

## ELECTRONIC TECHNOLOGY AND WORKPLACE ISSUES: THE NEW ZEALAND SITUATION

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The tyranny of geography keeps New Zealand on the fringes of much of the world's industrial and commercial developments. Yet it has enthusiastically adopted many features of the new electronic technology: the purchase of personal computers increased from 64,000 in 1990 to 230,000 in 1994; the number of Internet users grew by 440% and the number of companies joining the Internet increased at a compounding growth rate of 18% a month in 1994; New Zealand, by 1995, was fifth behind Iceland, Finland, the United States, and Norway measured by the number of computers connected directly to the Internet per 1,000 of the population.<sup>1</sup> Despite some early misgivings over too rapid an introduction of electronic technology (and speculation on Orwellian-type surveillance), the extent to which technological advances affect employer-employee relations has only recently become a matter of concern. New Zealand now confronts the same problems as do other countries; only the solutions to these problems might be different.

Reasons for a sluggish response in New Zealand to workplace problems associated with the electronic revolution are not obvious. The case for embracing the latest technological advances was certainly presented with considerable vigor. The advantages, so technoprophets argued, would result in net job creation, greater work flexibility, increased productivity, reduced costs, new horizons for the disabled, and improved opportunities for minority groups. Teleworking, for example, was described as "an escape from the normality crunch"<sup>2</sup> offering "flexibility for all."<sup>3</sup> In contrast, the

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1. Graham Butler, *Impact 2001: How Information Technology Will Change New Zealand*, Report by the Information Technology Advisory Group to the Dept. of Commerce, Wellington, 1996, at 26.

2. Bevis England, *Beating the Normality Crunch*, IPM NEWS, Feb.-Mar. 1996, at 9.

3. Adele Gautier, *Teleworking Mystery*, NZ BUSINESS, Mar. 1998, at 22.

extent to which the new electronic technology would impact adversely on labor-management relations was reported less extravagantly and was more muted.<sup>4</sup> It should be noted that the introduction of this technology accelerated after the Employment Contracts Act, 1991, which tilted the balance of power in favor of employers and drastically weakened the trade union movement in New Zealand. In 1989, there were 168 trade unions with a total membership of 649,857; there were 82 trade unions and a total membership of 375,906 by the end of 1994.<sup>5</sup> The response of trade unions to a new generation of employer-employee problems may have been slow and tentative, but this, after all, was a time when their priorities were organizational survival and membership retention.

### I. OUTSOURCING AND TELEWORKING

Outsourcing can be defined as the transfer of technological services previously performed "in-house" to a specialist provider at the specialist's premises. A variant of this, sometimes referred to as facilities management, is when a specialist performs the service at the customer's premises and provides skilled personnel and expertise. Teleworking, on the other hand, is the transfer of staff away from the company's premises to work at home. Its essential characteristic is that work is carried out in locations remote from head office and distant from production facilities and coworkers.

#### A. Outsourcing

The advantages of outsourcing to the employer are obvious. It removes the expense of employing the necessary resources "in-house" and allows staff to focus on core business activities. It provides specialist skills and employers gain from economies of scale enjoyed by the provider and by saving on appropriate premises, updating hardware and software, maintenance, and retraining. There are disadvantages. It means control over a company's information technology passes to a specialist provider whose failure to deliver can seriously affect the company's operation. Contracts can provide penalties in the event of breach of service but "seldom equate to the

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4. Never were reservations about electronic technology articulated as grandiloquently as some of the advantages reported by overseas observers. The Internet, for example, was considered to be a "force for peace" and digital communications would assist in "computer-aided peace." See *What the Internet Cannot Do*, THE ECONOMIST, Aug. 19, 2000, at 11.

5. John M. Howells, *New Zealand*, in THE INTERNATIONAL ENCYCLOPAEDIA OF LAWS 225, 236 (1996).

maximum actual loss that could be suffered.”<sup>6</sup> Furthermore, there are often additional charges for increased utilization of resources when no formula for calculating these charges exist. Indeed, extra costs might seriously depart from the predicted costs initially used to justify an outsourcing exercise.

The only employer-employee issue of any import arising out of outsourcing in New Zealand is redundancy. Staff previously operating in the area taken over by a specialist provider are no longer required to perform work for which they were originally employed. Under the Employment Contracts Act, 1991, as was the case under the Labour Relations Act, 1987, all employment contracts were required to include a procedure for settling personal grievance cases. The definition of a personal grievance covered unjustifiable dismissal and detrimental changes to an employee’s employment. Any employee dissatisfied with an employer’s response to a personal grievance complaint could pursue claims further through the Employment Tribunal that provided mediation assistance or adjudication of the grievance. Appeals could be taken to the Employment Court. However, the legislation allowed the parties to avoid the formal procedure of Tribunal and Court if parties agreed to accept binding arbitration before a private arbitrator.

