# Extracts of address by Chief Judge Graeme Colgan to the ADLS Employment Law Committee's Annual Dinner 28 June 2017

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Deciding what to say as a speaker at a dinner is a difficult exercise made more difficult by my not being either a stand-up or (more appropriately for a Judge) a sit-down comedian. Judging 101 says judicial humour is neither judicial nor humorous. Because of what I call my advanced demographic in comparison to that of most of you, I thought I might talk a little about the practice of the law, and industrial law in particular, going back to the early 1970s at the University of Auckland Law School and then in practice leading to my being sworn in as a Judge of the Labour Court on 3 July 1989.

There were no lawyers in my family and I can't even remember being told by my parents that I was so argumentative that I had better study law. At the end of secondary school I knew I did not want to be a teacher but otherwise I drifted vaguely and hopefully to Auckland University doing the first year of a BA in New Zealand and Pacific history, geography, French and psychology. Towards the end of that year, 1971, I had some spare time and wandered over Waterloo Quadrant to what was then known as the Supreme Court, what we now know as the High Court. In the historic courtroom number 1 there was a criminal jury trial going on (all jury trials were then in the Supreme Court) and I sat and observed it, coming to the realisation that this should be my field of study and vocation henceforth. And so it was. I enrolled in the Law School for the following year.

Some of my teachers I can remember very well and of others I have no recollection. In 1972 I studied constitutional law, what is now encompassed in public law I think. The lecturer was a young North American, fresh off the boat, who I remember told us that his name was William Cromwell Hodge III, originally from Ohio. He is now more commonly known as Bill Hodge. He is a descendent of Oliver Cromwell whose words (Oliver's, not Bill's) I quoted in one of my last judgments. Bill had literally arrived for the first time in New Zealand at the very start of the academic year and I suspect spent his evenings reading up on New Zealand constitutional matters before he presented his lectures on the following day. He was, nevertheless, an inspiring and insightful lecturer and I attribute my long-held interest in our constitutional law, to Bill's class.

In the following year I took a course that was called industrial law. We were a small class, probably no more than 15 students, taught by a then junior lecturer, Margaret Wilson who I am pleased to say is with us this evening. Margaret's connection with employment law continued in her parliamentary career and as the first Dean of the Law School at the University of Waikato. She has just this year retired from a lecturing role there Again my enthusiasm for employment law is in substantial part attributable to her teaching. To give you an idea of how much employment law has changed between 1974 and today, one of my industrial law essays was on the advantages and disadvantages of compulsory (worker) unionism. This was a raging issue of the day and we were, at that time, subject to compulsory unionism in a wide range of fields including, you may find interesting, employees (including employed lawyers) in legal offices. For some reason I kept the marked copy of my essay on compulsory unionism and discovered it in the attic a few years ago. It

was marked in red pen with a number of largely supportive comments and, to my eternal surprise, an A+ was circled at the top. Perhaps that (for me) unusual mark was the reason for my keeping it. To the best of my knowledge nobody at all these days advocates for compulsory unionism in the employment field. Otherwise, for the most part I managed to achieve undistinguished pass marks although I seriously doubt that I would now make the grade to get into Law School.

I graduated in 1976, my Honours dissertation being on police powers of search and seizure. The dissertation was supervised and marked by Bill Hodge who was then lecturing in criminal law. Jobs in law offices were difficult to get in those days and I benefited immensely by a voluntary work experience programme that the Law School arranged with downtown practitioners. I was attached to a barrister, Michael Harte, who later became the doyen of blood alcohol defence work in Auckland, if not New Zealand. I assisted in, and observed, several criminal jury trials in the Supreme (High) Court in which Michael Harte was counsel and I can still remember the full names of our accused clients in each case. Michael Harte put in a word for me at the firm he had recently left to go to the Bar, then known as Haigh & Charters.

Because no law clerk job was available immediately, I took work driving Auckland Regional Authority buses, principally trolley buses, while I completed my Professionals which were then conducted within the Law School. It was then well paid shift work. I wasn't the only law student who turned up to lectures in a bus driver's uniform before or after my shift. My income dropped significantly (to $66 per week) when I got the job of law clerk at Haigh & Charters in April 1975. This small firm had a substantial personal injuries practice but after the Woodhouse Report and the first Accident Compensation Act had been in force for a couple of years, personal injuries litigation was declining. As lawyers do, new fields of practice were found including criminal law and, increasingly, industrial law. Because unions had brought in the personal injuries work, so they continued to bring other litigation, both collective and individual on behalf of themselves and their members.

