MEMORIAL SITTING IN HONOUR OF TG GODDARD CNZM

SPEECHES

Employment Court Wellington
Courtroom 5.01
4 pm Thursday 7 November 2019

CHIEF JUDGE CHRISTINA INGLIS
on behalf of the Employment Court

E ngā mana
E ngā reo
Rau rangatira ma
Tēnā koutou, tēnā koutou, tēnā koutou katoa

Welcome to this very special occasion – an opportunity for us to gather together and reflect on Tom Goddard's significant contribution to the law, and employment law in particular.

I first want to acknowledge the presence of Tom's family – it is lovely to have you here (a gaggle of Goddards) and for us to share with you our memories of Tom and our deep appreciation for his judicial legacy as Chief Judge. The high regard with which Tom was held is reflected in the large number of people who are present – we have members of the judiciary – Judges from the Court of Appeal and the High Court, including the President of the Court of Appeal, and retired Judges of the Employment Court sitting with us on the bench; members of the inner bar; members of the Employment Relations Authority (including the Chief of the Authority); representatives from employer and employee organisations; senior Ministry of Justice officials and staff who worked with Tom; academics, lawyers and advocates.

The high regard with which Tom was held is also reflected in the warm messages and apologies received from those who would have liked to have been here but could not – the Chief Justice; The Chief High Court Judge; the Chief District Court Judge; the Principal Family Court Judge; other members of the judiciary who had the pleasure (sometimes, it appears, the pain) of appearing before Tom while in practice; previous judicial colleagues of Tom's including Tony Ford, Dan Finnigan and Coral Shaw, and another previous Judge of the Employment Court, Tony Couch; senior practitioners including Peter Kiely; the National Manager Mediation Services; and the Chief Executive of the Ministry of Justice.

We have quite a line-up of speakers today (I think I can accurately describe it as a stellar line-up) – John Goddard, an employment (amongst other things) lawyer and one of

Tom's offspring, will address the Court; then Graeme Colgan, retired Chief Judge of the Employment Court and a judicial colleague of Tom's for many years; Professor Gordon Anderson; Ms Maria Dew QC from the New Zealand Law Society; Mr Peter Cranney on behalf of the Council of Trade Unions; Mr Paul Mackay for Business New Zealand; and rounding it all off will be another of Tom's sons (like two perfectly formed bookends to the sitting), Justice David Goddard who is also perched on the bench with us.

Each of the speakers has been allocated a rigorous five minutes. If you are particularly observant you will realise that my five minutes is already nearly up. That might be so, but I have a distinct advantage over the other speakers, including Justice Goddard, and that is that I am the Chief Judge, I am presiding, and this special sitting will proceed according to my clock. And my clock says that my five minutes starts now.

I didn't know Tom personally. I have, however, had the privilege of reading a vast swathe of his judgments, his extra-judicial musings, and much of the correspondence he wrote and received as Chief Judge. All of that puts me in a good position to be able to speak objectively about his impressive legacy.

I wish to touch on four particularly strong veins running through the body of Tom's judicial work.

The first is Tom's deep understanding of employment law and the might of right. The cornerstones of this Court's statutory jurisdiction – equity and good conscience and good faith – are not well understood and are often presented in legal argument as amorphous wobbly concepts. Tom did not really do wobbly legal concepts. He had a clear view of most – and in fact I'm going to go out on a limb and say he had a clear view of all – legal concepts which the Court was called on to apply and he did not shy away from actively engaging with them.

As Chief Judge, Tom delivered nearly 900 substantive judgments. Almost a quarter of these referred, at least in some way, to "equity and good conscience". Even when he wasn't explaining such concepts, it's really clear from his judgments that they were floating just beneath the surface. The Court's equity and good conscience jurisdiction did not, he said, equate to arbitrary decision-making:

> What it means instead is that the Court systematically brings to the decision of each case a certain attitude of mind which is that it should endeavour to do that which is right in adjusting the position of the parties.

The nuanced, independent, nature of the work the Employment Court is required to do as a matter of law, and its role in supporting industrial stability despite changes in the political landscape, no doubt explain why it has historically stood separately from the ordinary courts, with limited appeal rights and its own powers of judicial review.

All Tom's hard intellectual work and his carefully-trod development of the common law has been a gift to those who have followed along behind him.

Tom was a Judge who did not tangle his judgments up with complexity, arcane Latin phrases and obscure legalese. If he had taken a different career path he might have done well in what is now nattily known as the 'Comms industry'.

I believe that Tom saw communication as particularly important in this branch of the law – where judgments are read, deciphered and applied by a broad range of people beyond the particular parties, including industry groups, unions, policy advisers, HR advisors, representatives, academics. Effective judicial communication is and always has been a necessary ingredient in ensuring that those in employment relationships (so in fact most members of society) can understand their rights and obligations going forward. Tom appreciated this.

There is a wall of judicial photographs in the Judges' corridor – many feature Tom. I have always been struck by his penetrating gaze (some might describe it as terrifying – I couldn't possibly say). As the span of his judicial work reflects, Tom's penetrating, terrifying gaze was steadfastly fixed on an important end goal – access to justice.

In a speech shortly after the passing of the Employment Relations Act 2000, Tom publicly expressed concerns about the lack of employees and unions litigating their cases to the highest level, noting that in employment matters the costs of representation rarely survive any economic analysis of their benefits. Tom was also vocal in pushing for the extension of personal grievance rights to all employees as a right which could not be bargained away.