Although the Employment Contracts Act provided a clear procedure for the type of dispute common in outsourcing, many employees using the procedure faced two major problems. First, the intention of the National Government’s Employment Contracts Act was to encourage individual rather than collective employment contracts.<sup>7</sup> Therefore, some employees facing redundancy were following the personal grievance process without the support of a trade union or the advocacy assistance of experienced trade union officials. Secondly, the majority of employees on individual contracts were unable to afford the costs involved in taking an employer to the Tribunal and the Court for a remedy. There were nearly 220 companies outsourcing in 1995 and there was a genuine concern that many employees in the 1990s were being denied their legal rights by a combination of high legal costs and the lack of any organizational support.<sup>8</sup> This changed after the adoption of the Labour Government’s Employment Relations Act in 2000, which was weighted more favorably toward trade unions. Its positive impact on

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6. Quentin Lowcay & Ross Johnston, *IT Outsourcing*, N.Z.L.J. 110, 111 (Mar. 1998).

7. Howells, *supra* note 5, at 230.

8. Lowcay & Johnston, *supra* note 6, at 111, quoting Richard Pastore, *Outsourcing in the 90's*, CIO MAGAZINE (1996).

employees can be gauged from employer criticism that "a personal grievance is now easier to bring and harder to defeat."<sup>9</sup>

### B. Teleworking

Teleworking is a strategy that enables certain employees to work at other than the traditional workplace on a regular and formal basis. Electronic technology provides the essential link that allows employees to work and communicate regardless of where they are based. Unfortunately, both in New Zealand and Australia, the definition of who is a teleworker has been loosely used to cover different people in many different situations. The confusion is sometimes perpetuated by companies hiding the presence of a contractual relationship with teleworkers in order to avoid any legal obligations over employee rights.<sup>10</sup> Statistical information, therefore, is less than reliable. Nevertheless, there is little evidence to show that New Zealand companies rapidly turned to teleworking as a useful business strategy. By the end of 1995, teleworking was still "a solution in search of a problem."<sup>11</sup> Three years later, in 1998, it was reported that support for teleworking had actually diminished further "due to a resounding lack of enthusiasm on the part of the organizations whose support would have had the most impact."<sup>12</sup> Despite an exciting inventory of advantages—offered mainly by agencies likely to benefit from the spread of electronic technology—the fact remains that few New Zealand companies have adopted teleworking arrangements.

#### 1. Reasons for the Lukewarm Response to Teleworking

One reason for a general reluctance to introduce teleworking, which perhaps is an indictment of New Zealand employers, is the view that "management don't trust staff."<sup>13</sup> Many employers regard telework with suspicion due to "possible uncertainties about the remote control of employees."<sup>14</sup> Put bluntly, the management style in

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9. See John M. Howells, *New Zealand*, in THE INT'L ENCYCLOPEDIA OF LAWS ¶ 367 (to be published).

10. Anna Smith, *Is Teleworking Really Taking Off?*, MANAGEMENT, Oct. 1995, at 118; see also George Lafferty et al., *Homeworking in Australia: An Assessment of Current Trends*, AUSTR. BULL. LAB., June 1997, at 143-156.

11. Smith, *supra* note 10, at 118.

12. Gautier, *supra* note 3, at 22.

13. Alistair Fraser, A Research Project on the Information Technology Impact of Teleworking (Sept. 1996) (unpublished manuscript, on file with the Graduate School of Business and Government, Victoria University of Wellington, Wellington).

14. Butler, *supra* note 1, at 15.

many companies is one “in which employees are measured by the time they are present rather than by what they achieve.”<sup>15</sup> The willingness to resort to teleworking is negatively influenced by the conventional wisdom that teleworkers are difficult to manage and employers fear the loss of control over sections of their workforce. It would seem that teleworking initiatives have been held back by the absence of a culture of trust in many New Zealand businesses.

Two other factors underpin this conservative response by employers to teleworking. One of these is cost. Rightly or wrongly, many companies have assumed that teleworking needs a sophisticated technological infrastructure. This obsession with advanced technology prevented many companies from supporting teleworking because the cost appeared prohibitive. Of course, advanced technology is not crucial to teleworking. However, New Zealand experience confirms that when employers “think about the costs of IT every time they consider the potential of teleworking, they will never start telework programs.”<sup>16</sup> Another factor behind business conservatism was that the reluctance by employers to accept teleworking was bolstered by reservations from trade unions. Teleworking, to some in the labor movement in New Zealand and Australia, is “an exploitive arrangement... the inevitable consequence of competitive pressures in an increasingly globalised economy.”<sup>17</sup> This has meant very little enthusiasm for novel work arrangements from the two main industrial relations actors.

