VALEDICTORY SITTING TO MARK THE RETIREMENT OF HIS HONOUR CHIEF JUDGE GL COLGAN

SPEECHES

EMPLOYMENT COURT AUCKLAND
COURTROOM 2.01
4 PM FRIDAY 7 JULY 2017

JUDGE CHRISTINA INGLIS
on behalf of the Employment Court

E ngā mana, e ngā reo tēnā koutou katoa.
Tēnā koutou kua huihui mai nei i runga
i te kaupapa whakahirahira o te ra.
Ka nui te mihi ki a koutou, me ō koutou whānau
kua hui mai nei.
No reira, tēnā koutou, tēnā koutou,
tēnā koutou katoa.

Welcome, everyone, to this very special occasion. We are here to pay tribute to the Chief Judge and to acknowledge his many years of service on the Employment Court. While the Chief Judge, with his usual modesty, suggested that our smaller courtroom might be large enough for this occasion – perhaps even the filing room he suggested at one point – the fact that we are bulging at the seams in courtroom number 1 is testament to the high regard in which he is held and the connections he has made and maintained during his time in legal practice and on the Bench.

Welcome to members of the judiciary from all courts who are here today, both sitting and retired, to Members of the Employment Relations Authority, the raft of practitioners who have had the pleasure of appearing before his Honour over the years, to the academics and retired academics, Court and Ministry staff and officials, friends and colleagues of the Chief Judge. Many have travelled a great distance to be here today and many would have wished to have been here but have not been able to make it, including the Chief Justice who offers her apologies and best wishes for this occasion.

I particularly want to welcome the Colgan clan, family members who have plainly played a pivotal role in keeping his Honour's judicial feet firmly on the ground: his wife Philippa, his children Emily, Andrew, Tim and Annie, their partners, his grandchildren, other family members and friends – welcome. The Judges of the Employment Court appreciate the fact that you have lent the Chief Judge to the Court, and to the public service, for so many years. We know that it has significantly

diminished the amount of time you have had with him. We know that because we have received the emails from him, sent out in the middle of the night, while he was meant to be on holiday, from various far flung locations around the globe - dingy internet cafes, the tropical rainforests of Malaysia, the back roads of Rajastan and innumerable airport lounges in between. Such dedicated and committed service to the Court and those who use it has, of course, come at a personal cost - not just to the Chief Judge but to his family, which the Employment Court Judges wish to publicly acknowledge.

Those of us who have been lucky enough to have been colleagues of the Chief Judge know what a tireless work horse he is. Research reveals the following statistics: He has delivered over 1,615 substantive judgments in his time on the Employment Court (including 116 while a Judge of the Labour Court); 38 per cent of his judgments have been reported; he has delivered 50 full Court judgments and presided over many more full Court hearings on important issues of law affecting a significant proportion of the population. He has delivered 42 published papers and speeches, including on weighty issues such as the role of the Courts and lawyers in the 21st century, collective bargaining, good faith obligations, and access to justice in this specialist jurisdiction. The Chief Judge has assisted countless parties to reach seemingly impossible resolution via judicial settlement conferences and has been instrumental in resolving many more before they reach the courtroom door. …

The Chief Judge's impressive contribution to the law emerges not only from the pages of the Law Reports but from his out-of-court educational activities, engaging with practitioners and students, discussing employment law and the employment institutions in a way that is readily digestible. I also wish to acknowledge his quiet behind-the-scenes work in promoting issues of equality and diversity across the spectrum, including of women who practise in this area of the law. I, along with many others, have appreciated the quiet ongoing encouragement and support he has gone out of his way to give.

The Chief Judge is always respectful of other people's views and engages constructively, making it a pleasure to sit on full Courts with him. His patience is absolutely legendary. He has never been heard to snap, raise his voice or deal with

colleagues, court staff or those appearing before him in anything other than a courteous way. …

One of the Chief Judge's defining characteristics (of which there are many) has been the influence he has brought to bear in keeping industrial relations on a lawful track, but his reach has extended like the tentacles of an octopus to virtually every corner of this jurisdiction's reach. I say "virtually every corner"; there is one particular area of the law which mysteriously appears not to have featured quite so visibly in his Honour's jurisprudence and that is litigation involving the Holidays Act.

The Chief Judge will be remembered by his judicial colleagues for his careful development of the law in a way that harmonises with the underlying objectives of the legislation; his enviable ability to take a drone-like approach, surveying the legal landscape from a height and pulling disparate threads together, summarising where the law has got to and where it should go; his deep understanding of broad legal principles and the way they interconnect across jurisdictions; his insight into human nature and all of its frailties; the compassionate way he deals with vulnerable people; his strong principles, kindness and generosity of spirit; his judicial bravery in an area of law which is difficult and fraught with differing philosophical perspectives; his intellectual capacity; and his wonderful sense of humour. …

Chief Judge Colgan, you depart with the sincere best wishes and respect of your colleagues on the Bench. You leave behind an enduring legacy which you and your family will no doubt be rightly proud of.

Nga mihi nui.

MR AARON MARTIN, DEPUTY SOLICITOR-GENERAL
on behalf of the Attorney-General

E nga kaiwhakawa o te Kōti Take ā-mahi o Aotearoa, tena koutou.
(Greetings to the Judges of the Employment Court of New Zealand.)

E te kaiwhakawāh or te Kōrti Take āh-mahi, tēna koe.
E nga kaiwhakawāh, tēna koutou.
(May it please the Court, may it please your Honour.)

