questionable. Even if left only to investigate the parties' intent, then either the contract successfully embodies this or it does not. If it does not, then the contract provisions themselves would have to be ignored, and thus the parties would be left with an intention that failed to transform itself into legally defined parameters, thus a non-contract. Apart from the view that the true intent may indeed most accurately be gleaned from the terms of the contract itself, his Honour's view would not seem to accept that it is possible for economic participants to seek to determine the terms of the relationship and *also* the legal classification.

The issue thus presented seems to be whether the parties' intent should be honoured if the nature of the agreement has characteristics of one type of arrangement but the parties wish it to be classified as another. As Casey J's comments indicate, a split personality is currently unacceptable. However, it is arguable, that such split personalities may not be contrary in principle to business practice if they amount to a reallocation of administrative/managerial tasks, such as tax collection/payment. It may be more difficult to enforce separate classifications for employment protection and vicarious liability. However, this was deemed feasible in *NLRB v Hearst Publications, Inc* :[72]

> Within a single jurisdiction a person who, for instance, is held to be an independent contractor for the purposes of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation.

70 Ibid.

71 The company wants parcels picked up and delivered within, say, sixty minutes, it is this task performance which is essential, and it may equally be completed in the Central Business District by a cyclist courier or conceivably by a runner. In these latter cases although the contract is primarily a contract of carriage, it is the result - parcel pick up and delivery - that is contracted for. The use of the car, cycle, or feet is incidental.

72 (1944) 322 US 111, per Rutledge J.

It was further said that intermediate contracts may exist whereby the incidents of employment may partly be characterised as independent contractor and partly employee in varying proportions of weight "[a]nd consequently, the legal pendulum, for purposes of applying the statute, may swing one way or the other depending on the weight of this balance and its relation to the special purpose at hand".[73]

2. Plugging the Gap - Targeting Exchange Asymmetry

An aspect of the relationship that calls for specialist employment law is that aspect that may be termed "exchange asymmetry." The asymmetry itself is not the rationale for legal intervention. Rather, the case for intervention is made out where exploitation of the asymmetry would otherwise allow a misfeasant in a relationship to escape accountability. That exploitation does occur is evidenced by the presence of provisions in the Employment Contracts Act dealing with personal grievances and figures indicating that approximately ninety percent of employment court and tribunal work is concerned with applications under those provisions.

The asymmetrical exchange argument relies on circumstances where what is exchanged is of relatively minor significance to one party, yet of major importance to the other.[74] For example, when a worker seeking a job in an environment of scarcity applies for the job, the outcome for him or her is relatively more crucial than it is for the potential employer. The asymmetry of position is a matter of economic reality and this article does not take the position that its presence is inherently "wrong" or "right". However, the worker's relative vulnerability does import to the interaction the potential for exploitation. A grievance surfaces if any asymmetrical vulnerability is exploited. An exploitation amounts to misappropriating elements to the relationship not originally exchanged.

Because of the potential impact on the worker on sudden termination of the contract, employment law now insists on termination being procedurally and substantively justified.[75] Dependent contractors operate in the same environment as employees.[76] Thus the existing economic and social asymmetries impact equally on them as on employees. It follows that any justification for access to personal grievance machinery that applies to employees applies equally to dependent contractors.

VI: IN FROM THE COLD - A FLOOR OF RIGHTS

Extending coverage of the Employment Contracts Act to include dependent contractors will harmonise commercial and legal responses to prevailing economic conditions. It will install a floor of rights for those economic agents for whom

73 Ibid, 126.

74 Reddy, *Money and Liberty in modern Europe: A Critique of Historical Understanding* (1987), 67.

75 For example, *Turner v Ogilvy and Mather (NZ) Ltd* [1995] 1 ERNZ 11.

76 Supra at note 61, at 1045.

there is currently no effective support. Extension would restore to dependent contractors the ability to enforce economic and social expectations due to them as participants in the market.

The extension, however, would not give these workers an advantage in dealing with employers. The personal grievance procedures ensure only that a dispute resolution avenue is open when standards of behaviour in the employment relationship are perceived to have been dishonoured. If the court or tribunal finds no validity in the claim it will be dismissed.

The approach in *Andrews v Parceline Express*[77] indicates a defacto acknowledgment of the hiatus. The lack of a floor of rights for dependent contractors may therefore be mitigated by the incremental extension of remedies. Indeed, commercial courts seem disposed towards incorporating ideas commonly found in the employment jurisdiction. For instance, in *Andrews* the Court of Appeal awarded a courier driver "distress damages" to compensate for the anxiety, distress and other mental consequences of breach of contract.[78] The court found that the circumstances had warranted a six month notice of termination.[79] The company had only given one months notice and was therefore in breach of contract. Tipping J justified the imposition of distress damages on two bases. First, as the termination notice was intended to give the worker "breathing space" in which to reorganise his affairs, its provision was analogous to those contracts, providing expressly or by necessary implication, for freedom from anxiety.[80] Second, although, following *Cunningham*, the contract was a contract for services:[81]

> Nevertheless the present contract was similar to an employment contract. It was the means by which Mr Andrews earned his living. It was the means by which Parceline obtained the human services it required. The common law is entitled to develop its principles and its approach to contemporary problems bearing in mind, and by analogy with, the way the Legislature has dealt with allied subjects.