## 2. Trade Union Reservations and Policy Responses

A serious concern for trade unions is that teleworkers are much more exposed to exploitation because they work alone and are isolated from the main workforce. This is a view strongly held by clerical unions in New Zealand who consider that home workers “are those most vulnerable and less likely to be able to negotiate or insist on their rights.”<sup>18</sup> Moreover, because of the specialized skills of many of these workers, individual employment contracts were seen as more appropriate for them than collective employment contracts.<sup>19</sup> In the aftermath of the Employment Contracts Act, which facilitated individual employment contracts, there was some justification for

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15. Bevis England, *Telework: Heed the Call*, THE EMPLOYER, July 1997, at 6.

16. Bevis England, *Telework Takes Off*, CHARTERED ACCT. J., Sept. 1996, at 61.

17. Lafferty et al., *supra* note 10, at 143.

18. Tomorrow's Workplace, 1991, at 123 (proceedings of the Teleworking Conference, Auckland).

19. Butler, *supra* note 1, at 13.

trade union concerns that teleworkers might become more isolated and marginalized. At no time, however, was there enough evidence to substantiate the rather exaggerated claim that teleworking would result in "the creation of a ghettoized labor force with significantly reduced wages, opportunities and, ultimately, living standards."<sup>20</sup>

The other problems that helped shape trade unions' negative attitudes toward teleworking centered on health and safety, redundancy, personal grievance provisions, parental leave, the level of wages and re-training. In normal circumstances, many of these problems would be raised as part of the collective bargaining process and agreed solutions incorporated into collective agreements. However, much of this changed after the Employment Contracts Act. By 1993, less than 44% of employees were covered by collective employment contracts and just over 77% of New Zealand firms had more than 50% of their employees on individual employment contracts.<sup>21</sup> By the mid-1990s, the majority of employees worked under "take it or leave it" individual contracts,<sup>22</sup> the contents of which largely reflected the greater bargaining power of employers and that could not be policed by trade unions. It was also the case that employers, when reporting the names of employees actually covered by collective employment contracts to the appropriate trade union, often failed to include teleworkers working away from the firm's center of operations.<sup>23</sup> Between 1991 and 2000, there is little doubt that problems facing the small group of teleworkers received scant attention; an adequate policy appropriate to the worst features of teleworking did not exist.

The situation changed with the passing of the Employment Relations Act in 2000. The Act is weighted more favorably toward trade unions and this is likely to increase the number of employees operating under the umbrella of collective employment contracts; with this goes the advantage of a clearly stated procedure on personal grievance issues backed, of course, by the organizational support of a trade union. The new legislation does allow for individual employment contracts, but these must meet the requirements for good faith bargaining. Bargaining is deemed to be unfair if the employee:

- is not given an opportunity to get advice on aspects of the individual contract;

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20. Tomorrow's Workplace, *supra* note 18, at 125.

21. Howells, *supra* note 5, at 233 and 235.

22. John Hughes, *The Potential Benefits of the New Employment Relations Act*, 2000, at 3 (submission to the select committee on the Employment Relations Bill).

23. Tomorrow's Workplace, *supra* note 18, at 127.

- does not understand the provisions of the contract due to age, sickness, mental, educational or communication ability, or emotional distress;
- relies only on advice from the employer; and,
- is not told how to contact the relevant union.

If it is shown that an employer does bargain unfairly, the newly established Employment Relations Authority has the power to cancel or vary the terms of an individual employment contract.<sup>24</sup> This, hopefully, will remove the worst aspects of “take it or leave it” individual employment contracts.

Although the protection of the Employment Relations Act applies only to employees, the definition of an employee specifically includes teleworkers as those “engaged to do work in a dwellinghouse, not including work on the house and fittings.”<sup>25</sup> Furthermore, for homeworkers who might be employed as independent contractors, the Act also extends the definition of an employee to include independent contractors. To determine whether people employed as independent contractors are actually employees, the Employment Court or the Employment Relations Authority will give most weight to two factors: one, the extent to which the contractor forms an integral part of the business of the employer on an ongoing basis; two, the extent to which the employer exercises real control and direction over the activities of the contractor.<sup>26</sup> On both counts, teleworkers would be considered as employees and be entitled to the full protection of the new Act.

In terms of other concerns relating to teleworking, the Act is not silent. It certainly addresses one aspect of wage abuse which is very likely to affect marginalized teleworkers. In a significant policy shift, failure to pay wages under the Minimum Wage Act and holiday pay under the Holidays Act imposes a liability not on any body corporate, but on the directors, officers, and agents of a company. More specifically, liability is imposed on those shown to have directed or authorized the default in payment. Moreover, the Employment Relations Authority can authorize a labor inspector to bring a claim for unpaid wages if the inspector can establish that the amount claimed is unlikely to be paid in full. In terms of a personal grievance action based on discrimination (including wage discrimination), there

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24. See Employment Relations Act, §§ 35-39, 2000 (N.Z.)

