An Introduction to the Industrial Court

* BILL HODGE

FUNCTIONS OF THE COURT:

From 1894, when the Industrial Conciliation and Arbitration Act sprang from the Fabian brain of New Zealand's first Minister of Labour, William Pember Reeves, the Arbitration Court had both a judicial and an arbitral function;[1] that is, after first arbitrating between the employers and the workers' organisations and "awarding" them wages, hours and conditions of employment to live by, the Court could then don judicial garb and interpret those very same awards whenever disputes as to their meaning or application arose. An award is something akin to a statute.[2] But the techniques of statutory interpretation were never a burden to the Arbitration Court, as the Court as law interpreter always understood the intent of the Court as law giver, and interstices could be filled according to the original intent of the parties.

It is now history that that Court foundered on the rock of wages, driven by inflationary winds of the latter 1960's. That story is oft-told, and there is no space or need to retell it here.[3] The industrial legislation of 1973, the most thorough-going overhaul of the system since 1894, abolished the Arbitration Court, and separated the arbitral and judicial functions. The giving of awards and the registration of conciliated settlements has been entrusted to a new institution, called the Industrial Commission, created and described in sections 17-31 and 84-90 of the Industrial Relations Act 1973 (the Act). The judicial function was given to the renamed Industrial Court which

> **" . . . is hereby declared to be the same Court as that established by the Industrial Conciliation and Arbitration Act 1954 and heretofore called the Court of Arbitration."** s.32 (2).

This bifurcation of judicial and arbitral powers should reduce pressure on the Court. When the Industrial Commission suffers the slings and arrows of outraged applicants, dispute settlement in the Court ought not be strained.

In this division of labour is found the first contradiction, and indeed, the first serious mistake in the new Act. Section 17 provides that the Industrial Commission shall consist of five members, being three government appointees (s. 17 (3) (a)) and one each recommended by the Employers Federation (s. 17 (3) (b)) and the Federation of Labour (s. 17 (3) (c)). The Industrial Court is constituted by an appointed judge and two nominated members, being

> **" . . . the same persons as are appointed as members of the Industrial Commission under paragraphs (b) and (c) of subsection (3) of section 17 of this Act . . . "** s. 40 (2).

* **BILL HODGE, Senior Lecturer in Law, Faculty of Law, University of Auckland. Dr Hodge has also published a similar article on the Industrial Court in (1976) 2 N.Z. Recent Law (N.S.) 28.**

1—The 1894 Act created the Court of Arbitration, a name preserved until 1973 when the Industrial Relations Act adopted the name "Industrial Court."

2—Salmond, J., gave the following definition of award in **N.Z. Waterside Workers Federation I.A.W. v Frazer** (1924) NZLR 689, 798:

> An award is, in effect, a code of rules for the regulation of the industry concerned during the currency of the award, by which certain rights and obligations are conferred and imposed upon the employers and workers engaged in that industry during that period . . . An industrial award is in form a judicial decree, but in substance it is an act of legislative authority . . . The making of an industrial award is as much an act of delegated and subordinate legislative authority as the making of by-laws by a municipal authority."

3—See Roth, **Trade Unions in New Zealand,** pp. 143-146.

That identity of membership between the two institutions was apparently an attempt to create " . . .liaison between the Court and the Commission, and improve the understanding thereof." (Department of Labour paper, (1974) N.Z.L.J. 32, 33). That may have been a worthwhile effort, but in practice it could have seriously impaired the functioning of both institutions. It is becoming more clear that a seat on the Industrial Court is something more than a part-time position. Advocates in Auckland, both union and management, allege that the Northern Industrial District alone could fill the Court's docket. The Industrial Commission, on the other hand, **must** sit as a full Commission under s. 31 (2) when either party requests it. It is only because the Industrial Commission has a very limited role indeed to play under the Wage Adjustment Regulations that the work of the Industrial Court has not been seriously hampered.[4]

The new Industrial Relations Amendment (No. 2) Bill remedies that deficiency and provides that the same nominated members shall no longer sit on both institutions. The current sitting members will remain on the Court and the two central organisations will nominate new members for the Commission.

ASPECTS OF THE COURT

The new judge of the Industrial Court is Mr Justice Jamieson, who replaced Judge Blair in September 1974. A man of wide legal experience, Judge Jamieson had a practice outside the main centres, principally in Ranfurly and New Plymouth, until 1961, when he was appointed Stipendiary Magistrate. He retains his positions as the Pharmacy Authority, the Maritime Appeal Authority, Chairman of the Licensing Control Commission, and Chairman of the Crime Compensation Tribunal. He is perhaps primarily known in Wellington as the chairman of the inquiry into the loss of the **Wahine,** and he also chaired a similar inquiry regarding the **Kaitawa.** (Those latter appointments led more than one commentator to note the similarity between a Big Wind which causes a disaster and industrial relations).