Tom understood what we all now understand (or should understand), namely that the employment contract is not akin to a commercial contract. When swearing in the first appointed members of the Employment Relations Authority he said this:

> Those of us who have been on the employment relations scene for a long time all realise that we must learn to think differently. The employment relationship is *not a contract for the sale and purchase of a kilo of bananas*. It is, of course, something altogether different.

Finally, Tom understood the constitutional place of the Employment Court and he was fiercely protective of it. He spoke publicly of the ongoing attacks on the Court from a variety of sources, which spanned his entire time as Chief Judge.

Tom was resolutely committed to constitutional principle, and the independence of all courts, including specialist courts such as the Employment Court, to get on with their work without undue influence from partisan quarters, including the threat of abolition or 'demotion'. We have much to thank Tom for in terms of laying the foundations for a developing understanding of these fundamentally important principles.

Indeed, standing back, some might say that Tom's greatest legacy to the legal system in New Zealand, and to employers and employees alike, is the continued existence of the Employment Court as a stand-alone Court, of status akin to that of the High Court, as Professor Paul Roth eloquently explains in his article on the place of the Employment Court in the Court structure published in the most recent Victoria University Law Review.[1]

None of what I have said, drawn with the benefit of hindsight, is novel. It was all clearly foreshadowed at a very early stage by one of Wellington's talented lawyers. Sandra Moran had this to say on behalf of the profession on the occasion of Tom's swearing in:

> One of your most endearing attributes was your genuine desire to right wrongs and help those in need, no matter how humble the client and no matter whether you were paid or not.
>
> Our legal system deserves the very best of those who are chosen to lead it, to guide it and to serve it.
>
> It is desirable, indeed essential that our judges possess qualities of erudition, tireless and patient dedication to the task at hand, an ability to grasp novel legal and social concepts, the courage to extend and develop those concepts where circumstances dictate, wisdom,

[1] Paul Roth "The Place of the Employment Court in the New Zealand Judicial Hierarchy" (2019) 50 VUWLR 233.

> old-fashioned common sense and above all an innate instinct to do that which is fair and just.
>
> It is our opinion, sir, that your appointment reflects precisely those qualities.

Ms Moran's observations were characteristically prescient. While she is no longer with us I would not be at all surprised if about now, somehow somewhere, she is raising a toast with Tom and saying "I told you so."

We come full circle, looking backwards rather than forwards, with a letter that crossed my desk a couple of days ago from a High Court Judge who shall remain anonymous (but I'll give you a hint – he's a relative of the Solicitor-General). He said this:

> Tom was a kind, generous, and principled man, whose judicial practice remains inspirational to me. His influence and contributions were of course much broader and more significant, as your special sitting recognises.

I respectfully agree with and heartily endorse those sentiments.

Nga mihi nui

MR JOHN GODDARD

Tēnā koutou katoa. Ka nui te mihi ki a koutou kua tae mai nei ki te Kooti Take Mahi o Aotearoa. Kō te kaupapa nei hei whakamaumahara ngā mahi nui o tōku mātua, Thomas George Goddard. Nō reira kia ora anō tātou.

On behalf of the Goddard family, I welcome and acknowledge the presence of current and former Judges of the Employment Court, Judges of other Courts, members of the Employment Relations Authority, family, friends and colleagues.

It's a pleasure and a privilege to be addressing the Court. I attended the High Court where dad had his final sitting in 2005, 14 years ago, and if somebody had said to me then that I would be addressing this Court as counsel, I would have called them crazy.

I know for a fact that dad was excited about the prospect of a memorial sitting. He would have been especially proud that David is sitting alongside the Employment Court Judges as a Judge of the Court of Appeal and that his family is so well represented here today. All the family is immensely proud of dad's achievements as Chief Judge.

At his final circuit sitting in Auckland, dad told the Auckland Employment Court that he had four sons, all of whom he was inordinately proud; that he had encouraged us always to ask "why" because there wasn't a reason for a rule then, like the Emperor's new clothes, it might not exist or it should be made to cease. This questioning attitude, especially of those in positions of authority, was an important feature of our father's raison d'être.

In 2005 dad wrote that no branch of law had undergone greater or more energetic change in the last two decades than employment law. This change was driven by a clear vision which included prioritising access to justice; the independence of the judiciary; an awareness of international human rights instruments; promoting and protecting the integrity of the employment institutions; ensuring consistency of decision-making; and modernising the Court.

Dad's professional legacy is reflected in the actions he and his fellow Judges have taken in pursuit of this vision. It is demonstrated in case law, the institutions themselves, and the legislation.

I did not appear before the Court during dad's time on the bench but in recent times employment law has been a regular and significant part of my work life, as your Honour alluded to. Invariably, every employment law question that comes across my desk is answered, at least in part, by one of dad's decisions. During his tenure he was responsible for – according to Westlaw – almost 1,000 judgments (which equates to more than one per week) for the full 16 years he sat on the Labour and Employment Courts. Thirty-three of these cases have been cited by subsequent courts more than 50 times. This is a significant and enduring body of work.