25. *Id.* § 5; see also, *Cashman v. Cent. Reg'l Health Auth. and Sunderland Cmty. Support Services, Ltd.*, unreported, CA 34/96.

26. See Employment Relations Act, *supra* note 24, § 6(2).

will now be a rebuttable presumption that there is discrimination. Employers will be guilty until proven innocent.<sup>27</sup>

Recent labor legislation has gone some way to meeting a number of problems raised by the introduction of teleworking arrangements. It should be noted, however, that other legislation also has considerable relevance to many teleworking issues. For those who suffer personal injury by accident inside New Zealand, the cornerstone of public policy remains the basic approach introduced in 1972 in the Accident Compensation Act. Compensation, which is income-related, is paid to anyone who suffers work or non-work injuries regardless of fault. Teleworkers are covered for accident compensation like everybody else in New Zealand. In the broad area of health and safety, teleworkers are subject to the same rights as company-based staff both in common law and under the Health and Safety in Employment Act, 1992.<sup>28</sup> In practice, employers are responsible for managing work risks that they can practically be expected to manage.<sup>29</sup> Over matters of proper supervision, establishing communication channels with staff, training in the use of equipment and even the provision of appropriate furniture, responsibility rests squarely with the employer.<sup>30</sup> What is practicable when applied to remote teleworkers is left to interpretation through caselaw and, even here, legal costs are covered by employers. Trade unions have the right under the law to enter workplaces to check safety and health matters affecting their members, but a dwelling house is not considered to be a workplace.

Legislation and the common law provide considerable support for teleworkers in nearly all areas of potential concern. However, one point is often ignored by those who report the evils of teleworking. Homeworkers can provide special skills; in "knowledge" enterprises, the crucial asset is what workers know. It is reasonable to assume, therefore, that companies will be keen to encourage and retain teleworkers and not discourage and exploit them. In fact, some New Zealand companies have adopted teleworking policies that include procedures for regular supervision of teleworkers. Those employed

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27. See Employment Relations Act, *supra* note 24, § 113.

28. Sue Weston, *Home and Away*, SAFEGUARD, July-Aug. 1997, at 15-16.

29. See Chris Patterson, *Occupational Overuse Syndrome and the Law*, EMPLOYMENT LAW BULLETIN 93-96 (July 1998). In New Zealand, work risks include the Occupational Overuse Syndrome, as shown in *Masters v. Wanaka Tourist Craft, Ltd.*, unreported, [May 2, 1996], DC Alexandra.

30. See *Stewart (Health and Safety Inspector) v. Price Waterhouse Administration Ltd.* [1997] ERNZ 360, 379; *Department of Labour v. FAI Metropolitan Life Assurance Company of NZ Ltd.* [1995] 1 ERNZ 317.

by the Reserve Bank, for example, are supervised by an occupational health nurse in the same way as company-based staff.<sup>31</sup> There is nothing to suggest that teleworkers are a largely ghettoized part of the workforce in New Zealand. Furthermore, those few employees whose jobs might have been displaced by teleworkers can pursue claims through the same personal grievance procedures as those made redundant as a result of outsourcing arrangements.

## II. ELECTRONIC TECHNOLOGY IN THE WORKPLACE

The concept of an employee working agreed hours at premises specifically provided for that purpose has contributed substantially to the content of the law of employment in most advanced industrialized countries. In New Zealand, in the last decade or so, technological change and the blunting of the division between “home” and “work” has rendered this model of the employment relationship increasingly obsolete. There has also been a growing awareness that in some areas (for example, computer crime), even existing criminal law has become inadequate.<sup>32</sup> Serious concerns, especially in legal circles,<sup>33</sup> over the law’s relevance to the electronic environment of the 1990s might be explained by a number of factors: major problems over the use of electronic technology had already emerged; these problems had been given wide media publicity; it was obvious that the new generation of problems were likely to affect so many different areas of the employment relationship; the Crimes Act was enacted as far back as 1961 “when very few had access to computers and even fewer to computer networks.”<sup>34</sup>

### A. *Monitoring and Surveillance*

The employers’ case for a surveillance protocol to monitor employee use of electronic technology centers mainly on three arguments. One, the misuse of technology can lead to unacceptably high telecommunication costs; two, it is possible that confidential information is being leaked; and, three, facilities are being used for purposes that have nothing to do with the company’s business

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31. Weston, *supra* note 28, at 16.