The Court is a relatively informal forum, although of course rules of evidence are adhered to, and it will go almost anywhere the trouble is. The Court regularly sits in Magisterial Chambers around the country as a tenant, and on at least one occasion it used the board room of an electric power board. It has its own courtroom in Wellington, and it has chambers in Auckland in the old U.E.B. Building. There was a movement to keep the Court permanently in Wellington, but there seems little reason to do that, especially now that the Amendment Bill provides for a Deputy Registrar. Presumably one Registrar will remain in Wellington, while the other goes on tour with the Court.

As defined in ss. 32-62 of the Act, the Court is a court of record, in many respects analogous to a Supreme Court. By s. 145 it can imprison and/or fine up to $100 any person committing contempt in the face of the Court, and by s. 146 it can fine up to $200 persons who publish material which may affect any matter before the Court. These sections are clearly necessary since they allow the court to protect the Commission and conciliation councils as well for such contempts, but ss. 145-6 may actually derogate from or limit what would otherwise be the unrestrained common law power of a court of record to punish all types of contempts.

Imagine an unsuccessful litigant, after receiving an unfavourable judgment, who published his opinion that the Court was unforgivably biased and that no party from his class could ever hope to get justice from such a pestilent, blind, prejudiced, oppressive institution. Could that contempt be dealt with by the Court itself, or would the Attorney-General apply for committal to the Supreme Court? Precedent indicates the latter course, although as a court of record the Industrial Court would have such power unless it were expressly taken away by statute.[5]

4—Under the Wage Adjustment Regulations 1974, as amended, the main function of the three-man Commission has been to approve the annual 2.25% wage increases under Regulation 5, and to reject the wage increases applied for under Regulation 7 as "serious anomalies." It has also approved one major productivity agreement under Regulation 6.

5—See Halsbury, 3rd Ed., Volume 8, page 2. The Attorney-General has twice gone to the Supreme Court to protect the Arbitration Court. **A-G v Blundell** (1942) NZLR 287; **A-G v Butler** (1953) NZLR 944. In the former case Myers C. J., concluded, rather peremptorily, that the Arbitration Court had no contempt powers other than those expressly created in the statute (sections 116-7 in the act under consideration is analogous to ss 145-6 of the Industrial Relations Act 1973). With respect, it is submitted that those remarks of Myers C. J., are incorrect, but for policy reasons it may be best to bring such contempts to the Supreme Court. It is also good policy to bring such contempts before a judge other than the one "stung" by the publication.

In any such case an appeal would be to the Court of Appeal under s. 47 (b) or s. 51 of the Act.

Barristers and solicitors are, of course, privileged to practise before the Court, although most unions prefer to do their own advocacy, and union secretaries or senior field officers frequently appear before the court. Advocates for various employer associations, holding no practising certificate, also frequently appear before the court. When an Inspector of Awards is the plaintiff, the Department of Labour usually sends a qualified solicitor to appear.

It should be noted that the individual worker has no standing before the Industrial Court; the important provisions in the Act (ss. 116, 117, 118, 119, 150) create standing for the employer, the union, the associations of both, and the Inspector of Awards, but never the single worker. His only personal remedy against the employer (or against his union) would be to sue on a contract in the Supreme Court.

LAWYERS AND THE COURT

A second contradiction, and in the view of this writer, a serious flaw in the Act, is the role to be played by barristers and solicitors in the administration of industrial relations. The writer felt it necessary, as noted supra, to record that barristers and solicitors may practise before the Industrial Court. That Parliament felt it necessary to record this privilege, in s. 54 (1) of the Act, is in itself noteworthy. Lawyers may appear before the Industrial Commission, under s. 30 (1) (c), only with the consent of all the parties, and **they are statutorily barred absolutely from appearances before conciliation councils:** s. 78 (3). This exclusion is critical, not because of employment prospects in the legal industry, but because of the implied contradiction.

Most provisions in collective agreements and awards are drawn up and agreed upon in these councils, where lawyers are forbidden. The assessors are expected to be lay representatives in the industry concerned (and in the superseded Industrial Conciliation and Arbitration Act 1954, this was a statutory requirement: s. 115). And it is common knowledge that the draftsmanship is not always done with parliamentary precision. Herein lies the contradiction: when one of these casually (or carelessly) drafted agreements is brought to the Court for interpretation, it will be analysed by lawyers in a legal forum before a legally trained judge. The Court will apply sophisticated legal tools in this task, including **Maxwell on the Interpretation of Statutes** and the rule in **Assam Railways and Trading Co. v Inland Revenue Commissioners.**[6]

It is of course completely defensible for a legal institution to approach a problem in a legal way — how else could a Court perform its job? — but the problem is now compounded by the bifurcation of Court and Commission. The old Arbitration Court could fill in a **casus omissus** or virtually re-write an award to overcome deficiencies. The new Court can only **interpret** the plain words of awards and agreements, and has the same position in respect of industrial agreements as does the Supreme Court. See **Anderson** v **Couchman** 40 Book of Awards 114, 117.