A key development during dad's tenure was the Employment Contracts Act. This Act conferred exclusive jurisdiction on this Court to hear and determine proceedings based on employment contracts. Dad often spoke about the law of unintended consequences and one of those consequences was that the proliferation of personal grievances afforded this Court many opportunities to develop a clear and principled jurisprudence. Some of this jurisprudence attracted criticism and resulted in a number of high-level reviews and threats to abolish the Court, as has been alluded to. Looking back now, it seems clear that the criticism directed at this Court had the effect of raising its profile well beyond the expectation of the employment law community. The period of the 1990s will be remembered for the controversies which ensued. But dad transcended these events by focusing intently on his vision. His legacy is that the institutions – the Court, the Authority, Mediation Services – have endured. Today MBIE's Mediation Services, the Authority and the Court assist in the resolution of disputes on a daily basis – I'm booked in for a mediation on the 18th.

Dad was especially proud that the law contained in many Employment Court judgments was adopted and endorsed by Parliament when the Employment Relations Act was passed. He considered that it vindicated the Court's position on the significance of the employment relationship and the implied duty of trust and confidence reflected in the statutory duty of good faith.

In the *Baguley* decision – the first decision under the new Act – dad noted that the new Act signaled a move away from the purely contractual principles of the 1990s and a return to a collectivist approach.[1]

> Instead, the Act of 2000 requires something of a return to the collectivist principles of previous legislation and some discarding of the model of free contractual bargaining. In its place are the doctrines of good faith and the principles underlying ILO Conventions 87 and 98. Also, the duty of good faith applies expressly when consultations are in progress. It follows, of course, that if an employer chooses to consult, even if not bound to do so, it must observe the dictates of good faith expressly required by the Act to be observed when consultation is being undertaken or a proposal is being made that can possibly impact on the employer's employees. That was precisely the situation here. In *Auckland CC v Hennessey* (1982) ERNZ Sel Cas 4; [1982] ACJ 699 (CA), the Court of Appeal approved the following statement by Sir John Donaldson in *Earl v Slater & Wheeler (Airlyne) Ltd* [1973] 1 WLR 51; [1973] All ER 145:
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> "good industrial relations depend upon management not only acting fairly but being manifestly seen to act fairly."

Dad's legacy may not be fully understood for some time – it's clear that his approach of ensuring that there was a level playing field, an equality of arms, and limits on the unreasonable, arbitrary and unjustified use of power, provided the building blocks for modern employment law in New Zealand.

Perhaps dad's key role during this time on the bench was as leader of the employment law community. He consistently recognised and commended the important contributions made by his fellow Judges, Registry staff, academics, Authority Members, lawyers, and parties themselves. It is fitting that representatives from these groups are present here today.

Nō reira. Tēnā koutou. Tēnā koutou. Kia ora anō tātou katoa.

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1 *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [50].

MR GRAEME COLGAN

Kia ora tatou.

I have been asked by the Chief Judge to speak briefly – what I will call an 'Inglis five minutes' – about Thomas George Goddard's judicial career from 1989 to 2005. I am honoured to do so at this memorial sitting in my predecessor's beloved city, even if in a courtroom in which he never sat. His seat was on the top floor of the Vogel Building on Aitken Street. It had both magnificent views over the city and – I'm sure the irony was not lost of Tom – looking over, dare I say overlooking, the Court of Appeal. But back to the start of his judicial career.

I knew, by reputation, of Wellington civil litigation practitioner Tom Goddard but, apart from a telephone call about cases we each had in common, I did not meet him in person until the day of my swearing-in as a Judge. In those days, the practice of employment law was not so nationwide as it is now. Clientele were local rather than national and although we both had busy industrial practices, we had not encountered each other as adversaries.

In the first six months of 1989 there were three new appointments to the then Labour Court. First was Auckland practitioner Barrie Travis, who is at the end of the bench today. I was the third, but between us, in March of that year, came Tom Goddard. From August 1989 when the first Chief Judge of the Labour Court, JRP (Jack) Horn, was due to retire, Tom would and did succeed him as Chief Judge of the Labour Court and, two years later, of the Employment Court.

At his retirement sitting in August 1989, Jack Horn disclosed his simple formula for deciding employment cases. First, what is the just thing to do? Second, does the law allow me to do this? I suspect that, although Tom Goddard never articulated this two-step approach, he probably followed it. I must confess, also, that it guided, at least subconsciously, my approach to decision-making. Its simplicity and humanity were

impressive and congruent with the three statutory regimes under which it was applied by Tom.

Tom had the gift of being able to provide cogent legal justifications for what he decided in reliance on the Court's longstanding equity and good conscience jurisdiction. He was, first and foremost, an equity lawyer. His judicial head rationalised and gave legal expression to his judicial heart.

Over what I will call 'the Goddard years', we sat as full Courts probably six times a year. Sitting as a panel of three, or occasionally five, provided Judges with the only opportunity to observe our colleagues undertaking their core work. Tom Goddard led almost all, if not all, the full Courts in which I participated as a member. Hearings, including full Court hearings and even in the Employment Court, are, to an extent, theatrical events. Some Judges sit as impassive sponges. Of others, there can be no doubt of their thinking and opinions. As a Judge, Tom Goddard was certainly never an impassive sponge.