32. Tony Macken, *Employment Law and the Internet—Working in Cyberspace*, L. INST. J., June 1998, at 59.

33. ELECTRONIC COMMERCE PART ONE: A GUIDE FOR THE LEGAL AND BUSINESS COMMUNITY, LAW COMMISSION REPORT 50 (1998); ELECTRONIC COMMERCE PART TWO: A BASIC LEGAL FRAMEWORK, LAW COMMISSION REPORT 58 (1999).

34. Mark Perry, *Unauthorised Access to Computer Systems*, N.Z.L.J. 418 (Dec. 1998).

operation. In addition to the obvious problems of misuse, it is argued in New Zealand that employers do not hire workers to be left alone and electronic monitoring is a powerful tool to increase worker productivity and to ensure performance targets are met in a competitive environment. Some point out that many companies that open postal mail automatically do not apply the rule to employees' letters marked "personal" or "confidential" and that this approach could be applied to e-mail. The common response to this is that e-mail is less private, it makes use of the employer's property in working hours and it can be misused more easily with far greater adverse effects upon the employer's interests.

The trade union response to the wide array of monitoring devices used in New Zealand is predictable. Monitoring, it is argued, leads to stress and insecurity and to a loss of privacy.<sup>35</sup> A major problem is the level and nature of surveillance in call centers where employees respond to customers and make proactive sales calls to potential customers according to computer-held procedures of varying sophistication. Call center employees "are being supervised by people they can't even see, let alone talk to" and managers "supervise while sitting at home."<sup>36</sup> Although much of the evidence is anecdotal, it indicates that monitoring in New Zealand is in line with world trends. Despite trade union concerns, most employers have introduced policies to prevent company property being used for private messages that may upset clients if inadvertently sent or for illegal purposes such as down-loading pornography. Monitoring is common to stop Internet surfing for recreational purposes during work time and to prevent viruses entering the system.

The situation in New Zealand on surveillance and monitoring, therefore, is clear-cut: there is "no privacy right in respect of employees e-mail or other Internet use."<sup>37</sup> Employers "can legally listen to staff telephone calls, intercept e-mails, operate hidden surveillance cameras, count the number of computer key strokes and even use infra-red transmitters to monitor toilet breaks."<sup>38</sup> However, the Privacy Act, 1993, does require an employer to notify employees of three facts: that monitoring will take place; the purpose of monitoring; and, the employee's right of access to any information

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35. Accident Rehabilitation, Compensation and Insurance Act 1992 (N.Z.). (Given these concerns, it should be noted that this Act does not provide compensation for occupational stress.)

36. *Employer Surveillance and Monitoring*, THE INDEPENDENT, June 2, 1999, at 19.

37. Paul Roth, *Workplace Privacy: The State of Play*, EMP. L. BULL., Oct. 1998, at 135.

38. THE INDEPENDENT, *supra* note 36, at 18.

held. This means that “the justifiability of any disciplinary action based on uncovered misconduct may turn on employee expectations of privacy and the extent to which the employer has set clear bounds.”<sup>39</sup> In fact, the points raised in the Privacy Act have been argued in a number of recent cases.<sup>40</sup>

Not surprisingly, many New Zealand companies have adopted and use a formal protocol on surveillance and monitoring. Such protocols incorporate most, if not all, of the following guidelines:

- a clear statement of the permitted use of the system and a stipulation that the technology is for business only;
- guidelines for sending messages to external addresses and covering format and content;
- rules regarding disclosure of messages received from external sources;
- safeguards on downloading software that could compromise a system’s integrity;
- parameters regarding (or forbidding) the use of other employees’ PC terminals;
- a statement of the consequences of a breach of policy with a hierarchy of consequences linked to the seriousness of any breach;
- confirmation that the employer may access an employee’s e-mail; and,
- ideally, a written acknowledgment by employees about the policy’s applicability.

Although employers have a legal right to operate a policy of surveillance and monitoring, there is still a need to address privacy issues and to consider the employment law’s concern with natural justice.

### *B. The Misuse of Electronic Technology*

Faced with increasing computer misuse and electronic crime, the existing law in New Zealand is insufficient to guarantee computer security. Furthermore, in terms of the strict employment relationship, the need to follow reasonably a policy for dismissal means that there

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39. Roth, *supra* note 37, at 135; see also Rodney Goh, *E-mail—For Whose Eyes Only?*, NZ BUSINESS, Nov. 1997, at 5; *Disciplinary Action Against Employees’ Misuse of Technology*, THE INDEPENDENT, Sept. 26, 1997, at 22.