The danger, as was pointed out by Mr Hewitt in **Pickford** v **Canadian Construction Co. Ltd,**[7] is that the intent of the parties, so necessary until now in the interpretation of agreements, is no longer of relevance. Just as the Supreme Court is not interested in Hansard as an aid to the interpreting of statutes, so the Industrial Court will not consider evidence of the parties' real, if concealed, intention.

Furthermore, there is the statutory directive in s. 91 (1) of the Act that awards and agreements are to be framed so as "to avoid unnecessary technicalities." That directive is welcome in so far as it bans nineteenth century legal prolixity and jargon, but not if it discourages the use of accepted principles of sound draftsmanship.

The solutions to the dilemma are two: (1) the parties should employ a legally trained person as one of their assessors, either a legal executive or a law graduate with no certificate, or (2) the Court should abandon the Salmond concept that awards are statutory and view them instead as contractual in nature. As it is now, awards are negotiated by laymen as contracts, but interpreted by judges as statutes.

6—(1935) A. C. 445, at 458. Lord Wright surveyed a series of cases, representing the principle that parliamentary speeches and debates are inadmissible in a court of law as an aid in determining statutory meaning: "We must endeavour to attain for ourselves the true meaning of the language employed." See also **Rex v West Riding of Yorkshire County Council** (1906) 2 KB 676, at 716.

7—Decided by the Industrial Court on 17 July 1975. Mr Hewitt is a nominated member of the Court. That decision may have ignored the known intent of the parties in granting meal money to shift workers on ordinary time.

BREACHES OF AWARD

There are several types of case argued regularly in the Industrial Court which could be avoided with a minimum of legal forethought. Among these are unjustifiable dismissals and employment of non-union labour.

Dismissals:

A dismissal could only be wrongful (and thus actionable) at common law if it were (1) without notice and (2) without cause. If the employer gave notice, he needed have no cause to dismiss. Employers must recognise that this unbridled, managerial, discretionary prerogative has vanished; by s. 117 the employer must justify **every** dismissal, even those with notice. Under that section, the employer who dismisses an employee may have to discuss the justification with the union (s. 117 (4) (c)), reply to a written claim before a grievance committee (s. 117 (4) (e)), and finally, justify the dismissal before the Court (s. 117 (4) (g)). If he fails to meet the burden of proof, the Court can order not only back pay, but also reinstatement and compensatory damages.

Therefore, it behooves the practitioner to warn his clients that arbitrary dismissals are illegal; the employer must dismiss only with cause, **and** he must be able to prove that cause. He ought to keep a written record of warnings given to unsatisfactory employees, perhaps having the employee in question initial the record. In some situations it would be appropriate to inform the union headquarters, or to ask the union delegate to initial the record also.

Recent cases have indicated that dismissals can be justified on a "last straw" basis but, most positively, the employer must meet the burden of proof.[9]

Coverage:

It is axiomatic that when an industry is covered by an agreement or an award, workers in that industry must be union members. Yet numerous cases have come before the Court in recent months involving breaches of that rule.

Management may be relatively helpless if it arises as a demarcation dispute, when the workers refuse to join the appropriate union because they want to join another. See **Northern, Wellington etc Fire Brigades I.U.W.** v **Hamilton Fire Board,** decided by the Industrial Court on 6 August 1975.

A serious breach can arise when management creates a spurious independent contract as a device to circumvent an award. In **Lineham** v **Newlandia Industries Ltd,** 19 August, 1975, the defendant purported to rent factory space, tools and machinery to independent contractors for ten cents per week. The corporate defendant was fortunate in being fined only $100.

Most cases are much more genuine attempts to create contractual arrangements, and, in the words of Lord Denning, are rather "troublesome questions." Past issues of **Recent Law** have featured the cleaning ladies in Invercargill **(Invercargill City** v **N.Z. Tramways I.U.W.,** 5 August 1975), the answering service in the Bay of Islands **(Auckland Clerical Workers I.U.W.** v **Bay of Islands Veterinary Service,** 30 July 1975) and the three-man printing company in Masterton **(Rona Print Ltd** v **N.Z. Printing I.U.W.,** 18 August 1975). Counsel should review leading New Zealand cases on the contract of employment, such as **Perry** v **Satterthwaite** (1967) NZLR 718 and **McMullin Holdings Ltd** v **Auckland Clerical Workers Union** (1969) NZLR 530, and consider the following factors: ownership of the tools, method of payment, degree of control, hours of labour, holidays taken, relation to costs and profits, possibility of sub-contract, and deductions for P.A.Y.E. and Superannuation.