But away from the dramatics of the courtroom, discussions about the case in conference between the Judges were more revealing of the true judicial character. These usually began, included and finished with Tom's war stories from practice, often of his beloved defamation cases. As we all tend to do in telling our own war stories, these were nearly always of the great victories. Tom's smile was never broader than when reminiscing about his former practice at the bar. I think he missed, and even hankered after, the greater sweep of the law of torts, contract and equity, and the drama and politics of defamation and media law.

But when focused on the case at hand, Tom prepared and participated assiduously, often late into nights and over weekends, at least in winter when he couldn't slip off to the Basin Reserve. He gave truly earnest consideration to the facts and the relevant law, in the latter regard displaying his knowledge – both broad and deep – of the applicable principles, often drawn from European legal regimes. He listened patiently and attentively to the opinions of his colleagues and was always open to persuasion away from his strongly-worded first draft.

Never one to agree for the sake of peace, Tom was, however, a strong proponent of comity and unity and is recorded as delivering very, very few dissents or even separately-reasoned judgments.

Some of Tom's strongest statements in judgments were reserved for such important issues as workplace sexual harassment, oppressive and intimidatory conduct towards vulnerable people, and attempts at restriction of free speech and dissent. He was a staunch advocate for societal freedoms, and a promoter of women in the legal profession and the judiciary. Tom Goddard was not a moraliser. It was, he said for example, not the judicial role to enforce politeness between parties to employment relationships and, importantly, he looked beyond such attributes in his quest for workplace justice.

Although describing the role of Chief Judge as *primus inter pares* (or first among equals), Tom saw it as his responsibility as Head of Bench to take the difficult, the controversial and the constitutionally important cases that came before the Court. He did not, however, to my knowledge, seek to influence to his way of thinking any of his judicial colleagues deciding cases on their own. Nor did he suggest what the results should be, despite it being clear sometimes that these may have been different had Tom been the Judge.

Finally, I can say unhesitatingly that while never boastful, Tom was quietly very proud of his wider family's – but in particular his four sons' – achievements. It is sad that his death in March did not allow him to know, John, of your recent promotion within your firm and, David, of your leapfrog elevation to the Court of Appeal.

On behalf of his colleagues on the Labour and Employment Court benches, we remember a fine Judge but, at that time, a sometimes unrecognised and, for some, an unappreciated prophet. That today we recognise as unremarkable his principles of employment law that were then thought by some in influential quarters to be radical and unwarranted, is itself a remarkable testament to Thomas George Goddard.

PROFESSOR GORDON ANDERSON

Your Honours, Chief Judge Inglis, Justice Goddard, Judges and former Judges of the Court and other Judges present.

Your Honours, it is a great privilege to be invited to address the Court this afternoon to honour the memory of its former Chief Judge, Thomas Goddard. May I first acknowledge the presence here of my professional colleagues and friends and, of course, Tom's family. May I also convey the respects of my academic colleagues, particularly those who are somewhat longer in the tooth. Professor Margaret Wilson, Professor Paul Roth and John Hughes have all joined me today in this tribute to Tom.

As well as providing the raw material for our work, Tom also maintained a strong personal link with the academic world and its activities, and was always willing to speak to students and at the various academic activities that we organised.

I was personally delighted when Tom agreed to launch my book "Reconstructing Labour Law".[1] Chief Judge Colgan only got to write the Foreward. One of the advantages of being an academic, rather than a writer of fiction, is that the chief characters can come along to the launch.

Your Honours, Tom arrived in New Zealand as a refugee in 1948 and, as with many refugees of that era, he made a massive and significant contribution to the life of his adopted country. He made his career in the law and of course as a Judge, particularly in the area of labour law. Another European refugee in England, Professor Otto Khan-Freund, observed that labour law is concerned with the regulation of social power. For 16 years from 1989 until 2005, first as a Judge and then Chief Judge of this Court, Tom Goddard sat at one of the epicentres where the competing forces of capital and labour sought to exercise their power. He chose his time perhaps a little too well. Not for Tom the normality of slow-slip adjustments in the balance of economic power – rather, the seismic upheavals and disruptions of the labour law triggered by the decades of neo-

[1] *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011).

liberal economic reforms and, in particular, the shockwave generated by the Employment Contracts Act.

Tom became Chief Judge at a point when the new right, including elements of the judiciary, sought to re-envision labour law as a modernised version of 19th century master and servant law. The Court was seen as an obstacle to that project. As part of that project, the Court – particularly Tom as its public face – was subjected to an extraordinary and sustained level of professional and personal attacks, both in the press and the publications of now re-labeled lobby groups. Those attacks were not only totally unjustifiable; their substance was demonstratively incorrect. At the time they went largely unanswered. The traditional defenders of the judiciary remained largely silent although I do note the response of Austin Forbes QC when President of the New Zealand Law Society. It was also notable that in 1994 the 100th anniversary of this Court was allowed to pass largely un-noted and un-celebrated. In the face of this attack Tom remained dignified, professional and largely silent. I say "largely silent" but gems such as Tom's memorable dissection of the Court of Appeal's reasoning on constructive dismissal in his judgment *Taranaki Healthcare* remains a joy to read.[2]

In time, Tom was to lead the Court in the more welcoming era of the Employment Relations Act, and by the time of his retirement, the new statutory obligation of good faith which is now central to employment and labour law, had become firmly entrenched. As many will remember, Tom had long espoused the need for such a firm obligation in the law, at least as early as 1994, in *Rasch v Wellington City Council.*[3]

Your Honours, from its inception 125 years ago, the Judges of this Court, more than any other, have had a daily impact on the social and economic security of all New Zealanders. A Judge of this Court needs of course to be a person of considerable intellect and to be capable of a rigorous analysis of the law. But in addition, they must have a deep understanding of the realities of labour relations and understand the forces that drive employment relationships and the motivations of the parties, both individually and collectively.