40. For reviews of the Privacy Act by Paul Roth, see EMPLOYMENT LAW BULLETIN, Aug. 1993, at 64-68; EMPLOYMENT LAW BULLETIN, July 1994, at 70-71.

is no instant dismissal. As a counter to computer misuse, and costs to the company can be considerable, there are “no grounds today for employment to be summarily terminated.”<sup>41</sup> Of course, when obvious abuse of an employer’s technology is dealt with “in-house,” one can assume that an employee will be given a warning or, depending on the severity of the case, is very likely to be dismissed. Only when such action becomes publicly part of the formal personal grievance procedure, and continues on to the Employment Tribunal (now the Employment Relations Authority), and even to the courts, is it possible to observe legal responses to the misuse of electronic technology.

### 1. Transmitting Offensive Messages

Clearly, New Zealand employees follow their international counterparts and use company Internet facilities for recreational purposes in work time. Recent evidence shows that employees access the Internet at work for personal reasons for an average of nearly five hours each week. Employees also send personal e-mail messages from work. A local government officer was recently banned from using e-mail when it was found she had 350 people in her address book and, in a short period of time, had sent over 18,000 messages.<sup>42</sup>

However, not all e-mail messages are innocent. In *Clarke v. Attorney-General*,<sup>43</sup> three employees of the Department of Labour were dismissed for objectionable e-mail. One had sent 612 salacious messages over a period of six weeks, another had used another worker’s PC to send messages and much of the e-mail contained derogatory remarks about colleagues and the Department’s customers. Although the privacy issue was raised—e-mail was being monitored on the grounds of suspected wrongdoing—the Court’s decision not to recommend reinstatement rested on two sets of arguments. First, the employer had met privacy requirements: examination of e-mail was not done arbitrarily, but because of suspected wrongdoing; staff had been instructed on the proper use of the e-mail system; employees had been given fair warning of what constituted inappropriate conduct; the plaintiffs’ actions had seriously undermined the privacy of other employees. Secondly, the offensive nature of the e-mail messages went beyond the bounds of

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41. Paul Tremewan, *A Fiction in Employment Today?*, EMPLOYMENT TODAY, Apr.-May 1998, at 10.

42. Rachel Grunwell, *Rampant E-mailer Banned*, SUNDAY STAR TIMES, July 23, 2000, at 3.

43. [1997] ERNZ 600.

reasonableness: messages were abusive and defamatory to female staff and customers; they were sent in a workplace context and could have done considerable psychological and social harm; the form and content of the messages suggested a degree of premeditation; the unauthorized use of a female's computer and accusations that she had sent some of the messages were contrary to the values that employers expect of their employees. On the matter of dismissal, the Chief Judge made it clear that reinstatement should at least satisfy the principle that "those who seek equity must do equity."

In the case of *Howe v. The Internet Group Ltd. (IHUG)*,<sup>44</sup> two employees who sent e-mail messages containing language that was obscene and threatening were reinstated. The employees were trade union delegates and, at the time, the company was negotiating new individual employment contracts. Messages were sent to a private mailing list and took the line that the company's contract offer was insulting. Some senior supervisory staff on the same list felt threatened by the messages and reported the employees to the employer. The Internet company considered the messages to be slanderous, the language and behavior of the employees to be inappropriate, and argued their actions interfered with contract negotiations. The employees insisted that the messages had been sent on a private system and not the company's e-mail service, and one claimed never to have been informed of any policies on e-mail use at work or outside work. In granting reinstatement, the Judge raised the following issues: the e-mail messages were not out of character with others previously condoned by the employer; the action of the employer could be considered as discriminatory since the two employees were trade union delegates; there were issues of freedom of expression particularly important during contract negotiations; the content of the messages would have caused no concern to recipients given the language commonly used in this particular workplace. An important lesson for employers, therefore, is that "you can't sack your employees for swearing at you or threatening your manager if you allow threats and foul language to become commonplace in your office or factory."<sup>45</sup>

Both cases clarify the law's stance in relation to passing offensive messages. Employment law sets limits on the monitoring practices of employers to the extent that they do not undermine the trust and confidence essential in the employment relationship and that the

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44. Unreported, Employment Court, AC 54/99.

45. *Foul Language on E-mail Messages*, THE INDEPENDENT, Aug. 11, 1999, at 8.

results of monitoring are used fairly. The Privacy Act goes further. Monitoring must be for a lawful purpose connected with the company's business and is done in a way that is fair, lawful, and does not intrude on the privacy of employees subjected to surveillance. If these conditions are not met, a decision to discipline or dismiss an employee, as in *Graham v. Christchurch Polytechnic*,<sup>46</sup> might constitute procedural unfairness.