My first industrial law case on my own, was in the Arbitration Court in August 1978. The Court consisted of Chief Judge Jamieson with two Panel Members. I represented the Auckland branch of the New Zealand Carpenters & Related Trades Industrial Union of Workers in a personal grievance against Hieber Construction Co Ltd which was engaged in the building of a supermarket complex at Howick.[1] Counsel for the respondent was Miss Josephine Budge who may be known to you now as Judge Josephine Bouchier, a District Court Judge based in Auckland and who has been a Judge even longer than I have. The case was a personal grievance which involved elements of a trial period and alleged unsatisfactory performance by the site manager who was a member of the union. The site manager (in effect my client) was found to have been justifiably dismissed. My first solo flight crashed, and that was a portent of many later cases that I specialised in losing. Perhaps the only thing that could have been said in my favour in my first case alone in the specialist jurisdiction, was that the Arbitration Court declined to make any order for costs against the union. The Court sat in what was known as the former UEB building which is still in Eden Crescent,

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[1] *New Zealand Carpenters and Related Trades Industrial Union of Workers v Hieber Construction Ltd* [1978] ICJ 147.

opposite the current Law School, and, as for many years thereafter also, counsel were fully wigged and robed.

Unlike these days of specialist boutique employment law firms and specialist departments in larger firms, employment law was only a relatively small part of my (or anyone's) practice which included elements of criminal law, family law and other civil litigation including especially testamentary promises and family protection claims. Employment common law (the industrial torts), nevertheless, generated a steady volume of work, most of it undertaken urgently, arising out of allegedly unlawful strikes and occasionally lockouts. Injunction proceedings would be issued in the Supreme Court and, for the most part, I represented defendants to those injunction proceedings who were alleged to be engaged in unlawful strikes. Almost inevitably most cases never went on to trial. The interim injunction hearing concluded most cases. So it was very much a 'stick 'em up, shoot 'em down' type of litigation that lasted intensively for a couple of weeks at most. As the common law then stood, there were few prospects of winning for a defendant.

In 1978 I went to the independent Bar at Southern Cross Chambers. The litigation team at what had by then become the firm of Haigh Lyon had grown and, several years previously, John Haigh had gone to the Bar. I was increasingly involved, even in a small firm, in staff supervision and training which were not my strong suits. I was, after all, a lawyer and not a manager and I wanted to practise as a lawyer. With the expansion of the top two floors of the Southern Cross building in Victoria St East, I joined a list of luminary names in those Chambers which included, among others, then QCs Sian Elias, David Baragwanath, Robert Fisher, Robert Chambers, John Priestley, Peter Salmon, Robert Smellie and others who both attracted good quality work and were a delight to be around, even if only to watch the interactions of some strong egos. RE Harrison QC, now the leader of the employment Bar, was an associate member of those Chambers and still is 30 years later!

I will regale you with the details of only one case, albeit a particularly memorable one and an employment case. It was a salacious case, but I will not re-tell it for that reason. Rather it is an example of a case in which the real control of what was to happen lay entirely with the parties and on purely pragmatic grounds. It also ended with what for me at least, was a unique forensic experience. It is an example of a case that, whatever the inherent merits, is really about getting the case sorted and moving on from corporate embarrassment. It was also a sad case for the plaintiff personally. There is no judgment to read because the case settled mid-trial.

An Air New Zealand cabin crew member (I think in those days called an air hostess) flew off-duty from Auckland to Los Angeles to commence a tour of duty from the USA. In the mid-1980s the effects on sleep patterns and general health of long hours flying at high altitudes across different time zones, had begun to be appreciated. A medication known by its common name of Halcyon could assist in countering these effects in airline crew. The evidence was a doctor signed blank prescription forms for Halcyon tablets which his nurse distributed on request to cabin crew. The plaintiff, whom I will not and indeed cannot name because of a permanent non-publication order made in the case, consumed her Halcyon, but then began to drink alcohol on her night flight from Auckland to Los Angeles. All the medical evidence was that a combination of Halcyon and alcohol was very likely to result in disinhibited behaviour, particularly so far as libido was concerned. The plaintiff met up with

a man and they soon adjourned to a lavatory on the Boeing 747 40,000 feet above the Pacific Ocean. They were not discouraged by some other cabin crew on duty, but she was also dobbed in by other crew members. Long story short – the plaintiff was dismissed summarily by the airline when the aircraft arrived in Los Angeles. She had little recollection of what had happened but there was a lot of evidence from eye witnesses.