It is a great privilege to speak today on behalf of the Attorney-General at your Honour's final sitting. The privilege is mine only because the Attorney-General and the Solicitor-General are unable to be here and they have both asked me to convey their regrets at not being able to attend themselves. The Attorney-General wanted me to specifically acknowledge, firstly, the role played by this Court and its vital importance, particularly in light of the issues it has dealt with; and, secondly, your Honour's profound contribution to this country as a Judge for over quarter of a century. You are one of our longest serving Judges in history.

Your Honour, I appear as one who has taken the Queen's Shilling. In fact I have it here. It's small - but it's relevant. This one is doubly good I think because it has two heads on it and that is apparently due to some cheat interfering with it rather than any problem down at the Royal Mint, but it's an especially lucky coin as long as you always call "heads". In other words, it's rigged. But your Honour could be relied on to spot it for what it is. I'm not proposing to produce it Ma'am; I'll put it over here.

The Queen's Shilling was originally given to press-ganged sailors. Crown employment may not be perfect but it has undergone continuous improvement over time. Cases about public employment can often have a slightly different character to other cases. They sometimes touch on the slightly different character to other cases. They sometimes touch on the exercise of public functions or raise questions about the public's confidence in government, and over the last 28 years your Honour has been well placed to see this. You have presided in cases about special kinds of

employment that come with special privileges and challenges: police officers, corrections officers, teachers, nurses, a court registrar, an employment mediator. You have found that the Court has the power to direct a special advocate procedure where classified security information was involved. The State Sector Act turns 30 this year and it is easy to forget how much government has changed in that time. But it is right that those of us who take the Queen's Shilling should continue to hold ourselves to high standards and that we should expect the Court to hold us to those same high standards: not that we will always achieve them, and there may be good human reasons why we sometimes fail, but neither should the standards to which officials subscribe be merely aspirational. It is in the nature of public service that the public has a direct and abiding interest in the way public servants go about their work and perform their duties, be those the duties of a public employer or of a public employee.

Your Honour was appointed a judge of the then Labour Court in 1989 at the age of 35, the youngest judge to be appointed to the specialist employment courts. The Labour Court had only been in existence since 1987, so you were there almost from its inception. You then saw the transition from the Labour Court under the Labour Relations Act to the Employment Court under the Employment Contracts Act in 1991. After 18 years of service on the Labour and Employment Courts, you were appointed Chief Judge in 2005. You have dealt with difficult discrimination cases, personal grievances, unjustified dismissals and cases of worker exploitation.

Service is a dominant theme in your Honour's career. You had a hand in the establishment of the first community law centre in New Zealand at Manukau in 1975, foreseeing the opportunity to make the law more accessible to communities. For two years you chaired a Ministerial Educational Development Initiative in East Auckland. In 2004 you volunteered as an adviser and instructor at the Royal School for Judges and Prosecutors in Phnom Penh.

As a Judge, there have been the cases the public will remember – cases, sometimes high profile ones, affecting ordinary New Zealanders. And then there have been the cases that will form your lasting legacy in the eyes of lawyers, the cases which might not have made the headlines but which steadily and judiciously developed and clarified the law. You said in your address to Judge Inglis on her appointment in

2011 that popularity is not in the job description of an Employment Court Judge. I respectfully suggest it has no place in the job description of any judge, nor should it have. Independence, wisdom and fairness are the hallmarks of a great judge, not the headlines written about a judgment or, dare I say it, how many Facebook friends the judge may have. I have, however, had the pleasure of appearing before your Honour and you are known for your good humour, fairness and courtesy towards counsel. One Crown counsel who appeared before you tells me he particularly appreciated those qualities during a hearing lasting eight days in a courtroom with no air-conditioning.

I want to conclude by saying something that perhaps is not said often enough these days. On behalf of the Attorney-General and the New Zealand Government, thank you for your service sir. We all wish you the very best for your retirement.

No reira, kia kaha, kia toa, kia manawanui
(In conclusion, be strong, be courageous, be steadfast)

MS KATHRYN BECK
on behalf of the New Zealand Law Society, the New Zealand Bar Association and the Auckland District Law Society

May it please the Court

Tena koe Judge Colgan

May it please your Honour, and your Honours, greetings to you all. A special greeting to you your Honour Chief Judge Colgan, and I bring you many greetings as you will appreciate from many organisations.

Your Honour it is a privilege to convey to you the best wishes and gratitude on behalf of the entire profession, the Auckland District Law Society, the New Zealand Bar Association and the New Zealand Law Society. I have also had a late text in this modern age from Judge McIlraith who had hoped to be here but his trial has run over.

Your Honour graduated with Honours from the University of Auckland and was admitted to the Bar in 1976. You practised as a staff solicitor and a partner at Haigh Charters, which then became Haigh Lyon, in Auckland in the areas of criminal, family, civil, civil litigation and of course employment law. In 1987 your Honour joined the independent bar at Southern Cross Chambers and some of those people are here today. Your appointment to the Labour Court followed quickly in 1989, followed by the Employment Court in 1991. You were a regular guest lecturer at both Auckland and Waikato Universities from 1998 to 2002 and your appointment as Chief Judge of this Court came in May 2005, taking over from his Honour Chief Judge Goddard.

Preparing this address was daunting. The esteem in which you are held by the profession and the many things you have achieved and have done for the profession and the wider public made it difficult to commend your achievements in a short time, but I will try to do so.

Your Honour has always been a high achiever. I believe you still remain our youngest appointee to the specialist employment courts since they were established in 1894. You may also be the only member of this Bench, notwithstanding her Honour's peerage, to hold a peerage. I understand that early in your career you were known as Lord Squirrel, a title conveyed on you by the late John Haigh QC as a result of your very sensible manner of dealing with your arguably less than minimum age at Haigh Charters at the time. This was also, I am told, because you had gradually collected all of the materials for your house build at the time and had them stored under your parents-in-law's house until you had enough to pay for the builder. I'm not sure how long you held that title sir, but memories are long in the law and in the absence of the irrepressible and very irreverent Mr Haigh, I felt sure that it was something he would want you to be reminded of today.