## 2. The Disclosure of Confidential Company Information

It is well established in New Zealand law that protection for an employer against an employee disclosing confidential company information is the duty of fidelity.<sup>47</sup> Conduct that seriously impairs the trust and confidence in a contract of employment can amount to gross misconduct and is a dismissable offense. Confidential information includes all information that is designated as confidential by the company or is, by its nature, obviously confidential and would be regarded as such by the employee to whom it is given. In the public sector, protection to employers is reinforced by provisions in the Public Service Code of Conduct. The sole exception under the common law (and this is strictly confined to the public sector) is the tightly circumscribed "disclosure of iniquity" defense. Commonly known as "whistleblowing," confidential information can be revealed as long as its purpose is to draw attention to behavior that threatens the public interest and then only if the information is passed to those who have a proper interest in receiving it.<sup>48</sup> This "disclosure of iniquity" defense was successfully used in *Pugmire v. Good Health Wanganui Ltd.*<sup>49</sup> However, given that e-mail messages disclosing company information can be sent to a large number of people—sometimes mistakenly or unintentionally—an additional problem is that the content of the disclosure might be taken as defamatory. In such a situation, the employer is liable for damage caused by defamatory e-mail when an employee uses the employer's domain.

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46. Unreported, GEC 48/93.

47. *New Zealand Airline Pilots' Assoc. IUW and Others v. Air New Zealand, Ltd.*, N.Z.L.R. CA 212/90, CA 245/91 (considering press statements on company matters by the Airline Pilots Association and senior pilots were considered a breach of the duty of fidelity. The court viewed the conduct to involve "a loss of public confidence in an employer's business" that could lead to a loss of custom.).

48. John Hughes, *The Whistleblowers Protection Bill*, EMPLOYMENT LAW BULLETIN, July 1994, at 72. This Bill proposed to establish an independent authority to which public interest concerns could be directed and, also, to extend the principle of public interest disclosure into the private sector. The Bill never passed into law.

49. Unreported, WEC 1/94 and WEC 6/94.

Not only could employers be implicated in legal action, but employees who forward such e-mail messages definitely risk being sued. Up to the present time, the problem has not arisen in New Zealand. No defamation claim has been brought on an e-mail publication.

Clearly, the matter of e-mail disclosures of confidential company information is hardly a major issue in New Zealand. Of much greater importance to employers is the loss of special skills and “insider” information when trained employees leave a company to join a rival firm.<sup>50</sup> In *Ravensdown Corporation Ltd. v. Groves*,<sup>51</sup> the company wanted the employee to work a full notice period before taking up employment with a rival company. After submitting his resignation, and there was a confidentiality clause in his contract, the employee accessed confidential information from his computer. The company then tried to obtain an injunction restraining the employee from starting in his new position for nine months after the expiration of his notice (a period of time “commensurate with currency of the confidential information”). The employee was ordered to repay remuneration received over the period of notice, but the injunction failed on the grounds that the company had identified the computer information that might have been used to its detriment.

In those cases where workers shift to employment where they can utilize specialist knowledge to the detriment of their previous employer, the current legal position is captured in judgments from several cases in the 1980s. For example, in *Marsden Providers (1988) Ltd. v. DW Cotterill and GD Jones*,<sup>52</sup> the company’s attempt to seek damages against former employees for improper use of confidential information failed. The court’s decision, following *Faccenda Chicken Ltd. v. Fowler*,<sup>53</sup> stressed that certain information must be treated as confidential by an employee:

either because he is expressly told it is confidential, or because from its character it obviously is so, but which once learned necessarily remains in the servant’s head and becomes part of his own skill and knowledge applied in the course of his master’s business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same

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50. See *Thrower v. WJ Hamilton Ltd.*, *Edney v. Commodore Computer (NZ) Ltd.*, *Others, Smith-Biolab Ltd. v. Dive*, and *Griffith Laboratories Ltd. v. Laws and Another* (these are cases on this issue that have recently come before the High Court).

51. Unreported, CC 33A/98.

52. High Court (CP 16/89).

53. [1985] 1 ALL ER 724.

service, the law allows him to use his full skill and knowledge for his own benefit in competition with his former master.

In *SSC & B Lintas NZ Ltd. v. Murphy and Truman*,<sup>54</sup> two senior employees of an advertising agency announced their immediate resignation and on the following day commenced their own advertising business and 17 other employees of the agency joined them. Also, a number of large companies transferred their business to them and others indicated they would do the same. The court, finding for the plaintiff, ruled that “had there not been a relationship between the defendants and the customers created while the defendants were employees and under a fiduciary relationship to the plaintiff, and had the defendants not previously worked for the plaintiff and acquired a relationship with the customers in that capacity, they would not have obtained the business of the plaintiff’s customers.” A final comment on the law’s role in the possible loss of confidential information through employment transfer comes in *PCA of New Zealand Ltd. v. Evans and Photography by David Evans Ltd.*<sup>55</sup> The point is made that the law “is astute to distinguish between an employer’s special confidential information and the employee’s ordinary acquired knowledge. . . . The employer will be protected against the use of the former but not of the latter by an employee.”