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2 *Taranaki Healthcare Ltd v Lloyd* [2001] ERNZ 546.
3 *Rasch v Wellington City Council* WEC 17/942, 2 May 1994).

To be an outstanding Judge, those skills alone are not enough. They must be exercised by an individual with political acuity and a person of compassion, humaneness and integrity. Your Honours, Tom Goddard was an outstanding Judge.

May it please the Court

MS MARIA DEW QC
On behalf of the New Zealand Law Society

Tēnākoe e te kaiwhakawa matua.
Tēnā kotou e nga kaiwhakawa.
E ngā rōia.
E te whānau pani.
Rou rangatira mā.
Tēnā koutou, Tēnā koutou, Tēnā koutou katoa.

May it please the Court, your Honour Chief Judge, members of the judiciary, the profession and Judge Goddard's family and friends, I greet you all. It is my great pleasure today to appear on behalf of the President of the New Zealand Law Society and of the national legal profession to remember the contribution of our first Chief Judge of the Employment Court, Thomas Goddard. Chief Judge Inglis, long-time colleagues, friends and family have and will cover the breadth of his achievements. They speak from personal experience about the Judge as an exemplar of what it means to be great in the law and in life.

On behalf of the profession, I would like to acknowledge Judge Goddard's time within the profession and as one of our leaders in employment law from the early 1960s through to his retirement in 2005 – a remarkable span of 45 years that marked significant milestones and dramatic change in industrial relations.

Chief Judge Goddard held a particularly special place in the heart of the Wellington legal profession, having studied and then worked here all his life after his admission. I only had the opportunity to appear once in front of him as junior counsel in the case *Grey v Nelson Methodist Presbyterian Hospital Chaplaincy Committee* where, as a second defendant, we weren't covered in glory, so I'm not going to dwell on that decision. But I remember him being particularly polite to junior counsel which I appreciated at the time.

In 1964 one of his first leadership roles in the profession was to be elected as the President of the Wellington and Districts Legal Employees Union and I think he might smile wryly today to know that in the year of his death a new union, Aotearoa Legal Workers Union, has commenced and has a strong membership of some 600 members.

But back to the start of his career: In 1965 his Honour joined the firm of AJH & J Dunn and later took partnership with that same firm. During the 1970s, he then enjoyed a period of sole practice. In 1978, his Honour re-joined partnership in another firm that successfully merged and expanded and was eventually to become Goddard Oakley Carter & Moran. This was, and still is, regarded as one of the original boutique law firms, uniquely specialising in media law and labour relations and the firm had a high-profile litigation practice through the 1980s and well beyond – I remember in my five years' practice in Wellington in the 1990s it was certainly regarded as the stand-out employment law firm of those times.

In 1989, his Honour accepted appointment as a Judge of the Labour Court and shortly thereafter the changes that marked his time on the bench began. His Honour was appointed just two years later as the first Chief Judge of this Court, seeing the transitions through the Labour Relations Act, the Employment Contracts Act and finally in 2000 the Employment Relations Act. His Honour's contribution as an advocate and as a Judge has meant that he has left his signature on most aspects of employment law which we now take as a 'given' in our jurisdiction. The concepts of unjustified dismissal, good faith, the protections that exist for those in strikes and lockouts, fixed-term employees, and in redundancy procedures, all bear his mark.

Margaret Atwood, in her novel released this year, "The Testament", says beautifully "… history does not repeat itself, but it rhymes". Looking back at his Honour's life and judicial decisions, there are rhymes that are evident now. I have no doubt that if he were here today, he would be a fierce champion of the access to justice issues that we face as a community and as a profession. And I looked at his Honour's decision in 1998, the *McCulloch v New Zealand Fire Service Commission* decision, this was a very significant decision at the time.[1] However, it was Appendix 5 that caught my eye. His Honour titled it "A glimpse of the future". He was clearly frustrated after some 16 days of the hearing with lengthy hearing times and costs, and so his Honour took the opportunity in Appendix 5 to set out his ideal for case management. "Imagine if", he says several times in this appendix, as his Honour offers a detailed imagining of a future of proactive and rigorous case management, working in co-operation with counsel, both before and during the trial. This was all presented in Appendix 5 with a steely

[1] *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378 (EmpC).

determination to secure more efficient and accessible justice. His words and his challenge to us all continue to ring true.

The profession wishes to honour his life, his contribution and bravery displayed throughout his time in the profession.

May it please the Court.

MR PETER CRANNEY
On behalf of the New Zealand Counsel of Trade Unions

If the Court pleases, ma'am I have shortened my speech in accordance with your Honour's direction and in fear of a penalty.

Perhaps just first of all, speaking for Oakley Moran, Tom's old firm, he is often remembered, not as an employment lawyer or as a Judge, but as a brilliant civil litigator – persuasive, formidable, kind of unbeatable in most cases, a very strong figure in the civil bar. We occasionally come across old files that he's done; there are one or two I'd probably like to share notes with the family at some point; there's great history there before his career as an employment lawyer and as an Employment Court Judge. He was a courtroom fighter and very dominant. These attributes he passed on to Sandra Moran who has been mentioned, who started off as his apprentice – she used to get Tom off his parking tickets – and became his co-tradesperson.