Your generosity to the profession, both here and internationally, is well-known. You have always been someone who is concerned about access to justice for those with un-met legal needs, and you have undertaken significant work in this area: my friend talked about some of that earlier.

Your Honour was also a former Chair of the Employment Law Standing Committee of Lawasia. You have always been generous with your time to attend events and to chair conferences. We know you have always been very supportive of continuing education and have supported many conferences run by ADLS and New Zealand Law Society CLE including our regular Employment Conferences. I am not going to talk about your forays onto the dance floor your Honour; you can relax.

I believe you have presented at almost all of those conferences and the 2006 Employment Law Colgie Awards were named in your honour. We are also very grateful for the many webinars and seminars you have presented and been involved in that fell between the biennial conferences, and sir you need not think that your retirement from this Bench will stop us approaching you for more assistance.

You and Judge Travis, as sitting Judges, also took the innovative step of teaching the Employment Law Masters paper for a few years in the early 2000s. I have to say sir that does seem a relatively extreme way of addressing a perceived knowledge gap in

those who appeared in front of you but those who were taught by you on that course considered the experience invaluable. I am told that you and Judge Travis were extraordinarily generous and open in your sharing of your own personal experiences and insights and imbued your classes with an enthusiasm that was contagious. Those who participated felt that they were part of something very special.

When I asked a colleague about what they appreciated most about your Honour's time as Chief Judge, they said you deeply care about your position and role and have always been considerate and welcoming, and encouraging to new practitioners in particular. You, sir, are the utmost professional, never flustered, cool and calm, even over the most tedious circular arguments. You bring out the best in those petrified wee souls who appear before this Court for the first time. You make them comfortable enough to put aside their terror and encourage them to deliver their arguments in the clearest and best possible manner. Being questioned by a Judge is a frightening experience and yet while always respecting the solemnity of the Court, you manage to ask your questions and draw out information in a non-confrontational way that relaxes them, and relaxes indeed all practitioners, sometimes to our detriment. This wonderful manner with those who are nervous and unsure is perhaps why a number of practitioners would hopefully suggest that I mention in this address that perhaps mediation could be the second career that you contemplated when taking on this role 28 years ago. They really do not want to lose you from the employment law area.

Other practitioners have described you as thoughtful, considerate and very personable. They talked about the many dinners they had attended with you, how down to earth and approachable you were at these events and how they hoped very much that you would continue to join with the employment Bar. It is your humanity and approachability that gets the most mention when your Honour is discussed. People are important to you and you have always ensured that the people are not forgotten in the operation of this Court. You have made sure that this Court has not just paid lip service to having justice done locally and this has made a difference to many people who may not have otherwise been able to attend the hearings that so directly affected them in their lives.

You have always been willing to sit outside of the large centres in small towns, using whatever premises are available including licensed premises on an occasion. This has also enabled your Honour to feed your addiction for site visits. We have noted, sir, as counsel, the alacrity with which you have volunteered to visit factories, ports, meat and seafood processing plants and pulp mills but I'm sure the list could go on. Perhaps this was also part of your second career investigation or perhaps it was because you wanted to see what the case was really about and understand the true impact of any decision you would make on the people that would be feeling it.

When we approached not just the profession but also some on this Bench and asked what they thought were the most significant cases you had presided over, we found it nearly impossible to narrow it down. Your Honour's influence over all spheres of employment law has been pervasive and quite remarkable – not surprising after 28 years on the Bench but frankly, sir, not very helpful for today's purposes. One of your colleagues has said "It is virtually impossible to isolate anything in particular. The reality is that his name pops up routinely in terms of most cited and most hit upon" - I'm assured sir that that's in a judicial sense only – "and we simply cannot research an important question of law without reading several lead judgments he has penned on subjects as diverse as unjustified dismissal for redundancy to collective bargaining, restraints of trade to mediation, confidentiality to drug testing" (one of my favourites), and so it goes on and on and on. Your colleague said it best: You have been at the forefront of judicial analysis of the majority of legislative amendments during the years you have been a Judge of this Court. And I agree that this is indeed where your Honour has made one of your most valuable contributions. You have an ability to clearly express changes in the law in a way that others can understand.

In *Angus v Ports of Auckland* your Honour brought a halt to the confusion that reigned around the wording of s 103A that was the test for justification for dismissal, bringing clarity to the very fine distinction between 'would' and 'could'. Your judgment was expressed clearly and has brought certainty to what is perhaps the most important area of employment law for ordinary New Zealanders – dismissals. In that case your adoption of counsel's topical Rugby World Cup analogy, dealing with whether the French 'could' have or 'would' have won the Final also demonstrated your underlying and always welcome sense of humour, an analogy sir that feels very

relevant today, or tomorrow in particular. Also, nobody knew what a modal auxiliary verb was before that case and so we have also all been enlightened in that respect.

In *Gilbert v The Attorney-General* your Honour distilled a very complex case into a readily understandable judgment which still provides guidance to practitioners, particularly in the evolving area of workplace stress. Your Honour also dealt in that judgment with complex damages issues without losing sight of the human consequences to Mr Gilbert of his employer's actions. You have never shied away, apparently other than in Holidays Act cases, from taking on difficult and potentially unpopular cases on this Bench, something you started in your career and have held true to throughout.

We are sorry to see you go from this role but you take with you our fullest respect and gratitude and we wish you all the very best for the future.