### C. Collective Bargaining and New Technologies

The courts in New Zealand have viewed the introduction of new technology as part of managerial discretion. It has been accepted that they have no jurisdiction to direct employers on how to carry out their business. In 1980, the Arbitration Court ruled in a dispute relating to the New Zealand (excluding Northern and Taranaki Districts) Law Practitioners Award that the introduction of new technology and the installation of new machinery, though affecting workers by status or job loss, are not industrial matters, but managerial decisions. However, it was suggested that methods of operating new technology, when they affect working conditions, may be within the scope of industrial matters and could be covered by award provisions and disputes procedures. A more significant change came in *Post Office Union (Inc.) v. Telecom Corporation of New Zealand Ltd.*<sup>56</sup> Here, the court concluded that the introduction of computer-aided equipment obviously affected the terms and conditions of workers and the new

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54. High Court (A 966/81).

55. High Court (A 312/85).

56. Labour Court (WLC 82/88, W 74/88).

technology, therefore, was a “new matter” as defined in the Labour Relations Act, 1987.<sup>57</sup> This meant that a strike relating to a “new matter” was legal.<sup>58</sup> It meant, also, that issues relating to the introduction of electronic technology could more easily be brought into the collective bargaining arena and appropriate policy responses incorporated into collective agreements.

Indeed, there have been examples of the bargaining process reacting sensitively to the introduction of new technology. A recent New Zealand Journalists’ Award included a detailed agreement on the introduction of new technology that “demonstrated advanced thinking and goodwill by both parties.”<sup>59</sup> The agreement specified early warning of the introduction of new technology, consultation, retraining, medical tests, ergonomic factors, and rest periods after long use of visual display terminals. Again, a freezing company and the Meatworkers Union agreed to introduce what became known as “the four days work for five days pay system” in exchange for the installation of new technological devices at one of its plants. The new arrangements were likely to increase production by 50% and jobs would be protected by having a 4-day roster, a 32-hour week, but keeping a full 5-day week at the plant. However, the Government persuaded management to change its mind; it was vetoed “by an orchestrated chorus of opposition expressing fears that the economy would be ruined and if the scheme was allowed it would spread ‘like measles.’”<sup>60</sup> Though not common in awards and agreements, the case of *Harrison v. Tuckers Wool Processors Ltd.*,<sup>61</sup> did reveal that a collective employment contract actually contained a clause that allowed the employer the right to make pay deductions to cover equipment damage due to employee fault. The limited evidence, therefore, does indicate that the collective bargaining vehicle has been able to anticipate and cope with some aspects of technological change that bear directly on employer-employee relations.

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57. Howells, *supra* note 5, at 221.

58. Northern Clerical, Administrative and Related IUW v. Auckland Taxi Co-operative, Labour Court, ALC 45/88 (applying a similar ruling over the computerized processing of telephone taxi orders).

59. *Changes in Awards and Agreements*, INDUSTRIAL LAW BULLETIN, Nov. 1981, at 47.

60. A. Szakats, *Technology, Sport and Democratic Rights*, INDUSTRIAL LAW BULLETIN, Nov. 1981, at 38.

61. Unreported, WC 46, 00.

### III. CONCLUSION

For obvious reasons, New Zealand has been an enthusiastic but late participant in the industrial and commercial utilization of advanced electronic technology. Not surprisingly, therefore, it has escaped some of the contentious issues plaguing employer-employee relations in other countries: there are no reported cases of employees making unlicensed copies of electronic software or disclosures of employers' computer systems containing pirated software; the issue of employees using work equipment to link with trade unions and government agencies has never been raised; problems over teleworking have been limited because teleworking itself has not been a popular and widespread business strategy. In part because of New Zealand's small size and homogenous population, and the proliferation of small- and medium-sized firms, the introduction of workplace electronic technology has been achieved without serious upheaval in employer-employee relations.

In managing the change to a "global" and "networked" economy,<sup>62</sup> there has been a heavy reliance on existing legislation. Labor legislation has provided collective agreements with a guaranteed disputes procedure and an avenue of redress to the Arbitration Court, the Employment Court or the Employment Relations Authority. A wide range of welfare and social legislation has offered some protection to the worst excesses of electronic technology in the critical areas of occupational health and safety, holidays and holiday pay, accident compensation, minimum wages, and wage discrimination. Even the possession of certain kinds of material, particularly the downloading or disseminating of pornography, is covered by the Film, Videos and Publications Classification Act, 1993. Some of this legislative support is dated and whether it remains relevant and effective in the face of future problems is still being debated.

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62. Butler, *supra* note 1, at 16.