I interpolate here to say that my former colleague on the Court, Barrie Travis, was then a partner in Chapman Tripp which had all of Air New Zealand's employment litigation. I think it is one of Barrie's very few regrets from his time at Chapman Tripp that when the case came to court, he was taking a sabbatical overseas and was not able to represent the airline in the Labour Court on a case that attracted more publicity than I have ever experienced in my employment law career. You will be pleased to know that I tried to settle the case with Air New Zealand before we went to trial. I offered, very generously I thought, to take only 10 per cent of the increased revenue that Air New Zealand had accrued as a result of the publicity about this case. The case dominated talk-back radio. The road to Auckland Airport saw several large Air New Zealand advertising billboards graffitied by crude references to the plaintiff's predicament. I knew that both in New Zealand and in Australia, the airline's bookings had taken off, as it were, as if this was some kind of new service operated by the airline, rather like lie-flat beds or extra leg room. Very unreasonably I thought, the airline rejected my win-win proposal for settlement and we went to trial before the very proper Judge Noel Williamson and two Panel Members in the Labour Court in what was then the 280 Centre building between Queen St and Lorne St, where the Court of Appeal now sits in Auckland.

Media interest in the case was frenetic. Television teams from Australia were camped outside the building and although an order was made prohibiting publication of the plaintiff's identity, that did not apply in Australia in those pre-internet days.

The case also engendered another amazing phenomenon. I received through the mail, anonymously, a number of plain brown envelopes enclosing photographs of other cabin crew taken at parties at exotic overseas destinations. These were presumably to encourage me to present these to the Court as showing that the plaintiff's behaviour was relatively mild compared to what lots of other cabin crew got up to off duty. Tempting though it was to introduce this evidence, I could not for the life of me see what the relevance of it might be and so the brown envelopes of photographs and other salacious material remained in the firm's safe.

I had decided early on in the case that it might be prudent to have a woman junior with me in the proceeding. Coral Shaw had then recently joined Haigh Lyon from Meredith Connell where she had been prosecuting for the Department of Social Welfare and was keen to expand her horizons. One afternoon saw Coral and me inspecting a stripped down jumbo jet in the Air New Zealand hangar at Mangere where it was undergoing major maintenance. Our task was to find the location of the emergency call button in one of the lavatories. This was to check whether it might have been possible for a part of someone's anatomy to have activated that emergency call button which was said to have resulted in a member of the operating cabin crew opening the lavatory door from the outside. The opportunity to look over a partially deconstructed jumbo jet was fascinating.

At trial, Air New Zealand called its evidence first to justify the dismissal. Its final witnesses were to be the members of the operating crew on that flight as to what they had observed. They were apparently equally split between supporters of the plaintiff and opponents. She had a strong personality that alienated some of her colleagues. Over a luncheon adjournment these two groups of staff who were about to be called as witnesses, almost came to blows in the Court foyer and there were suggestions of refusals to give evidence. The union was called in. The then Secretary of the Union, Tom Downey, promptly got onto someone very senior at Air New Zealand and, over the lunch adjournment, the case was settled between them and I was simply told we should discontinue when the Court resumed at 2.15. I emphasised in my brief statement to the Court withdrawing the proceeding, that I was "very pleased" to advise that a settlement had been reached, hoping that this subtlety would not be lost on the media present. Neither the merits of the case nor the lawyers had anything to do with the settlement that was entirely pragmatic.

However, I hadn't counted on the next thing that happened. In my cross-examination, I had given a hint of some of the evidence that would be called for the grievant and I hoped would have portrayed the employer in a bad or inconsistent light over similar incidents. After the Court adjourned and Coral and I had spirited our client away through a back exit to avoid the Australian TV crews and the local vultures, I was changing in the robing room. The registrar handed me a note. It was written by one of the Panel Members of the Court, the workers' representative. It said "Can you meet me at De Brett's Hotel at 4 o'clock this afternoon for a drink so that you can tell me what the rest of the evidence would have been!" I don't think this qualified as a Court order with which I would have had to comply. I also suspect that Judge Williamson didn't know of this "summons" issued by a member of his Court..