Tom was always thought of as a man for the underdog. In a 2005 interview he was asked about his childhood, about fleeing from Poland to escape the advancing scourge of fascism which is perhaps not completely beyond the possibilities at the moment. He referred not only to the adjustments he had made as a refugee but also to – and I quote – "… a determination that one should do one's little bit to make sure it can't happen anywhere else ever again." That was the history.

I think Tom's life became entwined with New Zealand's history because of the historical period in which he was a Judge. He was appointed as the old system – the old protective system which had been such a hallmark of New Zealand – was in the process of being destroyed. He spanned the period – and in my view the most important period – between 1989 and 1996/1997. He spanned that period and it was because of that timing that he is an important person for New Zealand's history. And I would like to say, your Honours, that although this is a very useful and important occasion, this needs to be done in more depth at some point and I would like to propose at some point there will be some kind of a proper two-day seminar with papers presented and his role studied and fully understood so that we can understand our current country.

The initial idea at the time was to abolish the Labour Court altogether. The initial idea was to contract the rule of law out of the workplace and, to a large extent, that was successful. The Employment Contracts Act 1991 caused huge lawlessness, huge damage, over a long period of time and society has not yet recovered. As this Court knows, it's a jungle out there in some places and the Employment Relations Act 2000 is neither effective nor fully operational; it is not a current nirvana either, and I think that the people who have said today that the judgments made by Tom Godard, especially the ones in which he was overturned by the Court of Appeal – all of those propositions, or almost all of them, are now accepted as being valid propositions of law in New Zealand society, and that is his contribution in my submission. He somehow had the ability to fully appreciate his historical role and to play the role that he played over a long period of time. He was not regarded by the unions as being some kind of pro-worker radical at the time of his appointment and of course he wasn't. In 1989 he had fined the Seafarers Union I think $50,000 and sequestrated their assets because they had defied an injunction, and I think they were quite "wrong" to do so but time moves on. Dave Morgan, who was the principal "villain" of the piece died on Monday night in Masterton. Both he and Tom Goddard got on very well after 1989, after the original disagreement.

Your Honours, I've got other material here which has been said by other people. I just want to refer to one case and since I'm the only person that's referred to the case, I should be able to read out the paragraph. All Judges have pieces of dicta which are known and you may remember, your Honours, the famous piece of dicta from Judge Horn who said, in the case of frustration of contract, that an employer can "fairly cry halt". It's a famous piece of dicta. Sometimes employers forget the word "fairly" and they simply cry "halt". Your Honour, Chief Judge Inglis, I do not intend to identify any of your dicta – it's too soon. As Deng Xiaoping said about the French Revolution "It's too soon to know whether it worked or not". This is a case of a worker who was given two pages of problems and was facing dismissal for each one of these different issues. I want to read out a very beautiful piece of writing from Tom Goddard.[1]

> I reject the submission that Mr Donaldson was behaving like a reasonable employer. If he had a list extending to two pages of matters causing dissatisfaction those concerns could not all have arisen at the same time. He must

[1] *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 (EmpC).

> obviously have had many opportunities to raise these matters singularly or in pairs, as and when they cropped up. To store them up and then to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined.

Now you cannot get more beautiful writing – smiting – a single instalment – singly or in pairs but not in threes – and I think it doesn't just show the face of a man who was very confident with the English language and its use, but also a person of great compassion, to write that kind of material.

And so to the family. I thank the family very much for supporting this event and your Honours for allowing the CTU to speak.

MR PAUL MACKAY
On behalf of Business New Zealand

To your Honours, to previous Judges, to the legal fraternity and to the family, may it please the Court.

The context of my remarks today is the changes that were wrought on the employment law landscape by the passage of the Employment Contracts Act in 1991. One of the key changes was that which gave the Employment Court exclusive jurisdiction over employment matters. The High Court lost its old role and there was a limited right of appeal to the Court of Appeal. It was against this background that Tom Goddard created his legacy and one for which I think we can all be grateful today, even if some of us were not so sure at the time.

Two specific aspects of this legacy are the focus of my remarks today. The Employment Contracts Act brought about the end of compulsory unionism and its subsequent replacement with what many considered to be a purely contractual approach to employment relationships, and the Employment Relations Act brought us to the current focus on mutual obligations of good faith between employer and employee. As many here today will recall, in the mid-1990s the very future of the Court came under attack with suggestions that the Court of Appeal was better placed as the defender of the true intent of the Employment Contracts Act. And for their part, my predecessors, the Business Roundtable and the Employers Federation, joined forces in 1992, saying there was a case for reviewing the need to retain a specialist Employment Court, given the Employment Court's present jurisdiction to the High Court or a specialist division of the High Court may be a preferable alternative. Fortunately, as it turns out, we did not succeed and I for one am happy about that.

Tom Goddard was at the centre of the storm as we've all heard. History and his obituary record that throughout he remained a steadfast and strong voice for fair dealing according to the rule of law. This is his first legacy, his championship of the Employment Court which today remains the specialist Court he fought so hard for.