May it please the Court

MR PETER CRANNEY
on behalf of the New Zealand Council of Trade Unions

If the Court pleases

I do not intend to repeat anything which has already been said which I know will endear me to all the Judges who are here. But, sir, I do wish to disclose my motive in being here and I think everybody here will agree, and that is essentially that once these four speeches have been delivered, they will be so praise-worthy of your Honour that you will tell us that you have changed your mind and decided to stay, as David Lange once did. And sir, if you do, I will guarantee in front of all of these people I will address you as "Your Majesty" for as long as you require it.

Sir I do wish to acknowledge the presence of your family here today. The one particular case you may remember was a case involving 16 matrons who were asking to be paid for sleepovers and after the judgment at least three of them independently asked me "Does he have a wife?" and I was very pleased to be able to give that information to them. And, sir, another recent case involving a bus driver – I remember being in a licensed establishment with the gentleman in Invercargill and he was saying to his bus driver colleagues that "the wisdom of this man just shone out of him from the Bench and every move that he made you could see he was a wise man." But of course this was said after the judgment. He went on to say, sir, "I can fully understand" he said "why they call him the Chief Judge".

Your Honour this is an important and historical occasion for both yourself and for this Court and you will be very sorely missed by everybody in this room. I wish to make that it clear that while I'm here to talk on behalf of the CTU I do take some licence to make some comment about the profession, the legal profession, as well.

You are greatly respected, sir, by lawyers who have appeared in front of you. I want to endorse what has been said by other speakers and that is that you have been a patient and respectful Judge, not only to the workers and employers who have

appeared here but, perhaps more praiseworthy, to lawyers, and we are not an easy bunch to deal with. It is very difficult for any of us to remember, as other people have said, a difficult or harsh word that has come from you to us as representatives. I would like to say that that is a hallmark of this Court and that it is one of the contributions you have made to the culture of this Court which is greatly appreciated by the people who appear here.

Sir, the New Zealand Council of Trade Unions has asked me to bring you the greetings of the unions who are affiliated to it and the greetings of many ordinary workers who you have affected profoundly in your leadership of this Court. The CTU has always enjoyed a cordial relationship with the Chief Judge of this Court including yourself sir. You were well-known to two of the finest members in the trade union movement, Helen Kelly and Peter Conway, both of whom we lost in the last couple of years, and the union movement would like to keep its relationship with you and would like to form relationships that have existed in the past and continue those with the other Judges.

This Court, as other speakers have said, is a place of vital importance in New Zealand society. And you, sir, have never wavered from the obligation imposed by your office to do justice without fear or favour and this place is, as a result of your leadership, a robust and solid bastion of the rule of law. As we all know there are pressures. Workers' rights are fragile. Workers' rights can easily be dismantled and when they are, the consequences are very serious for societies who go down that path. This particular institution is crucial in New Zealand to prevent that from happening.

I say, sir, to your family and friends and to everybody here, you are a popular Judge and you are popular amongst lawyers and litigants and everyone who has dealt with you. It is, sir, common, as the speaker from the Government has done today, to thank you for your service to the New Zealand State and to the New Zealand Government. My brief is wider and to say to you that we appreciate your service to the people of the country. It has been very important and has had a very significant impact on the way in which this country has developed. Your Honour there are many – I would say tens but perhaps coming to hundreds of thousands of people – who have been affected by decisions made by this Court. There are many workers who have come here,

either represented by others or on their own, and I am talking about ordinary workers, carers of disabled people, ordinary factory workers, mussel openers, bus drivers, truck drivers, meat workers, seafarers, wharfies, carers for the sick, carers for the aged, and many other groups. Some of the decisions of this Court under your leadership have had a profound effect on achieving greater equality in the country and that is a requirement I think of the statute itself which refers in s 3 of the Act to the need to address the inherent inequality that workers suffer in the country, and this Court has been loyal to that statute and to that provision and to the human rights instruments which are referred to there.

One - and many other lawyers here will agree with me on this – thing that we often do in appearing before Judges is we often appear on judicial conference calls and I have had many of these as many other lawyers have had. You would always begin the call by saying to people, to the competing lawyers who are present, "Thank you for making yourselves available" which we consider to be a courtesy extended to us in the way in which this Court has dealt with the lawyers. So, sir, what I will say to you is we support fully your successor. She has big shoes to fill and she will fill them. We say to you, sir, that we will miss you and we want to wish you well and we want to thank you for making yourself available to us as a servant of the people of this country.

If the Court pleases

MR KIRK HOPE
on behalf of Business New Zealand Inc

May it please the Court

Ms Beck spoke of your generosity in dealing with petrified wee souls appearing for the first time, so I just ask your indulgence. In these few remarks Business New Zealand would like to recognise your service and farewell you from the Bench of the Employment Court. Business New Zealand is the largest and possibly the best known of New Zealand's employer organisations and as such, we wear, as does our counterpart Council of Trade Unions, a mantle that transcends the simple servicing of members' day-to-day needs. This mantle manifests itself in a variety of ways: public commentary on government policy; membership of task groups and review teams that look at government policy; working with industry and sector groups on honing the messages they want presented to government; and, perhaps most importantly, working with and advising government on the construction and operation of the rules that govern the behaviour of people in government and enterprise in whatever they are engaged.

Not least of our involvement is with employment law. Not just is it in members' interests but in the interests of all New Zealanders as well. We are a strong advocate for fair and readily applicable employment law. And it is in the Employment Court where our expectations of fairness and simplicity are met. The Court's judgments represent the interface between law and business and it goes without saying that Business New Zealand has an ongoing interest in both. We have had a long and enjoyable association with the Court. There may have been the occasional exasperated sigh when a decision was less than we were hoping for, but we know that the Employment Court strikes a consistent balance between fact and law, rules and reality.