Cases like that don't come along very day and exciting as it was to be at the centre of a very high-profile case, it was sad to see the effect of a moment of medically induced madness on the plaintiff, not only in her chosen field of work but long-term in her own personal life.

In 1987 the new Labour Relations Act had changed the industrial law landscape to one that is more readily recognisable today. A new body called the Commission concentrated on terms and conditions in awards and registered agreements, and large parts of the state sector that had previously had its own separate IR system, came into the private sector mainstream. New judges had been appointed in 1987 and the Court's workload was expanding.

By late 1988 Judge Noel Williamson had died, too young. Judge Derek Castle wanted to return to his home city of Wellington, having been posted to Auckland for several years. Auckland needed two new Labour Court Judges based in the city. In early 1989 Barrie Travis was appointed from practice as a partner in Chapman Tripp. Within a couple of months thereafter Wellington practitioner Tom Goddard was appointed to that city with the assurance of becoming the Chief Judge a few months later. In the first quarter of 1989 I took a call in my Chambers from the then Chief Judge, Jack Horn, who was shortly to retire. He said he was authorised by the Minister of Labour to select an appointee. The Minister was then the Hon Stan Rodger, commonly known as "sideline Stan" because of his refusal to continue the traditional practice of Ministers of Labour to try to resolve disputes over a bottle of whiskey in the Minister's office. It was clear that if I agreed, the Chief Judge could assure me that I would be the next Judge of the Labour Court. I know that most people like me say this, but the approach was quite unexpected, it really was. I asked for, and was given, a week to think

about it. I was then still 35 years of age, had been at the independent Bar for less than two years, and had only been in practice for 13 years, although effectively 11 years after deducting two years for an OE adventure. I had a very young family including four children aged from six months to seven years. I was working nights and weekends but enjoying life at the independent Bar and with a range of good work coming in a variety of different fields of law. Then, as now I suspect, the salary of a Labour Court Judge then was about half of my income as a barrister. I consulted two practitioners confidentially, one of whom, now Sir Anand Satyanand, had then recently become a District Court Judge. The other was my former partner then at the independent bar, subsequently the late John Haigh QC both of whom encouraged me. Anand Satyanand said it would provide me with an opportunity for a third career which I suppose, in a sense, I am about to take up. Certainly in his case, a young appointment to the Bench provided him with several later alternative careers which I could not possibly emulate.

A week after the Chief Judge's telephone call, I was to be counsel in a case to be heard by a full Bench of the Labour Court which, in those days, meant three Judges plus two Panel Members. Interestingly in retrospect, it was to deal with whether an appeal from a decision of a grievance committee was in the nature of what we would now call a hearing de novo or a conventional appeal, so perhaps there's nothing novel in our field – the same issues just come around again eventually. My client had been unsuccessful in the decision of a grievance committee chaired by a mediator and wanted to run a significantly different case before the Labour Court, taking advantage of what had turned out to be its strong and weak points at first instance. So I was arguing for what we would now call a hearing de novo. The Labour Court had not previously considered the issue and the Chief Judge had assembled a full Court to hear it.

The night before the hearing I went to the Chief Judge's hotel on Anzac Ave to give him my decision. It was not the Railway Hotel on Anzac Ave which, by then, was well past its heyday and was reduced to letting rooms by the hour. It was to what was then and still now is the Copthorne Hotel that I went. I told Jack Horn of my acceptance of his offer but when he wanted to seal the deal over a whiskey and not being a spirits drinker, I said I had to leave to complete some work on my submissions for the following day. He said in his succinct way, "You won't need to do that!". Indeed the outcome of the case was in my client's favour.[2] For myself, I hope I would never have been so bold as to arrive at a decision on behalf of a full Court before the hearing on a controversial and very arguable but important point of procedure. I certainly didn't tell my opponent what had happened, let alone tell my client. You should not take from this story that these days arguments in court are just window dressing, and that a single Judge of a multi-member Court decides the outcome in advance.

That was how, on 3 July 1989, I joined the Labour Court.

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2 *NZ Baking Trades IUOW v Findlays Gold Krust Bakeries Ltd* [1989] 1 NZILR 661.