His second legacy was broader and even more valuable. Business remembers Tom Goddard for his strong advocacy of the principle of fairness. He used his time on the bench to address the almost complete lack of case law of the newly-introduced obligations of good faith, and the Law Society's obituary at the time of his death quoted Kit Toogood who, in the Victoria University Law Review, said:[1]

> Overseas precedents … provided little assistance. There has been, therefore, fertile ground for the growth of a new and uniquely New Zealand jurisprudence and the Employment Court under Chief Judge Goddard has demonstrated no reluctance to cultivate it.

Cultivation is all very well but the sustainability of the crop is more important and Tom Goddard created a long-lived crop indeed. In his hundreds of judgments he laid the foundations for many of what are now uncontroversial and well-established principles. Despite referring, probably more than once, to Chief Judge Goddard as a liberal, Business New Zealand recorded its view on the occasion of his retirement that he was erudite, eloquent and responsive, and was an extremely good leader as Chief Judge of the Employment Court and the employment fraternity. I repeat that view now but I would add to that our memory that employers in those days led a slightly schizophrenic existence in which they often marvelled at the eloquence and clarity of his decision while simultaneously gnashing tightly-gritted teeth at the outcome. Another aspect of this second legacy was that Tom Goddard was no slouch in expressing his views of those who breached their obligations and in so doing he set a new standard of expectation of good faith behaviour. For instance, many recall his words in the *Fire Service Commission* case where he did not support the Commission's attempt to comprehensively restructure the Service. On that occasion he said:[2]

> … the defendant did not comport itself as a fair and reasonable employer, let alone as a good or ethical one. … In the end, the defendant is shown to be an employer who was willing deliberately to breach its employment contract obligations.

Beautifully expressed, but "ouch".

In summary, Business remembers Tom Goddard for his defence of the institution, his leadership in establishing a platform of fairness under a totally new approach to

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1 Kit Toogood QC, *Facilitating and Regulating Employment* (VUW Law Review, vol 33).
2 *McCulloch v New Zealand Fire Service Commission* [1998] 3 ERNZ 378 (EmpC) at 26.

employment regulation, and his uncompromising attitude to poor behaviour, and we are grateful to him.

THE HONOURABLE JUSTICE DAVID GODDARD

E ngā mana, e ngā reo, e rau rangatira mā
Tēnā koutou, tēnā koutou, tēnā tātou katoa

Chief Judge, your Honours, colleagues, family, friends

My father would be very surprised to see me sitting here today, on this bench, wearing his gown. I am very grateful to the Chief Judge and the Judges of the Employment Court for the invitation – for the honour – of joining them on the bench at this sitting to remember the contribution that my father, Tom Goddard, made to this Court and to the law.

It's a large topic, and one that I couldn't possibly cover in the short time we have today. I will, of necessity, be selective. Fortunately, much has already been said – and very well said – by others.

Having recently (and rather unexpectedly) embarked on a career as a Judge myself, I have been forced to spend some time thinking about what the role involves, and what it means to do the job well. That, in turn, has prompted me to think more deeply about my father's approach to judging. The way he went about his work as a Judge exemplifies many of the traits of the good Judge – setting a challenging example for me (and other younger Judges) to follow!

First, his patience and courtesy. I have lost track of the number of lawyers who appeared before my father who have told me how patient, courteous and considerate he was. That included a fair few who went on to express polite disagreement with the ultimate outcome. But, they emphasised, you always knew that your argument had been fairly heard and understood. This was all the more impressive because patience did not always come naturally to dad! But he understood that the first responsibility of a Judge is to listen carefully and attentively in order to understand the point the party is seeking to make, especially when they are not making it as clearly or coherently as one might wish. When people made comments along these lines to me while I was at the bar, I tended to take it for granted. Of course Judges should be patient and courteous.

Some were not, but that was an obvious and deplorable failing on their part. After just a few months on the job, I do have a new understanding of the ways in which lay litigants – and some counsel – can test the capacity of a judge to remain focused, attentive, patient and courteous. And as a result, I have a new respect for the way in which my father conducted his hearings.

Second, learning. My father's first love before the law was languages and literature. He was widely read in several languages. That gave him a breadth of perspective that a narrow focus on law could never provide, and it contributed to the elegance and clarity with which he wrote – something that a number of people have already remarked on today. His judgments are a pleasure to read. He did also love the law – the people, the stories, the ideas, the body of judgments that he saw as reflecting an accumulation of wisdom over the centuries. Ronald Dworkin, one of the great legal philosophers of our time, has described the role of the Judge using the metaphor of a chain novel – the Judge's role is to write the next instalment, taking the story forward in a meaningful way while staying true to the essence of the narrative that you inherit from others. That is an image that would have appealed to my father, combining as it does two of his great loves.

Third, hard work. My father took the view that as Chief Judge it was up to him to show leadership in a number of ways: sitting in all the Court Registries regularly, taking on a substantial share of hearings and (for full Courts) writing assignments, dealing with urgent applications, getting judgments out in a timely way, and accepting invitations to speak at a wide range of conferences and seminars. We had a number of conversations over the years about the importance of Judges being committed to just getting through the work and delivering judgments promptly. He saw this as enormously important to the parties and to the relevance and legitimacy of the Court.

Fourth, independence. That did come naturally to my father. I could easily spend my allotted time just telling stories about my father's independent cast of mind, from an early age. I heard plenty from his parents. His father (my grandfather) used to complain that he didn't live in a family – he lived in a Parliament.