The judgments are not necessarily just decisions for sparring partners. They are also a key vehicle for guiding future behaviour and here you have been a longstanding and

well respected contributor. Your decisions have not only been balanced and informative; they have, on many occasions, also exemplified the need to provide not just a decision to the litigants but education and guidance to the wider community.

It is not only in the formal sense that the Court is helpful; over the years we have also appreciated - and we are sure that this will continue to happen – the Court's willingness to step away from the Bench to discuss, in a less formal setting, the matters confronting it and the messages that businesses should heed. This is something in which you have always been a willing participant, enabling broader issues to be debated informally in a way that is informative to all.

We know that sitting on an Employment Court Bench is not an easy task. What the Court can be asked to consider is often fraught with emotion, a smattering of ideology, and even a little theatre. In the majority of cases of course it is likely that these will all be red herrings and it is fair to say they have not been something that you have allowed yourself to be distracted by. Indeed, on many occasions your ability to cut to the chase has had uninformed observers wondering about the connection between impassioned submission and evidence, and the surgical, albeit usually without anesthetic, treatment of the matters at hand, though those of us closer to the process have always known.

Today's world is more complex than it was when you first sat on this Bench. Now it is harder to manage without mishap, given the increasingly complex mix of commercial and social regulation and policy. For that reason, sensible people don't – or don't usually – make significant decisions without first seeking wise counsel. But it is not just lawyers and other often expensive advisers who provide that counsel. Wise counsel is also free from the Court in the form of case law. That makes the Court as much a valued adviser as any other source, perhaps rather more so. And it is the Judges on the Bench of this Court who provide the advice, and on their advice we will continue to rely. But at the same time we will both miss and remember with affection the expertise and style that was uniquely Chief Judge Colgan. We wish you a long and happy retirement.

CHIEF JUDGE COLGAN

E ngā mana, e ngā reo, e ngā waka, e ngā hau e wha o te mutu, nau mai, piki mai, haere mai. Haere mai ki te Koti Take a Mahi. Kei te mihi nui ki a koutou katoa.

Thank you. In addition to family and friends who have been welcomed, I would add to that list my sister Julia and her husband Tom, and the person that I refer to as my favourite mother-in-law, Joan Curtis.

I appreciate very much you all coming here today. I think there are even some people from Hamilton and Wellington and Nelson and I can only suspect you've lost your way going to another function. I wondered first whether such an amazing turnout in numbers might be attributable to the attraction of afternoon tea but I soon came to realise that you were here to ensure that I am really leaving the Bench. And, as someone adverted to a moment ago – and I had thought about this a couple of days ago – I am tempted to say what David Lange said at a joint press conference with Geoffrey Palmer as the then Prime Minister was about to retire. He turned to his successor and said "Geoffrey, I've changed my mind!". So, Christina…. I haven't changed my mind.

I want to thank the speakers and I'll go in reverse order which leaves my last remarks addressed to my colleague.

Mr Hope, welcome to the Employment Court. I am not sure but I suspect you may not have been here much, if ever at all. You are of course welcome in your relatively new role as Chief Executive. I'm sure you're not a wee soul and this remark applies equally to the Council of Trade Unions. Both organisations are of great value to the Court as interveners. You provide the necessary broad perspective of the interpretation and application of new law beyond the immediate parties. It is a unique feature of this Court that I hope will continue, and that includes of course, at ceremonial sittings such as this, that your two organisations have rights of audience.

Mr Cranney, thank you for your remarks. I was a little worried to hear that several of those matrons from the Hawke's Bay school wondered if I were married. One of the

very memorable things about that case is the longevity of the matrons. At least one was in her 80s and they were loyal servants but I'm not sure what that says about inquiries about my marital status.

Ms Beck, thank you for your kind remarks. We go back a long way. You talked about filling a knowledge gap at Auckland University. I suspect not in Barrie Travis's case of course, but in my case, undertaking that course was to fill my own knowledge gap. That was rather like being on the Faculty of the Litigation Skills course as I was in the early days. At no cost to myself, that enabled me to be upskilled in the guise of helping others to do likewise. You talked about, I think, the ultimate relaxant. I have to confess that the Holidays Act is the ultimate relaxant. It's good for insomnia and you are not wrong that I have been able to delegate when Holidays Act cases have come along.

Mr Martin, thank you for your kind remarks on behalf of the Attorney. I would be pleased if you would convey to the Attorney the thanks and the respect in which I and my colleagues have held him in a very professional and supportive relationship over his last eight years as Attorney-General. You have also rumbled us on the role of coins although the coins here are separately-headed. It is the way of course that we decide cases - I have to confess to that.

Now to Her Honour whom I want to congratulate formally and publicly on her appointment as my successor. I was very pleased upon learning of that announcement and I am sure that you will all be very well served – indeed better served – by a new Chief Judge.

I want to reflect briefly on my experiences over my time on the Court. Penultimately I want to focus on some areas which I think we, as practitioners, can do better in employment law. Finally, I will share some thoughts about this institution and its future.