The Court alluded to the principles of the Employment Contracts Act,[82] in particular s 40 which allows compensation for humiliation, loss of dignity, and injury to the feelings of the employee because of a personal grievance.

The *Andrews* decision appears to be a step toward extending to dependent contractors the kinds of protections presently available only to orthodox employees. However, the costs and delays involved by leaving this development to the common law indicate a preferable course is full inclusion of dependent contractors into the specialist employment court jurisdiction. Given the nonspecific definitions of employee and employer in the Employment Contracts Act, this inclusion can be implemented by defining an employee by reference to the updated economic reality test.

77 [1994] 2 ERNZ 385.
78 Ibid.
79 Ibid, 393.
80 Ibid, 397.
81 Ibid.
82 Ibid.

VII: CONCLUSION

Economic reorganisation designed to promote a flexible labour market has brought about the need to reassess attributes in the labour/capital interaction that may signal independent contractor or employee status. The old demarcation derives from the special context of historical circumstance. In *Cunningham*, Cooke P said courts should not shrink from legal development if a reconsideration of common law decisions show them to be untenable or unsatisfactory in principle, provided that the development is not contrary to legislative policy.[83] Although his Honour went on to find that such development was not then justified under either head,[84] it is hoped that the arguments in this article will cause reassessment of that view.

Freedom in the labour market liberates workers and employers to redistribute their obligations and accustomise their agreements to specific conditions in their industry. The terms found with respect to dependent contractors generally, and encountered in *Cunningham* specifically, amount to the reallocation of duties which nonetheless leaves the parties within the same economic region naturally inhabited by employee/employer. To hold that tax and tool obligations indicate independent contract status is to retain historical rationale that has become remote from present culture.

The ability to respond to issues placed before it safeguards the law's relevance. The arguments presented indicate that employment law has failed to keep pace with the emergence of the dependent contractor. The revamped economic reality test suggested, focuses on risk, premium, and managerial control to better identify the nature of working relationships.

Labour/capital participants define the scope of their bargain subject to constraints imposed by society. The Employment Contracts Act further moulds these expectations. In arms length commercial transactions, contract law is able to regulate agreements. In those transactions, participants are presumed to be able to marshal economic and legal resources sufficient to ensure the terms of the original promise are honoured. The labour/capital exchange is at the nexus of private and public life. As such it impacts directly on both the economic vitality of the nation, and the physical, emotional and economic welfare of the people dealing with each other. Consequently, it occupies a position where both social and economic factors are expressly taken into account.[85]

83 Supra at note 54, at 703.

84 Ibid.

85 For example, provisions regarding freedom of association(Part I), bargaining (Part II), personal grievances (Part III), and strikes/lockouts (Part V).

To withhold from dependent contractors the opportunity to share in this social development is to erect barriers that can effectively exclude them from their share of the social dividend when employees and employers each have access to it. Refusing dependent contractors recognition of their unique place in developing economic organisation is to shut them out in the cold where they are subject to increasing financial obligations without the comfort of consideration for their contribution to the economy.[86]

86 Prior to publication the Court of Appeal delivered its judgment in *Cashman & Ors v Central Regional Health Authority* (CA 34/96, 26 August 1996, Blanchard J). While this case essentially turned on the meaning of "homeworkers" within s 2 ECA, it is clear that the same reasoning would apply to dependent contractors. Dependent contractors are vulnerable to exploitation because of isolation and inequality of bargaining power. Where exploitation does occur, access to the personal grievance and dispute resolution procedures of the ECA will provide relief.

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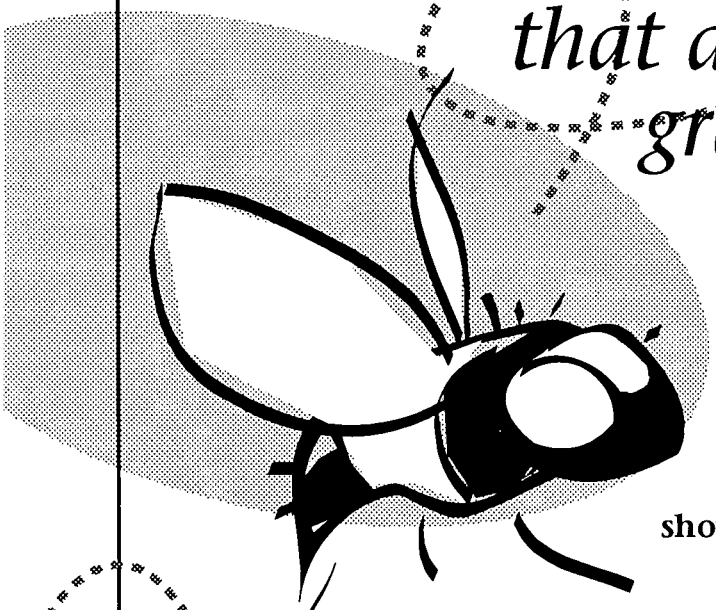

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