On appointment Judges take an oath to do justice according to the laws of New Zealand without fear or favour, affection or ill well. As we have heard from others, there were

times during my father's tenure when the Court, and he personally, came under sustained attack from some quarters. It was, as he said in the interview with Kathryn Ryan at the time of his retirement that Mr Cranney mentioned, their right to criticise. But he wasn't there to win popularity; he wasn't there to please politicians, sectional interests or the media. He was there to do his best to do justice according to law. And he was willing to do it, and keep on doing it, case after case, issue after issue, completely uninfluenced by fear of criticism or the desire for personal favour.

Fifth – and this is closely linked to his independence – my father had a deep and uncompromising commitment to justice. More specifically, he detested injustice of all kinds, and in particular the unfair misuse of power. He knew what it was like to be powerless; to be on the receiving end of high-handed and arbitrary treatment. He knew what it was like to be the underdog.

As many of you know, my father was born in Warsaw in Poland in 1937. He was two years old, and his family was on holiday in eastern Poland when the Soviet Union invaded in September 1939. The family ended up behind Soviet lines. The Soviets moved them to a 'safe place' behind enemy lines – some 5,000 kilometres behind enemy lines – to an isolated forestry camp near Archangel right up in the Arctic Circle. In this remote, frozen land they lived a precarious life, seeking to survive by achieving what my grandmother described as a chameleon-like invisibility. The hardships they endured were, as my father said at his mother's funeral, impossible to describe in any credible way: The scarcity and monotony of food; the challenge of heating their home through harsh winters by making – with their bare hands – fuel bricks from cow pats and mud; living next door to a night soil pond; the fear of arbitrary arrest and execution (and it wasn't an abstract fear – it happened to many around them); and illness – my father contracted pneumonia and family legend is that his father carried him 10 kilometres through snow to the nearest hospital. That prompted a long and difficult journey to Kazakhstan in search of a milder climate. There my father, rather ungratefully, promptly contracted malaria – all of this before he was 10.

But they survived. After the war they made it back to Poland, another long and arduous and dangerous journey – it's a long story in itself. But Poland was not a safe place for members of the Jewish intelligentsia, the few who survived after the Holocaust. My grandparents managed, very much against the odds, to find a way to leave Poland and

make their way to Australia, to Melbourne, where my grandfather had a brother – John Goddard, whose son Andrew Goddard, dad's cousin, is here today from Melbourne for this sitting. And a year or so later they moved to Wellington, where my grandmother's sister was living: Suzanne Borrin (nee Krinsky), married to Michael Borrin, and their son Ian Borrin who will be known to many of you, my dad's Wellington cousin. Here my father grew up, learned to speak English and to speak it with a Kiwi accent, and learned to play cricket, his other love. He blended in.

In the retirement interview which I've mentioned, Kathryn Ryan asked my father, and you also mentioned this Mr Cranney, whether that upbringing had an impact on his development and his beliefs. He said that as usual – one of his frustratingly nuanced answers – the answer was "yes and no". In his words: "As children do, you put all that behind you and you learn new languages, new cultures, new practices, new pastimes, you get new friends and all that is behind you, but" – and I've got to say this again even though you did because it's so important – "there is also a determination that one should do one's little bit to make sure it can't happen anywhere else ever again."

My father was passionate (his term – he used it to me earlier this year when he was unwell and we were sitting together one evening) about the works of Voltaire, which he studied when doing his MA(Hons) in French at Victoria University. Voltaire was a prolific French writer famous for his wit, for his outspoken advocacy of civil liberties, and for his attacks on intolerance, religious dogma and public institutions. My father shared Voltaire's suspicion of dogmas of all kinds and his belief that "il faut cultiver notre jardin" – we should be suspicious of grand theories and dogmas, and focus on the practical day-to-day task of cultivating our own garden. Mr Mackay, your comments about gardens and crops were particularly apt I think because that's a phrase he really really liked and really believed in. And for some 16 years my father's garden was employment law in New Zealand. He was committed to cultivating it as best he could, seeking to develop the law in a coherent and principled way, and nurturing the sometimes fragile plants of justice and good faith. As I think the many speeches here today have confirmed, he left that garden much improved by his labours.

Some of the more than 1,000 cases (according to his own Westlaw research, which I'm just borrowing from) which my father decided or helped decide (so that includes the ones he was a party to, I think, on a full Court) continue to be important authorities

today. Others that made less of a mark at the time, because they did not find immediate favour in the Court of Appeal – and he frequently pointed out to me as a young lawyer that that Court was right because it was final, not final because it was right, something that I now find useful to remember – some of those which didn't strike the mark at the time have since found expression in legislation, as others have said. I think it is fair to say that on many significant issues, his sense of where the just solution lay has prevailed. That was certainly the view expressed by the editors of the Employment Law Bulletin in April 2005 at the time of his retirement, and I think it remains equally true today.

That is what my father would ultimately have seen as important. He could not have cared less whether those solutions were attributed to him. It wasn't about him. It was about ensuring that everyone, however vulnerable, however lacking in resources, should get a fair hearing. And if they were victims of an injustice, that injustice should be identified and called out – sometimes in very elegant prose – and remedied in a meaningful and effective way.

The best way we can honour his legacy is to share that commitment, and continue that work.