First, there are a list of people and organisations (that I'll run through quickly) whom I should acknowledge: practitioners of course who are represented here; the Universities and their Law Schools - Auckland, Waikato and AUTU; the Employment

Law Institute of New Zealand; the Council of Trade Unions and Business New Zealand; the Chief and Members of the Employment Relations Authority, many of whom are here; the court staff – I was going to say in Auckland but I was very pleasantly surprised that the Wellington court staff, all four of them, were able to join us today and are here with us. I want to pay particular tribute to my Assistant for the last 23 years, Barbara Sokolich. You will probably all have had dealings with Barbara as she has managed things on my behalf. Before Barbara had children, she was the Associate to Justice Ian Barker in the High Court so her court experience goes back even further than with me. I have been the beneficiary of 23 years of loyal and very helpful service from Barbara and she's staying on with my successor. So, I wanted to acknowledge you Barbara. As some say of twins, the other finishes the first's sentences. Barbara literally finishes my sentences; she's so used to knowing what I'm going to say that she's able to type it up before I say it.

I want to acknowledge my colleagues and former colleagues, not only on the Bench here with me, but those in our Chambers on this level, the Judges of the Environment Court and the Environment Court Commissioners with whom we have, for the last five or so years, shared a very pleasant collegial relationship although our Courts are quite different.

I want to acknowledge the Auckland District and New Zealand Law Societies, their branches and their Employment Law Committees. And finally – and I've told the Chief Justice I'm going to do this although it may be unusual – I want to acknowledge the Judges of the Court of Appeal and the Supreme Court. I think over the period of my being at the helm of the Employment Court we have established respectful and collegial relations between both of those Courts and the Employment Court and I am very grateful to the members of those Courts, the Court of Appeal and Supreme Court, and to the Presidents and the Chief Justice, for their part in that.

Reflecting briefly on my last 28 years on the Bench, one of the most remarkable things is the Court's stability, at least in the early days. In the first six months of 1989 there were three new appointments to the Employment Court Bench. I was the last of those but I was also then the last Judge to be appointed for 10 years. I was the junior Judge of the Court from 1989 to 1999. Whether that high level of stability was or was

not healthy for the development of the law is for others to judge, but I am pleased that there is now much greater frequency of turnover on the Bench.

I have been called many things, most of which I suspect have not been in my hearing, and sometimes counsel who have been appointed to this Bench have quietly told me and confirmed that I have been called different things. Two of my more memorable titles I will share with you and Ms Beck has already adverted to the first. A rather nervous court taker, on opening the courtroom door, intoned "Silence, all stand for His Majesty the Queen's Judge". I resisted a royal wave and speaking in the first-person plural. The second of the titles bestowed on me was from a witness who had formerly been a London police officer and insisted on addressing me as "My Lord". I won't guess at other sobriquets but nothing would surprise me and all may have a degree of justification.

I have sat – I counted the other day – in 23 cities and towns from Kaikohe in the North to Invercargill in the South, New Plymouth in the West to Gisborne in the East, and included among those are such salubrious locations as Marton and Gore in each island. It puzzles me still why I have never sat on the South Island's West Coast, nor in Palmerston North. There must be something to account for that absence from those significant places. I have sat in venues from the historic number 1 courtroom in Dunedin (which is now being restored to its former glory) to an ambulance hall in Whangarei. The ambulance hall in Whangarei contains, very near to what was used as the bench, a training skeleton in a cupboard, which was somewhat disconcerting between the sounds of landing and taking-off emergency helicopters outside. And, of course, we have sat in motel conference rooms. I think I am the last Judge of the Employment Court to have sat fully wigged and gowned in all cases until the early 1990s and I am the last Judge to have sat with Panel Members who were part of the Court from 1896 to 1990. I suppose I am the last of the dinosaurs from the 1980s and 1990s.

Some cases have been more memorable than others but I acknowledge that they have all been important for those involved as parties and witnesses. I hadn't done the statistics as you have, Judge, but it sounds like a heck of a lot of cases. The more interesting and challenging ones were, I think as Ms Beck mentioned, the drug and

alcohol testing cases including, as they did, elements of privacy, human rights and health and safety; the cases involving physical, mental and psychological disablement. And the first ones of those were, as has been mentioned, *Gilbert v Attorney-General* and subsequently, which Judge Travis heard, *Davis v Portage Licensing Trust.* They were awful cases and I have to say that *Gilbert* was a case of the Crown as employer acting quite egregiously to a loyal and faithful long-serving employee. *Davis* was the case of a barman in a West Auckland tavern who was held up three times in armed robberies in three months and after each occasion there were very few, if any, improvements made to the security of the premises. Those cases didn't open the floodgates as many people predicted and these days they would both be dealt with as health and safety issues and, I am confident, much better by employers than they were 20 years ago.

Also remaining in my memory are the early outsourcing, or contracting out, cases. The first one I heard was the outsourcing of Air New Zealand's catering in the early 1990s. Now most recently and I suspect what is going to dominate the landscape for a little while, there have been and are the pay equity cases.

Also challenging and fascinating has been the ebb and flow of cases about whether individuals are employees entitled to the statutory protections of employment law and whether employees are engaged to work when they are 'on call' and therefore entitled to minimum wages – for example, the boarding school matrons from Hawke's Bay whom Mr Cranney talked about. The capacity for human ingenuity, or probably really lawyer ingenuity, to sidestep legal definitions is unbounded and constant. Whether people labelled independent contractors, volunteers, unpaid interns or those undertaking work experience, who increasingly constitute the gig labour market, are employees under employment law will, I predict, also continue to occupy and challenge the Judges.

I have not, at least consciously, tried to model myself on any judicial heroes or mentors. Whether that has been a good thing or not I don't know. My closest thing to a guiding star or compass has been the passage from a 1970 United Kingdom case which, if you'll bear with me, I would like to read because these words do resonate with me and I think should resonate with employment lawyers. It is the judgment of

Lord Justice Megarry in case called *John v Rees*,[1] which was a political party selection case, and the quote goes thus:

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.