It is submitted that in an honest case, proper accounting techniques can unquestionably create a contractual arrangement which would lie outside the coverage of the Industrial Relations Act, and P.A.Y.E. Equal Pay, Statutory Holidays, Wages Protection, and other legislation.

CONCLUSION

As a concluding remark, it may be helpful to note those areas where it has been suggested the court should be able to act, and where it is powerless. First, it was noted above that the court has no

8—**Cook v North Shore Ferries Ltd** (1974) B.A. 3473. A bus-driver was dismissed after a series of minor infractions. The employer proved his case, and the dismissal was found justifiable.

9—**Smith v Crown Crystal Glass** (1974) B.A. 3781. The dismissed worker and the foreman told conflicting versions of the facts. As there was no other proof, the employer had not shown a preponderance of the evidence, and the dismissal was unjustified.

power to entertain complaints of any sort from the individual worker. Secondly, the Court has no jurisdiction in the field of industrial torts and may not act in equity to restrain or enjoin commission of such torts. Finally, the Court has no power to review a deregistration order under s. 130 of the Act. Jurisdiction in these fields would allow employment of the special expertise of the Court in such matters, but it would also involve the Court in rather explosive political matters. ⊙

NEWS and VIEWS:

CANTERBURY AND OTAGO:

P. Jenkins*

WAGE REGULATIONS

With the issuing of the Wage Adjustment Regulations 1974 Amendment No. 9 the Government seemed to have brought down a clear-cut set of Regulations aimed unequivocally at holding wage increases for the next 12 months. Whether one agreed with the size of the increases or not, one would have to agree that the Regulations had confirmed that the National Party meant business when it intended to control wage increases as part of a policy of controlling inflation. So Amendment No. 9 seemed consistent with stated National Policy. Regulation 4 of Amendment No. 9 extended the expiry date for virtually all instruments by a period of 12 months. This meant that the Parties (Employers and Unions in this instance) would not meet in conciliation for another 12 months. The rationale behind Government thinking seemed clear: previously the Parties had been able to negotiate new instruments within guidelines (usually of 2¼%), but these had been clearly flouted as settlement after settlement went to the Industrial Commission seeking a wage increase above guideline on the grounds of a so-called serious anomaly, and also as the number of different fringe benefits increased, perhaps as a convenient way of getting around the Regulations. If the Parties were going to treat the Regulations with such contempt then the only effective way to control wage increases was to take away the rights of the Parties to negotiate.

The reaction to the Regulations from the Trade Union movement was equally unequivocal with mass protests being threatened throughout the country. The Government responded by issuing Amendment No. 10 which gave the Parties the right to negotiate new instruments on limited terms (terms in fact which are by no means clear).

The Government's handling of the situation has provoked a series of rolling stoppages which will be extremely costly to employers. For example, at the Port of Lyttelton in the week commencing 28th June each of the different work groups is each taking one day off work. This means that while the foremen are off the watersiders cannot work, then while the maintenance employees are off work, again the watersiders cannot work, and so the issue drags on and effectively means that there will be no work done in the Port for a week but each of the work groups will have only lost one day's pay. The protest is aimed at the Government but it is the employer who suffers the loss.

200 Shearers went out on strike in early June in mid and North Canterbury, over wage rates for this season's shearing. The shearers collectively were refusing to work for last year's rate plus the maximum increase permitted under the Wage Adjustment Regulations. The matter has been referred to the Conciliator who has endeavoured to get the Parties back to normal working conditions. However, his task has been made more difficult by certain employers who apparently have indicated that they are quite prepared to pay above the maximum permissible rate provided the job gets done.

Accidents: With the introduction of plastic rubbish bags in Christchurch the number of rubbish collectors suffering cuts from broken glass has increased to 8-10 injuries per week. As a result of this the rubbish collectors made it known that there was "a big possibility" of black listing the worst streets if there was no improvement. Following this statement there was apparently a significant decrease in the amount of broken glass found in the bags. Perhaps this could have become an example, in commonsense terms, of justified industrial action?

Recently a Christchurch bus driver was refused compensation by the Accident Compensation Commission when he report-

* **PETER JENKINS is Industrial Relations Manager of a large manufacturing company in Christchurch.**