I think those words from 1970 are still as appropriate to our law and our field of law today as they were when Lord Justice Megarry spoke them.

I have enjoyed immensely the insights into the working lives of others and the experiences of their work environments. I suppose this might be called 'judicial voyeurism'. It is a lawful activity but, as Ms Beck said, I have to confess to a willingness to undertake a site visit whenever that might be possible. Those site visits have included such thrills as riding in the cabs of railway locomotives; seeing freezing works and fish processing plants in operation; and standing atop a container crane at the Port of Auckland. My experience of literally hundreds and perhaps, from what Judge Inglis says, thousands of cases, has reinforced in me what is sometimes called "the dignity of work" and the integral role of work to our identities and to our very beings. The importance of work and the dignity of it in practice affect especially those working in low-paid and undesirable work.

Two incidents remain in my memory. Both involved women in low-paid jobs, but otherwise the incidents are unconnected. In the first, after I had taken an adjournment in a hearing, the court-taker told me that, following the adjournment, a litigant (a bus driver) had said to her: "I don't really mind about the outcome of the case. I have had my first chance to have my say and be listened to uninterrupted and acknowledged".

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1 *John v Rees* [1970] 1 Ch 345, [1969] 2 All ER 274, 309.

The second and more recent case was about KiwiSaver deductions by an employer in the aged care sector. I know that counsel for all parties are with us today and I should say that my sentiments about that case do not reflect on counsel: we all have to play the cards we are dealt. That was a case in which migrant women employees not only paid their own KiwiSaver deductions out of their literally minimum wages, but they paid their employer's deductions out of them as well.[2] The case concerned the lawfulness of that practice. I am usually content for an appeal to be brought and happy to be corrected as I often am for good reason. In that case I was pleased that the Court of Appeal (a member of which, then Justice Randerson who is with us today and although presiding didn't write the judgment) dismissed the appeal against our full Court judgment that this exploitative arrangement breached the Minimum Wage Act.

If nothing else, these vignettes establish the continuing need for an independent, expert court to protect fundamental rights of vulnerable employees.

That is, however, more than enough about me. More important is the future of employment law and this Court. Another judicial aphorism I enjoy is that of Lord Cooke of Thorndon when he said that there are two types of Judges, "the conservative, and the more conservative". I suspect there are those present who both agree and disagree with that simple categorisation, at least as it applies to the Employment Court. So I hope the following remarks can be taken to be those of a mere (not a more) conservative.

An important but largely under-developed element of employment law jurisprudence is the effect of local constitutional and international bodies and instruments on the interpretation and application of the law in New Zealand. Those fundamental instruments are things such as the New Zealand Bill of Rights Act, the Human Rights Act and the Privacy Act and they, together or individually, have the potential to influence the course of employment law. They are not generally yet, even now I'm sad to say, in the repertoire of practitioners' pleadings or submissions except, I acknowledge, in those of Rodney Harrison QC, the senior employment law Silk who

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[2] *Faitala & Goff v Terranova Homes and Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614 (EC); *Faitala v Terranova Homes and Care Ltd* [2013] NZCA 435, [2013] ERNZ 347 (CA).

is present today. So, if I may suggest, you may all take a lead from Mr Harrison. International instruments such as the Universal Declaration of Human Rights (of which New Zealand was a central proponent in 1948), ILO Conventions and Covenants, as well as United Nations Instruments, not to mention the jurisprudence of other nations in this field, should be thought about and used. I hope these will influence the development of our employment law in future. I think it is safe to say that we have moved well beyond what was sometimes thought to be the position in the 1990s at least, that the words within the four walls of a contract were the start and finish of the legal issues in the case. The challenge will be to keep moving with the times. In statutory and contract interpretation, and indeed in the law generally, even if context isn't everything as many assert it is, it's up there with oxygen.

Next I want to make a few but important points for our future consideration as employment lawyers. They are in no particular order.

The first is access to courts. Legal aid seems now to be only for the destitute and the destitute generally don't have work, and we as Judges don't see those who don't have work except if they've lost their work. What that means is that we don't see many legally aided cases. That means of access to justice is largely beyond litigants in this Court these days unfortunately. We have increasing hearing fees to bring proceedings to court and the costs of good representation are generally beyond the means of most in the community. We may care to reflect that if access to the Courts is a fundamental constitutional protection in the same way as is, for example, access to one's Member of Parliament, it is not difficult to imagine the response if going to see your MP was charged for at an hourly rate to cover the costs of having MPs in their electoral offices. That is not a unique thought; I first heard it from retired High Court Judge, the Hon John Priestley QC, but I endorse it and invite you to reflect on the increasing inability of people to access justice.

Next, I would like to say a few words about experiences of people giving evidence. Giving evidence as a witness, for those of you who will have experienced it as I have on occasions, is not a natural means of human communication: in fact it is the antithesis of a means of good and effective communication. It is artificial in the extreme, and particularly when people come to give evidence about the non-economic

effects of losses they have suffered, and particularly I have to say, males. It is a very inadequate way of being able to talk about the effects of wrongs that have been perpetrated on people. I think we would do well to look at better ways of gathering evidence, gathering accounts of cases, than the very formal and formulaic evidence presentation we have at the moment.

I have a concern also about the inadequacy of purely monetary awards for non-economic loss. We have got into a position where we compensate for non-economic loss but we do so only directing payment of a sometimes arbitrary sum of dollars. Reputational loss, loss of confidence and feelings which is sometimes very intense and ongoing, is difficult to compensate by a sum of money; it is difficult for a Judge to work out a sum of money that compensates, but also in many cases that sort of compensation is simply inadequate.

I am concerned also about the absence of collective representation and collective terms and conditions of employment for the most vulnerable of employees and that goes not merely to minimum wages, holidays and sick leave which are enshrined in statute. Whether by sector or nationally, I think there is a need for a comprehensive code of minimum terms and conditions of employment other than wages and holidays. My view is that strong unionism is now mostly the preserve of employees better equipped to look after their employment interests while the most vulnerable, in both seeking and retaining jobs, have few of the same employment protections that we expect to be there in 21st century New Zealand. How we do that I don't know but it is still a need that I think we should try to meet.

One of my other concerns is the increasingly early resort to lawyers and legalism. I have seen and said this in some of the cases I've decided. It is a particular phenomenon in the education sector and possibly because of insurance implications, but in too many cases I have heard, a common-sense in-house result may have been achieved had the lawyers not been brought in so early and had run the process with one eye on litigation.

Another concern I have also is the increasing adherence to formulaic processes and unfortunately that is especially so among some large government departments which,

in some cases, have led to unfair or even absurd results. I hope that human resources people abandon what have often been narrow mindsets of 'Is this going to be a dismissal or an exoneration?'. There is a much wider range of consequences to problems in employment relations which are not at the extremes of dismissal or exoneration.

I am concerned, penultimately, about the unintended consequences of publishing all judgments on the Web including long-term consequences, not only for parties, but even for witnesses. When names go up there, they are very easily accessible. I have heard so many times that it has got to be more than anecdotally correct, that searches of people's names who are applying for jobs will reveal that they have been either a party in a case, perhaps even a successful party in a case, or even a witness in a case, and that will count against them because they will be perceived to have been litigious or vexatious. That is even if they had been successful, or they will be seen to have associated with people who were litigious or vexatious and so not the "model" desired employee. That has become a consequence of publishing everything on the internet and I think we need to reflect on that carefully and decide how we deal with it.

I want to end this topic on a positive note because I know that we, as judges, see the dysfunctional and it is easy to think that there are only dysfunctional employment relationships out there. We are supported in that view by the news media who principally publish accounts of dysfunctional and salacious cases. There are, of course, a great many successful employment relationships and new initiatives which involve employers, collectively or individually, and unions. As I say, public commentary seems to seek out the negative and the sensational but I think we would do well to publicise and promote the very successful application of employment law and employment relations in the community.

Finally, I want to turn briefly to the topic of the future of the Court. I want to expose my thoughts about this as an institution. This is an opportunity not afforded to a sitting Judge which has therefore constrained me for the last 28 years. Unfortunately, about a week ago, one political party divulged its employment relationships manifesto. In case any of the following ideas either accord with, or contradict, that manifesto, that will be purely coincidental. My thoughts were developed long before

that emerged and I should not be taken to approve any one political road map in this very political area of law.

This Court and its predecessors trace our whakapapa to 1894 and the enactment of the Industrial Conciliation and Arbitration Act of that year. Especially in the last 30 years, the nature and work of the Court has changed, but its continued existence is not guaranteed by its longevity and tradition alone. I have experienced personally, two concerted and powerful strategies to abolish the Employment Court as an institution in our legal system and society.

The first was in the early to mid-1990s when some, then in powerful positions, considered that the abolition of this specialist Court was the only business left unfinished after the reforms of the Employment Contracts Act 1990. From personal experience at the time, I have to say that those of us who did not agree with the Court's abolition have to thank a principled Attorney-General of the time, the Honourable Doug Graham, who recognised and had to tell a Minister of the Crown that it was unconstitutional simply to abolish a court in the same way that a company might be wound up. I know he did this because the Attorney did so in my presence and that of my colleagues.

The second, albeit more muted, attempt to abolish the Employment Court occurred only a few years ago. It, too, was born of powerful interest groups persuading some Ministers of the Crown that employment law was no different to general contract law and could be dealt with in the District Court's civil jurisdiction.

Those with an insufficient or no knowledge of legal and social history, or of societal context, may well be destined to repeat the worst lessons of the first 90 years of the specialist institutions beginning in 1894. As is the cost of freedom, the cost of an independent judiciary and the rule of law is eternal vigilance. I want to illustrate the important value of a specialist court by one recent example that I can think of. Because I was, as a Judge, only a bystander in the litigation (albeit one with a good view) I think I am able to comment about the Ports of Auckland dispute now several years ago. Had that not been dealt with by this Court (and others, particularly in mediation) in the way that it was over 18 months or so, the economic and social harm

that may have ensued from a purely contractual and legalistic approach may have been devastating economically and socially. Because of the manner in which it was managed by the Court, relatively little working time was lost to strikes or lockouts in that dispute and it is difficult to resist a comparison with events in the same workplace (and at other ports) in 1951. This example illustrates another important but apparently unfashionable practice. Despite an Executive bureaucracy now virtually insisting that all files should be closed within one year of their opening, some cases warrant slow and carefully managed litigation which may be the best outcome as it was in the Ports of Auckland case. The Court is not a widget factory or an issuer of licences that everyone wants as soon as possible, in which inputs and outputs must be minimised and maximised respectively and cases dealt with and disposed of as quickly as possible.

That is not to say, of course, that either criticism or change (including of the Court as an institution) should be stifled. Indeed, both should be encouraged where warranted. But going for what might be called the nuclear weapon option of abolition of the Court, as a pre-emptive strike, is as unwise in employment law and practice as it is in international relations.

I have now had my chance to say what I could not say in judgments and, now, to a captive audience. Thank you all for being here, for the kind things you have said about me, and for listening to me.

Nā reira, kei te mihi nui anō ki a koutou katoa, mo tō koutou aroaro i tēnei rā, me tō koutou whakarongo pīkari. Nā reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.